[2016] JMCA Civ 20

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 23/2014

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA
THE HON MR JUSTICE F WILLIAMS JA (AG)

BETWEEN THE MINISTER OF HOUSING APPELLANT

AND NEW FALMOUTH RESORTS LTD RESPONDENT

Mrs Susan Reid-Jones and Miss Vanessa Blair instructed by the Director of State Proceedings for the appellant

Keith Bishop, Mrs Juliet Mair-Rose and Romaine Tulloch instructed by Riam Esor & Co for the respondent

20, 21, 22 October 2015 and 29 April 2016

PHILLIPS JA

[1] I have had the opportunity of reading the judgment of my learned brother F Williams JA (Ag). I have found the judgment to be very thorough and comprehensive. I agree with his reasoning and conclusion and there is nothing that I can usefully add.

BROOKS JA

[2] I too have read in draft the judgment of my brother F Williams JA (Ag) and agree with his reasoning and his conclusion. I have nothing to add.

F WILLIAMS JA (AG)

[3] This is an appeal by the Minister of Housing (the Minister) against the decision of Campbell J dated 12 February 2014, by which the learned judge dismissed the Minister's application for interim injunctive relief and granted the application of New Falmouth Resorts Limited (New Falmouth) to strike out the Minister's claim. The learned judge also ordered that the costs of the application should go to New Falmouth to be assessed on an indemnity basis and further ordered that the costs of the claim and the costs and damages which had been previously ordered by Donald McIntosh J in claim no HCV 01702 of 2007 be paid before any further steps be taken in the matter.

Background

[4] The Minister is a corporation sole, with perpetual succession and the capacity to acquire, hold and dispose of land and other property of whatever kind, by virtue of section 3 of the Housing Act. New Falmouth is a limited liability company registered under the laws of Jamaica and the registered proprietor of all that parcel of land part of Orange Grove, in the parish of Trelawny, being part of the land comprised in the certificate of title registered at Volume 1008 Folio 636 of the Register Book of Titles. Mr James Chisholm is the sole shareholder, chairman and chief executive officer of New Falmouth.

[5] Several acres of the land registered to New Falmouth (the subject lands) have been unlawfully occupied by numerous persons and have been the subject of two law suits. As such, it will be useful to outline the more-salient aspects of the legal history of the subject lands.

Claim no 1: HCV 01702 of 2007

Claim for recovery of possession

[6] In 2007, New Falmouth brought claim no HCV 01702 of 2007, against 99 defendants (alleged to be squatters) for recovery of possession of the subject lands. On 6 April 2010, after a lengthy trial, Donald McIntosh J delivered the judgment of the court, ordering, *inter alia,* recovery of possession and the payment of damages in the sum of $50,000.00 by each defendant to New Falmouth. New Falmouth, as part of its efforts to enforce that judgment to recover possession, sought to have the Jamaica Public Service Company Limited (JPS) discontinue power supply to the unlawful occupants of the subject lands.

Applications for stay of execution of McIntosh J's judgment and for injunctive relief

[7] On 6 and 8 March 2012, notices of application for (i) a stay of execution of McIntosh J's judgment and (ii) for injunctive relief (to prevent interference with the 99 defendants' possession of the subject lands), respectively, were filed under claim no HCV 01702 of 2007. Both applications, although brought in the suit between New Falmouth and the 99 defendants, were in effect (for reasons that will shortly be discussed) made by the Minister. The main ground on which the applications were made was that on 29 February 2012, the Minister had declared the lands comprised in certificates of title registered at Volume 1008, Folio 636 and Volume 1389, Folio 427 of the Register Book of Titles to be improvement areas in accordance with section 6 of the Housing Act (the Act) and so he was at liberty to compulsorily acquire the subject lands. The applications were supported by affidavits filed on 6 and 8 March 2012,

deposed to by Joseph Ameen Shoucair, (Mr Shoucair) attorney-at-law, managing director of the Housing Agency of Jamaica (the HAJ) and "a duly authorized agent of the Honourable Minister Housing of Jamaica [sic]". (See, for example, paragraph 1 of his affidavit filed on 8 March 2012 in HCV 01702 of 2007.)

[8] On 8 March 2012, G Brown J, heard the *ex parte* application for the stay of execution, granted an interim stay for a period of 30 days and set the application to be heard *inter partes* on 20 April 2012. On 30 March 2012, McDonald-Bishop J (as she then was) heard the application for injunctive relief and ordered that New Falmouth, its servants, agents or anyone else acting on its behalf or on its instructions (including the public-utility companies) be restrained from interfering with the 99 defendants' possession and quiet enjoyment of the subject lands until the determination of the *inter partes* application for a stay.

[9] On 20 April 2012, when the application for the stay of execution went before McIntosh J, after hearing submissions from counsel for the parties, he adjourned the matter, requesting that either the Minister or the deponent (Mr Shoucair) should appear. On 4 May 2012, McIntosh J delivered his decision, dismissing the application. Neither the Minister nor the deponent had appeared in court. However, the learned judge recognised the presence of officers of the HAJ (Mrs Simone Morris-Rattray and Mrs Janice Buchanan-McLean) and handed them a copy of the orders which he had made. There was no appeal from the learned judge's decision.

[10] The reasons for the learned judge's decision were contained in the formal order filed on 18 May 2012, which stated, *inter alia*, the following:

> "3. It is clear from the Application to Stay Execution that this is intended to be an Indefinite One, as there is no indication of a date or period for allowing the Claimants to have the fruits of the judgment/award handed down in their favour.
>
> 4. The presence of legal officers from the Housing Agency may be intended to suggest to the Court that the Government is taking actual and immediate steps to assist the **Parties** in a mutually beneficial settlement.
>
> 5. Given the History of this case; the length of the trial and the efforts made by the Court to assist the Defendants, who seem to have been misled by politicians into squatting on private property, notwithstanding their unlawful act this Court empathises with the gullible Defendants.
>
> 6. The Application is iniquitous. It may be that the law is not a shackle to the Law Makers. That does not apply to the Court which must dispense justice according to the Law.
>
> 7. It is the Court's view that the Application is devoid of sincerity, it is an attempt to pervert the course of Justice and an Abuse of the process of the Court.
>
> 8. The application is refused with costs to the Claimants [sic] to be taxed if not agreed.
>
> 9. Leave to appeal granted to the Defendants on the condition that the Defendants pay all costs of the Claim appealed and present the application within fourteen (14) days hereof."

Minister lodges caveat and gazettes order to compulsorily acquire

[11] On 1 May 2012 the Minister lodged a caveat against the certificate of title for lands registered to New Falmouth, including the subject lands, and gazetted notice of the subject lands being declared to be an improvement area pursuant to section 6 of the Housing Act, published in the Jamaica Gazette dated 15 May 2012 to facilitate the compulsorily acquisition of the subject lands.

Claim no 2: HCV 02767 of 2012

Applications before Campbell J

[12] On 18 May 2012, the Minister filed against New Falmouth a fixed-date claim form with claim no HCV 02767 of 2012, seeking several declarations, including one that he was entitled to compulsorily acquire the subject lands. He also filed a notice of application for injunctive relief against New Falmouth in the same claim. The fixed-date claim form was supported by the affidavit of Mrs Simone Morris-Rattray, senior manager of the legal services department and company secretary of the HAJ, sworn to on 18 May 2012. In response to the applications filed by the Minister, New Falmouth, on 22 October 2012, filed a notice of application for court orders, seeking as a matter of urgency, to strike out the Minister's application on the ground that, *inter alia*, the said application was an abuse of process and was actually seeking in substance the same relief sought under claim no HCV 01702 of 2007, which had already been refused.

