

THE EASTERN CARIBBEAN SUPREME COURT

SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

SVGHCV2019/0209

IN THE MATTER OF AN APPLICATION BY BIGGER CEMENT AND AGGREGATE INCORPORATED
FOR THE REVIEW OF A SURVEY OF LANDS AT RABACCA WHICH THE GOVERNOR GENERAL
CAUSED TO BE CONDUCTED AND APPROVED AND REGISTERED AS SURVEY PLAN C1842
PURSUANT TO THE CROWN LANDS ACT CAP 319 OF THE REVISED LAWS 2009 OF ST VINCENT
AND THE GRENADINES

AND

IN THE MATTER OF AN APPLICATION FOR RELIEF PURSUANT TO SECTION 16 OF THE ST
VINCENT AND THE GRENADINES CONSTITUTION ORDER 1979

BETWEEN

BIGGER CEMENT AND AGGREGATE INCORPORATED

CLAIMANT

AND

THE GOVERNOR GENERAL
REPRESENTED BY THE ATTORNEY GENERAL OF
ST. VINCENT AND THE GRENADINES

DEFENDANT

Before: The Hon. Mde. Justice Esco L. Henry High Court Judge

Appearances:

Mr. Stanley John Q.C., Mr. Akin John and Mr. Jomo Thomas for the claimant/respondent.
Mrs. Joezel Allen for the defendant/applicant.

2020: Dec. 2
Dec. 16
Dec. 21

REASONS FOR DECISION

BACKGROUND

[1] **Henry, J.:** This is an application by the Governor General for leave to appeal a decision delivered on

24th June 2019; and for a stay of the said order. The underlying dispute surrounds ownership of lands at Rabacca in Saint Vincent and the Grenadines. Bigger Cement and Aggregate Incorporated ('Bigger Cement') claims to be the beneficial owner while the Crown has signaled that it is the legal owner.

[2] Bigger Cement filed a claim¹ seeking a review of a survey of the disputed lands, which was conducted by a licensed land surveyor in late 2019, allegedly at the instance of the Governor General. Bigger Cement claimed that the survey was subsequently approved and lodged at the Lands and Survey Department as purportedly depicting Crown lands and/or Crown Boundaries. It sought among other things declarations that the survey was illegal and that it beneficially owns the disputed lands.

[3] The Governor General responded by filing an application² for an order that the court has no jurisdiction to entertain the claim. She argued that the claim is statute-barred and further that Bigger Cement had not exhausted the alternative avenue for redress set out in the Crown Lands Act³ ('CLA'). She applied to strike out the claim. The application was dismissed. The Governor General desires to appeal that decision. Her application for leave to do so was opposed by Bigger Cement. By decision delivered on December 16th, 2020, the application for leave and for a stay were dismissed.

[4] The parties were informed then that the written decision with reasons was prepared prior to December 16th, 2020, but unfortunately was corrupted by a computer virus. Consequently, it had to be reconstructed. This turn of events delayed delivery of the reasons to them. They are provided now. For completeness, the orders made earlier are repeated at the end of this document.

ISSUE

[5] The issues are:

- 1) Whether leave should be granted to the Governor General to appeal the decision dated 24th June 2020? and
- 2) Whether the order dated 24th June 2020 should be stayed pending the determination of the appeal?

¹ Dated 17th December 2019.

² On 15th January 2020.

³ Cap. 319 of the Laws of Saint Vincent and the Grenadines, Revised Edition 2009.

LAW AND ANALYSIS

Issue 1 – Should leave be granted to the Governor General to appeal the decision dated 24th June 2020?

[6] The practice and procedure for seeking leave to appeal a determination is well-established and well-

known. Both parties referred to elements of this. The Eastern Caribbean Supreme Court (Saint Vincent and the Grenadines) Act allows for appeals with leave, from interlocutory orders⁴ and as of right in other situations such as when the order is final as opposed to interlocutory. In deciding whether an order is final or interlocutory, the court performs the 'application test'⁵ or the 'order test'⁶.

