

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

ANTIGUA AND BARBUDA

ANUHCVP2020/0011

BETWEEN:

THE ATTORNEY GENERAL OF ANTIGUA AND BARBUDA

Appellant

and

HMB HOLDINGS LIMITED

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste

Justice of Appeal

The Hon. Mr. Mario Michel

Justice of Appeal

The Hon. Mr. Gerard St.C. Farara

Justice of Appeal [Ag.]

Appearances:

Mr. Anthony Astaphan SC, with him, Ms. Carla Brookes-Harris, Dr. David Dorsett
and Ms. Cherissa Roberts Thomas for the Appellant

Ms. Tana'ania Small Davis QC, with her, Mr. Jomokie Phillips for the Respondent

2022: February 25;
July 29.

Civil appeal — Compulsory acquisition of land — The Land Acquisition Act — Section 9(1) of the Constitution of Antigua and Barbuda — Award of compensation inclusive of interest by a Board of Assessment — Right of appropriation of payment — The rule in Clayton's Case — Common justice principles — Whether the Government had at common law a right of appropriation of payments made to the respondent first to the principal sum of the award — Whether the respondent had the primary right of appropriation in relation to the award — Whether the rule in Clayton's Case applies to payment of an award of compensation under the Land Acquisition Act — Whether an award of a Board of Assessment under the Land Acquisition Act is a judgment debt — Section 26(2) of the Limitation Act 1997 — Whether pursuant to Section 26(2) of the Limitation Act the respondent is barred from recovering arrears of interest accruing under the award beyond the expiration of six years

In 2007, the Government of Antigua and Barbuda ("the Government" or "the appellant") compulsorily acquired the property of HMB Holdings Limited ("HMB" or "the respondent") known as the Half Moon Bay Resort in Antigua ("the property"). The process of compulsory acquisition of the property by the Government under the Land Acquisition Act was initiated in the year 2000. This led to judicial review proceedings being commenced by HMB as the registered proprietor of the property challenging the lawfulness of the said acquisition. In June 2007 the Privy Council upheld the lawfulness of the compulsory acquisition of the property. The Government took registered title to the property and entered into possession thereof on or about 23rd July 2007. Up to this point, the Government had taken no steps under the Land Acquisition Act to appoint a Board of Assessment to determine the amount of compensation to be paid to the respondent for its property. The respondent commencing proceedings before the High Court against the Government to compel it to take the necessary steps to continue the process of compulsory acquisition prescribed under the Land Acquisition Act leading to an award of compensation to the respondent. In 2009, after an order of mandamus made by the High Court against the Government, a Board of Assessment was appointed to assess the compensation to be paid to the respondent for the deprivation of the property. On 5th January 2010, the Board of Assessment awarded the respondent the sum of US\$23,820,999.00 as compensation and interest at the rate of 10.25% per annum from July 2007 to the date of payment, as well as US\$42,090.00 representing the costs of an expert witness and legal costs which was subsequently assessed at US\$104,285.82.

An appeal by HMB against the quantum of the award by the Board of Assessment (but not the award of, or the rate of interest) was allowed by the Court of Appeal on 5th December 2011, and an award of US\$45,499,102.09 principal sum substituted for the award of the Board of Assessment. On appeal by the Government to the Privy Council, the Board, in a written decision dated 26th February 2014 set aside the award of the Court of Appeal and the Board of Assessment (except as to costs) and replaced it with an award that the appellant pay to the respondent compensation in the principal sum of US\$26,616,998.00. By the order of the Privy Council, the respondent was also awarded interest on the principal sum at the rate of 10.25% from 23rd July 2007 to 22nd January 2011 in the total sum of US\$9,560,000.00, and thereafter interest at the rate of 4% per annum on the said principal sum of US\$26,616,998.00 until payment. The Government failed or refused to pay the award (as varied). The respondent brought proceedings against the Minister of Finance seeking an order to compel payment of the award by the Government (Claim No. ANUBOA2010/0001 and Claim No. ANUHCV2012/0727).

As of the date of the hearing of this appeal, the Government had made six (6) payments totaling US\$26,616,998.00 in part payment of the award of compensation as ordered of the Privy Council. By letter dated 10th November 2015, the Government's lawyers wrote to the lawyers for HMB indicating the Government's intention to pay the sum of US\$20,000,000.00 which the Government expressly elected to have applied first towards payment of the principal sum of the award of compensation. By letter dated 11th November 2015, the lawyers for HMB responded that the said payment must be applied in the manner prescribed by law first to the interest owed before it can be applied in reduction of the principal sum. On 23rd December 2015 the Government made the US\$20,000,000.00 payment to HMB. At that time the parties had not reached any agreement or consensus as to how this payment was

to be appropriated. However, in making the payment, the Government reiterated in writing that it should be applied first towards the principal sum of the award. On 9th February 2016, the respondent's lawyers wrote to the appellant demanding payment of what they calculated to be the sum then outstanding to them as compensation under the award. They disputed again the appellant's contention that the US\$20 million payment was to be applied towards the principal sum of the award and threatened to institute court proceedings to ensure that payment is made in accordance with the Land Acquisition Act and section 9 of the Constitution of Antigua and Barbuda ("the Constitution").

On 7th September 2018, HMB commenced a constitutional claim against the Government of Antigua and Barbuda seeking a declaration that the action of the Government in seeking to appropriate the payments made first in satisfaction to the principal sum of the award and thereafter to interest, is a breach of HMB's constitutional right to payment of fair compensation within a reasonable time, and is unlawful and/or unfair. In a written judgment, the learned judge observed that the issue for determination is not one covered by authority and must be approached from first principles. Having reviewed, in some detail, the case law, he concluded, based upon principles of 'common justice', that HMB (i.e. the creditor) has the paramount right to appropriate a part payment by the Government of compensation due and owing by it for the compulsory acquisition of the respondent's property. Accordingly, the judge granted certain declarations. The first was to the effect that the US\$20 million payment was to be applied first to discharge all interest due under the order of the Privy Council which had accrued to that date and, to the extent of any surplus remaining, to the principal outstanding at that date. Secondly, a declaration was also made that with respect to all further payments by the Government, the respondent HMB shall be entitled to appropriate said payments to principal or interest or to both as it deems fit.

Being dissatisfied with the decision of the learned judge, the Government appealed relying on five grounds of appeal. The broad issues for determination in this appeal are: (i) whether the respondent was required to apply payments made by the appellant to the principal sum first as the appellant had purported to exercise a right of appropriation prior to making payments to the respondent, and not first to interest as contended by the respondent; (ii) whether an award of a Board of Assessment under the Land Acquisition Act is a judgment debt; and (iii) whether the respondent is by section 26(2) of the Limitation Act 1997 barred from recovering from the Government interest six years beyond the date when that interest became due.

Held: dismissing the appeal, affirming the declarations and orders made by the High Court, and awarding costs to the respondent to be assessed by a judge of the High Court, if not agreed within 21 days, that:

1. The common law rules relating to the right, as between a debtor and a creditor, to appropriate payments made by the debtor in partial satisfaction of a debt or debts fall, broadly, into two categories. The first is the rule in **Clayton's Case** and the second, the 'old' or well-established rule of common justice as recognised by Rigby LJ in **Parr's Banking Company Limited v Yates**. Both rules are of general application and are subject to the particular circumstances in which the debt being considered has arisen. Neither of these rules are expressed in the case law to be of universal application to any and all situations where a debtor makes a payment

towards satisfaction of a debt. The rule in **Clayton's Case** has been readily applied where a single payment is made by the debtor in circumstances where there exists more than one debt or account owed to or held by the debtor with the creditor. In such circumstances, the debtor clearly has the paramount or first right of appropriation of the payment, unless the contractual documents or the established practice or course of dealing between the parties dictate otherwise, or provide or stipulate a right of appropriation different from that elected by the debtor. The rule in **Parr's Banking Company Limited v Yates**, on the other hand, which applies in situations where a single debt carries interest, requires that a payment made by the debtor is, ordinarily, to be applied first in payment of interest due on the debt.

Devaynes v Noble, Clayton's Case (1816) 1 Mer. 572 considered; **Parr's Banking Company Limited v Yates** (1898) 2 QB 460 considered.

2. The rule in **Clayton's Case** does not apply and was never intended to apply to situations where there is a principal sum which attracts interest or to which interest is accruing. In those circumstances, there is only one debt which consists of both principal and interest. In the instant matter, there is only one award which comprises the compensation sum for deprivation of the property and interest thereon at a specified rate until the entire award has been paid in full. By contrast where the rule in **Parr's Banking Company Limited v Yates** applies, any sums paid by the debtor to the creditor must be applied first to interest outstanding and, if any surplus, to principal. The operation of this old or well-established rule of common justice is not stated to be contingent upon the exercise by the debtor of an existing right of appropriation.

Devaynes v Noble, Clayton's Case (1816) 1 Mer. 572 distinguished; **Cory Brothers and Company Limited v The Owners of the Turkish Steamship "Mecca"** [1897] AC 286 distinguished; **Florence Deeley v Lloyds Bank Limited** 1912] AC 756 considered; **Falk v Haugh** (1935) 53 CLR 163 distinguished; **Meka Venkatadri Appa Row Bahadur Zemindar Garu and others v Raja Parthasarathy Appa Row Bahadur Zemindar Garu (Madras)** [1921] UKPC 32; Privy Council Appeal No. 40 of 1919 distinguished; **Parr's Banking Company, Limited v Yates** (1898) 2 QB 460 considered.

3. In the instant matter, there is one award of compensation for the compulsory acquisition of the respondent's property. The award comprises the principal compensation sum for the loss of the property and interest at a certain rate or rates until the entire award has been paid in full. The rule in **Clayton's Case**, by which the debtor has the first right of appropriation of a part payment, has no application to an award of compensation by a Board of Assessment for the compulsory acquisition by the Government of a landowner's property, as an exception to the landowner's constitutional protection from having his property acquired by Government without his consent or agreement. Moreover, this common law rule does not apply to an award made under and pursuant to the provision of the **Land Acquisition Act**. These common law rules or principles apply more aptly to contractual debts and debts arising by way of mortgages, guarantees, bills of

exchange and other commercial transactions. Likewise, these common law rules and principles have no place in giving legal effect to the full realisation by a landowner, whose property has been lawfully acquired by the Government, of his or her constitutional entitlement to the payment of fair compensation within a reasonable time.

The **Land Acquisition Act**, Cap 233, Revised Laws of Antigua and Barbuda considered.

4. To apply the common law rules and principles from **Clayton's Case**, forged in contractual and commercial situations, would run contrary to the purpose and function of an award of statutory interest as part of the compensation for the loss suffered by the landowner as a direct result of the Government's actions in acquiring his or her property for a public purpose. In a contractual context, interest serves as the price for the delay in repayment of the money owed. In that context, payment of interest by the borrower or debtor or mortgagor is an integral part of the bargain struck between the parties to such agreements. It is part of the price for using someone else's money for your purposes. In the non-contractual context, interest serves as recompense to the creditor for the delay by the debtor in making payment, in circumstances where the debtor has no contractual or other legitimate right to enforce such delay. The role and purpose of interest in matters such as the instant case, is to compensate the landowner for any delay in the Government making payment of the fair compensation within a reasonable time.

The London, Chatham and Dover Railway Company v South Eastern Railway Company [1893] A.C. 429 considered; **The Attorney General of Antigua and Barbuda v The Estate of Cyril Bufton et al** ANUHCVP2004/0022 (delivered 6th February 2006, unreported) considered.

5. There is no case law cited dealing with the question of the applicability of the common law rules and principles relating to the right of appropriation of part payments in satisfaction of a debt on which interest is also due, to an award of compensation by a Board of Assessment under the Land Acquisition Act. Faced with such a situation, the learned judge was correct to resort to principles of 'common justice' when determining the appropriation issue.
6. As a matter of fairness, to permit the Government to postpone its satisfaction of the respondent's clear entitlement to payment of interest on the principal sum of the award, by appropriating payments first to the principal, would be manifestly unfair to the respondent which has, for too long, been kept out of its money by the Government, and runs contrary to the spirit and letter of section 21 of the **Land Acquisition Act**, and what is contemplated by section 9 of the Constitution. Furthermore, it would be contrary to the terms of the award of the Board of Assessment, as varied by the 2014 judgment and order of the Privy Council, which order provided for payment of the sum of US\$9,560,000.00 interest up to 22nd January 2011, and interest at 4% continuing to run on the principal sum of the award

until the entire award has been paid in full. In those circumstances, there was no existing right of appropriation by the Government of payments made towards satisfaction of the award and, accordingly, its purported appropriation of the payment of US\$20 million to principal first was invalid and ineffective.

Section 21 of the **Land Acquisition Act**, Cap 233, Revised Laws of Antigua and Barbuda considered; Section 9 of **The Constitution of Antigua and Barbuda** SI No. 1106 of 1981 considered.

