

BARBADOS
[Unreported]

IN THE SUPREME COURT OF JUDICATURE
HIGH COURT

CIVIL DIVISION

CV 1770 of 2011

BETWEEN:

CLICO HOLDINGS (BARBADOS) LIMITED **First Applicant**

TERRENCE THORNHILL **Second Applicant**

AND

FINANCIAL SERVICES COMMISSION **First Respondent**

MINISTER OF FINANCE AND ECONOMIC
AFFAIRS **Second Respondent**

Before: The Honourable Madam Justice Kaye Goodridge, Judge of the High Court.

2012: March 17, 23

Mr. Garth Patterson, Q.C., Ms. Onika Stewart and Ms. Alana Gore, Attorneys-at-Law for the Applicants.

Mr. Alair Shepherd, Q.C., for the First Respondent.

Ms. Donna Brathwaite for the Second Respondent.

DECISION

Introduction

[1] This is an application for an injunction filed on 23 February 2012 by the applicants and supported by affidavits of the second applicant. The relief sought by the applicants is as follows:

- (i) An Order that the First Respondent and/or the Commissioner of Police or either of them by their officers or servants or agents or otherwise howsoever be restrained until the conclusion of the trial of this claim or further order from continuing any criminal proceedings pursuant to Information No. 758 of 2011 (the information) that was laid before the

Magistrate for District ‘A’ against the Second Applicant, by which it is alleged that the Second Applicant contravened a directive given by the Supervisor of Insurance, namely that the company Clico International Limited (whose correct name is Clico International Life Insurance Limited, and is hereinafter referred to as Clico Life) was prohibited from writing new business with effect from 14 August 2009 (hereinafter sometimes referred to as the “prohibition order”).

- (ii) An Order that all proceedings in the respect of the information in the Magistrate’s Court for District ‘A’ be stayed forthwith pending the hearing of and determination of the Judicial Review application filed herein or until further order.

The Background

- [2] The facts may be briefly stated as follows: Clico Life is a company which is engaged in carrying on insurance business in Barbados. Consequently, the company is subject to the regulatory framework set out in the ***Insurance Act, Cap 310 (the Act)***. Previously, the Supervisor of Insurance (the Supervisor) was responsible for the general administration of the **Act** but those responsibilities were transferred to the first respondent by virtue of the ***Financial Services Commission Act, 2010***.
- [3] By letter dated 14 August 2009, the Supervisor informed the principal representative of Clico Life that there was concern over the fact that the statutory fund had not been put in place and that Clico Life in continuing to write new business was increasing the company’s liability to policyholders without protection for its liability. As a result, the Supervisor stated that he had decided in the interest of policyholders to prohibit the company from writing any new business with immediate effect. That order was extended to 13 August 2010.
- [4] Clico Life was advised on 21 September 2010, that the company would be placed under judicial management in accordance with ***section 57(1)(b)*** of the **Act**. On 13 April 2011, the High Court made an order appointing judicial managers of Clico Life.
- [5] The second applicant was notified by the police that they were carrying out investigations in September 2011. He was subsequently interviewed on 10 October 2011, and informed that criminal proceedings may be instituted against him in connection with the matters being investigated. On 21 January 2012, the second applicant was served with a summons issued by the Magistrate’s Court for District ‘A’ and based on Information No. 758 of 2011 laid by the Commissioner of Police in which it is alleged that he unlawfully contravened a directive given by the Supervisor of Insurance. He is due to appear before the Magistrate to answer the charges on 13 April 2012.
- [6] On 31 October 2011, the applicants filed an application for judicial review seeking, inter alia, (i) a declaration that the Supervisor’s decision prohibiting the company from writing any new policies was made in breach of the rules of natural justice and was accordingly invalid, null and void, and, (ii) an interim order/injunction prohibiting the first respondent and/or the Commissioner of Police from commencing or continuing any criminal proceedings against Clico Life and/or the second applicant and/or any of Clico Life’s other former or current officers or directors in respect of any alleged disobedience of the prohibition order pending the hearing and determination of the application.