[7] As explained by Byron CJ in the **Sylvester v Singh** case and echoed by him in the **Pirate Cove case**:

'Under the application test, an order would be final if it was made on an application which would have determined the matter in litigation for whichever side the decision was given. It is conceded that if the application test was applied the order of Georges J. would be interlocutory, because if he had not set aside the writ and discharged its service, the proceedings would have continued.

Under the order test an order is final if it finally determines the issue in litigation, or disposed of the rights of the parties. It seems to me that although the order, having adjudged the writ and its service to be invalid, effectively determined the proceedings, it

⁴ Cap. 24 of the Laws of Saint Vincent and the Grenadines, Revised Edition 2009, section 32(2)(g).

⁵ Civil Procedure Rules 2000 ('CPR') rule 62.1(3); rule 13(1) of the Court of Appeal Rules; Othneil R. Sylvester v Satrohan Singh Saint Vincent and the Civil Appeal No. 10 of 1992, page 10; and Pentium BVI Ltd. et al v Bank of Bermuda BVIHCVAP2003/0014. See also The Attorney General of Grenada v Andy Redhead Grenada Civil Appeal No. 10 of 2007, at para. 19.

⁶ Pirate Cove Resorts Ltd. and Robert Brisbane v Euphemia Stephens et al, Saint Vincent and the Grenadines Civil Appeal No. 11 of 2002.

did not determine any issue in litigation between the parties nor dispose of their rights, and therefore was not a final judgment or order.’⁷

[8] Applying the application test to the instant case, it is pellucid that the impugned decision did not determine the central issue between the parties – the ownership of the disputed lands. The order did not finally determine that issue or dispose of the parties’ rights. It follows that the decision is interlocutory. Accordingly, if the Governor General is to appeal, she must first obtain leave.

[9] CPR part 62 outlines the procedural steps. An application for leave to appeal must be made in writing⁸ within 14 days of the order against which the appeal is to be brought and it must summarize the proposed grounds of appeal. It must be supported by affidavit evidence⁹. The Governor General complied with those mandatory requirements.

[10] The Court will grant leave to appeal only if satisfied that the applicant has a realistic chance of success on appeal¹⁰. The test used by the Court of Appeal to evaluate a lower court’s exercise of judicial discretion is whether the judge erred in principle by failing to take into account or by giving not enough or too much weight to ‘relevant factors and considerations’; or by having regard to ‘irrelevant factors or considerations’; and as a result of such error ‘exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.’¹¹ The court is guided by this standard at the leave stage, when assessing whether a prospective appellant has a realistic prospect of success. Those principles will be borne in mind in considering the present application.

[11] The Governor General sought two specific orders under the instant application. She prayed that:

1. leave be granted to her to ‘appeal the decision of the court dated the 24th day of June 2020, ordering *inter alia*:

⁷ At para. 9 of the Pirate Cove case.

⁸ CPR 62.2(1) & (2).

⁹ Rule 29(2) of the Court of Appeal rules made pursuant to the Eastern Caribbean Supreme Court (Saint Vincent and the Grenadines) Act, Cap. 24. See also Attorney General of Grenada v Andy Redhead case, at para. 13.

¹⁰ See the Attorney General of Grenada v Andy Redhead decision.

¹¹ Michel Dufour and others v Helenair Corporation Ltd and Others (1996) 52 WIR 188, at pages 190-191, per Sir Vincent Floissac CJ.

- a. The Court has jurisdiction to hear the claim. The Governor General's application to strike out the claim is dismissed.
 - b. The Governor General shall pay to Bigger Cement and Aggregate Incorporated, costs to be assessed, if not agreed; on application to be filed and served on or before 28th July 2020.
2. That the order of the Hon. Justice Esco L. Henry, dated June 24th 2020 be stayed pending determination of the appeal therefrom, pursuant to rules 62.16(1)(b) and 62.19 of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000.
3. Any other order that the Court deems fit or appropriate.'

[12] The Governor General articulated 9 grounds on which the application is founded. Those grounds chronicle the historical background to the proceedings. In them, reference is made to the date on which Bigger Cement filed its Fixed Date Claim Form; the date when she filed her application challenging the court's jurisdiction and the grounds for it; and the date that the impugned decision was delivered. She asserted that she has a realistic prospect of success and that the court has jurisdiction to grant the stay of proceedings.

