

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES**

IN THE HIGH COURT OF JUSTICE

SVGHCV2019/0209

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

AND

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

BETWEEN

BIGGER CEMENT AND AGGREGATE INCORPORATED

CLAIMANT

AND

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

DEFENDANT

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

Appearances:

Mr. Stanley John Q.C. with him Mr. Akin John and Mr. Jomo Thomas of counsel for the claimant/respondent.

Mr. Duane Daniel and Mrs. Joezel Allen of counsel for the defendant/respondent.

2020: Apr. 23
Jun. 24

DECISION

BACKGROUND

- [1] **Henry, J.:** The claimant Bigger Cement and Aggregate Incorporated ('Bigger Cement') claims to be the fee simple owner of certain lands situated at Rabacca in the State of Saint Vincent and the Grenadines. It alleged that it was notified by notice dated 18th February 2019 of the Chief Surveyor's intention to conduct a survey of the boundary between its land and other lands in the area. It claimed that a survey was carried out notwithstanding its protestations. It claimed further that a notice was subsequently published in the *Official Gazette* accompanied by a copy of survey plan C1842, purportedly depicting the boundary between lands identified as 'Crown lands' and Lot 6 at Rabacca.
- [2] Bigger Cement contended that none of the area delineated as Crown lands on the survey plan ('the subject land') constitutes Crown land within the meaning of the Crown Lands Act ('the Act')¹. It averred that the subject land has 'been formed, and has settled, grown and accrued upon, against and unto the lands conveyed to it'; or alternatively that it has been in adverse possession of the subject lands for a period in excess of 30 years and consequently the provisions of the Limitation Act² precludes the Crown from taking action to recover it. It objected to the boundaries being treated as Crown lands and filed a Fixed Date Claim Form³ against Her Excellency the Governor General for the court to review the survey.
- [3] Bigger Cement sought declarations that the subject land does not depict Crown land or boundaries; that the survey was not conducted pursuant to the Act and is therefore illegal, irrational, unreasonable, unfair, an abuse of power, unlawful and void *ab initio*; that the subject land and other lands are beneficially owned by it; and costs.
- [4] The Honourable Attorney General represents the State in these proceedings. He has resisted the

¹ Cap. 319 of the Laws of Saint Vincent and the Grenadines, Revised Edition 2009.

² Cap. 129 of the Laws of Saint Vincent and the Grenadines, Revised Edition 2009, section 17 (1) and section 10 of Part II of the Schedule.

³ Filed on 17th December 2019.

claim. By Notice of Application filed on 15th January 2020, he applied for a declaration that the court has no jurisdiction to hear the claim and for an order striking it out. He contended that the claim is statute-barred by virtue of section 9 of the Act; and that Bigger Cement did not exhaust the alternative route to redress as provided by the Act. He argued further that the claim is an abuse of the court's process. The Honourable Attorney General also requested an extension of time within which to file the Defence, in the event that the application is dismissed.

- [5] Bigger Cement opposed the application and on 12th February 2020, filed an application for leave to amend its Fixed Date Claim Form. That application was not resisted. Both applications were heard on April 23rd, 2020. The court has concluded that it has jurisdiction to hear the Fixed Date Claim Form. Bigger Cement's application to amend its Fixed Date Claim Form is granted. The Governor General is also granted an extension of time for filing her defence.

ISSUES

- [6] The court must decide whether:

1. The court has jurisdiction to hear the claim; and
2. Bigger Cement should be granted leave to amend the Fixed Date Claim Form?

ANALYSIS

Issue 1 - Does the court have jurisdiction to hear the claim?

- [7] The Honourable Attorney General submitted that the application complies with the requirements of rule 9.7 of the Civil Procedure Rules 2000 ('CPR') which outlines the procedure for disputing the court's jurisdiction. That rule provides that a defendant who wishes to dispute the court's jurisdiction must first file an acknowledgment of service and file the application with supporting affidavit within the time fixed for filing of the defence. An acknowledgement of service was filed on 2nd January 2020. In it, the Attorney General indicated that the Fixed Date Claim Form and statement of claim were received on December 17th 2019.

- [8] Based on the foregoing, the deadline for the defence was 15th January 2020 – the date on which the instant application was filed. An affidavit in support, sworn to by Mr. Kezron Walters was filed on the same date. The Hon. Attorney General has thereby complied with the procedural

requirements for disputing the court's jurisdiction. He advanced this as a ground on which the application was premised.

