SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CIVIL APPEAL NO.19 OF 2004

IN THE MATTER OF THE COMMISSIONS OF INQUIRY ACT CAP 14 VOL 1 OF THE LAWS OF SAINT VINCENT AND THE GRENADINES REVISED EDITION 1990

AND

IN THE MATTER OF THE AMENDMENT
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 10TH MARCH 2003 (No.11) No 111 INSTRUMENT APPOINTING COMMISSIONER

AND

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

BETWEEN:

[1] RICHARD JOACHIM
[2] GLENFORD STEWART

Appellants

and

[1] THE ATTORNEY GENERAL OF
SAINT VINCENT AND THE GRENADINES
[2] EPHRAIM GEORGES

Respondents

Before:

The Hon. Mr. Brian Alleyne, SC — Justice of Appeal
The Hon. Mr. Michael Gordon, QC — Justice of Appeal
The Hon. Madam Suzie d'Auvergne — Justice of Appeal [Ag.]

Appearances:

Ms. Nicole Sylvester with Ms. Rochelle Forde for the Appellants
Mr. Andrew Cummings for the 1st Respondent

Mr. Alair Sheppard Q.C. with Mr. Joseph Delves and Mr. Richard Williams for the 2nd Respondent

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2004: October 21;
December 8.

JUDGMENT

[1] GORDON, J.A.: In 2003 the Government of Saint Vincent and the Grenadines determined that a Commission of Inquiry should be established pursuant to the Commissions of Inquiry Act, Chapter 14 of the Revised Laws of Saint Vincent and the Grenadines 1990, (hereafter "the Act") to inquire into matters and affairs surrounding the Ottley Hall project in Saint Vincent and the Grenadines

[2] By an instrument under the Governor General's hand dated 10th March 2003 (hereafter "the First Instrument") the second Respondent was appointed sole Commissioner. The First Instrument was published in the Official Gazette of Saint Vincent and the Grenadines on the same day. In the Official Gazette dated 28th April 2003 there was published an "ERRATUM" under the hand of the Hon Attorney General which 'Erratum' sought to correct certain "errors made in the Instrument Appointing the Commissioner to the Ottley Hall Inquiry, published in Extraordinary Gazette dated Monday 10th March, 2003". By an instrument dated 28th April 2003 (hereafter "the Second Instrument") under the hand of the Governor General the Second Respondent was again appointed sole Commissioner in an inquiry into matters and affairs surrounding the Ottley Hall project. The Second Instrument was never published in the Official Gazette. That is the historical background to the purported appointment of the second Respondent the efficacy of which is the subject of this appeal.

[3] Sometime after the publication of the First Instrument, and probably after the date of the Second Instrument, though nothing turns on this, the second Respondent commenced hearing evidence in the Inquiry. The first Appellant was summoned to

appear before the Commission by Summons dated 1st December 2003 and the second Appellant was also summoned to appear, though when is not clear from the record. These summonses were the genesis of these proceedings

[4] The legislative history of the law pursuant to which it was sought to appoint the second Respondent as Commissioner is as follows: the Act is published in the Revised Edition, 1990, Chapter 14; subsequent thereto, an amending Act was passed, the Commissions of Inquiry (Amendment) Act 2002 (hereafter referred to as "the Amending Act"). The most significant change for the purposes of this appeal, though not the only one, is the amendment of section 2 (1) of the original Act. The original reads as follows:

> "2. (1) The Governor-General may, whenever he deems it advisable, issue a commission appointing one or more commissioners and authorizing such commissioners, or any quorum of them therein mentioned, 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 Saint Vincent and the Grenadines, 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."

Section 2 (1) as amended by the amending Act reads as follows:

> "(1) The Governor-General may, whenever he considers it advisable, issue a commission appointing one or more commissioners and authorizing the commissioners, or any quorum of them, 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."

I have highlighted the areas of the original section which have been changed and the areas in the amendment which effected the changes for ease of reference.

[5] By a Claim Form with Statement of Claim attached, the Appellants sought against the Respondent, inter alia, a declaration that the instrument appointing the second Respondent was invalid, illegal, null, void and ineffective. The Appellants sought a number of other remedies which were ancillary to their basic claim. One remedy

sought that was not ancillary to the above claim was an order that there was a real likelihood of bias in the second Respondent. Learned Counsel for the Appellants advised the Court that this latter claim was not being pursued.

