SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE
(CIVIL)

CIVIL SUIT NO. 141 OF 2001

BETWEEN:

PHILLIP MARK VAUGHAN	Applicant
and	
THE COMMISSIONER OF POLICE	First Respondent
THE ATTORNEY GENERAL	Second Respondent
WILLIAM HARRY	Third Respondent
LENROY BREWSTER	Fourth Respondent

Appearances:

Nicole Sylvester and Kay Bacchus-Browne
instructed by Cheryl McSheen for the Applicant

Margaret Hughes Ferrari and Grahame Bollers instructed by Jaundy Martin
of the Attorney General's Chambers for the Third and Fourth Respondents

……

2001: July 2, 3, 6 and 11

……

DECISION

[1] WEBSTER, J. *(acting)*. On Friday July 6, 2001 this Court dismissed the Preliminary Motion filed by the Third and Fourth Respondents on June 13, 2001 to strike out the Applicant's Motion to Commit the said Respondents for their contempt of court and promised to reduce its reasons into writing. The reasons are set out hereunder.

BACKGROUND

[2] On Friday April 20, 2001 the Applicant was arrested by the police on a charge of breaking the immigration laws of the State. He was detained at the Central Police Station in Kingstown, St. Vincent in circumstances that led to the filing a motion against the First and Second Respondents for redress under the Constitution. On the 25th April at 9 a.m. the Applicant appeared before the Kingstown Magistrates Court and pleaded guilty to the charge against him. The Learned Magistrate adjourned sentencing to 2 p.m. At 1:30 p.m. the Applicant appeared before His Lordship Mr. Justice Ian Donaldson Mitchell QC in Chambers and obtained an *ex parte* injunction against the First and Second Respondents in the following terms:

> "That this application be heard *inter partes* on Wed 2nd May, 2001 at 1:30 pm.
> That Documents be served on the Respondents forthwith and that in the meantime the order is that no official action be taken against the Applicant towards his removal from St. Vincent and the Grenadines or in restraint of his liberty until further ordered or until the hearing of this application." ("the Injunction")

At 2:00 p.m. the Applicant returned to the Magistrate and was fined $2,000 which he paid forthwith. Within minutes he was again taken into custody by the police Events unfolded rapidly in the next few hours and by 6:19 p.m. the Applicant was placed on board an aircraft at the E.T. Joshua Airport and taken out of the State.

[3] On the 9th May the Applicant applied by motion for an order committing the Third and Fourth Respondents to prison for their contempt of court in breaching the Injunction, or for such other orders as the Court may consider appropriate ("the Committal Motion"). On the 13th June the Third and Fourth Respondents (referred to hereinafter as "the Respondents") applied by motion to strike out the Committal Motion on the following grounds:

(a) That the failure to endorse a penal notice on the copy of the order of His Lordship, the Honourable Mr. Justice Ian Donaldson Mitchell QC, made on Wednesday 25th April 2001, was a non-compliance the provisions of Order 66 Rule 7(2) of the Rules of the Supreme Court 1970 and was fatal.

(b) That the failure to personally serve the Third and Fourth Respondents with a copy of the said order was a non-compliance with the provisions of Order 66 Rule 7(2)(a) and was fatal.

(c) That the alleged prohibitory injunction granted by His Lordship, the Honourable Mr. Justice Ian Donaldson Mitchell QC, made on Wednesday 25th April 2001, was unclear and ambiguous in its terms and therefore cannot form the basis of an application for committal of the Third and Fourth Respondents and was fatal.

(d) That the affidavits on which the Applicant intends to rely in support of his application to commit, do not establish beyond reasonable doubt that the Third and Fourth Respondents were aware of the terms of the order and was fatal.

[4] On June 25, 2001 when the Committal Motion first came on for hearing Counsel for the Applicant objected to the Court hearing the Respondents' Preliminary Motion on the ground that the Respondents had committed a contempt of court and such contempt was continuing. As such they should not be allowed to proceed with the Preliminary Motion until they purge their contempt by returning the Applicant to the State. The Court overruled the objection and reduced its reasons into writing in a ruling dated July 2, 2001. The Respondents were therefore allowed to proceed with the Preliminary Motion to the Committal Motion when the matter next came on for hearing on the 2nd July.

