THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

HIGH COURT CIVIL CLAIM NO. 179 of 2007

IN THE MATTER OF THE CONSTITUTION OF SAINT VINCENT AND THE GRENADINES CHAPTER 2 OF THE LAWS OF SAINT VINCENT AND THE GRENADINES

AND

IN THE MATTER OF THE SAINT VINCENT AND THE GRENADINES PORT AUTHORITY ACT CHAPTER 373 OF THE LAWS OF SAINT VINCENT AND THE GRENADINES REVISED EDITION 1990

AND

IN THE MATTER OF THE INTERPRETATION AND GENERAL PROVISIONS ACT CAP 10 OF THE LAWS OF SAINT VINCENT AND THE GRENADINES REVISED EDITION 1990

AND

IN THE MATTER OF THE SAINT VINCENT AND THE GRENADINES PORT AUTHORITY PROCEDURES FOR USING THE KINGSTOWN FERRY TERMINAL FOR THE MOVEMENT OF PASSENGERS/CARGO/VEHICLES TO THE GRENADINES FROM THE KINGSTOWN FERRY TERMINAL

BETWEEN:

GODWIN L. FRIDAY

First Claimant/Respondent

TERRANCE OLLIVIERRE (Suing on behalf of himself and the people of the Southern Grenadines using the Grenadines Ferry Terminal at the Kingstown Port)

Second Claimant/Respondent

DANIEL COMMINGS

Third Claimant/Respondent

GODWIN FRIDAY (Suing on behalf of himself And the people of the Northern Grenadines using the Grenadines Ferry Terminal at the Kingstown Port)

Fourth Claimant/Respondent

MARGARET L. WILLIAMS

Fifth Claimant/Respondent

THE ATTORNEY GENERAL OF THE SAINT VINCENT AND THE GRENADINES

First Defendant/Applicant

THE SAINT VINCENT AND THE GRENADINES PORT AUTHORITY

Second Defendant/Applicant

THE PRIME MINISTER OF SAINT VINCENT AND THE GRENADINES

Third Defendant/Applicant

THE COMMISSIONER OF POLICE OF SAINT VINCENT AND THE GRENADINE

Fourth Defendant/Applicant

LEROY DOUGLAS OF THE SAINT VINCENT AND THE GRENADINES POLICE FORCE

Fifth Defendant/Applicant

ALPHEUS STAPLETON OF THE ROYAL SAINT VINCENT AND THE GRENADINES POLICE FORCE

Sixth Defendant/Applicant

Appearances:
Mr. Bertram Commissiong Q.C., Mrs. Kay Bacchus-Browne for the Claimants/Respondents
Mr. Camillo Gonsalves for the First Defendant/Applicant, Mr. Anthony Astaphan S.C. and Mr. Graham Bollers for the Second and Fifth Defendants/Applicants, Mr. Hans Matadial for the Third Defendant/Applicant, Mr. Arthur Williams for the Fourth Defendant/Applicant, Mr. Richard Williams for the Sixth Defendant/Applicant.

2007: June 14, 21
July 12, 19
October 31

RULING

[1] **THOM, J**: This is an application to strike out the Claimants' claim for constitutional redress and judicial review.

[2] On May 31, 2007 having obtained leave of the Court on the 17th day of May 2007, the Claimants applied to the Court for constitutional redress and judicial review.

[3] It is not disputed that with effect from the 16th day of April 2007, the Second Defendant the Saint Vincent and the Grenadines Port Authority commenced collection of EC$1.00 from each person traveling by ferry from the Kingstown Ferry Terminal.

[4] On April 27, 2007 there was a demonstration against the collection of the EC$1.00 organized by the National Democratic Party, Her Majesty's Loyal Opposition in the Parliament of Saint Vincent and the Grenadines at which time the 3rd and 5th Claimants alleged their fundamental rights were contravened by the 6th and 5th Defendants respectively.

[5] On the 4th day of June 2007 S.R.O. No. 24 of 2007 was Gazetted in the Official Gazette of Saint Vincent and the Grenadines. S.R.O. No. 24 of 2007 authorizes the Second Defendant to collect a sum of EC$1.00 for admission onto the Ferry Terminal.

[6] The Claimant's claim is based on the alleged illegal action of the Second Defendant in collecting the EC$1.00 prior to the enactment and publication of S.R.O. No. 24 of 2007, the alleged unconstitutionality and illegality of S.R.O. No. 24 of 2007 and the alleged assault by the 6th and 5th Defendants on the 3rd and 5th Claimants respectively..

