

SAINT LUCIA

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

SLUHCV 2010/0756

1. GREGOR JUILAN
2. PHILBERT MANGAL
3. CECILIA ALEXANDER
4. MOSES GILBERT
5. GREGORY CYRIL
6. LAMBERT ST. LUCE
7. ABEL J. JAMES
8. IGNATIUS MANGAL
9. RICHARD LANGELLIER
10. ALEXANDER ANTOINE

Applicants

AND

WINFRESH LIMITED

Respondent

Appearances:

Mrs. Esther Greene Ernest for the Applicants
Mr. Hilford Deterville Q.C and with him Mr. Gregory Delzin and Ms. Nandi
Deterville for the Respondent

2010: September 23rd;
2011: December 15th

[1] **WILKINSON J.:** On August 18th 2010, the Applicants filed an application seeking leave to file judicial review proceedings against the Respondent and filed an amended application on September 28th 2010. The grounds of the application were:

- (a) The Respondent in its capacity as export company with whom the Applicants have no direct contractual arrangement but which has control over the Grower Management System (hereinafter "GMS") and the export processes has unfairly, unreasonably, and/or unlawfully refused to allow

the Applicants to change their trading company from the Saint Lucia National Fair Trade Organisation (hereinafter "SLNFTO") to Tropical Quality Fruit Co. Ltd. (hereinafter "TQFC").

- (b) The Respondent has arbitrarily directed that the Applicants must settle all debts with SLBC before they would be allowed to transfer to TQFC.
- (c) That the Applicants had a legitimate expectation that they would be approved to transfer based on the representations made by the Respondent.
- (d) The Respondent has abused its authority and control over the GMS to the financial detriment of the Applicants who rely on the sale of bananas as their sole source of income.
- (e) The Applicants and the banana farming industry as a whole are likely to suffer grave injustice and loss of livelihood by the Respondent's acts.
- (f) The Respondent's actions have a significant public impact as it affects the trading of bananas which forms a large segment of the commercial sector of the Island of Saint Lucia.

The relief sought was as follows:

- (a) An order for Certiorari to remove into the High Court and quash the decision of the Respondent not to transfer the Applicants trade of bananas to TQFC the producer company of their choice on the grounds of their alleged indebtedness to the other producer company SLNFTO.
- (b) A declaration that the decision of the Respondent not to transfer the Applicants trading from SLNFTO to TQFC is unlawful and is null and void or without effect.
- (c) A declaration that the Applicants have been denied the right of freedom to trade their bananas with a company of their choice.
- (d) A declaration that the Applicants have been denied the legitimate expectation that they would be transferred during the period agreed by the parties.
- (e) A declaration that the Respondent acted unreasonably and unfairly.
- (f) An order restraining the Respondent from refusing to effect the Applicants transfer as requested.
- (g) Damages.
- (h) Costs.

(i) Such other order as the Court deems just.

- [2] The application was supported by an affidavit from each of the Applicants and which in many instances were identical.
- [3] The Respondent opposes the application for leave to file judicial review proceedings and filed submissions in that regard. There was no affidavit filed by the Respondent.

The evidence

- [4] All of the Applicants are farmers who have been planting and selling bananas for several years, in one instance for as long as thirty eight (38) years. Bananas cannot be exported and sold on an individual basis by any of the Applicants or any other farmer directly to the United Kingdom but rather there are three (3) companies that provide assistance to take the banana plants from small plants to fruit bearing then to a dock in the United Kingdom for sale in that country.
- [5] Two (2) of the companies are identified as producer companies. The producer companies are TOFC and SLNFTO. The rules of the banana industry as approved by the certifying organization, FLO-CERT Gmb H, dictate that no individual member of a Fairtrade Certified Producer Organisation can sell directly to an exporter. Both SLNFTO and TOFC are Fairtrade certified. The Applicants must sell their bananas through one of the producer companies.
- [6] The Court thinks it is important to grasp the importance of the Fairtrade Mark. The Fairtrade Foundation is an independent non-profit organization that licences the use of the FAIRTRADE Mark on products imported for sale in the United Kingdom in accordance with internationally agreed Fairtrade standards. The Foundation is the United Kingdom member of Fairtrade Labeling Organisations International (FLO), which united twenty one (21) labeling initiatives across Europe, Japan, North American, Mexico, Australia and New Zealand as well as networks of producer organizations from Asia, Africa, Latin America and the Caribbean. The

Foundation states that its marketing strategy aims at making Fairtrade products the first choice for consumers and businesses.¹ The Foundation's vision is:

"Our vision is of a world in which justice and sustainable development are at the heart of trade structures and practices so that everyone, through their work, can maintain a decent and dignified livelihood and develop their full potential.

To achieve this vision, Fairtrade seeks to transform trading structures and practices in favour of the poor and disadvantaged. By facilitating trading partnerships based on equity and transparency, Fairtrade contributes to sustainable development for marginalized producers, workers and their communities."