[5] At the commencement of the hearing on the 2nd July Learned Counsel who addressed the Court on behalf of the Respondents, Mr. Grahame Bollers, indicated that he would not pursue paragraph (d) of the Preliminary Motion. He then proceeded to argue the remaining grounds beginning with paragraph (c).

CLARITY OF NJUNCTION

[6] It is common ground between the parties that a person cannot be found guilty of contempt in breaching an order unless the terms of the order are themselves clear and unambiguous (Iberian Trust Ltd. v Founders Trust and Investment Co.Ltd. [1932] 2KB 87). Counsel for the Respondents attacked the Injunction in this case on the ground that it is unclear and ambiguous, in that it does not specify the acts that are prohibited, and is not directed to any person. He submitted that the phrase "no official action" is vague and on a literal

reading it is subject to several unspecific meanings. He further submitted that in order to determine the meaning of the Injunction the Court cannot refer to any other documents and must construe the Injunction according to the words used in the Order. He relied on the decision of Northrop, J. in Salvatore Mercogliano and others v Tampas Nominees PTY Ltd. and others (unreported), a decision of the Federal Court of Australia, where the Learned Judge said at paragraph 9 of the judgment:

> "In approaching the issue of contempt the first step is to construe the order of the Court which it is said has been offended. I refer to, and, with respect, agree with the opinion expressed by Southwell J. in Mc Nair Anderson Associates PTY Ltd. V. Hinch [1985] VR 309, 311 and 312: …that it was not open to the Court to go behind the Order, either by reference to the transcript or to the reasons for judgment."

Relying on this authority Counsel submitted that the words "no official action" in the Injunction created doubt and are open to numerous interpretations which could not have been intended by the Learned Judge. For example, he submitted that it means that a police officer could not arrest the Applicant and thereby restrain his freedom if he committed a serious crime before the *inter partes* hearing on the 2nd May. This could not have been the judge's intention, and yet that is what the Injunction means. Further, the fact that the Injunction was not directed to any specific person served to increase the doubt as to the true meaning of the Injunction.

[7] Learned Counsel for the Applicant, Nicole Sylvester, agreed that the order must be interpreted without reference to any other document, and submitted that *ex facie* the document was clear and unambiguous. It directed the First and Second Respondents, and any other official who had notice on the Injunction, not to do two things:

(a) take any action to remove the Applicant out of the State; and

(b) take any action to restrain the Applicant's freedom.

She submitted that this is the plain and ordinary meaning of the words and there is no room for ambiguity.

[8] The crucial words in the Injunction are "no official action". A similar phrase was defined in Black's Law Dictionary (6th Edition) where the expression "official act" is defined as "*One done by an officer in his official capacity* under *colour and by virtue of his office. Authorised act.*" I find this definition to be helpful in determining what the Learned Judge intended when he issued the Injunction on the 25th April. It means that the Respondents, and any other public official who has notice of the Injunction, is not to take any action to remove the Applicant from St. Vincent or restrain his liberty. That is the clear and unambiguous meaning of the words used on a literal interpretation. It would have been better if the more traditional wording for a prohibitory injunction "*the Respondents are hereby restrained from taking any official action*" were used, instead of "*no official action*", or that the words "*by the Respondents*" were included between the words "taken" and "against". However, there is no doubt or ambiguity in the words actually used. The Injunction was directed to the First and Second Respondents upon whom the Learned Judge also ordered that the documents in the ex parte application be served forthwith. I am also mindful of the fact that the Injunction was granted in circumstances of extreme urgency and that the Learned Judge did not hear the application, but adjourned the hearing until the 2nd of May. The purpose of the Injunction was clearly to preserve the status quo by allowing the Applicant to remain in the State, without his liberty being restrained, until his application could be heard on an *inter partes* basis by the Judge on the 2nd May.

[9] In the circumstances I find that there is no ambiguity or lack of clarity in the Injunction and the first ground of Preliminary Motion fails.

SERVICE OF INJUNCTION

[10] Order 66 Rule 7(2) of the Rules of the Supreme Court 1970 provides that breach of an injunction cannot be enforced by committal proceedings unless the Court is satisfied that a copy of the injunction that is alleged to have been breached was served personally on the

alleged contemnor. The considerations regarding service of the Injunction in this case differ with respect to each Respondent. I will therefore deal with them separately.

