15 of 1975

IN THE PRIVY COUNCIL No. 9 of 1974

ON APPEAL

FROM THE COURT OF APPEAL OF THE WEST INDIES ASSOCIATED STATES

B E T W E E N :

THE ATTORNEY GENERAL
and
THE MINISTER OF HOME AFFAIRS — Appellants

- and -

ANTIGUA TIMES LIMITED — Respondents

CASE FOR THE RESPONDENTS

RECORD

1. This is an appeal from the Judgment and Orders of the Court of Appeal of the West Indies Associated States (Lewis, C.J. (Ag) and St. Bernard J.A., Peterkin J.A. (Ag.) dissenting) dated the 13th June 1973, which dismissed with costs an appeal from (1) a ruling on the Appellants' Preliminary objection and (2) the Judgment of the High Court of Antigua (Louisy, J.) dated the 24th May 1972, and the 15th June, 1972 respectively. — p.117; p. 5; p. 12; p. 54

10 2. The relevant statutory provisions of Antigua are: The Newspapers Registration (Amendment) Act, 1971 No. 8 of 1971 (hereinafter referred to as Act 8 of 1971):

(2) The (Newspapers Registration) Act is hereby amended by inserting the following sections .....:

"1A. In this Act the word "newspaper"shall have the same meaning as defined in Section 2 of the Newspaper Surety Ordinance.

20 1B (1) No person shall publish or cause to be published any newspaper unless he has

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obtained a licence from the Cabinet in respect of the newspaper published or caused to be published by him and has paid the annual licence fee prescribed by this Act.

Provided that every person who prints or publishes a newspaper registered under the provisions of the Principal Act fifteen days before the commencement hereof and has paid the annual licence fee prescribed by this Act shall be deemed to have been granted a licence.

(2) A licence issued under this section shall be signed by the Secretary to the Cabinet and the person named in the licence as the publisher of the newspaper specified therein shall on or before the 2nd day of January in every year pay into the Treasury the sum of six hundred dollars.

(3) If the publisher of a newspaper to whom a licence has been granted fails to pay the said sum of six hundred dollars on or before the 2nd day of January in every year the licence shall be invalid until such payment has been made.

(4) If any person shall publish or cause to be published any newspaper without holding a valid licence under this section he shall be guilty of an offence and shall on summary conviction be liable to a fine of five hundred dollars for every day on which such newspaper is published.

The Newspaper Surety Ordinance (Amendment) Act, 1971, No. 9 of 1971 (hereinafter referred to as Act 9 of 1971).

2. Section 3 of the Principal Law is hereby amended as follows:-

(a) by renumbering the section as section 3(1); and

(b) by adding the following as sub-section (2) thereof -

(2) No person shall print or publish or cause to be printed or published within the State any newspaper unless he shall have previously deposited with the Accountant General a sum of ten thousand dollars in cash to be drawn against in order to satisfy any judgment of the Supreme Court for libel given against the editor or printer or publisher or proprietor of the said newspaper or any writer therein and shall at all times maintain the said deposit at the sum of ten thousand dollars. The deposit aforesaid shall be paid into a deposit account in the name of the depositor and shall bear interest at the same rate payable by the Government Savings Bank;

Provided however that the Minister responsible for newspapers on being satisfied with the sufficiency of the security in the form of a Policy of Insurance or on a guarantee of a Bank may waive the requirement of the said deposit;

Provided further that no amount of the principal sum shall be paid from the deposit account aforesaid or against any policy of Insurance or recovered from the guarantee of the Bank save upon the Certificate of the Registrar of the High Court as to any award of the Court".

The Antigua Constitution Order, 1967 (hereinafter called the Constitution).

"1 Whereas every person in Antigua is entitled to the fundamental rights and freedoms of the individual, that is to say, the right whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect of the rights and freedoms of others and for the public interest to each and all of the following namely:-

(a) life, liberty, security of the person, the enjoyment of property and the protection of the law;

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(b) freedom of conscience, of expression and of peaceful assembly and association; and

(c) respect for his private and family life,

the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest".

"10 (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, and for the purposes of this section the said freedom includes the freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence and other means of communication.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -

(a) that is reasonably required -

(i) in the interests of defence, public safety, public order, public morality, or public health; or

(ii) for the purposes of protecting the reputations, rights and freedoms of other persons, or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts or regulating

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telephony, telegraphy, posts, wireless, broadcasting, television or other means of communication, public exhibitions or public entertainments".

