THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

IN THE STATE OF SAINT VINCENT AND THE GRENADINES

CLAIM NO. 241 OF 2004

IN THE MATTER OF THE COMMISSIONS OF INQUIRY ACT NO. 14 OF 2002

AND

IN THE MATTER OF THE OFFICIAL GAZETTE OF SAINT VINCENT AND THE GRENADINES VOL 136 DATED MONDAY 10TH MARCH 2003 (NO. 11) NO. 111 INSTRUMENT APPOINTING COMMISSIONERS

AND

IN THE MATTER OF EXTRAORDINARY PUBLICATION IN THE OFFICIAL GAZETTE OF SAINT VINCENT AND THE GRENADINES VOL. 136 DATED 28TH APRIL 2003 (NO. 19) ERRATUM

BETWEEN:

RICHARD JOACHIM

Claimant/Applicant

AND

THE ATTORNEY-GENERAL OF SAINT VINCENT AND THE GRENADINES
EPHRAIM GEORGES

Defendants/Respondents

Appearances:
Ms. Nicole Sylvester and Ms. Rochelle Forde for Applicant
Mr. Jaundy Martin, Senior Crown Counsel for 1st Respondent
Senior Counsel Mr. Anthony Astaphan and Mr. Joseph Delves for 2nd Respondent

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2004: May 18
May 24

RULING

[1] **BRUCE-LYLE, J** - This is an application for an order for leave to seek Judicial Review on behalf of the Applicant/Claimant Richard Joachim.

[2] Richard Joachim claims the following orders –

(a) Leave to apply for Judicial Review of the decision of the Commissioner Ephraim Georges of 11th May 2004 wherein he stated that the witness summons of Richard Joachim issued under the hand of Roslyn I. Harry was valid and did not contravene s. 10(3) of the Commission of Inquiry Act Cap. 14 Vol. 1 of the Laws of Saint Vincent and the Grenadines Revised Edition 1990.

(b) Leave to apply for an order for certiorari quashing the decision of Ephraim Georges of 11th May 2004 wherein he stated that the witness summons in respect of Richard Joachim dated the 30th April 2004 was valid

(c) Leave to apply for an Interim Order of Certiorari quashing the decision of Ephraim Georges wherein he stated that the letter dated 30th April 2004 to the Claimant did not create any possibility of bias.

(d) Leave to apply for Judicial Review of the decision of the Commissioner Ephraim Georges of the 11th May 2004 wherein he stated that the letter of 30th April 2004 created no real possibility of bias in respect of Richard Joachim.

(e) Leave to apply for an order of certiorari quashing the decision of Ephraim Georges of 11th May 2004 that there was no real possibility of bias in relation to the letter of 30th April 2004 in respect of Richard Joachim.

(f) Leave to apply for a declaration that the summons dated 1st day of December 2003 issued under the hand of Roslyn I. Harry is unlawful and contravenes s. 10 (3) of the Commissions of Inquiry Act Cap. 14.

(g) Leave to apply for a declaration that any evidence or testimony taken on the said summons of 1st day of December 2003 is unlawful.

(h) Leave to apply for a declaration that the summons dated 30th day of April 2004 is ultra vires and void.

(i) Leave to apply for a declaration that the letter dated 30th April 2004 drew inferences and reached conclusions in relation to Richard Joachim by Ephraim Georges which is in breach of the rules of Natural Justice, fairness and fair play.

(k) Leave to apply for a declaration that the letter of 30th April 2004 creates a real danger or real possibility that Ephraim Georges would be biased as against Richard Joachim.

(l) Leave to apply for an injunction restraining Ephraim Georges his servants and/or agents or howsoever otherwise from inquiring into the conduct, actions or otherwise of Richard Joachim as it relates to the Commission of Inquiry into Ottley Hall until the hearing and determination of this claim or until further order.

(m) Leave to apply for an order that Ephraim Georges deliver up the transcript and/or portions of the transcript of witnesses that gave evidence adverse to Richard Joachim.

(n) Leave to apply for an order that Ephraim Georges deliver up and specify by reference to the transcript of witnesses who said of and concerning Richard Joachim the following:

(i) That Richard Joachim persistently sought and obtained the approval of the Board of Directors for such loans – most of which were unsecured – by the round robin procedure and often went over the head and ignored the advice of the bank's General Manager, Mr. Beverly Brisbane, pointing out the inherent risks of adopting such a course – to the ultimate detriment of the bank and its customers.

(ii) The evidence further shows that such frequent indiscriminate and imprudent lending at the instigation of "the Major Shareholder" issued by yourself in order to assist the said Dr. Rolla violated the Central Bank regulations (to your knowledge) with serious negative effects on the bank's liquidity and foreign exchange reserves.

