Easter Term
[2015] UKPC 21
Privy Council Appeal No 0028 of 2015

JUDGMENT

Brantley and others (Appellants) *v* Constituency Boundaries Commission and others (Respondents) (Saint Christopher and Nevis)

From the Court of Appeal of the Eastern Caribbean Supreme Court (Saint Christopher and Nevis)

before

Lord Mance
Lord Kerr
Lord Clarke
Lord Reed
Lord Hodge

JUDGMENT GIVEN ON

11 May 2015

Heard on 11 and 12 February 2015

Appellants
Peter Knox QC
Thomas Roe QC
Douglas Mendes SC
Christopher Hamel-Smith SC
Rowan Pennington-Benton
(Instructed by Simons
Muirhead & Burton)

Respondents
Lord Goldsmith QC
Simone Bullen Thompson
Angelina Gracy Sookoo
Jessica Gladstone

(Instructed by Debevoise
& Plimpton LLP)

LORD HODGE:

1. Saint Christopher and Nevis faces the problem that there has, since 1989, been no updating of the boundaries of its 11 parliamentary constituencies. The Commonwealth Assessment Team in 2005 and the Commonwealth Expert Team in 2004 and again in 2010 expressed concerns that a review was overdue. This appeal arises out of an attempt by the former government to break that impasse on 16 January 2015 immediately before calling an election.

2. In this judgment the Board sets out the reasoning for its decision on 12 February 2015 to order that the election, which took place on 16 February 2015, was to be conducted using the electoral list "existing prior to, and apart from, the proclamation bearing the reference No 2 of 2015 purportedly issued and published by the Governor General in Extraordinary Gazette No 3 bearing the date 16 January 2015". The Board also discusses wider constitutional issues which were raised in the appeal but which were not the basis of its determination.

3. The appeal arose out of an interlocutory application. Accordingly, the facts which underlie the substantive challenge have not been established. The appellants, who were representatives of the then opposition political parties or movements, obtained an interim injunction on the evening of 16 January 2015 prohibiting the Governor-General from making the proclamation altering the constituency boundaries until the determination of the appellants' challenge or further order of the court. As more fully set out below, that order was discharged and the Eastern Caribbean Court of Appeal upheld that discharge on the basis that the interim injunction had come too late, because it held that the proclamation had already been made.

4. The Court of Appeal, with the consent of the parties, granted leave to appeal to the Board on 5 February 2015. In an admirably pragmatic arrangement the parties agreed and the Court of Appeal recorded their undertaking that the Electoral Commission and the Supervisor of Elections would (i) prepare two lists of voters, one on the boundaries existing before the purported alteration on 16 January 2015 and the other on the boundaries described in the impugned proclamation and (ii) use for the purposes of the election the list which the Board held to be appropriate.

5. The Board has concluded that the dissolution of the National Assembly occurred before the impugned proclamation was made. Accordingly, the proclamation, if valid, did not govern the election which followed that dissolution. But the appeal also raised important constitutional questions on which it is expedient that the Board express at least tentative views. Those questions are: (i) whether, if there were a deliberate attempt to exclude the review by the courts of the Constituency Boundaries Commission's

report, that attempt was unconstitutional because it was contrary to the rule of law, and (ii) whether the publication of the impugned proclamation in the Gazette after the grant of the interim injunction was unlawful and therefore of no effect.

The review of constituency boundaries

6. The Constitution of Saint Christopher and Nevis provides for the supervision of the registration of voters and the conduct of elections by a Supervisor of Elections (section 34). He or she in turn is supervised by an Electoral Commission of three persons appointed by the Governor-General (section 33). Section 49 of the Constitution provides for the Constituency Boundaries Commission ("CBC") of five members appointed by the Governor-General and section 50 requires the CBC to review constituency boundaries to give effect to the rules set out in Schedule 2 and to report to the Governor-General at intervals of not less than two and not more than five years. Schedule 2 provides:

> "1. There shall be not less than eight constituencies in the island of Saint Christopher and not less than three constituencies in the island of Nevis and if the number of constituencies is increased beyond 11, not less than one-third of their number shall be in the island of Nevis.
>
> 2. All constituencies shall contain as nearly equal numbers of inhabitants as appears to the Constituency Boundaries Commission to be reasonably practicable but the Commission may depart from this rule to such extent as it considers expedient to take account of the following factors, that is to say:
>
> (a) the requirements of rule 1 and the differences in the density of the populations in the respective islands of Saint Christopher and Nevis;
>
> (b) the need to ensure adequate representation of sparsely populated rural areas;
>
> (c) the means of communication;
>
> (d) geographical features; and
>
> (e) existing administrative boundaries."

