18

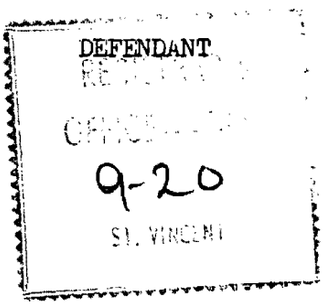
ST. VINCENT AND THE GRENADINES
IN THE HIGH COURT OF JUSTICE
(CIVIL)
A.D. 1991

SUIT NO: 579/90

BETWEEN: HENRY WILLIAMS — PLAINTIFF

v.

ATTORNEY GENERAL — DEFENDANT



Dr. R. Gonsalves for Plaintiff

Mr. Karl Hudson Phillips, Q.C. and Mr. O. Ramjeet, Solicitor General for Defendant.

21st March, 1991
Delivered 11th April, 1991

JUDGMENT

JOSEPH, MONICA J.

The Plaintiff was inaugurated as Governor General of St. Vincent and the Grenadines on 29th February, 1988, and performed the functions of that Office continuously up to and including 18th September, 1989. The Defendant is sued by virtue of the Crown Proceedings Act, 1952 (No. 37 of 1952).

On 16th October, 1989, the Plaintiff wrote a letter to the Permanent Secretary, Prime Minister's Office, (the P.S.) the 2nd paragraph of which reads:

> I request that the necessary particulars be forwarded to the Accountant General for computation and payment of the gratuity and pension to which I am entitled under the relevant legislation.

Two replies were addressed by the Permanent Secretary to the Plaintiff. The first letter dated 31st October, 1989 is as follows:

/2...

"GRATUITY AND PENSION

I wish to acknowledge receipt of your letter of 16th October, 1989, on the above captioned subject and to advise that the matter is receiving attention."

The second letter dated 10th April, 1990, reads:

"Please refer to your letter of 16th October, 1989, and mine in acknowledgement thereof on 31st October, 1989.

I am directed to advise you that legislation presently in force does not provide for the payment of a pension in respect of an acting appointment to the post of Governor General.

I regret therefore that your request for Gratuity and pension for the period you acted in that capacity cannot be entertained."

The next step was the serving of a notice on the Atorney General on 5th September, 1990 under the Public Officers' Protection Act 1981 (No. 4 of 1981) (The 1981 Act). The notice is dated 5th August, 1990, and is signed by the Solicitor for the Plaintiff.

On the 8th November, 1990, a writ of summons with a statement of claim endorsed was filed in the Registry of the High Court, claiming a declaration that the plaintiff is entitled to be paid gratuity and pension for the period he acted as Governor General: general damages: costs and further or other relief. The defendant denies that the plaintiff is so entitled.

Learned Counsel for the defendant in a submission in limine argued that the suit is not maintainable as no action can be brought after a period of twelve months of the date the cause of action arose: that by paragraph 3 of the Statement of Claim the Plaintiff alleges that he was appointed to act as Governor General and ceased to hold that office on 18th September, 1989.

/3....

Under Section 3 of the 1981 Act (as amended) a notice in a particular form is to be served and under section 4 the action must be commenced within twelve calendar months.

Learned Counsel contended that, in the defendant's view, the cause of action arose, if it ever arose, at the date the plaintiff demitted office and that to hold otherwise would mean that the plaintiff could wait for twenty years before bringing an action and merely base his action on the last refusal to pay. For example, he said, if someone is entitled to monthly pension payments, then that person would have successive causes of action every month on a failure to pay.

It is erroneous to say, Learned Counsel argued, that as the Permanent Secretary responded on the 10th April, 1990, that that is the date the period of limitation started to run. Enquiry is to be directed towards determining the first date that is referable to the duty to be undertaken by the public officer as opposed to the date on which successive damages flowed to the plaintiff as a result of the breach. What is being attacked is the decision not to grant pension from 1st March, 1988. Learned Counsel posed the question - When does injury occur?
And referred the Court to a number of cases which I shall consider later in the judgment.

