ST VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO. 550 OF 1999

BETWEEN:

HENRIK LINDVIG

Plaintiff

and

TREVOR PAYNTER
WINDWARD PROPERTIES LIMITED

Defendants

Appearances:

B Commissiong Esq QC, Ms M Commissiong with him, for the Plaintiff
E Robertson Esq, Ms S Robertson with him, for the 2nd Defendant

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2000: February 10, 22

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DECISION

[1] MITCHELL, J: This was an interlocutory application filed on 18 January 2000 by the 2nd Defendant for a number of orders. On 10 February 2000 a ruling was made on the application with oral reasons given. It now becomes necessary to put those reasons in writing. The application sought an order, first, that an *inter partes* summons of the Plaintiff for an injunction be struck out. Secondly, it sought an order that all further proceedings be stayed under the inherent jurisdiction of the court on the ground that the Plaintiff had failed and or refused to re-serve the writ of summons on the 2nd Defendant as ordered by Adams J on 26 November 1999.

[2] It is appropriate to describe briefly what the substantive matter is, and what the previous order of the court was that is being invoked. The Summons for an

injunction and the affidavits in support revealed the following allegations and claims. The Plaintiff claimed he was a Danish citizen. He claimed that the 1st Defendant was the voluntary liquidator of the 2nd Defendant, and that the 2nd Defendant was a company set up in 1984 by Mr Othniel Sylvester QC CMG of the firm of Sylvester & Co at the request of the Plaintiff and his Danish colleagues. The 2nd Defendant had in 1985 purchased land in St Vincent for $5,646,900.00. It used money put up by the Plaintiff and his Danish colleagues. Later in 1985, the government of St Vincent forcibly acquired the land. The 2nd Defendant never got the land it had purchased. In 1991 a Board of Assessment awarded it $4,700,000,00. The Court of Appeal altered the award. The Plaintiff and his colleagues approved an appeal to the Privy Council. There were other court cases. They paid Mr Sylvester and the English lawyers. The 2nd Defendant gave the Plaintiff and his colleagues a promissory note for US$3,000,000.00 to secure the monies borrowed by the Plaintiff and used by the 2nd Defendant to purchase the land. In 1996 the Plaintiff learned from reading a newspaper article that the government of St Vincent had since 1993 paid the full amount of compensation to Mr Sylvester for the 2nd Defendant. The government of St Vincent had paid $6,697,500.00 to Mr Sylvester for the 2nd Defendant. Mr Sylvester had not informed the Plaintiff and his Danish colleagues. The Plaintiff and his colleagues had been demanding ever since that discovery that Mr Sylvester pay the Plaintiff and his colleagues their money. As a result, Mr Sylvester in 1997 had paid the Plaintiff $1,485,000.00. He did not account for a balance of $5,203,336.00. He denied any more money was owing to the Plaintiff. The Plaintiff demanded to know what had happened to the balance. The Plaintiff had learned in 1997 that in 1985 Mr Sylvester had put the majority of the shares in the 2nd Defendant in his name and the names of members of his family and office staff. In 1999 the Plaintiff and his colleagues had formed the opinion that Mr Sylvester was hostile to them. They felt that they had put their absolute trust in Mr Sylvester, and he had betrayed that trust. They had decided to change their solicitor. They had written Mr Sylvester asking him to turn over all papers to their present solicitors, Commissiong & Commissiong. Mr Sylvester had replied by letter informing the

Plaintiff that he had been the solicitor of the Plaintiff several years before. That relationship had ended. He had claimed that he had long previously handed over any papers that belonged to the Plaintiff. Mr Sylvester had claimed that the 2nd Defendant had been formed specifically for the purpose of circumventing the Aliens Landholding Regulation Act. Mr Sylvester had claimed that all monies received by the 2nd Defendant had been in the exercise of a circumvention of the law. Mr Sylvester, claimed the Plaintiff, had then wrongfully had his family and staff put the 2nd Defendant into voluntary liquidation. Mr Sylvester, claimed the Plaintiff, had dishonestly used the money properly belonging to the Plaintiff and his colleagues for his own benefit. The Plaintiff sought an order stopping the 1st Defendant from carrying out the liquidation of the 2nd Defendant while the shareholding and directorships of the persons who put the company into voluntary liquidation were being questioned.