[9] Four other grounds were listed in the application. In this regard, the Hon. Attorney General pleaded that:

1. There is an adequate alternative remedy available to Bigger Cement and consequently the claim for constitutional redress is frivolous and vexatious, amounts to an abuse of process and should be struck out.
2. The High Court may refuse to exercise its powers under section 16 (2) of the Constitution if satisfied that adequate redress is available under any other law.
3. The claim does not comply with the Crown Lands Act⁴ ('the Act') because:
 - a) it is not an application for review pursuant to section 9 of the Act which permits a person aggrieved by a survey conducted under the Act, to petition a judge in chambers within 2 calendar months of its publication in the *Gazette*, to review the survey; and
 - b) it is statute-barred because the 2 month limitation period expired on December 8th 2019.
4. The claim should be struck out pursuant to CPR rules 9.7(6)(c) and 26.3(1) as an abuse of the court's process or on the ground that it is likely to obstruct the just disposal of the proceedings.

[10] There is considerable overlap between grounds 1 and 2 and between grounds 3 and 4. Each set of grounds will be considered together for good order. Mr. Walters averred that Bigger Cement was served on February 18 2019, with a notice of even date pursuant to section 7 of the Act, informing it of the commencement on February 26th 2019 of a survey. He stated that the referenced survey would be of the boundary between '(b) lands owned by the Crown/State (Rabacca and Langley Park Dry Rivers) and following lands ... called (c) lands owned by the claimant (Lot 6 C364-5A OER 2P) situate at Rabacca (Bower) in the parish of Charlotte' such survey to be commenced at a 'point (d) to be determined'.

[11] Mr. Walters attested that the survey was carried out on that date (February 26th) by Alrick Williams licensed land surveyor and senior surveyor at the Ministry of Transport and Works. He deposed

⁴ Cap. 319 of the Laws of Saint Vincent and the Grenadines, Revised Edition 2009.

further that a Notice was published in *Gazette* No. 53, Vol. 152 on October 8th 2019, pursuant to section 8 of the Act. Mr. Walters recited the text of the Notice.

[12] It stated:

'In keeping with section 8 of the Crown Lands Act, a copy of a registered survey Plan C1842 depicting the boundary between Crown Land and Lot 6 on Plan C364 at Rabacca is hereby published. Any person who may consider himself aggrieved by this Plan may, without prejudice to any application to the Governor-General, within two (2) calendar months of this publication, apply by petition to a judge in chambers to review the survey. The petition must state fully the objections to the survey and the petitioner's claims and reasons for the application.'

[13] Mr. Walters deposed that a person aggrieved by any such plan conducted under the Act may petition the court to review the survey. He asserted that Bigger Cement had not done so before seeking leave on December 12th 2019, to apply for judicial review. He accepted that the application for judicial review was withdrawn and that Bigger Cement has now applied for an administrative order. He reasoned that the present application is frivolous and vexatious and amounts to an abuse of process because Bigger Cement did not utilize the petition mechanism provided by the Act.

[14] Mr. Walters averred that the instant application is statute-barred because it was not filed within the 2 month period stipulated in the Act. He asserted that the 2 calendar months would have elapsed on December 8th 2019 and therefore the court lacks jurisdiction to hear the claim. He averred that Bigger Cement has available to it an alternative remedy pursuant to sections 9 and 10 of the Act. He asserted further that the claim should be struck out pursuant to CPR rules 9.7(6)(c) and 26.3(1)(c) and section 16(2) of the Constitution.

[15] Mr. Leon Samuel provided affidavit testimony on behalf of Bigger Cement. He averred that he was the Managing Director. He claimed that Bigger Cement at all material times and for a period in excess of 30 years through its predecessors in title and by itself were successively in occupation and possession of the subject lands depicted in the impugned survey plan. He asserted that Bigger

Cement's predecessor in title acquired the land by Deed of Conveyance 3430 of 1978 and received payments as licence fees from General Equipment and Services Corporation (GESCO) whose role and responsibility has been assumed by Bridges, Roads and General Services Agency (BRAGSA).

[16] Mr. Samuel averred that on or about 2nd July 2008, Bigger Trucking and Block Construction Company Limited (BTBC) an affiliated company of Bigger Cement submitted an application for planning permission to the Physical Planning and Development Board for permission to conduct mining operations and block production on its land which included an Environmental Impact Assessment and site development plan depicting 16 acres of land including the subject lands.

[17] He asserted that planning permission was granted whereupon mining operations were commenced and continued until abruptly halted by order of the Physical Planning and Development Board and the Governor General through a Minister. He averred that authorities of the Crown have accepted that the lands are owned by BTBC. He asserted further that Bigger Cement and its predecessor in title have been in adverse possession of the subject lands in excess of 30 years; that they are the legal fee simple owners by Deed No. 2857 of 2007 and riparian owners of part of those lands based on the changing course of the Lady Jane/Langley Park River and Rabacca River and by virtue of the 'slow, gradual and imperceptible projection, alluvion, subsidence, and accretion of ooze, soil, sand and other matter, being slowly, gradually and by imperceptible increase, in long time cast up, deposited, and settled by and from the flux and reflux of the tide and water of the river in and upon and against the outside and extremity of the lands in Lot 6 on plan C364, has been formed, has settled, grown and accrued upon against and unto the said land.'