[6] The Respondents by way of Notice of Application applied to the Court for the following remedies:

- to strike out the Appellants' Claim Form and Statement of claim as disclosing no reasonable grounds for bringing the claim
- to strike out the Claim Form and Statement of Claim as being an abuse of the process of the Court
- to strike out the Claim Form and Statement of Claim as having no real prospect of success.

The learned Master upheld the Respondents' application and struck out the Claim Form and the Statement of Claim and it is that decision which is being challenged by this appeal. A number of grounds were advanced by the Respondents before the learned Master in support of their application, but before this Court, both Counsel for the Appellants and for the Respondents agreed that the single issue deriving from the Master's decision on which they sought the Court's ruling was whether the second Respondent had been validly appointed as a Commissioner under the Commissions of Inquiry Act (as amended).

[7] The first issue raised by the Appellants was under what instrument did the second Respondent act in hearing evidence for the Commission, and more particularly in summoning the Appellants to give evidence before the Commission. Was it the First Instrument or the Second Instrument. Learned Counsel for the Appellants argued that the Second Instrument, namely that of the 28th April 2004, not having been gazetted, had no efficacy in law. Section 16 of the Commissions of Inquiry Act reads as follows:

> "All commissions under this Act, and all revocations of such commission, shall be published in the Gazette, and shall take effect from the date of such publication."

[8] The section appears clear and mandatory. Failing the publication in the Gazette, the Second Instrument has no weight or power. I believe that learned Queen's Counsel for the second Respondent accepted that the Appellant's position was correct. He offered no counter-argument. (However see paragraph 15 hereunder) Indeed, his whole argument was predicated on the First Instrument being valid.

[9] Learned Counsel for the Appellants argued strenuously that in his Affidavit evidence the Second Respondent stated categorically that he relied on the Second Instrument for his authority and he could not resile from that position. Paragraph 2 of the Second Respondent's Affidavit dated 4th June 2004 reads as follows:

> "I am the sole Commissioner duly appointed by His Excellency the Governor General of the State of St. Vincent and the Grenadines by Instrument dated April 28th 2003 [*the Second Instrument*] to inquire into a number of matters relating to the Ottley Hall Project and the Union Island Project. A true copy of my Instrument of Appointment is herewith exhibited and marked EG1" [*the exhibited Instrument was the Second Instrument*]

[10] With the greatest of respect for the opinion of the second Respondent, what he believed or was advised has no effect on the legal position. If the First Instrument is valid, then notwithstanding his belief that he was acting pursuant to the Second Instrument, he was clothed with legal authority. If a Commissioner is duly authorized to hold an inquiry and purports to act pursuant to his authority in that behalf, his authority is not negated by his mistake as to the identity of the instrument of his authority. Thus expressed, the issue becomes starkly clear; was the First Instrument valid?

[11] I am of the view that the exercise to determine the validity of the First Instrument must start with a contextual examination of the Commissions of Inquiry Act and the 2002 amendment having regard to the statutory purpose for both pieces of legislation.

[12] As I understood the argument of learned Counsel for the Appellant, she urged the Court to find that when the Governor General addressed his mind to the criteria for appointing a Commission of Inquiry, he addressed his mind to the wrong criterion, namely the public welfare, rather than that the issue being inquired into was of sufficient public importance. Learned Counsel argued that the Governor General in addressing his mind to the wrong criterion was an error of substance rather than of form and thus such error could not be corrected by the "Erratum" previously referred to published in the Gazette under the hand of the Attorney General. If Learned Counsel is right that the Governor General addressed his mind to the wrong criterion, then I would agree with Counsel that an "Erratum" under the hand of the Attorney General in those circumstances would not cure the ill. At the very least, I opine, but do not decide, that such correction should be under the hand of the Governor General.

[13] The focus of the argument by Counsel for both the Appellants and the Respondents was the difference in meanings between the phrases "for the public welfare" contained in the Act and "of sufficient public importance" which the Amending Act substituted for the former phrase. Learned Queens' Counsel for the second Respondent argued that the former phrase is merely a sub-set of the latter. In other words, "public importance" includes "public welfare".