[3] The 1st Defendant entered an appearance to the writ, but not the 2nd Defendant. On 26 November 1999, a summons by the 2nd Defendant pursuant to O.2, r.2 of the Rules of the Supreme Court 1970 came before Adams J for hearing in Chambers. It complained that the service of the writ on the 2nd Defendant be set aside on the grounds that the writ bore no filing date, no date of issue, and no suit number. The offending copy of the writ was exhibited to an affidavit. Adams J on the same 26 November 1999 made an order as follows:

> IT IS ORDERED that the service of the writ of summons beginning this action and all subsequent proceedings herein be set aside as against the Second Defendant.
>
> IT IS FURTHER ORDERED upon application by the Plaintiff that Writ to be re-served upon payment of costs in the sum of $250.00.

[4] The application of the 2nd Defendant of 18 February 2000 described at paragraph [1] above, now the matter of this ruling, followed on the re-serving of the writ on the 2nd Defendant. The 2nd Defendant complained that the writ had not been

properly re-served. By an affidavit filed on 18 January 2000, Peter John, a senior clerk in the Chambers of OR Sylvester & Co, deposed that their offices were the registered office of the 2nd Defendant. He complained that to that date the writ had not been re-served, yet on 13 December 1999 a summons for an interlocutory injunction had been served on the 2nd Defendant.

[5] By an affidavit of 19 January 2000, Vanda Foster a clerk in the Chambers of Commissiong & Commissiong, solicitors for the Plaintiff, deposed that on Monday 13 December 1999 at 3.50 pm at the Chambers of OR Sylvester & Co she

> did … personally serve the First Defendant Windward Properties Limited with true copies of [emphasis added]:
>
> (a) The writ of summons in the matter herein dated the 5th day of November 1999 and filed on the 8th day of November 1999;
>
> (b) The inter partes summons for interlocutory injunction dated the 24th day of November 1999 and filed on the 25th day of November 1999;
>
> (c) …
>
> (d) …

[6] A copy of the writ that had been re-served on 13 December 1999 as claimed by Vanda Foster was produced at the hearing of this application by counsel for the 2nd Defendant. It was apparent from a perusal of the writ that it was an original. It was not a photocopy. The stamps of the Registrar's Office were original stamps. The date of issue had been correctly filled in. The number of the suit had been correctly filled in. The only thing that was missing on the writ was the embossing seal of the High Court. The court's copy of the writ on the court file had been endorsed with particulars of the original service, but not of the re-service on 13 December 1993. Counsel's submissions were as follows:

(1) The copy of the writ for re-service should have been re-sealed by the court. There was no evidence that the court had resealed the writ. Failure to have done so was fatal. The Plaintiff was obliged to have applied for a concurrent writ. Counsel relied on the White Book 1999 Edition at note 10/1/8 and note 6/6/1.

(2) The affidavit of service of Vanda Foster showed at paragraph 2 an error when she stated that she "did … personally serve the 1st Defendant Windward Properties Ltd." Windward Properties Ltd was the 2nd Defendant, not the 1st Defendant. O.50, r.2 said how personal service was to be effected. That rule had not been complied with. She had not personally served the 2nd Defendant.

(3) The affidavit of service did not say that it had been personally served on a director or that it had been left at the registered office. The Plaintiff chose to serve it "personally." The Plaintiff did not choose to serve it by the method set out at section 513(a) of the Companies Act.

(3) The re-service by Vanda Foster should have been in compliance with O.10, r.1(4) of the Rules of the Supreme Court 1970. The re-service should have been endorsed on the copy on the court's file, and that had not been done. Counsel relied on the cases of Hamp-Adams (1911) KB 942; and Addis Ltd v. Berkeley Supplies Ltd [1964] 2 All ER 753.