[13] The application set out 2 proposed grounds of appeal: -

1. The learned Judge erred in holding that the 2 calendar month period for the initiation of the petition procedure under the Crown Lands Act Is not mandatory; and specifically finding at paragraph [56] of her judgment, that:

“It follows that the Act does not require strict compliance with the 2 month timeline, but rather elicits a reasonable effort by the applicant to observe that timing. I find therefore that Bigger Cement was not required to file his application or claim within the 2 calendar months of publication in the Gazette. The 2 calendar month period is directory only and is to be used as a yardstick or benchmark for determining what is realistic. I find accordingly that the claim is not statute-barred.”
2. The learned Judge erred in finding that the time period set out in section 9 of the said Act can be waived by granting an extension of time for compliance upon application in accordance with the Civil Procedure Rules 2000; and specifically holding as follows at paragraph [57] of her judgment:

“I am satisfied that the time period set out in section 9 of the said Act can be waived by granting an extension of time for compliance on application by Bigger Cement, in accordance with the CPR.”

They will be considered in turn.

Proposed Ground 1

[14] Affidavit testimony was supplied by Ms. Melicia Gilchrist who averred that she is vault attendant at the Attorney General’s Chambers in the Ministry of Legal Affairs. She asserted that she is advised by counsel of several things which she believes. She stated that on or about 18th February 2019, the Governor General served Bigger Cement a notice of even date which contained information about the commencement of a boundary survey, scheduled for February 26th, 2019 between lands owned by the Crown/State (Rabacca and Langley Park dry rivers) and lands owned by Bigger Cement (lot 6 C364-5A OER 2P) situated at Rabacca (Bower) in the Parish of Charlotte and that the survey would be commenced at a point to be determined.

[15] Ms. Gilchrist averred that on February 26th, 2019, pursuant to the notice, a survey was carried out by licensed land surveyor and senior surveyor at the Ministry of Transport and Works Alrick Williams. She indicated that pursuant to section 8 of the CLA a notice was published in Gazette No. 53, Vol. 152 on October 8th, 2019 which stated:

‘In keeping with section 8 of the Crown Lands Act, a copy of a registered Survey Plan C1842 depicting the boundary between Crown Land and Lot 6 on Plan C364 at Rabacca is hereby published. Any person who may consider himself aggrieved by this Plan may, without prejudice to any application to the Governor General, within two calendar months of this publication, apply by petition to a judge in chambers to review the survey. The petition must state fully the objections to the survey and the petitioner’s claims and reasons for the application.’

[16] Ms. Gilchrist stated that Bigger Cement’s Fixed Date Claim Form was met by the application challenging the court’s jurisdiction. She outlined that the application was made on the grounds that Bigger Cement’s claim for constitutional redress should be struck out because an alternative remedy was available; that it did not comply with section 9 of the CLA and should be struck out pursuant to CPR 9.7(6)(c) and 26.3(1) (c). Ms. Gilchrist recited the proposed grounds of appeal.

[17] She averred that the Governor General has a realistic prospect of appeal because:

1. Sections 6 and 8 respectively of the CLA make provision for Crown boundaries to be surveyed; for such surveys to be laid before the Governor General for approval; for a copy of the survey to be deposited at the Survey Office and notice of such deposit to be published in the Gazette.
2. Section 9 of the CLA permits an aggrieved person to petition a judge in chambers to review the survey.
3. Notice of deposit of the referenced survey was published in the Gazette. The two-month period within which Bigger Cement should have applied for review elapsed on December 8th 2019. It commenced its action on December 17th, 2019 after the time period for applying for review had expired. Bigger Cement's claim is therefore statute-barred and the court lacked jurisdiction to hear the claim.
4. The judge erred in considering that the 2-month period was directory only and that the claim was not statute-barred.
5. The judge erred in finding that the period was capable of being waived by granting an extension of time to Bigger Cement.
6. The judge erred in failing to consider that the discretionary nature of the word 'may' in section 9 of the CLA 'pertained to an aggrieved person's option to invoke the petition stipulated by the said provision, without prejudice to any application to the Governor-General, and not to the 2-month period mandated by the said provision.'

