SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CIVIL APPEAL NO.4 OF 2005

BETWEEN:

OTHNEIL SYLVESTER

Appellant

and

[1] FAELLESEJE, A DANISH FOUNDATION

Respondent

Before:

The Hon. Mr. Brian Alleyne, S.C.	Chief Justice [Ag.]
The Hon. Mr. Denys Barrow, SC	Justice of Appeal
The Hon. Mr. Hugh Rawlins	Justice of Appeal

Appearances:

Sir Henry Forde Q.C., Mr. Russel Martineau S.C., Mr. E. Robertson and Ms. Nicole Sylvester for the Appellant

Mr. Karl Hudson Phillips Q.C., Mr. Stanley Marcus S.C., Mr. Bertram Commissiong Q.C., and Ms. Mira Commissiong for the Respondents

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2005: December 19;
2006: February 20.

JUDGMENT

[1] BARROW, J.A.: Against the decision of the master (i) refusing to strike out proceedings in which an aggrieved person sought a *rule nisi* to issue against the appellant ("the barrister") to show cause why he should not be suspended or struck off the roll of barristers and solicitors, (ii) refusing to stay those proceedings, and (iii) directing that the *rule nisi* issue to the barrister to show cause, the appellant has appealed with leave of this court.

[2] The proceedings in the High Court were commenced by notice of application filed by Faelleseje, A Private Foundation ("the foundation"), who claimed that the barrister had

acted as the foundation's legal adviser in a land purchase. The foundation alleged that the barrister had advised them to arrange the purchase using corporate vehicles and shareholding structures to avoid the effect of legislation restricting the right of aliens to purchase land in St. Vincent, that they followed that advice, that the foundation was subsequently told the arrangement was illegal, that the land was compulsorily acquired by the Government, that the barrister received compensation money from the Government, and that he has for many years failed and refused to pay over the money received to the foundation.

Jurisdiction of a judge in chambers

[3] Objection was taken before the master, by counsel for the barrister, that the master had no jurisdiction to conduct the proceedings that were placed before him, only a judge in chambers could do so. Reliance was placed on the terms of Booklet 4 of the Eastern Caribbean Supreme Court (Saint Vincent and the Grenadines) Act[1] which contains the Barristers and Solicitors Rules that specify in rule 4 as follows:

> "4. Proceedings. (1) Proceedings to suspend or strike a barrister or solicitor off the roll shall be commenced by an application to a judge in chambers for a rule to issue to the barrister or solicitor named to show cause why he should not be suspended or struck off the roll.
>
> (2) Such application may be made by the Attorney General or by the person aggrieved by the action of the barrister or solicitor complained against.
>
> (3) In the event of a rule being granted, further proceedings thereunder shall be in open court."

[4] The Supreme Court Act was amended to create the jurisdiction of a master of the Supreme Court by the addition of a new section 12A which provides:

> "12A (1) A Master shall exercise the authority and jurisdiction of a judge of the High Court sitting in chambers and any other authority and jurisdiction as may from time to time be assigned by Rules of Court made under section 17 of the Court Order.
>
> (2) Where a Master has and exercises jurisdiction in relation to any matter, he shall have all the powers, rights, immunities and privileges of a judge in relation to such matter."

[1] Cap 18 of the Laws, Revised Edition 1990.

[5] Counsel for the barrister argued that s 12A does not say that a master **is** a judge in chambers. It is one thing to say that a person has the same jurisdiction as another, counsel argued, but it is a different thing to say that a person can exercise that same jurisdiction every time that other person is to exercise that jurisdiction. Counsel insisted that when the rule says a judge sitting in chambers it means what it says. It would have been a different matter if the amendment had said that the words 'judge sitting in chambers' includes Master, but that is not the amendment, counsel argued. Counsel colourfully put it that "this is judge business not master business". There can be no encroachment on the jurisdiction of judges by a side wind, counsel argued, and he added that the rule expressly provides for the proceedings to be conducted by a judge in chambers so that any amendment needed to have been made to the Rules rather than to the Act.