[7] The Claimants in their claim seek several declarations. These can be put into three groups being:

(a) Contravention of their fundamental rights contrary to Sections 1, 6, 12 and 13 of the Constitution as a result of the collection of the EC$1.00, the implementation of S.R.O. No. 24 of 2007 by the Second Defendant.

(b) Contravention of the fundamental rights of the 3rd and 5th Claimants by the alleged assault of the 6th and 5th Defendants respectively contrary to sections 5, 9, 10, 11 and 12 of the Constitution.

(c) The alleged unconstitutionality and illegality of S.R.O. No. 24 of 2007.

[8] The Defendants all filed applications to strike out the Claimant's statement of case.

[9] The Claimants through their counsel Learned Counsel Mrs. Kay Bacchus-Browne agreed that the Claim against the 4th Defendant the Commissioner of Police should be struck out.

[10] The 1st, 2nd and 5th Defendants alleged in their application that the claim should be struck out on the following grounds:

(a) The statement of case does not disclose any reasonable grounds for bringing the claim.

(b) The Claimants have alternative adequate means of redress under the Saint Vincent and the Grenadines Port Authority Act and/or the Criminal Code of the Laws of Saint Vincent and the Grenadines.

(c) The 1st and 2nd Claimants represent persons who do not have the same or similar interest.

[11] The 3rd Defendant in his application alleged that the claim should be struck out on the following grounds:

(a) The statement of case does not disclose any reasonable cause of action and is an abuse of the process of the Court.

(b) No relief is claimed against the Third Defendant.

(c) The Third Defendant had also sought an order to expunge from the record the exhibit attached to the affidavit of Daniel Cummings filed on the 18th day of May 2007 the exhibit being minutes of the meeting of the Parliament of Saint Vincent and the Grenadines held on the 16th day of November 2006 showing the Third Defendant's response to a question posed by the 2nd Claimant. The Third Defendant in his submissions stated that this aspect of the application was not being pursued. Therefore, nothing further need be said about that.

[12] It cannot be disputed that the Third Defendant is the Minister responsible for Ports in Saint Vincent and the Grenadines. The Third Defendant is sued in his capacity as the Minister responsible for Seaports and Airports.

[13] The Sixth Defendant in his application alleged that the statement of case should be struck out for the following reasons:

(a) There is no reasonable ground for bringing the claim, it is an abuse of the process of the Court.

(b) The Third Claimant by pursuing his common law remedies for assault in the Magistrates Court is precluded from pursuing a constitutional motion for the very assault.

(c) The 3rd Claimant has alternative adequate means of redress under other laws.

[14] Under CPR 26.3(1) the Court has power to strike out a statement of case or part of a statement of case. The relevant provisions are Part 26.3(1)(b) and (c). The Section reads as follows:

> "26.3(1) In addition to any power under these Rules the Court may strike out a statement of case or part of a statement of case if it appears to the court that –
>
> (a) –
>
> (b) The statement of case or the part to be struck out does not disclose any reasonable ground for brining or defending a claim.
>
> (c) The statement of case or the part to be struck out is an abuse of the process of the Court and is likely to obstruct the just disposal of the proceedings, or ...."

[15] The principles on which the jurisdiction of the Court is exercised when striking out a statement of case were stated by the Court of Appeal in the case ***Baldwin Spencer v Attorney-General of Antigua and Barbuda*** Civil Appeal No. 20A of 1997. While this case was decided under the 1970 Rules of the Supreme Court the principles remain the same under CPR 2000.

[16] In the ***Baldwin Spencer*** case Byron C.J. stated the principles as follows:

> "In brief the Court is empowered to dismiss an action in a summary way without a trial where the statement of claim discloses no cause of action, or is shown to be frivolous or vexatious or is otherwise an abuse of the process of the Court. This summary procedure should only be used in clear and obvious cases, when it can clearly be seen on the face of it, that a claim is obviously unsustainable cannot succeed or in some other way is an abuse of the process of the court. In one of the cases from Canada on which reliance was placed the standard was expressed in terms that the Claim should not be struck out if there is even a scintilla of a cause of action (***Operation Dismantle v the Queen*** (1986) L.R.C. (Constitutional) p. 421)."

[17] Further at page 8 of the ***Baldwin Spencer*** case the Learned Chief Justice stated:

> "... the operative issue for determination must be whether there is even a scintilla of a cause of action. If the pleadings disclose any viable issue for trial then we should order the trial to proceed but if there is no cause of action we should be equally resolute in making that declaration and dismiss the appeal."

[18] I shall be guided by the above principles in determining this matter. I will deal with the applications together since the grounds and submissions are essentially the same.

