IN THE HIGH COURT OF JUSTICE
SAINT VINCENT AND THE GRENADINES

2004 NO: 263

BETWEEN:

RICHARD JOACHIM
GLENFORD STEWART **CLAIMANTS**

AND

THE ATTORNEY GENERAL OF
SAINT VINCENT AND THE GRENADINES
EPHRAIM GEORGES **DEFENDANTS**

Appearances:
Ms. N. Sylvester, Ms. R. Forde for Claimants
Mr. A. Cummings for Defendant No. 1
Mr. Alair Sheppard Q.C, Mr. Joseph Delves for the Defendant No. 2

RULING
July 1, 2, 2004

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[1] In March 2003 His Excellency the Governor General appointed the second defendant the sole Commissioner to enquire into the facts and circumstances on and relating to the Ottley Hall Project. That Commission was expressed to have been granted by the Governor General under section 2 of the Commissions of Inquiry Act Chapter 14 of the Laws of St. Vincent and the Grenadines. The Commission was duly published in the official Gazette on 10th March 2003. There were several errors in the commission as published and an erratum was published in the official Gazette on 28th April 2003 which purported to correct the errors. The text of the Erratum is reproduced below.

> **"TO JUSTICE EPHRAIM GEORGES, RETIRED HIGH COURT JUDGE instead of "TO EPHRAIM GEORGES, RETIURED HIGH COURT JUDGE, JUSTICE OF APPEAL (Acting)."**

1st paragraph which reads as follows:-

"WHEREAS it is provided by Section 2 of the Commissions of Inquiry Act Chapter 14 of the Revised Laws of Saint Vincent and the Grenadines 1990, that whenever the Governor-General shall deem it advisable it shall be lawful for him to issue a Commission appointing one or more Commissioners to inquire into the conduct or management of any department of the public service, or of any public or local institution or the conduct of any public or local officers of this State or of any parish or district thereof, or into any matter in which an inquiry would, in the opinion of the Governor-General, be for the public welfare."

Should be cancelled and replaced with the following:-

"WHEREAS it is provided by section 2 of the Commissions of Inquiry Act Chapter 14 of the Revised Laws of Saint Vincent and the Grenadines 1990 as amended by the Commissions of Inquiry (Amendment) Act, No. 14 of 2002, that whenever the Governor-General shall deem it advisable it shall be lawful for him to issue a Commission appointing one or more Commissioner to inquire into and report on any matter within the jurisdiction of Saint Vincent and the Grenadines or the conduct of public business in Saint Vincent and the Grenadines that is in the opinion of the Governor-General of sufficient public importance".

2nd paragraph, second line, delete the words:-

"for the public welfare" and insert the following **"of sufficient public importance"**

Page 165 – the paragraphs which begin:-

"AND I FURTHER DIRECT....."delete **"7th"** and insert **"28th"**

"AND WHEREAS..." third line, delete the words, **"and Justice of Appeal (Acting)"**

"NOW THEREFORE, KNOW YE..." fourth line, delete the words, **"and Justice of Appeal (Acting)".**

The Erratum was under the hand of the First defendant.

[2] On 28th April 2003 the Governor General issued a second commission. This commission was in the same terms as the first commission with the corrections made as indicated by the Erratum referred to above. There was no subsequent publication of the corrected commission in the gazette.

[3] The claimants brought this claim and subsequently amended it on 29th June 2004. They sought the following relief.

(1) A **Declaration** that the instrument appointing the **Second Defendant** as Commissioner is invalid, illegal, null, void and ineffective.

(2) A **Declaration** that any findings or conclusions arrived at by the **Second Defendant** in relation to the Commission of Inquiry into the Ottley Hall Development are null and void.

(3) An **Order** that there is a real likelihood of bias in the **Second Defendant**.

(4) An **Order** that any findings or conclusions arrived at by the **Second Defendant** in relation to the Commission of Inquiry into the Ottley Hall Development Project be sealed and not published.

(5) An **Order** that all transcripts, documents, witness statements in relation to Commission of Inquiry into the Ottley Hall development be sealed.