- [7] Certain materials and products essential to the Applicants and other farmers for the production of bananas for export can only be purchased from the producer companies. The Applicants operates a credit account with their choice of the producer companies for the purchase of materials and products such as fertilizers, packaging materials, agro-chemicals, diseases and pests control. Payment for the materials and products is usually made by way of deduction against payment due on sale of the bananas to the chosen producer company.
- [8] The "exporter" is the Respondent, WINFRESH Limited formerly Windward Islands Banana Development and Exporting Company Limited². The Respondent is a profit company and was incorporated on March 28th 1994 pursuant to the Companies Act³. The articles of the Respondent provide for amongst other matters the following:

"5. Number (or minimum or maximum number) of directors.

There shall be nine (9) directors of the Company, four (4) of whom shall be appointed and removed by the Governments jointly and/or severally, four (4) of whom shall be appointed by the Banana Growers Associations jointly and/or severally, and the other of whom shall be appointed and removed by the Governments and the Banana Growers Associations jointly."⁴

¹ Extract from the Fairtrade Foundation website.

² Name change was filed at July 10th 2009.

³ Cap. 13.01

⁴ Articles of Continuance filed October 16th 1998.

[9] The Respondent has several shareholders which include the Governments of Saint Lucia (62.5 ordinary shares), Dominica (62.5 ordinary shares), Saint Vincent (62.5 ordinary shares), Grenada (62.5 ordinary shares), Saint Lucia Banana Growers Association (100 ordinary shares, 743 preference shares), Saint Vincent Banana Growers Association (78 ordinary shares, 395 preference shares), Dominica Marketing Corporation (66 ordinary shares, 330 preference shares), Grenada Banana Co-operative Society (6 ordinary shares, 32 preference shares).

[10] The articles at Schedule two (2) provide for restrictions on the transfer of shares:

“SCHEDULE 2

Restrictions on Transfer

In the event of any one of the shareholders of the Company being desirous of giving up its shares and withdrawing from the Company (hereinafter referred to as the “Retiring Shareholder”), the shareholder so withdrawing shall by written notice to the Company offer its shares, in the case of a Government, to the other Governments and, in the case of a Banana Growers Association, to the other Banana Growers Association. The Company shall immediately notify the remaining shareholders and the auditors of the Company of the receipt of the said notice. The auditors of the Company shall, within thirty (30) days of the receipt of the said notice carry out a valuation of the shares offered for sale and notify the Company of their findings (hereinafter referred to as the “Certified Price”). The other Governments and Banana Growers Association, as the case may be, shall have the option of purchasing the shares of the Retiring Shareholder at the Certified Price. If within 180 days after the auditors shall have notified the Company of the Certified Price no other Government or Banana Growers Association (as the case may be) is willing to purchase the said shares at the Certified Price, the Retiring Shareholder shall be entitled to have the Company wound up, and the other shareholders shall consent to, and shall do all acts and things as may be for, the passing of any requisite resolution for such winding up or consent to an order for that purpose, should a petition for such winding up be presented by the Government or Banana Growers Association so withdrawing aforesaid.”

Further Schedule three (3) provides:

“ (A) Any invitation to the public to subscribe for shares or debentures of the Company is prohibited.”

- [11] There is no contract in existence between the Applicants and the Respondent. There are therefore no rights and liabilities that the law would recognize and enforce pursuant to a contract.
- [12] The Respondent controls the GMS which is a system set up to trace the banana producing farms and designates the producer company through which the Applicants and other farmers must sell their bananas to the Respondent. The bar code system is part of the process. Only the Respondent can change the information in the GMS and the bar code so that the Applicants can sell their bananas through one or the other of SLNFTO or TOFC. With control of the registration process, the Respondent maintains control over every hand of bananas the Applicants wish to sell to the United Kingdom.
- [13] The Applicants are free to indicate their choice of SLNFTO or TOFC on their banana sales consignment slip but at the depot where the bananas are received for export, only the bar code and registration determines to which of SLNFTO or TOFC their bananas have been traded and sold.
- [14] The Respondent, SLNFTO and TOFC agreed between themselves and informed Applicants and other farmers that they would be allowed a "window" of time once per year within which they could switch from one producer company to the other. This "window" was to be preferably after the signing of annual trading contracts between the Respondent and SLNFTO and TOFC. At 2010, that window was June 7th – 18th 2010.
- [15] A number of the Applicants said that the primary reason they wanted to change from SLNFTO to TOFC was because they had observed that while their farms were facing a decline in production, the farmers with TOFC their farms were showing "remarkable progress".
- [16] At January 7th 2010, TOFC wrote the following letter on behalf of several farmers, two (2) of whom were the First and Ninth Applicants. The letter stated:

"January 7, 2010

Ms. Tessa Boland
Product Manager
WIBDECO
P.O. Box 115
Bridge Street
Castries

Dear Ms. Boland,

Attached is a listing of farmers and accompanying completed CHANGE OF COMPANY FORMS. By their completed Change of Company Forms, those farmers have asked that WIBDECO/Winfresh change their GMS trading designation from NFTO to TQFC.