(iii) One inference to be drawn from the available evidence is that as a Director and Chairman of the bank, you were in breach of your fiduciary duty to protect the interests of the bank and its customers and misused and abused your position qua Chairman to the detriment of the bank, resulting in huge financial loss.

(iv) In short, you recklessly conspired with another or others in giving away the bank's money. And all of this was done with the benefit of the advice of the Bank's lawyer, Mr. Karl Hudson-Phillips, which you had yourself sought and obtained in June 1994.

(o) Leave to apply for an Interim Injunction to restrain the Commissioner from inquiring into matters relating to the said Richard Joachim until the hearing of this Claim Form or until further order.

(p) Leave to apply for further or other reliefs as the Court may deem fit.

(q) Leave to apply for costs.

[3] At an inter partes hearing in open Court on 18th May 2004, arguments and submissions were received from Learned Counsel for the Claimant Ms. Nicole Sylvester and from Learned Senior Counsel Mr. Anthony Astaphan, counsel for the second defendant. A plethora of legal authorities by way of texts and case law was also submitted for the Court's consideration.

[4] Having reviewed and analyzed the arguments and submissions put forward by both sides to this application, and given careful consideration to the legal authorities and texts submitted, I now opine as follows.

[5] Ephraim Georges, a retired Judge of the Eastern Caribbean Supreme Court was duly appointed Commissioner authorized by His Excellency the Governor-General by Instrument dated the 28th April 2003 to inquire into a number of matters arising from the Ottley Hall Project and Union Island Resorts projects. His appointment and Terms of Reference were published in the official Government Gazette dated 20th March 2003.

[6] Based on certain actions emanating from the Commission, and more specifically the Commissioner Ephraim Georges, Richard Joachin now challenges the validity of a summons dated 30th April 2004, with a letter, commonly referred to in legal jargon as a "Salmon Letter" attached with even date (Ex. R.J. 4).

[7] Really, the issues for the determination of this Court concern the proper interpretation of the Summonses, the Salmon Letter, the Commission of Inquiries Act Cap. 14, as amended, and a consideration of all the relevant circumstances within the context of the recent law on Bias.

[8] I wish at this stage to point out that there is no automatic right to the grant of leave to apply for Judicial Review and its attendant reliefs. The granting of such leave is discretionary. If the Claimant, Richard Joachim, in this case fails to cross the threshold required by the Court and Law, to enable the exercise of its discretion, the application for leave ought to be dismissed.

[9] The Court will have to consider the merits of Richard Joachim's case, that is whether the case and the application are misconceived, an abuse of the process, or that the case is not strong and likely to fail at a trial if leave is granted. In this matter before hand, it is my view that the Claimant Joachim must not only show that his case is arguable or raises arguable

or triable issues, but must also go on to show that his case is strong and is likely to succeed at a trial if leave is granted.

VALIDITY OF THE SUMMONSES

[10] I propose to deal with this head first for reasons of neatness and priority. It is around the summonses that Richard Joachim's involvement as a witness at the Commission has its genesis.

[11] The Commissions of Inquiry Act, Cap. 14 came into force on the 2nd June 1900. Section 10(3) of the Act states as follows:

> "All summonses for the attendance of witnesses or other persons, or for the production of documents, may be in the form in the schedule and shall be signed by one of the Commissioners"

[12] Section 6 of the said Act also states as follows:

> "The Governor-General may appoint a secretary to attend the sittings of the Commission to record their proceedings, to keep their papers, summon and minute the testimony of the witnesses, and generally to perform such duties connected with such inquiry as the Commissioners shall prescribe, subject to the directions, if any, of the Governor-General."

[13] Learned Counsel for Richard Joachim, Ms. Sylvester contends that a Commissioner appointed under the Statute must act in accordance with its provisions. And that what is contemplated by the Act is that once the Commissioner has signed the Summonses as required by the Act Section 6 only entails the secretary to the Commission performing administrative duties relevant to the summonses being served on its intended recipients and having the testimony of such witnesses minuted. She further contends that to attempt to interpret the Statute otherwise is an affront to common sense and repugnant to the principles of Statutory Interpretation.

[14] She further contended that her position was further buttressed by the Commissions of Inquiry (amendment) Act 14 of 2002 Sections 3(5) – which states that pursuant to sub-sections (3) and (4) the persons so deputed shall have the powers conferred by sections 2

(4) and 10. And further that it was never the intention of the framers of the Act to clothe the secretary with the same powers as the Commissioner when it related to the issuance of summonses and subpoenas, otherwise it would have been so spelt out.