[6] It seems to me that the amendment does precisely what counsel denies that it does. The amendment does not say that the master has the same jurisdiction as a judge in chambers; it says that a master shall *exercise the* authority and jurisdiction of a judge sitting in chambers. The master, therefore, does not exercise a jurisdiction that is separately conferred on him; he exercises, specifically, *the* jurisdiction that is conferred on a judge in chambers. Indeed, it seems that until such time as other authority and jurisdiction are assigned to the master by Rules of Court, the only jurisdiction that he may exercise is that possessed by a judge in chambers. To borrow counsel's colour, the master's business is to do judge business.

[7] Counsel's submission, that conferring equivalent jurisdiction on a newly created official does not vest the existing jurisdiction of an established officer in that new official, is shown to be inapplicable to the exercise of jurisdiction for which s 12A provides, when one looks at a provision such as s 7 of the Supreme Court Act. That section establishes the jurisdiction of the court by providing that it shall have all such jurisdiction as were vested in the High court in England. To this scenario counsel's submission is applicable: the court in St. Vincent cannot exercise the jurisdiction of the court in England even though the former has jurisdiction equivalent to that possessed by the latter. It would have been a different

thing if it had been provided that the former shall exercise *the* jurisdiction of the latter. It is this last that s 12A provides – that the master shall exercise *the* jurisdiction of a judge in chambers.

[8] The amplitude of the jurisdiction that the master may exercise is also to be gathered from the language of sub-rule 4(2), which speaks of the master's exercise of jurisdiction in any "matter". This word has a special significance when used in the Supreme Court Act because it is defined[2] to include "actions" which refers to civil proceedings between parties but also to include, as well, proceedings that are not actions. The provision for the master to exercise jurisdiction in any "matter" was not accidental; it was intended to reflect that it was not just in civil proceedings that he would exercise the jurisdiction of a judge sitting in chambers but in other proceedings, as well. This is clear confirmation, in my view, that the master may exercise the jurisdiction of a judge in chambers in relation to disciplinary proceedings.

Nature of the proceedings

[9] A major point was taken on behalf as to the nature of the proceedings and it helps to set out the full heading and title of the proceedings, which were as follows:

> Claim No. 86A of 2004
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> In the Matter of the Eastern Caribbean Supreme Court (Saint Vincent and the Grenadines) Act Chapter 18 of the Laws of Saint Vincent and the Grenadines, Revised Edition 1990, Section 76 and Paragraphs 3 and 4 of the Barristers and Solicitors Rules Booklet 4
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> And
>
> In the Matter of Unprofessional Conduct by Othneil R. Sylvester A Barrister and Solicitor
>
> And

[2] At s. 2

In the Matter of the Application for a Rule to Issue Othneil R. Sylvester Barrister and Solicitor to show cause why he should not be suspended or struck off the roll of Barristers and Solicitors

And

In the matter of the application of Faeselleje a private commercial foundation of Denmark

Between

Faellesje, A Private Danish Foundation

Claimant

and

Othneil Sylvester

Defendant

[10] It is now common ground that disciplinary proceedings against a barrister are neither criminal nor civil proceedings. This is clearly established in this jurisdiction by this court's decision in Hansraj Matadial v John Bayliss Frederick.[3] It follows that there are no claimant and defendant in such proceedings because there are no parties since there is no litigation. To so characterize the person aggrieved and the barrister who is the subject of the proceedings reflects the major flaw in the foundation of the proceedings and there is nothing to do but dismiss the proceedings, the appellant argued. The very mode of commencing the proceedings, by notice of application, which is a form created by the Civil Procedure Rules 2000 for use in civil proceedings, shows how irremediably the proceedings are flawed, counsel submitted. Counsel asserted that it was not that the wrong form made the proceedings flawed, but that the wrong form made the proceedings of a wrong nature: the wrong jurisdiction was invoked. It is not possible, counsel urged, to change what is fundamentally civil proceedings into disciplinary proceedings.