Their request is in keeping with conditions set by WIBDEC in its April 2009 Company Change Form, Information Circular to Banana Farmers and Press Release. Conditions being:

'After Tuesday, 21 April 2009, no farmer will be allowed to change from one company to another until January, 2010.'

I trust that you will honourably carry out the farmers' request.

Best wishes for a prosperous 2010 and good trading relations.

Yours truly

.....
Peter L. Serieux'.

- [17] Similar requests were made for all the other Applicants. In some instances, requests started to be made at 2009, and in other instances, there were two (2) requests for several of the Applicants between January 2010 – June 2010.
- [18] At June 1st 2010, the Respondent issued the following notice to banana farmers:

"WINFRESH LIMITED

NOTICE TO BANANA FARMERS

Winfresh wishes to advise all banana farmers that it has entered into new trading arrangements with the SLNFTO and TQFC for the year 2010 and the contracts with these parties have been finalized.

In keeping with Winfresh's agreement with these two companies, farmers who are considering changing the company through which they trade their bananas have from week 23, beginning Monday, 7 June 2010, until the end of week 24, Friday, 18 June 2010, to make a final decision as to which of the two companies, the SLNFTO or TQFC, they wish to trade with for the remainder of the trading year 2010.

Farmers wishing to take advantage of this opportunity should work with their preferred trading company to complete the relevant form indicating when between weeks 23 and 52 they intend to start trading with their new company.

Any farmer who is indebted to his/her current trading company must make satisfactory arrangements for the settlement his/her debt, if he/she wishes to move to another company. No change will be made to the Winfresh Grower Management System (GMS) and farmers will NOT be able to change to another company until Winfresh is satisfied that the debt repayment arrangements are in place.

All completed form(s) must be submitted to Winfresh by Friday, 18 June 2010.

Farmers are further advised that once they have made their decision and have begun trading with their designated company, they will not be able to change to another company for the remainder of the year.

Winfresh wishes to assure farmers that it is taking these actions to preserve order in the banana industry and ensure that the banana supply companies are able to meet their obligations under their trading arrangements with the Company. The companies will be better able to plan and provide support services in extension, leafspot control and credit for purchasing inputs to their trading farmers. (My emphasis)

For further clarification, contact your current and proposed trading company."

[19] At June 4th 2010, there was an email sent by Dr. Reid of the Respondent to Mr. Peter Serieux of TQFC and Mr. Julius Polius of SLNFTO. It read as follows:

"Mr. Peter Serieux
Managing Director
TQFC Ltd.

Mr. Julius Polius
Chairman
SLNFTO

Dear Sirs,

During the meeting between the SLNFTO Chairman, Mr. Julius Polius, Managing Director, TQFC Ltd. and the Winfresh Chief Executive Officer, Mr. B Cornibert on Tuesday 1 June, it was agreed that both the SLNFTO and TQFC will have in place arrangements to ensure the indebtedness of any farmer who chooses to change from one company to the other are satisfactorily addressed.

In this regard, TQFC proposed the following undertaking:-

'TQFC hereby gives the undertaking that once the input debt balance of a farmer transferred to TQFC is verified, deduction will be made as per existing agreement with former trading company (NFTO) and the same remitted to the named or assigned beneficiary. This has been and will remain a TQFC standard practice.'

While the SLNFTO proposed that:-

'That all debts be settled in full before farmers can change from one company to another.'

We are of the view that a fair and satisfactory arrangement which does not penalize the farmer while ensuring that any indebtedness is resolved in a reasonable timeframe is that:-

"Any indebtedness to his company of a farmer choosing to move to another company will be settled by the new company making such payments to the former so as to fully discharge the indebtedness within a 12 weeks period."

We will be grateful for you agreeing to proceed accordingly.(My emphasis)

Best regards,

E.D. Reid"

[20] A further notice was published on June 17th 2010, and it read:

" WINFRESH LIMITED

NOTICE TO BANANA FARMERS

Winfresh wishes to advise all banana farmers that it is extending the deadline for them to decide the company through which they trade their bananas from 2010, by three additional weeks, that is from the end of week 24 to the end of week 27.

Therefore farmers who are considering changing the company through which they trade their bananas have until the end of week 27, that is from now until Friday 9th July 2010, to make a final decision as to which of the two organizations, the SLNFTO or TQFC, they wish to trade with for the remainder of the trading year ending December 2010.

Winfresh found it necessary to extend the period allowed for switching companies because the SLNFTO and TQFC have not been able to agree a common method for dealing with farmers who are indebted to them and additional time that might be required to deal with the matter.