Lenroy Brewster

[11] The Fourth Respondent is not a party to the substantive action and is not directly bound by the Injunction. The only persons who are directly bound by the Injunction, in the sense of being in a position to breach it, are the persons enjoined (the First and Second Respondents). The allegation against the Fourth Respondent is that he was notified of the terms of the Injunction, and actively committed and participated in breaches of the Injunction. In other words, he aided and abetted others to breach the Injunction. His position is governed by the Common Law which stipulates that an injunction does not have to be served on the alleged contemnor. What is required is that he must be shown to have had notice of the terms of the injunction before the alleged breaches were committed: St. Georges University School of Medicine Ltd. V. Eric Lampinstein (Civil Appeal No. 1 of 1995) Grenada – unreported), a decision of the OECS Court of Appeal. The unanimous decision of the Court was delivered by Satrohan Singh J.A. who summed up the Common Law position at page 8 of the Judgment as follows:

> "This was dictum uttered by this Court in a matter involving a principal offender and therefore attracting a provisions of Order 66 Rule 7. If this were a matter that was governed by Order 66 Rule 5, I would unhesitatingly have agreed with learned Counsel, and Mr. Bristol so conceded. But the matter before us is for the committal of an aider and abettor, and not of the principal offender, a matter which is governed by the common law and not by Order 66 Rule 5. The cases of Avery v Andrews and Seaward v Patterson do not speak of service personally on an aider and abettor. They seem to suggest that once it is proved that the aider and abettor had knowledge of the injunctive order that would be enough to satisfy the requirement of service. I accept that as a true legal position at Common Law. The vigilance required of the Court in these circumstances as contemplated in Toppin's Case would be to ensure strict compliance with this Common Law rule. To apply the rule of "service personally" on an aider and abettor would be to insist on a virtually impossible prerequisite. A person only becomes an aider and abettor

after he has aided and abetted. No one can therefore predict who an aider and abettor would be so that there can be no service on him"

[12] Relying on this decision, which is binding on this Court, I find that where the alleged contemnor is not the principal offender but an aider and abettor, personal service of the injunction, or any other type of service, is not a prerequisite to a successful prosecution for contempt. Strict proof of knowledge of the terms of the injunction is sufficient. There is therefore no need to comply with the requirement for personal service in Order 66 Rule 7(2) with regard to the Fourth Respondent

William Harry

[13] The considerations regarding service of the Injunction on the Third Respondent are different. He is being proceeded against as a principal in that he was the person who held the position of Commissioner of Police when the Injunction was granted and allegedly breached on the 25th April. Counsel for the Respondents submitted that Order 66 Rule 7(2) applies to the Third Respondent as an alleged principal and a copy of the Injunction had to be served on him personally. As there was no attempt to comply with Order 66 Rule 7(2) the proceedings against him are fatally flawed and the Committal Motion cannot succeed. Counsel for the Applicant countered by submitting that the Third Respondent is an officer of the Crown and the allegations against him relate to activities carried out by him in his official capacity. The proceedings against him are therefore *"Civil Proceedings against the Crown"* within the meaning of section 3 of the Crown Proceedings Act, Cap. 85. As such, service on Mr. Harry can be effected in accordance with Order 54 Rule 3(2) which states that:

> "Personal service of any document required to be served on the Crown for the purposes of or in connection with any civil proceedings is not requisite; but where the proceedings are by or against the Crown service on the Crown must be effected–
>
> (a) by leaving the document at the office of the person who in accordance with section 16 of the Crown Proceedings Ordinance, is the person to be served, or any agent whom that person has nominated for the purpose, but in either case with a member of the staff of that person, or

(b) by posting it in a prepaid envelope addressed to the person who is to be served as aforesaid or to any agent as aforesaid."

Section 16 of the Crown Proceedings Act provides that:

> "All documents required to be served on the Crown for the purpose of, or in connection with, any civil proceedings by or against the Crown, shall be served on the Attorney General."