Adequate Alternative Remedy

[18] The Hon. Attorney General argued that it is settled law that constitutional relief should not be sought where there is a parallel/alternative remedy available to a claimant, 'as it should not be used as a general substitute for the normal procedures that are available under common law or statute.' He submitted that this principle is enshrined in section 16 (2) of the Constitution on Saint Vincent and

the Grenadines and illustrated in the cases of **Harrikissoon v Attorney General of Trinidad and Tobago**⁵.

[19] He quoted Lord Diplock who stated:

‘The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action.’⁶

[20] The learned Jurist’s further pronouncement in that case was referred to by the Hon. Attorney General. Lord Diplock there opined:

‘... the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.’

[21] The Hon. Attorney General also cited the Dominican case of **Johnson Moise v The Attorney General and Chief of Police**⁷ where the learned judge struck out a claim as being an abuse of the court after she found that the claimant had an alternative route to secure relief. The Hon. Attorney General submitted that in view of the provisions of section 9 of the Act, Bigger Cement has an alternative remedy available to it.

[22] The Hon. Attorney General acknowledged that the law creates an exception or qualification to the

⁵ [1980] AC 265.

⁶ At page 268 of the Harrikissoon case.

⁷ DOMHCV2015/0132.

general rule that constitutional relief should not be pursued if an alternative remedy exists. In this regard, he accepted that the Court may entertain constitutional claims in instances where the facts of the case constitute exceptional circumstances or possess an exceptional feature. He advanced the case of **Jaroo v Attorney General of Trinidad and Tobago**⁸ as authority. He argued that in that case the Board concluded that the appellant Jaroo could have framed his claim against the State under the common law tort of detainee, instead of seeking redress under the Constitution. The Law Lords ruled that the claim for constitutional redress was an abuse of the court's process, in those circumstances.

[23] The Hon. Attorney General highlighted the case of **Attorney General of Trinidad and Tobago v Ramanooop**⁹ as one exemplifying what might be considered exceptional circumstances. Lord Nicholls of Birkenhead provided guidance. He remarked:

'... where there is a parallel remedy, constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse or abuse, of the court's process.'¹⁰

[24] The Hon. Attorney General submitted that the case at bar contains no such exceptional feature and can be appropriately and adequately addressed pursuant to the provisions of section 8 and 9 of the Act. He contended that the facts of the case, the adequacy of the alternative remedy under section 9 of the Act and the cases referenced above are enough to satisfy the court that it should exercise its discretion under section 16 of the Constitution and decline to hear Bigger Cement's claim for constitutional redress.

[25] Bigger Cement argued that its claim for administrative orders is properly brought for review of the

⁸ [2002] UKPC 5.

⁹ [2005] UKPC 15.

¹⁰ At para. 25.

impugned survey, pursuant to section 9 of the Act and for constitutional redress. It submitted that rules 8 and 56 of the CPR require that a Fixed Date Claim Form be used. It contended that the conduct of the survey on its lands, ostensibly pursuant to the Act and their treatment as Crown lands amount to a violation of its constitutional right to protection from a) arbitrary entry on its property by others; and b) deprivation of its property. It submitted further that breach of such rights is not 'coterminuous with the statutory cause of action for review of the survey pursuant to section 9 of the Act.'

[26] It contended that the remedy which the court is empowered to grant in connection with an application brought under section 9 of the Act is specified in section 10. It submitted that the relief available under the statutory regime is an order directing the Chief Surveyor or other surveyor employed by the Governor General to make a fresh plan in duplicate and place fresh boundary marks if necessary; such boundaries then being deemed to replace the impugned boundaries. Bigger Cement argued that the instant claim goes beyond that restricted recourse and seeks vindication of its constitutional right to protection from deprivation of its property; and the referenced declarations that the boundaries do not depict Crown land and further that the survey was illegal, irrational, unreasonable, unfair, an abuse of power, unfair and void *ab initio*.

[27] Referencing the judgment in the **Ramanoop case**. Bigger Cement accepted the established principle that constitutional redress should not be invoked if alternative redress is available, otherwise than in exceptional cases. It highlighted a particular pronouncement made by Lord Nicholls of Birkenhead of what might constitute such exceptional feature:

'A typical, but by no means exclusive example of a special feature would be a case where there has been an arbitrary use of state power.'¹⁰

[28] Bigger Cement accepted that the judgments in **Jaroo v The Attorney General of Trinidad and Tobago** and **Harrikissoon v The Attorney General of Trinidad and Tobago** are instructive and outline the applicable principles. It cited the case of **Observer Publications Ltd. v. Matthew and Others**¹¹ as being equally relevant. Bigger Cement highlighted specifically Lord Cooke of

¹¹ [2001] UKPC 11.

Thorndon's commentary of Lord Diplock's pronouncement in the **Harrikissoon case**, (quoted by the Hon. Attorney General¹² in his submissions).