7. The process under the Land Acquisition Act by which the amount of compensation to be paid by the Government to a landowner for the compulsory acquisition of his or her property is to be assessed and awarded, is not court proceedings. The proceedings before a Board of Assessment leading to the determination of an award of compensation are not commenced by any originating process or application. A Board of Assessment duly appointed under the Land Acquisition Act, is not a court of law, but a quasi-judicial tribunal, imbued with a special function and with certain powers. Accordingly, the award made in this matter by the Board of Assessment was not a judgment of a court of law in civil proceedings. Furthermore, there is no provision in the **Land Acquisition Act** which elevates such an award to the legal stature of a judgment of a court of law. The character of the award in this matter has not been changed by virtue of the judgments and orders made on appeal, including the 2014 judgment and order of the Privy Council, by which the quantum of the award was varied or substituted. Therefore, the proceedings of the Board of Assessment being not civil proceeding or proceedings before a court, the provisions of section 26(2) of **Limitation Act 1997** cannot apply to bar recovery by the respondent of interest owing on the principal sum of the award beyond a period of 6 years.

Ruddell v Union Gas Co. Ltd (1974), 6 L.C.R 181 considered; **McPhail's Equipment Co. Ltd v Surrey (District)** (1990), 44 L.C.R 173 considered; **Gairy v Attorney General of Grenada** [2002] AC 167 considered; the **Land Acquisition Act**, Cap 233, Revised Laws of Antigua and Barbuda considered; Section 28 of the **Eastern Caribbean Supreme Court (Antigua and Barbuda) Act**, Cap 143, Revised Laws of Antigua and Barbuda applied; Part 62 of the **Civil Procedure Rules 2000** considered.

JUDGMENT

- [1] **FARARA JA [AG.]:** This is an appeal by the Hon. Attorney General of Antigua and Barbuda against the written judgment of the High Court delivered by Kelsick J [Ag.] on 19th March 2020 by which the learned judge, in giving judgment for the

respondent, HMB Holdings Limited (“HMB”), the claimant in the court below, made the following declarations:

“(i) The payment of US\$20,000,000 by the Government on 23rd December, 2015 was applied firstly to discharge all interest due under the Order of the Privy Council dated 27th day of May, 2014 which had accrued to that date and secondly (and to the extent of any surplus remaining) to the principal outstanding at that date.

(ii) In respect of all further payments by the Government of Antigua and Barbuda to the Claimant, the Claimant shall be entitled to appropriate the said payments to principal or interest (or partially to one and partially to the other) as it deems fit.”

[2] In his judgment, the learned judge concluded that ‘this matter arises solely within the confines of the Land Acquisition Act and does not raise any constitutional issue. It is therefore not open to HMB to assert that the common law discussed later has been abrogated by the Constitution’.¹ Accordingly, the learned judge set out, as the issue for determination applying common law principles: ‘[O]n the making of part payments towards compensation (which includes an award of interest) due for the compulsory acquisition of land, does the creditor or the debtor have the primary (or paramount) right to appropriate the payment?’.²

[3] The learned judge observed that the issue for determination is not one ‘covered by authority’ and must be approached from ‘first principles’. Having reviewed in some detail the case law, he concluded that ‘HMB (i.e. the creditor) has the paramount right’ to appropriate a part payment by the Government of compensation due and owing by it for the compulsory acquisition of the respondent’s property, to interest or to principal. The learned judge gave six reasons for this conclusion. They are:

“(i) it is easy to understand a rule that provides that where a debtor is indebted to a creditor in respect of two or more ‘distinct insulated debts’, then the debtor should have the paramount right to determine which debt he is paying. It is also easy to understand why, in default of election by either party, the presumptions will be derived from a consideration of what is most beneficial to the debtor (thereby reviving his paramount right);

¹ See paragraph 17 of the judgment below.

² See paragraph 19 of the judgment below.

- (ii) it is not as easy, however, to understand how this principle can be implied without modification to every case (whether contractual or not) where a debtor owes a single debt comprising principal and interest. In a contractual context, interest serves as the price for the delay in repayment of the money owed, and in a non-contractual context as compensation for being kept out of money owed; in either case interest accrues for the benefit of the creditor as recompense for the detriment arising from the debtor being enabled (contractually or otherwise) to defer the payment of his debt. Why should the debtor in either case have the paramount right to determine, when both principal and interest are owing, to which a payment is to be appropriated?
- (iii) as held in Parr's Banking, common justice requires the payments to be appropriated first to interest. This default position is for the benefit of the creditor;
- (iv) as Grant MR explained in the extract above [in **Devaynes v Noble, Clayton's Case**³] what I consider to be the foundational principle, the only reason why the default presumption is to be guided by what is beneficial to the debtor is based on the fact that the debtor has the paramount right. It must, or should, follow that where the default presumption is to be guided by what is beneficial to the creditor, the creditor must have the paramount right;
- (v) in a case such as the present, the interest has only accrued to the level it has because of the failure of the Government to make any payments on the acquisition for approximately 8 years, and none for the last 5 years. If the Government is correct, it would mean that, having defaulted in prompt payment, they can now exercise a choice which would significantly reduce the compensation ultimately received by HMB for the compulsory acquisition of its property. This appears to me to have an element of a defaulter being permitted to take advantage of, or escaping, its own default; and
- (vi) the emphasized words from paragraph 10.1 of Paget referred to above show the advantage a contractual creditor (such as a bank) would otherwise have over a non-contractual creditor (such as HMB). The former is able to provide in its contract how payments are to be appropriated or for the reversal of the common law rule. The right of a creditor such as the Claimant to compensation arises outside of contract. It never gets the opportunity to negotiate how payments are to be appropriated or who should have the paramount right. This seems to me to be contrary to common justice."

³ (1816) 1 Mer. 572.

The Appeal

[4] In its original notice of appeal, the appellant relies on four grounds of appeal. Grounds 1, 2 and 3, in essence, challenge the judge's finding that the respondent had the paramount right, at its discretion, to appropriate the part payments made by the Government to interest first owing on the award of compensation for the compulsory acquisition of its property, and his failure to recognise and to give effect to the appellant's express appropriation of such payments to the principal sum of the award of compensation. Ground 4 is the perfunctory ground that the judgment 'is wrong in law and on the facts'. This ground raises no legal or factual issue different from or in addition to those raised by grounds 1, 2 and 3 (and the new ground 5) for this Court's determination.

[5] By a further amended notice of appeal the appellant added a fifth ground of appeal. This new ground raises, for the first time in these proceedings, a limitation point in reliance on section 26(2) of the **Limitation Act 1997**.⁴ By this ground of appeal the appellant seeks an order to preclude, as a matter of law, the respondent from recovery interest accruing on the award after 6 years. There being no objection by the respondent, the appellant's further amended notice of appeal was, at the commencement of the hearing of the appeal, deemed properly filed. The appellant's fifth ground of appeal reads-

"The judgment is wrong in law in (sic) so far as the respondent is precluded from the recovery of interest on the judgment of the Court of Appeal dated 5th December 2011, and or the Privy Council Order dated 27th day of May 2014 after 6 years, pursuant to section 26(2) of the Limitation Act 1997 of Antigua and Barbuda."

[6] In its revised written submissions, the appellant distilled the grounds of appeal into two broad issues for determination by this Court. These are:

- (i) Whether the respondent was required to apply payments made by the appellant to the principal sum first as the appellant had purported to exercise a right of appropriation prior to making payments to the

⁴ Act No. 8 of 1997, Laws of Antigua and Barbuda.

respondent, and not interest as contended by the respondent; (the Appropriation Issue)

- (ii) Whether the respondent is by law not permitted or unable to recover arrears of interest for periods of time or years beyond the expiration of six years from the date on which the interest became due as prescribed by section 26(2) of the **Limitation Act 1997** (the Limitation Issue).

[7] During the hearing of the appeal, Mr. Anthony Astaphan, SC, learned counsel for the appellant, made clear that the appellant would be relying on its revised submissions and on its reply submissions. In addition to its primary written submissions, the respondent also filed supplemental submissions (pursuant to the order of this Court dated 18th October 2021). These submissions address, principally, the Limitation Issue raised or foreshadowed by the appellant in its further amended notice of appeal. The appellant's reply submissions address two issues. The first is the respondent's reliance on the two Canadian cases of **Ruddell v Union Gas Co. Ltd**⁵ and **McPhail's Equipment Co. Ltd v Surrey (District)**⁶ for the proposition that the Board of Assessment, as established pursuant to the **Land Acquisition Act**,⁷ is not a court of law but a tribunal. The correctness of this position in law is not disputed by the appellant, who cited the decision of the Privy Council in **Shell Company of Australia, Limited v Federal Commissioner of Taxation**⁸ on this point. The second issue addressed by the appellant in his reply submissions is the Limitation Issue, which falls to be considered later in this judgment as the second broad issue posited by the appellant.

Background in Brief

[8] Before embarking upon a consideration of the first broad issue in this appeal (the Appropriation Issue), it is convenient to set out, in brief, the background and procedural history of this matter. The genesis of this matter is the compulsory

⁵ (1974), 6 L.C.R 181.

⁶ (1990), 44 L.C.R 173.

⁷ Cap 233, Revised Laws of Antigua and Barbuda.

⁸ [1931] AC 275 at 297.

acquisition by the Government of the property of the respondent in 2007. This property is known as the Half Moon Bay Resort, a luxury hotel operated on 108 acres of land in Half Moon Bay in Antigua and registered as parcels 55, 56 and 57 Block 32 3282 A St. Philip's South Registration Section ("the property"). The property had been destroyed during the passage of hurricane Luis in 1995 and had not been rebuilt or reopened at the time of its compulsory acquisition by the Government.

- [9] The process of compulsory acquisition of the property by the Government under the **Land Acquisition Act** was initiated in the year 2000. This led to judicial review proceedings being commenced by HMB as the registered proprietor of the property challenging the lawfulness of the said acquisition. These proceedings eventually reached the Privy Council which, in June 2007, upheld the lawfulness of the compulsory acquisition of the property. The Government took registered title to the property and entered into possession thereof on or about 23rd July 2007. Up to this point, the Government had taken no steps under the **Land Acquisition Act** to appoint a Board of Assessment to assess and to determine the amount of compensation to be paid to the respondent for its property. This was now some 7 years after the Government had initiated the process of compulsory acquiring the respondent's property.
- [10] The delay in having the compensation to be paid to the respondent for its property assessed, resulted in the respondent having to commence proceedings before the High Court against the Government to compel it to take the necessary steps to continue the process of acquisition as prescribed under the **Land Acquisition Act** leading to an award of compensation to the respondent. In 2009, under an order of mandamus made by the High Court against the Government, a Board of Assessment was appointed to assess the compensation to be paid to the respondent.

- [11] On 5th January 2010, the Board of Assessment awarded the respondent the sum of US\$23,820,999.00 as compensation and interest at the rate of 10.25% per annum from July 2007 to the date of payment as well as US\$42,090.00 representing the costs of an expert witness. Legal costs of US\$104,285.82 was also awarded to the respondent on 1st June 2012.
- [12] An appeal by HMB against the quantum of the award by the Board of Assessment was allowed by this Court on 5th December 2011 and an award of US\$45,499,102.09 substituted for the award of the Board of Assessment. On appeal by the Government to the Privy Council, the Board, in a written decision dated 26th February 2014, set aside the award of the Court of Appeal (and the Board of Assessment, except as to costs). Lord Hughes, in giving the decision of the Board, observed:
- “It is a further striking feature of this case that despite an award from the Board made in January 2010, which the Government has never challenged, not a penny of compensation has been paid. This Board was informed that it has proved difficult to sell the site and that the money is not available, in a very small community, until it is sold. Even assuming that that is correct, it provides no excuse for non-payment and it would work (sic) an in justice to HMB to require it to begin all over again when it has received nothing.”⁹
- [13] Before the Privy Council, the Government sought to amend its notice of appeal to add a new ground challenging the rate of interest awarded by the Board of Assessment as not in conformity with the cap of 4% per annum in section 21 of the **Land Acquisition Act**. The award of interest by the Board of Assessment at the rate of 10.25% per annum was not in conformity with the express provision of section 21 of the **Land Acquisition Act**. It had been based on an explicit concession by the Government before the said tribunal (which concession it had maintained before the Court of Appeal) that the 4% rate was unconstitutional, and does not represent fair compensation. As a result of this concession, the Board of Assessment, in arriving at a rate of 10.25%, had split the marginal difference between the rate offered by the Government and that sought by HMB before it.

⁹ The Attorney General v HMB Holdings Ltd. [2014] UKPC 5 at paragraph 13.

[14] Having delivered its written decision on 26th February 2014, the Privy Council (as reflected in the certificate of results dated 27th May 2014), advised and reported to Her Majesty the Queen, who made, on the said date, the following orders directed to the Government of Antigua and Barbuda to be 'punctually observed and obeyed':

"(1) The orders of the Court of Appeal and the Board of Assessment are set aside, save for the Board of Assessment's order on costs (and the subsequent assessment thereof).

(2) The Board of Assessment's award is replaced with an award that the First Appellant pay to the Respondent compensation in the sum of US\$26,616,998.

(3) The Appellants have permission to amend their notice of appeal to the Privy Council in the form annexed hereto...