[14] It is worth remembering that the Injunction was granted in proceedings for redress under the Constitution. Service of the Injunction was effected by Marcelle Foyle who deposed that she served a copy of the Injunction, and other documents in the constitutional proceedings, at 3:15 p.m. on the 25th of April at the office of the Commissioner of Police at the Central Police Station, Kingstown, St. Vincent, and at 3:30 p.m. on the said date at the Attorney General's Chambers, Methodist Building, Kingstown, St. Vincent. This is sufficient to satisfy the requirements of Section 16 of the Crown Proceedings Act and Order 54 Rule 3, and service of the Injunction was therefore effected on the Third Respondent. The efficacy of that service cannot be diminished because the issue arises in committal proceedings. Order 66 Rule 7(2) requiring personal service of the order on the person sought to be committed for contempt must therefore be read in the context of Order 54 Rule 3 and Section 16 of the Crown Proceedings Act when the alleged contemnors are officers of the Crown.

[15] Counsel for the Respondents sought to avoid the consequences of Order 54 Rule 3 and Section 16 by submitting that these provisions relate to service of originating process. I do not agree. The wording of section 16 is clear and there is no reason to limit it to the service of originating process. It relates to *"All documents required to be served on the Crown*…"

[16] I therefore find that it is not necessary to comply with the requirement for personal service in Order 66 Rule 7(2) with respect to the Third Respondent.

[17] If, contrary to my finding, it is necessary to serve the Third Respondent personally with the Injunction, I am satisfied that the Court has power under Order 66 Rule 7(6) to dispense with such service in appropriate cases. Rule 7(6) provides that:

> "Without prejudice to its powers under Order 50 rule 4 the Court may dispense with service of a copy of an order under this Rule if it thinks it just to do so"

The English equivalent of Rule 7(6) is Order 45 Rule 7(7) which was considered by the Court of Appeal in Davy International Ltd. and others v Tazzyman and others [1997] 3 ALL ER 183. The Court had to reconcile four of its previous decisions, two deciding that Order 45 Rule 7(7) could not be used to dispense with service of the order retrospectively (Lewis v Lewis [1991] 3 All ER 247 and Denman v Temple -1991 unreported), and two deciding that Rule 7(7) had retrospective effect (Turner v Turner (1978) 122SJ 696 and Hill Samuel & Co. Ltd v Littaur – 1985 unreported). The unanimous decision of the Court was that Turner v Turner and Hill Samuel v Lattaur should be followed and the Court has power to dispense with service of the order at any stage up to the trial of the committal proceedings. I agree with and adopt the approach of the Court of Appeal in Davy v Tazzyman and I find that this Court has power to dispense with service of the Injunction retrospectively. In coming to this conclusion I have reviewed the cases cited by Counsel for the Respondents and I am satisfied that this conclusion is not inconsistent with any decision of the Court of Appeal of the OECS.

PENAL NOTICE

[18] Order 66 Rule 7(4) provides that

> "There must be endorsed on the copy of the Order served under this Rule a notice informing the person on whom the copy is served –
>
> (a) in the case of service under paragraph (2), that if he neglects to obey the order within the time specified therein, or, if the Order is to abstain from doing an act, that if he disobeys the order, is liable to process of execution to compel him to obey it,"

The purpose of the penal notice is to give the Respondent notice of the consequences of disobeying the order. Again the considerations differ in respect of the each Respondent.

In the case of the Fourth Respondent where there is no requirement for service, it follows that there cannot be a requirement for service of the Injunction with the penal notice. In the case of the Third Respondent there was service of the Injunction without a penal notice. In 1990 the Court of Appeal in England confirmed that a committal for contempt of court was enforceable in the discretion of the court, notwithstanding that the copy of the order that was served on the contemnor was not endorsed with a penal notice as required by Order 45 Rule 7(4) (our Rule 7(3): Sofroniou v Szigetti Times Law Reports September 19, 1990. I agree with and follow this decision, especially having regard to my finding that this Court has a discretion to dispense with service of the Injunction on a principal offender.

CONCLUSION

[19] The issues relating to the Court's powers to dispense with service of the Injunction and the penal notice are best left to be resolved at the trial of the Committal Motion where the Judge will be able to review the evidence in its entirety, properly tested by cross-examination. It is enough for me to say at this stage that the failure to serve the Fourth Respondent, and to serve the Third Respondent personally with a copy of the Injunction endorsed with the penal notice, are not fatal to the Committal Motion, and having found that the Injunction is clear and unambiguous, the Preliminary Motion is dismissed with costs to the Applicant certified fit for two counsel

Paul Webster
High Court Judge (*Ag.)*