7. Under section 50, the Prime Minister is required to lay before the National Assembly a draft of a proclamation by the Governor-General for giving effect, with or without modifications, to the recommendations contained in the CBC report. It is appropriate to set out subsection (6), as it is central to the Board's determination of this appeal:

> "If any draft proclamation laid before the National Assembly under subsection (3) or (5) is approved by a resolution of the Assembly, the Prime Minister shall submit it to the Governor-General who shall make a proclamation in terms of the draft; and that proclamation shall come into force upon the next dissolution of Parliament after it is made."
>
> (The Board's underlining)

8. It is appropriate also to set out the terms of subsection (7), which provides for the ouster of the court's jurisdiction, in view of the appellants' challenge, which the Board notes but is not in a position to determine, that the former governing party deliberately rushed through the approval of the impugned proclamation in order to prevent legal challenge. Subsection (7) provides:

> "The question of the validity of any proclamation by the Governor-General purporting to be made under subsection (6) and reciting that a draft thereof has been approved by resolution of the National Assembly shall not be enquired into in any court of law except upon the ground that the proclamation does not give effect to rule 1 in Schedule 2."

The factual background

9. In this section of the judgment the Board records what appear to be uncontested facts, unless otherwise stated. It is sufficient to say by way of background that for several years there have been disputes between supporters of the government and the opposition over the terms of the CBC's reports, giving rise to legal challenges. More recently, a CBC report of 5 September 2013 was subject to a legal challenge and was quashed on the ground of inadequate consultation on 31 July 2014. After the CBC produced revised recommendations, members of the CBC, who had been appointed on the advice of the leader of the opposition, expressed concerns whether those recommendations complied with the requirements of Schedule 2. On 18 December 2014, attorneys acting for representatives of the opposition parties wrote to the Prime Minister to intimate that they were instructed to mount a legal challenge to the revised recommendations in a forthcoming CBC report. Thereafter, on 13 January 2015 the CBC met and by a majority of 3:2 approved the maps of the revised constituency boundaries. This set the scene for the events of 16 January 2015.

10. At about 2 pm on 16 January 2015 the CBC met to consider a draft report which was then tabled. The majority of the CBC signed the draft report; the minority refused to sign. Thereafter, the Clerk of the National Assembly, acting on the instructions of the Speaker, issued a letter summoning an emergency meeting of the National Assembly for 4.15 pm. Once members of the National Assembly had gathered at approximately 4.35 pm, a draft proclamation to give effect to the CBC report was tabled and, after a heated debate, the National Assembly approved the draft proclamation at about 6.10 pm.

11. The Attorney General promptly took the draft proclamation to the Governor-General, who at about 6.20 pm signed both it and a proclamation dissolving Parliament. The Attorney General states in an affidavit that he instructed the proclamation to be gazetted and that on his return to Government Headquarters at about 6.35 pm he received a printed copy of an Extraordinary Gazette containing the proclamation. The parties dispute whether the text of the proclamation at that stage contained all the necessary formalities and on the evidence this appears arguable. But the Board is prepared to proceed on the basis that the Attorney General received a printed copy of the Gazette as it was later published. At some time between 6.30 pm and 6.50 pm the Prime Minister broadcast an announcement that the impugned proclamation had been gazetted and that he had advised the Governor-General to dissolve the Parliament with effect from that day. His announcement and the texts of both the impugned proclamation and a proclamation dissolving the Parliament were placed on the government website. The Prime Minister's press secretary sent copies of the proclamations to the media. Again, the parties disagree whether the full text of the impugned proclamation was placed on the government website; but that has no bearing on the Board's determination.

12. The appellants applied to the High Court for an interim injunction prohibiting the Governor-General from making the impugned proclamation until the determination of their substantive legal challenge or further order of the court. The court initially directed that there should be an inter partes hearing. But, after the appellants explained that they could not give notice of that hearing to several respondents who were at the time involved in the proceedings of the National Assembly, the court ordered that the application should proceed ex parte. At 7.38 pm, Carter J granted the ex parte injunction, which was served at the home of the Attorney General at about 8.40 pm although he did not read the order until later that evening.

13. The appellants have produced evidence in affidavits that members of the public were not able to obtain printed copies of the Gazette from the Government Information Service, the official provider of the Gazette, until 20 January 2015. The respondents do not deny this assertion. The Board therefore proceeds on the basis that it is correct and that the Gazette containing the impugned proclamation and the proclamation dissolving the National Assembly with effect from 16 January 2015 was not available in printed form to the general public until 20 January 2015.