[18] In her submissions in support of the Governor General's application, learned crown counsel Mrs. Joezel Allen repeated the statements made by Ms. Gilchrist in her affidavit. She added that the intent of Parliament 'ought to be taken into account in interpreting' section 9 of the CLA. She submitted that the Legislature would not have specified a 2 month timeframe if it was not expected that such a timeframe should be strictly adhered to.' She argued 'in the context of section 9 of the **Crown Proceedings Act**, (sic) the limitation period is mandatory, not discretionary.'

[19] Learned counsel Mrs. Allen submitted further that it was the intent of Parliament that an aggrieved person's pursuit of the petition mechanism should be discretionary or directory, but that the two-month time limit should be mandatory or discretionary. She submitted further that in the case of

Clayton Douglas v The Police¹², the Court of Appeal considered the use of punctuation marks and sentence structure in ascertaining legislative intent. She quoted Sir Vincent Floissac CJ who said:

‘The function of a court in relation to a statute is to interpret the statute by ascertaining the legislative intention in regard thereto. That legislative intention is an inference drawn from the primary meanings of the words and phrases used in the statute with such modifications of those meanings as may be necessary to make them consistent with statutory context. Those words and phrases, the punctuation marks used and the structure of the sentences in the statute are among the components of the statutory context by reference to which the legislative intention is required to be ascertained or the words and phrases are required to be interpreted.’¹³

[20] Learned counsel Mrs. Allen contended that in determining legislative intent in regard to section 9, consideration must be given to among other things, the use of punctuation marks and the resultant grammatical effect. She explained that this learning can be applied to the interpretation of section 9 of the CLA.

[21] Section 9 provides:

‘Any person who may consider himself aggrieved by any plan of a survey of Crown boundaries may, without prejudice to any application to the Governor-General, within two calendar months next after the publication in the Gazette of the last mentioned notice, apply by petition to a judge in chambers to review the survey. The petition must state fully the objections to the survey and the petitioner’s claims and the reasons for the application.’
(Underlining added)

[22] The Governor General argued that the words ‘within two (2) calendar months next after the publication in the Gazette of the last mentioned notice’, as contained within two commas, constitute an intervening phrase to which the word ‘may’ does not apply. She added that ‘the word “may”, instead pertains to an aggrieved person’s option to pursue the remedy provided’ in the said

¹² Commonwealth of Dominica Civil Appeal No. 31 of 1991.

¹³ At page 5 of the judgment.

provision. She submitted that in light of the use of the intervening phrase, punctuation marks and grammatical context in section 9, the word 'may' in the provision, does not confer a discretionary or directory effect on the two-month time limitation stipulated therein. She contended that it was mandatory.

[23] In supplemental submissions, the Governor General appeared to have resiled a bit from this posture. She submitted that she does not oppose the stipulation outlined in section 3 of the **Interpretation and General Provisions Act**¹⁴ that 'shall' must be read as imperative and 'may' as permissive and empowering. She argued that she does not contest the court's finding on this point, or the established case law supporting this trite principle of statutory interpretation.

[24] Bigger Cement countered that the Governor General's proposed ground of appeal against the finding in respect of the limitation is bound to fail, to the extent that it challenges the meaning given to the word 'may' as being directory. It submitted that the court is obligated to follow its earlier decision in this regard. It cited the case of **Charles Joseph v Antigua Commercial Bank**¹⁵ where the learned Master adopted the approach taken by Olivetti-Joseph J. and the Court of Appeal in another case¹⁶ by interpreting 'may' as directory and not mandatory.