[11] Counsel for the barrister failed to persuade me that the confusion produced by the foundation's insufficiently discriminating adaptation of a civil procedure form for commencing disciplinary proceedings was fatal. The response by counsel for the

[3] St. Vincent and the Grenadines Civil Appeal No. 23 of 2001.

foundation to the allegedly fundamental flaws is persuasive: the specific intituling of the proceedings made its nature beyond peradventure. As set out in the title reproduced in paragraph 10 above, the matter was stated to concern the specific section of the Supreme Court Act and the highly specialised Barristers and Solicitors Rules Booklet that deal with the disciplining of barristers; it was stated to concern alleged unprofessional conduct by the barrister; it was stated to concern an application to strike the barrister off the roll; and it identified the foundation as the applicant in the proceedings. The minor solecisms that were all that counsel could produce did not justify the conclusion that the proceedings were thereby rendered incapable of continuing as disciplinary proceedings. It is clear that the proceedings were disciplinary rather than civil.

A prima facie case

[12] Leading senior counsel for the barrister rose to submit that the master having heard submissions on the application to stay proceedings went on to rule not only on that issue but also to rule that the affidavit disclosed a prima facie case against the barrister sufficient to justify that a rule should issue. Leading senior counsel for the foundation rose to submit in response that the master had not simply heard an application to stay proceedings but had also conducted a hearing on the merits. Counsel for the foundation invited the court to hear junior counsel on what took place before the master but we rejected the offer of 'evidence' from the bar table.

[13] In any case, counsel for the foundation argued, the application for the rule nisi was intended to be without notice so that ultimately it did not matter if the barrister was not heard to argue about whether there was a prima facie case since he really had no entitlement to be heard. In response to this submission it may be mentioned that the case of Rees v Crane[4] shows that proceeding ex parte in disciplinary proceedings, even if it is only at the stage of deciding whether or not to allow proceedings to progress, is seriously open to challenge. Although opposite views were expressed on whether, in the instant proceedings, the barrister had a right to be heard, the issue was not argued before us and

[4] [1994] 1 All ER 833 pgs.847-848

it would therefore be inappropriate to make any unaided pronouncement on it. Similarly, I would decline to make any adjudication on the submission that the barrister was not heard on the question whether a prima facie basis was established for a rule nisi to issue because that question formed no part of the grounds of appeal and this court is in no position even to determine what in fact took place before the master and so cannot pronounce on the legality of what occurred.

Stay of proceedings

[14] Other proceedings arising from the same facts[5] were pending at the time that this matter came before the master for hearing (as they still are) and counsel for the barrister applied for a stay of these proceedings on the ground that it is oppressive to proceed with both sets of proceedings simultaneously. Counsel submitted that in all the cases that were cited before the master, in which civil proceedings and disciplinary proceedings were extant at the same time, the civil proceedings went ahead and the disciplinary proceedings were deferred and this was the course that the master should have followed in the instant case. There were also natural justice implications to the master's decision, counsel submitted.

[15] The master decided, in the exercise of his discretion, that while the two sets of proceedings were based on the same set of facts, the relief sought in them were not identical. Indeed, stated the master, it would not be possible to obtain the relief sought in the instant proceedings unless separate disciplinary proceedings were brought and so he did not consider that the instant proceedings were an abuse of process. It may have been inappropriate, bearing in mind the nature of disciplinary proceedings, to refer to the desired outcome of a complaint as 'relief', but I do not think that reference vitiated the conclusion that simultaneous disciplinary and civil proceedings did not amount to an abuse of process and so did not merit striking out.

[5] Saint Vincent and the Grenadines Claim No. 86 of 2004, between Faellesje, A private Danish Foundation and Othneil Sylvester.