(4) This permission is given on condition that the rate of interest on the said sum of US\$26,616,998 shall be 10.25% from 23 July 2007 to 22 January 2011, in the total sum of US\$9,560,060.

(5) Thereafter interest shall run on the said US\$26,616,998 at the rate of 4% a year until payment.

(6) There shall be no order as to the costs of the appeal before the Court of Appeal.

(7) The Respondent shall pay to the Appellants their costs of the appeal to the Privy Council, to be assessed on the standard basis if not agreed."

[15] These sums, totaling US\$36,177,068 plus interest at 4% from 23rd January 2011 until payment in full, is the award of compensation to the respondent for the compulsory acquisition of its property and the delay by the Government in making payment to the respondent in breach of its constitutional right to payment of fair compensation within a reasonable time. It was then some 14 years since the process of compulsory acquisition of the respondent's property had been initiated by the Government, and approximately 7 years since the Government had taken possession of the said property.

[16] The Government failed or refused to pay the award. This delay in payment of the award was found by Remy J to be tantamount to a refusal to pay. It has also been the subject of a finding by this Court of breach of the respondent's constitutional rights; and of adverse comments by the Privy Council in its decision dated 26th February 2014. The respondent brought proceedings seeking an order to compel payment of the award by the Government through the Minister of Finance (Claim No. ANUBOA2010/0001 and Claim No. ANUHCV2012/0727). The first payment made by the Government towards satisfaction of the award was on 18th February 2015 in the sum of US\$370,370.37. This payment represented a mere 1% of the aggregate sums awarded (as found by the Privy Council), not counting the interest accruing at 4% from 23rd January 2011.

[17] As of the date of the hearing of this appeal, the Government had made six (6) payments totaling US\$26,616,998.00 towards the award of compensation as settled by the judgment and order of the Privy Council dated 27th May 2014. The first five of these payments were made before the matter was heard before the learned judge in the court below and are listed at paragraph [5] of his judgment. The sixth payment was made a few days before judgment was delivered in the court below. The six payments made by the Government towards the award are:

(i) 18th February 2015 – the sum of US\$370,370.37;

(ii) 7th August 2015 – the sum of US\$407,407.41;

(iii) 7th September 2015 – the sum of US\$37,037.04;

(iv) 23rd December 2015 – the sum of US\$20,000,000.00;

(v) 31st October 2017 – the sum of US\$3,000,000.00; and

(vi) 12th March 2020 – the sum of US\$2,802,183.19.

[18] In its revised skeleton argument the appellant asserts that the Government had expressly requested in relation to each of the payments at (iv), (v) and (vi) above, that they be appropriated to the principal sum of the award. In the judgment below, the learned judge observed 'it is with respect to the payment of [US]\$20,000,000.00

on 23rd December, 2015 that the issue arises'. However, it is to be observed that in the claim the respondent sought a declaration concerning the application or appropriation of the US\$20 million payment '**and other payments by the Government...**'; that the appellant's '**appropriations were unlawful and/or unfair**'; and an order that 'all payments go first to interest'. (Emphasis added). By contrast, the declarations made by the learned judge concerned specifically the US\$20 million payment by the Government on 23rd December 2015, and 'all further payments'. This latter expression would encompass the fifth and sixth payments listed above.

- [19] By letter dated 10th November 2015, the Government's lawyers wrote to the lawyers for HMB indicating the Government's intention to pay the sum of US\$20,000,000.00 which the Government sought 'to have applied towards the principal award of compensation'. This letter constituted a clear appropriation by the Government of this payment first towards reduction of the principal sum of the award. By letter dated 11th November 2015, the lawyers for HMB responded that the said payment 'must be applied in the manner prescribed by law to the accrued interest before it can be used to reduce the principal amount owed'. In the said letter, the respondent's lawyers provided its calculation of the amount owing on the award as of 27th November 2015. This showed a total debt or balance owed of US\$40,724,077.00, of which US\$14,107,079.00 represented accrued interest pursuant to the judgment and order of the Privy Council dated 27th May 2014. The respondent also made clear that once the US\$20 million payment was applied first to accrued interest, this left the sum of US\$5,892,921.00 to be applied in reduction of the principal sum of the award still owing. This was followed by a letter dated 24th November 2015 from the lawyers for the Government requesting that they be provided with any statutory provision which required the payment to be applied to accrued interest first, failing which they 'must insist on [their] initial proposal to apply the US\$20,000,000.00 first to the principle (sic) award of compensation'. To this letter the lawyers for the respondent replied citing certain provisions of the **Judgments Act**¹⁰ and the **Land**

¹⁰ Cap 227, Laws of Antigua and Barbuda.

Acquisition Act in support of their contention that the payment must first be applied to the accrued interest under the award.

[20] The upshot of this was that on 23rd December 2015 the Government made the payment of US\$20,000,000.00 to HMB. At that time the parties had not reached any agreement or consensus as to how this payment was to be appropriated. However, in making the payment, the Government reiterated in writing that it should be applied towards the ‘principal award of compensation’. On 9th February 2016, the respondent’s lawyers wrote to the appellant demanding payment of what they calculated to be the sum then outstanding to them as compensation under the award. They disputed again the appellant’s contention that the US\$20 million payment was to be applied towards the principal sum of the award and threatened to institute court proceedings to ensure that payment is made in accordance with the **Land Acquisition Act** and section 9 of the **Constitution of Antigua and Barbuda** (“the Constitution”).¹¹

[21] On 7th September 2018, HMB commenced a constitutional claim against the Government of Antigua and Barbuda seeking a declaration that the action of the Government in seeking to apply the payment to the principal sum of the award first and thereafter to interest, ‘is a breach of the [respondent’s] constitutional right to fair compensation within a reasonable time pursuant to section 9(1) of the Antigua and Barbuda Constitution Order 1981’; and is unlawful and/or unfair. HMB also sought an order of the court:

“directing that all payments towards satisfaction of the compensation due to [it] be applied firstly to interest due and payable as at the date of payment and thereafter to the principal balance so as to ensure that [HMB] is paid fair compensation as provided for in section 9(1) of the Constitution.”

In the alternative, HMB sought an award of damages ‘representing the loss to [it] for [the Government’s] failure to pay fair compensation within a reasonable time’. As mentioned above, the learned judge found that the claim or dispute does not engage

¹¹ SI No. 1106 of 1981.

the Constitution but arises solely within the **Land Acquisition Act**. From this conclusion there has been no appeal.

- [22] It is accepted that whichever way this issue is determined, it will have a significant effect on the balance remaining owing by the Government under the award. The learned judge observed, if HMB is correct that it has the right to stipulate the appropriation when making a part payment, the balance owing to it by the Government as at 25th February 2020 would be US\$19,108,917.91. If the Government's contention is correct and the right of appropriation was its to exercise, the balance owing would be US\$6,616,998.00, which sum Mr. Astaphan indicated to the judge the Government would soon be in a position to pay. This would result in full payment of the principal sum; interest would thereby cease altogether to accrue, with the remaining balance of US\$12,491,919.91 consisting entirely of outstanding accrued interest.

The Appropriation Issue – Grounds 1, 2 and 3 Appellant's Submissions

- [23] The appellant submits that this is a straightforward issue. It argues that the principles regarding the right of appropriation upon part-payment of a debt are clear. At common law, the primary or paramount right to appropriate a part-payment towards payment of a debt rests with the debtor, the person making the payment; and once the debtor has made an appropriation, whether to principal or interest, it is valid, binding and conclusive on this issue and it is not open to a different appropriation by the creditor, whose right to appropriate the payment as he sees fit only arises in the absence of an appropriation by the debtor.
- [24] In support of this primary submission, the appellant cites this passage from the judgment of Lord MacNaghten in the House of Lords in **Cory Brothers and Company Limited v The Owners of the Turkish Steamship "Mecca"**:¹²

¹² [1897] AC 286 at 293.

“Now, my Lords, there can be no doubt what the law of England is on this subject. When a debtor is making a payment to his creditor, he may appropriate the money as he pleases, and the creditor must apply it accordingly. If the debtor does not make any appropriation at the time when he makes the payment the right of appropriation devolves to the creditor.”

- [25] In further support of this principle, the appellant relies on the dicta of Lord Shaw in **Florence Deeley v Lloyds Bank Limited**,¹³ expounding on the principle or rule in **Clayton's Case**:

“After referring to Sherry's Case, he [Eve J] says: ‘In giving judgment the Lord Chancellor (Lord Selborne) says this: ‘**The principle in Clayton's Case and of the other cases which deal with the same subject**, is this, that where a creditor having a right to appropriate moneys paid to him generally, and not specifically appropriated by the person paying them, carries them into a particular account kept in his books, he prima facie appropriates them to the account, and the effect of that is, that the payments are de facto appropriated according to the priority in order of the entries on the one side and on the other of that account.’ I understand that to mean this: **According to the law of England, the person paying the money has the primary right to say to what account it shall be appropriated**; the creditor, if the debtor makes no appropriation, has the right to appropriate; and if neither of them exercises the right, then one can look on the matter as a matter of account and see how the creditor has dealt with the payment, in order to ascertain how he did in fact appropriate it. And if there is nothing more than this, that there is a current account kept by the creditor, or a particular account kept by the creditor, and he carries the money to that particular account, then the Court concludes that the appropriation has been made; and having been made, it is made once and for all, and it does not lie in the mouth of the creditor afterwards to seek to vary that appropriation’.” (Emphasis added)

- [26] The appellant takes issue with the judge's reliance on common justice principles in reaching his conclusion on the issue of appropriation. It is not disputed that the learned judge asked himself the correct question: does the creditor or the debtor have the primary (or paramount) right to appropriate the payment? In arriving at his approach to a determination of this issue, the learned judge considered the various authorities cited by both parties. These include a passage from the judgment of Rigby LJ in **Parr's Banking Company, Limited v Yates**¹⁴ where he referred, not

¹³ [1912] AC 756 at 783-784.

¹⁴ (1898) 2 QB 460.

to the rule in **Clayton's Case** on which the appellant relies, but to the 'old rule' or the well-established rule which, where applicable, lead only to 'common justice'. The appellant also refers to the dicta of Sir William Grant MR in **Clayton's Case**,¹⁵ and the statement of principle by Lord Buckmaster in **Meka Venkatadri Appa Row Bahadur Zemindar Garu and others v Raja Parthasarathy Appa Row Bahadur Zemindar Garu (Madras)**.¹⁶ The learned judge then concluded that this matter, involving as it does a debt arising as a result of an award of compensation for the compulsory acquisition by the Government of the real property of the respondent pursuant to the **Land Acquisition Act**, is not covered by the case law cited and relied upon, and the issue ought to be approached from first principles. This, he posited, necessitated the application of common justice principles which would require that payments made by the Government are to be appropriated first to interest.

[27] In **Parr's Banking**, Rigby LJ formulated the 'common justice' principle in this way-

"There is one point remaining with which I must deal. The defendant's counsel relied on the old rule that does, no doubt, apply to many cases, namely, that, where both principal and interest are due, the sums paid on account must be applied first to interest. That rule, **where it is applicable**, is only common justice. To apply the sums paid to principal where interest has accrued upon the debt, and is not paid, would be depriving the creditor of the benefit of which he is entitled under his contract, and would be most unreasonable as against him." (emphasis added).

[28] The appellant submits that in stating the 'old rule', Rigby LJ opined that it would apply to 'many' and not all cases, and in deciding the issue in that case he did not apply the common interest rule. In fact, the English Court of Appeal held that the said common interest rule of appropriation was inapplicable in the case of interest on an overdrawn account which, according to the practice of the bankers, has been from time to time converted into principal. Another distinguishing feature pointed to by the appellant is that in **Parr's Banking** there was no specific appropriation by the

¹⁵ (1816) 1 Mer. 572 at 792-793.

¹⁶ [1921] UKPC 32; Privy Council Appeal No. 40 of 1919.

debtor, as in the instant matter where the Government expressly appropriated its payments to principal first.

- [29] The appellant relies on the decision of the Privy Council in **Garu v Garu**. There, Lord Buckmaster, in giving the advice of the Privy Council, had this to say in relation to the statement of common justice by Rigby LJ in **Parr's Banking** –

“The question then remains as to how, **apart from any specific appropriation**, these sums ought to be dealt with. There is a sum due that carries interest. There are moneys that are received without a definite appropriation on the one side or on the other, and the rule which is well established in ordinary cases in that in those circumstances the money is applied in payment of interest and then when that is satisfied in payment of the capital. That rule is referred to by Lord Justice Rigby in the case of *Parrs Banking Company v Yates* in these words [as already quoted at paragraph [27] above]. Their Lordships can find nothing in this case to take the question outside the general principle referred to by the learned Lord Justice.” (Emphasis added).

- [30] The appellant submits that the decision in **Garu v Garu** is that once an appropriation has been made by the debtor that is decisive, the rule of common justice cannot apply. Accordingly, the learned judge erred in relying on that rule to determine the question before him. This being a case where it is incontrovertible that the Government made an express appropriation of the fifth payment (US\$20 million) to principal, that appropriation was decisive and it was simply not open to the judge to resort to the rule of common justice and to conclude that it fell to the creditor, HMB, to appropriate the payment first to interest.