[25] The Governor General rejoined that she takes issue with the learned judge's incorrect application of the word 'may' to the 2-month time period mandated by section 9 of the CLA, instead of to an aggrieved person's option to invoke the petition procedure stipulated by the section. Learned counsel Mrs. Allen argued that the first sentence of section 9 of the CLA should be interpreted as follows:

'Any person who **may consider** himself aggrieved by any plan of a survey of Crown lands **may apply** by petition to a judge in chambers to review the survey. Such petition **must be** initiated within 2 calendar months next after the publication in the Gazette of the last mentioned notice. This remedy shall not be without prejudice to the Governor General.' (bold added)

¹⁴ Cap. 14 of the Laws of Saint Vincent and the Grenadines, Revised Edition 2009.

¹⁵ ANUHCv2005/0287 at paras. 6 -7.

¹⁶ Identified as Suit 309 of 1999.

[26] When asked by the court, which words she was construing as ‘must be’, learned counsel replied: ‘There does not appear to be a particular word, but reading from the context of the section the words ‘shall be’ or ‘must be’ can be construed from such context. She did not indicate how the punctuation marks could lead to this construction.

[27] The first ground of the proposed appeal targets the court’s interpretation of the second ‘may’ in section 9 of the CLA. The argument as advanced seeks to require on the one hand a dichotomous interpretation of ‘may’. In that way, the word ‘may’ would be interpreted as directory for part of the sentence and as mandatory for the other part of the sentence. On the other hand and alternatively, the Governor General is proposing a judicial amendment to the section by introducing a new word ‘shall’. These positions are best illustrated by placing the text of the provision next to the proposed interpretation in tabular format. Both approaches are demonstrated in the following table, using the language suggested by learned counsel Mrs. Allen in one case. The second example is the court’s rendering of the interpretation argued for, which would result in an amendment of the section.

[28]

Section 9 of CLA	The split/dichotomous interpretation
‘Any person who may consider himself aggrieved by any plan of a survey of Crown boundaries may , without prejudice to any application to the Governor-General, within two calendar months next after the publication in the <i>Gazette</i> of the last mentioned notice, apply by petition to a judge in chambers to review the survey. (bold added)	‘Any person who may consider himself aggrieved by any plan of a survey of Crown lands <u>may apply</u> by petition to a judge in chambers to review the survey. Such petition <u>must be</u> initiated within 2 calendar months next after the publication in the <i>Gazette</i> of the last mentioned notice. This remedy shall not be without prejudice to the Governor General.’ ¹⁷
	Amendment by introducing ‘shall’
	Any person who may consider himself aggrieved by any plan of a survey of Crown boundaries may , without prejudice to any

¹⁷ Suggested by learned counsel Mrs. Allen.

	application to the Governor-General, apply by petition to a judge in chambers to review the survey, and shall so apply <u>within two calendar months</u> next after the publication in the <i>Gazette</i> of the last mentioned notice. (bold added)
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[29] The foregoing table graphically exemplifies the result of the interpretation advocated by the Governor General. In option 1, the word 'may' is split and given two meanings. In the first meaning (in the first sentence), it is correctly applied as a modal verb to qualify 'apply'. The dangling modifier 'without prejudice to any application to the Governor-General,' and the interposed timeline are removed and the sentence simplified. The second sentence is then used to introduce another meaning, so that 'may' becomes 'shall'. In that rendition, the subject of the verb 'apply' is changed from 'the person aggrieved' to 'such petition'. This ignores the clear grammatical construction that 'may' qualifies the only verb in that sentence which is capable of being qualified – 'apply'. The other verbs 'consider', 'aggrieved' and 'to review' do not need or attract that qualifier. This runs afoul of rules of grammar and all rules of statutory interpretation. There is no logical or legal basis for interpreting the section in that way.

[30] The other part of the argument advanced by the Governor General proposes that the court introduces the word 'shall' as the qualifier to the word 'apply' but only in respect of the time limit. As illustrated in the second option in the table, the only other way that the Court can construe the section in the manner argued for by the Governor General is to amend the section by inserting the word 'shall' and making other consequential adjustments. Such amendments while permissible are rare and made only if necessary, to cure some absurdity in the statute. In view of the clear and unambiguous language of the section, this is not necessary.