[29] In this regard, Lord Cooke of Thorndon offered the following qualification:

'The last words of that passage are not to be put aside. With respect, the image of the Constitution as secluded behind closed doors is not one which their lordships adopt. Nor would it be right to think of the Constitution as if it were aloof or, in the famous phrase of Holmes J, 'a brooding omnipresence in the sky'. On the contrary, human rights guaranteed in the Constitution ... are intended to be a major influence upon the practical administration of the law. Their enforcement cannot be reserved for cases in which it is even arguable that an alternative remedy is available. As Lord Steyn said, delivering the advice of the Privy Council in *Ahnee v Director of Public Prosecutions* [1999] 2 AC 294 at 307 '... bona fide resort to rights under the Constitution ought not to be discouraged'. Frivolous, vexatious or contrived invocations of the facility of constitutional redress are certainly to be repelled. ... the right to freedom of communication is at the heart of this case.'¹³

[30] Bigger Cement submitted that in view of the foregoing, the issue is whether the instant claim is frivolous and vexatious or an abuse of the court's process and made for the purpose of avoiding application for review under the Act; or whether it contains some feature which makes it appropriate to seek constitutional redress. It submitted that it is not hereby seeking to avoid taking the review approach under the Act. It contended that this claim includes an application for review as contemplated by section 9 of the Act. It argued that there is therefore not question that it is seeking to purposefully avoid that remedy.

[31] Bigger Cemented argued further that it is seeking constitutional relief arising from the arbitrary entry onto its land by surveyors employed by the State; and the State's treatment of its land as Crown land. It submitted that such conduct constitutes infringement of its constitutional rights. The Hon. Attorney General made no submissions rebutting this argument.

¹² At paragraphs 19 and 20 above.

¹³ At paragraphs 53 of the *Observer Publications Ltd. v Matthew and Others* case.

[32] The parties are in agreement that the Court is empowered to entertain claims for constitutional relief in appropriate cases. This is the import of section 16 (1) and (2) of the Constitution the relevant portions of which provide:

'16. Enforcement of protective provisions

(1) If any person alleges that any of the provisions of sections 2 to 15 inclusive of this Constitution has been, is being or is likely to be contravened in relation to him ... then, without prejudice to any other action with respect to the same matter that is lawfully available, that person ... may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction –

(a) to hear and determine any application made by any person in pursuance of subsection (1) of this section; and

(b) ...

and may make such declarations and orders ... for the purpose of enforcing or securing the enforcement of any of the provisions of sections 2 to 15 (inclusive) of this Constitution.

Provided that the High Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.' (underlining added)

[33] The guiding principles regarding how this provision is to be applied have been enunciated in several decisions emanating from the courts in this jurisdiction. Those principles have been referred to by the parties and highlighted in the decisions of **Jaroo, Harrikissoon, Observer Publications Ltd.** and **Ramanoop**. Distilled to their essential features, those principles are:

1. Any person may apply to the High Court for relief if he or she apprehends that any of the protected rights and freedoms in sections 2 to 15 of the Constitution is being contravened in relation to him or her.
2. The High Court may refuse to entertain and determine any such claim if satisfied that there is adequate recourse for redress under the common law or other legislative provision.

3. In exercising its discretion, the court will consider whether another judicial route for alternative redress is available and if so whether there are exceptional circumstances which justify entertaining the claim as a constitutional one.

[34] Sections 9 and 10 of the Act have been invoked by the parties. It is useful to set them out. The material parts provide respectively:

‘9. Proceedings on objection

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

10. Judicial proceedings

...

(6) Where the Court alters the boundaries in any case, it shall cause the Chief Surveyor, or other surveyor employed by the Governor-General, to make a fresh plan in duplicate and place fresh boundary marks, if necessary, and the written judgement of the Court with such fresh plan attached thereto shall be recorded in the Survey’s Office, and the Chief Surveyor shall preserve a copy in his office, and the boundaries in such fresh plan shall be thereafter the boundaries of the land delineated in such plan.

(7) The Court may prescribe forms, give directions and make rules for the procedure on the petition.’

[35] The Act provides a right of entry to the Chief surveyor or other persons for the purposes of viewing lands to ascertain if any damage has been caused to Crown lands; erecting trigonometrical marks, making observations; accessing Crown lands; or for other purposes provided in any other law.¹⁴ In the claim at bar, Bigger Cement alleged that the land described as Crown land in the referenced

¹⁴ Sections 13, 21, 22 and 23 of the Act.

notice and Gazette belong to it. The Hon. Attorney General is adamant that those lands belong to the Crown. Bigger Cement is seeking among other things a declaration that the said lands are owned by it beneficially by virtue of adverse possession and in some respects as fee simple owner by virtue of Deed of Conveyance No. 2857 of 2007, and also as riparian owner. It has studiously avoided making a claim in trespass. Theoretically, however, the claim has aspects of this tort embodied in it.