Learned Counsel for the plaintiff submitted that the question to be decided by the Court is whether the cause of action arose on 18th September, 1989 or on 10th April, 1990. He submitted further that the requirement of the Act had been complied with and that by para 1 of the defence there is an admission that the notice is in order.

I shall deal with this latter point first. Paragraph 7 of the statement of claim is as follows:

/4.....

"On the 5th day of September, 1990, the Plaintiff served on the defendant the requisite statutory notice under the Public Officers' Protection Act 1981, as an act preliminary to the institution of this action."

The defendant admits this. Learned Counsel for the defendant's contention was that, although the notice was served as required, the action was not commenced within the period required by the 1981 Act.

Learned Counsel argued that in 1990 there was a statutory duty to pay gratuity and pension but that the cause of action, arose from the moment of the breach of the statutory duty in April 1990.

In support of this proposition he cited Jarvis v. Surrey County Council (1925) AER print p. 297 a case where the plaintiff claimed compensation for damage to his property by a riot of soldiers. Under the Riot (Damages) Act 1886, the plaintiff had a right of action against the police authorities in the event of their refusal or failure to fix the amount of compensation.

By letter to the police authorities dated January 1920 the plaintiff asked for a settlement of the claim but no reply was received and on January 29th, 1924, the defendants refused to fix compensation. The plaintiff issued a writ.

The issue at the trial was the date of the accrual of the cause of action so as to determine whether the action had been commenced within the period fixed by the Civil Procedure Act, 1833, namely two years.

In Pitchers v. Surrey County Council (1923) 2 K.B. 57 cited in the Jarvis case Swift J. said:

"In my view the cause of action here really only arose after the Council had failed to grant compensation. The Act of Parliament which gives a right of compensation

/5.....

prescribed the method in which it shall be obtained, and then goes on to provide in Section 4(1) that where a claim for compensation has been made in accordance with the regulations and a claimant is aggrieved by the refusal or failure of the police authority to fix compensation on such a claim, he may bring an action. It seems to me that he cannot bring an action until he is aggrieved by the refusal or failure of the police authority to fix compensation upon such claims."

Finlay J. in the Jarvis case supra had this to say:

"But, after full argument, I am of the same opinion as Swift J. and the awkward results which would follow from the adoption of any other view are obvious. The scheme of the Act is that a plaintiff is not to have a right of action until he has been through the procedure indicated, and this procedure involves a certain amount of time and negotiation. It would be awkward if, while he was still negotiating, time should be running against a plaintiff.....In my opinion, the plaintiff was not aggrieved by any refusal or failure within the meaning of S 4(1) of the Act of 1886 until January 29, 1924 when the defendants finally refused to fix compensation."

In those cases legislation had provided a procedure to be followed. The police authorities were to fix the amount of compensation, and it was only after a refusal or failure to do what statute provided that the cause of action would arise. Any action instituted prior to a refusal or a failure by the authority to fix compensation would have been premature and the plaintiff would probably have been met with a defence that the procedure had not been complied with: that the condition precedent to the bringing of an action had not been followed.

I now consider some of the cases cited by Learned Counsel for the defendant.

/6.....

Cartledge (Widow and Administratrix of the Estate of Fred Hector Cartledge (deceased) and Others v. E. Jopling and Sons Ltd. (1963) 1 AER 341.

The plaintiff suffered from an industrial disease which was found to have been caused by the inhalation of dust particles while he was working in a factory owned by the defendant which was not ventilated as was required by statute. This breach of the statute caused injury to the plaintiff's lung before October, 1950 and the disease from which the plaintiff suffered gave no indication of its presence in its early stages. The plaintiff was unaware of it and he continued to work.

He then became aware that he had the disease and on 1st October, 1956, began an action against the defendant for damages for breach of the statutory duty to provide effective ventilation.

