

SAINT VINCENT AND THE GRENADINES
IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO: 178 OF 1999

BETWEEN:

FRANKLIN GONSALVES Plaintiff

and

NATIONAL QUARRIES LIMITED First Defendant

and

VELTHEA MATHEWS Second Defendant

Appearances:

Parnell Campbell for the Plaintiff

Hans Matadial for the Defendants

2001: June 15 and 19

DECISION

[1] **WEBSTER, J. (acting)** This is an application by the First Defendant under Order 39 of the Rules of the Supreme Court, 1970 for the issue of a Letter of Request to the proper judicial authority of the state of New York in the United States of America for the examination on oath of six persons resident in New York, and that this action be stayed until the return of the said Letter of Request and examination.

Background

[2] By a generally indorsed Writ of Summons filed on April 13, 1999 the Plaintiff claims that the First Defendant, acting by its *alter ego* Kenrick Thomas, wrongfully took possession of his 1998 heavy duty backhoe which he had imported into St. Vincent from New York, and

has kept it since. In their Defence filed on February 22, 2000 the Defendants allege that the First Defendant purchased the backhoe in good faith for \$75,614 from the Plaintiff's agent, Mr. Karl Ballantyne, and registered it in the name of the First Defendant at the Licensing Department in St. Vincent. Alternatively, the Plaintiff is not the owner of the backhoe. The alternative defence was not particularised, and paragraph 6(iii) of the Defence states: "*The defendants are presently not in a position to give particulars as to who are the true owners of the backhoe. The defendants are presently making enquiries and as soon as the said enquiries are completed will give the particulars to the plaintiff.*" The Request for Hearing was filed on April 26, 2000. The notes at the back of the Court's file indicate that on May 5, 2000 the case was set for trial on November 14, 2000. The trial did not take place on that day, and December 1, 2000 Mitchell, J. set a new trial date of April 24, 2001. On April 24, 2001 the Defendants applied for a further adjournment which was granted by Mitchell, J. on condition that the Defendants pay the costs thrown away of US\$1,200. On April 30, 2001 there was a further adjournment by consent to June 27, 2001.

- [3] The present application was filed June 11, 2001. It is supported by the affidavit of the said Kenrick Thomas. In paragraph 3 he deposed that the enquiries mentioned in paragraph 6(iii) of the Defence have been completed and exhibited a copy of the New York State registration of the backhoe showing M. Track Enterprises Inc. of 12 Red Coat Lane, Waccabu, NY 10597 as the owner. The affiant further deposed that the Plaintiff stole the backhoe and shipped it to St. Vincent, and that the true owner of the backhoe is M Track Enterprises Inc. As such it is necessary to get the evidence of the persons listed in the Summons, and that evidence has to be taken in New York. His explanation for the delay in making the application is the amount of time that it took to complete the enquiries.
- [4] Learned Counsel for the Plaintiff objected to the application primarily on the ground that this long delayed and often adjourned trial is set for hearing in two weeks, and his client has already made arrangements to come to St. Vincent for the trial. He supported his primary submission by reference to the facts that the Applicant is in possession of the disputed backhoe making a substantial income, and the Applicant's proposal will delay the

trial for months if not years. Finally, he made clear that he was not suggesting that the investigation should not continue by examining the witnesses, but this is a separate issue that can be tried separately if and when the evidence becomes available. The Plaintiff's claim that the Applicant took the backhoe without paying for it is ready for trial and should be tried without further delay. He did not submit, but intimated subtly, that this application was nothing more than an attempt by the Defendants to delay the trial while they keep the backhoe and its profits.

Order 39 Rule 2

[5] Order 39 Rule 2 provides a mechanism for taking the evidence of persons who are out of the jurisdiction and unable or unwilling to travel to St. Vincent to attend the trial to give evidence. The exercise of the power is discretionary and should be exercised to achieve what is just in all the circumstances. The factors that a Court should take into consideration in exercising its powers under Order 39 can be gleaned from **The Supreme Court Practice 1997 paragraph 39/2-3/1**. They include :

- (a) whether the witnesses are unwilling or unable to travel to the trial to give their evidence;
- (b) the promptness of the application;
- (c) whether the witnesses can give substantial evidence material to the issues before the Court;
- (d) the cost of examination of the witnesses abroad; and
- (e) any other relevant consideration.

I will deal with these factors as they relate to the present application.

Unwillingness or Inability to Travel to St. Vincent

[6] There is no evidence that the witnesses listed in the Summons have been contacted to ascertain whether they are willing and able to travel to St. Vincent to give evidence in the trial. In fact, only two of the witnesses are identified by name, the other four being persons holding certain positions, for example, the president of Fast Cars Inc. and the officer in

charge of the New York State Department of Motor Vehicles. The application is presented on the assumption that the potential witnesses are not willing or able to come to St. Vincent. This is not sufficient. The Court must be satisfied that the Applicant has attempted to secure the voluntary attendance of the witnesses in St. Vincent, and having failed, now needs the assistance of the court. The Applicant has failed to satisfy the first requirement.

Promptness of Application

- [7] The Defence filed on February 22, 2000 states that: "*The defendants are presently making enquiries and as soon as the said enquiries are completed will give all the particulars to the plaintiff.*" The evidence in support of the application does not say when the enquiries were completed. If the enquiries were completed recently it means that they took 15 months. If they were completed some time ago, the Applicant was tardy in making the application. In either case there has been delay. The enquiries having taken this long the Court is left to ponder how long the examination of the six witnesses listed in the Summons will take. There has already been substantial delay in the trial of this action. The examination of the witnesses in New York will add significantly to the delays. The Applicant has failed to satisfy the Court that this application was made promptly.

Relevance and Materiality

- [8] The evidence that the witnesses can give goes to the Plaintiff's title to the backhoe. This evidence could be both relevant and material at the trial, and a Court is always concerned to receive evidence that is relevant or material. Counsel for the Plaintiff has suggested that any such concern can be addressed by proceeding with the trial of the issue which is particularised on the pleadings and ready for trial, viz: the alleged purchase of the backhoe by the Applicant from the Plaintiff. The issue of the Plaintiff's title can be tried separately if and when the evidence becomes available and proper pleadings defining the issue are filed.

Expense of Examination

- [9] The potential cost of examining six witnesses in New York is unknown and could be substantial. It may be that the cost of bringing some or all of the witnesses to St. Vincent would be cheaper than an examination in New York. I am concerned about the potential cost of the examination and I am not satisfied that it will result in a saving of costs in the long run

Bona Fides of the Applicant

- [10] Finally, I am not satisfied that this is a bona fide application. It appears to be to be an attempt by the Applicant to delay the trial of action, and this while it is in possession of the backhoe and receiving the income and profits from its operation.

Conclusion

- [11] In all the circumstances I am satisfied that the ends of justice are best served by exercising my discretion by refusing this application. The case will proceed to trial on June 27, 2001.
- [12] The Plaintiff will have his costs of this application to be taxed if not agreed.

Paul Webster
High Court Judge (Ag.)