[15] In short, her position , that is the Secretary, is to dispatch or arrange for the services of subpoenas or summonses which would have been regularly issued under the hand of the Commissioner, but not for her to initiate and issue summons under her hand; and therefore the role of the Secretary in relation to summons is purely an administrative one, and that issuing summonses is a judicial function which cannot be delegated, but however service of summons is an administrative function which may be delegated.

[16] I am afraid I do not accept that view. Any Act or Legislation, to my mind must be construed and interpreted within the practical realities of the societies we live in. I agree with learned Senior Counsel Astaphan that Section 10(3) of the Act must be construed within the context of the 21st Century, and a modern day one-man Commission of Inquiry with all of its complexities; and that it must also be given a commonsense and purposive construction. This view as juxtaposed with Section 6 of Cap. 14 which provides as follows – ".... such duties connected with such inquiry as the Commissioner shall prescribe" – allows the power of delegation from the Commissioner to the Secretary.

[17] It is now generally accepted that certain functions of a Commission may be delegated once the primary functions of hearing the evidence and making decisions are not delegated. An examination of the summonses impugned together with the Salmon Letter referred to earlier in this ruling shows that these documents were signed by the Secretary Roslyn I. Harry for the Commissioner Ephraim Georges. This presupposes that the summonses were drafted by the Commissioner Ephraim Georges and the Secretary Roslyn Harry was instructed and authorized by the Commissioner to sign them on his behalf. This in my view was purely a matter of administrative convenience and commonsense, as the Commissioner, as is generally known resides in the State of Antigua and Barbuda.

[18] There is also not one scintilla of evidence that Richard Joachim was misled or prejudiced in any way by these summonses. This whole issue of the validity of the Summonses is one which goes to form rather than substance and is premised on a technicality which cannot be upheld by this Court. It is interesting to note that Richard Joachim by his conduct and that of his Counsel unequivocally waived any complaint or objection to the validity of the summonses and have participated in the proceedings pursuant to the said summonses. Can they now be heard to complain? My answer is a resounding no. Further, there is no evidence that Joachim has suffered any prejudice or injustice as a result of the form the summonses took. I therefore hold that the Impugned Summonses dated 1st December 2003 and 30th April 2004 were valid summonses as contemplated within the scope and purpose of the Commissions of Inquiry Act, Cap 14, as amended.

THE SALMON LETTER

[19] A Salmon Letter is a required part of a fair procedure of a Commission. Lord Salmon in his report "Royal Commission on Tribunals of Inquiry 1966" laid down six cardinal principles. The purpose of those principles is for Tribunals of Inquiry such as this one at hand to set out the allegations or provisional findings made against a witness, so as to put the intended witness on notice. The substance of the evidence must also be told to the witness in the Salmon letter. The question then arises as to what form and manner the letter is to take. My answer to that question is that the form and manner is entirely within the discretion of the Commission.

[20] There is another purpose of a Salmon letter, and that is to advise the witness that he is required to give evidence or rebut the allegations or provisional findings set out in the said letter, failing which adverse findings or conclusions may be made against him. It stands to reason therefore that by its very nature and purpose it would be inevitable that a Salmon letter will contain allegations, provisional findings and material, and criticisms adverse to the witness. This is why there is a need to issue a Salmon letter – so that the Tribunal of Inquiry is seen to be fair by putting the Claimant on notice in accordance with the principles of fairness.

[21] I have examined the letter of the 30th April 2004 under the hand of Roslyn I. Harry Secretary to the Commission, on behalf of the Commissioner Ephraim Georges. I have also examined the very recent legal authorities in the cases of ***Beno v Canada (1997) F.C. 5278; Attorney-General of Canada v Canada (Krever Commission of Inquiry) 3 S.C.R. 440; Small and others vs Elliot Fitzroy Belgrave H.C. 370 of 2000 and C.A. No. 23 of 2000 (Barbados); Allan Joseph v Sir Allister McIntyre et al, Civil Suit No. ANUHCV 2002/0078***. In all these cases, which are very recent, the challenges on the ground of bias failed as regards Salmon letters issued. This was because the nature and functions of a Commission of Inquiry and a Salmon letter, with criticisms, comments or provisional findings make it inevitable that these be contained in a Salmon letter and cannot, without a great deal more give rise to a sustainable case of bias. In other words the Court, according to the law of bias has to consider all of the circumstances of the case. Each case has to be looked at and decided on its merits. Depending on the nature of the Inquiry and the evidence led, no two Salmon letters are expected to be the same. In other words every Salmon letter is peculiar to its own circumstance and the nature of the enquiry it emanates from.

[22] It should not be forgotten that the principles require as a matter of procedural fairness that a witness be put on notice of all the evidence both documentary and oral that has been placed before the Commission which a witness is expected to refute, before definite findings are made.