14. Section 48 of the Constitution requires the general election to be held within 90 days after the dissolution of Parliament. The Governor-General appointed the election to be held on 16 February 2015.

The legal proceedings after the interim injunction

15. On 19 January 2015, the appellants filed proceedings seeking leave to apply for judicial review, in which they sought relief including an order quashing the CBC report and an injunction prohibiting the Governor-General from making the impugned proclamation. On the same day, the Attorney General applied to discharge the interim injunction on the basis that the proclamation had already been made by the time Carter J granted the ex parte injunction.

16. Carter J heard the respondents' application to discharge the interim injunction on 22 January 2015 and, in a ruling dated 27 January 2015, held the proclamation did not rely for its validity on being in the public domain so long as it became so available within a reasonable time after it was included in the Gazette. She held that the interim injunction came too late because the proclamation had been made and published by its appearance in the Gazette by 6.35 pm on 16 January 2015, before the interim injunction was served on the Attorney General. She therefore discharged the injunction.

17. The appellants appealed. On 29 January 2015, the Court of Appeal granted the appellants interim relief pending their appeal. But, on 5 February 2015, the Court of Appeal (Baptiste, Michel and Thom JJA) refused the appeal. The court held that section 50 was a self-contained regime for the review of constituency boundaries and interpreted section 50(6) purposively, to provide that changes to constituency boundaries should not come into force during a subsisting parliamentary term. The court agreed with Carter J that the act, which she had sought to prohibit, had already occurred by the time she made the order and that the injunction therefore fell to be discharged. As already stated, the Court of Appeal granted leave to appeal to the Board.

Decision

18. The Board is persuaded that the impugned proclamation, if valid, did not govern the election which was held on 16 February 2015. In its view, the case turns on (a) the correct interpretation of section 50(6), which is set out in para 7 above, and (b) an analysis of when a proclamation is "made".

19. The Board considers that the words which it has underlined in section 50(6) in para 7 above should bear their natural and ordinary meaning. There is nothing in the

statutory context or on an analysis of statutory policy to require another meaning to be given to those words. None was suggested.

20. The next question is: when is a proclamation "made" under section 50(6)? Under the Constitution, proclamations by the Governor-General are limited to specified matters of importance. In addition to the alteration of constituency boundaries, they are: (a) the declaration of a state of emergency (section 19(1)); (b) the revocation of such a declaration (section 19(5)); and (c) the supersession of legislation of the Nevis Island Legislature in the interests of external affairs or in the interests of defence (section 37(4)). Other things being equal, one would expect the Constitution to regulate the publication of such legal instruments; and it does.

21. Section 119 of the Constitution defines what a proclamation is. It provides, unless the context otherwise requires:

> "'proclamation' means a proclamation published in the Gazette or, if such publication is not reasonably practicable, published in Saint Christopher and Nevis by such means as are reasonably practicable and effective."

The Board is satisfied that the context of section 50 does not require a different interpretation to the word "proclamation". Lord Goldsmith QC submitted that section 50(6) was self-contained and did not require publication of the proclamation because it had its own mechanism for the commencement of its legal effect, namely that the proclamation came into force upon the next dissolution of Parliament after it is made. The Board is not persuaded. The Board accepts his point that the subsection specifies the time for the coming into operation of the proclamation, whereas section 42(4) provides that no law made by Parliament shall come into operation until it has been published in the Gazette. But the specific provision in section 50(6), which brings the proclamation into force, does not alter the meaning of "proclamation" so as to disapply the section 119 definition. The making of a proclamation is not simply the signing of a document, which can thereafter be kept on an internal government file. Nor is it the production of a hard copy of the text of a Gazette which similarly is deposited in a file and not made available to the public by the publication of the Gazette. A proclamation is what it says it is. It is something which is proclaimed or published; and the constitutionally recognised means of publication are stated in section 119. Lon Fuller in "*The Morality of Law*" (2nd ed, p 39) identified as one of eight desiderata of law the need to publicise, or at least make available to the affected party, the rules he is expected to observe. One of the benefits of such promulgation is that laws can be subjected to public criticism (Fuller op cit p 51). Section 119 provides the means of promulgation by which law is made by proclamation.

22. The respondents did not argue that it was not reasonably practicable to publish the impugned proclamation in the Gazette (which is defined in the Constitution as the official Gazette of Saint Christopher and Nevis). Accordingly, the other means of disseminating the terms of the impugned proclamation, which section 119 authorises, are irrelevant. Therefore, the dissemination of the text or the bulk of the text of the proclamation on the Government website is not a substitute for publication in the Gazette. The question is: when was the impugned proclamation published in the Gazette?