The Limitation Act provided that the action could not be brought after a specified time. The Court held that time did not run from the date when the plaintiff knew or ought to have known that he was suffering from the disease, but from the date when the cause of action accrued, i.e., the date of the injury to the plaintiff's lung. The judgment of Lord Pearce at Page 351 reads:

> "Past cases have been decided on the basis that the time runs from the accrual of the cause of action whether known or unknown and no case has been cited in which the plaintiff's lack of knowledge has prevented the time from running where that lack of knowledge has not been induced by the defendant."

In Islander Trucking Ltd. v. Hogg Robinson and Gardner Mountain (Marine) Ltd and others (1990) 1 AER 826 where a person failed to obtain a valid and effective policy of insurance as a result of a misrepresentation or non-disclosure by an insurance broker, that person suffered damage at the time when the insurance contract was

/7....

executed and not when the insurers later discovered the full material facts and elected to avoid the contract, since at the time of execution of the contract he had entered into a contract which was of less commercial value than that which he had engaged the broker to procure, it was held that the limitation period for bringing an action against the brokers for negligence began to run from the time when the insurance contract was executed and not from the time when the defect was discovered or financial loss was suffered.

and at page 834 paragraph "d"

"Whilst I shall not do full justice to the submissions which I have heard, it seems to me that the position is this, and I hold: firstly, that there is a close analogy between what I have called the Solicitor cases and the present case where the defendants are insurance brokers. The nature of the damage is the vital factor, and in the property cases the decision has been that the relevant damage must consist of damage to property regardless of knowledge.

Central Electricity Generating Board v. Halifax Corporation (1962) 3 AER 915. This is a case where there was a dispute as to whether properties and liabilities held by the respondents were to vest in the appellants on the vesting date i.e., 1st April, 1948. In accordance with legislation the matter was referred to the Minister on the 3rd January, 1957, to decide whether the sum of money held by the respondents was held wholly or mainly in their capacity as electricity undertakers.

On 18th September, 1958 the Minister gave his decision that the funds were so held. In an action by the appellants to obtain the funds held the respondents raised the defence that the action was barred by the Limitation Act 1949 as more than six years had elapsed since the vesting date.

/8....

With regard to the time the limitation period started to run, Lord Reid at page 919 said:

"There are two possibilities. If the cause of action accrued when this sum vested in the appellants' predecessors in 1948 then clearly this action is statute-barred and fails. But if, as the appellants contend, the cause of action only accrued when the minister gave his decision in 1958 then this appeal must succeed. This depends on what is meant by a cause of action accruing."

At page 920: Lord Reid continued -

> "I do not think that the giving of a decision by the Minister was a condition precedent.....If the appellants had begun an action within six years of the vesting date, and had applied to the Minister for his decision when the respondents traversed their allegation that the sum sued for had been held or used by the respondents in their capacity of electricity undertakers, proceedings in the action could if necessary have been stayed to await the Minister's decision. But they did not do that and in my judgment this action is barred by the Limitation Act, 1939."

Learned Counsel for the Plaintiff urged upon the Court to accept what I refer to as the common sense approach, that is, that time should not start to run against the plaintiff until he had knowledge that his claim for gratuity and pension was rejected.

I agree with Learned Counsel that that would seem to be the common sense approach, but the principle enunciated in the cases to which I have referred to earlier is that the plaintiff's lack of such knowledge is not relevant. In the Jarvis case and the Pitchers case which Counsel cited in support of the proposition that time should commence from the date of the Permanent Secretary's letter is not directly on point with the instant case.

In Howell v. Young (1824-34) A.E. Reprint P. 377 the cause of action was the misconduct or negligence of the defendant in taking

/9.....

insufficient security. The action was barred as the court held that the period of limitation ran from the time when the defendant was guilty of that misconduct and not from the time when the plaintiff discovered that the security was insufficient.

I cite from the judgment of Holroyd J.

> "So here, if the action had been brought immediately after the insufficient security had been taken, the jury would have been bound to give damages for the probable loss which the plaintiff was likely to sustain from the invalidity of the security."

I put it in another way by referring to a judgment of Lord Esher M.R. in Coburn v. Colledge (1897) 1 Q.B. 702 at page 707.....