[7] Counsel for the Plaintiff responded to the above submissions as follows:

(a) The 2nd Defendant had complained that the original copy served had been missing the suit number, and the space for the date of issue had not been filled in. The validity of the writ had never been questioned. The originating process was intact. Adams J had set aside the service on the 2nd Defendant, and ordered service to be re-done.

(b) Peter John had deposed that the registered office of the 2nd Defendant was at the offices of OR Sylvester & Co. A duly sealed and completed copy of the writ had been re-served on the 2nd Defendant by leaving it at the registered office. The Defendant that Vanda Foster named as having been served by her was the 2nd Defendant. When she said that she re-served it on the 1st Defendant that was an obvious typing error.

(c) When she said that she "personally" served the writ, that was another obvious typing error. The evidence was that it had been re-served by leaving a copy of it at the "registered office." Leaving it at the registered office is proper re-service.

(d) The absence of the endorsement of service on the court's copy of the writ was a matter that could be easily cured. That absence did not invalidate the re-service. Any irregularity the court could readily cure.

(e) There was no question of re-sealing the writ. There had been no question of applying for a concurrent writ. The court had merely ordered re-service, and that had been done. Counsel relied on the cases of

Brady v Barow Steelworks [1965] 2 All ER 639;
Smalley v Robey & Co [1962] 1 All ER 133;
and Dickson v Law and Harding [1995] 2 Ch 62.

The Indorsement of Service

[8] O.10, r.1(4) of the Rules of the Supreme Court 1970 provides for details of service of a writ to be indorsed on the court's copy of the writ. It reads:

> Where a writ is duly served on a defendant ... then, subject to O.11, r.5, unless within 3 days after service the person serving it indorses on it the

following particulars, that is to say, the day of the week and date on which it was served, where it was served, the person on whom it was served, and, where he is not the defendant the capacity in which he was served, the plaintiff in the action begun by the writ shall not be entitled to enter final or interlocutory judgment against that defendant in default of appearance or in default of defence.

Hamp-Adams [supra] was an old case, decided on a version of the rule that existed prior to our O.10, r.1(4). The head note describes what the case decided thus:

> A writ of summons having been served, the date of service was not indorsed thereon within 3 days as required by Order IX, r.15. The plaintiff subsequently signed judgment in default of appearance, and a verdict for damages was given by a jury in the sheriff's court: -
> *Held*, that non-compliance with Order IX, r.15 was not an irregularity which could be waived, and that the plaintiff, not having complied with the rule, was not entitled to proceed by default, and that the judgment and verdict must, therefore, be set aside.

The version of the UK rule then known as O.IX, r.15 that the Hamp-Adams case dealt with is set out in a footnote to the judgment in the case, and need not be repeated here. Our ECSC Rules of the Supreme Court 1970 are essentially the same as the UK Rules of the Supreme Court 1965. The White Book 1970 Edition at note 10/1/7 deals with the UK equivalent of our O.10, r.1(4). It reads thus:

> Effect of Rule 1(4). - Unless and until the indorsement of service on a writ is duly completed where required, the plaintiff is not entitled to enter judgment, whether final or interlocutory, in default of appearance or defence. Failure to comply with this requirement, however, will not nullify

> the judgment entered in default without the writ being thus indorsed nor any proceedings under such judgment, but such failure will be treated as an irregularity which may be waived or the Court may set aside such judgment wholly or in part on such terms as it thinks just … negativing Hamp-Adams v. Hall [1911] 2KB 942, as to which see per Upjohn LJ in Re Pritchard [1963] Ch 502, 522.

[9] This was not a case of the Plaintiff entering a default judgment without the particulars of service having first been indorsed on the writ as in Hamp-Adams. No doubt, the particulars of re-service should be indorsed on the writ for due compliance with O.10, r.1(4). Certainly, without this indorsement the Plaintiff would not be permitted to obtain a default judgment. But, the Plaintiff is not applying for a default judgment. The Plaintiff is applying for an injunction by way of an inter partes summons to preserve the status quo pending determination of the shareholdings and directorships in the 2nd Defendant.