Unless there is satisfactory arrangement in place for the settlement of farmers' debts, Winfresh will not accede to them changing to another company. (My emphasis)

Farmers are advised further that:

- a) Your current trading company has an obligation to sign the Winfresh release form to allow you to trade with the company of your choice once you are not indebted to the company.
- b) However, once you have made your decision and have begun trading with your chosen company, you will not be permitted to change to another company for the remainder of the year.

Winfresh looks forward to the cooperation of all concerned to ensure smooth banana trading operations throughout the year."

[21] To support the change between SLNFTO and TQFC the Respondent provided a form bearing its logo and headed "Change of Trading Company/Producer Group". It requested information such as the Applicants' name, address, telephone number, the Respondent's registration number, the current trading group, the proposed trading group and proposed date of change over from one producer company to another.

[22] By letter dated June 18th 2010, TQFC on behalf of the 2nd, 3rd and 10th Applicants amongst others submitted the following letter to the Respondent:

"June 18, 2010

Dr. Errol D. Reid
Director, Technical Support
Winfresh Ltd.
Bridge Street

Castries.

Dear Dr. Reid,

Attached is a tabulated (d) listing of TQFC farmer members who, as per the accompanying Company Change Forms, have requested that Winfresh change their banana trading company designation in the Grower Management System (GMS) controlled by Winfresh, from NFTO to TQFC.

The table as well as the forms gives the farmers, GMS code and effective date of change required by each.

Yours truly,

.....
Peter L. Serieux
Managing Director"

[23] On June 21st 2010, Dr. Errol Reid of the Respondent sent an email to Mr. Peter Serieux that read as follows:

"Dear Sir,

You will see from the attached notice to banana farmers that Winfresh have informed them that their current trading company has an obligation to sign the Winfresh release form to allow them to trade with the company of their choice once they are not indebted to the current company.

We expect the TQFC to honour that obligation and to sign the release form as required. If TQFC refuse to sign the form for any farmer, notwithstanding the fact that the farmer is not indebted to it, Winfresh will accept the change of company form signed by the farmer if he/she can provide evidence, such as his last shipment payment slip, that he/she is not indebted to TQFC.

We hope you will be guided accordingly.

Errol Reid
Director, Technical Support"

[24] On June 22nd 2010, Dr. Reid issued a letter, which read as follows:

"Mr. Peter Serieux
Managing Director
Tropical Quality Fruit Co. Ltd.
Castries
St. Lucia

22 June, 2010.

Dear Sir,

Request to Change trading Company

I refer to your letters of 18th and 22nd June submitting the names of and Company Change Forms for farmers said to be requesting that Winfresh change their banana trading company designation in the GMS from NFTO to TQFC.

Winfresh is unable to act on these requests since they do not meet the condition set out in its notices of 1 and 17 June to farmers on the matter. The notice of 1 June states, inter alia,

'Any farmer who is indebted to his/her current trading company must make satisfactory arrangements for the settlement (of) his/her debt, if he/she wishes to move to another company. No change will be made to another company until Winfresh is satisfied that the debt repayment arrangements are in place.'

While notice of 17 June states

'... Unless there is a satisfactory arrangement in place for the settlement of farmers' debts, Winfresh, will not accede to them changing to another company"

Neither of your covering letters nor the documents/forms accompanying same address in any way the farmers' indebtedness to their current company.

Yours sincerely,

.....
Errol Reid
Director, Technical Support"

- [25] A number of the Applicants stated that they were aware that TQFC had given an undertaking that once the debit balance at SLNFTO of a transferring Applicant was verified, deductions would be made per the existing agreement with SLNFTO and sent to SLNFTO.

Issues

- [26] (1) Whether the decision of the Respondent not to accede to the Applicants' request to change their producer company from SLNFTO to TQFC unless satisfactory arrangements were in place for settlement of the Applicants' debt at SNLFTO was made in support of a public or private function.
- (2) Whether there has been unreasonable delay in filing the application for leave to file judicial review proceedings.
- (3) Whether the Applicants are estopped by their alleged prior actions.
- (4) Whether there are alternative remedies available to the Applicants.

The law

- [27] The Respondent has submitted that the Applicants are not entitled to leave because (a) the decision of the Respondent is not susceptible to judicial review because of the status and nature of the Respondent, (b) there are alternative remedies available to the Applicants that are more suitable to resolve the matter, (c) in the circumstances of the case, there has been unexplained delay in applying for judicial review, and (d) the Applicants are estopped from objecting to the decision of the Respondent.
- [28] The Applicants have submitted that they (a) have a sufficient interest in the decision of the Respondent so as to enable them to make the application for leave, (b) are of the view that given the nature of the Respondent's function, monopolistic power over trading of bananas and Government involvement amongst other things, the Respondent's decision is reviewable, (c) have submitted before the Court sufficient material to establish an arguable ground with a realistic prospect of success and so are entitled to leave, (d) there has been no undue delay in filing the application and there is no time limit fixed by CPR 2000 Part 56.5, (e) have no alternative remedy, and (f) are of the view that estoppel does not apply to the facts because the Respondent was not enforcing or adopting or implementing a course of action adopted by the Applicants.
- [29] There were several acts passed over the years touching and concerning the banana industry at Saint Lucia. Amongst the acts passed were the Banana

(Marking) Act⁵, Banana (Protection & Quality) Act⁶ and the Windward Islands Banana Insurance Act⁷.

