

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

SAINT CHRISTOPHER AND NEVIS

NEVHCVAP2020/0001

BETWEEN:

MANOHARDAS DEVIDAS CHANDIRAMANI
(In his capacity as Sole Executor of the Estate of Kishu Chandiramani)

Appellant

and

**[1] MARK BRANTLEY (In his capacity as Minister of Finance in the
Nevis Island Administration)**
[2] THE ATTORNEY GENERAL OF ST. CHRISTOPHER AND NEVIS

Respondents

Before:

The Hon. Mde. Louise Esther Blenman
The Hon. Mr. Gerard St. C. Farara, QC
The Hon. Mr. John Carrington, QC

Justice of Appeal
Justice of Appeal [Ag.]
Justice of Appeal [Ag.]

Appearances:

Mr. Damien Kelsick with Ms. Danni Maynard for the Appellant
Mrs. Rhonda Nisbett-Browne for the First Respondent
Mrs. Simone Bullen-Thompson, Solicitor General for the Second Respondent

2020: October 30,
November 13, 16 and 17.
December 9.

Civil appeal – Compulsory acquisition of land – Procedure for compensation for compulsory acquisition – Nevis Land Acquisition Ordinance – Section 11 of Nevis Land Acquisition Ordinance – Constitutional law – Sections 3 and 8 of the Constitution of Saint Christopher and Nevis – Right to protection from deprivation of property – Whether the judge erred in concluding that fundamental rights under sections 3 and 8 of the Constitution of Saint Christopher and Nevis, were not infringed – Locus Standi – Whether appellant had standing to claim breach of constitutional rights – Whether learned judge erred in concluding that appellant was not entitled to the relief claimed – Alternative remedy – Whether judge erred in concluding that alternative remedy was available – Costs – Rule 56.13(6) of Civil

Rest Haven Limited owned a parcel of land situated in Nevis which was mortgaged to Kishu Chandiramani ("Kishu"), now deceased. The Government of Nevis ("the State"), in accordance with the Nevis Land Acquisition Ordinance ("the Ordinance"), compulsorily acquired the property for touristic development. A Board of Assessment ("the Board") was convened. The Board conducted a hearing in which an award was made to Rest Haven Limited in the sum of US \$6,362,316.88 with interest at the rate of 6% per annum. Kishu participated in the hearing before the Board. He was represented by counsel who cross-examined witnesses on his behalf. At the hearing, Kishu made no claim for compensation, and accordingly, received no such award. The Board however made a costs order in Kishu's favour.

Subsequently, Manohardas Devidas Chandiramani ("Manohardas"), in his capacity as sole executor of Kishu's estate, filed an originating motion, by way of fixed date claim form, seeking a declaration that Kishu's fundamental rights under sections 3 and 8 of the Saint Christopher and Nevis Constitution Order, 1983 ("the Constitution") had been infringed. He alleged that the Board had made an award to Kishu in respect of the acquisition of the property by the State. He further sought an order to compel the Minister of Finance to pay the award out of the Nevis Island Consolidated Fund, notwithstanding that no such award was, in fact, made.

The matter came before the learned Williams J who held that Kishu's fundamental rights were not breached and that Manohardas, in his capacity as Kishu's executor, was not entitled to the relief sought. Accordingly, the learned judge refused to make orders for compensation to be paid to Manohardas, and to compel the Minister of Finance to effect the payment. The judge also held that Kishu, and therefore Manohardas, had an alternative remedy available.

Manohardas, being dissatisfied with the judge's decision, appealed. The issues that arose for this Court's determination were: (i) whether the judge erred in concluding that Kishu's fundamental rights, as provided by sections 3 and 8 of the Constitution, were not infringed; (ii) whether the judge erred in concluding that Manohardas was not entitled to the relief claimed; and (iii) whether the judge erred in concluding that Manohardas had an alternative remedy available to him.

