Supreme Court
Spry, C.J.
6 April 1979

Practice and procedure — joinder of parties — whether Attorney General may be joined against his will — Supreme Court Rules, r.35(vi).
Constitutional law — question whether ordinance ultra vires the Constitution— desirability of giving Attorney General an opportunity of being heard.

The appellant in an appeal from a decision of the Court of First Instance applied for the joinder of the Attorney General as a defendant, as one of the grounds of appeal raised an issue that affects the public. The Attorney General opposed the application.

HELD: The court had power to join the Attorney General as a respondent against his will but the discretion to do so would not be exercised.

Per curiam. The question whether an ordinance is ultra vires the Constitution should not be decided without giving the Attorney General an opportunity of being heard.

Cases referred to in the order

Ellis v. Duke of Bedford [1899] 1 Ch. 494; [1901] A.C.1.
Gouriet v. Union of Post Office Workers [1978] A.C. 435.

Application

This was an application to the Supreme Court for the joinder of the Attorney General as a respondent to an appeal from the Court of First Instance.

J. E. Triay for the applicant.
C. Finch for the Attorney General.

10 April 1979: The following order was read —

This is an application by a person appealing to this court against a decision of the Court of First Instance for the joinder of the Attorney General as a defendant and for leave to adduce

certain evidence. It appears that in the decision appealed against, the learned trial judge held that the existence of a nuisance order was not a ground for ordering that possession be yielded up of certain premises that come under Part II of the Landlord and Tenant (Miscellaneous Provisions) Ordinance. In his notice of motion, the appellant is putting forward a ground of appeal that was not raised in the court below, that is, that Part II is ultra vires the Constitution. On his behalf, Mr Triay submits that as this is an issue that affects the public, the Attorney General ought to be made a party.

Mr. Finch, for the Attorney General, submits that the court has no power to join the Attorney General against his will as a party to an appeal from proceedings in which he was not a party. The Attorney General is willing to appear as amicus curiae at the request of the court but he is not willing to be made a party.

Rule 35(vi) of the Supreme Court Rules empowers the court to join any person as a party in any appeal. Mr Finch has suggested that the Attorney General has a position of privilege and cannot be joined without his consent, but he has cited no authority in support of his argument. I do not think the Attorney General can be made a plaintiff or appellant without his consent but I can see no reason why he should not be made a defendant or respondent, where the circumstances require it.

I find some support for this view in *Ellis v. Duke of Bedford* (1) where the Court of Appeal discharged an order made in the trial court on an interlocutory summons for the striking out of the action, conditionally on the plaintiffs undertaking to make the Attorney General a defendant, to represent the public at large. The Attorney General was apparently not before the court and there was no suggestion that his consent had to be obtained. When the matter went on appeal to the House of Lords (2), two of the Law Lords commented that they could in the circumstances of the case see no useful purpose that would be served by making the Attorney General a party but none suggested that the Court of Appeal had exceeded its powers and the order was allowed to stand. Incidentally, the Attorney General does not seem to have appeared or been represented in the House, as one would have expected had his prerogative rights been breached.

(1) [1899] 1 Ch. 494.
(2) [1901] A.C. 1.

The making of the order sought is of course discretionary and the question remains, whether I ought to make such an order, against the wishes of the Attorney General. I do not think I should. On the material now before me, I cannot foresee being asked to make any order against or in favour of the Attorney General, nor do I think I could properly make any such order in this appeal. The appeal does not directly concern any material rights of the Crown or of the Government. The decision of the appeal will affect a substantial number of people, landlords and tenants, but I do think it can be said to affect the public generally.

I am not sure what would be the implications of making the Attorney General a party. In *Gouriet v. Union of Post Office Workers* (1), to which Mr. Triay referred me, it was said —

> "There are clear objections to making him a defendant: if he were so joined, he, and through him all members of the public, would be bound by the decision."

I do not propose to pursue this aspect of the matter.

I do not think the question whether an ordinance is ultra vires the Constitution should ever be decided with giving the Attorney General an opportunity of being heard but that can be done by inviting him to appear as amicus curiae, a step I had taken before this application was lodged. The first part of the application is accordingly dismissed.

[*The Chief Justice then dealt with the application for leave to adduce additional evidence.*]

(1) [1978] A.C. 435, at p. 482.