(6) An **Injunction** restraining the publication by the Defendants their servants and or agents or howsoever otherwise from publishing any documents, transcripts and findings or conclusions in relation to the Commission of Inquiry into the Ottley Hall Development,

(7) An **Order** that all proceedings of **Second Defendant** be stayed until after the hearing of this claim.

(8) An **Injunction** to restrain the **Second Defendant** from further hearings or inquiries with respect to the Ottley Hall Inquiry.

(9) Further, or alternatively, an Order of prohibition, prohibiting the **Second Defendant** from hearing any further evidence for the purpose of making any findings or recommendations.

(10) An **Order** to quash the Commission on the grounds of a real danger of bias.

(11) Further or consequential reliefs as the Court may deem fit.

(12) Costs.

[4] The gravamen of the complaint of the claimants is that

(1) The instrument of 10th March 2003 in its preamble uses the language of the repealed section 2 of the Commissions of Inquiry Act. Because of this reference the claimant's say, the appointment of the defendant 2 is void and of no effect

(2) The erratum was not under the hand of the Governor General and therefore is an attempted usurpation of the power of the Governor General to appoint Commissions of Inquiry.

(3) The circumstances of this claim demonstrate a real danger of bias on the part of the Defendant 2 and/or introduce an element of unfairness into his carrying out of his commission.

[5] The second defendant applied to have the claim form and statement of claim struck out as disclosing no reasonable grounds for brining the claim or as an abuse of the process of the court or as having no real prospect of success.

It is useful to set out, to borrow a term from Counsel for the claimants, the factual matrix.

[6] As noted above the Erratum was published on 28th April 2003. By that date, the conjoint effect of the publication of the instrument of appointment and the erratum was to place before the public to correct version of the instrument appointing the second defendant. The commission began its hearings on 28th April 2003. On 14th August 2003 a letter or invitation to send in a statement was issued to the First Claimant.

[7] On 8th December 2003 the First Claimant appeared before the Commission and gave evidence. Subsequently the First Claimant secured the services of Counsel who embarked on a series of communication with the Commission. The First Claimant was supplied with documents that were requested. The Commission also permitted the claimant to attend at the offices of the commission to inspect documents. At the resumed hearing on 21st April 2004 Counsel for the claimant requested an adjournment.

[8] On 11th May 2004 the First Claimant appeared before the Commission with Counsel and through Counsel objected to

(i) the issue of the summons to attend

(ii) the contents of the Salmon letter on the basis of bias.

[9] Those objections were dismissed by the Commission. On the same date the First Claimant applied to the Court for leave to seek judicial review of the decision of the Commissioner dismissing the objections that had been raised on behalf of the first Claimant. The application for leave was heard *inter partes* before Bruce-Lyle J. on 18th May, 2004 and a decision was reserved. On 21st May 2004 before the decision could be given the first claimant filed a claim 241 of 2004 seeking the identical relief that is now sought by the claimants in the claim before me. On 24th May 2004 Bruce-Lyle J. refused the claimant's application. An Appeal was lodged against that decision and remains pending. On 25th May 2004 the First Claimant filed a Notice of Discontinuance of Claim 241 of 2004.

[10] I now turn to consider the Application of the Second Defendant. The Application posits three grounds upon which the defendant argues that the claim ought to be struck out I

view ground three as being subsumed under ground one. I propose to deal with this joint ground first.

[11] No reasonable grounds for bringing the claim.

[12] The first challenge of the claimants is to the appointment of the first defendant. The instrument of appointment was published on 10th March 2003. It was under the hand of the Governor General and was gazetted. The Claimants say that, His Excellency purportedly acted under section 2 of the Commissions of Inquiry act. I agree. It is only under section 2 that His Excellency has power to act.

[13] The amended section 2 reads;

"The Governor General may, whenever he considers it advisable, issue a commission appointing one or more commissioners and authorizing the commissioner, or any quorum of them, to enquire into and report on any matter within the jurisdiction of Saint Vincent and the Grenadines that is in the opinion of the Governor General of sufficient public importance."