[13] On 21 May 2012, V Harris J (then acting) after hearing the submissions of counsel, ordered that, by consent, New Falmouth and its agents be restrained from

dealing with the subject lands and from interfering with the occupants or any of the structures which were then on the land, without the consent of the Minister or the court, until 7 June 2012, to which date the matter was adjourned to be heard.

[14] The hearing, which began before Campbell J on 21 May 2013, continued over several months, at the end of which Campbell J ruled that the application before the court was an abuse of process; dismissed the Minister's claim and made orders as summarized in paragraph [3] herein.

The appeal

[15] It is from the above decision of Campbell J that this appeal emanates. The grounds of appeal, as set out in the notice and grounds of appeal filed on 27 March 2014, are as follows:

> "i. The learned judge misdirected himself in law and fact when he found that the stated or alleged purpose of the Claimant/Appellant is not for general interest of the community but merely for private individuals voluntarily associated together for their own benefit.
>
> ii. The learned judge, in finding that there is no public purpose to the compulsory acquisition, failed to appreciate that the definition of "public purpose" would take into account the benefits that would redound to the community as a whole. In so doing, the learned judge misconstrued the provisions, intent and purpose of Section 25 of the Housing Act ("The Act").
>
> iii. The learned judge misconstrued the meaning of Section 25 of The Act and exceeded its [sic] jurisdiction by exercising a discretion reserved for the Minister.

iv. The learned judge failed to appreciate and or misdirected himself in law when he found that the principles of res judicata and abuse of process were relevant to the proceedings before him.

v. The learned judge erred in fact and misdirected himself in law when he found that the relief sought in both claims was the acquisition of the subject lands.

vi. The learned judge erred in law when he found that the identification of public law issues are [sic] an insufficient answer to the defendant's argument that the issues have been ventilated before the court.

vii. The learned judge misconstrued Section 4 and Section 6 of The Act and misdirected himself by failing to take into account or give proper consideration to Section 6 (c) of the Act which provides "**the acquisition of any land, or building in the area which it is expedient to acquire for the reconstructuring and development of the areas".**

viii. The learned judge misdirected himself and his decision was influenced by premature factual findings when he found that there is no evidence that the Minister has caused to be prepared proposal for a housing scheme as required by Section 4(2) of The Act. In so doing the learned judge failed to appreciate that by virtue of Section 8 of the Act the time limited for the Minister to do so had not elapsed.

ix. The learned judge erred in law in concluding that an explanation would have been necessary as to the authority under which a valuation of the land in question was done. In so doing the learned judge failed to appreciate the provisions of Section 35 of The Act which permits the Minister or any person authorized by him to enter upon land proposed to be acquired for the purposes of valuation."

[16] The appellant, in written submissions, sought to advance and address the grounds of appeal under three headings, namely:

(i) *Res judicata* and abuse of process-*grounds (iv), (v) and (vi);*

(ii) Usurping the Minister's jurisdiction-*grounds (i), (ii), (iii) and (vii); and*

(iii) Misinterpretation of sections of the Housing Act- *grounds (viii) and (ix)*

[17] The respondent likewise adopted this treatment of the grounds of appeal in its submissions.

Appellant's submissions

- *Res judicata* and abuse of process- *grounds (iv), (v) and (vi)*

[18] Counsel for the appellant submitted that Campbell J erred in accepting the submissions of the respondent that the issues in the claim had already been adjudicated upon. It was submitted that, as such, the principle of *res judicata* was inapplicable. In seeking to demonstrate that the principle of res judicata had wrongly been applied, counsel cited: (i) **Sadie Vaughan v National Water Commission** claim no HCV 03034 of 2007, delivered on 14 November 2008; (ii) **Johnson v Gore Wood & Co (a firm)** [2001] 1 All ER 481; (iii) **Administrator-General for Jamaica v Rudyard Stephens, Federal Investors Ltd, Krias Ltd, and Exley Ho** (1992) 29 JLR 289; (iv) **Bradford & Bingley Building Society v Seddon Hancock and Others (Third Parties)** [1999] 1 WLR 1482; (v) **Hon Gordon Stewart OJ and Others v Independent Radio Company Limited and Wilmott Perkins** [2012] JMCA Civ 2; (vi) **Justin O'Gilvie and Others v Bank of Jamaica and Others** [2013] JMSC Civ 143 and (vii) **Donovan Crawford v Musson (Jamaica) Limited and Others** (1989) 26 JLR 139.

[19] Counsel submitted that the facts and issues of this appeal and the case before the learned judge below do not permit an application of the principles in **Henderson v Henderson** [1843-60] All ER Rep 378, having regard to the following:

a) the Minister was not a party to the previous claim with claim no HCV 01702 of 2007 - that claim having been a private-law action brought by New Falmouth for recovery of possession.

b) it was the 99 defendants (the occupants of the subject lands) in the previous claim who had sought to have the judgment stayed and in support of that application had filed the supporting affidavit of Mr Shoucair.

c) the HAJ having supported the application for the stay in New Falmouth's claim (HCV 01702 of 2007) and the HAJ legal officers having attended the hearing, did not operate to:

(i) make the Minister a party to those proceedings; or

(ii) bar the Minister from commencing proceedings premised on a different cause of action or from seeking injunctive relief.

[20] Counsel further submitted that there was no evidence before Campbell J that the court (in claim no HCV 01702 of 2007 between the 99 defendants and New Falmouth), had considered in that claim, the issues which were now before the court. Further, it was submitted that the two claims were divergent and of a different jurisprudential nature. Additionally, the fact that both claims touched and concerned the same land was, by itself, insufficient to permit the drawing of the conclusion that the substance of the relief sought in both claims was the acquisition of the subject lands.

[21] Counsel also submitted that Campbell J erred in his finding that the Minister's attempt to contradistinguish the issues involved in claim no HCV 02767 of 2012 (the case before him) from those in the previous case (claim no HCV 01702 of 2007) as public-law issues, was an insufficient answer to the respondent's argument that the issues had been ventilated before.

[22] It was further submitted that the learned judge erred when he ordered that the appellant pay the costs and damages awarded by McIntosh J against the 99 defendants (in claim no HCV 01702 of 2007), before any further step could be taken in this matter. Counsel submitted that there was no legal basis for the costs order as it could be interpreted as requiring the Minister to pay the costs of an action in which he was not a party. Counsel further made the submission that, in any event, the court would have

been *functus officio* in relation to claim no HCV 01702 of 2007. Further, it was submitted that, if that argument did not find favour with the court, then rule 64.9 of the Civil Procedure Rules 2002 (CPR), which permits the court to make such an order, had not been properly utilised.

- Usurping the Minister's jurisdiction - *grounds (i), (ii), (iii) & (vii)*

[23] Counsel submitted that the court below could only seek to examine whether the Minister had made his decision with propriety and fairness having regard to the principles of natural justice. Additionally, counsel contended that no evidence had been placed before the court for the learned judge to have concluded that the ministerial order was not made for a 'public purpose'. Further, counsel submitted that the court had failed to give appropriate consideration to the proper definition of 'public purpose' as outlined in **Hamabai Framjee Petit v The Secretary of State for India in Council; Moosa Hajee Hassam and Others v The Secretary of State for India Council** Privy Council Appeals Nos 139 and 140 of 1913, delivered on 18 November 1914.