- [30] The Banana (Marking) Act which commenced on April 11th 1959 stated that it was “AN ACT to provide for the marking of bananas for the purposes of identification and for other connected matters.” The Act provides for the preparation of a scheme for the allocation of identification marks, the allocation of the identification marks, the registration of identification marks, penalty for unauthorized use of identification marks, penalty for forging identification marks.
- [31] The Court was not made aware of whether the provisions under Banana (Marking) Act are still in use, but reference is made to the Act, merely to show that from as early as 1959, there was a marking system, a predecessor one might say to the bar code.
- [32] The Banana (Protections and Quality Control) Act is stated to be “AN ACT to amend and revise the law relating to the harvesting, handling and reception of bananas and to ensure and maintain quality standards on reception and for connected matters.” In this Act “buying companies” mean Geest Industries Limited, a company incorporated at the United Kingdom or Geest Industries (W.I.) Limited a company incorporated at Saint Lucia or the person who has the statutory or contractual right to purchase exportable bananas from the Association. Association in the Act is identified as the Saint Lucia Banana Growers Association, a statutory corporation established by the Saint Lucia Banana Growers Association Act.
- [33] There is no doubt that CPR 2000 provides quite succinctly who may apply for judicial review and amongst other matters if the Court finds that there is a decision suitable for review, then it has to consider whether there has been unreasonable delay before making the application. CPR 2000 provides:

⁵ Cap.7.06

⁶ Cap.7.05

⁷ Cap. 12.11

“56.2 (1) An application for judicial review may be made by any person, group or body which has sufficient interest in the subject matter of the application.

(2) This includes –

(a) any person who has been adversely affected by the decision which is the subject of the application;

(b) any body or group acting at the request of a person or persons who would be entitled to apply under paragraph (a);

(c) any body or group that represents the view of its members who may have been adversely affected by the decision which is the subject of the application...

56.5 (1) In addition to any time limit imposed by any enactment, the judge may refuse leave or to grant relief in any case in which the judge considers that there has been unreasonable delay before making the application.

(2) When considering whether to refuse leave or to grant relief because of delay the judge must consider whether the granting of leave or relief would be likely to

–

(a) be detrimental to good administration; or

(b) cause substantial hardship to or substantially prejudice the rights of any person.”

[34] Judicial review has been described as:

“2.1 **Supervising public authorities.** Judicial review is a central control mechanism of administrative law (public law), by which the judiciary take the historic constitutional responsibility of protecting against abuses of power by public authorities. It is an important safeguard which promotes the public interest, assist public bodies to act lawfully and ensures that they are not above the law, and protects the rights and interest of those affected by the exercise of public authority power. This special supervisory jurisdiction is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the judge disagrees with what the public body has done, but whether there is some recognizable public law wrong.”⁸

[35] The Respondent is not a public authority but a corporate entity. Today, the status of a corporation is no longer a bar in certain circumstances against a decision of such entity being the subject of judicial review. Michael Fordham Q.C in his Judicial Review Handbook states:

⁸ Michael Fordham Q.C, Judicial Review Handbook, 5th Ed.

“In deciding whether a body is or is not amenable to judicial review the focus is on the particular function rather than the status and nature of the body.⁹”

This brings us to the issue whether the decision and actions of the Respondent fall under public law or private law.

[36] The case of **R v. Panel on Take-Overs and Mergers, ex p Datafin Plc**¹⁰ is instructive on many fronts in relation to the facts before the Court. Sir John Donaldson M.R said about the nature of the Panel:

“Consistently with its character as the controlling body for the self regulation of take-overs and mergers, the panel combines the functions of legislator, court interpreting the panel’s legislation, consultant, and court investigating and imposing penalties in respect of alleged breaches of the code. As a legislator it sets out to lay down general principles, on the lines of E.E.C. legislation, rather than specific prohibitions which those who are concerned in take-over bids and mergers can study with a view to detecting and exploiting loopholes.

Against that background, there is little scope for complaint that the panel has promulgated rules which are ultra vires, provided only that they do not clearly violate the principle proclaimed by the panel of being based upon the concept of doing equity between one shareholder and another...The issue is thus whether the historic supervisory jurisdiction of the Queen’s courts extends to such a body discharging such functions, including some which are quasi-judicial in their nature, as part of such a system...