- [36] The court is required to consider whether the Act, other statute or the common law provides an adequate alternative remedy to Bigger Cement to vindicate the claims it has outlined in the Fixed Date Claim Form and if so whether exceptional circumstances exist which justify allowing it to proceed with the claim for constitutional redress. An examination of sections 8, 9 and 10 of the Act reveals that the regime for review of survey conducted of 'Crown boundaries' contemplates application to the Governor-General or to a judge in chambers by review.
- [37] Section 4 of the Act empowers the Governor-General to make Regulations regarding among other things, survey of Crown Boundaries; their management and protection. No such regulations have been made. No procedure is set out in the Act to govern review by the Governor-General.
- [38] Significantly, section 9 provided for application to a judge in chambers 'without prejudice to any application to the Governor-General.' That language suggests that either procedure may be adopted. In the absence of Regulations, it strikes me that the only viable legislative option is petition to a judge in chambers. Section 10 (7) empowers the judge to make rules governing the procedure for such a petition.
- [39] I agree with Bigger Cement that the Act contemplates that the judge's function when considering the survey is limited by the Act to evaluating whether the boundaries should be altered. The use of the expression 'to review the survey' in section 9 coupled with the specifics of the orders that the court may make in section 10 (6) leads me inexorably to that conclusion. In this regard, I note that section 17 deals with compensation restrictively, and only in relation to the unrelated matter of use of private land for a roadway. It does not appear to me that it was envisaged that the legislative

framework in the Act would be engaged to address the issues of riparian rights and related matters which are being advanced by Bigger Cement. Neither party has pointed to any statute which adequately covers that area of law. Those are matters which arise by virtue of the common law.

[40] If, as Bigger Cement contends, any part of the referenced land is legally owned by it, and have been so recognized by the Crown for an extended period, the Court would be entitled to investigate any reasonable claim to arbitrary exercise of State power as suggested by Lord Nichols of Birkenhead. In such a case, the Court should be careful not to discourage Bigger Cement from pursuing what it has framed as *bona fide* rights to real property, allegedly recognized by the State, which conceivably include certain constitutional protections, that could be eroded substantially during the waiting period from the filing to determination of a regular claim in tort.

[41] Of significance is that there is no rebuttal from the Governor General to any of the assertions made by Bigger Cement. This is not to be interpreted to mean that such a response should have been made in the context of the challenge to the court's jurisdiction. It is simple an observation which must be factored into the determination of the application.

[42] In the premises, I do not view Bigger Cement's claim to be frivolous, vexatious, contrived or an abuse of the court's process. Rather, I am of the opinion that it has demonstrated that the issues joined between the parties are weighty and considerable and deserve to be fully ventilated. In my estimation, this cannot be achieved by way of review under the Act or perhaps not by a tortious claim for trespass only. I find that there is no adequate alternative avenue for redress in what has been formulated and presented in the claim. It appears to me that the allegations involve claim of arbitrary use of State power coupled with accusations of State agents impinging on private property rights. Those alleged circumstances place this case in the exceptional category described by the learned Law Lords in the cited cases. I therefore make no order pursuant to section 16 (2) of the Constitution, declining to entertain the claim.

Limitation

[43] Mr. Samuel attested that Bigger Cement received a letter from the Chief Surveyor dated 30th October 2019 in which notice was given that the impugned survey plan was published in the

Gazette and stating that it may apply to aa judge in chambers for review within 2 calendar months of that letter.

- [44] The Hon. Attorney General submitted that the claim is statute-barred. He argued that while section 6 of the Act provides for the survey of Crown boundaries, section 8 stipulates that on completion of such survey, a plan of it is to be laid before the Governor-General for approval and thereafter a copy is to be deposited at the Surveys Office and notification of such deposit published in the *Gazette*. He submitted that any aggrieved person must apply to the Court within 2 calendar months pursuant to section 9 of the Act.
- [45] The Hon. Attorney General submitted that the stated 2 month period expired on December 8th 2019, the Gazette notice having being published on October 8th 2019. He contended that Bigger Cement did not file his claim within that period but did so much later on December 17th 2019.
- [46] Bigger Cement submitted that the word ‘month’ is used in several senses. It contended that it may mean one of 12 unequal parts in which the calendar year is divided; the period which beginning on any day of a calendar month other than the first, ends on the day next before the corresponding day of the next month; or denote a lunar month – a period consisting of 28 days. It relied on the learning propounded in **Halsbury’s Laws of England**¹⁵.
- [47] It is now settled that ‘in calculating the period of a month or months that have elapsed after a certain event, e.g. a notice, the period ends on the corresponding date in the appropriate subsequent month irrespective of whether some months are longer than others.’¹⁶ Bigger Cement cited **Dodds v Walker**¹⁶ and also **Freeman v Read**¹⁷ in its submissions.