[24] It was also submitted that there had been no evidential basis for the learned judge's finding that the ministerial declaration was irregular and evidenced procedural impropriety. Counsel also argued that the learned judge's decision was influenced by premature factual findings in that the time period stated in section 8 and prescribed by section 4(2) of the Housing Act for the Minister to cause the scheme to be prepared,

had not yet expired at the time of the hearing, thus the learned judge had wrongly found that the Minister had not caused the scheme to be prepared.

- Misinterpretation of sections of the Housing Act- *grounds (viii) and (ix)*

[25] Counsel submitted that the learned judge erred when he relied on his finding that the land was not required for a public purpose to conclude that section 35 of the Housing Act did not authorise the valuation of the respondent's land. In so doing, it was submitted, the learned judge failed to appreciate the express provisions of section 35 of the Act. Counsel submitted that, in any event, there was ample evidence before the court that the land was proposed to be compulsorily acquired.

[26] Counsel for the appellant submitted that there was no proper basis for the refusal of the injunction or for the claim to have been struck out as there were before the court serious issues to be tried. Relying on the principles from **American Cyanamid Co v Ethicon Ltd** [1975] 1 All ER 504, counsel sought to have the court conclude that damages would not have been an adequate remedy for the appellant. Counsel further submitted that the law authorises compulsory acquisition of land in exchange for monetary compensation to the proprietor, thus the only recourse for the respondent would be to attempt to secure adequate damages. Counsel also submitted that there was evidence before the court that steps had been taken by the respondent which could render nugatory, before the matter was tried, any order of the court and the purpose for which the acquisition was being sought.

Respondent's submissions

- *Res judicata and abuse of process- grounds (iv), (v) and (vi)*

[27] The submissions on behalf of the respondent were that the issues raised in the claim were already adjudicated on by the court. Relying on the judgment of **Tewani Limited v Indru Khemlani** [2011] JMCA Civ 31, counsel stated that the principle of *res judicata* extended to cover issues which could have been raised in litigation, but were not. Counsel sought to emphasize the point that the crucial question for the court to determine was whether a party was seeking to raise before the court an issue which could and should have been raised before.

[28] Counsel further submitted that the Minister sought to obtain compulsory acquisition in a 'back handed' manner, re-opening a closed case by using the 'crutch of compulsory acquisition' which in effect fell within the meaning of the term: 'the court's process being used for improper purposes' (see **Sadie Vaughan v National Water Commission**). Counsel also submitted that the notices of application dated 6 and 8 May 2012, had sought to litigate the issue of compulsory acquisition as in the fixed-date claim form before the court. Further, although the Minister was not named as a party in claim no HCV 01702 of 2007 for recovery of possession and the applications dated 6 and 8 May 2012, those proceedings were supported by affidavits sworn to by authorized agents of the Minister. Counsel additionally submitted that there was nothing in the affidavits in support of the applications that would prevent the general rules in the **Henderson v Henderson** from applying, as the '99 defendants' were to have placed their entire case before the court, (counsel also noted that the same attorneys-

at-law that had represented the 99 defendants in the original claim (no HCV 01702 of 2012) brought by New Falmouth, had also conducted the applications on behalf of the Minister and the 99 defendants in claim no HCV 02767 of 2007).

[29] With regard to costs, counsel submitted that there had been a breach of rule 1.10 of the Court of Appeal Rules by the appellant. This was so as, although the appellant in its notice and grounds of appeal was seeking an order to set aside the award of costs made below, no findings of law were challenged, neither was any ground of appeal filed in respect of that issue. In light of those circumstances, counsel further submitted that, even if the appellant was allowed to argue any issue relating to costs, it should be limited to the award of indemnity costs below.

[30] In the result, the court ruled on that submission to the effect that that issue was not properly before the court and as such was not to be argued.

[31] Counsel also submitted that there had been oppressive conduct on the part of the Minister, in that the Minister, even though he had full knowledge of the 2010 court order for recovery of possession, had still issued two ministerial orders dated 29 February 2012. These orders claimed the respondent's over-284 acres of land for the illegal occupants whilst the Minister was aware of the fact that the occupants had been in occupation of less than 15 acres. Counsel further argued that the oppressive conduct was demonstrated by the Minister lodging a caveat to prevent the respondent from dealing with its own land, while the illegal occupants remained in possession.

- *Usurping the Minister's jurisdiction- grounds (i), (ii), (iii) & (vii)*

[32] In relation to the Minister's power under the Land Acquisition Act, counsel submitted that that Act authorised compulsory acquisition for a public purpose; and, since the subject land was required for a 'selected few', the purpose of the acquisition was not a public one. On that basis, counsel submitted that the respondent could not be deprived of its constitutional right to own land. Counsel submitted that the public benefit must be that the efficiency of government is an advantage for all whom it governs, not just a handful. Counsel highlighted the point that a piece of New Falmouth's land had been previously compulsorily acquired for the purpose of forming part of a highway and that the land unlawfully occupied is prime real estate directly in front of a prominent hotel. Furthermore, there were other available government lands nearby, to which the occupants could be relocated.

[33] Counsel further argued that no affidavit evidence had been provided by the appellant to demonstrate what value the occupants would bring to the community, area or parish. Counsel submitted that the appellant's submissions that dispossessing the unlawful occupants would result in social turmoil and riot, was not a sufficient reason to dispossess a lawful proprietor.

[34] In relation to compulsory acquisition, counsel contended that the court possessed the power to prevent misuse of procedural rules. Further it was argued that the Minster's actions were subject to judicial review (citing **HMB Holdings Ltd v Cabinet of Antigua and Barbuda** [2007] UKPC 37). Additionally, the Jamaican Constitution provided that compulsory acquisition could only occur in certain

circumstances. Counsel likewise stated that to date no monies had been paid by the occupants or the Minister pursuant to the order for damages made by McIntosh J. Additionally, the caveat placed on the land had prevented the respondent from obtaining loans to set off costs, including land taxes which have been unpaid since 2013, which the Government of Jamaica had initiated proceedings to collect.

- *Misinterpretation of sections of the Housing Act- grounds (viii) & (ix)*

[35] It was also the contention of the respondent that the Minister had failed to follow proper procedure in seeking to compulsorily acquire New Falmouth's land (referring to **The Commissioner of Lands v Clifford Armstrong and Others** [2012] JMSC Civ 115).

Issues:

[36] Having considered the submissions of counsel and the grounds of appeal, these are the issues that, in my opinion, fall for consideration:

(1) Whether the learned judge misconstrued sections 4 and 6 of the Housing Act or failed to give proper weight to section 6(2) of the Housing Act and had thereby:

i. erred in finding that the Minister had not caused an improvement scheme to be prepared; and failed to appreciate the significance of section 8 of the Housing Act and so was influenced by premature factual findings.

ii. erred in finding that there was no evidence of the considerations which had informed the Minister's decision before him; and

iii. erred in finding that the conditions on the subject lands did not accord with section 6 of the Housing Act.

(2) Whether the learned judge correctly found that the stated or alleged purpose of the appellant's acquisition was not for the general interest of the community but for private persons voluntarily associated for their own benefit, the compulsory acquisition thereby not being for a public purpose.

(3) Whether the learned judge misconstrued section 25 of the Housing Act and exceeded his jurisdiction by exercising a discretion which was reserved for the Minister.

(4) Whether the learned judge correctly found that:

i. the principles of *res judicata* and abuse of process were relevant to the proceedings before him and that the relief in both claims concerned the acquisition of land; and

ii. the identification of public law issues was an insufficient answer to the respondent's argument that the issues had already been ventilated before the courts.