Held: dismissing the appeal and ordering each party to bear their own costs, that:

1. It is trite that where Parliament has provided a legislative scheme for the resolution of a claim, it is not open to a claimant to avoid that scheme and seek to utilise another avenue. In the appeal at bar, Parliament has, by way of the Nevis Land Acquisition Ordinance, provided a comprehensive legislative scheme for the ventilation of issues relating to the compulsory acquisition of property, and that scheme must be adhered to. Under the Ordinance, Kishu was entitled to and ought to have asserted his right to compensation, and sought apportionment in the assessment before the Board, but failed to do so. In addition, if he was dissatisfied with the Board's decision, he had a direct right of appeal to the Court of Appeal.

Small v Saul and Saul (1965) 8 WIR 351 applied.

2. Section 11 of the Ordinance enables the Board of Assessment to determine all questions and claims for the payment of compensation and the apportionment of that compensation in relation to compulsorily acquired land. It is neither the function of the High Court on the basis of an originating motion alleging breach of constitutional rights, nor the Court of Appeal on an appeal flowing therefrom, to determine the amount of compensation that is owed to Kishu and to seek to apportion it. All of these matters fell within the remit of the Board under the provisions of the Ordinance. In circumstances where Kishu participated in the Board of Assessment hearing, cross-examined witnesses, and failed to pursue any claim for compensation or apportionment, it is an abuse of the court's processes for Manohardas to then invoke the special fundamental rights jurisdiction of the High Court to allege breaches of Kishu's right not to be deprived of property without compensation.

Sections 3 and 8 of the **Saint Christopher and Nevis Constitution Order** Cap. 1.01, Revised Laws of Saint Christopher and Nevis 2009 applied; Section 11 of Nevis Land Acquisition Ordinance Cap. 4.02, Revised Laws of Saint Christopher and Nevis 2009 applied; **Rosie Modest v The Attorney General and another** [1989] ECSCJ No. 4; Civil Appeal No. 4 of 1988 (delivered 2nd May 1989) considered; **Grande Anse Estates Limited v His Excellency Sir Leo Victor De Gale et al** Grenada Civil Appeal No. 3 of 1976 (delivered 7th October 1977, unreported) considered; **Kemrajh Harrikissoon v The Attorney-General of Trinidad and Tobago** [1979] 3 WLR 62 considered.

3. It is well settled that the fundamental rights jurisdiction of the court is a special jurisdiction that should only be utilised in appropriate circumstances, namely, where there is or is likely to be a breach of a fundamental right. This special fundamental rights jurisdiction ought not to be misused or abused by litigants, and critically, should not be engaged if there is an adequate alternative remedy available. It is clear that Kishu had adequate alternative remedies available to him under the Ordinance, such as an appeal to the Court of Appeal against the Board of Assessment's award, a remedy of which he did not avail himself. Further, he was required to utilise the procedure, which was provided to him by the Ordinance, namely making a claim during the Board's hearing and obtaining an award in his favour together with the appropriate apportionment. In all the circumstances therefore, Manohardas' resort to the procedure of an originating motion, on behalf of Kishu's estate, was inappropriate.

Section 18(2) of the **Saint Christopher and Nevis Constitution Order** Cap. 1.01, Revised Laws of Saint Christopher and Nevis 2009 considered; **Kemrajh Harrikissoon v The Attorney-General of Trinidad and Tobago** [1979] 3 WLR 62 applied; **Jaroo v The Attorney General of Trinidad and Tobago** [2002] UKPC 5 applied; **Durity v Attorney General of Trinidad and Tobago** [2009] 4 LRC 376 applied.

4. A litigant must prove that there is a sustainable allegation that his or her fundamental rights were breached or are likely to be breached, in order to assert standing to bring a claim under the fundamental rights jurisdiction of the court. In this case, Manohardas sought to assert that Kishu's fundamental rights had been breached as a result of the failure by the Nevis Island Administration to pay him the compensation allegedly assessed as due to him. However, the relief claimed was based on the false premise that the Board of Assessment made an award in Kishu's favour. The Board made no such order, Kishu having not asserted any claim before it for either compensation or apportionment. Given the totality of the circumstances, Manohardas does not have standing to bring the originating motion, as there was no sustainable allegation that Kishu's fundamental rights were breached.

