ST. VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO. SVGHCV0184 / 2003

BETWEEN:

IN THE MATTER OF THE TOWN AND COUNTRY PLANNING ACT 1992
AND
IN THE MATTER OF THE APPLICATION BY OTTAVIO LAVAGGI FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

OTTAVIO LAVAGGI

Claimant

and

THE PHYSICAL PLANNING AND DEVELOPMENT BOARD

Defendant

Appearances:

Mr. Samuel E. Commissiong and Dr. Godwin Friday for the claimant.
Mr. Grahame Bollers and Mr. Jaundy Martin for the defendant.
Miss Nicole Sylvester for Wireless Venture (St. Vincent) Ltd.

2003:June 12, 13.

RULING

ALLEYNE J.

[1] Ottavio Lavaggi, a resident of the small Grenadine island of Bequia, has filed an application for leave to seek judicial review of a decision of the Physical Planning and Development Board to grant planning permission to Wireless Ventures (SVG) Ltd. (in fact the company's name is Wireless Ventures (St. Vincent) Ltd.) to erect a telecommunications tower at Friendship, Bequia, close to the boundary of his

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property. Mr. Lavaggi also sought an interim order to stay the decision until the application for judicial review has been heard and determined on its merits.

[2] On May 5th, the court made an interim order granting Mr. Lavaggi leave to apply for judicial review of the order, and further granting an interim order to stay the decision of the Board until the application for judicial review has been heard and determined on its merits. Further orders were made and the matter was adjourned to May 22nd for a first hearing. Mr. Lavaggi duly filed a claim for judicial review and the first hearing was held on May 22nd. On that occasion the court directed, among other things, in accordance with **Civil Procedure Rules 2000** (CPR) Rule 56.11(2)(a) and (b) that Wireless Ventures (SVG) Ltd., now known to be Wireless Ventures (St. Vincent) Ltd., being a body appearing to have sufficient interest in the matter, should have an opportunity to be heard in the proceedings, and that they might make submissions by way of written brief and might make oral submissions at any hearing of the matter.

[3] On June 4th, Wireless Ventures (St. Vincent) Ltd. (hereafter Wireless Ventures) filed a Notice of Application seeking among other things

(i) to be added as a party

(ii) an order that the Claim Form fails to comply with the CPR

(iii) an order that the Claim Form was defective and fatal ab initio

(iv) an order that the Notice of Application seeking leave for judicial review was procedurally flawed

(v) an order that the statement of claim be struck out for non compliance with the Rules

(vi) an order that the interim order granted on 5th May be set aside and/or varied on the ground of material non-disclosure

(vii) a finding that the interim order amounted to a prohibitory injunction which severely prejudiced Wireless Ventures

(viii) an order that the interim order is wrong in law

[4] The application is supported by the affidavit of Susan Roberts, General Manager of Wireless Ventures.

[5] At the hearing of the application on 12th June, counsel for Mr. Lavaggi took objection to the right of Wireless Ventures to make the application, on the ground that Wireless Ventures is not a party to the proceedings and could not be named as a party, the proceedings being for judicial review and by its nature an action between the citizen and the State. Dr. Friday submitted that only a public body could be a defendant in judicial review proceedings, that Wireless Ventures, not being a public body, could not therefore be a defendant and is not competent to make the application before the court.

[6] Counsel submitted that the rights of Wireless Ventures under the order of the court made on 22nd May are limited to the rights set out in CPR Rule 56.11 and 56.13, i.e. the right to be heard, and the right to submit written briefs and to make oral submissions. The applicant Wireless Ventures has no sufficient standing to make the application. Counsel contended that R. 56.13 (3) does not apply to a person or body in Wireless Venture's position, but only in respect of a party to the action, i.e the claimant or the respondent. Counsel relied on Blackstone's Civil Practice 2000. paragraph 74.1.

[7] Mr. Bollers for the Board said that he had instructions to make an application to set aside the order granting leave to apply for judicial review, but that in light of Wireless Venture's application, and thinking that the court would not consider

separate applications to the same effect, especially in light of the overriding objective of CPR to save costs and to make the best use of the court's resources, he had decided to support that application instead of filing a separate application on the part of the Board. He asked for leave to make submissions in support of the application of Wireless Ventures. Leave was granted.

