

ST. VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO. SVGHCV0184 / 2003

BETWEEN:

OTTAVIO LAVAGGI

Claimant

and

THE PHYSICAL PLANNING AND DEVELOPMENT BOARD

Respondent

Appearances:

Mr. Samuel Commissiong and Dr. Godwin Friday for the claimant.
Mr. Grahame Bollers and Mr. Jaundy Martin for the respondent.
Miss Nicole Sylvester for Wireless Ventures (St. Vincent) Ltd. the party
interested/applicant.

2003:June 16, 27.

IN CHAMBERS

JUDGMENT

ALLEYNE J.

[1] This is an application by Wireless Ventures (St. Vincent) Ltd., a person found at the first hearing to have a sufficient interest in the subject matter of the claim to be heard, pursuant to Rule 56.11 (2) (a), for the following orders, among others;

- (i) That the applicant be added as a party to the claim with necessary consequential directions.



- (ii) That the affidavit of the claimant in support of the interim order made without notice on the 5th May 2003 failed to disclose reasons or good reasons for not giving notice.
- (iii) That the said interim order be set aside and/or varied.
- (iv) That the said interim order was obtained as a consequence of material non-disclosure.
- (v) That the said interim order amounted to a prohibitory injunction which severely prejudiced Wireless Ventures.
- (vi) That the said prohibitory injunction is wrong in law.
- (vii) That the claimant in obtaining that injunction was under a duty to give a cross-undertaking in damages.

[2] The claimant, Mr. Lavaggi, owns several acres of land at Friendship, Belmont, Bequia, bounding with lands owned by Mrs. Avita Lewis. He lives at Friendship. On or about March 25th 2003 he noticed excavation works going on on Mrs. Lewis' land, less than a foot away from their common boundary. Mr. Lavaggi learned from one of the workers that the excavation was in preparation for the construction of a communications tower. He wrote to the Board the following day objecting to what had taken place, and to "a possible proposal to locate such tower very close to the border of my property". Mr. Lavaggi drew the Board's attention to his understanding that "radiation from communication towers is hazardous to health at short distance, in case of permanent exposure, according to scientific evidence", and he suggested that such construction would prevent him from using the right to build a residence on his land close to his border, within the limits prescribed by the law. He claimed that that would probably drastically reduce the value of his property. As a result, the Board ordered that work cease on the site.

- [3] Mr. Lavaggi held discussions with representatives of Wireless Ventures.
- [4] By Public Notice published in the Gazette of 8th April 2003 notice was given of the application made by Wireless Ventures to the Physical Planning and Development Board (hereafter the Board) to construct a new cell tower at Belmont, Bequia, and inviting persons to inspect the application, plans and other documents and to make representation on the matter during a period of 14 days following the publication of the notice. Contrary to what Mr. Lavaggi had been led to believe by a representative of the Board, and to the normal practice of the Board, no notice of Wireless Ventures' application was published in any local newspaper.
- [5] On or about April 18th 2003, before the period of 14 days for objection had expired, construction work resumed on the site. Mr. Lavaggi objected, on the ground that the Board had stopped the work, whereupon one of the workers produced a document which he said was approval by the Board. Mr. Lavaggi perused the document, and contacted his Solicitor. It transpires that approval was given for the construction on 17th April 2003.
- [6] Mr. Lavaggi contacted an official of the Board to discuss the matter, and asked whether the approval could be suspended and the "intended proper procedure followed, so that (he) and others who wished to do so might make representation" to the Board in relation to the proposed project. The official acknowledged that there might have been a failure to publish notice in a local newspaper as was customary, but gave no assurance that the decision would be suspended.
- [7] On the 5th May 2003, on an application without notice, Mr. Lavaggi obtained an interim order granting a stay of the decision until the application for judicial review has been heard and determined on the merits.
- [8] Wireless Ventures now seeks the several remedies set out in its Notice of Application, as partially set out in part in paragraph 1 of this Judgment. As I understand it there is no opposition to the application that Wireless Ventures be

added as a party to the Judicial Review proceedings, but in any event I am of the view that the application is meritorious, and I have no hesitation in granting that order. It is accordingly ordered that Wireless Ventures (St. Vincent) Limited be joined as a third party to these proceedings, and that all documents exchanged in these proceedings be served on the third party within 7 days of the making of this order.