(5) Whether the learned judge failed to appreciate the meaning of section 35 of the Housing Act and erred in finding that an explanation as to the authority under which the valuation was carried out was required.

(6) Whether the learned judge erred in making the costs order that he did.

Discussion & analysis

[37] The guiding principle on which this court ought to base the exercise of its discretion whether to interfere with the decision of a judge below was stated by Lord Hodge in **Beacon Insurance Co Ltd v Maharaj Bookstore Ltd** [2014] UKPC 21, at paragraph 12 as follows:

> "...it has often been said that the appeal court must be satisfied that the judge at first instance has gone "plainly wrong"...This phrase...directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole….The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions..."

[38] Thus, the function of the appellate court being one of review, the power of the court to interfere with the decision of the lower court is restricted to the cases in which

one or more of the conditions set out above have been satisfied. It is therefore necessary to examine whether the findings of the learned judge were palpably wrong, warranting this court's interference.

Issue 1: Whether the learned judge misconstrued sections 4 and 6 of the Housing Act/ whether the learned judge was influenced by premature factual findings

[39] The learned judge had found that the ministerial declaration was irregular and evidenced procedural impropriety. He further found that the evidence before him presented no basis on which a ruling could validly have been made by the Minister pursuant to section 4 of the Housing Act, as there was no evidence of the considerations borne in mind by the Minister with regard to the housing conditions in the area. The learned judge also found that it had not been demonstrated that section 4 of the Housing Act was relevant to the circumstances existing on the subject lands.

[40] Additionally, the learned judge found that the affidavit of Mrs Simone Morris-Rattray, sworn to on 18 May 2012, in support of the fixed-date claim form, demonstrated that the conditions existing on the subject lands did not satisfy the requirements of section 6 of the Housing Act. Instead, the evidence of the existing conditions on the subject lands, stated in the affidavit, proved to be contrary to the deplorable conditions that would have been expected to be in existence, in order to provide a basis for intervention under section 6 of the Housing Act, which allows the Minister to declare an area to be an improvement area. At paragraph 9 of the affidavit it was stated that nearly all the occupants have established concrete structures and have the usual public amenities on the subject lands and at paragraph 8 the area is

described as 'a vibrant community'. In the result, the learned judge found that there was a failure by the Minister to comply with sections 4(2), 6, 11 and 25 of the Housing Act.

[41] It is important in this analysis to have an understanding of the particular powers granted by sections 4, 5 and, in particular, 6 of the Housing Act and the apparent reasons for their existence.

[42] Section 4(1) of the Housing Act provides that the Minister, after considering the housing conditions in any area and "...the need for the provision of further housing accommodation...", may cause the area to be defined on a plan and may by order declare the area so defined a housing area. Further, pursuant to section 4(2), after declaring the area to be a housing area, the Minister is required to, within the time prescribed by section 8(2), cause to be prepared a proposal for the provision of further housing accommodation in that area. I shall shortly examine the terms and relevance, if any, of section 8(2).

[43] One fact that must be acknowledged from what I consider to be the clear terms of section 4(1), is that the pre-requisite for the declaration of an area as a housing area must be the desire for the provision of further housing accommodation. (In fact, the marginal note to section 4 indicates that it is a section dealing with "housing schemes".) In the instant case, there is no affidavit evidence indicating that the provision of further housing accommodation on the subject lands was the aim of the Minister's intervention.

[44] Section 5(1)(a) of the Housing Act states, as a basis for the Minister's intervention, the requirement of the Minister being satisfied that:

> "(a) ...in general the houses in such area are, by reason of disrepair or sanitary defects, unfit for human habitation, or are by reason of their bad arrangement or the narrowness or bad arrangement of the streets, or by reason of overcrowding in the area, dangerous or injurious to the health of the inhabitants of the area..."

[45] Section 6(1)(a) of the Act is in virtually-identical terms, with only one or two minor differences that do not alter the general (and common) meaning of the two provisions (sections 5 and 6). That common meaning is the requirement for the existence of the matters delineated therein (such as disrepair or sanitary defects; unfitness for human habitation; bad arrangement or danger to health etc), as a necessary prelude to the Minister's intervention. The difference between the two sections lies in the fact that section 5 (the marginal note to which reads: "Slum clearance schemes") contemplates a situation in which conditions are so bad that demolition of the buildings is the apparent solution. On the other hand, section 6 (the marginal note to which reads: "Improvement schemes") envisages circumstances in which demolition of all the buildings is not necessary; but the possibility of reconstruction and development of the area exists.

[46] The orders that were gazetted by the Minister in this matter reveal that it was under section 6 of the Act that he acted or purported to have acted.

i. Premature factual findings

[47] For completeness, I think it prudent to also look at section 8(2) of the Act. That section provides that the time period for preparation of the declared scheme is nine months after the coming into force of the order declaring the area to be an improvement area. Thus, the declaration having been gazetted on 15 May 2012, the scheme was to have been prepared within nine months of that date – that is, by 15 February 2013. However, in that regard, counsel for the Minister submitted that the finding of the learned judge that the Minister had not caused the scheme to be prepared was a premature factual finding in that at the time of the hearing, the nine-month period had not yet expired. It appears to me that this submission must be based on a miscalculation of the relevant time period, as, the matter having commenced before Campbell J on 21 May 2013, it is clear that that would have been some three months after the 15 February 2013 date on which the nine-month limit would have expired. This submission, therefore, cannot be accepted. Alternatively, if the substance of the submission is that the order did not expressly state the date on which it was to have taken effect, then that would render the very order defective and unsuited as a basis for further action.

[48] Furthermore, although it has been argued on behalf of the appellant that the time for preparing the scheme had not expired at the time the matter was heard, there was no evidence presented which could be used as a basis for attempting to rebut the learned judge's finding in that regard. For that matter, there was not, and still is, no evidence before the court of an improvement scheme having been prepared as required

by section 6(2). Additionally, there was no evidence presented of the improvement scheme having been approved by the Minister (as required by section 11); or of the precursor steps to approval referred to in section 8(3) being done – such as service of the notice and engaging in a process of considering objections, if any.

[49] It also deserves to be mentioned that neither does there appear to have been compliance with section 8(1) of the Act, which reads as follows:

> "8.-(1) Upon the making of an order declaring any area to be an ...improvement area, the Minister shall cause to be published in the *Gazette* and in a local newspaper a notice stating the place where the plan defining such area may be inspected."

i. Evidence of the Minister's considerations; and

ii. Conditions on the subject lands regarding section 6 of Housing Act

[50] On my review of the matter, there seems to have been no direct evidence presented to the learned judge of the considerations which informed the Minister's decision to compulsorily acquire the subject lands, in accordance with the statute. Another aspect of the matter is that, on a review of the entire documentary evidence in the matter, it emerges that from the time that the issue of possession was resolved in favour of the respondent (with the judgment and order for possession by McIntosh J on 6 April 2010), the affidavit evidence that came thereafter in support of the various applications, generally spoke to the need to resolve the issue amicably and to concerns about the dispossession of the 99 defendants. In this regard, the statutory declaration of Mrs Janice Buchanan-McLean, legal officer of the HAJ, made on 26 April 2012 (in

support of the lodging of a caveat), is instructive, particularly where at paragraphs 11 and 12 she stated as follows:

> "11. That the Government fears that if these persons are disturbed that there could be public upheaval in the Parish of Trelawny.
>
> 12. On this basis steps have been taken to acquire the said property by virtue of the Land Acquisition Act." (Emphasis added)

[51] The affidavits filed subsequently all speak to fear of upheaval, were the 99 to have been dispossessed in obedience to the court order. In fact, it is not until 7 June 2012, with the filing of the affidavit of Mr Shoucair that, for the first time, any of the matters possibly contemplated by section 6 of the Act is mentioned. At paragraph 10 of his said affidavit, Mr Shoucair deponed as follows:

> "10. Nearly all the occupants have established permanent concrete structures on the land and have the usual public amenities of water and electricity, however, the houses are badly arranged resulting in narrowness, bad arrangements of streets and there is overcrowding in the area."