Representative Action

[19] Learned Senior Counsel on behalf of the 1st, 2nd and 5th Defendants submitted that the 1st and 2nd Claimants cannot seek constitutional redress or judicial review in a representative capacity. Learned Senior Counsel submitted that the provisions of section 16(1) of the Constitution makes it clear that every constitutional complaint must be made personally except in the case of a person detained.

[20] Learned Senior Counsel further submitted that on an application for an Administrative Order under Part 56 of CPR 2000 an applicant must have a sufficient interest. Part 56.2 (2) provides for a person who has been adversely affected to apply personally and paragraphs (b) to (f) provides for application by a body or group whose interest has been affected or persons or body who has a right to be heard under the terms of any enactment or the Constitution. A Member of Parliament cannot purport to bring a representative application for judicial review.

[21] Learned Senior Counsel also referred to Part 21.1(2)(b) of CPR 2000 which requires every person in the Grenadines to have the same or similar interest before a representative order can be made or action proceeded with. The mere description of "the people of the Northern and Southern Grenadines" is wholly insufficient. The description does not indicate all of the people have the same or similar interest in opposing the collection of the EC$1.00. Further Part 21.3(1) provides that an order of the Court binds everyone when a representative party represents this includes an order for costs.

[22] Learned Counsel for the Claimants made no submission in response on this issue save to say that there is no class action before the Court as yet since the application has not yet been heard.

[23] I agree with the submissions made by Learned Senior Counsel on behalf of the 1st, 2nd and 5th Defendants both in relation to the claim for Constitutional Redress and Judicial Review. Section 16(1) of the Constitution is very clear on an application to enforce the fundamental rights provisions has to be made by the person alleging the contravention except where the person is detained.

Constitutional Redress

[24] The Claimants seek constitutional redress for contravention of sections 1, 6, 12 and 13 of the Constitution caused by the charge of EC$1.00 for admission to the Ferry Terminal as contained in S.R.O. No. 24 of 2007.

[25] Learned Senior Counsel submitted that the Claimants' application does not establish a contravention of any of the provisions of Chapter 1 of the Constitution. The applicants must properly plead and adduce credible and probative evidence of a contravention of the Constitution in clear and specific terms. Learned Senior Counsel submitted further that Section 1 is a mere preamble and it is not enforceable under Section 16 of the Constitution.

[26] It is settled law that a party alleging contravention of provisions of the Constitution must plead and particularize the alleged violation of the Constitution – see the ***Baldwin Spencer*** case.

[27] In relation to the alleged contravention of Section 1, I agree with the submission of Learned Senior Counsel that this section is a mere preamble. It does not establish any right which is enforceable under Section 16(1) of the Constitution. See the case of ***Ollivier v Buttigieg*** where the P.C. considered Part II Section 5 of the Constitution of Malta which is in similar terms to Section 1 of the Constitution of Saint Vincent and the Grenadines.

[28] In relation to the alleged contravention of Section 13 of the Constitution Learned Senior Counsel submitted that Section 13 prohibits a specific type of discrimination. The Claimants are incapable of establishing they were discriminated against as prohibited by Section 13(3) of the Constitution. Learned Counsel referred the Court to the ***Baldwin Spencer*** case referred to earlier.

[29] In relation to the alleged contravention of Section 13 having examined the pleadings of the Claimants I can find no allegation of discrimination in the sense in which discrimination is described in the Constitution of Saint Vincent and the Grenadines. Discrimination is ascribed the following meaning in Section 13(3) of the Constitution:

> "In this section the expression discriminatory means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by sex, race, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description."

[30] In the ***Baldwin Spencer*** case the Court of Appeal in considering section 14(3) of the Constitution of Antigua and Barbuda which is in the same terms as Section 13(3) of the Saint Vincent and the Grenadines Constitution stated at pages 10 and 11 as follows:

> "There was no allegation that the different treatment alleged in the statement of case was attributed to race, place of origin, political opinion or affiliation, colour, creed or sex. In the final analysis, the resolution of this issue must be based on the interpretation of the constitutional provisions. In my view the words are clear and unequivocal and there is no difficulty in giving them their plain and ordinary meaning. The idea is well expressed in ***Nielson v Barker*** (1982) 32 WIR p. 254 Massiah J.A. at p 280:
>
> > "What I am endeavouring to develop is the notion that it is a misconception to think that the Constitution is panacean in character, capacitated for the eventual solution of all legal problems. This process of magnification has led to attempts being made to fit a variety of rights into the framework of fundamental rights and freedoms, although the former often lacked the attributes essential for such categorization... The word "discriminatory" in article 149 does not bear the wide meaning assigned to it in a dictionary. It has a precise and limited connotation. Although it contains the elemental constituent of favouritism, or differentiation in

