

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

HIGH COURT CIVIL CLAIM NO. 300 of 2007

IN THE MATTER OF AN APPLICATION BY SIR JAMES FITZ ALLEN MITCHELL FOR JUDICIAL REVIEW OF CERTAIN DECISIONS OF THE COMMISSION OF INQUIRY APPOINTED BY HIS EXCELLENCY THE GOVERNOR-GENERAL ON 10TH MARCH 2003 UNDER THE COMMISSIONS OF INQUIRY ACT CHAPTER 14 OF THE LAWS OF SAINT VINCENT AND THE GRENADINES (REVISED EDITION) 1990 AS AMENDED TO INQUIRE INTO ALL OF THE FACTS AND CIRCUMSTANCES ON AND RELATING TO THE OTTLEY HALL PROJECT IN SAINT VINCENT

BETWEEN:

SIR JAMES FITZ ALLEN MITCHELL

Applicant/Intended Claimant

V

EPHRAIM GEORGES

(Sole Commissioner of the Ottley Hall Commission of Inquiry)

THE ATTORNEY GENERAL OF SAINT VINCENT AND THE GRENADINES

Intended Defendants

Appearances:

Mr. Ramesh Lawrence Maharaj; Mrs. Louise Mitchell-Joseph and Ms. Mira Commissiong
for the Applicant

2007: September 7

2007: September 14

RULING

[1] **BRUCE-LYLE, J :-** The applicant, Sir James Fitz Allen Mitchell (hereinafter referred to as “the applicant”) applied to this Court for the following orders by way of a Notice of Application, supported by Affidavit and Exhibits and a bundle of authorities -:

(1) an order that this application be heard during the vacation;

- (2) and order giving him leave to make a claim for judicial review of:
- (a) the decision of the said Commission or Inquiry (as contained in a letter dated 20th August 2007 from the said Commission of Inquiry to the applicant) to deny the applicant the payment of his reasonable costs of legal representation at the inquiry;
 - (b) the findings and/or decisions and/or statements of opinion of the said Commission of Inquiry in relation to the applicant which are contained in a second letter dated 20th August 2007 from the Commission of Inquiry to the applicant; and
 - (c) the decision of the said Commission of Inquiry (as contained in a letter dated 3rd September 2007 from the Counsel to the Commission of Inquiry to the applicant) to proceed with its inquiry on Monday 10th September 2007, notwithstanding the applicant's request by letter dated 3rd September 2007, that on the grounds of apparent bias, procedural unfairness, and breach of natural justice, the Commission of Inquiry not proceed any further with its inquiry;

[2] In paragraph 5 of the said Notice of Application the applicant sought the following reliefs:

- (1) a declaration that the decision of the Commission (as contained in a letter dated 20th August 2007 from the Commission to the applicant) to deny the applicant the payment of his reasonable costs of legal representation at the inquiry as illegal and/or unreasonable and/or an abuse of power and is accordingly unlawful;
- (2) an order of certiorari to remove into this Honourable Court and quash the decision mentioned in paragraph one above;
- (3) a declaration (as against the Attorney-General) that the Commissions of Inquiry (Amendment) Act 2007, being Act No. 17 of 2007, has contravened and/or is likely to contravene the applicant's rights under Sections 6 and 8 of the constitution and is accordingly unconstitutional and invalid and of no effect;
- (4) damages (as against the Attorney-General of Saint Vincent and the Grenadines as representing the State) for misfeasance in public office;

