

*Privy Council Appeal No. 79 of 1996*

**Electrotec Services Limited** *Appellant*

v.

**Issa Nicholas (Grenada) Limited** *Respondent*

FROM

**THE COURT OF APPEAL OF GRENADA**

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REASONS FOR DECISION OF THE LORDS OF THE  
JUDICIAL COMMITTEE OF THE PRIVY COUNCIL  
OF THE 2ND OCTOBER 1997, UPON THE  
RESPONDENT'S NOTICE OF MOTION, Delivered the

27th October 1997

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*Present at the hearing:-*

Lord Hoffmann

Lord Clyde

Lord Hutton

*·[Delivered by Lord Hoffmann]*

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1. On 2nd October 1997 the respondents ("Issa") moved before their Lordships' Board for an order that the appellants ("Electrotec") give security for the costs arising out of their appeal to Her Majesty in Council from a judgment of the Court of Appeal of Grenada and that the appeal be stayed until such security had been given or, in default of payment, that the appeal be dismissed. Their Lordships dismissed the motion with costs and indicated that they would give their reasons later. These now follow.

2. The appeal arises out of an action brought by Electrotec against Issa in the Supreme Court of Grenada for payment under a contract for plumbing and electrical work in connection with the renovation of an hotel. Issa had engaged a firm called Project Control Associates as Main Contractors and they had employed Electrotec. The issue was whether Issa had entered into an oral agreement with Electrotec creating a direct contractual liability for their remuneration. The trial judge, St. Paul J., held that they had. He gave judgment for Electrotec in the sum of EC\$325,921.00. The Court of Appeal reversed his decision, held that Electrotec were at all times merely sub-contractors and allowed the appeal with costs. From this decision, Electrotec appeal to Her Majesty in Council.

3. The appeal is brought as of right pursuant to section 104(1) of the Constitution of Grenada:-

"... an appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council as of right in the following cases:-

(a) where the matter on the appeal to Her Majesty in Council is of the value of fifteen hundred dollars or upwards ..."

4. In the case of an appeal from the Court of Appeal in Grenada, the Judicial Committee of the Privy Council forms part of the Grenadan judicial system (*Ibralebbe v. The Queen* [1964] A.C. 900, 922). The appeal procedure is governed by the West Indies Associated States (Appeal to the Privy Council) Order 1967 (S.I. 1967 No. 224) ("the West Indies Order"), which applies to the proceedings in the Court of Appeal, and the Judicial Committee (General Appellate Jurisdiction) Rules Order 1982, ("the Judicial Committee

Rules"), which apply to the proceedings before their Lordships' Board in London. Since these two instruments govern a single system of appeals, it is necessary to construe them as a coherent code.

5. Rule 2 of the Judicial Committee Rules provides that an appeal shall be either with the leave of the court appealed from or with special leave granted by Her Majesty in Council. It follows that notwithstanding that the case may be one in which an appeal lies as of right, the leave of the Court of Appeal must be obtained. Such leave is not, however, a matter of discretion for that court. Article 3 of the West Indies Order provides that:-

"An appeal shall lie to Her Majesty in Council from decisions of the Court given in any proceeding originating in a State in such cases as may be prescribed by or in pursuance of the Constitution of that State."

6. Article 4 provides for applications to the Court of Appeal for leave to appeal and Article 5 reads as follows:-

"Leave to appeal to Her Majesty in Council in pursuance of the provisions of any law relating to such appeals shall, in the first instance, be granted by the Court only -

(a) upon condition of the appellant, within a period to be fixed by the Court but not exceeding ninety days from the hearing of the application for leave to appeal, entering into good and sufficient security to the satisfaction of the Court in a sum not exceeding ,500 sterling for the due prosecution of the appeal and the payment of all such costs as may become payable by the applicant in the event of his not obtaining an order granting him final leave to appeal, or of the appeal being dismissed for non-prosecution, or of the Judicial Committee ordering the appellant to pay the costs of the appeal (as the case may be); and

(b) upon such other conditions (if any) as to the time or times within which the appellant shall take the necessary steps for the purpose of procuring the preparation of the record and the despatch thereof to England as the Court, having regard to all the circumstances of the case, may think it reasonable to impose."

7. It would therefore appear that the function of the Court of Appeal upon an application for leave is to satisfy itself that the case is one in which, under the Constitution of Grenada, a right of appeal exists and, if so satisfied, to consider the exercise of the power to impose

conditions conferred by Article 5. Leave is granted "in the first instance" subject to compliance with those conditions and final leave is granted when the conditions have been complied with.