> treatment, its application is confined only to favouritism or differentiation based on "race, place of origin, political opinions, colour or creed."
> No other kind of favourtism or differentiation is "discriminatory" within the narrow constitutional definition of that word in article 149(2). It is to be profoundly in error to think that there has been a contravention of a person's fundamental rights under article 149 where the alleged discrimination is based on some ground other than those referred to above, no matter how reprehensible such grounds may appear to be. Such a situation clearly does not come within the purview of the constitutional guarantee, although there may well be other means for its investigation and for securing redress."

[31] As stated earlier there is no allegation of discrimination on a ground within the provisions of Section 13(3) of the Constitution.

Sections 6 and 12

[32] In relation to Sections 6 and 12 the Claimants allege that the imposition of the EC$1.00 charge for admission to the Ferry Terminal is a contravention of their right to freedom of movement and a deprivation of property.

[33] Learned Senior Counsel for the Defendants submitted that there is no basis for the Claim for constitutional redress for contravention of Sections 6 and 12 of the Constitution. The payment of a fee for entering a corporation's property or in exchange for a service cannot be considered a deprivation of property or contravention of a fundamental right or freedom. Alternatively, the charge of EC$1.00 is a rate or due under Section 6(6)(a)(i) of the Constitution.

[34] I agree with the submission of Learned Senior Counsel that the payment of a fee for entering a corporation's property or in exchange for service cannot be considered a deprivation of property or contravention of a fundamental right or freedom. However, in this case the Claimants are not simply required to pay a fee for entering a corporation's property or in exchange for service. The undisputed factual position in this case is that pursuant to S.R.O. No. 24 of 2007 all persons traveling by Ferry must enter the Ferry

Terminal through an area designated by the Port Manager whether they wish to do so or not and they are required to pay an admission charge of EC$1.00.

[35] In relation to Section 6(6) (a)(i) the Section reads:

> "Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) of this section –
> (a) to the extent that the law in question makes provision for the taking of possession or acquisition of any property interest or right –
> (i) in satisfaction of any tax rate or due."

[36] I agree with the submission of Learned Senior Counsel that if the EC$1.00 charge is a rate or due then there could be no contravention of Section 6 of the Constitution. However, in my opinion, whether the EC$1.00 charge is a "tax" or a "rate or due" is an issue to be determined at a trail.

[37] Learned Senior Counsel also submitted that the imposition of a charge or fee incidental to the exercise of a fundamental right does not contravene that right or freedom. Even if rights are impacted, a charge of EC$1.00 cannot under any circumstances contravene that right or freedom. Learned Counsel referred the Court to the case of ***Attorney-General of Antigua and Barbuda v Antigua Times*** 1976 A.C. p. 16.

[38] In the ***Antigua Times*** case the Privy Council considered whether the requirement in Section 1B of the Newspaper Act for a publisher to pay a licence fee of $600.00 per annum before publication of a newspaper was a contravention of Section 10 of the Constitution of Antigua and Barbuda which said section made provision for the fundamental right to freedom of expression. The Court held that it was to be presumed that the licence fee imposed by Section 1B was a means of raising revenue for the purposes set out in Section 10 of the Constitution, the presumption was not rebutted and since the licence fee was not excessive or of such a character as to lead to the conclusions that Section 1B had not been enacted to raise revenue but for some other purpose it was not contrary to Section 10 of the Constitution.

[39] It is well established that the fundamental rights and freedoms are not absolute rights. The exercise of those rights may be restricted by law.

[40] Having perused the ***Antigua Times*** case I am of the opinion that the decision is not as far reaching as submitted by Learned Senior Counsel that the Government and Parliament may impose a licence or user fee on actions that may enjoy constitutional protection and if the licence or fee is not disproportionate, it will not contravene any constitutional right of movement or any other kind. The proposition of Learned Senior Counsel suggests that the determining factor is the quantum of the fee. Lord Fraser in delivering the judgment of the Court stated at pages 32 – 33 paragraphs G-A:

> "In their Lordships' opinion the presumption that the Newspaper Registration (Amendment) Act 1971 was reasonably required has not been rebutted and they do not regard the amount of the licence fee as manifestly excessive and of such a character as to lead to the conclusion that Section 1B was not enacted to raise revenue but for some other purpose...
> Though there maybe some taxing statutes which states the purpose for which the revenue raised will be applied ordinarily they do not. The purposes stated cover a very wide field of government expenditure and in the absence of any indication to the contrary their Lordships think it right to presume that the revenue derived from the licence fee was to be applied to those purposes. That being so in their opinion, Section 1B in so far as it requires the payment of a licence fee, is a provision which comes within Section 10(2) of the Constitution and which cannot therefore be treated as contravening it."