In *Reg. v. Criminal Injuries Compensation Board, Ex parte Lain* [1967] 2 Q.B. 864, 882, Lord Parker C.J. ...said that the exact limits of the ancient remedy of certiorari had never been and ought not to be specifically defined. I respectfully agree and will not attempt such an exercise...In *Reg. v. Criminal Injuries Compensation Board, Ex parte Lain* ...Ashworth J...said at pp 891-892:

‘... I do not think that this court should shrink from entertaining this application merely because the board had no statutory origin, it cannot be suggested that the board had unlawfully usurped jurisdiction: its acts with lawful authority, albeit such authority is derived from the executive and not from an Act of Parliament.’...”

And Lloyd L.J at pages 847 to 849 said:

⁹ 5th ed. Para.34.1

¹⁰ [1987]Q.B 815

"I do not agree that the source of power is the sole test whether a body is subject to judicial review, nor do I so read Lord Diplock's speech. Of course the source of the power will often, perhaps usually, be decisive. If the source power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review. If, at the other end of the scale, the source of power is contractual, as in the case of private arbitration, then clearly the arbitrator is not subject to judicial review: see Reg. v. National Joint Council for the Craft of Dental Technicians (Disputes Committee), ex parte Neate [1953] 1 Q.B. 704.

But in between these extremes there is an area in which it is helpful to look not just at the source of power but at the nature of the power. If the body in question is exercising public law functions, or if the exercise of its functions have public law consequences, then that may, as Mr. Lever submitted, be sufficient to bring the body within the reach of judicial review... The essential distinction, which runs through all the cases to which we referred, is between a domestic or private tribunal on the one hand and a body of persons who are under some public duty on the other...So once again one comes back to what I regard as the true view, that it is not just the source of power that matters, but also the nature of the duty. I can see nothing in Reg. v. Criminal Injuries Compensation Board, Ex parte Lain [1967] 2 Q.B. 864 which contradicts that view, or compels us to decide that, in non-statutory cases, judicial review is confined to bodies created under the prerogative, whether in the strict sense, or in the wider sense in which that word has come to be used... I agree with Mr. Lever when he says that there has been an implied devolution of power. Power exercised behind the scenes is power nonetheless. The express powers conferred on inferior tribunals were of critical importance in the early days when the sole or main ground of intervention by the courts was that the inferior tribunal had exceeded its powers. But those days are long since past. Having regard to the way in which the panel came to be established, the fact that the Governor of the Bank of England appoints both the chairman and the deputy chairman, and the other matters to which Sir John Donaldson M.R. has referred, I am persuaded that the panel was established "under the authority of the Government" to use the language of Diplock L.J. in Lain's case. In addition to looking at the source of the power we are entitled to look at the nature of the power, as I believe we are, then the case is also stronger."(My emphasis)

- [37] A further consideration for the Court at the permission stage is whether the Applicants have satisfied the Court that there is an arguable ground for judicial

review. In **Sharma v. Antoine**¹¹ Lord Bingham of Cornhill and Lord Walker of Gestingthorpe said:

“The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy.”

[38] The Respondent has submitted that there was delay by the Applicants in filing their application. In **Roland Browne v. The Attorney General**¹² Edwards J.A cautioned that the legislative context in England must be carefully examined when interpreting CPR 2000 Part 56.5(2). She said:

“[21] It is immediately noticeable that we have no rule in our CPR which is comparable to the English Order 53, Rule 4. Consequently, the absence of any rigid time limit for invoking the supervisory jurisdiction in Saint Lucia is salutary, subject of course to the Court’s insistence on reasonable promptness in all the circumstances of each particular case, and rejection of stale claims. However, the substance of our CPR 56.5 reflects the law in section 31(6) and (7) of the **English Supreme Court Act** in my view. “Undue delay” is not defined in section 31(6) of the English Act, neither is “unreasonable delay” defined in CPR 56.5. (1)....

[22] It has been explained by Lord Bridge of Harwich in **R v. Dairy** at page 746 that:

“... section 31(6) [of the English Supreme Court Act 1981] applied both to applications for leave to apply and to application for substantial relief... [and] section 31(6) looks to certain effects of delay as grounds for refusing leave, or substantive relief, as the case may be.” Lord Bridge there approved Lord Ackner’s interpretation of section 31(6) in **R v. Stratford-on-Avon District Council** who said as follows at page 1325 of his judgment. “The court therefore still retains a discretion to refuse to grant leave for the making of the application or the relief sought on the substantive application on the grounds of undue delay if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.” Lord Bridge concluded: “I respectively agree. First, when section 31(6) and (7) refer to ‘an application’ for judicial review, “those words must be read as referring where appropriate, to an application for leave to apply for judicial review

¹¹ [2006] UKPC 57, [2007] 1 WLR 780 at [14(4)]

¹² HCVAP 2010/023 Sant. Lucia.