[23] Going back to the Salmon letter of the 30th April, 2004, I cannot see how any allegation of bias real or imagined could be sustained. There is no serious question of bias to be tried in light of what I have said earlier on that issue, in this ruling. It has no real chance of succeeding if leave is granted.

[24] In this case the Commission has not entered beyond its boundaries as defined by its Terms of Reference. What is impugned is the content and expressions used in the Salmon letter, which according to Learned Counsel for Richard Joachim amount to definite

conclusions being drawn which the Commission is not required to reach. It is my view that the impugned letter should be looked at in its entirety and not fragmented with the sole aim of lifting out statements or paragraphs which when read out of context with the whole create an illusion of conclusiveness and definite findings.

[25] In my view the Commissioner Ephraim Georges explicitly informed Joachim of the nature of the evidence led against him so far by other witnesses who had testified before the Commission, and informed him of the possible inferences which could be drawn definitively if he did not appear before the Commission to refute the allegations contained in the Salmon letter. No allegation of bias could seriously emanate from this Salmon letter and I see no danger of bias or a real likelihood of bias lurking anywhere in this Salmon letter.

[26] It is not in dispute that the Commission has gone to great lengths in assisting Richard Joachim to prepare himself to refute these allegations. The Commission has entertained and granted several applications for adjournments to facilitate Joachim and his counsel; they have availed Joachim of transcripts of evidence and other documents to assist in his preparation; the date 11th May 2004 when Joachim was expected to appear before the Commission to testify in answer to the allegations was suggested by Joachim's own counsel; a date to which the Commission readily accepted to accommodate Joachim. Where is the evidence of bias or danger of it on the part of the Commission? – none, I would answer.

[27] Coupled with this is the affidavit of Commissioner Ephraim Georges in which he has stated that any witness the Claimant may wish to cross-examine will be made available, and that should he wish to lead witnesses he may do so once the intended evidence is relevant. Ephraim Georges has even gone further to state that he has not made, and will not make any final or conclusive findings unless Joachim has been given the fullest opportunity to be heard, and he has heard all of Joachim's evidence. Where again is the danger or real likelihood of bias? – None.

[28] Learned Counsel for Richard Joachim made heavy weather of a statement purportedly made by Commissioner Ephraim Georges as follows:

> "For the obvious purpose of this objection is to delay and frustrate the work of the Commission for no known manifestly good reason."

It is my view that when the Commissioner made this statement he had after careful consideration, given the history of Mr. Joachim's appearance and subsequent request upon request for various material and adjournments, come to the conclusion that Richard Joachim was trying to avoid testifying before the Commission. I see no reason why the Commissioner cannot or could not have made this observation given the circumstances. Is learned Counsel saying that judicial officer's mouths should be fettered in the face of situations where they may perceive attempts to wrest control of their tribunal from them? I rue the day when this would become the norm. I see nothing wrong with the statement made by the Commissioner, nor do I consider it anywhere near the insidious allegation of danger or real likelihood of bias.

[29] Having found as I have on the validity of the summonses, the Interpretation of the Commissioner of Inquiry Act, Cap. 14 as amended, the Salmon letter and the danger or real likelihood of bias, which to me form the main gravamen of this application before me, I am of the view that I need not consider learned Senior Counsel Astaphan's submissions relating to material non-disclosure, delay and the Claimant's conduct which were preliminary matters raised in his submissions. I consider them to be of academic importance at this stage of the ruling, having found against the Claimant on the other more crucial and pertinent issues before me.

CONCLUSION

[30] I therefore conclude by ruling, having in the exercise of my discretion considered the overriding objectives of the CPR 2000 and the principles established by the authorities, that this application has no merit. The Claimant Richard Joachim to my mind has failed to cross the threshold required of him by law. It is my considered view and ruling that the Claimant's case as it stands is not strong and is likely to fail at a trial if leave is granted. I

see no arguable or triable issues raised in the application before me and dismiss it in its entirety. In other words, the claim or application for leave to apply for Judicial Review as prayed for by Richard Joachim is hereby refused.

[31] Each party is to bear its own costs for this application. This is because even though the applicant has failed in his application, this Court considers any award of costs in this matter, to be, against the spirit of CPR 2000 Part 56(13)(b). I do not consider that the applicant has acted unreasonably in making the application or in the conduct of the application. An award of costs may have the effect of deterring other would-be interested parties from challenging actions emanating from tribunals of this kind, such as a Commission of Inquiry. I have no intention of assisting in the prevention of such actions being brought before the Courts.

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Frederick V. Bruce-Lyle
HIGH COURT JUDGE