- [9] In keeping with my earlier ruling on Wireless Ventures' oral application, delivered on June 13th, 2003, and also on the basis that such declarations and orders will not advance the matter, I make no order on paragraphs (ii), (iii), (iv), (v), and (vi) of the present application.
- [10] Mr. Lavaggi's affidavit in support of his application was sworn and filed on 30th April, 2003. His Solicitor's certificate of urgency was filed on the same date, as was the application for the interim remedies. The application was not heard until 5th May 2003, and there does not appear to be any reason why service could not have been effected in the intervening days, which included a Thursday, Friday and Saturday. Certainly, the affidavit and other documents filed do not disclose any. Rule 11.8(1) of the **Civil Procedure Rules 2000** (CPR) states the general rule that the applicant must give notice of the application to each respondent, which includes "the person against whom the order is sought" (CPR Rule 11.2 (a)), and the requirement for the court to be satisfied that there are good reasons for not giving notice is set out in Rule 17.3 (2). The period of notice for applications of this nature is set by Rule 17.4 (3) as 3 days, so Mr. Lavaggi had adequate time within which to give notice.
- [11] The order to stay the decision of the Board amounted to a prohibitory injunction seriously affecting the commercial interests of Wireless Ventures; **R v Inspectorate of Pollution and another ex parte Greenpeace Ltd.** [1994] 4 All ER 321, 327. In the circumstances, Wireless Ventures contends that Mr. Lavaggi was under an obligation to give a cross-undertaking in damages. This duty is stated in clear terms, subject to the court's discretion to direct otherwise, in Rule

17.4 (2) of CPR. The interim order does not disclose that the court exercised its discretion to forego the undertaking, and no undertaking has in fact been given.

- [12] It has been held, in **R. v Ministry of Agriculture Fisheries and Food and another, ex parte Monsanto plc** [1998] 4 All ER 321 that the general principles governing the grant of interim relief apply also in relation to judicial review proceedings, but that had to be in the context of the public law questions raised in such proceedings. The judgment in the case went on to declare that judicial review proceedings are not in general intended for, nor well suited to, inhibiting commercial activity, particularly over an indefinite, substantial period of time. See page 329 h.
- [13] **Monsanto's** case examines the application of the **American Cyanamid Co. v Ethicon Ltd.** [1975] 1 All ER 504 principles to judicial review cases where commercial activity is inhibited, principles which are clearly applicable to the instant case.
- [14] I am satisfied that Wireless Ventures' inevitable loss which would result from the stay granted in the interim order, and even more so if the stay were to be continued, would be difficult to quantify and, as in **Monsanto** (page 325 c), there would be difficulty in establishing causation.
- [15] Mr. Lavaggi's case on the health hazard, at least as presented in support of the application for interim relief, is highly speculative and unconvincing, and in my view does not provide substantial ground for granting interim relief of the nature of an injunction restraining construction of the tower. It is based on the report of a delegate at an International Conference on Cell Towers to the Toronto Board of Health, which concedes that "there is still insufficient data to accurately estimate the risk of low level exposure to radio frequencies". Mr. Lavaggi provided no expert opinion as to the parameters which would apply to a tower of the nature of that intended to be constructed by Wireless Ventures. He deposed that he owns several acres of land. There is no suggestion that he has a development plan for

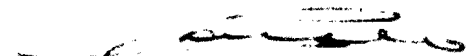
the land, nor as to his intentions for construction of residential buildings in close proximity to the tower. That the tower would substantially affect the value of his land is at this stage purely speculative and unsupported. In any case, the effect on the value of his land could in time be objectively estimated, in contrast to the loss to Wireless Ventures by the grant or continuance of the interim order. This is an important consideration in examining the issue of balance of convenience.

[16] On the foregoing grounds, I am of the view that the balance of convenience is against continuing the stay pending the consideration of the application for judicial review on its merits. It is therefore ordered that the interim order to stay the decision of the Board until the application for judicial review has been heard and determined on its merits be discharged.

[17] It is further ordered that Wireless Ventures (St. Vincent) Limited be joined as a third party to these proceedings, and that all documents exchanged in these proceedings which have not already been served on them be served on the third party on or before the 4th July 2003.

[18] Wireless Ventures' costs of this application to be paid by Mr. Lavaggi in any event, to be agreed or assessed.

[19] It is directed that the substantive proceedings for judicial review be set down for case management on the next visit of the case management Master to St. Vincent, and that an early date be set for hearing of the substantive action.



Brian G.K. Alleyne
High Court Judge