[page 747] Question of hardship or prejudice, or detriment under section 31(6) are I imagine, unlikely to arise on an ex parte application, when the necessary material would in all probability not be available to the judge. Such questions could arise on a contested application for leave to apply... but ever then, it may be thought better to grant leave where there is considered to be good reason... leaving question arising under section 31(6) to be explored in depth on the hearing of the substantive application. (My emphasis)

[23] I adopt the reasoning and conclusions of Lord Bridge which to my mind are also applicable to CPR 56.5. It can therefore be said in my view, that with the presence of the words "or grant relief in any case" in CPR 56.5(1) that CPR 56.5(1) applies to applications for leave to apply for judicial review and also to the substantive judicial review claim for relief."

Findings

- [40] The Court is without a doubt that the Applicants have sufficient interest pursuant to Part 56.2(1) in the subject matter as they are farmers for whom SLNFTO, TQFC and the Respondent exist to serve once they decide that they would like to produce and export their bananas to the United Kingdom.
- [41] That the Respondent is a corporation registered under the Companies Act is not to say that its decision complained of will not be reviewable because there is now what the authorities describe as "hybrid authorities". These authorities exercise both public and private functions. Where its acts are in issue, the relevant question is whether the nature of the act is private or public? The Court is called upon to look at the decision and make a determination as to whether it is in the context of the private or public act or function. See **R v. Panel on Take-Overs Mergers, ex p Datafin Plc**¹³.
- [42] As the authorities have stated, the self-interest endeavours of corporations and other entities generally work to the benefit of society and so that is plainly not enough to constitute such activities public functions. Many entities such as private schools, private hospitals and food retailers all provide goods and services that are in the public interest to provide, however, this does not render them public bodies nor their functions public functions.

¹³ Ibid.

- [43] With the shrinking of Government and Government's role in our societies there has been privatization of some functions formerly handled by Government and Government created authorities.
- [44] The proceedings are at the permission stage. The permission stage is to filter out unsustainable claims and allow for early case management.¹⁴ The Court must be satisfied at this stage that there is a basis for seeking judicial review, and the Court is not entitled to grant permission without such an issue being identified.¹⁵ **Sharma**¹⁶reinforces this point.
- [45] From the evidence it is observed that there is no contract in existence between the Applicants and the Respondent. There is therefore no agreement giving rise to rights and liabilities that the law would recognize and enforce and yet the decision of the Respondent would affect the Applicants very livelihood. This in the Court's view is something of considerable impact.
- [46] From the Court's observations at the Fairtrade Foundation website, which is represented at Saint Lucia by the SLNFTO and TOFC, the Foundation is clearly an organization of considerable force and impact at the United Kingdom and beyond.
- [47] It is no secret that the trade of bananas to the United Kingdom had for many years played a primary role in the economies of the Grenada, Saint Vincent, Dominica and Saint Lucia and therefore it is no surprise that the Governments of these same countries and the banana associations/corporations/organisations of these countries are the shareholders in the Respondent and the directors are civil servants or farmers.
- [48] The role that banana production and sale have played in the economy of Saint Lucia is also reflected in the several Acts passed and some of which have been referred.

¹⁴ Michael Fordham Q.C, *Judicial Review Handbook*. 5th Ed.

¹⁵ *R v. Social Security Commissioner, ex p Pattini* (1993) 5 Admin. LR 219, 223 G

¹⁶ *Ibid.*

- [49] The sale of bananas to the United Kingdom the Court imagines is where the highest price can be fetched and this is controlled by three (3) companies, one of whom is the Respondent.
- [50] The Respondent it is undoubted has a relationship of some sort with the Government and this is reinforced by the fact that the Respondent is partially owned by the Government of Saint Lucia through its shareholding, the Government also has a role to play in determining its directors and public ownership of shares is restricted.
- [51] This all brings the Court to examination of the decision in the context of the Respondent's actions and activities as a whole. The Respondent with its restricted shareholding and directorship appointments is the sole exporter of all bananas at Saint Lucia which are to be exported and shipped to the United Kingdom. It is the only entity which accepts bananas from Fairtrade certified TOFC and SLNFTO for sale at the United Kingdom. It controls the GMS and bar code, mandatory requirements for the sale of bananas at the United Kingdom.
- [52] The actions of the operation the GMS and the application of the bar code are not purely incidental or supplementary to the principal functions of the Respondent, they are at the heart of the Respondent's actions or function of exporting and shipping bananas to the United Kingdom.
- [53] A further consideration is that the Respondent was established with the assistance of the Governments that are shareholders and the various Banana Associations and whilst this is clearly not indicative in itself of a public authority, to the Court's mind this takes the Respondent out of the usual commercial sphere.
- [54] A powerful factor which also leans in favour of the decision of the Respondent being subject to review is that the Respondent is part of the three (3) companies contributing towards a policy of providing bananas of a certain standard and quality for sale to the United Kingdom. This must be a policy that affects the reputation of Saint Lucia as a whole and not just the Respondent as a private company.

