

**(1) Richard Joachim  
(2) Glenford Stewart**

*Appellants*

v.

**(1) The Attorney General  
(2) Ephraim Georges**

*Respondents*

FROM

**THE EASTERN CARRIBEAN  
COURT OF APPEAL  
(ST VINCENT AND THE GRENADINES)**

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REASONS FOR DECISION OF THE LORDS OF THE  
JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, OF THE  
4th December 2006, Delivered the 24th January 2007

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*Present at the hearing:-*

Lord Hope of Craighead  
Lord Scott of Foscote  
Baroness Hale of Richmond  
Lord Carswell  
Lord Brown of Eaton-under-Heywood

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*[Delivered by Lord Brown of Eaton-under-Heywood]*

1. In 2003, following a change of government the year before, the government of St Vincent and The Grenadines decided to establish a Commission of Inquiry to inquire into the Ottley Hall Project, a failed marina and shipyard development project which had been financially underwritten by the previous government. To this end, by instrument dated 10 March 2003 (“the First Instrument”), the Governor-General appointed the second respondent, a retired High Court judge, as

Commissioner, the First Instrument being published that same day in the Gazette.

2. That, one might have thought, would be that, and the Commission might have been expected long since to have concluded its hearings and reported upon the inquiry. But, as their Lordships will shortly explain, the process of appointment here has been plagued with error and, in the event, the Commissioner's oral hearings, which eventually began in December 2003, have remained suspended ever since May 2004 when the two appellants issued proceedings challenging the validity of the Commissioner's appointment in the first place.

3. The first appellant had been the Chairman of the National Commercial Bank at the time of the failed project and, according to the Salmon letter sent to him by the Commissioner (with a witness summons) dated 30 April 2004, had been responsible for the bank making large unsecured loans to the developers. The second appellant had provided engineering services for the project. To understand their challenge it is necessary first to set out the material parts of the legislation governing the appointment of commissions of inquiry, then the relevant terms of the First Instrument, and then the steps taken by government on 28 April 2003 to overcome what they had by then come to recognise as a problem with regard to the First Instrument.

4. The Commissioner was appointed under the Commissions of Inquiry Act 1990. Central to this appeal is section 2(1) of the Act, both in its original form and as amended by the Commissions of Inquiry (Amendment) Act 2002. For ease of reference the Board will set out the sub-section, first in its original form and then as amended, in each case highlighting in bold type those parts of the original provision which were changed and those parts of the amended provision which effected the changes:

Section 2(1) as originally enacted

“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:

“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.**”

5. It is necessary also to set out section 16 of the 1990 Act:

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

6. The First Instrument, before describing exactly what it was that the second respondent was to inquire into, contained the following two recitals:

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

And whereas the Governor-General on the advice of the Cabinet has deemed it advisable and for the public welfare that an inquiry be held into all of the facts and circumstances on and relating to the Ottley Hall Project and for the purpose to appoint a Commission of Inquiry with the following terms of reference.”

The First Instrument went on to specify that the inquiry should be held from 7 April 2003 (or from such other times as the Commissioner might determine).

7. As will readily be seen, both those recitals were plainly referring to section 2(1) of the 1990 Act in its *unamended* form. Within a few weeks, those advising the government had clearly spotted the problem: it was the *amended* section they should have had in mind. On 28 April 2003, therefore, two further documents were executed. One was an Erratum, under the hand of the Attorney General, published the same day in the Gazette, stating:

(i) that the first recital to the First Instrument should be  
“cancelled and replaced with the following:

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

(ii) that in the second recital to the First Instrument the words “for the public welfare” should be deleted and replaced by the words “of sufficient public importance”.

(iii) that the proposed starting date for the Inquiry should be 28<sup>th</sup> (not 7<sup>th</sup>) April 2003.

(iv) that in the three places where his name appears in the First Instrument the second respondent should be described simply as “Retired High Court Judge” rather than as “Retired High Court Judge, Justice of Appeal (Acting).”

8. The other document executed on 28 April 2003—but, unlike the Erratum, not published in the Gazette that day or indeed ever since—was a fresh instrument under the hand of the Governor-General (“the Second Instrument”) appointing the second respondent as Commissioner in

precisely the same terms as the First Instrument (assuming that were corrected as specified in the Erratum).