[14] Neither phrase has a technical meaning and so the ordinary meaning of each must be examined. Of great assistance in this regard is to have recourse to the whole of the Amending Act. The original section 2 (1) of the Act and the amendment thereto in the Amending Act have already been set out. It will readily be seen that the amended section 2 (1) is wider than the original. For example, in the original, commissioners may inquire, whereas in the amended version commissioners may inquire and report. In the original section 2 (1) the subject of enquiry is limited to "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 Saint Vincent and the Grenadines, or of any parish or district thereof, or any other

matter…" Under the amended section 2 (1) the commissioners may inquire "on any matter within the jurisdiction of Saint Vincent and the Grenadines or the conduct of public business in Saint Vincent and the Grenadines". In the former articulation it could well be argued that the formulation restricts the subject of inquiry to public or quasi public business whereas in the amended version there is no such restriction. Again, in the amending Act a new power is given to the commissioners to sit and hold hearings not only in Saint Vincent and the Grenadines but in any other country as the circumstances of the case may demand or require. Section 3 of the Amending Act expands the powers of the commissioners, if authorized by the Governor General, to engage the services of not only a secretary to the commission (as under the Act) but also investigators, experts, accountants or other technical advisers to assist and advise the commission and to depute them to inquire into any matter within the scope of the commission of inquiry. Section 4 of the Amending Act expands the powers of the Commissioners to summon witnesses, examine them under oath, call for the production of books plans or other documents. It can therefore be seen that the whole tenor of the Amending Act is to expand and clarify the Act and the powers there-under and not to constrain those powers. In that context, therefore, it becomes apparent that the intention of the legislature in the Amending Act was to enlarge not only the powers of a commission of inquiry, but to broaden the grounds on which the Governor General might issue such a commission. In other words, as Learned Queen's Counsel for the second Respondent put it, the former phrase is a subset of the latter. In my own words, the greater includes the lesser.

[15] Further in Russel (Randolph) and others v Attorney General of St Vincent and the Grenadines[1] a case from this Court which was approved by the Privy Council, Sir Vincent Floissac, Chief Justice said the following at page 134:

> "The question therefore arises whether it is concordant with judicial practice or principle to construe a constitutional or statutory provision as being mandatory in circumstances where (1) the provision prescribes the formalities to be observed before or during the performance of an act in

[1] (1995) 50 WIR 127

the execution of a public duty, (2) the act was performed without those formalities or in violation of the principle, (3) the nullification of the act would result in serious general public inconvenience and in injustice to persons who had no control over those entrusted with the public duty, and (4) the nullification of the act would not promote the main object of the provision.

> "That question was answered by the Privy Council in Montreal Street Railway Co. v Normandin[2]. There Sir Arthur Channel (delivering the opinion of the Board) said: 'When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to those persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the acts done… In the case now before the Board it would cause the greatest public inconvenience if it were held that neglect to observe the provisions of the statute made the verdicts of all juries taken from the list *ipso facto* null and void, so that no jury trials could be held until a duly revised list had been prepared.'"

[16] On the authority of Russel v The Attorney General of Saint Vincent and the Grenadines and the Montreal Street Railway Co case I find that if I were to hold that all that has been done by the Commission to date was null and void, this would "cause the greatest public inconvenience" not to mention a waste of public funds. It is not necessary to decide, but an argument could be made in the light of the learning in those cases that the Second Instrument might also be valid.

[17] I find support for the view that it is not a legal requirement that the grounds specified in the First Instrument should slavishly follow the language in the Amending Act in the case of Carltona Ltd v Commissioners of Works et al[3]. That case concerned the requisitioning of a factory by the Commissioners of Works under the Defence (General) Regulations 1939. The regulation under which this action was taken stated that if a competent authority thought it necessary or expedient to take possession of land "in the interests of public safety, the defence

[2] [1917] AC 170
[3] [1943] 2 All ER 560

of the realm or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community" then it might do so. The Plaintiff's factory was requisitioned and he brought suit claiming the requisitioning was invalid. One of the grounds on which the requisitioning was challenged was that the notice given to the Plaintiff did not conform to the language of the regulation in that it stated as the grounds "The National Interest". Lord Greene M.R. said this at page 562:

> "The mere use of the phrase "in the public interest" in this letter appears to lead the Plaintiffs nowhere when the fact appears, as it appears as clearly as any thing can be, that the assistant secretary was acting with regard to this regulation itself and was using the phrase "in the national interest" as a comprehensive phrase to mention all the grounds which are mentioned in the regulation."

[18] On the basis of the reasoning above I find that the second Respondent was properly appointed. This appeal is therefore dismissed. In the circumstances if this case I will make no order as to costs.

Michael Gordon, QC
Justice of Appeal

I concur.

Brian Alleyne, SC
Justice of Appeal

I concur.

Suzie d'Auvergne
Justice of Appeal [Ag.]