

**THE EASTERN CARIBBEAN SUPREME COURT  
IN THE HIGH COURT OF JUSTICE  
ANTIGUA AND BARBUDA**

**CLAIM NO. ANUHCV2009/0499**

**In the Matter of Antigua and Barbuda's membership in the World Trade  
Organization**

**And**

**In the Matter of a ruling on a dispute resolution between the United States of  
America and the State of Antigua and Barbuda given on the  
21<sup>st</sup> December 2007**

**And**

**In the Matter of the failure of the Minister of Finance and Economy to request  
authorization under the World Trade Organization for the suspension of  
obligations**

**Appearances:**

Mr. Hugh Marshall Jr. for the Applicant

Mr. Justin Simon, Q. C. for the intended Respondent(s)

.....  
2009: October 27

2010: January 15  
.....

**JUDGMENT**

[1] **MICHEL, J:** On 2<sup>nd</sup> September 2009 the Law Firm of Marshall & Co. filed an application on behalf of Carib Media Ltd. for an order that: -

1. Leave be granted to the Applicant to make an application for an order of mandamus directing the Minister of Finance to forthwith make application

under the provisions of Antigua and Barbuda's membership under the World Trade Organization (WTO) to suspend the obligations of Antigua and Barbuda under the TRIPS Agreement at a level not exceeding US\$21 million annually.

2. Leave be granted to the Applicant to make an application for an order of mandamus directing the Minister of Finance to forthwith make regulations for the orderly and equitable access to the Arbitration Award of 21<sup>st</sup> December 2007.
3. The Attorney General, the Commissioner of Police and the Minister of Finance be made respondents to this claim.
4. All necessary and consequential directions be given.

[2] The application was supported by an affidavit of Liam G. Pepper – the holder of a Power of Attorney for Carib Media Ltd. – and was accompanied by several exhibits, including a copy of the Arbitration Award of 21<sup>st</sup> December 2007.

[3] The matter came up in Chambers on 9<sup>th</sup> October 2009 and was adjourned to 19<sup>th</sup> October 2009 in Open Court and the Applicant was ordered to serve the application on the Attorney General by 12<sup>th</sup> October 2009.

[4] On 19<sup>th</sup> October 2009 the hearing of the application was adjourned to 27<sup>th</sup> October 2009 and the Applicant was ordered to file and serve on the Attorney General a Notice of Adjourned Hearing on or before 20<sup>th</sup> October 2009.

[5] On 26<sup>th</sup> October 2009 an affidavit deposed to by Mr. Colin Murdoch, the Permanent Secretary in the Department of Trade within the Ministry of Finance and the Economy, was filed on behalf of the Government of Antigua and Barbuda opposing the grant of leave to the Applicant.

- [6] On 27<sup>th</sup> October 2009 the application was heard by the Court, with Mr. Hugh Marshall Jr. appearing for the Applicant and the Honourable Attorney General appearing for the intended respondents.
- [7] The facts giving rise to this case are that the United States of America placed certain restrictions on its citizens participating in cross-border gaming offered by Antigua and Barbuda, leading to a challenge by Antigua and Barbuda of the US restrictions before the Dispute Settlement Board (DSB) of the World Trade Organization (WTO). This resulted ultimately in an award made by the Appellate Arbitration Board of the WTO that Antigua and Barbuda may request authorization from the DSB to suspend certain obligations to the United States of America under the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement at a level not exceeding US\$21 million annually. Instead of seeking the suspension of its obligations to the US under the TRIPS Agreement, Antigua and Barbuda appeared to have leveraged the WTO Award to negotiate a settlement with the United States of America on the cross-border gaming dispute. The Applicant – which is a company registered in Antigua and Barbuda – has been offering to the world unlimited downloading of US music and movies for one low monthly price through a site on the World Wide Web and has, through its attorneys, written to the Minister of Finance a letter dated 14<sup>th</sup> July 2009 seeking an audience “to discuss any possible regulations and/or license and any other way to mutually explore the development of this industry.” The Minister of Finance wrote to the Applicant by letter dated 18<sup>th</sup> July 2009 asking it to desist from offering infringed copyright material, which the Minister says constitutes an offence punishable by imprisonment under the Copyright Act, 2003 of Antigua and Barbuda, and informed the Applicant of the agreement between Antigua and Barbuda and the United States of America to stay the WTO recommendations pending a mutually agreeable settlement of the issue. The response of the Applicant was the filing of the application for leave on 2<sup>nd</sup> September 2009.


