

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

Antigua and Barbuda

Claim No: ANUHCV 2017/0430

**BETWEEN:**

**HMB HOLDINGS LIMITED**

**Applicant**

**and**

**GASTON BROWNE in his capacity as MINISTER OF FINANCE**

**Respondent**

**Before:**

Justice Jan Drysdale

**Appearances:**

John Carrington, Stacy Richards Roach and Jomokie Phillips of counsel for the Applicant

Anthony Astaphan SC, Dr. David Dorsett and Cherissa Roberts-Thomas of counsel for the Respondent

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2021: April 26

2022: March 8<sup>th</sup>

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**DECISION**

[1] **Drysdale, J.:** The matter for consideration arises from judicial review proceedings commenced by the Applicant for inter alia the remedy of mandamus to compel the Respondent to pay outstanding monies for the compulsory acquisition of property formerly owned by it.

## **Background**

- [2] Pursuant to CPR 56 the Applicant filed an application for leave to institute an action for judicial review. The Respondent eventually consented to leave being granted and the Applicant filed a Fixed Date Claim seeking the following reliefs:

‘A declaration that the Respondent is under a public duty under the Land Acquisition Act and the Finance Administration Act to procure payment of the balance of the compensation including interests and costs owed to the Applicant as finally determined by the Judicial Committee of the Privy Council, under the provisions of the Land Acquisition Act for the acquisition of Parcels 55,56 and 57 Block 32 3282A St. Phillip’s South Registration Section (“the Property”);

A declaration that the Respondent has wrongfully and in breach of his public duty aforesaid failed to procure payment of the balance of the compensation including interest and costs due to the Applicant;

An order for mandamus requiring the Respondent to comply with the public duty under section 29 of the Land Acquisition Act and section 39(5) of the Finance Administration Act and within no later than 21 days from the date of the Order of the Court to procure payment from the Treasury of the balance of the compensation including interest and costs payable to the Applicant in relation to the compulsory acquisition of the Property by the Government of Antigua and Barbuda.’

- [3] The Applicant was the previous registered owner of the Property from which it operated a hotel from about 1971. In 2007 the Government compulsorily acquired the Property and entered into possession of it.
- [4] In 2008 the Applicant filed judicial review proceedings to compel the Crown to constitute a Board of Assessment (hereinafter ‘the Board’) for the purpose of valuing the compensation consequent upon the acquisition of the Property that was due and owing to it. On 5<sup>th</sup> January 2010 the Board awarded the Applicant compensation in the sum of US\$42,090,000.00. This sum was later increased by the Court of Appeal to US\$45,499,102.01 pursuant to a decision made on 5<sup>th</sup> December 2011. The matter was appealed to the Privy Council which finally set the award of

compensation at the sum of US\$26,616,998.00 with interest at the rate of 10.25% from 23<sup>rd</sup> July 2007 to 22<sup>nd</sup> January 2011 and the rate of 4% from 23<sup>rd</sup> January 2011 to the date of payment.

- [5] A second judicial review application seeking the relief of mandamus was made in September 2012. This application was made after the Court of Appeal Decision but before the final determination of the Privy Council. In it the Applicant sought mandamus to compel payment of the adjudged sum. In that decision Learned Justice Remy found that the Minister of Finance was under a public duty to issue a warrant for payment and that this duty was breached when he failed to issue the warrant for the outstanding sum.
- [6] On 11<sup>th</sup> March 2012 the Applicant brought committal proceedings against the Minister of Finance. Prior to the hearing of these proceedings the Minister revealed that a warrant for payment had been issued and a corresponding voucher dated 9<sup>th</sup> April 2013 was exhibited to an affidavit in response.
- [7] The Applicant next approached the constitutional court who agreed that the failure of the Respondent to pay compensation was a breach of the constitution.
- [8] On 31<sup>st</sup> December 2014, following the decision of the Privy Council in August 2014, the Crown filed an application to pay by instalments. The Court ordered an interim payment of US\$10,000,000.00 to be made by 1<sup>st</sup> June 2015. An application by the Crown to vary that order was subsequently refused.
- [9] The Applicant then applied for a penal notice to be attached to the order for interim payment. The Court directed that the Crown make payment by 27<sup>th</sup> November 2015.
- [10] Although the Crown during the period of February 2015 to September 2015 made payments totalling \$2,200,000.00 the first substantial payment was made in December 2015. Payments were first applied to interest and costs by the Applicant.
- [11] The next payment was made on 23<sup>rd</sup> December 2017 wherein the sum of US\$16,528,921.88 was paid. From that sum the sum of \$9,330,832.01 was paid over to First Caribbean International Limited, the chargee. A further payment of \$3,000,000.00 was paid on behalf of the Crown by a company who purchased the Property.