"15 (1) If any person alleges that any of the provisions of sections 2 to 14 (inclusive) of this Constitution has been, or is being, contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said sections 2 to 14 (inclusive) to the protection of which the person concerned is entitled:

Provided that the High Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law".

"37 Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Antigua".

"61 (1) There shall be a Cabinet for Antigua which shall have the general direction and control of the Government of Antigua and shall be collectively responsible therefor to Parliament".

3. By their Statement of Claim, dated the 12th January, 1972, the Respondents set out section 1B of Act 8 of 1971 and Section 3 sub-section (2) of Act 9 of 1971 and claimed declarations that the said

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sections were ultra vires the powers of the legislature of Antigua by reason of, in particular, Section 10 of the Constitution and generally thereunder. Further and in the alternative the Respondents claimed a declaration that the said provisions were contrary to natural justice and constituted an infringement of Section 1 of the Constitution. Further and in the alternative they claimed a declaration that the financial provisions of the said statutes were penal and unlawful in that they infringed the freedom of expression provided for by the Constitution. The Respondents also claimed an enquiry as to damages and incidental relief.

p. 4 4. The Defence, dated the 16th February 1972, denied the allegations set out in the Statement of Claim.

5. The Appellants contended, on a preliminary objection on a point of law, that the Respondents had no locus standi before the Court because the words "any person" in section 15(1) of the constitution related only to natural persons. Louisy J. overruled the objection on the 24th May
p. 5 1972. He held that Section 19 of the Interpretation Act, 1889 applied, and, since no contrary intention appeared, the expression 'person' in S.10 and other sections was apt to
p. 8 include a legal person.

6. The hearing continued on the 24th and 25th May,
p. 9 1972. The only evidence given was that of Reuben Henry Harris, a Director and Deputy Chairman of the Respondents and the second largest shareholder. The nature of his evidence in summary, was that, owing to the requirements for a licence fee and bond in cash, the Respondents had reached the decision to cease publishing the "Antigua Times". He gave evidence also of comparative licence fees for other activities and stated that the "Antigua Times" had never been sued for libel.

7. Louisy J. reserved his Judgment until 15th June
p.12 1972. Counsel on both sides had agreed, for the purpose of submissions, three propositions of law.
p.18 The learned Judge dealt with them in turn. The first was: "Any law the effect of which is that the Cabinet has the right to decide what person
p.21 shall and what person shall not obtain a licence

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for a newspaper published or caused to be published by him or what person shall and what person shall not be allowed to register such newspaper by declaration is unconstitutional". The learned Judge agreed with this proposition. He held that the requirement of S.1 B(1)of the Newspapers Registration Act was a hindrance or previous restraint in the enjoyment of freedom of expression granted by the Constitution and so was unconstitutional. He rejected the Appellants' contention that since the Respondents did not have to apply for a licence (The "Antigua Times" having been in publication 15 days before the commencement date of the provisions), there was in effect no requirement. The Respondents' right was to publish a newspaper without the authority of the legislature; and, further, they might wish to publish newspapers other than the "Antigua Times". p.29

8. The second proposition was "Any law is constitutional which provides for a fee for registration of a newspaper, such fee being of a moderate figure in keeping with the established practice in the Caribbean". The learned Judge disagreed with this. He held that the vital issue to decide was whether the imposition of a fee was intra vires the legislative power. If it was, the quantum could not be questioned. He rejected any limitation upon legislative power by reference to the prevailing scale of practice in the Caribbean. He then considered whether the fee was within the taxing powers of the legislature. After consideration of authorities and an extensive review of the history of the concept of the freedom of the press, he held that the fee amounted to a hindrance in the enjoyment of freedom of expression and was therefore unconstitutional. p.29 p.32 p.33 p.34-45 p.45

9. The third proposition was "Any law is constitutional which provides that no person shall print or publish or cause to be printed or published any newspaper unless he shall previously have deposited with the Accountant General a sum of $10,000 in cash or a bond for the like amount from an established Bank or Insurance Company, to be drawn against in order to satisfy any judgment of the Court for libel against the editor or printer or publisher or proprietor of the newspaper and to be at all times maintained at the sum of $10,000". p.45

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The learned Judge disagreed with the proposition
p.52 itself. He considered various authorities, and came to the conclusion that the requirement was a hindrance to the enjoyment of freedom of expression and so was unconstitutional. Accordingly he
p.53 declared Acts 8 and 9 of 1971 repugnant to the Constitution and void. No order was made as to damages.