[52] This paragraph, however, does not stand alone. In fact, immediately following it is a recounting of the efforts previously made to organize the residents through a provident society in an effort for them to formally acquire the subject lands. In another set of paragraphs on page 5 of the said affidavit (mistakenly numbered 10, 11, and 12), the following is stated:

> "10. That if there is to be strict compliance with the judgement [sic] of this Honourable Court, hundreds of

persons and their families will be dispossessed and serious social and economic turmoil may result.

11. That the Minister of Housing has decided to exercise his statutory powers under the Housing Act and the Land Acquisition Act to resolve this matter for the benefit of all the parties.

12. That the occupants are seeking to regularize their occupation and possession of the land through a scheme of arrangement with the Minister of Housing, the Commissioner of Lands and the Housing Agency of Jamaica Limited."

[53] In these circumstances, it is not surprising that Campbell J, at paragraph [46] of his judgment made the following observation:

> "[46] The Housing Act and The Land Acquisition Act do not provide for the compulsory acquisition of privately owned land in order to transfer an interest to a community of persons who have occupied those lands despite the efforts of the owner to evict, and in defiance of Orders of the Supreme Court. I share the view of my brother McIntosh J, that the application of the claimant is insincere and iniquitous. The Constitution protects private property, and does not provide cover for the acquisition of private property in order to regularize the unlawful occupation of squatters."

[54] I find, in the context of the wider affidavit evidence, that the single mention by Mr Shoucair of overcrowding conflicts with other affidavit evidence and could properly have been found by Campbell J to have been insincere, and so rejected on that basis.

[55] Such affidavit evidence as was presented to Campbell J, in my view, not only failed to establish that these provisions of the Act had been complied with and that the meeting of their requirements had been achieved; but it also shows that what appeared

to have been at play was, at best, a misguided attempt to use the provisions of the Act in an effort to achieve certain social objectives, for which the Act does not provide.

[56] In the light of the above it is my view that the appellant failed to prove that:

i) having considered the housing conditions in the area, he was satisfied that the conditions existing in the area fell within section 6 of the Housing Act.

ii) after declaring the area to be an improvement area, he had caused a scheme to be prepared within nine months thereof (as required by section 8(2)); and

iii) any prepared improvement scheme was approved by him as required by section 11 of the Housing Act.

[57] On that basis I come (as I must) to the conclusion that there was no misinterpretation of the relevant sections of the Housing Act by the learned judge and that the learned judge was correct to have found as he did.

[58] In my view, this finding is sufficient to dispose of the appeal. However, I shall proceed to consider the other issues raised herein. In doing so, it appears to me that issues 2 and 3 might conveniently be dealt with together.

Issue 2: Whether the stated purpose of acquisition was for the interest of private individuals or for a public purpose

Issue 3: Whether the learned judge exceeded his jurisdiction re section 25 of the Housing Act

[59] Section 25 of the Housing Act provides that compulsory acquisition for the purposes of the development of an improvement scheme may be done pursuant to the provisions of the Land Acquisition Act, and that the purpose of any such acquisition will be deemed to be a public purpose.

[60] The learned judge at paragraph [32] of the judgment found that section 25 of the Housing Act, which provides for the acquisition of land for various schemes, imposed a rebuttable presumption that acquisition in that regard was deemed to be for a public purpose. He went on to find that in respect of the present acquisition such a presumption would be rebutted in favour of New Falmouth, on the basis of the affidavit evidence. The learned judge further held that the acquisition of the subject lands for "the purpose of the 100 families in illegal occupation does not constitute a public purpose, for the purposes of the Constitution and the Land Acquisition Act". He found (in accordance with dicta from the decision of **Bethel and Others v Attorney General of the Commonwealth of The Bahamas** [2013] UKPC 31) that he was not prevented from looking behind the stated purpose of the acquisition to reveal whether that stated purpose was a sham.

[61] The learned judge explored several other cases to examine what was meant by the use of the term 'public purpose' in the legislation. Included in the learned judge's review of the cases were the decisions of **Toussaint v Attorney General of St**

Vincent and the Grenadines [2007] UKPC 48 and **Spencer v Attorney General and others** [1999]3 LCR 1.

[62] The learned judge relied on the definition of 'public purpose' (quoted in the Eastern Caribbean Court of Appeal decision of **Spencer v Attorney General and others**), and as stated in the dicta of Lord Dunedin in **Hamabai Framjee Petit v The Secretary of State for India in Council**. Lord Dunedin there, at page 3, rejected the submission that there could be a public purpose in the taking of land if, when taken, it is not in some way made available to the public at large. He accepted the dictum of Batcher J, which had been expressed in the court below that:

> "...General definitions are, I think, rather to be avoided where the avoidance is possible, and I make no attempt to define precisely the extent of the phrase "public purpose"...it is enough to say that ... it ...must include a purpose, that is, an object or aim, in which the general interest of the community, as opposed to a particular interest of individuals, is directly and vitally concerned..."

[63] In the case of **Spencer v Attorney General and Others**, Byron CJ explored the concept of "private individuals voluntarily associated together for their own benefit", finding that in **Missouri PAC Rlwy Co v State of Nebraska** (1896) 17 SCR 130, the petitioners did not succeed in their bid to obtain a right to build and maintain a permanent structure (a grain elevator) on the railway's right of way because the court had found that they were "merely private individuals voluntarily associated together for their own benefit. They do not appear to have been incorporated by the state for any public purpose whatsoever..." In that regard, Campbell J observed that the affidavit of Mrs Simone Morris-Rattray, which supported the fixed-date claim form, stated at

paragraph 10 that efforts to organise the illegal occupants into a provident society in order to formally acquire the subject lands had failed. He found that their association was devoid of any public purpose, their aim being the acquisition of the subject lands for themselves.

[64] Campbell J found that the true reason for the acquisition was disclosed at paragraphs 10 and 11 on page 5 of the affidavit of Mr Shoucair, which stated:

> "10. That if there is strict compliance with the judgment of this Honourable Court, hundreds of persons and their families will be dispossessed and serious social and economic turmoil may result.
>
> 11. That the Minister of Housing has decided to exercise his statutory powers under the Housing Act and the Land Acquisition Act to resolve this matter for the benefit of all the parties."

[65] In the light of the above, the learned judge concluded that the true purpose of the appellant in seeking to acquire the subject lands was to prevent the dispossession of the families in occupation, consequent on the orders of McIntosh J, and to prevent the feared social and economic upheaval, which, it was being suggested, would follow the implementation of that order. That purpose, Campbell J found, was not for the general interest of the community, but merely for private individuals voluntarily associated for their own benefit. His judgment accords with the approach of the court in the definition of 'public purpose' in the **Hamabai Framjee Petit** case.