- [7] The application for interim injunctive relief was heard by *Kentish J.* on 23 November 2011. *Kentish J.* dismissed the application and ordered the applicants to pay costs to each respondent in the sum of \$1200 each.
- The Present Application***
- [8] Mr. Garth Patterson, Q.C., counsel for the applicants, recounted the history of the matter and referred to his written submissions filed on 17 November 2011 and 28 February 2012. Mr. Patterson submitted that the crux of the application is that the judicial review proceedings were filed to challenge the decision of the Supervisor. Criminal proceedings have now been brought against the second applicant which proceedings are founded on the said prohibition order.
- [9] It was further submitted that central to the pending civil and criminal proceedings is the issue whether the order of the Supervisor is a nullity. The issues to be decided in the criminal proceedings are so identical to those to be decided in the judicial review proceedings that if the applicants were successful in the judicial review proceedings, the criminal proceedings would necessarily fail.
- [10] It was counsel's submission that the authorities clearly establish that the court has jurisdiction to grant an injunction to restrain the continuation of concurrent criminal proceedings involving substantially the same issues, on the ground that it would be an abuse of process and vexatious to continue them until the judicial review proceedings have been determined. See *Thames Launches Ltd .v. Trinity House Corp. [1961] 1 All ER 26, Imperial Tobacco Ltd. and Another v. Attorney General [1980] 1 All ER 866.*
- [11] Mr. Patterson submitted also that the court had power to grant an injunction against a non-party in an appropriate case and cited a number of authorities in support of this submission.
- [12] Mr. Patterson submitted that the Magistrate was not the proper party to deal with the question of the validity of the prohibition order and would be placed in an invidious position if called upon to do so. The present situation is that there are now two concurrent proceedings which deal with the same issues and therefore the court should halt the proceedings in the Magistrate's Court.
- [13] In these circumstances, he concluded, the court should grant an injunction against the first respondent and the Commissioner of Police to restrain them from proceeding with the criminal charges against the second applicant and/or stay the criminal proceedings before the Magistrate's Court.
- [14] Mr. Shepherd, Q.C. counsel for the first respondent, conceded that the applicants have an arguable case to challenge the validity of the prohibition order and that in the event that the judicial review succeeds, that the criminal prosecution will not succeed.
- [15] Counsel disagreed with the applicants' characterization of the first respondent as the ultimate prosecutor in the criminal proceedings. He submitted that the informant is described as the Commissioner of Police in the information which was laid in the Magistrate's Court and therefore the characterization was wrong in law. The real injunction is being sought against the Commissioner of Police, the person who is charged in law with the power to bring criminal proceedings.
- [16] Counsel noted that in the *Thames* case relied on by the applicants, the informant was given an opportunity to be heard. While he conceded that the court had the jurisdiction to grant the relief sought, he contended that the Magistrate would not be placed in an invidious position if asked to exercise a jurisdiction, which he has,

to stay the proceedings. He urged the court to adjourn the matter to allow the applicants to apply to the Magistrate for a stay.

[17] Ms. Brathwaite, counsel for the second respondent, submitted that the injunction should only be granted in the clearest of circumstances. In so far as the informant, the Commissioner of Police was not a party to these proceedings, it would be more appropriate for the second applicant to seek a stay of the criminal proceedings in the Magistrate's Court before coming to the High Court for relief.

[18] Ms. Brathwaite conceded that the judicial review application and the proceedings in the Magistrate's Court could be called concurrent proceedings.

Discussion

[19] Having heard the submissions of counsel, it is clear that there is no dispute that:-

- (a) This Court has jurisdiction to grant an injunction and/or stay the proceedings in the Magistrates' Court;
- (b) The Court can grant an injunction against a person who is not a party to the proceedings;
- (c) There are two sets of proceedings in which substantially the same issue has been raised, namely the validity of the prohibition order.

There is a difference of minds as to whether this court ought to exercise its discretion and grant the relief sought. As was stated by ***Buckley J.*** in the ***Thames*** case:

“Where matters which involve substantially the same issues are raised both in civil proceedings and at a later stage by criminal proceedings, this court can restrain the prosecutors from continuing such proceedings until the civil proceedings have been decided. Jurisdiction of this kind, in my judgment, is clearly a jurisdiction which must be exercised with the greatest care, and this court, I think, would be very slow to interfere with the course of criminal proceedings unless it was clear that the issues in the civil proceedings and the criminal proceedings really raised in substance the same issue and that if the civil proceedings succeeded the criminal proceedings must necessarily fail”.

[20] As a general rule, the courts do not interfere with the course of criminal proceedings unless there are circumstances which establish that the exercise of such discretion is clearly warranted. However, in the present case, the validity of the prohibition order is central to the judicial review proceedings and the criminal proceedings. If it is determined that the order was a nullity, then the main plank of the criminal prosecution would be removed.

[21] The criminal proceedings against the second applicant were brought by the Commissioner of Police in the exercise of his powers under the ***Police Act, Cap. 167*** and neither respondent has any control over the Commissioner with respect to the institution or prosecution of any criminal proceedings.

- [22] It seems to me that, although the Commissioner of Police is not a party to these proceedings, he is the person who has control of the proceedings in the Magistrate's Court. It is the opinion of this court that the justice of the case would require that this court exercise its discretion to restrain the Commissioner of Police from continuing the criminal proceedings against the second applicant until the application for judicial review has been concluded. This is not an appropriate case in which the court should order the second applicant to give an undertaking in damages.
- [23] It is therefore ordered that:
- (i) The Commissioner of Police, his officers, servants or agents be restrained until the conclusion of the trial of this claim or further order from continuing any criminal proceedings pursuant to Information No. 758 of 2011 that was laid before the Magistrate for District 'A' against the second applicant;
 - (ii) There shall be no order as to costs;
 - (iii) The case be set down for an early trial;
 - (iv) The parties have liberty to apply.

KAYE GOODRIDGE
Judge of the High Court