9. As stated, in May 2004 the appellants issued proceedings challenging the second respondent's appointment. On 7 June 2004 the respondents applied to strike out the appellants' claim, the second respondent stating categorically in his supporting affidavit that he relied for his authority upon the Second Instrument.

10. On 2 July 2004 Master Cottle struck out the appellants' claim, holding that the First Instrument was valid, particularly when read together with the Erratum. On 8 December 2004 the Court of Appeal (Brian Alleyne SC, Michael Gordon QC, and Suzie d'Auvergne, JJA) dismissed the appellants' appeal, similarly holding the First Instrument to be valid (although without reliance upon the Erratum).

11. In advancing this further appeal to the Board, Mr Starmer QC for the appellants challenges the validity of the First Instrument on the ground that, in deciding to establish a Commission of Inquiry, the Governor-General addressed his mind to the wrong criterion (whether the holding of an inquiry would be "for the public welfare" instead of whether it was "of sufficient public importance"); he challenges the validity of the Erratum on the ground that the Attorney General could not thus rectify the flaw in the original decision-making process; and he challenges the effectiveness of the Second Instrument on the ground that, never having been published in the Gazette, the second respondent's appointment under it (albeit valid) has never taken effect. It is convenient to consider these documents in reverse order.

### The Second Instrument

12. The Board has already set out (in para 5 above) section 16 of the 1990 Act which requires that all commissions are published in the Gazette and provides in terms that they "shall take effect from the date of such publication". In these circumstances it is well-nigh impossible to argue that the Second Instrument, never having been published in the Gazette, has ever taken effect. The approach to be taken to this question is that now established by the House of Lords in *R v Soneji* [2006] 1 AC 340—see in particular para 23 of Lord Steyn's speech. Essentially the question to be asked is whether Parliament can fairly be taken to have intended the consequences of non-compliance to be total invalidity (or, in the present case, total ineffectiveness, since the appellants rightly recognise that the second respondent's appointment under the Second Instrument is valid and would immediately take effect if ever the Instrument comes to be published in the Gazette). The answer their

Lordships unhesitatingly give to that question is that Parliament must indeed be taken to have intended the consequence of non-publication of the commission to be total ineffectiveness. That intention is as plain as can be from the last ten words of section 16: “and shall take effect from the date of such publication.”

13. By the same token that this conclusion rules out the Second Instrument as the legal basis for the second respondent’s powers under the commission, so too it rules out one of the appellants’ arguments as to the validity of the First Instrument, the argument that the Second Instrument impliedly revoked the First Instrument. It is nothing to the point that the Second Instrument is valid. The plain fact is that it is ineffective, no more effective to effect the revocation of an earlier appointment than to confer powers on the commissioner under a new Instrument of appointment. For good measure the Board notes that under section 16 “all revocations” of any commission, just like commissions themselves, have to be published in the Gazette and only then take effect.

#### The Erratum

14. The Erratum set out “corrections to errors made in the [First] Instrument” and was published by the Attorney-General in the Gazette purportedly pursuant to section 66(1) of the Interpretation and General Provisions Act Chapter 10:

“The Attorney-General may, by order in the Gazette, rectify any grammatical and typographical mistakes appearing in any written law, and for that purpose may make any alteration, omission or addition of words, not affecting the meaning of such written law.”

15. There are two independent reasons why the Erratum could not validate the First Instrument if it were otherwise invalid: first, because the mistake made (or reflected) in the recitals, if sufficiently material to invalidate the First Instrument, cannot possibly be characterised merely as “grammatical [or] typographical”; secondly, because the First Instrument does not in any event fall within the definition of “any written law”. Widely defined though this expression is in section 3(1) of the Interpretation Act, it is not wide enough to include what was here an executive act rather than a “legislative provision”.

## The First Instrument

16. It follows, therefore, that the critical issue is whether the second respondent's appointment under the First Instrument is valid and effective, an issue which in turn raises the central question: in setting up the Commission of Inquiry "on the advice of the Cabinet" did the Governor-General (and/or the Cabinet) materially misdirect himself (themselves) as to the approach to be taken in deciding whether or not to issue the Commission.