8. In cases in which there is no right to appeal under the Constitution, the appellant may petition Her Majesty in Council for special leave. The procedure is governed by the Judicial Committee Rules, which include in Rule 6 a power to specify the amount of the security for costs (if any) which their Lordships require to be lodged as a condition of the grant of leave. On the other hand, the Rules give the Judicial Committee no power to require security or to impose any other condition in the case of an appeal as of right. The only reference to security in such cases is in Article 5 of the West Indies Order, in which the security which may be ordered by the Court of Appeal is specifically said to be for the payment (among other things) of such costs as the Judicial Committee may order the appellant to pay if the appeal should be dismissed, but is limited to ,500.

9. The background to the present application is that Electrotec went into receivership in 1991, some four years before the trial, ceased trading and on the evidence before their Lordships is insolvent. Issa applied before the trial for security for costs, presumably under the provision which then corresponded to section 548 of the Grenada Companies Act 1994. This is in similar terms to those of section 726 of the U.K. Companies Act 1985, reproducing previous legislation going back to 1857, and reads as follows:-

"Where a company is a plaintiff in any action or other legal proceeding any judge having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and may stay all the proceedings until the security is given."

10. In May 1991 Patterson J. ordered Electrotec to give security in a total of some EC\$80,000. This sum was duly lodged, but, unfortunately for Issa, was repaid to Electrotec after the latter's success before the trial judge. Issa went to the Court of Appeal without any security for its costs. The order in its favour by the Court of Appeal has not been taxed or paid; Issa says that there have been administrative delays in having it taxed and that it has lodged a bill in the sum of EC\$466,400.40.

11. When Electrotec applied to the Court of Appeal for leave to appeal to Her Majesty in Council, Issa gave notice of a cross-motion for an order requiring security in a substantial sum. At the hearing, however, Mr. Hudson Phillips Q.C., who appeared for Issa, accepted

that the jurisdiction of the Court of Appeal under Article 5 was limited to ,500. He therefore withdrew his motion and instead, a similar motion has been moved before the Board by Mr. Joseph.

12. Mr. Joseph submitted that the Board had jurisdiction to make such an order under section 548 of the Grenada Companies Act 1994 or alternatively, the inherent jurisdiction of the Judicial Committee as a court exercising Her Majesty's prerogative right and duty to provide justice of final resort. Their Lordships consider that no assistance can be obtained from section 548, which deals with proceedings at first instance. When first enacted as section 24 of the Joint Stock Companies Act 1857, section 548 created an exception to the general rule that a litigant at first instance cannot be required to provide security for costs on the grounds of impecuniosity. No such exception was required in the case of an appeal; the English Court of Appeal had for many years exercised a power to require an impecunious litigant, whether individual or corporate, to give security for the costs of an appeal. This power is now contained in terms in Order 59 rule 10(5) of the Rules of the Supreme Court and a similar power is contained in rule 27(1)(a) of the Court of Appeal Rules made under Article 17 of the West Indies Associated States Supreme Court Order 1967 (S.I. 1967 No. 223). Resort to section 548 is therefore unnecessary. Their Lordships consider that the words "or other legal proceeding" in section 548 meant, in the original English legislation, proceedings at first instance other than actions, i.e. commenced by originating process other than a writ: see *C.T. Bowring & Co. (Insurance) Ltd v. Corsi Partners* [1994] 2 Lloyd's Rep. 567. It did not include appeals and in their view the Grenada section does not have a more extended meaning.

13. As for the inherent jurisdiction, their Lordships consider that there is much to be said for the view that any inherent power which the Board may have had to require security for costs in a case such as this has been impliedly excluded by the code of procedure for appeals constituted by the West Indies Order and the Judicial Committee Rules. No precedent has been cited of such a condition ever having been imposed by the Board in an appeal as of right and it seems to their Lordships to be inconsistent with the constitutional right of a Grenadan litigant to appeal to Her Majesty in Council subject only to a requirement of security limited to ,500. Mr. Joseph placed some reliance upon the words "in the first instance" in Article 5 of the West Indies Order. He said that a power in the Court of Appeal to require security limited in the first instance to ,500 was not inconsistent with a power in the Board in the second instance to require security in a greater amount. Their Lordships do not think that this is what the words were intended to mean. "In the first instance" was intended to show only that the obtaining of leave to appeal was a two-stage process: first, leave conditional upon compliance with payment of security and the time-table imposed under paragraph (b), and secondly, final leave when the conditions have been satisfied. It is not however necessary to decide whether the inherent jurisdiction has been altogether

excluded because their Lordships are satisfied that if it exists, it should be exercised only in exceptional cases; for example, when it appears likely that the bringing of the appeal is an abuse of process. It is not suggested that this is such a case.

There may be arguments for saying that ,500 is too little and unfair to respondents to unsuccessful appeals by impecunious appellants. On the other hand, the recoverability of costs by a successful litigant is not a universal requirement of justice and, as Sir Vincent Floissac C.J. observed in the Court of Appeal, the Constitution appears to give priority to the free availability, in the designated cases, of the right of appeal to Her Majesty in Council. Any change must be a matter for the legislature of Grenada.

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