- [31] In support of this submission, the appellant also relies on the decision of the High Court of Australia in **Falk v Haugh**¹⁷ where it was held – ‘Where payments are received generally on account of a debt, which is in part interest and in part principal **and no specific appropriation is made**, they are treated as applicable to interest in priority to principal’. (Emphasis added). And at page 173 where it is said that Lord Justice Rigby’s rule of common justice ‘.... affords only a presumption **in the**

¹⁷ (1935) 53 CLR 163.

absence of any actual or express appropriation by the debtor or creditor'.
(Emphasis added).

- [32] The appellant submits that the issue of the right of appropriation of payments is a matter to be decided based on the applicable common law principles as set out in the authorities which gives the paramount right of appropriation of the debtor. The constitutional right to payment of fair compensation within a reasonable time does not override the common law principles relating to appropriation of payments, and there is nothing inherently unfair in having an appropriation to principal first. To the contrary, an appropriation to interest first would create an obligation on the Government not contemplated by the Constitution, and expose the Government to a liability which it was not exposed to under the Constitution. Therefore, in the absence of an order of a court or a specific requirement in legislation (to which there are none), the common law principle of appropriation by the debtor applies with respect to payment of the award.
- [33] Accordingly, it is the appellant's case on this first broad issue, that the learned judge failed to properly apply the law and misapplied the **Parr's Banking** case. In doing so, the judge, while accepting at paragraph [40] of his judgment the appellant's submission that **Falk v Haugh** and **Garu v Garu** 'recognised, in the circumstances before the court in each, that there was a right of appropriation', purported to overrule the applicable common law principle that once the debtor has made an appropriation, the common justice rule is inapplicable. As a result, the express appropriations made by the appellant with respect to the payments towards the award of compensation as settled by the Privy Council, were not properly considered and applied by the judge, who came to the wrong conclusion on this issue as a matter of law. His reasons for decision, especially at paragraphs [45] and [46] of the judgment on the common justice issue, are wrong in law, and the judgment ought to be set aside by this Court. The appellant also contends that there is nothing unfair and unjust about this to the respondent who was always entitled to interest, at the rate specified by the Privy Council, on the reducing balance of

principal. The respondent is not, however, entitled to more compensation than is contemplated by the Constitution and the **Land Acquisition Act**.

Respondent's Submissions

[34] In response to the appellant's submission on the Appropriation Issue, the respondent seeks to have the decision of the learned judge affirmed for the following reasons:

- (i) the principle that where principal and interest are outstanding on a distinct interest-bearing debt, a partial payment by the debtor is to be applied in satisfaction first of outstanding interest and then, any surplus, is to be applied to principal, is one of general application and achieves 'common justice';
- (ii) the common law cases on which the appellant relies to justify its purported right to appropriation to principal first, do not apply 'since they are all distinguishable on material facts and all arose in the context of a contractual relationship' between the parties;
- (iii) the rule in Clayton Case is wholly inapt as its application arises where the debtor is servicing multiple debts or payments into current accounts. This is not the context and situation in the instant matter which concerns an award of compensation for the compulsory acquisition by the Government of the respondent's property under the Constitution and pursuant to the provisions of the **Land Acquisition Act**, both of which provide a specific regime relating to compulsory land acquisition in Antigua and Barbuda;
- (iv) the learned judge was faced with a lack of authority on the issue raised and there being no hard and fast rule of law applicable to appropriation of payments, 'it was appropriate for the learned judge to apply the common justice approach and he took into account the relevant factors in applying that approach to the facts before him. To hold otherwise would be a grave injustice to the respondent.'

- (v) the appellant's submission that the respondent would be paid compound interest if it had the paramount right of appropriation 'is completely devoid of merit';
- (vi) the argument that the decision of the learned judge penalised the appellant who could only pay if the exigencies of public finance allows 'is similarly without foundation or relevance';
- (vii) the method of appropriation sought by the appellant 'is an attempt to circumvent the order of the Privy Council and to benefit from its own refusal and/or failure to pay compensation (of which interest is a part) due to the respondent.

[35] The respondent relies on the principle of 'common justice' set out by Rigby LJ in **Parr's Banking**, which case concerned a claim for recovery of moneys owed on a guarantee.

[36] It is submitted by the respondent that the 'old rule' that where principal and interest are owing a payment on account must be applied first to interest is one of general applicability, and is the foundation of the 'common justice' principle, which principle is entirely appropriate for the circumstances of this case. All other cases based on contract or a mortgage or some other commercial activity between the parties, are distinguishable from the instant matter. The principle in such cases as to debtor appropriation are nevertheless inapplicable to matters involving the compulsory acquisition of property and payment of an award of compensation pursuant to the Constitution and the **Land Acquisition Act**.

[37] As to **Clayton's Case**, which case involved a debt claim against an estate and the appropriation of payment made on a current account, the court found that the appropriation must follow the order in which the receipts and payments take place and are reflected in the account. Accordingly, the court decided that the debtor had the paramount right of appropriation, and where he failed to do so that right passed

to be exercised by the creditor. The respondent submits that the Privy Council in that case did not find this rule, the rule in **Clayton's Case**, was applicable to 'distinct insulated interest bearing debts', but that either the debtor or the creditor would have the right to appropriate depending upon the nature of the debt.

[38] The respondent sought to distinguish the case of **Cory Brothers**, which concerned a dispute over dishonoured bills of exchange. It was held that the rule in **Clayton's Case** did not apply to a case where there was no current account between the parties or where the creditor, in the absence of an appropriation by the debtor, similarly fails to do so. In such a case, the debtor held the paramount right of appropriation.

[39] The respondent also distinguished the decision of the Australian High Court in **Falk v Haugh** (payments pursuant to a mortgage) and of the Privy Council in **Garu v Garu** (involving an action for beneficial interest into estates and payments made to a receiver). In **Falk v Haugh**, the court applied the general rule as to the appropriation of payments on the mortgage first to interest. As to **Garu v Garu**, there had been no specific appropriation of payments made, and the Privy Council found that in such circumstances the payments must first be applied to any interest and then in reduction of principal. The respondent submits that neither of these two cases assists the appellant 'as to debtor led appropriation in the context of a single interest bearing debt'; and the decision in neither of them affirmed the rule in **Clayton's Case**.

[40] It is submitted by the respondent that the learned judge was correct to find that this issue was not covered by authority:

"since the cases referred to... either (1) arose within a contractual or commercial context in which case the parties could either have reduced the terms of the contract into writing or face the consequences of not doing so or (2) involved cases in which there had been no actual appropriation thus tasking the court to resolve the issue."

- [41] The respondent list certain factors which distinguish the instant matter from the cases cited and which take this case out of the realm of a contractual or commercial context. They point to there having been a specific appropriation by the appellant when making the payment of US\$20 million, and that this matter has to do with the application or appropriation of payments made in relation to an award following the compulsory acquisition of the respondent's property. The respondent argues that in such circumstances, it had no opportunity to reduce the payment terms into writing and it has, as the facts show, been paid at the pleasure of the Government. The respondent submits that these are fundamental differences which justify the decision by the learned judge to distinguish these cases.
- [42] Accordingly, the respondent submits that this is not an ordinary case, there is no authority as to the approach to be taken in deciding this issue in matters concerning the payment of an award of compensation for the compulsory acquisition of land. They submit that the learned judge was correct to resort to and to apply the common justice approach or the common justice rule, in reaching his decision on the issue of who has the right to appropriate. In the specific context of this matter, the Government cannot now be heard to invoke the 'exigencies of public finance' argument as a means of avoiding or further delaying payment. It ought properly to have considered that factor when it was deciding whether to compulsorily acquire the respondent's very valuable property; and also its constitutional right to payment of fair compensation within a reasonable time.
- [43] The context of this matter is also one where the Privy Council said in its 2014 decision that payment to the respondent must be promptly made. Also, a judge of the High Court, Remy J, in her 8th March 2013 judgment, found that the Government was in breach of the respondent's right to payment of fair compensation within a reasonable time, but declined to make an award of damages for the delay in payment, on the basis that the interest accruing on the principal sum was compensation for the delay. A similar finding of breach was also made by the Court of Appeal in 2013. Likewise, in its 2014 decision the Privy Council observed that

despite the Government not challenging the award of the Board of Assessment it was a 'striking feature' of the case that 'not a penny of compensation has been paid' up to that time.

[44] The respondent contends that the **Land Acquisition Act** is a complete code dealing with compulsory land acquisition in Antigua and Barbuda. The compulsory acquisition of property under the **Land Acquisition Act** is an exception to the protection afforded to persons under section 9 of the Constitution. Section 21 of the **Land Acquisition Act** expressly enables the Board of Assessment to add interest to an award as compensation. Such interest is compensation for any delay in making payment in full of the compensation for the deprivation of the landowner's property. Accordingly, interest is an element of the award of compensation and is an important part of the overall sum payable to a landowner to compensate him or her for the loss of their property. The limitation of 4% per annum in section 26(2) as interest recoverable by the landowner for being kept out of their money, substantially reduces the total measure of the amount that the respondent can recover as compensation for a delay in payment of the compensation for the deprivation of his or her land.

[45] The respondent argues that the judge was correct to apply the rule of 'common justice' in the particular circumstances of the instant matter, and especially so in the absence of any authority on the point. Ms. Tana'ania Small-Davis, QC submits that under an ordinary judgment of the court for a liquidated sum, payments go first to interest. Accordingly, the judge was correct in applying the common justice principle so as to 'default' to that principal or ordinary position.

[46] Ms. Small-Davis, QC takes issue with the appellant's reliance on the decision of the Privy Council in **Garu v Garu** and the passage from the judgment of the Board given by Lord Buckmaster. Counsel argues that this passage is supportive of the respondent's position on this issue as it serves to underscore the well-established rule referred to by Rigby LJ in **Parr's Banking** to the effect that in ordinary cases

where there is a debt which carries interest, moneys paid 'is first applied in payment of interest and then when that is satisfied in payment of the capital'. To, instead, apply the payment first to capital would be depriving the creditor of the benefit to which he is entitled. It is submitted that this is the principle which the learned judge applied in the last sentence of paragraph [45](ii) of the judgment, in reasoning to his conclusion on the common justice in this case.

[47] In its written submissions, the respondent lists a number of factors and circumstances which it considers were of relevance to be taken into account by the learned judge in applying the common justice approach. They are:

- (i) the compensation owed to the respondent is in respect of the deprivation of property which is an exception to its constitutional rights;
- (ii) the appellant had taken possession of the property in July 2007 but took no steps to complete the compulsory acquisition process through the appointment of a Board of Assessment and the assessment of the compensation to be paid to the respondent for the deprivation of its property;
- (iii) the respondent had to resort to court proceedings in 2010 to obtain the appointment of the Board of Assessment under the **Land Acquisition Act**;
- (iv) no substantial payment was made by the Government toward the compensation due to the respondent after the Board of Assessment had given its decision and even in the face of the Privy Council's order in May 2014 until December 2015;
- (v) the judgment of the Court of Appeal in 2013 found that the failure by the Government to pay compensation to the respondent was a refusal to pay and was in breach of the respondent's constitutional rights to the payment of fair compensation within a reasonable time;

- (vi) the judgment of Remy J in which the said judge expressly declined to award damages since the respondent would benefit from the interest accruing on the compensation sum in lieu of same;
- (vii) the extreme delay in making payments towards the compensation generally and especially after 2014;
- (viii) at the time of making the US\$20 million payment (the most substantial payment), there was significant interest outstanding on the compensation award which was the result of the failure of the Government to make payment to the respondent;
- (ix) the said US\$20 million payment would be enough to cover the outstanding interest as well as pay down a significant portion of the compensation award;
- (x) the appropriation of US\$20 million payment to principal would undoubtedly be to the detriment of the respondent; and
- (xi) there is likely to be further delay by the appellant in paying the outstanding compensation and the appropriation of the US\$20 million payment to principal would be a disincentive to any further or timely payments as no meaningful interest would continue to accrue on the significantly reduced principal sum and the ballooned accrued interest would become stale.

[48] The respondent zeroed in on what it sees as the role of an award of interest in compulsory acquisition to a determination of what is the common justice in this case. They seek to rely on and to uphold the judge's statement at paragraph [45](ii) of the judgment where he observed that:

"interest serves as the price for the delay in repayment of the money owed, and in a non-contractual context as compensation for being kept out of money owed; in either case interest accrues for the benefit of the creditor as recompense for the detriment arising from the debtor being enabled (contractually or otherwise) to defer payment of his debt."