"If the plaintiff alleges the facts which if not traversed, would prima facie entitle him to recover, then I think he makes out a cause of action."

To determine when the cause of action accrued in this case I pose the following Questions:

(1) Could the plaintiff have taken action against the defendant on the 19th September, 1989, the day after he demitted office, for the payment of gratuity and pension?

(2) Was there any damage quantifiable on the date the plaintiff demitted office?

(3) Was a new right created after the receipt of the letters from the Permanent Secretary the first acknowledging receipt of the plaintiff's communication: the second indicating that gratuity and pension were not payable under the legislation?

The answer to question (1) and also to question (2) is in the affirmative. All the facts required to institute legal proceedings were present. All that was required on the 19th September, 1989, was for the Accountant General to make a computation and to pay.

/10....

In fact this is what the plaintiff applied for in his letter of 16th October, 1989: I quote: "That the necessary particulars be forwarded to the Accountant General for computation and payment of the gratuity and pension to which I am entitled under the relevant legislation."

Legislation did not provide, as it did in the Jarvis case, a prerequisite or a condition precedent to the existence of a cause of action.

In formulating a claim for an action the plaintiff would have had to quantify the pension and gratuity, i.e., loss or damage sustained. It may well be that his quantification may not have tallied with a computation made by the Accountant General. but, in my opinion, quantification is not the issue. The issue is - was there a cause of action which could have been commenced on 19th September, 1989? The answer to this question has already been given.

The answer to question (3) is that a new right was not created after the receipt of the Permanent Secretary's letters. The cause of action existed from the 19th September, 1989, and there was nothing to prevent the plaintiff from instituting proceedings against the defendant from that date.

Can the first letter from the Permanent Secretary be regarded as an inducement not to take legal action? I think not. That letter was noncommittal. It was silent as to whether the particulars were being put together for forwarding to the Accountant General. It merely indicated that the matter was receiving attention - the usual acknowledgement letter from a Government department.

To test the matter another way - If the plaintiff had served the required notice and filed an action before the limitation period had expired, the defendant could not successfully plead and establish that the plaintiff ought to have applied to the Permanent Secretary to forward the necessary particulars to the Accountant General for

/11.....

of the Act together with Section 105(6) of the Constitution, and that Section 7 of the Act deals with the computation of pension.

Perhaps I should deal with the interpretation of Section 105(6) of the Constitution first. This section is as follows:

> "In this Constitution, unless the context otherwise requires, a reference to the holder of an office by the term designating his office shall be construed as including, to the extent of his authority, a reference to any person for the time being authorised to exercise the functions of that office."
> (Emphasis is mine)

This section provides the interpretation to be given to the expression underlined wherever that expression appears in the Constitution. If the drafter of the constitution had intended the interpretation to relate not only to the Constitution but also to other legislation he would have inserted the expression "and in any written law."

Learned Counsel for the plaintiff's contention was that inasmuch as the Acting Governor General receives the emoluments of the Governor General then he should also receive a gratuity and pension as a person who performs the functions of Governor General, and that the Acting Governor General is in the same position as the Governor General. His submission was that the framework of the Act lends support to this proposition.

Learned Counsel for the defendant, before dealing with the nub of the action submitted that the date of assent appearing on the Act should be 27th October, 1969, and not 21st April, 1970 as Section 14 of the Act enacts that the act shall be deemed to have come into operation from 27th October, 1969, and that this latter date is important in the context of this case.

/13....

The date the Act was assented to by the Governor is indicated under the word "Governor" and is the 8th April, 1970. The date appearing after the long title of the Act which is the date that the Act comes into operation is 21st April, 1970. I agree with Counsel that that date should be 27th October, 1969. It was obviously intended that the commencement date of the Act should coincide with the date the St. Vincent Constitution Order 1969 (1969 No. 1500) (1969 Constitution) came into operation, that is, 27th October, 1969.