[12] The Applicant alleges that the sum due and owing is US\$20,035,804.50 but this is disputed by the Respondent who ascribes the value of US\$18,279,516.42 as the true sum due and owing. The Respondent contends that the difference in the sum is on account of the manner in which the Applicant effected payment being first to interest and costs and not to principle which would have effectively reduced the amount of interest payable.

[13] Having set out these facts, the broad issues to be resolved are whether the Respondent has failed to comply with the statutory duty to procure payment and further whether an order of mandamus should be made to compel payment.

## **Submissions**

### **The Applicant**

[14] The Applicant argues that notwithstanding the dispute of the quantum of the remaining sum, that a significant sum remains outstanding. That the Minister is under a public duty to procure payment of the outstanding balance of the compensation, and he is in breach of this duty. Therefore, an order of mandamus is necessary to compel the Respondent to make good that payment.

[15] The Applicant relies on section 29 of the Land Registration Act and section 39(5) Finance and Administration Act of the in support of its position. Section 29 of the Land Registration Act provides that all amounts awarded by way of compensation to a person whose property has been acquired shall be paid out of the Treasury on the warrant of the Minister of Finance. Section 39(5) of the Finance and Administration Act provides that the Minister of Finance may on the advice of the Attorney General pay out of the Consolidated Fund moneys payable by an order of the Court or a tribunal. The Applicant posits that the conjoined effect of these provisions is to create a duty to procure payment which the Respondent by its failure to fully settle has breached.

[16] The Applicant then argued that an order of mandamus is appropriate in the circumstances as there is a refusal to perform a public duty and further there is no other means available to the Applicant to enforce its performance.

- [17] The Applicant relies on the Privy Council's statement that the order for payment of the compensation should be 'punctually observed and obeyed' to buttress the point that a delay of several years to effect full payment is a breach. The Applicant also highlights the Court of Appeal finding in November 2013 that there had been an inordinate delay by the Crown in the payment of compensation and the finding by Remy J that the delay is equivalent to a refusal to pay. The Applicant underscores that some 5 years have now passed thereby making the continued failure to pay as more egregious.
- [18] The Applicant further posits that the Respondent having accepted that there is a duty to direct and effect such payment and it now being more than 10 years since the Crown took possession of the property, that it is entitled to the final settlement of this matter.
- [19] The Applicant also challenges the Respondents explanations for the failure to pay. In relation to the submission that there is not a refusal to pay but mere difficulties in making payment, the Applicant answers by suggesting that this was largely disposed out in the judgment of Remy J and the finding by the Court of Appeal that the delay caused a breach of the Applicant's constitutional rights. The Applicant submits that in both cases the Crown relied on evidence of inability to pay which was rejected by the Courts in the making of this order.
- [20] The Applicant also rejects the assertion that there are competing debts to be paid out of the available funds and instead proffers that payment must be paid notwithstanding any competing interests. The Applicant further advances that to accept this argument would be to lower the concept of the duty to pay to a mere discretion as to how to apply the limited resources amongst competing interests. In any event that the Crown having accepted that there is a duty to pay must give the Applicant priority over other discretionary spending.
- [21] The Applicant dispels the Respondent's assertion of the impact of Hurricane Irma which occurred in 2017 as a viable excuse for non-payment. The Applicant asserts that the obligation to pay arose from 2010 when compensation was initially determined by the Board.
- [22] In relation to the Respondent's arguments concerning the manner in which payments have been applied to the debt, the Applicant submits that the Crown's accepted figure must be at least a minimum of the undisputed amount due to it. This the Applicant suggests can rightly be the subject

of a mandamus order with the balance due and payable after the Court has determined the parallel proceedings in this matter.