[49] The respondent points to the **Land Acquisition Act**. In section 21 provision is made for the payment of interest at 4% on an award. In **The Attorney General v HMB Holdings Ltd**¹⁸ the Privy Council awarded interest pursuant to section 21. The respondent also points to the finding and order by Remy J in **HMB Holdings Limited v Harold Lovell**¹⁹ in granting an order of mandamus against the Minister of Finance 'requiring [him] to comply with his public duty under the Land Acquisition Act Cap. 233 section 29 to issue a warrant for the payment from the Treasury of the compensation, interest and costs payable to [HMB]'. Reference was also made, in particular, to the finding by Remy J that the Government had been guilty of unreasonable delay in paying to the respondent the moneys due under the award, which delay constitutes 'not only a failure, but a refusal to do so'. This finding, the respondent contends, is tantamount to a finding of breach of duty under the Constitution and the **Land Acquisition Act** in deliberately refusing to make the requisite payments to the respondent in settlement of the award (including interest), and in discharging its constitutional obligation to pay fair compensation within a reasonable time. In reaching this conclusion, Remy J refrained from making an award of damages 'in light of the fact that interest is accruing on a daily basis'. This judgment and order made by Remy J has not been appealed.

[50] It is submitted by the respondent that the appellant, by the right of appropriation which it contends for in these proceedings, is seeking to undermine the judgment and order of Remy J; and the award by the Privy Council of interest in 2014 - some 6 plus years ago, which award is to compensate the respondent for the chronic delay by the Government making full payment and in lieu of an award of damages for such delay.

[51] The respondent also seeks to counter the appellant's position on this issue on the ground of fairness. It is submitted that, in the context of this matter, upholding a principle requiring the creditor, HMB, to appropriate payments to interest first, is

¹⁸ [2014] UKPC 5.

¹⁹ ANUHCv2012/0727 (delivered 8th March 2013, unreported).

simply a matter of fairness or common justice. The converse position as argued for by the appellant, would permit the Government 'to take advantage of [its] own default'. To buttress this proposition, the respondents refer to this passage from the judgment of Lord Herschell L.C. in **The London, Chatham and Dover Railway Company v South Eastern Railway Company**:²⁰

“ I think that when money is owing from one party to another and that other is driven to have recourse to legal proceedings in order to recover the amount due to him, the party who is wrongfully withholding the money from the other ought not in justice to benefit by having that money in his possession and enjoying the use of it, when the money ought to be in the possession of the other party who is entitled to its use.”

- [52] With regard to the appellant's argument that the judge's finding and order will have the practical effect of unjustly enriching the respondent, the respondent submits that, to the contrary, any outcome which permits the Government, which is and has been for several years in default of payment of the award and in breach of its obligations under the Constitution and the **Land Acquisition Act**, to pay compensation to the respondent for the compulsory acquisition of its property as far back as 2007, would be plainly unjust. It is also submitted that such an outcome would also unfairly prejudice the respondent and undermines its entitlement to payment of interest as an element of fair compensation. Accordingly, the learned judge was correct in holding that, in the circumstances of this case, the US\$20 million payment and any further payments, must first be appropriated to interest. As to the appellant's contention that the decision of the judge would lead to the respondent receiving compound interest, the respondent points out that at no time has it sought to capitalise on the outstanding interest into the principal sum due under the award, but has sought only to apply payments first to interest and any surplus in reduction of the principal sum. Further, according to the respondent, the right of appropriation does not mean that interest will not accrue on a reducing balance basis, but simply that outstanding interest has to be satisfied first.

²⁰ [1893] A.C. 429 at 437.

[53] As to the importance generally of interest as a compensatory element of an award, the respondent refers to a passage from the judgment of this Court delivered by Michel JA in **Andrey Adamovsky et al v Andriy Malitskiy et al**:²¹

“It cannot be disputed that a party wrongfully deprived by another of money to which the first party is entitled ought to be compensated for his loss, not just by an award to him of the sum of money to which he was entitled, but so too by an award of the time value of the money from the date of its appropriation to the date on which it is ordered to be paid to him. This latter award is what is referred to as an award of pre-judgment interest.”

[54] More specifically with regard to the purpose or role of an award of interest as an element of compensation for delay in paying a compensation award made by a Board of Assessment, the respondent relies on this passage (so far as material) at paragraph [40] of the judgment of this Court in **The Attorney General of Antigua and Barbuda v The Estate of Cyril Bufton et al**:²²—

“In the instant, (sic) case the constitutional damages that the judge awarded were for the Government’s deferring payment of compensation and causing distress and emotional travail to the Buftons. Would not an award of interest have been adequate compensation for the delay in payment? The established remedy for being kept out of money is an award of interest. In the instant case the judge awarded interest on the compensation for the value of the land at the rate of 4% per annum ... and there has been no challenge to that award or that rate.”

[55] Finally, the respondent submits, that the contention by the appellant that giving the right of appropriation to the respondent would unfairly penalise the Government, which can only pay as the exigencies of public finances will allow, is without merit. As I understand it, this argument was made by the appellant in reliance on passages from the decision of the Privy Council in **Gairy v Attorney General of Grenada**.²³ The factual basis of this assertion is also recited at paragraphs [11] and [27] of the judgment of Remy J in **HMB Holdings Limited v Harold Lovell**. At paragraph [30] Remy J treats with this issue, and refers to a passage at paragraph 31 of the judgment of Lord Bingham of Cornhill:

²¹ BVIHCMAP2014/0022 (delivered 3rd February 2017, unreported).

²² ANUHCVP2004/0022 (delivered 6th February 2006, unreported).

²³ [2002] AC 167.

“If the exigencies of public finance prohibit the immediate payment to the appellant of the full sum outstanding, the Attorney General, representing the Minister of finance, may apply to the Judge for approval of a schedule of payment by installments”

- [56] In addressing this point, the respondent submits: firstly, the Government is indebted to the respondent and has an obligation to settle the compensation, including the award of interest, due to the respondent. Its failure to meet and discharge this obligation has already been found by the Court of Appeal in 2013 and was categorised by the Privy Council in 2014 as a ‘striking feature’ with ‘not a penny of compensation’ having been paid. Secondly, the appellant has not sought an order of the court for payment by installments. Accordingly, it is in no position to assert the exigencies of public finance as a means of avoiding or further postponing compliance with the order of the Privy Council. For this and the other reasons advanced, the respondent contends that it would be unconscionable for the appellant, in the circumstances of this matter, to be permitted to appropriate the only large payment (US\$20 million) to principal, in the face of the significant accrued and outstanding interest. To conclude otherwise would undermine any future compensatory interest that the respondent would receive, since there would be no capital sum on which interest would accrue. All this must be seen through the prism of the Crown Proceedings Act and other legislation which serve to insulate the Government (the Crown) and its assets from the ordinary enforcement process applicable to other judgment debtors, except to obtain an order of mandamus against the public officer charged with taking steps to enable payment (the Minister of Finance) compelling him to do so.

Discussion and Conclusion on the Appropriation Issue

- [57] In my view, there are four main issues which arise for consideration from the submissions of the parties in relation to the Appropriation Issue. These are as follows:

- (1) At common law, as between a creditor and a debtor, which has the paramount or first right of appropriation of payments made by the debtor where both the principal and interest are due?
- (2) Whether the common law rules or principles of appropriation are properly applicable to circumstances where, as in this case, the debt arises from an award of compensation to the respondent for the compulsory acquisition of its property by the Government pursuant to the **Land Acquisition Act**?
- (3) Whether the judge was correct in approaching this issue from 'first principles' and/or principles of 'common justice' in reaching his conclusion?
- (4) Whether, if 'common justice' principles were to be applied, the judge correctly applied those principles and did he reach the correct conclusion that, in the circumstances of this case, that the paramount right of appropriation lies with the respondent and not the Government and the payments must be applied first to accrued interest?

But first some general and contextual matters to set the stage.

General and Contextual Matters

[58] In my judgment, the starting point in this matter has to be that this case is concerned with the payment of an award (including interest) made by the Board of Assessment duly appointed under the **Land Acquisition Act**, as varied by the judgment and order of the Privy Council dated 26th February 2014. The award is an award of compensation to the respondent for the Government's compulsory acquisition of the respondent's property at Half Moon Bay in Antigua. The award, as varied, represents the fair compensation (as assessed) to be paid to the respondent by the Government for the loss of its property in the public interest. This is an exception to the rights and protections under section 9 of the Constitution afforded to every property owner or person with an interest in real property. The process by which compulsory acquisition of a landowner's property is to be effected is not enshrined

or provided for in the Constitution itself. The entire process is provided for in the **Land Acquisition Act**.

- [59] The **Land Acquisition Act** sets out the entire regime for compulsory acquisition of property in Antigua and Barbuda. This includes, the steps which must be taken, and the declarations, notices and other steps and measures which must be put into effect by the Government in compulsorily acquiring the property of a landowner. It includes, the taking of possession of and title to the land being acquired in this way by the Government. Importantly, the **Land Acquisition Act** provides in sections 11(1) that:

“All questions and claims relating to the payment of compensation under this Act and to the apportionment of such compensation shall, save as hereinafter provided, be submitted to a Board of Assessment to be appointed in each case in accordance with the provisions of section 12.”

By section 11(2): ‘A Board of Assessment shall have full power to assess, award and apportion compensation in such cases, in accordance with the provisions of this Act.’

- [60] The steps to be taken to have a Board of Assessment appointed as set out in section 12, rest with the Governor-General, and not with the landowner whose property has been compulsorily acquired. Each such Board as constituted shall have a judge of the High Court as its chairman, one member appointed by the Governor-General, and the third member nominated by the landowner. Interestingly, where the landowner has refused or unreasonably delayed in exercising his or her right to nominate the third member to the Board of Assessment, the **Land Acquisition Act** empowers the Governor-General, by order in writing, to direct the chairman ‘to proceed with the inquiry notwithstanding that there has been no such nomination by the landowner’. In such cases, the Board of Assessment shall be deemed to be lawfully constituted without the presence of this third member.

- [61] The procedure to be followed when a Board of Assessment has been duly constituted, is set out in sections 15,16 and 17 of the **Land Acquisition Act**. The

powers of the Board of Assessment relative to the conduct of the inquiry include power to summon witnesses and to remunerate witnesses for their attendance. Section 15 expressly provides that 'all questions incidental to the inquiry shall be governed by the provisions of the laws for the time being in force relating to civil proceedings in the High Court'. Accordingly, procedural issues and questions arising during an inquiry shall be decided applying such principles in civil proceedings. At the conclusion of the inquiry, a duly constituted Board of Assessment is empowered by section 17 of the **Land Acquisition Act** to 'decide upon the claims for compensation and apportionments submitted to them and shall make an award under the hand of the Chairman who shall cause the same to be **filed** in the High Court'. (emphasis added) Its decision and award may be a majority decision. If all members differ, the mean between the amount decided upon by the chairman and that of the amounts decided upon by the two other members of the Board which approximates most nearly to the amount decided upon by the chairman 'shall be deemed to be the compensation awarded by the Board.' Accordingly, the appointment of a Board of Assessment and its decision and award of compensation to the landowner, is a crucial and indispensable part (unless the Government and landowner reach a binding agreement on the amount of compensation to be paid) of the discharge by the Government of its constitutional obligation to the landowner and the realisation by the landowner of its rights and protections under section 9 of the Constitution. Fundamentally, this right and protection, which is enforceable by court action by the landowner, is to not have his or her property acquired by the Government without payment of fair compensation within a reasonable time. The rules applicable to the assessment and award of compensation to the landowner (or other person having an interest in land), are set out in section 19 of the **Land Acquisition Act** and are binding upon the Board of Assessment. By section 17(3) an appeal against the decision of a Board of Assessment lies to the Court of Appeal, in the first instance.

[62] Section 21 authorises the Board of Assessment to 'add' to an award of compensation interest at the rate of 4% 'calculated from the date upon which the

authorized officer entered into possession of the land acquired until the date of the payment of the compensation awarded by the Board'. Importantly, the wording of this provision contemplates that interest will be paid first before the discharge in full of the compensation assessed and awarded for the loss of the property itself.

- [63] The **Land Acquisition Act** does not contain a provision making an award of compensation by a Board of Assessment a judgment of the High Court or enforceable as a judgment of the High Court. As alluded to above, the only requirement is that such an award be 'filed' in the High Court. The provisions with regard to the determination of 'small claims for compensation', that is, claims not exceeding \$240 is somewhat different. Such claims are to be determined by a Magistrate. Subject to the agreement in writing by the parties, claims not exceeding \$480 shall also be determined by a Magistrate. In determining either of these categories of claims, section 18(3) of the **Land Acquisition Act** provides that the Magistrate shall follow the procedure with respect to the summoning and remuneration of witnesses and:

"all questions incidental to such proceedings shall be governed by any law for the time being in force relating to the recovery of claims under two hundred and forty dollars before a Judge of the Supreme Court and all the provisions of any such law shall apply mutatis mutandis to any such proceeding."

An appeal from a determination of compensation by a Magistrate shall lie:

"in like manner as if such determination was given in the exercise of the summary jurisdiction of a Magistrate in a civil matter under the provisions of the Magistrate's Code of Procedure Act, **and for the purposes of such appeal the determination of the Magistrate under this section shall be deemed to be a decision of the Magistrate within the meaning of section 167 of the said Act.**" (Emphasis added).