[41] On this application to strike out the Court is only required to determine whether or not there is a viable issue for trial where a claim is obviously unsustainable it should be struck out.. The Claimants allege that by virtue of S.R.O. No. 24 persons traveling by Ferry are mandated to enter the Ferry Terminal through an area designated by the Port Manager and are required to pay for admission to the said area. Whether such action amount to deprivation of property or contravene the right to free movement I find to be a viable issue for trial.

[42] The 3rd and 5th Claimants also sought constitutional redress for contravention of Sections 5, 9, 10, 11 and 12 of the Constitution as a result of alleged assault on the 3rd and 5th Claimants by the 6th and 5th Defendants respectively.

[43] Learned Senior Counsel for the 5th Defendant and Learned Counsel for the 6th Defendant submitted that the Claimants' statement of case does not disclose any reasonable ground for bringing the claim for constitutional relief and it is an abuse of the process of the Court. There is no evidence supporting any contravention of the provisions of the constitution. Learned Counsel further submitted that there are adequate alternative remedies available to the Claimants in the private law of tort. Learned Counsel referred the Court to the cases of ***Harrikissoon v AG*** [1980] A.C. p. 265 and ***Jaroo v AG of Trinidad and Tobago*** [2002] 2 WLR 705.

[44] Learned Counsel for the Claimants submitted that the abovementioned cases should be distinguished from the present case since in those cases there was no infringement of any fundamental rights or freedom. Learned Counsel referred the Court to the case of ***Observer Publications Ltd v The Attorney General et al*** [2001] UK PC 11 where Lord Cooke in delivering the judgment at the Privy Council at paragraph 53 made the following observations with reference to the dictum of Lord Diplock at p 126 in ***Harrikissoon*** case:

> "The last words of that passage are not to be put aside. With respect, the image of the Constitution as secluded behind closed doors is not one which their Lordships adopt. Nor would it be right to think of the Constitution as if it were aloof, or in the famous phrase of Holmes J., "a brooding omnipresence in the sky." On the contrary human rights guaranteed in the Constitution of Antigua and Barbuda are intended to be a major influence upon the practical administration of the law. Their enforcement cannot be reserved for cases in which it is not even arguable that an alternative remedy is available. As Lord Steyn said, delivering the judgment of the Privy Council in ***Ahnee v Director of Public Prosecutions*** [1999] 2 AC p 294 at 307, "...bona fide resort to rights under the Constitution ought not to be discouraged." Frivolous, vexatious or contrived invocations of the facility of constitutional redress are certainly to be repelled."

I would add that the last words in the above passage are not to be put aside.

[45] In ***Jaroo v The Attorney-General of Trinidad and Tobago*** the Appellant's car was detained by the Police and despite several requests they failed to return the car to him. The Appellant sought constitutional redress under Section 14(1) of the Trinidad and Tobago constitution for contravention of his fundamental right to enjoyment of property and not to be deprived thereof without due process of law as guaranteed by Section 4 (1) of the

Constitution instead of bringing a common law action in detinue for the return of the car. The Privy Council in dismissing his appeal held:

> "that where a parallel remedy existed the right to apply for redress under section 14(1) of the Constitution was to be exercised only in exceptionally circumstances; that an originating motion under section 14(1) was appropriate in cases where the facts were undisputed and only questions of law were in issue but was wholly unsuitable in cases depending for their decision on the resolution of disputes of fact, which ought to be determined by the procedures available in the ordinary courts under the common law; that before issuing an originating motion under Section 14(1) a person should consider the true nature of the right allegedly contravened and whether having regard to all the circumstances some other common law or statutory procedural right could not more conveniently be used; that where such other procedure was available resort to the procedure afforded by Section 14(1) would be inappropriate and an abuse of the process as would its continued use after it had become clear that it was no longer appropriate."

[46] Having examined the affidavits filed in support of the Claim I have found no evidence that the 5th and 6th Defendants acted in breach of any of the provisions of the Constitution. There is no evidence that the 5th or 6th Defendants in any way prevented or hindered the Claimants in any way from participating in the protest action on April 27, 2007. A reading of the Third Claimant's affidavit dated May 31, 2007 and filed in support of the Claim in particular paragraphs 28 to 30 show that the Third Claimant alleges that he was outside of the gate of the Ferry Terminal making a complaint to one Officer Charles about persons who had forced their way inside the Ferry Terminal and were being assaulted by the police when he was assaulted by the Sixth Defendant.