[23] Finally, the Applicant counters that the claim is not an abuse of the process of the Court as suggested by the Respondent. The Applicant suggests that this argument has no weight as the Respondent agreed by virtue of a consent order to the granting of leave for judicial review. The Applicant submits that the test for granting leave is that there must be an arguable ground for judicial review having a realistic prospect of success. That the consent is in effect a concession that the Applicant had met this requirement and is thereby a bar to the claim that these proceedings are an abuse of the process of the Court.

[24] The Applicant argues therefore that it is not an abuse of the process of the court for it to utilise these proceedings to enforce the order for payment made by the highest court in this jurisdiction.

### **The Respondent**

[25] The Respondent does not dispute that it owes a duty to pay the award of compensation but vehemently disagrees that there has been a breach of that duty. The Respondent also takes issue with the submission advanced by the Applicant that payment of the balance of monies owed should be made within 21 days.

[26] The thrust of the Respondent's opposition to the claim is twofold being that the claim is an abuse and oppressive and that the Applicant has no prospects of showing that the Respondent has acted wrongly or unlawfully.

[27] In support of this position that this claim is abusive and oppressive the Respondent argues that there has been substantial payment of the monies owed being some US\$23,823,970.00. The Respondent further argues that the allocation of the monies paid by it to the Applicant, which the Applicant in the face of clear instructions allocated payments disregarded and which resulted in the Government being responsible for more money as compensation is unreasonable, abusive and oppressive. The Respondent also asserts that this has resulted in parallel proceedings for the determination of how much money is lawfully owed. In the circumstances the Respondent posits that it would be unconscionable to expect its fullest cooperation especially as the debt owed as at 31.12.18 was US\$18,279,516.42 in one instalment payment.

- [28] Secondly the Respondent relies on the undisputed evidence of the Financial Secretary who gave detailed evidence of the fiscal challenges faced by the Crown and declining revenue thereby justifying the submission that payment in 21 days and or in the near future would be impossible.
- [29] In expanding on the allegation of abuse of the process of the Court, the Respondent also argued that the Applicant has filed multiple proceedings against the Government of Antigua and Barbuda both locally and abroad thereby causing the Government to utilise its few precious resources in defending these matters.
- [30] The Respondent also contends that in order for the determination of whether there was a breach of duty to be made, the Applicant is required to prove that the Government was in possession of sufficient funds and notwithstanding it deliberately refused to pay the award of compensation or that payment could be made without serious disruption to the public finances. The Respondent further submits that the Finance and Administration Act gives the Minister of Finance the discretion to direct payments from the Consolidated Fund.
- [31] The Respondent posits that the **Gairy v The Attorney General**<sup>1</sup> case is distinguishable to the case at bar as in that case the legislation provided that an award of compensation acted as a charge on the consolidated fund which is not the case in Antigua. As such a debt which is not a charge on the consolidated fund must first be submitted to Parliament for approval and payments are only made if funds are available.
- [32] Furthermore, there exists the order of the Learned Remy J in the second application for mandamus in which she ordered a warrant be issued by the Minister of Finance Harold Lovell. A warrant opens the gate for payment once funds are available. Therefore, a warrant having been previously issued by the then Minister of Finance the Court should dismiss the request for a further order of mandamus to compel payment within 21 days notwithstanding the indisputable evidence of the fiscal condition of the Crown there being a huge fiscal debt and declining funds from the Citizenship by Investment Programme should be made.