[66] A perusal of the judgment of Campbell J and of the affidavit evidence in the matter does not disclose any evidence on the basis of which the learned judge's

findings of fact on the issue might be contradicted. In the absence of any evidence to the contrary, therefore, the finding of the learned judge must stand. There is no basis on which this court can make a finding that the decision of the learned judge in that regard was incorrect; as such a conclusion was quite clearly open to him on the evidence presented. The affidavit evidence of Mrs Morris-Rattray in particular, in relation to efforts to form a provident society, seems to speak to an attempt to formalise a voluntary association of a relatively-limited number of private individuals seeking to safeguard their own interests.

[67] Additionally, the learned judge's findings and general approach on this issue were clearly guided by and founded upon the cases of **Spencer v Attorney General;** the **Hamabai Framjee Petit** case; and **Missouri PAC Rlwy Co**, none of which has been successfully distinguished.

[68] Moreover, with specific regard to the deeming provision contained in section 25 of the Act, there are authorities that suggest that such a provision is not necessarily conclusive; but its interpretation will depend on the facts and circumstances of the particular case. One such case is **The Trustees of St. Peter's Evangelical Lutheran Church of Ottawa v The Council of the Corporation of the City of Ottawa and the Corporation of the City of Ottawa** [1982] 2 SCR 616, in which it was said by McIntyre J, delivering the judgment of the majority of the Ontario Supreme Court, at page 629, that:

> "...It is true, of course, that the words 'deemed' or 'deeming' do not always import a conclusive deeming into a statutory

> scheme. The word must be construed in the entire context of the statute concerned..."

[69] Similarly, in **Consolidated School District of St Leon Village No 1425 v Ronceray et al** 23 DLR (2d) 32, Schultz JA, delivering the judgment of the Manitoba Court of Appeal, stated at page 35 as follows:

> "The words 'deem', 'deemed' and 'shall be deemed' when used in statutes, usually imply an element of finality, but that meaning is not inflexible or invariable."

[70] At paragraph 37, he also stated:

> "...in deciding whether or not the words 'deem' or 'deemed' establishes a conclusive or a rebuttable presumption depends largely upon the context in which they are used, always bearing in mind the purpose to be served by the statute and the necessity of ensuring that such purpose is served..."

[71] A reading of section 25 of the Housing Act in its entirety shows that the land to which reference is made for acquisition under the Land Acquisition Act must be land:

> "... which is under or by virtue of the provisions of this Act proposed to be acquired for the purposes of any housing scheme, slum clearance scheme, improvement scheme or emergency housing scheme approved under this Act..."

[72] In accordance with the finding made in respect of issue 1, this description could not accurately and correctly be applied to the subject lands and so the deeming provision contained therein could not be regarded as being conclusive. Campbell J, therefore, cannot be faulted for having gone on to seek to ascertain the true purpose for the acquisition, which he found to have been not for a public purpose.

Issue 4(i): whether the principles of *res judicata* and abuse of process were relevant to the matter

[73] Campbell J, in analysing whether there was a serious issue to be tried, considered the respondent's submission that the appellant's failure to comply with the orders made by McIntosh J and the appellant's commencing of a similar claim with substantially the same facts, constituted an abuse of process, the issues in the claim before him having already been litigated. In considering that issue, the learned judge noted that in the applications of March 2012, under claim no HCV 01702 of 2007, none of the 99 defendants had appeared before the court, but rather that they were represented by two officers of the HAJ who appeared and acted as authorised agents of the Minister of Housing. The learned judge further accepted the submission of the respondent's counsel that the matters before him (the May 2012 applications) and the previous ones (the March 2012 applications), all concerned the acquisition of the subject lands, noting that the affidavits of Mr Shoucair and Mrs Simone Morris-Rattray supported that position in both sets of applications.

[74] The learned judge then proceeded to identify what he considered to be the crucial question to be addressed, which was: whether a party was seeking to raise before the court issues which could and should have been raised before and whether in all the circumstances the party's conduct was an abuse of process. The learned judge further noted that in the March 2012 applications the conduct of the parties had been the subject of strong criticism, as the application had been described by McIntosh J as 'iniquitous' and 'devoid of sincerity'.

[75] In the light of the above findings of the learned judge it is necessary to examine and compare in some detail the substance of the claim which was before Campbell J with the notices of application which were before McIntosh J.

Relief sought in the fixed-date claim form

[76] The declarations and orders sought by the Minister against New Falmouth in the fixed-date claim form were as follows:

> "(1) A Declaration that the Minister of Housing is entitled pursuant to Section 6 of the Land Acquisition Act and Section 25 of the Housing Act to compulsorily acquire part or all of the land known as "Orange Grove" south of Coopers Pen and Burnwood Beach...
>
> (2) A Declaration that pursuant to Section 15 of the Land Acquisition Act, that the Minister of Housing may direct the Commissioner of Lands to take possession of part or all of lands known as "Orange Grove" south of Coopers Pen and Burnwood Beach…
>
> (3) A Declaration that pursuant to Section 16 of the Land Acquisition Act that the land known as "Orange Grove" south of Coopers Pen and Burnwood Beach…now vests with the Commissioner of Lands.
>
> (4) An Order that the Respondent, New Falmouth Resorts Limited, shall be compensated for the said lands according to provisions of Section 14 of the Land Acquisition Act.
>
> (5) An Order that the Respondent, New Falmouth Resorts Limited, be restrained from transferring, parting with and or disposing of its interest in lands known as 'Orange Grove' south of Coopers Pen and Burnwood Beach…without the written consent of the Minister of Housing or an Order of this Honourable Court.
>
> (6) An Order that the Respondent, New Falmouth Resorts Limited be restrained from evicting,

harassing, intimidating, molesting and or disturbing in any way any of the current occupants currently on the land known as Orange Grove south of Coopers Pen and Burnwood Beach…without the written consent of the Minister of Housing or an Order of this Honourable Court.

(7) An Order that the Respondent, New Falmouth Resorts Limited be restrained from demolishing, removing, or altering any of the structures currently on land known as 'Orange Grove' south of Coopers Pen and Burnwood Beach… without the written consent of the Minister of Housing or an Order of this Honourable Court…"

The affidavit evidence

[77] As previously indicated, the fixed-date claim form was supported by the affidavit of Mrs Simone Morris-Rattray sworn on 18 May 2012. At paragraph 1 of her affidavit she deposed that she was a duly-authorised agent of the Minister. She further, at paragraph 5, deposed that the Minister had an interest in the matter as it touched and concerned land occupied in western Jamaica by a 'significant community of persons'. At paragraph 8 she averred that those persons have contended that they have occupied the land for more than 15 years and that they have established a 'vibrant community'. Throughout paragraphs 11-19 she stated that the residents had sought to obtain a stay of the 6 April 2010 judgment of McIntosh J which had granted recovery of possession to New Falmouth. That stay, she deposed, had been sought on the basis of a declaration made by the Minister under the Housing Act. She further stated that that application for a stay had been dismissed and that strict compliance with that judgment would result in serious social and economic turmoil.

[78] At paragraphs 20 and 23, she further averred that the Minister of Housing had decided to exercise his statutory powers and had declared the subject lands to be a 'Housing Area' and to be the subject of improvement in accordance with section 6 of the Housing Act. It was stated that the orders sought were in the best interest of the administration of justice.

The application before Campbell J for injunctive relief

[79] The notice of application for injunctive relief, filed 8 May 2012, which was before Campbell J, sought orders which were worded similarly to the orders sought at paragraphs 5, 6 and 7 of the fixed-date claim form (set out at paragraph [75] herein) while the grounds thereof were similar to those matters that had been stated in the affidavit of Mrs Simone Morris-Rattray in support of the said fixed-date claim form.