10. The Appellants appealed to the Court of Appeal
p.54 of the West Indies Associated States (Lewis, C.J. (Ag), St. Bernard, J.A. and Peterkin, J.A. (Ag.). Judgment was given on the 13th June dismissing the appeal by a majority (Peterkin, J.A. dissenting). 10

11. Lewis, C.J. rejected the Appellants' contention that "person" in S.15 of the Constitution meant only natural persons. He found that no contrary intention appeared to the construction required by the Interpretation Act, 1889. He considered various
p.57-69 authorities and stated that the correct approach was to consider whether the rights specified in the section were capable of being enjoyed by corporations. If they were, then corporations were entitled to the protection accorded thereby. The
p.71 Respondents were a "person" within the meaning of the Constitution and entitled to enforce S.15. In so far as Louisy J. had disagreed with some of the three agreed propositions, Lewis C.J. held that the learned Judge had acted properly, for the agreement had not tied his hands. The court had to decide
p.72 for itself whether the Constitution had been infringed. 20 30

12. The learned Chief Justice took the view that the requirements of a licence and payment of a fee were prima facie a hindrance to the right of freedom
p.76 of expression under Section 10 of the Constitution. He accepted a presumption in favour of constitutionality, but the prima facie situation had shifted the burden and the Appellants had failed to discharge
pp.78-80 the burden. They had not shown that the legislation came within the limits of Section 10(2). A newspaper was not an "other means of communication" within the meaning of S.10(2)(a)(ii), nor was Act 8 of 1971 regulatory. The Appellants called no
p.79 evidence to show that the provisions were reasonably required. Lewis C.J. also rejected the Appellants' submission that since the Respondents did not have to apply for a licence there had been no contravention 40

in relation to it. He considered the proviso constituted a matter of grace where a legal right was provided for. RECORD p.81

13. The learned Chief Justice held that the requirement of a deposit of $10,000 was prima facie a hindrance to the enjoyment of the right of freedom of expression. He did not consider that the proviso allowing other sufficient security altered the position, for the lack of guidelines regulating the exercise of the Ministers directions made that too unconstitutional. Since no evidence had been given that the legislation was reasonably required, the Appellants had failed to establish any of the exceptions under Section 10(2) of the Constitution. He concluded that, while there was some basis for saying that Louisy, J. had not adequately dealt with the principle of the presumption of constitutionality no prejudice had been suffered thereby. p.83 p.87 p.88 p.90

14. St. Bernard, J.A., on similar reasoning to that employed by the learned Chief Justice, held that "person" in Section 1 of the Constitution included a corporation. He also took the view that, once a prima facie violation was shown, the burden shifted to the Appellants to show that the legislation fell within section 10(2) of the Constitution. Act 8 of 1971 was not regulatory, and no evidence had been adduced to show that either that Act or Act 9 of 1971 was reasonably required. The learned Judge accordingly held both Act 8 and Act 9 of 1971 to be repugnant to the Constitution and void. p.97 pp.102, 103

15. In a dissenting judgment, Peterkin, J.A. held that a contrary intention to the application of Section 19 of the Interpretation Act, 1889 had been shown, with the result that the prohibitions of the Constitution protected natural persons only. The learned judge nevertheless went on to consider the two Acts. He considered that the three agreed propositions narrowed the argument and bound both the High Court and the Court of Appeal. In relation to the requirement of a licence, the learned Judge took the view that, since the Respondents did not need to apply for a licence, no contravention had been shown in relation to them. So far as the fee was concerned, he held that unless it was manifestly excessive it was not a hindrance to publication. There was no evidence, in his judgment, to show that it was manifestly excessive. He concluded by dealing with the requirement of a deposit and the proviso p.104 p.109 pp.112-113 p.114 pp.114-115

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granted to the Minister to accept other security. In view of the absence of guidelines he held the discretion to be unfettered and unregulated and
p.117 therefore unconstitutional. As a result however, of his view of the meaning of "person" in the Constitution, he thought the appeal should be allowed.