- (5) a declaration that the applicant is entitled to the payment of the reasonable costs of his legal representation as determined by the Registrar of the Supreme Court, at the whole of the Inquiry being conducted by the said Commission of Inquiry;
- (6) a declaration that the findings and/or decisions and/or statements of opinion of the Commissioner made in relation to the applicant and which are contained in a letter dated the 20th August 2007 from the Commissioner to the applicant were made as a result of the failure by the Commissioner to observe the requirements of natural justice and procedural fairness in relation to the Applicant/Intended Claimant and/or are vitiated by apparent bias, and are accordingly unlawful, null and void and of no effect;
- (7) an order of certiorari to remove into this Honourable Court and quash the findings and/or decisions and/or statements of opinion mentioned in paragraph (6) above;
- (8) an order of certiorari to remove into this Honourable Court and quash the witness summons issued by the Commissioner on 24th January 2007 and addressed to the applicant;
- (9) a declaration that the Commissioner has breached his obligation and/or duty under Section 7 of the Commissions of Inquiry Act to make a full, faithful and impartial inquiry;
- (10) damages to be paid by the Commissioner;
- (11) a declaration that the decision of the Commission (as contained in a letter dated 3rd September 2007 from the Counsel to the Commission to the applicant) to proceed with its inquiry on Monday 10th September 2007 is vitiated by apparent bias and is accordingly unlawful, null and void and of no effect;
- (12) an order of prohibition prohibiting the Commissioner from proceeding any further with the inquiry;
- (13) an interim order staying the inquiry by the Commissioner pending the hearing and determination of the application for judicial review herein;
- (14) alternatively to (13) above, an interim injunction preventing the Commissioner from proceeding any further with the inquiry pending the hearing and determination of the application for judicial review herein;
- (15) costs certified fit for two counsel;

(16) that all other necessary and consequential decisions be given.

- [3] It is necessary to give a brief history of events leading to this application for leave for Judicial Review being sought. On the 10th day of March 2003 His Excellency the Governor-General of Saint Vincent and the Grenadines, pursuant to Section 2 of the Commissions of Inquiry Act, Chapter 14 of the Laws of Saint Vincent and the Grenadines, appointed Retired High Court Judge, Mr. Ephraim Georges as the sole Commissioner to inquire into all of the facts and circumstances on and relating to the Ottley Hall Development Project in Saint Vincent. This inquiry has been ongoing and has heard from quite a number of witnesses to date.
- [4] Sir James Mitchell, KCMG, PC, of Villa Helianthus, in the island of Bequia, in the State of Saint Vincent and the Grenadines, former Prime Minister of St. Vincent and the Grenadines, is a person whose conduct is, by virtue of the terms of reference of the said Commission of Inquiry, a subject of the inquiry being conducted by the said Commission. He has, by letter from the said Commission dated 20th August 2007 and by a witness summons issued by the said Commission dated 24th January 2007, been summoned to appear as a witness before the said Commissioner on Monday 10th September 2007.
- [5] I propose to deal with the challenge by the applicant to the constitutionality of enacting Act No. 17 of 2007 in repealing the applicant's vested right to recover the payment of reasonable legal fees in relation to representation at the Inquiry first.
- [6] This is in view of the fact that the applicant has brought in a single set of proceedings both a constitutional motion and an application for judicial review. There is no obligation on the Court to grant leave to proceed with regard to the constitutional motion. This is not the case or position concerning the applicant's claim for judicial review, where leave has to be sought and obtained before proceeding with the claim.
- [7] The applicant challenges the constitutionality of the 2007 Act on two grounds:-

- (a) as a disproportionate deprivation of property under Section 6 of the Constitution;
and
- (b) as a disproportionate interference with the applicant's right to have the extent of his civil rights determined by an authority prescribed by law.

[8] Under Section 6(8) of the Constitution of Saint Vincent and the Grenadines "property" is defined as:

"Any land or other thing capable of being owned or held in possession and includes any right relating thereto, whether under a contract, trust or law or otherwise and whether present or future, absolute or conditional."

[9] The Commissions of Inquiry Act 1990 as amended in 1993 (by Act No. 23 of 1993) entitled any person whose conduct was the subject of an inquiry under the Act to be represented by a legal practitioner at the whole of the inquiry, and the right to the payment of the reasonable costs of his legal representation, such costs to be determined by the Registrar of the Supreme Court.

[10] The applicant's right to recover payment of his reasonable costs crystallized when the Applicant was required to provide a written statement on 8th October 2003 or when he was required to attend the inquiry. This I am in no doubt about.