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<sup>1</sup> [2001] UKPC 30

[33] In light of these arguments the Respondent submits that the claim is an abuse of the process of the Court; the Applicant has no prospects of showing that the Respondent has acted wrongfully; that the public duty imposed by section 29 of the Land Acquisition Act has been met by the issuance of the Special warrant and subsequent payments and will continue to be met by all subsequent payments towards the award of compensation until the entire amount is liquidated. That sections 5 and 39 of the Finance and Administration Act are being complied with as the Minister of Finance has been directing the payment of the award of the compensation; that the timely application made by the Respondent to pay by instalments coupled with the exigencies of the public purse prohibit payment of the balance of the compensation in one lump sum.

[34] Having set out the case of the parties I find the following to be the issues for determination:

- i. Whether these proceedings are an abuse of the process of the Court
- ii. Whether there has been a breach of the duty to procure payment?
- iii. Whether an order for mandamus for the payment of the balance of the compensation award in one lump sum within a relatively shorty period of time or at all should be made.

## Law and Analysis

### Whether these proceedings are an abuse of the process of the court

[35] The Court's ability to strike out proceedings as being an abuse of the process is found in Part 26.3 of the Civil Procedure Rules. The relevant part of those rules state:

'(1) In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that –

(c) the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;'

[36] This power to strike out is discretionary and should only be exercised in a clear and deserving case. The case of **Baldwin Spencer v the Attorney General**<sup>2</sup> refers to this as a nuclear option

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<sup>2</sup> ECSCJ NO 19 of 1998



and emphasises a cautionary approach stating that '[t]his summary procedure should only be used in clear and obvious cases, when it can clearly be seen, on the face of it, that a claim is obviously unsustainable, cannot succeed or in some other way is an abuse of the process of the court.'

- [37] The thrust of the Respondent's arguments is that these proceedings are an abuse of the process of the Court. What however is an abuse of the process of the Court? The case of **Hunter v Chief Constable of the West Midlands Police and another**<sup>3</sup> provided a working definition of what amounts to an abuse when it stated:

"a misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people."

- [38] Essentially therefore an abuse of the process is an improper use of the Court's process in a way which differs or is contrary to its intended ordinary use. Bearing this in mind I will now apply this to the circumstances that the Respondent alleges amount to an abuse of the process.

- [39] In determining the issue of abuse of the process I am also guided by the case of **Cable v Liverpool Victoria Insurance Co. Ltd**<sup>4</sup> in which a two-stage test was adopted. Specifically, it was held that:

'the correct approach to an application to strike out a claim for an abuse of process was a two-stage test; that, first, the court had to determine whether the Applicant's conduct was an abuse of process; that, secondly, if it was, the court had to exercise its discretion as to whether or not to strike out the claim;'

- [40] Having regard to the above and the factual matrix, I am of the considered opinion that the claim that there has been an abuse of the process of the Court has not been made out. Although I note that the Applicant has indeed engaged in a series of litigation against the Respondent not only in this Court but elsewhere it does not appear that the Applicant has been deemed to be a

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<sup>3</sup> [1981] 3 All ER 727

<sup>4</sup> [2020] 4 WLR 110

vexatious litigant. Further at least in this jurisdiction where the exact nature of the matters can be ascertained, it also does not appear that these matters were without merit. Indeed, the Applicant seemed to have been successful in many respects of its various claims.

[41] Further these proceedings concern the Applicant's right to obtain payment in accordance with the Privy Council judgment for the acquisition of the Property. The claim is not frivolous or vexatious and therefore not abusive.

[42] Additionally, I note that this issue was raised by the Respondent at the leave stage. However, the Respondent appeared to resile from this position having agreed to a consent order for leave. Nonetheless the Respondent appears to have resurrected the issue of abuse and purported to rely essentially on the same or similar arguments as put forward in their initial opposition for leave.