[31] I was led to the ineluctable conclusion that there is no merit in the propositions made by the Governor General for such construction, or her contention that the claim is statute-barred. The table above bears this out. The judgment in **Charles Joseph v Antigua Commercial Bank** and the case referred to in it is also instructive. I remained fortified that this suggested approach to

interpretation is incorrect. There is no merit to this proposed first ground of appeal and no realistic chance of success.

Proposed Ground 2

[32] In relation to the second proposed ground of appeal, the Governor General filed no substantive submissions. Bigger Cement submitted that the Governor General included in her application no reasons why these grounds are advanced. It observed that no appeal is proposed against the court's findings that there is no adequate alternative remedy and further that the Governor General has submitted to the court's jurisdiction by filing a defence¹⁸. It submitted further that even if the proposed appeal succeeded it would have no effect on reversing her submission to the court's jurisdiction in this matter.

[33] This proposed ground of appeal addresses a pronouncement which was not determinative of the jurisdiction issue in the earlier proceedings. The court found (at paragraph 56) that the 2-month time period in section 9 of the CLA was merely directory and not mandatory. It held further that the claim was not statute-barred. That was decisive of that point. For completeness, the court proceeded in the next paragraph [57] to indicate that even if the word 'may' was mandatory, its coercive effect was capable of being waived if Bigger Cement made an application for an extension of time to comply. Having found that such application was unnecessary, that statement was merely declaratory and not determinative of the issue or sub-issue. Moreover, there was no application before the court by Bigger Cement for an extension of time to file his claim and no order was made granting it such extension of time.

[34] For those reasons, there is nothing in that pronouncement to sustain an appeal. This proposed ground of appeal has no realistic prospect of success. Leave to appeal on both proposed grounds of appeal is therefore denied.

Issue 2 – Should the order dated 24th June 2020 be stayed pending the determination of the appeal?

[35] In light of the outcome of the application for leave to appeal, it is unnecessary to consider the application for a stay of proceedings. For the avoidance of doubt, that application is also dismissed.

¹⁸ On 23rd July 2020.

For what it is worth, I will summarize in the succeeding paragraphs the arguments of both parties and comment on the merits.

[36] Ms. Gilchrist testified that it would be just and equitable to grant a stay of proceedings of the order made on June 24th, 2020 pending determination of the appeal. She testified that without a stay the appeal will be worthless, a waste of the court's time and contrary to the overriding objective to deal with cases fairly, justly and expeditiously. She averred that if the stay is not granted the claim would proceed thereby rendering the appeal nugatory and a waste of the court's time. She reasoned that should the appeal be upheld the continuation of the claim would result in a waste of the court's time and resources. She added that the interest of the court in hearing the appeal is overwhelming and the stay should therefore be granted.

[37] The Governor General repeated the foregoing statements in her submissions. She submitted further that it is within the court's discretion to grant a stay pursuant to CPR 62.16(1)(b) and 62.19.

[38] Bigger Cement cited the case of **Novel Blaze Limited v Chance Talent Management**

Limited¹⁹ as affirming the principles applicable when the court considers an application for a stay of execution. In that judgment, the Court of Appeal referred to the judgment in **C-Mobile Service Limited v Huawei Technologies Co. Ltd.**²⁰ in which Blenman JA listed the five principles as: -

- '(i) The court must take into account all of the circumstances of the case.
- (ii) A stay is the exception rather than the general rule.
- (iii) A party seeking a stay should provide cogent evidence that the appeal will be stifled or rendered nugatory unless a stay is granted.
- (iv) In exercising its discretion, the court applies, what is in effect, a balance of harm test in which the likely prejudice to the successful party must be carefully considered.
- (v) The Court should take into account the prospects of the appeal succeeding but only where strong grounds of appeal or a strong likelihood the appeal will succeed is shown (which will usually enable a stay to be granted).

¹⁹ BVIHCVAP2020/0006, per Webster JA (AG) at para [10].

²⁰ BVIHCMAP2014/0017 (delivered 2nd October 2014).