[8] Miss. Sylvester for Wireless Ventures referred to Rule 42.12 (5) and (6), which provide that any person served with an order of the court, or on whom service is dispensed with, is bound by the terms of the order and may take part in any proceedings under the order, and that any such person may apply within 28 days to discharge or vary the order. Counsel argued that the effect of the order staying the decision is to restrain Wireless Ventures from proceeding with the construction of its tower. The order for a stay operates as a prohibitory injunction against Wireless Ventures, who must of necessity and in keeping with R. 42.12, have the right to apply to set the order aside; **R v Inspectorate of Pollution & Or. ex parte Greenpeace Limited** [1994] 4 All ER 321. That was a case of an application for judicial review, in which Greenpeace appealed from that part of the judgment of the court below refusing an application by Greenpeace to stay the relevant government department's decision to issue a variation of authorisations granted to an interested party pending the hearing of the substantive application. Glidewell, LJ., at page 324, stated the question thus;

> "(W)here it is sought to stay a decision of a government department, and the effect of granting the stay will be to affect detrimentally the operations of a third party who is not party to the proceedings, what is the proper approach for the court, from which the stay is sought, to adopt?"

His Lordship answered the question, which he called a difficult question on which, so far as he knew, there was no authority, in this way;

> ""It is quite clear, in my view, that Brooke J treated this application for a stay, in a sense, as if it were an application for an interlocutory injunction, and he applied the principles he would have applied had he been considering such an application. In my judgment, he was entirely right to do so. If a third party would be affected by a decision on an application for

> a stay but is not made a party to the proceedings as a respondent to an application for an injunction, then, in my view, nevertheless, the same principles should be followed."

[9] Scott LJ concurred and at page 327 said this;

> "In my opinion, if the real purpose of interlocutory relief in a judicial review case is to prevent executive action by a third party being carried out pursuant to the decision under attack, the more suitable procedure would be to have the third party in question joined and then to seek an interlocutory injunction against that party rather than to seek a stay of the decision. If, however, the purpose is pursued, as it has been in the present case, by an application for a stay of the decision rather than by an application for an interlocutory injunction against the third party, the court should, in my opinion, look to the substance rather than to the form, and apply the same principles to the application as would have been applicable had the application been for an interlocutory injunction."

[10] These principles clearly apply to the case at Bar, in which the true purpose of the application for judicial review is to prevent the construction of the tower for fear of its alleged potential health and aesthetic impact on Mr. Lavaggi and on his land.

[11] Miss Nicole Sylvester, counsel for Wireless Ventures, referred to Part 42.12 (5) of CPR and asserted that the interim order, which was served on Wireless Ventures, had the effect of restraining their work. Counsel referred to the case of **Robertson v Isaacs**, a decision of the Eastern Caribbean Court of Appeal on a matter out of this jurisdiction, which declares that a person having notice of a decision of the court is bound by it unless and until it is set aside. Counsel also referred to R. 42.12 (6) and 56.11. Counsel asserted that Wireless Ventures were not part of or informed about the hearing on 22nd May. However, the order of 5th May, which was served on Wireless Ventures, did fix that date for a first hearing, and service of that order would have been notice to Wireless Ventures. Counsel said that the directions of the court given on that occasion entitled that company to participate in the proceedings. I agree and I would not limit their participation as suggested by counsel for Mr. Lavaggi.

[12] I agree, however, that Wireless Ventures may not seek to set aside the proceedings for judicial review, but may participate in these proceedings to the extent that their interests are prejudiced by these proceedings, and may take all necessary and proper steps to protect their legitimate interests.

[13] The preliminary objections raised by counsel for Mr. Lavaggi fail, and I will hear the application of Wireless Ventures, within the limits above referred to, on Monday 16th June 2003.

[14] The matter of the costs of this proceeding will be considered in due course.

Brian G.K. Alleyne
High Court Judge

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