[10] The omission by the Plaintiff to complete the indorsement of the particulars of re-service on the court's copy of the writ, in addition to the affidavit of service, was an irregularity. Irregularity is dealt with at O.2, r.1(1) of the Rules of the Supreme Court thus:

> Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these or any other rules of court, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step in the proceedings, or any document, judgment or order therein.

The rule in Hamp-Adams relied on by the Plaintiff has been replaced and negatived by our rules of court. It is no longer good law. Applying O.2, r.1(1), I

deemed the failure of Vanda Foster to have indorsed the writ as a mere irregularity, and for completeness of the court records ordered her on or before 16 February 2000 to effect the indorsement as to re-service.

Personal Service

[11] Vanda Foster had sworn that she had "personally" re-served the 2nd Defendant. Peter John had sworn that the writ had in fact been served on the registered office of the 2nd Defendant. O.50, r.2 of the Rules of the Supreme Court 1970 says how personal service is to be accomplished. It provides:

> Personal service of a document is effected by leaving a copy of the document with the person to be served and if so requested by him at the time it is left, showing him –
>
> (a) in the case where the document is a writ or other originating process, the original, and
>
> (b) …

Service of originating process on a corporation such as the 2nd Defendant is, is provided for by O.50, r.3(1) which reads:

> Personal service of a document on a body corporate may, in cases for which provision is not otherwise made by any enactment, be effected by serving it in accordance with rule 2 on the mayor, chairman, or president of the body, or on the town clerk, clerk, secretary, treasurer or other similar officer thereof.

Service of documents on companies is also provided for by statute. The Companies Act , 1994, section 513(a) provides for service of documents on a company. It reads:

> A notice or document may be served on a company

(a) by leaving it at, or sending it by telex or telefax or by prepaid post or cable addressed to, the registered office of the company; or

(b) by personally serving any director, officer, receiver, receiver-manager or liquidator of the company.

Addis Ltd [supra] was relied on by the 2nd Defendant. It was not immediately clear how it assisted the 2nd Defendant. The case dealt with service of a writ on a company. Wilberforce J in the Chancery Division considered the various provisions found then in the UK equivalents of our O.50, r.3(1) and section 513(a) of the Companies Act. He considered the meaning of the equivalent of our r.3(1) which had come into force in the UK in the year 1964. He concluded that the rules of court dealing with service of documents on a corporation did not preclude service by a method provided for by the Companies Act. A writ may be served on a company by personally serving it on an officer, by mailing it to the company's registered office, or by leaving it at the company's registered office. That is still good law.

[12] It was clear from the affidavits before the court that there had been a mere typing error in the affidavit of service of Vanda Foster. The writ had not been personally served on the 2nd Defendant as deposed to by Vanda Foster. It had been served by leaving a copy of it at the registered office of the 2nd Defendant. The method of service used was a proper one, duly authorized by the statute. The 2nd Defendant had not been misled in any way by the typing error in the affidavit of service. For completeness of the court's records, Vanda Foster was ordered to swear and file a supplemental affidavit of service on or before 18 February 2000 correcting the errors in her affidavit of 19 January 2000.

Sealing a Writ

[13] Counsel for the 2nd Defendant emphasized that this was his major complaint against the copy of the writ that had been re-served. He submitted that the Plaintiff should have applied for a concurrent writ. The judge had not ordered that,

but that was what was necessary for the Plaintiff to be able to have a copy of the writ to re-serve on the 2nd Defendant. Counsel relied again on the White Book 1999 Edition. He read paragraph 10/1/8:

> Every copy of a writ for service on a defendant must be sealed with the seal of the office of the Supreme Court out of which the writ is issued (r.1(6)). The seal is intended to give a clear message to the defendant that he is being served with a writ by authority of the Supreme Court and not being sent some informal demand. Any non-compliance with this requirement, therefore, although it may be treated as an irregularity, may be regarded as a very serious and perhaps even fatal irregularity under O.2 r.1(2) so that the court may wholly set aside the service of the writ and all further proceedings taken thereunder. The Plaintiff's solicitors or the plaintiff if acting in person should ensure that every copy of the writ for service is duly sealed by the court officer, and for this purpose he must prepare a sufficient number of copies to correspond with the number of defendants to be served and of course two further copies, one of which must bear the appropriate fee and be signed by the issuing party and which will be treated as he court copy and retained and filed by the court, and the other of which will be treated as the "original" and will be so sealed and returned to the issuing party to be retained by him as the original writ. … Presumably there is nothing to preclude the Plaintiff from presenting a concurrent writ or writs for service for sealing by the court office after the date of the issue of the writ under 0.6, r.7.