[43] There has been no application to set aside that consent order. The fact that the Respondent consented to leave being granted in these proceedings ipso facto is indicative that the Respondent was in full agreement that the Applicant had met the requirement for leave to be granted, it having a an arguable ground for judicial review with a realistic prospect of success. I dare say as well that the consent also binds the Respondent from raising the same issue of abuse as it has purported to do here. In the event I am mistaken I have already assessed the issue of abuse and found that the Applicant has an arguable case. Further the previous litigation has not been deemed to be vexatious and or abusive and its effect on this case does not rise to the level of an abuse of the process of the court. Therefore, due consideration being given to the merits of this argument as well as the consent agreement between the parties I am of the considered opinion that the Respondent has not made out its claim that these proceedings are an abuse of the process of the Court.

#### **Whether there has been a breach of the duty to procure payment?**

[44] Although the parties have agreed that the Respondent has a duty to procure payment, they depart ways as to whether there has been a breach of that duty. Simply put the Applicant's argument is that an inordinate amount of time having passed since the acquisition of the property and the order settling the quantum and that there still being a significant sum outstanding, has resulted in a breach of duty to pay to the Applicant the monies owed to it.

[45] The Respondent does not dispute that there has been a failure to completely settle the outstanding debt. Instead, he argues that this must be viewed in the context of all of the circumstances to determine whether there has been a breach. I agree with the Respondent that this is a correct statement of the law and for that reason will explore the reasons given by the Respondent as justification for its non-payment of the adjudged sum to determine whether there has been a breach.

[46] Where property has been compulsorily acquired section 9(1) of the Antigua and Barbuda Constitution Order provides that fair compensation must be paid within a reasonable time.

‘9. (1) No property of any description shall be compulsorily taken possession of, and no interest in or right to or over property of any description shall be compulsorily acquired, except for public use and except in accordance with the provisions of a law applicable to that taking of possession or acquisition and for the payment of fair compensation **within a reasonable time.**’ (emphasis mine)

[47] I accept that considering the various challenges to the value ascribed to the Property by the Board that it would have been impossible to know the total sum for which the Government was liable to the Applicant and as such in these circumstances payment would not have been prudent. However, this issue was finally laid to rest with the decision of the Privy Council in 2014. Since that time more than 5 years have elapsed and although the Government has paid a substantial sum towards that debt, a significant sum remains outstanding.

[48] The Respondent has relied on the unchallenged evidence of the Financial Secretary detailing its fiscal challenges. As governments typically operate a deficit budget, this coupled with the various disasters I have no reason to doubt the veracity of the Financial Secretary’s evidence of the financial challenges faced by the government in meeting all of its financial obligations. However, I note that although compensation was finally determined in 2014, the Government was as far back as 2007 aware that significant compensation would be necessary for the acquisition of this Property. This Property was a hotel and with a significant amount of land. This and its location alone would have signalled that this decision to acquire could not be made lightly without ascertaining that there was a line of payment, or some measures put in place to ensure payment whenever fully determined within a reasonable time. The fiscal challenges that the Respondent

refers to all appear to relate to post 2016 which and whilst somewhat instructive does not fully explain why full payment or at least payment of the undisputed amount could not have been made thus far.

[49] What therefore is the effect of the application to pay by instalments? The Respondent submits that following the order of the Privy Council that due to the recognised inability to pay compensation in one lump instalment that on 31<sup>st</sup> December 2014 that an application to pay the award by way of instalment was filed. That application is part heard and has yet to be determined. Notwithstanding this the Respondent has paid the sum of US\$23,823,970.00 to date. Had the Respondent not continued to make payment and further had the Respondent not paid a significant sum whilst awaiting the hearing of the application to pay by instalments I would have readily thought that this would have been of no moment as clearly the effect of such an application is to provide a structured payment and it by itself does not obviate the duty imposed for prompt payment or payment within a reasonable time. However, the continued payments albeit not in a structured manner demonstrates that there was or has been attempts to pay and settle this debt.