- [39] The learned Justice of Appeal in the **Novel Blaze case** added that the foregoing elements apply in virtually all applications in varying degrees. He noted that the court carries out a balancing exercise in considering them and no one is decisive. Bigger Cement also advanced the case of **Marie Makhoul v Cecily Foster**²¹ where the learned Justice of Appeal referred to the modern authority **Linotype-Hell Finance Ltd. v Baker**²² and stressed that it is not enough to make a bald assertion that an applicant will be ruined, but rather that evidence must be adduced to demonstrate that such ruination would occur, if a stay is refused. Bigger Cement also cited **1st National Bank of Saint Lucia Limited v Universal Fishing and Trading Co Ltd.**²³ which illustrates those principles.
- [40] Bigger Cement argued that the Governor General has provided no evidence of how a refusal of a stay would prejudice it. It submitted further that the orders which the Governor General seeks leave to appeal against are declaratory in nature. It contended that a stay must be to prevent a party from taking executory measures on a judgment under appeal. It argued that the aspect of the order in respect of which a stay of execution is being sought must be executory in nature. The Governor General accepted this as a correct statement of the law. Bigger Cement submitted that the orders made by the court in the June 24th decision were all declaratory and cannot be made the subject of a stay. It relied on the decision in **The Attorney General et al v Jeffrey J Prosser et al**²⁴.
- [41] There, the learned Justices of Appeal in turn affirmed that non-coercive orders may not be stayed. They relied on pronouncements made by the learned judge in the Supreme Court of Nigeria in the case of **Chief RA Okoya & Ors v S Santilli & Ors**²⁵. In that case, Agabje J. opined:
- ‘First: (i) executory judgment declares the respective rights of the parties and then proceeds to order the defendant to act in a particular way, eg to pay damages or refrain from interfering with the plaintiff’s rights, such order being enforceable by execution if disobeyed.

²¹ ANUHCVP2009/0014 (delivered on 26th August 2009) per George-Creque JA.

²² [1993] 1 W.L.R. 321 at 323.

²³ SLUHCV2007/0998.

²⁴ Belize Civil Appeal No. 7 of 2006 (Delivered on 8th March 2007), per Manuel Sosa JA, Boyd Carey JA and Dennis Morrison JA.

²⁵ SC 200/1989.

Declaratory judgments, on the other hand, merely proclaim the existence of a legal relationship and do not contain any order which may be enforced against the defendant.

Second: A declaratory judgment may be the ground of subsequent proceedings in which the right having being violated, receives enforcement but in the meantime there is no enforcement nor any claim to it.'

[42] He continued: -

'It appears to me that the starting point ... is the consensus that a declaratory judgment may be the ground of subsequent proceedings in which the right ... violated receives enforcement but in the meantime there is no enforcement nor any claim to it. So, until subsequent proceedings have been taken on a declaratory judgment following its violation or threatened violation there cannot on the clear authorities ... (be) a stay of execution of the declaratory judgment because prior to the subsequent proceedings, it merely proclaims the existence of a legal relationship and does not contain any order which may be enforced against the defendant.'

[43] The learned judge concluded: -

'The conclusion I reach is that there cannot be (sic) a stay of execution of declaratory judgments. ... It follows in my judgment that a defendant who has filed an appeal against a declaratory judgment or order is not entitled to apply for a stay of execution of that judgment or order. Such an application in the circumstances will be misconceived.'
(underlining added)

[44] Learned counsel Mrs. Allen rejoined that the impugned order is partly executory and partly declaratory. She submitted that the court's order directing the Governor General to file her defence is executory as it mandates the continuation of the proceedings. She conceded that the rest of the order is declaratory.

[45] Bigger Cement's submissions as to the inapplicability of stays to declaratory orders, are persuasive. The decision in **Prosser** is compelling. I adopt the principles enunciated in that decision. The record reflects that the Governor General applied for an extension of time to file her defence as a result of which the court directed that she did so on or before July 23rd, 2020. The defence was filed on that date, and exactly two weeks after the instant Notice of Application was

filed. It would therefore have been within her contemplation that she was seeking a stay of the proceedings when she filed the defence. By filing her defence, she has submitted to the court's jurisdiction.