Interpretation

- [48] The opposing submissions from the parties demonstrate that the expression ‘calendar months’ and the words ‘may ... apply’ in the Act must be construed by the court, when determining if the claim is

¹⁵ 5th Ed. Paras. 307 and 311 respectively.

¹⁶ *Dodds v Walker* [1981] 1 W. L. R 1027, (H.L.)

¹⁷ (1863) 4 B & S 174.

statute-barred. In this regard, Bigger Cement argued that the case of **Dylan Bailey v Kenroy John**¹⁸ is authority for the proposition that a limitation period is not an automatic bar.

[49] The Hon. Attorney General countered that the **Dylan Bailey v Kenroy John** case may be distinguished from the present one on the facts. He argued that the **Limitation Act**¹⁹ which applied in the former, gives the court a broad discretion to dis-apply the limitation period in personal injury matters if it appears equitable to do so; but that no such discretion exists in the Act. I agree that there is no express discretion in the Act. The Hon. Attorney General submitted further that the obvious inference is that in the absence of such express discretion, section 13 of the Act serves as an absolute bar and that ‘the Court has no discretion to extend the period.’

[50] It advanced the decisions in **Jeyanthan v Secretary of State for the Home Department ex parte Jeyanthan**²⁰ and **Wilfred Miller v Gregory Miller & Ors.**²¹ in support of its contention that while the traditional approach of dealing with non-compliance of a procedural requirement is to consider whether a statutory provision is mandatory or directory; the modern approach requires that the court considers one or more factors, such as whether:

1. the statutory requirement is satisfied if there is substantial compliance as opposed to strict compliance;
2. the non-compliance is capable of being waived and whether it should be waived in the case at bar, (by for e.g. granting an extension of time to comply);
3. there is non-compliance and if so, what consequences flow from it.

[51] Bigger Cement submitted that if the Court finds that the time period had elapsed when it filed its claim, the Court should construe the statutory limitation period as being directory only and waive compliance, by granting an extension of time for it to complete its filing. It argued that this approach

¹⁸ SVGHCV2013/0201.

¹⁹ Cap. 129 of the Laws of Saint Vincent and the Grenadines, Revised Edition, section 33.

²⁰ [2000] 1 W. L. R. 354 applied by the EC Court of Appeal in Attorney General of Grenada v Salisbury Merchant Bank Limited GDAHCVAP2002/0020.

²¹ SVGHPT2012/0041.

was followed by the Court in **Wilfred Miller v Gregory Miller & Ors.** in face of a similar mandatory stipulation that a claim be filed within twenty-one days. It reasoned that this approach commends itself in the instant claim. It argued further that it was entitled to rely on a legitimate expectation that the Governor-General would follow the procedure articulated in the letter issued by the Chief Surveyor dated October 30th 2019 (i.e. that the deadline would be two months after the date of the letter as opposed to 2 months after the *Gazette* publication).

[52] It submitted that the time bar in the Act is directory and should not be fatal to its claim. Bigger Cement contended that publication of the notice should be deemed to have been on the date on which the Gazette was made available to the public, in this case some days after it was published,. Mr. Samuel had deposed²² that he was informed by the clerks for Bigger Cement's legal practitioners that queries they made to the Government Printery up to 8th October 2019 and days subsequently elicited responses that the Gazette was not available to the public. Bigger Cement cited in support the decision in **Brantley & Ors. V Constituency Boundaries Commission**²³.

[53] It also relied on the case of **Hazeline Maynard et al v SCN Solid Waste Management Corp. et al**²⁴ in which the Court of Appeal deferred the question of whether a matter was statute-barred until the trial; and dismissed an application to strike out the claim. The learned Chief Justice remarked in that decision that every assertion that a claim is statute-barred does not automatically translate to 'being an abuse of process in respect of which the nuclear weapon of striking out should be deployed.' Bigger Cement submitted that the court has discretion to extend the time for filing of the Fixed Date Claim pursuant to section 9 of the Act.

[54] The Hon. Attorney General countered that the facts of the instant case are distinguishable from the **Wilfred Miller case**. He argued that the discretion referred to in the **Miller case** related to the procedure to be followed subsequent to the filing of an entry of appearance subsequent to invocation of the Court's jurisdiction; while in the case at bar the discretion being invoked has to do

²² In his affidavit filed on 12th February 2020.

²³ [2015] UKPC 21 at paras. [23] and [24].

²⁴ SKBHCVAP2015/0006.

with extension of limitation period applicable to the initiation of the petition mechanism. It seems to me that while that distinction is accurate, it is a simplistic view of what is a distinguishing feature.

[55] In both cases, the parties seeking to obtain additional time for complying with the statute:

1. faced a legislative period of limitation;
2. were seeking to protect some alleged personal interest to land;
3. were attempting to obtain some relief from the Court.