New Falmouth's application

[80] In New Falmouth's notice of application for court orders filed 22 October 2012 and made as a matter of urgency to strike out that application, it was stated that the matter was one of urgency, as the occupants were expanding their occupation of the land. The sole order sought was that the fixed-date claim form filed on 18 May 2012 with claim number HCV 02767 of 2012 be struck out pursuant to rule 26.3(1)(a)(b)(c) of the CPR.

[81] The relevant grounds of the application were:

> "1. That Claim No. HCV. 02767 of 2012 is a repetition of the issues filed under Claim No. HCV 01702 of 2007 and therefore it is an abuse of the process of the

Court for the Claimant to attempt to re-litigate same under a different Claim Number.

2. That an application was made before this Honourable Court on March 8, 2012 for Injunctive Relief as well as a Stay of Execution of Judgment in Claim No. HCV. 01702 of 2007, on the basis that the Claimant intends to acquire the said lands. That on May 4, 2012, this Honourable Court denied the Application for Injunctive Relief as well as a Stay of Execution of Judgment and ordered costs to be paid to your Applicant/ Defendant.

3. That the Court's Order of May 4, 2012 granted the Claimant leave to appeal the Order, but, the Claimant choose [sic] not to pursue an Appeal and thereby forgo [sic] the right to contest the Court's Order of May 2012.

...

10. That the issues in the Fixed Date Claim Form filed on May 18, 2012 under Claim No. HCV. 02767 of 2012, regarding properly vesting Title for lands comprised in Certificate of Title registered at 1008 Folio 636 and Volume 1389 Folio 427 and Volume 1109 Folio 442 of the Register Book of Titles was duly heard by this Honourable Court under Claim No. HCV. 01702 of 2007 wherein the Claimant's interest was duly represented through their various attorneys.

...

15. The Claimant, Minister of Housing, has failed to set out in their Particulars of Claim any reasonable ground for bringing this new claim against New Falmouth Resorts Limited..."

[82] The above application was supported by the affidavit of Mr James Chisholm which was sworn on 4 June 2012. Mr Chisholm deposed that the application before the court was an avenue for the Minister to circumvent the orders which had been made by McIntosh J. He further stated that for more than a decade he had been appealing to

government agencies to assist the unlawful occupants as there were other government lands available nearby to which they could be relocated. Mr Chisholm also referred to what he said was the injustice which had been occasioned to him as a result of the continued unlawful use of the property in contravention of the court order and that the squatters were maintaining that their member of parliament was going to take the land away from New Falmouth and give it to them.

Application for stay before McIntosh J

[83] The orders sought in the notice of application for stay of execution before McIntosh J were as follows:

> "(1) That the judgment of His Lordship, the Honourable Mr. Justice Donald McIntosh dated April 6, 2010 handed down in this matter be stayed.
>
> (2) That this Honourable Court grant permission to the Housing Agency of Jamaica to enter negotiations with the Defendant in order to acquire the lands on the behalf of the Claimants.
>
> (3) That this Honourable Court restrains the Defendant, its servants and or agents from demolishing and or removing any of the structures currently on the subject lands…"

[84] The relevant grounds of the application were:

> "1. That without the benefit of these Orders the Applicants will face real and genuine hardship as some two hundred persons in the community will be displaced and dispossessed.
>
> 2. The applicants are genuinely at risk of losing their homes and livelihood.

3. That should the Applicants be displaced wholesale there would be an overwhelming impact on the surrounding communities and a severe and detrimental strain on state resources and available social services in the areas affected.

4. That the Honourable Minister of Housing has declared the lands comprised in Certificates of Title registered at Volume 1008 Folio 636 and Volume 1389 Folio 427 (the subject lands) to be "Improvement Areas" in accordance with Section 6 of the Housing Act. Having done so, the Minister is at liberty to acquire the said land in accordance with the provisions of the Land Acquisition Act (see Section 25(1) of the Housing Act).

5. That without the above mentioned judgment being stayed the Applicants will face real and genuine financial ruin and suffer losing their homes.

6. That the Court's over-riding objective will be advanced by the making of the Orders being sought herein."

[85] Mr Shoucair, in the affidavit filed in support of the application for stay, deposed that he was the duly authorised agent of the Minister. Additionally he expanded on the above grounds contained in the notice of application.

The application for injunctive relief before Harris J

[86] The notice of application for injunctive relief before Harris J sought, *inter alia*, to restrain New Falmouth and its agents from interfering with the 99 defendants' possession and quiet enjoyment of the subject lands.

[87] Mr Shoucair's affidavit in support of the application for injunctive relief was filed on 8 March 2012 and was similar to that of Mrs Simone Morris-Rattray. At paragraph 1 he deposed that he was the duly-authorised agent of the Honourable Minister and, at

paragraph 5, further averred that the Minister had an interest in the matter as it touched and concerned the occupation of lands in western Jamaica of which a significant community of persons had been in possession and had established their homes. He further stated, at paragraph 13, that the Minister had declared the subject lands to be an "Improvement Area" in accordance with section 6 of the Housing Act and that the Minister was at liberty to acquire the said lands in accordance with the provisions of the Land Acquisition Act.

Discussion

[88] Having examined the applications that were before McIntosh J, Harris J and Campbell J, I find myself to be in agreement with the finding of Campbell J that all the applications were in substance based on the compulsory acquisition of the subject lands by the Minister. Or, viewed from another perspective, their common aim was to prevent the orders of McIntosh J from taking effect. In the notices of application themselves and the affidavits, the Minister's power to acquire the subject lands was used as the basis for the request that the court grant the orders being sought. The affidavits of Mr Shoucair and Mrs Simone Morris-Rattray also clearly demonstrate the Minister's involvement in both matters - both deponents stating that they were duly authorised by the Minister and that the Minister had some interest in the matter.

[89] In my view, the Minister cannot now seek to detach himself from the proceedings by merely stating that he was not a party to those proceedings - especially where it is clear that at all material times he proposed to act on behalf of the 99 defendants or to help them achieve their original objective in the litigation. In any

event, a party must raise all relevant issues at the earliest opportunity and not be dilatory in doing so, in order not to occasion an abuse of the court's process. Thus, there was ample evidence before Campbell J on the basis of which it was open to him to have found, that the case before McIntosh J was the same as that before him, (Campbell J), namely the Minister's real intention for acquiring the lands. Additionally, as the Minister, from the affidavit evidence, must be viewed as having intervened (albeit informally and not in the technical legal sense) in the earlier action before McIntosh J, the attempt to compulsorily acquire the subject lands pursuant to the Housing Act was raised and fully developed at that time.

[90] Based on this analysis, the issues of *res judicata* and abuse of process are relevant to these proceedings.

[91] However, considering the possibility of a different view being taken of my analysis of this matter using the principle of *res judicata*, I have explored an alternative way of viewing the matter. The alternative is to view the claim in this matter (from which this appeal arises) as a "collateral attack" on the judgment and orders of McIntosh J; and as an attempt to re-litigate an already-decided issue, which approach has been frowned on in case law.