[47] The Fifth Claimant in her affidavit dated May 31, 2007 and filed in support of the Claim deposed at paragraphs 30 and 31 as follows:

> "30. On Friday, i.e. 27th April 2007, I was in the place by the wharf in Kingstown where people were demonstrating against the dollar tax they were charging for people to go to Bequia. In the afternoon I was close to area where the car pass to go to the wharf. A car went in the gate after the car go in the gate, people went in after the car.
>
> 31. The policeman who was inside shove the gate on us and I was behind and some people bounced on me and I fall on the ground inside the gate. Then a policeman came and "stamp" me in my belly and hit me with his hand in my side. I was on the ground when the officer hit me...."

[48] I find the evidence in the affidavits filed in support of the claim to be wholly incapable of establishing any breach of Section 5 protection from torture or to inhuman or degrading punishment, Section 9, protection of freedom of conscience, Section 10 protection of freedom of expression, section 11 protection of freedom of assembly and association or Section 12, protection of freedom of movement.

[49] Learned Counsel for the Claimants referred the Court to the decision of the Lords in ***Laporte v Chief Constable of Gloucestershire*** 2006 U.K. H L 55.

[50] Having reviewed the ***Laporte*** case I am of the opinion that it does not assist the Claimants. In ***Laporte*** case the appellant was prohibited by the Police from journeying to an anti-war demonstration.

[51] For the reasons stated above I agree that the Claims for constitutional redress against the 5th and 6th Defendants should be struck out. Further it cannot be disputed that there is the alternative remedy in the law of tort where the Claimants could obtain the remedy of general and special damages and aggravated and exemplary damages. Also the details of the incident at the Ferry Terminal are disputed by the parties as evidenced in the affidavits filed by the 3rd and 5th Claimants, the 5th and 6th Defendants and the affidavits in response filed on behalf of the 3rd and 5th Claimants. For this reason also I find that constitutional redress is inappropriate.

[52] Learned Counsel for the Claimants also referred the Court to Part 56.8 (1) of C.P.P. 2000. which deals with joinder of claims for other relief in an application for an administrative order. I will deal with this submission later in this judgment.

[53] The Claimants alleged that S.R.O. No. 24 of 2007 is unconstitutional and illegal. It was made in contravention of Section 72 of the Port Authority Act Cap 373, the Interpretation and General Provisions Act and the Constitution. The EC$1.00 charge is in effect a tax that required legislative measure by the Parliament of Saint Vincent and the Grenadines.

[54] The Defendants sought to have the claim struck out on the following grounds:

(a) There is no constitutional barrier to retrospective regulations. The Constitution precludes retrospective legislation only in relation to criminal offences. Learned counsel referred the Court to the case of ***Air Canada v British Columbia*** [1989] S.C.R. 1161 and section 22 of the Interpretation Act Chapter 10.

(b) Where there are alternative remedies judicial review is not appropriate. Regulation 5 of the Port Authority Regulations provides a right of appeal to the Claimants. Part 56.3(3)(e) requires a claimant to plead whether an alternative form of redress exists and if so why judicial review is more appropriate. The Claimants have failed to plead the right of appeal under Regulation 5 of the Port Authority Regulations.

(c) The charge of EC$1.00 concerns the public financial administration of the Port Authority, therefore in the absence of an exceptional plea or allegation of fraud or improper motive against the Minister, Port Authority and House of Assembly an application for judicial review was inappropriate. Learned Senior Counsel referred the Court to the case of ***Nottinghamshire County Council v Secretary of State for the Environment*** [1986] 2 WLR 1.

(d) There is no pleading that the Port Authority, the Minister or the House of Assembly acted without or in excess of the provisions of the Port Authority Act or misconstrued their respective powers. Learned Counsel referred to the case of ***Jones v Swansea City Council*** [1990] 1 WLR 1453.

[55] I agree with Learned Senior Counsel that the Claimants have made no allegation of fraud or improper motives against the Defendants.

[56] I do not agree with the submission of Learned Senior Counsel that there are no pleadings that the Port Authority or the Minister acted without or in excess of the provisions of the Port Authority Act or misconstrued their respective powers.