[14] I turn to examine the impugned instrument. The power of the Governor General is predicated on him deeming it advisable to act. The second preamble of the instrument which was published on 10th March 2003 recites that His Excellency had deemed it advisable. I do not consider that the errors in the recitals to have been of sufficient moment to invalidate the appointment. The operative part of the instrument is

> **"NOW THEREFORE, KNOW YE THAT I, SIR FREDERICK N. BALLANTYNE G.C.M.G.,** Governor-General of the State of Saint Vincent and the Grenadines as aforesaid reposing full confidence in your zeal, discretion and ability, do appoint you the said EPHRAIM GEORGES, Retired High Court Judge, and Justice of Appeal (Acting) to be the Commissioner under the said Commissions of Inquiry Act and to make diligent inquiries into and to report upon all facts and factors relating to the matters set out above."

[15] The Governor-General acts under section 2. He exercises the power that the Act confers on him. The instrument does not on the face of it purport to have been made under a repealed section. While it is clear that the language in the first recital repeats the terms of the repealed section 2 that entire recital could have been omitted from the instrument of appointment without invalidating the appointment. The claimants fall into error when they regard the initial recital as the appointing part of the instrument.

[16] I am further fortified when I consider the erratum. The erratum does not purport to appoint the second defendant. It merely corrects the errors in the recitals which form the preamble. I pause to add for completeness that no issue has been taken with the other amendments made in the erratum. I regard this as correct.

[17] Counsel for the claimants have cited a number of cases, including **Eton College v. Minister of Agriculture** but based on the view that I have taken of the facts of this case I do not consider these to be of assistance. They support the view that an act done in the purported exercise of a repealed provision is a nullity. As I have said. His Excellency acted under the authority provided by the act which was in force at the time of his appointment.

THE SECOND INSTRUMENT

[18] A second instrument was issued to the second defendant dated 28th April 2003. This has not been gazetted. The claimants say that because section 16 of the Commission of Inquiry Act makes publication in the gazette a mandatory precondition to validity, that this is of no effect. I consider this instrument of 28th April, 2003 otiose. The earlier instrument had been published. It was a valid instrument. The effect of the erratum was to correct the minor mistakes which mistakes did not operate to invalidate the instrument. Counsel for the claimants point out that the second defendant deposed to an Affidavit in which he swears that his appointment was by instrument dated 28th April 2003. The opinion or misapprehension of the second defendant, while understandable, does not alter the legal position. He had already been validly appointed by his Excellency. That appointment has not been revoked. The additional appointment I view as mere surplusage. The absence

of its publication in the Gazette does not operate to render the already granted commission which was gazetted on 10th March 2004 invalid.

BIAS

[19] I now turn to examine the Claim Form and Statement of Claim to see whether there is raised therein any issue of bias which is fit to be litigated. The claimants must show in the pleadings that they have reasonable grounds for bringing the claim. The claimants seek "an order that there is a real likelihood of bias in the second defendant.

[20] The averments in the pleadings reveal that

(1) On 2nd August 2002 a newspaper report quoted the Prime Minister as saying that a Counsel to the Commission had already been contacted.

(2) Counsel to the Commission was appointed by the first defendant.

(3) Counsel to the commission represented the sole commissioner in claim 241 of 2004

(4) Counsel to the commissioner represented the Prime Minster in Claim 406 of 2002 a defamation action.

[21] The claimants say that the combined effect of these four facts is likely to create a real danger of bias and/or introduce an element of unfairness into the Commission of Inquiry. Counsel for the claimant urged the court not to strike out the claim at this stage as the evidence to be led by the witnesses will change the complexion of this claim.

[22] I am not concerned with the evidence at this stage. My function is to examine the pleadings to see whether they disclose grounds for bringing the claim. I take the averments of the claimants as proved. Do they then disclose reasonable grounds?