- [64] The instant matter does not concern the payment of an ordinary judgment debt enforceable by civil proceedings, whether arising by contract, mortgage, guarantee, bill of sale, bill of exchange, or by some other binding commercial transaction or instrument. An award was made by a duly appointed Board of Assessment pursuant to and by virtue of its establishment, power and authority under the **Land**

Acquisition Act. A lawfully constituted Board of Assessment is not a court of law. It is a specific type of tribunal, imbued with certain functions and power pertaining to the assessment of compensation to be paid by the Government.

- [65] The **Land Acquisition Act** expressly provides for the right of appeal by the Government or the landowner to the law courts from an award of a Board of Assessment. In exercise of this right of appeal, either party may challenge the factual and legal bases upon which the Board of Assessment made the award, including the quantum of the award. The exercise of this right of appeal is well-illustrated by the steps taken by the parties in this matter all the way to the Privy Council to challenge the quantum of the award of the Board of Assessment.
- [66] The contention by the appellant, that the award by the Board of Assessment has been replaced by or has merged into a judgment debt of the court is, with respect, unsustainable. Dr. Dorsett, learned counsel for the appellant, contended (in reply) that this matter has given rise to a judgment debt. His reasoning is that, since both the Court of Appeal and the Privy Council have adjudicated upon the matter, and made orders setting aside the award (or most of it), the award has been replaced by the final order of the Privy Council in 2014 by which certain sums, including interest, were ordered to be paid by the Government to the respondent. In doing so, Her Majesty, on the advice of her Judicial Committee of the Privy Council, made an order setting aside the award of the Board of Assessment (except as to costs). Dr. Dorsett also submitted that the said order in the Privy Council is enforceable by the courts through an order of mandamus against the Minister of Finance, as was done in the instant matter. Accordingly, the award of the Board of Assessment has merged into a judgment and order of the court. These submissions are in contradistinction to those made by the respondent. Ms. Small-Davis, QC submits that an award of compensation made by a Board of Assessment under section 17 of the **Land Acquisition Act**, is not a judgment debt since it emanates from proceedings before a tribunal and not from proceedings originating in a court of law. Likewise, it is not a judgment debt for the purposes of section 26(2) of the **Limitation**

Act 1997. This latter point is concerned with the second broad issue – the Limitation Issue - to be addressed later in this judgment.

- [67] Dr. Dorsett has cited no authority in support of his submissions on this point. Ms. Small-Davis, QC relies on two Canadian cases: **Ruddell** and **McPhail**, in support of her argument that the determination of compensation by a Board or tribunal set up by or under a statute, is not a court and its proceedings are not civil proceeding or proceedings before a court, within the meaning and contemplation of the **Limitation Act 1997**. In **McPhail**, it was decided that proceedings before a board for the determination of compensation:

“do not fall within the definition of a proceeding in a court, and an application for determination of compensation is not ‘a self-help remedy’..... Proceedings before the Board are more closely aligned with and in the nature of an arbitration, and unlike an action, are commencing by way of application for determination of compensation and not by a writ of summons or a petition.”

- [68] In my judgment, there is great force in Ms. Small-Davis’ submissions on this point. The process under the **Land Acquisition Act** by which the amount of compensation to be paid by the Government to a landowner for the compulsory acquisition of his or her property is not court proceedings. The proceedings before it leading to the determination of the award of compensation are not commenced by any originating process or application. A Board of Assessment duly appointed under the **Land Acquisition Act** is not a court of law, but a quasi-judicial tribunal, imbued with a special function and with certain powers.

- [69] While the **Land Acquisition Act** speaks about making a ‘claim’ to compensation, it does not require that the claim must be in any particular form or by any particular document. Under section 2, the term ‘person interested’ is defined to mean ‘every person claiming, or entitled to claim, compensation under the Act’. The simple requirement, therefore, is that a person intending to seek compensation for the compulsory acquisition of any land or an interest in land, must make their claim known. By section 6, as soon as a declaration by Cabinet to acquire a specific piece of land for a public purpose has been issued and published in the Official Gazette

under section 3, the authorised officer is mandated without delay to enter into negotiations with the landowner for the purchase of the land to which the declaration relates 'upon reasonable terms and conditions, and by way of voluntary agreement'. By section 7(2)(c), every notice of acquisition shall 'require all persons interested, as soon as is reasonably practicable' either (i) to appear personally or by attorney or agent before the authorised office to state the nature of their interest in the land and 'full particulars of their claim to compensation in respect of those interests'; or (ii) give to the authorised officer a written statement signed by them or their attorney or agent setting forth their interest and particulars of their claim to compensation.

- [70] It is pellucid that the award made in this matter by the Board of Assessment was not and is not a judgment of a court of law. There is no provision in the **Land Acquisition Act** which elevates such an award to the legal stature of a judgment of a court of law. The character of the award in this matter has not been changed by virtue of the judgments and orders made on appeal, including the 2014 judgment and order of the Privy Council, by which the quantum of the award was varied. It remains (as varied) the award of the Board of Assessment, as the tribunal lawfully empowered under the **Land Acquisition Act** to make such an award. The jurisdiction exercised by both the Court of Appeal and the Privy Council to review, on appeal, the lawfulness and quantum of an award and to make orders in relation thereto, emanates from the appeal provisions of the **Land Acquisition Act** which confer such jurisdiction on the Court of Appeal, and by appeal from its decision to the Privy Council. This is not dissimilar from the position in law with decisions of other statutory bodies and tribunals where such jurisdiction is expressly conferred on the courts. This position is manifest by section 28 of the **Eastern Caribbean Supreme Court (Antigua and Barbuda) Act** ("the Supreme Court Act")²⁴ which confers on the Court of Appeal 'such other jurisdiction and powers as may be conferred upon it by this Act or any other law'. The procedure in such cases is governed by Part 62 of the **Civil Procedure Rules 2000** ("CPR"). CPR 62.1 applies to appeals to the Court of Appeal from '(c) a tribunal'.

²⁴ Cap 143, Revised Laws of Antigua and Barbuda.

[71] The powers of the Court of Appeal and the Privy Council to grant certain reliefs upon its determination of appeals from an award of a Board of Assessment, are as set out, respectively, in the Supreme Court Act and in the **Antigua and Barbuda Appeals to Privy Council Order**.²⁵ In determining such matters, the Court of Appeal and the Privy Council are circumscribed by and required to apply and follow relevant provisions of the Constitution and the **Land Acquisition Act** when determining whether the Board of Assessment erred. These powers include upholding or setting aside an award in full or in part; varying an award as to quantum and the substitution of a different sum or sums as the award. That is exactly what occurred in the instant matter. Here, the Privy Council's order expressly 'replaced' the sums awarded by the Board of Assessment with the sums as found by the Privy Council. It follows from this reasoning, that the award, as varied, remains the award of the Board of Assessment. Were this not the case, on the appellant's argument, there would be two awards in effect in this matter post the 2014 judgment and order of the Privy Council which expressly did not disturb the Board of Assessment's award as to costs. This would lead to the absurd position that the award of costs in the proceedings before the Board of Assessment would not be a judgment of a court, but the remainder of the award relative to compensation, interest and costs before the Privy Council would be a judgment debt.

[72] In my considered judgment, a court must be cautious in applying wholesale to the determination of the Appropriation Issue in the instant matter, common law principles from the case law as to the rights of appropriation of payments made by a debtor towards satisfaction of his debt. These principles have been forged out of contractual, banking, mortgage, current accounts, or other commercial transactions. A court must likewise be guarded in its application of these common law rules and principles to a determination of that issue in this case, where those rules and principles are meant to apply in circumstances where payments are made by a

²⁵ SI 1967 No. 224.

debtor to his creditor towards satisfaction of an account or debt or multiple accounts and debts, for which the debtor is liable.

[73] It is clear that the learned judge was correct to observe that this issue, involving as it does the appropriation of a part-payment made by the Government towards satisfaction of the award of compensation in a compulsory land acquisition matter, is not covered by any case law put before him. Indeed, no case directly on point has been brought to this Court's attention by either counsel.

[74] That said, however, the main point of departure between the appellant and the respondent on this issue rests with the judge's application of what is called in the cases, the 'common justice rule' or 'common justice principles'. It is the appellant's case that 'common justice principles' have no application to a determination of this issue in the instant matter since the decided cases, or a preponderance of them, demonstrate clearly that the first principle to be applied in circumstances where there is a creditor and debtor situation, is that the paramount right of appropriation of payments made by the debtor rests with the debtor – the person making the payment. If the debtor does make an appropriation, that is conclusive, and the creditor has no right to make or purport to make an appropriation of that payment different from what the debtor has specified. If the debtor does not make an appropriation at the time when the payment is made to the creditor, then the creditor has the right to make the appropriation, whether to principal or to interest, and may exercise that right up to the time of bringing an action for recovery of the debt. If neither of them made an appropriation of the payment, the court must look to the nature and circumstances of the debt or account, or to the transaction giving rise to the debt, or to any established practice or course of conduct or course of dealings between the parties, or to any other relevant circumstances, in determining the correctness of any appropriation.

[75] Put simply, in the instant matter, it is the appellant's case that the Government, having clearly made an appropriation to the principal sum of the award of its

payment of the sum of US\$20 million, that appropriation is valid, binding and conclusive, and it was not open to the respondent to appropriate or to seek to appropriate that payment to interest first. Accordingly, it was not open to the judge to apply 'common justice principles', in light of the clear appropriation by the Government at the time when that payment was made.

[76] On the other hand, it is the respondent's case on this first issue, that no such general common law rule giving to the debtor the first right of appropriation, applies in circumstances where there is a single debt attracting interest. Equally so, no such common law rule or principle contended for by the appellant, can apply or ought in the interest of common justice and fairness, to be applied, by the court in the particular context and special or unique circumstances of this matter. The context here is where the debt to be satisfied is an award of compensation, of which interest at specified rates is an integral part of the award, arising under a constitutional and statutory jurisdiction and power, as an integral part of the holistic regime provided for by Parliament under the **Land Acquisition Act**.

[77] It is also the respondent's case that doing common justice in this matter, requires the court to have resort to the well-established rule as formulated by Lord Justice Rigby in **Parr's Banking**, which rule requires a part-payment by the debtor to be appropriated first in payment of accrued interest, and once that sum has been satisfied in full and there is any surplus, to principal. This, the respondent contends, is the guiding principle to be applied in the instant matter, as determined correctly by the learned judge, and the only principle which does justice and fairness between the parties. Moreover, the application of this rule or principle in the instant matter, has not been displaced or rendered inoperable in the particular circumstances of this case. Accordingly, the purported appropriation by the Government of the payment to principal, was invalid and of no effect, there being no agreement between the parties to apply the said payment of US\$20 million in that way.

The Position at Common Law

[78] In considering the decided cases, a distinction seems to have been drawn, at some point, between cases where there is a debt on which has accrued a liability to pay interest and, on the other hand, cases which involve the existence of two or more debts or accounts held by the creditor, to which the debtor is required to make payments, and with respect to which payments the debtor has the primary right of appropriation between the debts or accounts. These two categories of cases gave rise to two different rules or principles of appropriation. These are: (i) the rule in **Clayton's Case** – upon which the appellant principally relies; and (ii) the rule or principle recognised and formulated by Lord Justice Rigby in **Parr's Banking** – upon which the respondent places must reliance. The latter rule is said by Rigby LJ as leading to 'common justice'.

Rule in Clayton's Case

[79] In contradistinction to the 'well-established' rule, by the rule in **Clayton's Case**, which is said to apply as a matter of general principle, the debtor has the paramount or first right of appropriation. Upon exercising that right his appropriation is binding on the creditor. The genesis of this rule is to be found in **Clayton's Case**, a decision of the King's Bench. At page 595 the rule is formulated in these terms:

"The rule of law to which it has been attempted to adapt this case, stands on a principle quite foreign to that with which the Court has now to deal. It is that where there are a debtor and creditor, and the debtor owes more than one debt, and pays a sum of money, he has a right to direct to which of the debts that payment shall be applied; and, if he omits to do so, then the law implies that it is immaterial to him to which the payment is applied, and, by his omission, he has left the application of the option of the creditor; and again, that, if the creditor neglects to exercise that option, still the application may be regulated by circumstances."

[80] This rule was further explained in **Clayton's Case** (at page 605-608) in these terms:

"This state of the case has given rise to much discussion, as to the rule by which the application of indefinite payments is to be governed. Those rules we, probably, borrowed in the first instance, from the civil law. The leading rule, with regard to the option given, in the first place to the debtor, and to the creditor in the second, we have taken literally from thence. But according to that law, the election was to be made as the time of payment, as well in the case of the creditor, as in that of the debtor. If neither

applied the payment, the law made the appropriation according to certain rules of presumption, depending on the nature of the debts, or the priority in which they were incurred. And as it was the actual intention of the debtor that would, in the first instance, have governed; so it was his presumable intention that was first resorted to as the rule by which the application was to be determined. In the absence, therefore, of any express declaration by either, the inquiry was, what application would be most beneficial to the debtor. The payment was consequently, applied to the most burdensome debt, - to one that carried interest, rather than to that which carried none, - to one secured by a penalty, rather than to that which rested on a simple stipulation; - and if the debts were equal, then to that which had been first contracted...