[57] I find that the Claimants in pleading that the EC$1.00 charge is in effect a tax and as such there should have been legislative measure by the Parliament in effect alleged that the 2nd Defendant and the 3rd Defendant acted without or in excess of the provisions of Section 72

of the Port Authority Act when they proposed to impose a tax by virtue of S.R.O. No. 24 of 2007, and also when they alleged that the 2nd and 3rd Defendants could not make the Regulations with retrospective effect.

[58] The grounds upon which judicial review may be sought are not limited to those referred to by Learned Senior Counsel. Lord Diplock in ***Council of Civil Service Unions v Minister for the Civil Service*** stated that the grounds upon which administrative action is subject to control by judicial review include:

(1) illegality

(2) irrationality

(3) procedural impropriety

[59] Lord Diplock explained the items in the following manner:

> "By illegality as a ground for judicial review I mean that the decision-maker must understand correctly by law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justicable question to be decided in the event of dispute by those persons, the judges by whom the judicial power of the State is exercisable.
>
> By "irrationality" I mean what can now be succinctly referred to as Wednesbury unreasonableness (***Associated Provincial Picture House Ltd v Wednesbury Corporation*** (1948) 1 K.B. p. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer or else there would be something badly wrong with our judicial system."

[60] At p. 411:

> "I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedure fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."

[61] The Claimants' claim for judicial review is made on two grounds illegality and procedural impropriety. As stated earlier the Claimants alleged that the 2nd and 3rd Defendants acted

without or in excess of the powers granted under section 72 of the Port Authority Act in making S.R.O. No. 24 of 2007 in that the $1.00 charge is in effect a tax. Also there was no power to make the Regulation retrospectively.

[62] The Claimants also alleged that there was procedural impropriety in that S.R.O. No. 24 of 2007 was not made in accordance with the procedure outlined in Section 72 of the Port Authority Act in that S.R.O. No. 24 of 2007 was not approved by the Parliament within the time stipulated. Secondly, S.R.O. No. 24 was made on a Sunday and it was not published in accordance with the Interpretation Act in that it was published prior to 9:00 a.m. on Monday the 4th day of June 2007.

[63] I agree with the submission of Learned Senior Council that there is no constitutional barrier to the making of legislation with retrospective effect except in relation to the creation of criminal offences. The relevant provisions are Sections 43(4) and 8(4) of the Constitution and Section 22 of the Interpretation Act. Section 43(4) reads as follows:

> "No law made by Parliament shall come into operation until it has been published in the Official Gazette but Parliament may postpone the coming into operation of any such law and may make laws with retrospective effect."

Section 8(4) reads:

> "A person shall not be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed."

Section 22 of the Interpretation Act reads:

> "Any subsidiary legislation may be made to operate retrospectively to any date, not being a date earlier than the commencement of the written law under which subsidiary legislation is made, but so, however, that no person shall be made or become liable to any penalty whatsoever in respect of any act committed or of a failure to do anything, before the day on which such subsidiary legislation is published in the Gazette."

Section 21 of the Interpretation Act referred to by Learned Counsel for the Claimants does not prohibit the making of subsidiary legislation with retrospective effect. It provides in

effect that subsidiary legislation shall come into effect on the date of publication or where the subsidiary legislation or some other written law provides for it to come into effect on some other day that it shall come into effect on such other day subject to annulment where applicable such as where the subsidiary legislation is subject to negative or affirmative resolution of Parliament. However Section 51 (1) and (2) of the Port Authority Act reads:

> "(1) Subject to the provisions of this Act, the dues, conditions and charges for the carriage or warehousing of goods and for any other service or facility performed or provided by the Authority when determined, shall be in the form of regulations and shall be first submitted to the Minister for approval.
>
> (2) Such regulations shall have effect from the date of such publication or from such later date as may be specified therein."

Whether the admission charge in S.R.O. No. 24 is a charge within the meaning of Section 51 of the Port Authority Act and the 2nd and 3rd Defendants were prohibited from making such regulations under Section 72 with retrospective effect is a viable issue for trial. Similarly, whether the charge imposed is a tax is a viable issue for trial.

[64] I find the procedural grounds alleged by the Claimants to be frivolous and vexatious. In relation to Section 72 of the Port Authority Act Section 72 (6) provides that all subsidiary legislation made under the section are subject to negative resolution of the House of Assembly within six weeks. It is settled law that where subsidiary legislation is subject to negative resolution of the House of Assembly, within a specified time the Regulation must be laid in the House of Assembly within the time specified. There is no need for a Resolution of the House of Assembly approving the Legislation. A resolution of the House of Assembly is only required where the subsidiary legislation is subject to affirmative resolution of the House of Assembly. Further none of affidavits filed by the Claimants or on behalf of the Claimants disclose when the subsidiary legislation was laid in Parliament. In relation to the making and publication of S.R.O. No. 24 of 2007 the Claimants have not referred to any provisions in the Interpretation and General Provisions Act or any other law which prohibits the making of subsidiary legislation on a Sunday or the publication of the Gazette prior to 9 a.m. There are indeed no such provisions.