16. The Respondents respectfully submit that the Judgments of Louisy, J., Lewis C.J. and St. Bernard J.A. are correct and should be upheld. Where the application of a statute is defined by reference to "a person", and the acknowledged and established state of affairs is that certain activities to which the statute applies are invariably conducted by companies, only the clearest possible intention to limit the protection of the statute to natural persons, be allowed to displace the normal rules of construction and the efficacy of the grant of a fundamental right. It is submitted that no such intention is shown by the use in S.1 of the Constitution of the word "individual" which is ambiguous of itself and apt to refer to any individual legal person as opposed to the general public. Under S.10 of the Constitution the position is even clearer, since the word used is 'person' which in its ordinary meaning embraces persons both natural and legal. There is nothing to displace the presumption introduced by S.19 of the Interpretation Act.

17. No valid distinction can be drawn in the Respondents' respectful admission, between that part of an Act which requires a licence to be obtained and that part of the same Act which absolves certain people in defined circumstances from actually applying for a licence. The hindrance to the enjoyment of the freedom of expression is constituted, not by the mechanics whereby a licence can be obtained or deemed to be obtained but from the requirement that a licence should be needed at all and in default there should be liability to a penalty. The Respondents submit further that, in so far as Act 8 of 1971 grants a discretion to the Cabinet, it is an unfettered and unregulated discretion, and so is repugnant to the Constitution.

18. The Respondents respectfully submit that the fee payable for registration under Act 8 of 1971 is

a direct hindrance of the exercise of the right of freedom of expression, and cannot be justified as a payment of the nature of a tax. The deposit required by Act 9 of 1971 is a similar hindrance and equally unjustifiable as a tax.

19. The Respondents respectfully submit that, upon a proper construction of the Constitution, the purpose of the provisions granting fundamental rights is to deprive the legislature of the power to restrict or abrogate those rights, unless it can be shown that such interference is sanctioned by express provision of the Constitution. In examining whether the impugned Acts constituted hindrances of the enjoyment of fundamental rights, it was the duty of the Courts to look at the effect of the provisions as well as the precise language. It is respectfully submitted that there could not be a clearer instance of rebuttal of any presumption of constitutional validity than that provided by unambiguous words of an Act forbidding a person exercising some fundamental right unless conditions are satisfied and evidence that those conditions have in fact obstructed the exercise of the right. The legislation can then be saved only if it can be brought within some exception provided by the Constitution. In the present case there was no evidence to bring either Act within the terms of the exception upon which the Appellants relied - i.e. S.10(2)(a)(ii) of the Constitution.

20. The Respon dents respectfully submit that the order of the Court of Appeal was right and should be upheld and this appeal should be dismissed with costs for the following (among other)

REASONS

(1) BECAUSE the expression "person" as it occurs in Section 15(1) of the Constitution includes any body of persons corporate or unincorporated;

(2) BECAUSE the requirement introduced by Act 8 of 1971 that a licence be obtained from the Cabinet for publication of a newspaper created a hindrance of the exercise of right of freedom of expression granted by section 19(1) of the Constitution and was unconstitutional;

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(3) BECAUSE the requirement introduced by Act 8 of 1971 that licence fee be paid for publication of a newspaper created a hindrance of the exercise of the right of freedom of expression granted by Section 10(1) of the Constitution and was unconstitutional;

(4) BECAUSE the requirement of a deposit of $10,000 under Act 9 of 1971 created a hindrance of exercise of the right of freedom of expression granted by section 10(1) of the Constitution and was unconstitutional;

(5) BECAUSE both the discretion granted to the Cabinet by Act 8 of 1971 and the discretion granted to the Minister by Act 9 of 1971 were unlimited and unregulated and so unconstitutional;

(6) BECAUSE the Respondents had locus standi to challenge the constitutional validity of both of the Acts;

(7) BECAUSE there was no evidence to bring either Act within the operation of S.10(2) of the Constitution;

(8) BECAUSE of the other reasons given by Lewis C.J., St.Bernard J.A. and Louisy J.

J. G. Le QUESNE

GEORGE NEWMAN

IN THE PRIVY COUNCIL

No. 9 of 1974

ON APPEAL FROM THE COURT OF APPEAL OF THE WEST INDIES ASSOCIATED ESTATES

BETWEEN

THE ATTORNEY GENERAL

and

THE MINISTER OF HOME AFFAIRS

Appellants

- and -

ANTIGUA TIMES LIMITED

Respondents

CASE FOR THE RESPONDENTS

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