23. The answer to that question lies in the unchallenged evidence adduced by the appellants. In particular, the Hon Sam Condor, the third appellant, records in an affidavit (dated 21 January 2015) that when on 19 January 2015 he approached the Government Information Service Department, which is the government department responsible for distributing the Gazette, he was informed by responsible officials that there was as yet no published Gazette for 2015. On the following afternoon, when he again asked for Gazettes published in 2015, officials gave him the impugned proclamation, which was published as Extra Ordinary Gazette No 3 of 2015, and the proclamation dissolving Parliament, which was Extra Ordinary Gazette No 3A of 2015. The attorney, Mr DeLara MacClure Taylor, also gave evidence in an affidavit that the Government Information Service Department was the only department responsible for distributing the Gazette to the public. On visits to that department on both 19 January 2015 and on the morning of 20 January 2015 officials told him that there were no Gazettes published in 2015. On his first visit an official told him that the most recent Gazette was Gazette No 56 of 2014, which had been published on 11 December 2014.

24. It follows, in the Board's view, that the impugned proclamation was made no earlier than 20 January 2015 when it became available to the public by publication in the Gazette on the authority of the Governor-General. The proclamation dissolving Parliament was published at the same time. In that proclamation (which, like the impugned proclamation, was erroneously stated to be published on 16 January 2015) the Governor-General dissolved the Parliament "as from the 16 day of January, 2015". That dissolution, which unquestionably occurred with effect from 16 January, predated the "making" of the impugned proclamation. As a result, the impugned proclamation, if valid, will have effect only on the dissolution of the Parliament that was elected on 16 February 2015 (section 50(6)).

The other constitutional questions

25. It is no part of the Board's role, in this appeal against an interlocutory order, to make any findings in relation to the appellants' substantive case that the way in which the former governing party sought to bring into effect the CBC's report to alter the constituency boundaries manifested a deliberate attempt to deprive the opposition parties of an opportunity to mount a legal challenge to that report. Those allegations

were yet to be tested by the courts in St Christopher and Nevis when the Board heard the appeal. In view of the change of government after the election, they may never be. Nonetheless, because (a) the Board heard submissions on important constitutional questions, which were based on the hypothesis that the allegations were established, in the context of its consideration of the ouster clause in section 50(7), and (b) the questions are relevant to the continued validity of the impugned proclamation, which may be of practical importance in a future election, it is appropriate that the Board state its views on those issues.

26. The first issue is whether, if there were such an attempt to prevent access to the courts to review the legality of the impugned proclamation, that attempt was unconstitutional and thus unlawful. The second is whether the steps taken to publish the impugned proclamation in the Gazette, after Carter J granted the interim injunction on 16 January 2015, were unconstitutional because they were taken in breach of the injunction and, for that reason or otherwise, the making of the impugned proclamation by its publication on 20 January 2015 is unlawful.

27. The Constitution of Saint Christopher and Nevis in section 1 declares that it is "a sovereign democratic federal state". Section 2 provides that its Constitution is its supreme law and "if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void". The Board is familiar with the structure of the Constitution. It resembles other constitutions within the Board's jurisdiction. Chapter II (sections 3-20) sets out protections for the fundamental rights and freedoms of the individual. Chapter III provides for the office of Governor-General as the Queen's representative in Saint Christopher and Nevis. Chapter IV (sections 25-50) provides for Parliament; Chapter V (sections 51-68) provides for the Executive; and Chapter IX (sections 96-99) for the judiciary. Other chapters provide for finance, public service, citizenship, and the Island of Nevis within the federation. It is a parliamentary democracy on the Westminster model: *Hinds v The Queen* [1977] AC 195, 212B-213H; *Ahnee v Director of Public Prosecutions* [1999] 2 AC 294, 302-303.

28. Among the provisions in Chapter II protecting fundamental rights is section 3(a), which entitles every person to the protection of the law. This declaratory provision has in the main the nature of a preamble (*Olivier v Buttigieg* [1967] 1 AC 115, 128), but on authority appears to extend to matters outside the more limited scope of section 10: see *Newbold v Commissioner of Police* [2014] UKPC 12, para 32. Section 18 provides the means by which the protective provisions of Chapter II are enforced, namely by an application to the High Court for redress. It provides (in subsection (1)):

> "If any person alleges that any of the provisions of sections 3 to 17 (inclusive) has been, is being or is likely to be contravened in relation to him or her … then, without prejudice to any other action with respect to

> the same matter that is lawfully available, that person … may apply to the High Court for redress."