Significantly, in the **Miller** example, the legislation used the word 'shall'. In the case at bar, section 9 of the Act used the words '**may** ... within two calendar months ... **apply** by petition ...' – a clear difference. The substantive similarities outweigh the distinction. In both instances, the issues of interpretation; strict or substantial compliance; waiver; and/or consequential implications have been raised. I will examine next the interpretation angle.

Interpretation

[56] **The Interpretation and General Provisions Act**²⁵ is helpful. Section 3 (6) states:

'In every written law, the word "shall" shall be read as imperative and the word "may" as permissive and empowering.'

It follows that the Act does not require strict compliance with the 2 calendar month timeline, but rather elicits a reasonable effort by the applicant to observe that timing. I find therefore that Bigger Cement was not required to file his application or claim within the 2 calendar months of publication in the *Gazette*. The 2 calendar month period is directory only and is to be used as a yardstick or benchmark for determining what is realistic. I find accordingly that the claim is not statute-barred.

[57] In any event, in view of the principles outlined in **Jeyanthan v Secretary of State for the Home Department ex parte Jeyanthan** and applied in **Wilfred Miller v Gregory Miller & Ors**. I am satisfied that the time period set out in section 9 of the Act can be waived by granting an extension of time for compliance on application by Bigger Cement, in accordance with the CPR. It is not necessary for me to consider the legitimate expectation arguments and I refrain from doing so.

²⁵ Cap. 14 of the Laws of Saint Vincent and the Grenadines, Revised Edition 2009.

Striking out

[58] The Hon. Attorney General submitted that the claim should be struck out pursuant to CPR 9.7(6) (c) and 26.3(1) as an abuse of the court's process or on the ground that it is likely to obstruct the just disposal of the proceedings. He argued that the Court is empowered by CPR 9.7(6) (c) to strike out a statement of claim if the application disputing the court's jurisdiction is successful; and pursuant to CPR 26.3(1) if the court finds that the claim is an abuse of the Court's process and is likely to obstruct the just disposal of the claim.

[59] The Hon. Attorney General recited the learning from the case of **Baldwin Spencer v The Attorney General of Antigua and Barbuda et al**²⁶ in which Sir Dennis Byron CJ noted:

'... the Court is empowered to dismiss an action in a summary way without a trial where the statement of claim discloses no cause of action, is shown to be frivolous or vexatious or is otherwise an abuse of the process of the Court. This summary procedure should only be used in clear and obvious cases, when it can be seen on the face of it that the claim is obviously unsustainable, cannot succeed or in some other way is an abuse of the process of the court.'²⁷

[60] The foregoing outlines some of the guiding principles which are applied by the court when considering an application to strike out a claim. They are well-known. They have been rehearsed in a number of relatively recent judgments including **Michael Wilson et al v Temujin International Limited et al**²⁸, **Tawney Assets Limited v East Pine Management Limited**²⁹, and **Real Time Systems v Renraw Ltd.**³⁰ In light of the findings that the Court has jurisdiction to hear this claim, that it is not statute-barred and that embodied in it is a reasonable ground for bringing the claim, find that Bigger Cement's claim cannot be justifiably characterized as an abuse of the court's process is likely to obstruct the just disposal of the claim. I make no order striking it out.

²⁶ ANUHCVP1997/0020A.

²⁷ At page 5.

²⁸ BVIHCV2006/0037 (unreported).

²⁹ BVIHCVP2012/007 (unreported).

³⁰ [2014] UKPC 6.

Issue 2 - Should Bigger Cement be granted leave to amend the Fixed Date Claim Form?

- [61] Bigger Cement's Notice of Application for leave to amend its claim was supported by affidavit of Leon Samuel. The application was made pursuant to CPR 20.1. That rule empowers the Court to approve amendments to a statement of case. The Court must consider how promptly the application was made after the applicant became aware that the change it wished to make was necessary; any prejudice to the respective parties if the application is granted or refused; and whether such prejudice to the opposing party can be compensated by the payment of costs and/or interest; whether the trial date or any likely trial date can still be met if the application is granted; and the administration of justice.
- [62] Mr. Leon Samuel averred that proposed changes were omitted from the Fixed Date Claim Form due to inadvertence. He indicated that Bigger Cement became aware of the need to make the changes only when it was preparing for the first hearing and further that the application was made promptly thereafter. The record reveals that the first hearing was held on 19th February 2020, 7 days after the application was made. I find that it was made promptly.
- [63] Mr. Samuel asserted that Bigger Cement would be gravely prejudiced if the amendment is not approved because it would be denied the opportunity to vindicate the constitutional rights which it alleged have been contravened by the proposed amendments and which raise very serious issues. He stated that the proposed reliefs arise out of the same facts as the claims already outlined in the pleadings. Mr. Samuel averred that the defendant would not be prejudiced because the proceedings are at a very early stage. He asserted that the issue of compensation or costs does not arise given the very preliminary stage of the proceedings.
- [64] Bigger Cement seeks an order for leave to amend its Fixed Date Claim Form by inserting
1. 'Originating Motion' in the heading;
 2. a reference to 'section 7 of the Constitution of St. Vincent and the Grenadines' in the introductory paragraph;
 3. in the prayer the following: '(4) A declaration that all and any of the acts which the defendant caused to be undertaken as part of the process of entering on the Claimant's land and procuring