17. That the Governor-General acted upon the advice of the Cabinet is plain from the face of the First Instrument: the second recital says so in terms. Nor is that surprising: section 55(1) of the (1979) Constitution provides that (save for immaterial exceptions): "In the exercise of his functions the Governor-General shall act in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet." (Section 102(2) of the Constitution provides that: "Where by this Constitution the Governor-General is required to perform any functions in accordance with the advice of any person or authority, the question whether the Governor-General has so exercised that function shall not be enquired into in any court of law." That section is not offended by the Board's conclusion derived from what is plainly apparent on the face of the Instrument. The conclusion is in any event in favour of the Governor-General.) For convenience, their Lordships will nonetheless hereafter speak of the decision as if it were that of the Governor-General alone.

18. It is plain too from the face of both recitals to the First Instrument that in deciding to appoint a Commission of Inquiry the Governor-General directed himself by reference to section 2(1) of the 1990 Act in its unamended, instead of its amended, form, and that this constitutes a clear misdirection. It is nothing to the point to say, as the respondents do, that the recitals are "mere surplusage" and need never have been included in the Instrument in the first place. The point is that they reveal (adventitiously though it may be) the approach in fact taken in the decision-making process, namely that the decision was arrived at by reference to the considerations set out in the unamended instead of the amended section 2(1). This is not a case like *Carltona Ltd v Commissioners of Works* [1943] 2 AER 560, where the notice (itself in fact, unlike in the present case, unnecessary – see Lord Greene MR's judgment at p562 D-E) stated that the decision (there to take possession of premises) was being taken as "essential in the national interest" rather than, as the relevant Regulation authorised, because it appeared "necessary or expedient so to do in the interests of the public safety, the defence of the realm or the efficient prosecution of the war, or for

maintaining supplies and services essential to the life of the community,” but where (and this is the crucial distinction for present purposes) the decision-maker’s evidence made clear that he “was using the phrase ‘in the national interest’ as a comprehensive phrase to cover all the grounds which are mentioned in the Regulation” (p562 G), and “did bring his mind to bear on the question whether it appeared to him to be necessary or expedient to requisition this property for the purposes named, or some of them” (p563 H).

19. There was, in the present case, the Board repeats, unlike in *Carltona*, a misdirection. The all important question is, therefore, does this matter? Was it material?

20. It is the Board’s clear view that it was *not* material. The short answer to this challenge is that any Governor-General deciding to set up a Commission of Inquiry as being advisable “for the public welfare” must inevitably have regarded the matter also as “of sufficient public importance”. The phrase “public welfare” in the unamended section, taking its colour from the other main limb of the provision (the appointment of a commission to inquire into the conduct of this, that or the other public body), clearly connotes the public good. Nobody would regard an inquiry into any particular matter as being for the public good unless the matter was also of sufficient public importance to justify holding an inquiry. It is as simple as that.

21. It seems to their Lordships, just as it seemed to the Court of Appeal, that the 2002 amending Act was in every case broadening rather than narrowing the power to set up an inquiry. The first limb of the old section 2(1) was needlessly complicated and specific as to the matters which could be inquired into. The amended sub-section encompasses all that and more. The old sub-section did not in terms provide, as the amended sub-section does, for the making of a report. And consistently with this, the 2002 Act introduced into the 1990 Act a new section 2(4) to allow commissions of inquiry to sit anywhere outside, and not just inside, St Vincent and the Grenadines; a new section 6(2) to allow the Commission to engage the services of experts, investigators, accountants or other technical advisers; and a new section 10(1) with regard to the summoning and examining of witnesses. The Court of Appeal were right to say (at para 14) that “the whole tenor of the Amending Act is to expand and clarify the Act and the powers thereunder and not to constrain those powers.”

22. It follows that the First Instrument was valid and (because published in the Gazette) effective to empower the second respondent to hold the inquiry upon which he had already embarked before this

challenge, and that the Instrument cannot be impugned because of its inappropriate recitals. The existence of the Governor-General's power to set up this inquiry has never been doubted or disputed. Their Lordships would hold that the immaterial misdirection here did not render its exercise unlawful.

23. For reasons given the Board will humbly advise Her Majesty that this appeal be dismissed. The parties are agreed that there shall be no order for costs.