[16] The record of appeal shows that the barrister applied to stay proceedings on the ground that the civil proceedings raise substantially the same issue as proceedings in the disciplinary proceedings. The application was supported by the affidavit of a clerk in the firm of the solicitors acting for the barrister. It was purely formal and argumentative. There were no personal or particular facts placed before the master that could entitle the barrister to a stay. The affidavit simply stated that the two proceedings relate to the same issue, that the instant proceedings are dependent and inextricably bound up with the issues in the civil claim, that the civil claim is estimated to last at least four months and accordingly a stay of five months was being requested, and that the barrister may be prejudiced if a stay was denied as there was a real likelihood that the civil proceedings may be struck out.

[17] In the written submissions placed before the High Court extensive argument was given to this issue. One premise in the arguments for the barrister was that the mere fact that two sets of proceedings were currently before the court made it oppressive. That is not a proposition that I would accept: no authority was cited that supports it and to my mind there has to be a factual basis to establish oppression.

[18] The related arguments were made that the barrister should not be vexed twice in the same matter and that there was a likelihood of inconsistent verdicts but the point that counsel for the barrister made about the different nature of civil and disciplinary proceedings is relevant here. It has not been shown how disciplinary proceedings, in which the criminal standard of proof applies[6], can be embarrassed by a possible inconsistent verdict in civil proceedings. Indeed, I can see the possibility of civil proceedings being defeated on certain grounds (which I will not mention so as to avoid altogether any suggestion that I endorse them) while disciplinary proceedings are unaffected by those grounds, so the outcome of one set of proceedings need not hinge on the outcome of the other. It is also to be noted that the submission on behalf of the barrister about not litigating the same issues in two sets of litigation at the same time is misconceived, because it is clear that disciplinary proceedings are not litigation and are not conducted to resolve issues. In this regard, counsel's reference to inconsistent verdicts is also misconceived because a verdict

[6] See Campbell v Hamlet [2005] 3 All ER 1116 (PC).

refers to the outcome of civil or criminal proceedings and, as was the foundational point of counsel's submission, the instant proceedings are neither.

[19] Even now there is not advanced any factual basis for the assertion that simultaneous proceedings would be oppressive. It can be accepted as a matter of argument that simultaneous proceedings would be inconvenient and expensive for the barrister but on reflection, probably no more so than they would be for the foundation. In any case, I do not see that inconvenience alone can justify interfering with the master's discretion and it was not argued that it could. I note that in the written submissions on appeal the matter of a stay was not even identified as an issue, although it was the subject of a ground of appeal and was advanced in oral argument. The short response to the argument is that the master exercised his discretion on the issue and, as is well known, even if this court would have exercised the discretion differently, it will not interfere with the master's exercise of discretion "unless the appellate court is satisfied the judge erred in principle and as a result of this error the decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong."[7] That has not been shown and, in my view, this court has no basis upon which to interfere with the master's refusal to stay these proceedings.

Conclusion

[20] In the circumstances, I would dismiss the appeal against the decision of the master to issue the rule nisi for the barrister to show cause. The disciplinary proceedings may continue as such but I would direct, as part of the court's inherent case management powers, that the heading and title of the matter be amended to reflect the true nature of the proceedings: the details I would leave to be determined by the master. Counsel for the foundation informed the court that there is a practice in this state for the judge sitting in chambers, upon ordering the rule nisi to issue, to direct that a charge be formulated in a schedule to the order and served on the barrister; the charge would be in the form of a summary of the allegations that led to the issue of the rule nisi. I see no reason why this

[7] Dufour v Helenair Corporation (1996) E.C.L.R. 95.

practice should not be followed and I would so order and direct that the master manage compliance with the practice and approve the terms of a draft. We have heard no submission on costs and I would order that the matter of costs be reserved for the conclusion of the disciplinary proceedings.

Denys Barrow, SC
Justice of Appeal

I concur.

Brian Alleyne, SC
Chief Justice [Ag.]

I concur.

Hugh Rawlins
Justice of Appeal