[11] On the 8th June 2007 a Bill was piloted in the House of Assembly by the Prime Minister, to amend this said Act by repealing those provisions of the Act which conferred on a person whose conduct was the subject of an inquiry the right to the payment of the reasonable costs of his legal representation as determined by the Registrar of the Supreme Court. This Bill was debated and passed in one day in the absence of the opposition who had indicated earlier that they were boycotting the sittings of the House of Assembly on that day. The Bill was enacted as Act No. 17 of 2007 and was assented to on the 22nd June 2007, and not 8th June 2007 as stipulated in the applicant counsel's submissions to the Court.

[12] It is interesting to note that this recent amendment was taken to the House and passed after the applicant had on the 24th April 2007 requested the payment of his reasonable legal fees. I diverge with the applicant at this point for reasons which I will expound on later in this ruling.

[13] There is no doubt in my mind that the applicant's vested right to be compensated for the cost of legal representation before the inquiry plainly falls within the scope of Section 6(8) of the Constitution and Section 17(3)(c) of Chapter 10 of the Laws of Saint Vincent and the Grenadines Revised Edition 1990 which deals with Interpretation and General Provisions. It states as follows:- Section 17 –

“(3) where a written law repeals in whole or in part any other written law, then, unless a contrary intention appears, the repeal shall not –
(c) affect any right, privilege, obligation or liability acquired or accrued or incurred under any written law so repealed ...”

[14] There is no dispute in my mind that the effect of Act 17 of 2007 was to extinguish the Applicant's vested rights accrued under Act No. 23 of 1993. The Inquiry was commissioned by His Excellency on the 10th March 2003. The applicant and his counsel were notified and have been in correspondence with the Commission since 2003. This effectively puts the applicant under the provisions of the Commissions of Inquiry Act as amended by Act 23 of 1993. I cannot envisage that the Legislature intended that some witnesses who were subject to the Inquiry and who had the benefit of legal representation when they testified before Act 17 of 2007 came into force would have their reasonable costs paid by the State and those who would testify after Act 17 of 2007 came into force would not be entitled to their reasonable costs under the same Commission of Inquiry.

[15] Applying my commonsense and the principles of Interpretation of Statutes, I cannot agree with Learned Senior Counsel when he says in his submissions that the effect of Act 17 of 2007 was to extinguish the Applicant's vested right, nor that the deprivation of the Applicant's property was not for a legitimate purpose and/or was disproportionate in that the 2007 Act was targeted at depriving the applicant of his right to recover reasonable legal fees in relation to the inquiry. I cannot find any unconstitutionality affecting the

applicant to the point of depriving him of his property contrary to Section 6 of the Constitution at this stage of the inquiry.

- [16] To go further Act 17 of 2007 was not given retrospective effect. It therefore took effect from the date it was assented to by His Excellency the Governor-General, on the 22nd June 2007. Clearly the applicant's appearance before the Commission would be guided by Act 23 of 1993 and not Act No. 17 of 2007. In G.C. Thornton's text "**Legislative Drafting**" Third Edition at Page 117 under the Rubric "(E) Proposals for retrospective Legislation" it is said –

"It is desirable that wherever possible a statute should indicate in express and unmistakable terms whether (and, if so, how far) or not it is intended to be retrospective. The expenditure of much time and money would be thereby avoided. Retrospective laws offend against the general principle that legislation intended to regulate human conduct ought to deal with future acts and ought not to change the character of past transactions carried on upon the faith of the then existing law."

- [17] In the same text referred to above, under the Rubric "(b) Proposals affecting private property rights" it says as follows at page 117 –

"Also in this class are proposals which would interfere with the provisions of existing contracts or detract from rights or privileges enjoyed under existing written law.

It is certainly not suggested that legislation on the above subject is wrong in principle; it is necessary, however, to proceed with caution and to have regard to the rights of the persons affected and include where necessary transitional provisions and other safeguards, rights of appeal and compensation provisions."