[92] One case in which this approach (that of a "collateral attack") was discussed was the House of Lords case of **Hunter v Chief Constable of West Midlands and another** [1981] 3 All ER 727. These were the facts of that case: the appellant (one of the accused at first instance), had alleged at his trial for murder arising from bombings

which killed 21 people, that his confession to the crime had been obtained as a result of his having been assaulted by police officers. The confession (which was the main evidence against the appellant) had been found admissible by the court upon a *voire dire*. Police officers were later charged with the offence of assaulting him; but were acquitted. An appeal against the conviction (in which no challenge was made to the admissibility of the confession), was dismissed. The appellant then brought a civil suit against the Chief Constables in charge of the police officers, claiming damages for assault, one contention being that there was fresh evidence to support the allegation of assault. The court of appeal struck out his statement of case in the civil action on the basis that he was barred by issue estoppel from raising the issue of assault in the civil trial, since it had already been decided against him in the criminal trial. The appellant appealed that decision to the House of Lords. It was held by the House of Lords that the civil action was an abuse of the process of the court, it being a "collateral attack" on the decision of a competent court (that is, the court at first instance in the criminal case that had determined the confession to be admissible). In the House of Lords' finding, the civil action was not brought to obtain damages; but to prove that the confession had been obtained by force. As such, the proper avenue of challenge was through an appeal against the murder conviction, attacking the admissibility of the confession.

[93] There are two quotations from Lord Diplock in that case that have a bearing on the instant appeal. This is the first (to be found at page 733 of the judgment):

> "...The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack on a final decision

> against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made..."

[94] This is the other quotation of Lord Diplock (to be found at page 733 of the judgment):

> "My Lords, collateral attack on a final decision of a court of competent jurisdiction may take a variety of forms. It is not surprising that no reported case is to be found in which the facts present a precise parallel with those of the instant case. But the principle applicable is, in my view, simply and clearly stated in those passages from the judgment of A L Smith in *Stephenson v Garnett* [1898] 1 QB 677 and the speech of Lord Halsbury LC in *Reichel v Magrath* (1889) 14 App Cas 665 which are cited by Goff LJ in his judgment in the instant case. I need only repeat an extract from the passage which he cited from the judgment of A L Smith LJ in *Stephenson v Garnett* [1898] 1 QB 677 at 680-681:
>
> > '…the Court ought to be slow to strike out a statement of claim or defence, and to dismiss an action as frivolous and vexatious, yet it ought to do so when, as here, it has been shewn that the identical question sought to be raised has been already decided by a competent court'."

[95] The second case demonstrating the alternative approach was that of **Arthur J S Hall (a firm) v Simons; Barratt v Ansell and others (trading as Woolf Seddon (a firm); Harris v Scholfield Roberts & Hill (a firm) and Another** [2003] 3 All ER 673. In my view, the facts of that case need not be rehearsed, given the purpose for which it is being cited. The case is being cited for the usefulness of the discussion of the principle of "collateral attack" or relitigation to be found in the judgment of Lord Hoffman at page 701. These were his observations:

> "...The law discourages relitigation of the same issues except by means of an appeal. The Latin maxims often quoted are nemo debet bis vexari pro una et eadem causa and interest rei publicae ut finis sit litium. They are usually mentioned in tandem but it is important to note that the policies they state are not quite the same. The first is concerned with the interests of the defendant: a person should not be troubled twice for the same reason. This policy has generated the rules which prevent relitigation when the parties are the same: autrefois acquit, res judicata and issue estoppel. The second policy is wider: it is concerned with the interests of the state. There is a general public interest in the same issue not being litigated over again. The second policy can be used to justify the extension of the rules of issue estoppel to cases in which the parties are not the same but the circumstances are such as to bring the case within the spirit of the rules." (Emphasis added).

[96] It is my considered view, therefore, that, even if the facts of this case do not make it one that, strictly speaking, falls within the principle of *res judicata* or of issue estoppel, the particular circumstances are such as to bring this case within the spirit of the rules relating to those principles, to make the matter in essence an abuse of the process of the court. In the result, regardless of which approach is adopted, the appellant cannot succeed on this ground.

Issue 4 (ii): identification of public law issues

[97] The principle in **Henderson v Henderson** was stated by Wigram V-C at page 381-382 as follows:

> "...I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might

> have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in a special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."

[98] The appellant has contended that the identification of public-law issues in the fixed-date claim form has rebutted the argument that the issues had already been litigated, as public-law issues had not been previously raised. However, the mere fact that the previous applications under claim no HVC 01702 of 2007 were litigated in the names of the 99 defendants and as a private-law claim, did not of itself preclude Campbell J from properly finding that he was being requested to consider the same issues that had been raised. It is my view that what must be looked at is the substance of the claims, although the form that they take might appear to be different.

[99] The view to which I hold is that, even if the appellant is right in his contention that the **Henderson v Henderson** principle of abuse of process would not apply to the facts and circumstances of this case (given the fact that the Minister would not have been a party, in the strictest sense, to the earlier proceedings), the appellant's claim no HCV 02767 of 2012 would still be an abuse of the process of the court as previously discussed in paragraphs [90] to [95] of this judgment.

[100] However, it is hard to see how the **Henderson v Henderson** case would not apply. The reason for this is that the appellant was to all practical intents and purposes

a party to the action, although not formally having obtained leave to do so; and not formally being named as a party in the proceedings before McIntosh J. As previously pointed out, however, the application for the stay of execution before McIntosh J was in effect conducted by the Minister through the HAJ, and the stay was sought on the basis of the Minister's position on the anticipated consequences of the then-impending eviction.

[101] In these particular circumstances, I am minded to accept the respondent's submissions on this issue outlined at paragraphs [27] and [28] of this judgment. These were to the effect that: the issues raised in the claim were already adjudicated on by the court; and that: the Minister was seeking to obtain compulsory acquisition in a 'back handed' manner, re-opening a closed case by using the 'crutch of compulsory acquisition', which in effect fell within the meaning of the term: 'the court's process being used for improper purposes'.

Issue 5: whether the learned judge failed to appreciate section 35 of the Housing Act

[102] Section 35 of the Housing Act authorises entry on any land, house, premises or building in order to conduct a survey where that land, house, premises or building has been proposed to be compulsorily acquired. Thus the validity of the valuation of New Falmouth's land would be dependent on whether the land valued had been proposed to be compulsorily acquired in accordance with the provisions of the Housing Act.

[103] In light of the previous findings of this court with regard to the irregularities involved in the purported compulsory acquisition, it is, in my view, not necessary to address the issue of the valuation.

Costs

[104] As previously indicated, one of the orders of Campbell J, in striking out the appellant's claim, was (as stated at paragraph [48] of his judgment) to the following effect:

> "Cost to the defendant to be assessed on an indemnity basis. The cost ordered in this claim and the cost and damages awarded by McIntosh J, be paid before any further steps be taken in this matter."

[105] This aspect of the matter might shortly be disposed of, as the court had ruled that this issue ought not to be argued (see paragraphs [29] and [30] of this judgment).

Conclusion

[106] In light of the foregoing analysis, I am unable to say that the learned judge fell into error in his overall analysis and treatment of the issues in the case. The later claim having been in substance the same as the earlier claim; and appearing to have the effect of attempting to circumvent the orders of McIntosh J, they clearly amounted to an abuse of the process of the court. That fact, coupled with the Minister's failure to demonstrate compliance with the requirements of section 6 of the Act, helped to seal the fate of his applications. In these circumstances, it could not fairly be said that the learned judge was "palpably wrong". I am therefore of the view that the appeal ought to be dismissed, with costs to the respondent to be agreed or taxed.

PHILLIPS JA

ORDER

Appeal dismissed. Costs to be the respondent to be agreed or taxed.