Learned Counsel adverted to differences between the two constitutions and contended that the 1969 Constitution contemplated the possibility of the holders of certain designated offices acting as Governor whereas the 1979 Constitution did not so contemplate.

His submission was that the Act must be construed with such modifications and qualifications as provided for in para 2(1) of Schedule 2 to the 1979 Constitution which provides:

> "The existing laws shall, as from the commencement of the Constitution, be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into confirmity with the Constitution and the Supreme Court Order."

With regard to the provision dealing with the appointment of Acting Governor, I agree with Learned Counsel for the defendant that there are differences between the two Constitutions, as para (b) of Sec. 21 (1) of 1969 Constitution is not reproduced in the 1979 Constitution, but does the difference referred to by Counsel affect the question to be decided by the Court?

The 1969 Constitution enacts in Sec. 21 -

> (1) During any period when the office of Governor is vacant or the holder of the office of Governor is absent from Saint Vincent or is for any other reason unable to perform the functions of his office those functions shall be performed -

/14.....

(a) by such person as Her Majesty may appoint; or

(b) if there is no person in St. Vincent appointed by Her Majesty and able to perform those functions, by the person for the time being performing the functions of such office as may be designated by Her Majesty."

The almost parallel provision in the 1979 Constitution is Sec. 20 (1) which reads:

> "During any period when the office of Governor General is vacant or the holder of the office of Governor General is absent from Saint Vincent or is for any other reason unable to perform the functions of his office those functions shall be performed by such person as Her Majesty may appoint."

Paragraph (b) of Sec. 21 (1) of the 1969 Constitution does not appear in the 1979 Constitution. The effect of this change is that, whereas under the 1969 Constitution, if Her Majesty did not appoint a person to act Governor, a person holding a post designated by Her Majesty would automatically act Governor, under the 1979 Constitution an individual would have to be selected (whether from within or without the Public Service) to act Governor General. No longer is there any post designated by Her Majesty.

If an individual from the Public Service is selected then by section 5(2) of the Act he would not draw two salaries, but his salary as Governor General would be abated to the extent of the salary he receives from his substantive post.

Learned Counsel for the defendant argued that the Constitution makes a dichotomy between the holding of office and the carrying out of the functions of office and that a person may be appointed to perform functions of office even though there is a holder of office, but in any event, Counsel submitted that the Constitution has little or nothing to do with this suit.

/15....

The Act, Learned Counsel for the defendant argued, makes a distinction between the Governor General and the Acting Governor General. On the other hand, Learned Counsel for the Plaintiff contended that Sec. 2 of the Act shows no distinction between the holder of office and a person carrying out the functions of the office. As this section defines "Acting Governor" to mean any person who performs the functions of the office of Governor under section 21 of the Constitution. The question is: "Is there a real dichotomy between the holder of office and the person acting in the office?

The plaintiff's claim turns on an interpretation of the Act. The Act deals with the emoluments of Governor General and Acting Governor General separately. Is this merely a question of drafting style or is there a distinction to be made between the two offices?

Section 3(1) of the Act enacts that the emoluments of the office of Governor General are specified in the schedule to the Act, which schedule reads:

1. Salary at the rate of $13,209 per annum.
2. Duty allowance at the rate of $3000 per annum.
3. Allowance at the rate of $1,200 per annum in lieu of exemption from Customs duties.

Sec. 5(1) Subject to the provisions of sub-section (2) of this section, an Acting Governor shall, in respect of the period during which he discharges the functions of the office of Governor, receive emoluments at the rate specified in respect of the office of Governor.

(2) Where an Acting Governor, in reference to any period during which he discharges the functions of the office of Governor, receives salary defrayed from the Consolidated Fund in respect of any office, his emoluments under sub-section (1) of this section in respect of such period shall be abated to the extent of the salary so received.

/16....

Sec. 6 . There shall be granted to any person who has held the office of Governor with effect from the date on which he ceases to be Governor, a gratuity equivalent to twenty-five per centum of the aggregate of the salaries paid to him during his term of office.