In this capacity the High Court acts as the independent and impartial court which section 10(8) requires to secure the protection of law.

29. The High Court also has jurisdiction in constitutional matters in Chapter IX of the Constitution (entitled "Judicial Provisions"). Within that Chapter, section 96(1) provides that, subject to inter alia section 50(7),

> "any person who alleges that any provision of this Constitution (other than a provision of Chapter II) has been or is being contravened may, if he or she has a relevant interest, apply to the High Court for a declaration and for relief under this section."

The Board notes that the ouster provision of section 50(7) (set out in para 8 above) may exclude a challenge under section 96. But it does not exclude the High Court's jurisdiction under section 18 to enforce the protective provisions of Chapter II, including the section 3(a) right to the protection of the law.

30. Section 38 of the Constitution entrenches its terms against alteration by requiring the votes of no less than two-thirds of the National Assembly (subsection (2)). Section 38(3) provides further entrenchment of certain provisions of the Constitution by requiring both a 90-day interval between the introduction of a Bill and the beginning of proceedings on its second reading and also approval of the Bill once passed on a referendum by not less than two-thirds of all the votes cast on that referendum in each island. This deeper entrenchment protects section 38 itself and also the provisions set out in Schedule 1, which include (a) Chapter I which declares the existence of a sovereign democratic federal state and the supremacy of the constitution, (b) Chapter II which protects fundamental rights and freedoms, and (c) Chapter IX, the judicial provisions.

31. It is not necessary to set out further the structure of the Constitution to show that, like the constitution discussed in *Ahnee* (above) and in *State of Mauritius v Khoyratty* [2007] 1 AC 80, that of Saint Christopher and Nevis has the characteristics which Lord Steyn, in giving the judgment of the Board in *Khoyratty*, summarised at para 11. Those characteristics are: (a) Saint Christopher and Nevis is a democratic state based on the rule of law; (b) the principle of separation of powers is entrenched; and (c) one branch may not trespass on the province of any other in conflict with the principle of separation of powers. That conclusion does not answer the hypothetical question the Board is addressing, which is the constitutionality of a deliberate attempt to exclude the

opportunity of access to the High Court for constitutional redress. But it gives a clear pointer towards the answer.

32. In the Board's view there is at least a strongly arguable case that a deliberate attempt by one branch of government, in the control of a governing party, to prevent individuals from obtaining access to the High Court for a constitutional adjudication under section 96 would be unconstitutional as it would deny the protection of the law contrary to section 3(a). In such circumstances, it is strongly arguable that section 2 would nullify the impugned proclamation and section 50(7) would not apply. In any event, on the ordinary principles of judicial review, it is arguable that the making of the proclamation would be open to challenge, notwithstanding the ouster clause, if the power to do so were exercised for an improper purpose: *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 and *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

33. Turning to the second issue, it is well established in the common law that the court can give interim injunctive relief against a minister in an official capacity or a government department and make a finding of contempt if he or it breaches an injunction: *M v Home Office* [1994] 1 AC 377. In that case, Lord Woolf, who gave the leading judgment, was of the view that a finding of contempt, without other sanction, would be sufficient to ensure compliance. He stated (at p 425A), "The very fact of making such a finding would vindicate the requirements of justice". A judge proceeds on the prima facie assumption that a public body would not deliberately flout an order of the court: *R (JM) v Croydon London Borough Council (Practice Note)* [2010] 1 WLR 1658, at para 12 per Collins J. Even if a minister considers on advice that a judge should not have made an order, the order is to be treated as valid and one which is to be obeyed until it is set aside: *M v Home Office* (above), 423G per Lord Woolf.

34. If a minister acts in breach of an injunction, for example in the belief that it is invalid or that it has come too late to prohibit his actions, the legality of the act, which the order prohibited, may be open to challenge by judicial review on the basis that the minister in so acting has failed to take into account a relevant consideration, namely the validity of the court order pending its discharge. If a minister were to go further and knowingly exercise his powers in defiance of the injunction and in an attempt to render it ineffective, it would be clearly arguable that he had used his powers for an improper purpose: *Padfield* (above). On the factual hypothesis on which the Board is considering these other constitutional questions, the making of the impugned proclamation by its publication on 20 January 2015 may be amenable to a quashing order under normal principles of judicial review.

35. Where, as here, the interlocutory injunction was granted in the context of a constitutional challenge, the constitutional arguments, which the Board has set out in para 32 above, may provide another basis for invalidating the impugned proclamation.

Conclusion

36. For these reasons the Board will humbly advise Her Majesty that the appeal should be allowed and that the parties should make written submissions on costs within 21 days of the delivery of judgment.