- [18] This buttresses my view that it could not have been the intention of the Legislature that Act 17 of 2007 should have retrospective effect. As it stands a perfect comedy of errors has been created where some witnesses would fall under Act 23 of 1993 and others under 17 of 2007. I therefore hold that the applicant is clearly guided by Act 23 of 1993. Retrospectivity has not been specific.

- [19] Where I have great difficulty is with the applicant, as mentioned earlier, in his precipitate request for payment of his reasonable costs by way of letter to the Commission dated 24th

April 2007. It is clear that the Commission has not completed its work. The inquiry is still ongoing. To ask for payment of costs at this stage is premature and unreasonable in the circumstances. And consequently to seek the protection of the Court at this stage concerning Acts 23 of 1993 and Act 17 of 2007 is also premature. I would have thought that the request for payment of reasonable costs would have been properly made after the whole of the inquiry and the Commissioner refuses the request for payment of reasonable costs.

[20] Having thus said I cannot in all conscience agree with the Learned Senior Counsel that this amounted to a disproportionate interference with the right of access to the inquiry. It is my view flowing from what I have said earlier that the applicant has not been deprived of his right of access to defend himself at the inquiry under Section 8(8) of the Constitution which entitles him to any Court or other authority prescribed by law for the determination of the existence or extent of any civil right or obligation. I therefore rule that the letter dated the 20th August 2007 did not have the effect as posited by Learned Senior Counsel, but at best the position taken by the Commissioner was one of non-committal in acceding to the request for payment of reasonable costs by the Applicant, in view of Act 17 of 2007, until the whole of the inquiry had concluded. Therefore, there is no constitutional issue arguable before this Court for determination. The constitutional motion is hereby dismissed in its entirety as being premature. As far as this Court is concerned this Commission of Inquiry is guided by the Commissions of Inquiry Act (as amended by Act 23 of 1993). Act No. 17 of 2007 therefore guides future commissions of inquiry and not this instant one.

[21] I now turn to discuss the applicant's application for leave for judicial review. In paragraph 10 of the applicant's Notice of Application supported by the Affidavit of Sir James Mitchell the applicant referred to the letter dated 20th August 2007 (the Salmon Letter) to the applicant in which the applicant alleges that the Commissioner of the Inquiry made certain findings and/or decisions and/or statements of opinion specifically in relation to the applicant. These are set out in paragraphs 10. (1). (a), (b), (c), (d), (e), and paragraph 10. (2) of the Notice of application and supported by the affidavit of the applicant.

[22] There was also an allegation of certain findings and/or decisions and/or statements of opinion specifically in relation to the applicant in an interim report compiled by the Commissioner and sent to His Excellency The Governor-General dated 18th November 2005. The Gravamen of the applicant's case for this application for leave centers on issues of alleged bias or likelihood of it raised as a result of the Salmon Letter to the applicant dated the 20th August 2007 and the Interim report dated the 18th November 2007.

[23] I have no quarrel with Learned Senior Counsel for the applicant's submissions on the relevant tests for apparent bias and authorities provided to support such. In fact the plethora of authorities submitted are all relevant if this court finds that there is apparent bias which would afford leave to file a claim for judicial review.

[24] I have carefully considered the alleged offending areas of the Salmon Letter to the applicant dated the 20th August 2007. I have also carefully analyzed the Salmon principles as enunciated by the Rt. Hon. Lord Justice Cyril Salmon in his report under the Royal Commission on Tribunals of Inquiry which was presented to Parliament in England by command of Her Majesty in November 1966. These principles guide or regulate proceedings of Commissions of Inquiry in England and Common Law jurisdictions like Saint Vincent and the Grenadines.

[25] Having so analyzed, I am convinced beyond doubt that the Commissioner conformed strictly to the dictates of the Salmon principles in his letter to the Applicant dated 20th August 2007, specifically principle Number 2 which states –

“Before any person who is involved in an inquiry is called as a witness he should be informed of any allegations which are made against him and the substance of the evidence in support of them.”