[14] O.6, r.6(3) of the Rules of the Supreme Court 1970 is the rule on the sealing of a writ in our jurisdiction. It provides simply:

> Issue of a writ takes place upon its being sealed by the Registrar at the Registry out of which it is issued.

The White Book 1970 Edition provides the learning when the UK's rules of court were the version still used in our jurisdiction. The White Book 1999 Edition deals by contrast with UK rules of court that are now quite variant from our rules of court. The White Book 1970 Edition provides at note 6/7/4 as follows:

> … Both original and duplicate will then be sealed (para.3), the original (unstamped) returned to the solicitor, and duplicate (stamped) retained and filed. The duplicate must be signed in the margin by or for the solicitor issuing the writ ….

[15] O.6, r.5 of the Rules of the Supreme Court 1970 deals with concurrent writs. It provides:

> (1) One or more concurrent writs may, at the request of the plaintiff, be issued at the time when the original writ is issued or at any time thereafter before the original writ ceases to be invalid.
> (2) …
> (3) A concurrent writ is a true copy of the original writ with such differences only (if any) as are necessary having regard to the purpose for which the writ is issued.

The White Book 1970 Edition at note 6/6/1 explains the law and procedure on the use of concurrent writs in the UK when that country's rules of court were the same as our rules of court. The note is quite straightforward, and needs no further explanation. It provides as follows:

> It is sometimes desirable for the purpose of service to have a duplicate of the original writ. In these cases, a concurrent writ or writs may be issued, upon production of a praecipe being duly completed and impressed with the proper fee …

[16] Having heard both counsel, I found as follows. First, as regards the absence of the embossing seal of the High Court. It is notorious in legal circles in St Vincent that the ancient embossing seal of the High Court has become so worn down that it cannot any longer leave an impression on a document. It is no longer in regular use. The Registrar has for many years now used a rubber stamp as the court seal in replacement of the embossing seal. All writs issued out of the Registry of the High Court in St Vincent for a decade or more have had a rubber stamp, and not an embossing seal, used as the court seal. In any event, when a solicitor prepares a writ and submits it to the Registrar for sealing, the solicitor is entitled to presume that the Registrar will seal it correctly. He must ensure that it is sealed, but he cannot tell her what seal to use. Once the document has been accepted by the Registrar, processed by her, and the copy returned to the solicitor for serving, the solicitor is entitled to presume that all that was required to be done had been done. We have to assume that this copy of the writ was properly applied for. We must assume that the Registrar had duly affixed the seal as used in the Registry to the writ that had been used for the re-service. The Registrar had properly sealed the writ. There was nothing evidently defective about its sealing. To decide otherwise would be contrary to the evidence, and would be to put into question all originating process coming out of the High Court for decades past.

[17] The ruling on this submission was, therefore, that I was satisfied that the copy of the writ re-served on the 2nd Defendant had been properly sealed. The irregularities complained of by the 2nd Defendant did not render the service on its registered office void. The summons of the 2nd Defendant filed on 18 January 2000 was dismissed.

Costs

[18] The court having dismissed the 2nd Defendant's application, the Plaintiff applied for costs. Counsel for the 2nd Defendant resisted the application on the ground that the Court had found irregularities, and although it had dismissed the application it ought not to award costs against the applicant. I considered that the

application of the 2nd Defendant had been unmerited, and could only have the effect of delaying the trial of the substantive issues. An order of costs would follow. In exercise of my discretion, I ordered the 2nd Defendant to pay the Plaintiff his costs of the application, to be taxed if not agreed.

I D MITCHELL, QC
High Court Judge