[50] I pause here to note my disappointment with the conduct of the parties in allowing this application to pay by instalments to flounder for several years. It is unclear why this application has remained as part heard and was never completed. Whilst I believe the greater duty is imposed on the Respondent this being his application, yet the Applicant is not fully absolved especially as it has a vested interest in the determination of these proceedings. Both parties are reminded of their collective duties to advance matters before the courts. Parties should not utilise any failings of the Court Office or the Court to advance a claim especially in circumstances where the issue could have been easily remedied and may have altogether obviated these proceedings.

[51] Finally, I have had regard to disputed manner of payment which the Respondent has alleged affected to amount of money due and owing by the Government. Whilst there are legal proceedings in train to determine this issue the Respondent has agreed that by its calculations the sum of US\$18,279,516.42 is outstanding. In light of this admission, this dispute cannot be a justification for at least satisfying the amount the Government has recognised as due and owing.

[52] Having examined all of the relevant factors, I am of the considered opinion that notwithstanding that the Respondent has paid a significant sum towards the judgment debt that when looked at

in the round that there has been a breach of duty to effect payment within a reasonable time. This matter has been outstanding for several years and is a claim which the Government when making the decision to acquire would have been aware that it had the duty to pay within a reasonable time. The fact that there are other competing obligations which the Court is mindful of cannot simply allow the Respondent to unilaterally decide when it is convenient to effect payment. Public policy would lend in favour of the Applicant as the Government should be seen to be responsible in meeting its obligations especially in circumstances where it made the unilateral decision to compulsorily acquire property of another.

**Whether the court should exercise its discretion to grant an order for mandamus as prayed or at all**

- [53] Lord Chelmsford in the case of **R v The Church Wardens of All Saints, Wigan and Others**<sup>5</sup> expressed that mandamus is a prerogative writ, and not a writ of right. Ergo it is ultimately within the courts discretion whether mandamus should be granted or not.
- [54] The purpose of a writ of mandamus is to compel the performance of a public duty by a public authority. Therefore, it is a remedy used to enforce unlawful inaction. It should also not be granted where the remedy is inter alia unnecessary, or a more suitable remedy exists.
- [55] The circumstances of this case are not straightforward. Although there is a decision on quantum and the obligation to pay the same within a reasonable time, there is an existing application for payment by way of instalments which has yet to be determined. I believe that this is important for two reasons. The purpose of that application if successful is to find a structured approach to the payment of the judgment debt. This application is a means to ward of proceedings for enforcement such as these. Further that application through filed several years earlier is still undetermined. As both of these matters concern payment (although the manner differs) I am of the considered opinion that the guidance given in the case of **St. Kitts Nevis Anguilla National Bank v Caribbean 6/49**<sup>6</sup> that chronologically and logically the application being prior in time should be first determined should be adhered to. To determine whether mandamus should be granted in these circumstances would do a grave injustice to the parties.

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<sup>5</sup> [1876] 1 AC 611 at page 620

<sup>6</sup> Civil Appeal No 6 of 2002 (St. Kitts and Nevis)

## **ORDER**

It is hereby declared that:

1. The Respondent is under a public duty under the Land Acquisition Act and the Finance Administration Act to procure payment of the balance of the compensation including interests and costs owed to the Applicant as finally determined by the Judicial Committee of the Privy Council, under the provisions of the Land Acquisition Act for the acquisition of Parcels 55,56 and 57 Block 32 3282A St. Phillip's South Registration Section ("the Property");
2. The Respondent has wrongfully and in breach of his public duty aforesaid failed to procure payment of the balance of the compensation including interest and costs due to the Applicant.
3. The application for an order of mandamus is hereby refused.
4. The Court Office shall set the application for payment by instalments down for hearing before the appropriate Judge.
5. No order as to costs.

**Jan Drysdale**

**High Court Judge**

**By The Court**

**Registrar**