This the Commissioner, Mr. Justice Ephraim Georges to my mind has effectively done or complied with in the said Salmon Letter. How could he have done it better than he did, by following strictly to the evidence that alleges matters against the applicant and setting them out in the letter so the applicant is made fully aware of the allegations against him? What

the applicant and his counsel have put before this Court are certain portions and chunks of the letter which taken out of context would make a fair minded observer conclude that there is a real possibility of the tribunal being biased.

[26] If one reads the letter as a whole and in context, it becomes clear that all that was said in the letter were couched from evidence that had been led before the Inquiry by witnesses up to the point in time of the letter, and which touched upon the applicant. The letter concludes by saying –

“You are specifically requested to note that you should come prepared in the course of your testimony to show cause why the commission ought not to report adversely upon you for the reasons set out herein.”

This clearly indicates that the allegations set out in the letter were or amount to provisional criticisms of the evidence so far and touching upon the applicant to which he was now being called upon to respond to by appearing and testifying before the Commission. This the Commissioner is perfectly entitled to do in his functions as Commissioner in accordance with the Salmon principles. I do not consider the contents of this letter of the 20th August 2007 as anything more than that.

[27] The nature of a Salmon letter should include areas of provisional criticisms based on the evidence both written and oral led before the inquiry so far. This puts the witness being summoned on guard or on notice as to the nature of the allegations being made against him by way of the evidence led and for him to show cause why these provisional criticisms should not be made against him at the end of the inquiry.

[28] In so doing, a clear distinction should be made between an inquiry and a criminal trial. In an Inquiry there is no prosecution or a defendant. All witnesses are witnesses for the Commission who assist in the fact finding and ascertainment of the truth as per the Commission’s mandate. At the end of the whole inquiry the Commission may make findings upholding or dismissing these provisional criticisms as it deems fit based on the totality of the evidence before it – see the **Bahamas Air Inquiry Report** in the Commonwealth of Bahamas with Sir Williams Randolph Douglas as Chairman, and Sir Lee

Moore (deceased) Q.C. as Counsel to the Commission; and the Report of the Royal Commission of Inquiry into the Medical Benefits Scheme – Antigua and Barbuda, July 2002 chaired by Sir Alister McIntyre with John Roberts Q.C. of the United Kingdom and Sierra Leone and Mr. Oscar Frederick as the other members of the Commission at Chapter Seven and under the Rubric “Findings”. Sir Richard Cheltenham Q.C. and Mr. Vernon Tomlinson were the counsel for that Commission.

[29] The same argument holds for the Interim Report dated 18th November 2005. It would serve no purpose to go over the same reasoning expounded above in relation to the Interim Report.

[30] This application, in my view should have been contemplated at the end of the whole inquiry rather than at this stage, when the Commission would have made its final findings. I see no apparent bias or a real likelihood of bias in any of the documents of 18th November 2005 and 20th August 2007.

[31] It is interesting to note that the applicant Sir James Mitchell and his Learned Senior Counsel have been in correspondence with the Commission of Inquiry since the 14th October 2003 to date. In fact, counsel’s first correspondence to the Commission as being the legal representative of the applicant pertaining to this Commission is dated the 17th November 2003. For the applicant to state in his Notice of Application that he was not represented by counsel at any stage of the Inquiry, which commenced on Friday 14th November 2003, and was not invited to attend before the Inquiry on a specified date until he received the witness summons dated 27th January 2007 enclosed with the Salmon letter dated 20th August 2007 and which advised him for the first time of his right to be represented by a legal practitioner at the whole of the Inquiry can at best be described as misleading.

[32] It is also clear from the Salmon principles that any material witnesses the applicant wishes called at the Inquiry should, if reasonably practicable, be heard; and he should have the

opportunity of testing by cross-examination conducted by his own solicitor or counsel any evidence which may affect him. This is still open to the applicant.

[33] Therefore I rule that:

- (1) leave for Judicial Review is refused;
- (2) the stay imposed on the Commission of Inquiry's proceeding is lifted forthwith
- (3) there will be no order as to costs.

.....
Justice Frederick V. Bruce-Lyle
HIGH COURT JUDGE