[46] The orders made in the June 24th, 2020 decision were: -

'It is declared and ordered:

1. The court has jurisdiction to hear the claim. The Governor General's application to strike out the claim is dismissed.
 2. Bigger Cement's application to amend its Fixed Date Claim Form by inserting
 - a) 'Originating Motion' in the heading;
 - b) a reference to 'section 7 of the Constitution of St. Vincent and the Grenadines' in the introductory paragraph;
 - c) in the prayer the following: '(4) A declaration that all and any of the acts which the defendant caused to be undertaken as part of the process of entering on the Claimant's land and procuring the Survey Plan No 1842 to be prepared, approving same and publication of the Notice in the Government Gazette No. 53, Vol 152 dated the 8th October, 2019 purportedly on the basis of the Crown Lands Act amounted to the unconstitutional entry on the Claimant's land which is shown on the said survey plan in that it was arbitrary and/or a curtailment of its interest therein without due process, contrary to sections 6 and/or 7 and/or 8(8) and/or 8(10) of the Saint Vincent and the Grenadines Constitution Order 1979 and is an abuse of power and is null and void.' and
 - d) Cosmetic and consequential insertions in the introductory paragraphs of the Fixed Date Claim Form (by inserting 'and/or 7'); by replacing 'on' with 'dated'; by inserting respectively 'survey of' and 'as shown' in lines 1 and 3 of the first declaration in the prayer; and changing 'do' to 'does' in that paragraph.
- is granted.
4. Bigger Cement shall file and serve the amended Fixed Date Claim Form within 14 days of today's date (i.e. on or before 9th July 2020).
 5. The Governor General is granted an extension of time to July 23rd, 2020 to file her defence.
 6. The Governor General shall pay to Bigger Cement and Aggregate Incorporated, costs to be assessed, if not agreed; on application to be filed and served on or before 28th July, 2020.'

- [47] The first observation that must be made is that the Governor General has not applied for leave to appeal any of the foregoing orders. Instead, she has attacked one element of the rationale behind the court's finding, that it has jurisdiction to entertain the claim. That prong was limited to the interpretation of 'may' in section 9 of the CLA.
- [48] The order at paragraph 1 in the preceding paragraph is self-evidently declaratory and does not attract a stay. Paragraphs 2, 4 and 5 of the order are neither executory nor declaratory. They are simply directions to move the proceedings along. They have all been acted on. A stay would therefore be ineffective in relation to them. Paragraph 6 is executory. None of the proposed grounds of appeal attacked that order.
- [49] Applying the principles laid out in **Prosser**, to the case at bar, I am of the considered opinion that apart from the costs order, none of the other paragraphs is executory and can be stayed. The costs order has not been challenged. There is no legal or factual basis on which an application for stay of proceedings or the impugned order is justified.
- [50] Furthermore, no cogent evidence has been supplied which supports a conclusion that the Crown would be ruined if a stay is not granted. Ms. Gilchrist's assertions are skeletal at best and do not satisfy this requirement. In addition, the chances of success on appeal are in my opinion infinitesimal. In all the circumstances, there is no justification for granting a stay.

Costs

- [51] The assessed costs regime is applicable in respect of the present application. The general rule is that the winner is awarded costs²⁶. In the premises, Bigger Cement and Aggregate Incorporated is entitled to recover its costs pursuant to CPR 65.11, if the parties are unable to agree them. An application for assessment of those costs will be necessary in such eventuality. The deadline for doing so is January 29th, 2021.

ORDER

- [52] The order made on December 16th, 2020 was: -
1. The Governor General's application for leave to appeal the decision dated June 24th, 2020 is dismissed.

²⁶ CPR 64.6.

2. The Governor General's application for a stay of the June 24th, 2020 order is dismissed.
3. The Governor General shall pay to Bigger Cement and Aggregate Incorporated costs pursuant to CPR 65.11, to be assessed if not agreed. Bigger Cement and Aggregate Incorporated shall file and serve its application on or before January 29th, 2021.

[53] I am grateful to counsel for their submissions.

Esco L. Henry
HIGH COURT JUDGE

By the Court

Registrar