But it has been contended that, in this respect, our Courts have entirely reversed the principle of decision, and that, in the absence of express appropriation by either party, it is the presumed intention of the creditor that is to govern; or, at least, that the creditor may, at any time, elect how the payments made to him shall retrospectively receive their application. There is certainly, a great deal of authority for this doctrine...

"The cases then set up two conflicting rules; - the presumed intention of the debtor, which, in some instances at least, is to govern, - and the ex post facto election of the creditor, which, in other instances, is to prevail. But I think the present case is distinguishable from any of those in which that point has been decided in the creditor's favour. They were all cases of distinct insulated debts, between which a plain line of separation could be drawn. But this is the case of a banking account, where all the sums paid in form one blended fund, the parts of which have no longer any distinct existence. Neither banker nor customer ever thinks of saying, this draft is to be placed to the account of £500 paid in on Monday, and this other to the account of the £500 paid in on Tuesday. There is a fund of £1,000 to draw upon, and that is enough. In such a case, there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into the account. Presumably, it is the sum first paid in, that is first drawn out. It is the first item on the debit side of the account, that is discharged, or reduced, by the first item on the credit side. The appropriation is made by the very act of settling the two items against each other. Upon that principle, all accounts current are settled, and particularly cash accounts."

- [81] The appellant relies on the learning and guidance given by Lord MacNaghten in the 1897 decision of the House of Lords in **Cory Brothers**. Briefly, this case concerned four dishonoured bills of exchange. They each had been given in payment of necessities supplied in Egypt to the steamships Mecca and Medina. Each of the

bills of exchange were for a different sum and were due on different dates; with two of the four being, respectively, on the account of the Mecca and Medina. An action was brought to recover the moneys due in respect of the necessities supplied to the mecca, and an account was delivered appropriating the 900l paid on 15th August 1894 to the appellants, Cory Brothers and Company, Limited, to the Medina bills and legal expenses in connection with that vessel. The judgment at first instance in favour of the defendant applying the rule in **Clayton's Case**, was affirmed by the English Court of Appeal. On appeal to the House of Lords, it was held that the rule in **Clayton's Case** did not apply, the appeal was allowed, and judgment was entered for the plaintiff. The ratio decidendi is -

“When a debtor pays money on account to his creditor and makes no appropriation **to particular items**, the creditor has the right of appropriation and may exercise that right up to the last moment, by action or otherwise; the application of the money is governed, not by any rigid rule of law, but by the intention of the creditor, expressed, implied or presumed. The rule in Clayton's Case, (1816) 1 Mer. 585, does **not apply to a case where there is no account current** between the parties, nor where from an account rendered or other circumstances **it appears that the creditor intended, not to make any appropriation, but to reserve the right.**” (Emphasis added).

- [82] In considering the rule in **Clayton's Case**, all three Law Lords expressed the view that it was a general rule and not one of universal application, but its applicability depended on the particular circumstances of each case. Lord Halsbury L.C opined:

“This rule, so formulated, has been adopted in all the Courts in Westminster Hall (see *Field v Carr*). It is to be remembered, however, that on more than one occasion it has been pointed out that **this is not an invariable rule of law; but the circumstances of a case may afford ground for inferring that transactions of the parties were not so intended as to come under this general rule ...**”. (emphasis added)

- [83] In considering whether the Court of Appeal had gotten it right in treating the case as being governed by the rule in **Clayton's Case**, Lord Herschell opined:

“I do not think the present case is governed by Clayton's Case. It was there decided that where there is a current account between parties, and payments are made without appropriation of them, they are to be attributed in point of law to the earliest items in the account. In the present case, at the time the payment was made no account had been delivered by the

appellants to the respondents. The debts in respect of the two vessels arose from transactions which were entirely distinct; they had never been brought into a common account. An account comprising all the items was for the first time made out and transmitted by the appellants to the respondents after payment was made.”

[84] The appellant cites the passage from the judgment of Lord MacNaghten reproduced at paragraph [24] above. However, that statement of the rule in **Clayton’s Case** is not, upon a more careful consideration, a principle of universal application to any debtor and creditor relationship. This was, in my respectful view, not what Lord MacNaghten intended or meant. It was his formulation or reformulation of the rule in **Clayton’s Case**. That rule is concerned with situations where there is a current account and the debtor owes more than one debt to the creditor, or there are more than one accounts for which payments are to be made. In such circumstances, absent any agreement governing the appropriation of payments or absent any established practice or course of dealing in relation to the way in which payments to these debts or to these accounts are to be appropriated, the primary right of appropriation rests with the debtor as the person making the payment. In such circumstances, the authorities are clear, the debtor can stipulate the manner in which or the accounts to which a payment is to be appropriated or applied. Put differently, the rule in **Clayton’s Case** does not apply and was never intended to apply to situations where there is a principal sum which attracts interest or to which interest is accruing. In those circumstances, there is only one debt which consists of principal and interest. In the instant matter, there is only one award which comprises the compensation sum for deprivation of the property and interest thereon at a specified rate until the entire award has been paid in full.

[85] The purport of this distinction between two categories of cases and the different well-established rules, is illustrated by the case **Deeley**, a decision of the House of Lords (also relied on by the appellant). This case is an example of the second category of cases concerned with the appropriation of payments to more than one account – the classic rule in the **Clayton’s Case** situation. It concerned the mortgage by G of his business premises first to a bank to secure an overdraft on his

current account and, secondly, 2 years later, to Deeley to secure 3,500l. The second mortgage was expressly made subject to the first. Notice of the second mortgage had been given to the bank on the date of its execution, but the bank continued the account as one unbroken account instead of opening a fresh account. G from time to time made payments into his account which, if applied according to the rule in **Clayton's Case** would have paid off the moneys due to the bank at the date of the second mortgage. However, the bank had forgotten about the notice of the second mortgage. In the events that developed subsequently, the bank realised their security and G was made bankrupt. Deeley brought an action against the bank for the usual accounts as against a mortgagee in possession, and for a declaration that in taking these accounts they were not entitled to charge for advances made by G after notice of the mortgage to Deeley. The issue concerned whether Deeley's mortgage was entitled to priority.

[86] The House of Lords held that the rule in **Clayton's Case** was not excluded by the conduct of the parties. The circumstances in which a debtor has the primary right of appropriation was considered by Lord Shaw. In giving judgment, Lord Shaw first referred to that part of the judgment of Eve J in the court below where he opined:

"The principle of Clayton's Case and of the other cases which deal with the same subject, is this, that where a creditor having a right to appropriate moneys paid to him generally, and not specifically appropriated by the person paying them, carries them into a particular account kept in his books, he prima facie appropriates them to the account, and the effect of that is, that the payments are de facto appropriated according to the priority in order of the entries on the one side and on the other of that account."

Lord Shaw continued:

"I understand that to mean this: According to the law of England, the person paying the money has the primary right **to say what account it shall be appropriated**; the creditor, if the debtor makes no appropriation, has the right to appropriate; and if neither of them exercises the right, then one can look on the matter as a matter of account and see how the creditor has dealt with the payment, in order to ascertain how he did in fact appropriate it. And if there is nothing more than this, that there is a current account kept by the creditor, or a particular account kept by the creditor, and he carries the money to that particular account, then the Court concludes that the appropriation has been made; and having been made, it is made once for

all, and it does not lie in the mouth of the creditor afterwards to seek to vary that appropriation.” (emphasis added)

The ‘Old’ and well-established rule leading to common justice

[87] In the second category of cases, the ‘old’ or well-established rule as formulated by Rigby LJ in **Parr’s Banking** is that where both principal and interest are due, any sums paid by the debtor to the creditor must be applied first to interest outstanding and, if any surplus, to principal. The operation of this rule was not stated to be contingent upon the exercise by the debtor of an existing right of appropriation. The legal justification for that well-established principle as given by Lord Justice Rigby is that to apply the payment, instead, first to principal where interest has accrued upon the debt and is not paid, ‘would be depriving the creditor of the benefit to which he is entitled under his contract’. This rule has, to a large extent, stood the test of time and has been referred to and endorsed in a number of the cases cited by counsel and dealt with by the judge below, including in **Garu v Garu**. However, the appellant argues that this rule, as explained in the cases, is expressly subject to the primary right of the debtor to appropriate his or her payment as he or she see fit.

[88] In **Parr’s Banking** it was held:

“The rule with regard to the appropriation of payments by which interest is presumed to be paid before principal is not applicable in the case of interest on an overdrawn account which according to the practice of bankers has been from time to time converted to principal.”

This is an example of a case where the ‘old’ and well-established rule (as referred to by Rigby LJ), applicable to many cases, was displaced by the particular circumstances of this case, the court recognising and giving effect to an established practice or course of dealing by bankers, whereby payments on an overdrawn account are applied or appropriated first to principal. The appellant says that this ‘common justice’ rule, as stated by Rigby LJ, does not apply in all cases. This is correct as is the cases with the rule in **Clayton’s Case**. The other point raised by the appellant, which is part of the same point, is that Rigby LJ did not apply the common justice rule in determining the issue in the said case. Again, this is a non-point for the reason already provided. The appellant’s third point is that there does

not appear to have been any specific appropriation by the debtor in **Parr's Banking**. The short answer to this is that the 'common justice rule', as it was formulated by Rigby LJ, does not depend for its general applicability on the absence of an appropriation or purported appropriation by the debtor.

- [89] In **Garu v Garu**, a decision of the Privy Council in 1921 (also relied on by the appellant), the common justice rule expounded by Lord Justice Rigby in **Parr's Banking** in 1898 was recognised, endorsed and applied by Lord Buckmaster, who in restating the rule made its applicability subject to 'any specific appropriation'. He stated:

"The question then remains as to how, apart from any specific appropriation, these sums ought to be dealt with. There is a debt due that carries interest. There are moneys that are received without a definite appropriation on the one side or on the other, and the rule which is well-established in ordinary cases is that in those circumstances the money is first applied in payment of interest and then when that is satisfied in payment of the capital. That rule is referred to by Lord Justice Rigby in the case of *Parr's Banking Company v Yates*, which is reported in these words...[extract not included as already set out above]

Their Lordships can find nothing in this case to take the question outside the general principle referred to by the learned Lord Justice. They therefore think that the money received must be applied in the ordinary way, first in the reduction of the interest and when that is satisfied in the reduction of the principal."

- [90] The appellant has seized upon the highlighted words in the passage from the speech of Lord Buckmaster in **Garu v Garu**, to submit that the Privy Council was there deciding that the existence of an appropriation by the debtor is decisive. With respect, I do not agree entirely. In my view, the learned Law Lord was, in posing the question for determination, noting the absence of any appropriation in that case, either by the debtor or the creditor. He did not address directly and decide the issue of whether a finding of an appropriation by debtor or creditor would be decisive and he certainly did not decide which of them would have the paramount right of appropriation in the application of this old and well-established rule. What his decision does reflect is that there were no circumstances which would take that case outside of the ordinary rule espoused by Lord Justice Rigby. In my considered view,

this decision is, to a large extent, confirmatory of the ordinary or general rule of appropriation leading to what Rigby LJ saw as the common justice.

- [91] The appellant also placed much reliance on the decision of the High Court of Australia in **Falk v Haugh**, one of the two cases unearthed by the learned judge below as a result of his research (the other being **Garu v Garu**). **Falk v Haugh** concerned an action brought by a mortgagor under the Financial Emergency Acts 1931-1934 of Australia to prevent the mortgagee from exercising his power of foreclosure. The mortgagor alleged that interest on the principal sum of the mortgage had been paid to a date within the immediately preceding period. However, there was no actual payment of interest by the mortgagor during the said period, but the mortgagee had entered into possession and was in receipt of the rents and profits. It was held that the mortgagor was entitled to have an account taken for the purpose of showing that interest had been satisfied to a date within the prescribed period. It was also held that:

“When payments are received generally on account of a debt, which is part interest and in part principal and no specific appropriation is made, they are treated as applicable to interest in priority to principal. The rule applies to net rents and profits received by a mortgagee in possession.”

- [92] It is instructive that pursuant to section 28 of the Financial Emergency Act 1931 under which the mortgagor had brought the application by summons for an order preventing the mortgagee from exercising any power of sale or foreclosure before 1st October 1935, two conditions are prescribed. The first is that under the mortgage (a) any interest accrued due and payable is not in arrears; or (b) interest has been paid to a date within a specified period immediately preceding the date of the application (12 months). The second condition is that apart from the non-payment of principal and interest, the mortgagor has performed his covenants or has committed only a minor or technical breach in the opinion of the court.