- [8] In order for the Court to issue an Order of Mandamus directing the Minister of Finance to do a certain thing or to take a certain course of action, the Court must first determine the existence of an obligation on the part of the Minister of Finance to do the thing or take the course of action.
- [9] On the evidence presented, the Minister of Finance is not under any obligation to make application under the provisions of Antigua and Barbuda's membership of the WTO to suspend the obligations of Antigua and Barbuda to the United States of America under the TRIPS Agreement at a level not exceeding US\$21 million annually or to make regulations for the orderly and equitable access to the Arbitration Award of 21<sup>st</sup> December 2007 and no Order of Mandamus can therefore be issued by the Court directing him to do so.
- [10] Learned Counsel for the Applicant sought assistance from the doctrine of legitimate expectation in seeking leave to apply for judicial review, but legitimate expectation arises from a promise that a person would be consulted prior to the making of a decision or from a past practice of consulting or from the belief that a benefit enjoyed by a person will not be taken away without prior consultation or at all. None of these situations exists on the evidence in this case so as to give rise to any legitimate expectation on the part of the Applicant that the Minister of Finance will make application under the provisions of Antigua and Barbuda's membership of the WTO to suspend its obligations to the US under the TRIPS Agreement or will make regulations for access to the Arbitration Award of 21<sup>st</sup> December 2007.
- [11] The threshold for the grant of leave in judicial review proceedings is arguability. In *R v Secretary of State for the Home Department, ex parte Begum* [1990] C.O.D. 107, the UK Court of Appeal indicated that the following approach should be adopted: permission (or leave as it is referred to in the CPR) should be granted if it was clear that there was a point fit for further investigation at a substantive hearing with all such evidence as was necessary on the facts and all such argument as

was necessary on the law; if the judge was satisfied that there was no arguable case he should dismiss the application for leave to apply for judicial review; if on consideration of the papers the judge came to the conclusion that he really did not know whether or not there was an arguable case the right course was for the judge to invite the intended respondent to attend and make representations as to whether or not leave should be granted and, if then satisfied that there was a case fit for further consideration, the judge should grant leave.

[12] In the present case, the Applicant was ordered to serve the application on an intended respondent, who then filed an affidavit in response, and the matter of the application for leave was argued in Court. In the end, based on the evidence presented by way of affidavit, with supporting exhibits, the Court is satisfied that there is no arguable case for the grant of an Order of Mandamus directing the Minister of Finance to make application to suspend Antigua and Barbuda's obligations to the United States of America under the TRIPS Agreement or to make regulations for access to the Arbitration Award and so no leave will be granted to apply for judicial review.

[13] The Court also considered whether on the evidence there was an arguable case for the grant of an Order of Certiorari quashing the decision of the Minister of Finance to seek a mutually agreeable settlement of the dispute with the United States of America instead of requesting authorization from the DSB to suspend its obligations to the United States of America under the TRIPS Agreement in the amount of US\$21 million annually. Here too the Court could find neither a right nor a legitimate expectation of the Applicant that Antigua and Barbuda should escalate a trade war with the United States of America instead of leveraging a favourable WTO Award to seek a mutually agreeable settlement of its dispute with the United States of America on cross-border gaming. No amendment need therefore be made of the application for leave, because leave will not be granted to the Applicant to apply for judicial review on this basis either.

- [14] Having regard to the view taken by the Court on the absence of an arguable case for the grant of an Order of Mandamus or Certiorari, it is unnecessary to determine whether the procedural irregularities in the Applicant's application referred to by the Learned Attorney General are meritorious and, if so, whether they would be fatal to the application.
- [15] The application for leave to apply for judicial review is accordingly declined, but no order will be made as to costs, because it is the Court which directed and not the Applicant which required the presence and participation of the Honourable Attorney General in the application for leave.



**Mario Michel**  
High Court Judge