the Survey Plan No 1842 to be prepared, approving same and publication of the Notice in the Government Gazette No. 53, Vol 152 dated the 8th October, 2019 purportedly on the basis of the Crown Lands Act amounted to the unconstitutional entry on the Claimant's land which is shown on the said survey plan in that it was arbitrary and/or a curtailment of its interest therein without due process, contrary to sections 6 and/or 7 and/or 8(8) and/or 8(10) of the Saint Vincent and the Grenadines Constitution Order 1979 and is an abuse of power and is null and void.' And

4. Cosmetic and consequential insertions in the introductory paragraphs of the Fixed Date Claim Form (by inserting 'and/or 7'); by replacing 'on' with 'dated'; by inserting respectively 'survey of' and 'as shown' in lines 1 and 3 of the first declaration in the prayer; and changing 'do' to 'does' in that paragraph.

[65] While I accept that Bigger Cement may experience prejudice if not afforded the opportunity to amend its statement of claim, I make no such finding in respect of the Governor General who has not yet filed a defence. She would be able to issue instructions to respond to the proposed new allegations, without impediment arising from having already particularized her defence. For the same reason, I find that it is not necessary to consider making a compensation or costs order in her favour. I am satisfied that it is just to grant leave to Bigger Cement to make the proposed amendments which are grounded in the same factual allegations. Filing and service of the amended Fixed Date Claim Form is to be effected within 14 days of today's date (i.e. on or before 9th July 2020).

Extension of time to file defence

[66] The Governor General has requested an extension of time to file her defence. Bigger Cement has not opposed the application. In light of the historical background, particularly the sequence of applications and administration of justice imperatives, it is just to extend time for the Governor General to file her defence. Accordingly, the time for filing her defence is extended to July 23rd 2020.

Costs

[67] Bigger Cement was the victor in this round of the proceedings. The Governor General shall pay

costs to it to be assessed pursuant to CPR 65.11, if not agreed. Bigger Cement shall file its application for assessment on or before 28th July, 2020.

ORDER

[68] It is declared and ordered:

1. The court has jurisdiction to hear the claim. The Governor General's application to strike out the claim is dismissed.
2. Bigger Cement's application to amend its Fixed Date Claim Form by inserting
 - a) 'Originating Motion' in the heading;
 - b) a reference to 'section 7 of the Constitution of St. Vincent and the Grenadines' in the introductory paragraph;
 - c) in the prayer the following: '(4) A declaration that all and any of the acts which the defendant caused to be undertaken as part of the process of entering on the Claimant's land and procuring the Survey Plan No 1842 to be prepared, approving same and publication of the Notice in the Government Gazette No. 53, Vol 152 dated the 8th October, 2019 purportedly on the basis of the Crown Lands Act amounted to the unconstitutional entry on the Claimant's land which is shown on the said survey plan in that it was arbitrary and/or a curtailment of its interest therein without due process, contrary to sections 6 and/or 7 and/or 8(8) and/or 8(10) of the Saint Vincent and the Grenadines Constitution Order 1979 and is an abuse of power and is null and void.' and
 - d) Cosmetic and consequential insertions in the introductory paragraphs of the Fixed Date Claim Form (by inserting 'and/or 7'); by replacing 'on' with 'dated'; by inserting respectively 'survey of' and 'as shown' in lines 1 and 3 of the first declaration in the prayer; and changing 'do' to 'does' in that paragraph.is granted.
4. Bigger Cement shall file and serve the amended Fixed Date Claim Form within 14 days of today's date (i.e. on or before 9th July 2020).
5. The Governor General is granted an extension of time to July 23rd, 2020 to file her defence.

6. The Governor General shall pay to Bigger Cement and Aggregate Incorporated, costs to be assessed, if not agreed; on application to be filed and served on or before 28th July, 2020.

Postscript

- [69] At the April 23rd, 2020 hearing the parties represented that they intended to file speaking notes to summarize their written submissions. Learned counsel Mr. Duane Daniel requested a deadline of May 15th, 2020 which was granted. I wish to thank all counsel for their submissions and copies of the speaking notes.
- [70] Preparation of the decision was protracted due to lack of equipment and facilities for several weeks. Any inconvenience occasioned to the parties is regrettable. This was totally outside of the control of the undersigned. The parties' patience and forbearance are acknowledged and appreciated.

Esco L. Henry
HIGH COURT JUDGE

By the Court

Registrar