- [93] The appellant relies, in particular, on a short extract from the judgment of the High Court [Rich, Dixon, Evatt and McTiernan JJ]. At page 173 of the judgment, the Justices refer to the ‘common justice rule’ by Rigby LJ in **Parr’s Banking**, and to a

recent statement or restatement of that rule by Lord Buckmaster in **Garu v Garu**. The Justices go on to observe: 'The rule affords only a presumption in the absence of any actual or express appropriation by the debtor or the creditor'. In my considered view, this restatement of the principle as formulated by Rigby LJ in **Parr's Banking** does not accord in every respect with his formulation of it. His formulation does not have as a predicate to its application, the absence of an appropriation by either the debtor or creditor. If this were the case, the effect would be to merge the two rules (common justice and **Clayton's Case**) into a single rule or principle whereby the debtor would have the paramount right of appropriation, regardless of the kind of debt or the circumstances under which it arose. Furthermore, the Justices in **Falk v Haugh** did not consider whether the rule in **Clayton's Case** would be applicable and whether that rule was, in essence, the same as the 'common justice rule'. They also did not stipulate as to whether, in the circumstances of that case, the debtor or the creditor would have had the paramount or first right of appropriation. Finally, this case turned on its peculiar facts and applicable statutory provisions which are quite unique and 'home grown' by providing certain protections to a mortgagor against the remedies which the law gives to a mortgagee. This is very different from the circumstances of the instant matter in which the debt arose as a result of the compulsory acquisition of the respondent's property, an award of compensation with accruing interest until paid in full, and the chronic failure by the Government to make payment to the respondent of the said award.

- [94] The learned judge considered that there was 'a certain tension' between the principle in **Parr's Banking** and the principle in **Clayton's Case**. He also observed that the principle in **Parr's Banking** 'operates somewhat differently. In the absence of an indication to the contrary, common justice requires the payment to be appropriated to interest first.' And, he went on state, 'The default presumption in Parr's Banking therefore suggests that the paramount right rests with the creditor in a case where a debt comprises principal and interest'. He also referred to the

decision in **Falk v Haugh** as suggesting a 'potential oddity'. At paragraph [40] of his judgment the learned judge concluded:

"I accept the submission that both cases [**Falk v Haugh** and **Garu v Garu**] recognised, in the circumstances before the court in each, that there was a right of appropriation. What they do not decide, however, is whether it is a creditor or the debtor, in a case of compulsory acquisition of land that has the paramount right of appropriation."

Do the Common Law Rules or principles apply to an award of compensation in compulsory acquisition?

From the case law analysed above, the common law rules relating to the right, as between a debtor and a creditor, to appropriate payments made by the debtor in partial satisfaction of the debt or debts fall, broadly, into two categories: the rule in **Clayton's Case** and the 'old' well-established rule recognised by Rigby LJ in **Parr's Banking**. It seems clear that both rules are of general application and are subject to the particular circumstances in which the debt or debts have arisen. Neither of these rules are expressed in the case law to be of universal application to any and all situations where a debtor makes a payment towards satisfaction of a debt. The rule in **Clayton's Case** has been readily applied where a single payment is made in circumstances where there exists more than one debt or account between the debtor and the creditor. In such circumstances, the debtor clearly has the paramount or first right of appropriation of the payment, unless the contractual documents or the established practice or course of dealing between the parties dictate otherwise, or dictate or provide for an appropriation different from that elected by the debtor. The 'old' or well-established rule as formulated by Lord Justice Rigby in **Parr's Banking**, which applies in situations where a single debt carries interest, requires that a payment made by the debtor is, ordinarily, to be applied first in payment of interest due on the debt. The question of whether, in the latter situation, that rule is subject to there having been no appropriation, whether by the debtor or creditor, also has some authoritative judicial support.

[95] None of the cases cited and considered, are examples of payment of a judgment debt by the judgment debtor which, in the usual way, carries interest either under

the **Judgment Act** or as a term of the judgment itself. Ms. Small-Davis, QC has submitted that in relation to ordinary judgment debts arising by decisions or orders of courts of law, which judgment carries interest as a matter of law pursuant to the **Judgment Act** but, in some instances, an award of interest may also be part of the judgment debt, the general rule is that any payment is to be applied first in payment of any accrued interest, before being applied to the principal sum of the judgment, and the debtor is not entitled to appropriate such a payment to principal first. I am not aware of any statutory or other rule of law which so provides, and none was cited to us. I am aware, however, that this is the practice among both lawyers at the bar and the courts.

[96] Certainly, no case involving an award of compensation by a Board of Assessment (or its equivalent) or by a tribunal or some other statutory body and no case concerning payment towards an award of compensation for the compulsory acquisition of property, has been brought to our attention by counsel for the parties. In short, there is no case law directly on this point which has been put before this Court and none was put before the learned judge below. This is the situation which the learned judge faced. His answer was to resort to or to fall back on 'first principles' and principles of 'common justice'. In my view, in the absence of any direct authority and having regard to the somewhat confusing state of the position at common law, the learned judge was correct to take that approach to the determination of this issue.

[97] In my judgment, the common law rule in **Clayton's Case** by which a debtor has the paramount right of appropriation in relation to payments made by the debtor towards satisfaction of a debt or debts, has no application to an award of compensation by a Board of Assessment for the compulsory acquisition by the Government of the respondent's property. This is so for several cogent reasons. The first is that the common law rule regarding the right of appropriation and the manner in which a payment towards satisfaction of a debt or debts is to be treated, does not apply to an award made under and pursuant to the provision of the **Land Acquisition Act**.

These common law rules or principles apply more aptly to contractual debts and debts arising by way of mortgages, guarantees, bills of exchange and other commercial transactions. These rules and principles have no application to matters of compensation for compulsory acquisition by the Government of a landowner's property, as an exception to the landowner's constitutional right to and protection from having his property acquired by Government without his consent or agreement. Likewise, these common law rules and principles have no place in giving legal effect to the full realisation by a landowner whose property has been lawfully acquired by the Government, of his or her constitutional entitlement to the payment of fair compensation within a reasonable time. Indeed, no case has been cited either in the court below or before this Court by either party, where the common law rules or principles applicable in contractual and other commercial transactional matters and agreement was applied in the constitutional context or in the context of an award made by a Board of Assessment pursuant to its statutory powers to award fair compensation, and to include, as part of the award, the payment of interest on the sum awarded as recompense for the landowner being kept out of his or her money for the deprivation of their property by the Government.

- [98] Moreover, to apply these common law rules and principles forged in contractual and commercial situations would run contrary to the purpose and function of an award of statutory interest as part of the compensation for the loss suffered by the landowner as a direct result of the Government's actions in acquiring his or her property for a public purpose. As the learned judge observed: 'In a contractual context, interest serves as the price for the delay in repayment of the money owned'. In that context, payment of interest by the borrower or debtor or mortgagor is an integral part of the bargain struck between the parties to such agreements. It is part of the price for the debtor using the creditor's money for his purposes. In the non-contractual context, interest serves a fundamentally different purpose. Again, as the learned judge correctly observed, in a non-contractual context interest serves 'as compensation for being kept out of money', that is, money to which you have an immediate right to full payment. Interest in that context serves as recompense for

the delay by the debtor in making payment, in circumstances where the debtor has no contractual or other legitimate right to enforce such delay. It is well-settled, that the role and purpose of interest in compulsory acquisition matters is to compensate the landowner for any delay in the Government making payment of the fair compensation within a reasonable time (per **London Chatham and Dover Railway Company; Andrey Adamovsky et al**; and **Cyril Bufton**). In my judgment, to apply these common law principles in this context would be inimical to the purpose of an award as compensation to the landowner for the loss of his property (or an interest in the property) by and through this process.

[99] This is a matter of profound importance in relation to compulsory acquisition, where the landowner is entitled to claim damages for any losses suffered as a result of delay by the Government in making payment and where, as here, the High Court in 2013 declined to make an award of damages to the respondent for the egregious delay by the Government in paying the award on the basis that the respondent would be adequately compensated for such losses by the award of interest on the principal sum. In the instant matter, an award of interest was made by the Board of Assessment in 2010, which, along with the entire award, was not challenged by the appellant on appeal to the Court of Appeal. Before the Privy Council, an award of interest was upheld in 2014 (albeit with a varied percentage applicable to different periods), as an important element of the award.

[100] This issue also goes to 'fairness'. In my judgment, to permit the Government to postpone its satisfaction of the respondent's clear entitlement to payment of interest on the principal sum of the award, by appropriating payments first to the principal, would be manifestly unfair to the respondent which has long been kept out of its money by the Government. It runs contrary to what section 21 of the **Land Acquisition Act** contemplates (as observed above). Furthermore, it would be contrary to terms of the award of the Board of Assessment and to the 2014 judgment and order of the Privy Council which varied the award by stipulating that the respondent was entitled to be paid the sum of US\$9,560,000.00 as interest up to

22nd January 2011, and provided for interest to continuing to run on the award of compensation for the compulsory acquisition of the property, until the entire award has been paid in full. In my judgment, the appellant's points regarding what they see as unfairness if they are not permitted to appropriate their payments first to the principal sum of the award, and their concerns with regard to the judge's decision, if permitted to stand, leading, in practical terms, to compound interest, are without merit and unsustainable.

Whether the judge was correct to apply common justice principles and if so whether he came to the correct conclusion?

- [101] It follows from the reasoning above, that in my judgment this issue falls to be decided applying both 'common justice' principles and the particular context of the statutory compulsory acquisition regime, the award made by the Board of Assessment and the 2014 judgment and order of the Privy Council varying the quantum and interest of the award. It also follows that I do not accept that there was or is any right of appropriation of payments made towards satisfaction of the award by the Government and its purported appropriation of the US\$20 million payment to principal first was invalid and ineffective.
- [102] The learned judge sets out at paragraph [45] of his judgment, some six reasons why he reached the conclusion on this issue that 'HMB (i.e. the creditor) has the paramount right' of appropriation. For the reasons and analysis given above, I agree with this conclusion. In doing so I accept as correct the learned judge's reasons, in particular, those stated at sub-paragraphs (i), (ii), (iii), (v) and (vi). I do so without finding it necessary, having regards to what has already been said above, to detail these subparagraphs, which, in any event, have been referred to and reproduced verbatim earlier in this judgment.
- [103] In the premises, the appellant fails on this first broad issue, the Appropriation Issue, with the consequence that grounds 1, 2 and 3 of their appeal fails.

The Limitation Issue – ground 5

[104] This issue may be disposed of shortly. Section 26(2) of the **Limitation Act 1997** of Antigua and Barbuda states:

“26. (1) An action shall not be brought upon any judgment after the expiration of six years from the date on which the judgment became enforceable.

(2) No arrears of interest in respect of any judgment debt shall be recoverable after the expiration of six years from the date on which the interest become due.”

[105] The appellant’s principal submission is that by virtue of section 26(2) of the **Limitation Act 1997** the respondent cannot recover more than six years interest pursuant to the order of the court made 5th December 2011 and/or the Privy Council made 26th February 2014. For completeness, I take this to also include the order dated 27th May 2014 of Her Majesty consequent upon the decision of her Judicial Committee of the Privy Council. They assert that the critical date from which the six year limitation period on the recovery of interest begins to run is 5th December 2011. Accordingly, the said period would expire on 6th December 2017 and the legal effect is that the respondent is not entitled to recover interest after the latter date.

[106] The appellant relies on the Privy Council’s treatment of the constitutional effect of article 19 and section 9 of Schedule 2 to the Constitution in **The Attorney General of Antigua and Barbuda v HMB Holdings** per Lord Hughes at paragraphs 17-19. There it was held that issues concerning compensation for the acquisition of property and recovery of any compensation, are to be determined in accordance with the existing law, and not the broad constitutional jurisdiction under article 18 of the Constitution. They also rely on the decision of the House of Lords in **Lowsley and another v Forbes (Trading as L.E. Design Services)**²⁶ per Lord Lloyd of Berwick at page 342, concerning the interpretation of section 24(2) of the Limitation Act 1980 of the United Kingdom, which provision is in identical terms to section 26(2) of the **Limitation Act 1997** of Antigua and Barbuda. Reliance was also place on the

²⁶ [1999] 1 AC 329.

extract from paragraph [150] of the judgment of Roberts J in **Mann v Mann (No. 2)**²⁷ and paragraphs 130 to 141, and 148.

[107] I have already, effectively, concluded that the award is not a judgment debt for the purposes of the **Limitation Act 1997**, having considered and applied the dicta from the two Canadian cases cited by learned counsel for the respondent. Accordingly, it does not fall within section 26(2) of the **Limitation Act 1997** as a judgment debt. It is an award, albeit the Government and the respondent are bound by the final decision and order the Privy Council in 2014 varying the award, except as to interest awarded by the Board of Assessment. I also rely on and adopt the statements of principle by Byron CJ in **Gairy** which was relied on by the respondent. This extract illustrates the fundamental distinction, as drawn in the two Canadian cases, between an ordinary money judgment of a court of competent jurisdiction and an award of compensation under the **Land Acquisition Act** or indeed any other statutory board or tribunal imbued with such powers.

[108] In the premises, the appellant also fails on this second broad issue and ground 5 of its further amended notice of appeal.

Conclusion and Disposition

[109] For the reasons set out above, this appeal is dismissed and the declarations and order of the High Court are affirmed, with costs to the respondent to be assessed by a judge of the High Court, if not agreed within 21 days, and to be paid promptly and in full.

²⁷ [2016] Fam 281.

[110] I take this opportunity to record our appreciation for the helpful submissions of counsel for the parties.

I concur.
Davidson Kelvin Baptiste
Justice of Appeal

I concur.
Mario Michel
Justice of Appeal

By the Court

Deputy Chief Registrar