- [55] The function of exporting and shipping bananas has the Respondent making a major contribution to the economy of Saint Lucia.
- [56] It appears to the Court that the Respondent was “under the authority” of the Government allocated the responsibility of exporting and shipping bananas to the United Kingdom while SLNFTO and TQFC are responsible for assisting the Applicants and other farmers with the necessary materials and products to bring their plants to fruit bearing and certifiable for the Fairtrade Mark.
- [57] There was no evidence before the Court as to from whence the Respondent obtained the power to arbitrate between TQFC and SLNFTO and so take it upon itself to dictate that unless the Applicants paid off their debts with SLNFTO the Applicants could not be accepted by TQFC. Indeed the lack of agreement on this issue is seen by the mere fact that TQFC kept processing applications to transfer Applicants and other farmers from SLNFTO to TQFC which the Respondent kept rejecting. Further the decision was an abrupt change of the Respondent’s position as set out in its letter of June 4th 2010, whereby it stated that the new producer company was to pay off the former producer company’s debt over a twelve (12) weeks period. The decision of the Respondent could therefore only be described as arbitrary.
- [58] As the Court sees it, if there is no agreement between the Applicants, SLNFTO and TQFC as to what the arrangements were for payoff of any debt of the Applicants on transfer from one producer company to another, and they failed to payoff their outstanding debt with their former producer company, then TQFC or SLNFTO can like any other person at Saint Lucia pursue collection of the debt through the Courts.
- [59] It appears to the Court that the Respondent is using the GSM and bar code system to regulate the commercial affairs of the banana industry as it seeks to regulate the affairs between the Applicants and other farmers and the producer companies.

- [60] Taking all these matters on board, the Court does not believe that the matter is as simple as the Respondent has made out. It appears to the Court that unless the Applicants submit to whatever conditions the Respondent imposes from time to time, they are shut out from the United Kingdom market. The situation is not one of choice for the Applicants but rather one that is imposed on them if they wish to sell their bananas to a particular market, the United Kingdom. The Court therefore finds that the decision of the Respondent which flows across the whole banana industry is reviewable.
- [61] On the submission that there has been delay, the Court being guided by *Edwards J.A Roland Browne v. The Attorney General*¹⁷ and looking at the dates of the exchange of correspondence between the TQFC and the Respondent, the Court is not of the view that there has been unreasonable delay. Further, the Respondent did not provide any evidence that the granting of leave or relief would be detrimental to good administration, or cause substantial hardship to or substantially prejudice the rights of any person. These are mandatory matters that the Court must consider when it is considering refusing leave on the ground of unreasonable delay.
- [62] The Respondent has raised estoppel and submitted that the Applicants adopted a position whereby they have acted upon the decision of the Respondent to not allow them to change their producer company without a release from the current producer company and therefore they have held out to the Respondent that its decision, as a policy was acceptable to the Applicants and the Respondent has acted accordingly.
- [63] The Respondent produced no evidence to support this submission and the evidence before the Court is quite to the contrary. Firstly, the Applicants state that the Respondent was acting arbitrarily. Secondly, the Applicants state that there were aware that TQFC had stated that it was prepared to pay their outstanding debt with SLNFTO pursuant to whatever agreement SLNFTO had with the Applicants once the balance on their accounts was verified. Thirdly, the Court is of

¹⁷ Ibid.

the view that TQFC was not on board with the proposition that SLNFTO's accounts had to be cleared before transfer because TQFC continued to process the Applicants and other farmers applications for transfer. The Court therefore rejects the submission of estoppel.

[64] On the issue of there being an alternative remedy, the Court is not convinced that a civil suit is any more suitable to address the Applicants' complaints because as shown by the evidence there is no contract between the Applicants and the Respondent. Further, there is no evidence from SLNFTO before the Court showing that SLNFTO was refusing to release the Applicants, or could indeed refuse to release the Applicants so that they could trade with TQFC. The decision under review is that of the Respondent.

[65] For all the reasons above, the Court is prepared to find that the Respondent's decision is in support of a public function and therefore the decision is reviewable.

[66] The Court's order:

1. The Applicants are granted leave to apply for judicial review of the Respondent's decision and apply for the administrative orders and declarations sought in their application.
2. The decision of the Respondent is stayed until determination of the matter.
3. Court further directs that the Applicants are to file and serve a fixed date claim and affidavits in support for the administrative orders and declarations sought within fourteen (14) days of the date of this order.
4. The first hearing of the claim for judicial review shall take place on January 26th 2012 at 9.00 a.m.

**Rosalyn E. Wilkinson
High Court Judge**