Sec. 7. Subject to the provisions of section 8 there shall be granted to any person who has held the office of Governor, with effect from the date on which he ceases to be Governor.

(b) if he has held that office for less than five consecutive years, a pension based on the proportion of the amount he would have received as pension if he held that office for five consecutive years that the period in which he held that office bears to that period of five years.

Sections 8 to 12 of the Act make certain provisions in respect of the Governor General. Section 13 is worded somewhat differently -

> "The emoluments of the Governor, and all pensions and gratuities payable under this Act shall be and are hereby charged on the Consolidated Fund and paid thereout."

I do not think that the language of Section 13 is particularly significant.

By Sections 3 and 5 the Governor General and Acting Governor General receive the same salary.

It is my opinion that it is not merely a question of drafting style that the legislation is as it is. It seems to be that a distinction is made between the holder of the office of Governor General and the holder of the office of Acting Governor General. It may seem not to be just. It may seem not to be common sense, but I consider that this is what is done in the Act. I give my reasons for so finding.

I have already held that sections 3 to 5 of the Act deal separately with the offices of Governor General and Acting Governor General.

/17.....

Dealing with the question of gratuity and pension in sections 6 and 7 only the Governor General is mentioned. Why does the "thread" of providing for gratuity and pension for the Acting Governor General not continue? The drafter of the Act could easily have provided for pension and gratuity for the Acting Governor General in a number of ways, two of which I shall mention. In Section 6 he could have drafted -

> "There shall be granted to any person who has held the office of Governor General or Acting Governor General with effect from the date on which he ceased to hold office, a gratuity equivalent to twenty-five per centum of the aggregate of the salaries paid to him during his term of office."

Section 7 could similarly have been drafted.

Or the matter could have been dealt with in another way: by providing that in sections 6 and 7 "Governor General" includes "Acting Governor General".

The fact that the legislative draftsman drafted the legislation as he did means that that is what the legislative body desires and the structure of the Act clearly reflects the intention of the legislature for the reasons that I have already given.

Where two constructions of an Act are put to a Court and the Court has to make a choice between the two constructions, the factors of injustice, hardship, inconvenience, and whether one construction is more reasonable or sensible than the other may be relevant in determining which construction, as being more reasonable, should be accepted.

But before a choice based on any of these factors can arise, the langugage of the Act must be reasonably capable of two constructions. In this case the structure and language of the Act admit of but one

/18.....

interpretation and effect must be given to it whatever its consequences.

I adopt what White J. said in The King v. Board of Commissioners of Public Utilities (1926) 54 N.B.R. 138 at P 143.

> "In deciding which of these two meanings the legislature intended the section to bear, I think that the construction should be adopted which, upon a reading of the Act and its amendments as an entire enactment, appears to better accord with the body of the enactment than does the alternative construction."

I look at the other side of the coin. The question may be asked - if it were intended to exclude the Acting Governor General why were not words of exclusion inserted in the Act, by for example, inserting after the word "Governor General" in sections 6 and 7 the expression "(not Acting Governor General)": or a provision that, in sections 6 and 7, the expression "Governor General" does not include "Acting Governor General."

The answer is that it is not necessary to use words of exclusion as the structure and scheme of the Act can achieve and, in the instant case, have achieved the purpose of words of exclusion.

The general principle in the interpretation of legislation is that where there is a change in language in the sections of an Act the change must be presumed to have some significance. The fact that provision was made for gratuity and pension for the Governor General and no mention is made of gratuity or pension for the Acting Governor General is significant.

My interpretation of the Act seems to be supported by the maxim Expressio unius personae vel rei, est exclusio alterius - The express mention of one person or thing is the exclusion of another.

/19....

The express provision for gratuity and pension for the Governor General and the absence of provision for gratuity and pension for the Acting Governor General excludes gratuity and pension for the Acting Governor General.

For the reasons given I dismiss the plaintiff's claim with costs to be taxed unless agreed.

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Monica Joseph
PUISNE JUDGE

4th April, 1991.