[65] Applying the principles relating to striking out as outlined by the Court of Appeal in the ***Baldwin Spencer*** case I find that the Claimants' application for judicial review on the ground of illegality as outlined above is not frivolous or vexatious or an abuse of process. I find that there are viable issues for trial.

[66] While I agree with the submissions of Learned Senior Counsel that where there are alternative remedies which are appropriate the Court may decide not to grant leave, the alternative remedies should be pursued, having perused Regulation 5 of the Port Authority Regulation, I find that the Claimants here are questioning the legality of the S.R.O. This cannot be a matter to be determined by the Council.

[67] I will deal now with Learned Counsel for the Claimants submission with reference to Part 56.8 of CPR 2000. I agree that a Claim at common law for damages for assault could be joined in an application for an administrative order. However, in this case there is no such claim for damages for assault, there is a claim for a declaration that the Claimants' fundamental rights under sections 5, 9, 10, 11 and 12 were contravened and damages for breach of the said fundamental rights.

[68] Indeed the Third Defendant in his affidavit dated May 31, 2007 in support of the Claim deposed at paragraph 35 as follows:

> "This is not a mere grievance. This situation is very urgent and an ordinary common law suit will not provide adequate redress..."

While the fifth Defendant in her affidavit dated May 31, 2007 in support of the Claim deposed at paragraph 2 as follows:

> "I am informed by my Legal Advisers and verily believe that no other form of redress exists in relation to the reliefs sought by the Claimants and this is the most applicable method of pursuing my interests."

[69] I have also considered the provisions of Part 56.8 (3) which reads as follows:

> "The Court may at any stage:
> (a) Direct that any claim for other relief be dealt with separately from the claim for an administrative order; or

(b) direct that the whole application be dealt with as a claim and give appropriate directives under Part 25 and 27."

[70] The application for an Administrative Order in this case is of general public interest and must be dealt with urgently. I am of the opinion that it would not be appropriate to hear private law matters relating to the alleged assault on the 3rd and 5th Claimants which will no doubt necessitate lengthy cross-examination of several witnesses since the details are disputed, in the several affidavits that have been filed, at the same time as the application for an Administrative Order. I will therefore not exercise my discretion under Part 56.8(3). The 3rd and 5th claimants are at liberty to institute proceedings in private law.

[71] It is ordered:

(1) By consent, the Claim against the 4th Defendant is struck out.

(2) The Claim by the 1st and 2nd Claimants on behalf of the People of the Northern and Southern Grenadines respectively is struck out.

(3) The Claimants' claim for constitutional relief for contravention of Sections 1 and 13 is struck out.

(4) The 3rd Claimant's claim for constitutional redress against the 6th Defendant is struck out.

(5) The 5th Claimant's claim for constitutional redress against the 5th Defendant is struck out.

(6) The Claimants' application for Judicial Review on the ground of procedural impropriety is struck out.

[72] As a consequence of the above the following paragraphs of the Claim are struck out: paragraph 3 in so far as it includes Sections 1 and 13 of the Constitution, 4, 7, 8, 9, 11, 12(b), 13 and 14. The Claim will proceed against the 1st, 2nd and 3rd Defendants.

Costs

[73] The general rule is that a successful party is entitled to his costs. This case concerns an application for an Administrative Order. While this was not the hearing of the application,

the general rule as stated in Part 56.13(6) of CPR 2000 is that no order for costs may be made against an applicant for an administrative order unless the Court considers the Applicant has acted unreasonably in making the application or in the conduct of the application.

[74] In relation to the 4th Defendant I am of the opinion that the Claimant did not act unreasonably in brining the application or in the conduct of the application. When the application to strike out was filed the Claimants readily conceded thereby making it unnecessary for either side to make any submissions. I will therefore make no order as to costs.

[75] In relation to the 5th and 6th Defendants I will also make no order as to costs. I find that the Claimants did not act unreasonably in making the application.

[76] In relation to the 1st, 2nd and 3rd Defendants the application was successful to a large extent. I find that the Claimants did not act unreasonably in making the application. In the circumstances I will make no order as to costs.

.....

Gertel Thom
HIGH COURT JUDGE