[23] No complaint is made of the sole Commissioner. The newspaper report does not identify the Counsel who the Prime Minister has contacted. I fail to see how that fact provides any basis for saying that there is any real likelihood of bias in the sole commissioner. Similarily I do not agree that the fact that Counsel to the Commissioner are appointed by the

Attorney General – and I take judicial notice of the fact that the Honourable Attorney General is a Civil Servant – gives any reasonable grounds for apprehending a likelihood of bias in the second defendant. In Claim 241 of 2004 the first claimant brought an action against the second defendant in his capacity as sole commissioner. He was represented by Counsel for the Commission. No issue was taken than that his appearance for the second defendant was in any way unfair or improper. The final suggestion appears to be that in some way the fact a respected Senior Counsel acted in the past for the Prime Minister in an unrelated defamation action and now appears as Counsel to the commissioner, will in some inexplicable fashion contaminate the Commissioner with bias. No particulars are given to support this speculation. I do not consider that these factors are sufficient to provide reasonable grounds to permit this claim for bias to be litigated. In short I do not consider that they pleadings of the claimant disclose any reasonable grounds for bringing this claim. I consider this claim to have no prospects of success.

ABUSE OF PROCESS

[24] The first claimant brought an earlier claim 241 of 2004 in which he claimed the identical relief that the claimants now seek. The defendants say it would be an abuse of process to permit him to relitigate issues which he ought to have litigated in the earlier claim. The claimants say that the second claimant has not filed any previous claim. There can be no issue of relitigation where he is concerned. I agree. The claimants further urge that the action ought not to be separated. I disagree. I examine the case for each claimant individually. The rules which govern the issue of relitigation are well known. The ancient case of **Henderson v. Henderson 1843** Hare 100 in the words of Sir James Wigram VC puts it thus

> "... where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence,

or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time".

[25] This rule has been applied over the intervening years on numerous occasions. Counsel for both sides have adverted to several cases. I am grateful for their assistance. Counsel for the claimant says that there is no abuse of process by the first claimant as Claim 241 of 2004 was concerned with judicial review of the decision of the second defendant. No decision is being reviewed in this claim. But this statement is at odds with the relief claimed. Not only do the claimants seek to challenge the decisions of the second defendant they seek to prohibit the hearing of evidence by the second defendant for the purpose of making any findings. And, as has been noted the relief sought now is identical to the relief sought then. Clearly it would be an abuse of the process of the court to permit the claimant to relitigate in an effort to obtain the relief he sought in his earlier claim. All of the matters he now seeks to raise were known to him then.

[26] As far as the second claimant is concerned different considerations apply. The second claimant has come by way of claim form. The defendants say that this is an abuse of process. The claimant is attempting to circumvent the provisions of part 56 of Civil Procedure Rules 2000 which would require him to seek and obtain leave for judicial review. The claimant argues that no decision of any body is being challenged. There is no need for judicial review.

[27] Part 56.1(3) defines judicial review as:

The term "judicial review" includes the remedies (whether by way of writ or order) of –

(a) certiorari, for quashing unlawful acts;

(b) mandamus, for requiring performance of a public duty, including a duty to make a decision or determination or to hear and determine any case; and

(c) prohibition, for prohibiting unlawful acts.

[28] A quick perusal of the reliefs sought by the claimants reveals that they are asking for orders of certiorari mandamus and prohibition. In the case of **O'Reilly et al v. Mackman et al [1983] 2 AC 237** Lord Diplock put the position thus

> "... it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities".

[29] Clearly what the claimants seek here is judicial review. I adopt the words of Lord Diplock. To permit the second claimant to bring this action by ordinary claim form and thus circumvent the provisions of part 56 of the Civil Procedure Rules 2000 is contrary to public policy and an abuse of process. It is precisely to protect public authorities such as the defendants that the provisions of part 56 exist. In this case where all the relief concern the protection of public rights I have no hesitation in holding that any challenge ought to be by way of judicial review.

[30] For the foregoing reasons the Application of the defendants is granted. The Claim Form and Statement of Claim are struck out as disclosing no grounds to bring the claim and as an abuse of process.

COSTS

[31] This claim raised matters of public importance. In a democratic society it is important that citizens are not deterred from litigating matters of public importance in proper cases. I make no order as to costs.

[32] Should leave be required leave to appeal this decision is hereby granted.

Brian S. Cottle
MASTER