Baldwin Spencer v The Attorney General of Antigua and Barbuda and others [1998] ECSCJ No. 19; Civil App. No 20A of 1997 (delivered 8th April 1998) applied.

5. It does not appear that either the Minister of Finance or the Attorney General sought costs in the High Court, and indeed the judge made no order as to costs. Furthermore, the Minister of Finance and the Attorney General have not sought to challenge the learned judge's costs order before this Court. Neither have they made an application to this Court to have their costs on the appeal. In those circumstances, the appropriate order is that each party is to bear their own costs.

Rule 56.13(6) of the **Civil Procedural Rules 2000** considered.

JUDGMENT

- [1] **BLENMAN JA:** This is an appeal by Manohardas Devidas Chandiramani ("Manohardas") (in his capacity as sole executor of the estate of Kishu Chandiramani ("Kishu")), against the decision of the learned Williams J ("the learned judge") by which the learned judge held that the mortgagee of a property, Kishu, could not sustain a claim for breach of fundamental rights as a consequence of the State's compulsory acquisition of the property, which was owned by Rest Haven Limited. Manohardas launched his claim on the alleged basis that the Board of Assessment (or "the Board") had made an award to Kishu. His claim for relief was rejected by the judge. His appeal against the judge's decision is vigorously resisted both by the Minister of Finance in the Nevis Island Administration (the "NIA") and the Attorney General of Saint Christopher and Nevis, both of whom challenge the standing of Manohardas to have brought the

claim in the first place. They also assert that the judge correctly refused to grant Manohardas the reliefs claimed as there were no breaches of Kishu's fundamental rights.

Background

- [2] Undergirding this appeal is an originating motion, by way of fixed date claim, filed by Manohardas by which he sought a declaration that Kishu's fundamental rights under sections 3 and 8 of the **Saint Christopher and Nevis Constitution Order 1983**¹ ("the Constitution") were infringed. This, he said, was as a result of the failure by the NIA to pay the compensation due to Kishu's estate, which compensation was assessed as due to him in respect of the acquisition by the NIA, on or about 8th October 2007, of lands owned by Rest Haven Limited which were mortgaged to Kishu. Manohardas, acting in the above-mentioned capacity, also sought an order requiring the Minister of Finance to issue a warrant authorising the payment of the compensation out of the Nevis Island Consolidated Fund.
- [3] The factual background has been very fully and helpfully stated in the judgment below. With thanks, I therefore propose to adopt that background as follows. Mr. Kishu Chandiramani was the brother of Mr. Manohardas Devidas Chandiramani, Kishu is deceased and Manohardas is the executor of his estate. For ease of reference, and with no disrespect to the appealing party, I will simply refer to the deceased as Kishu and his executor as Manohardas.
- [4] The genesis of this appeal lies in circumstances where the Government of Nevis ("the State") needed land for touristic development. A company by the name of Rest Haven Limited owned a parcel of land situated in Nevis. By virtue of an Indenture of Mortgage dated 27th July 1993 and Registered Deed No. 12633, Rest Haven Limited mortgaged the parcel of land to Kishu. The State, on 8th October 2007, compulsorily acquired the parcel of land that was owned by Rest Haven Limited, and which had been mortgaged

¹ Cap. 1.01, Revised Laws of Saint Christopher and Nevis 2009.

to Kishu, for public purposes. This was done in accordance with the **Nevis Land Acquisition Ordinance**² (“the Ordinance”).

- [5] On 21st November 2013, there was a Board of Assessment hearing by which the Board made an award to Rest Haven Limited in the sum of US\$6,362, 316.88 with interest at the rate of 6% per annum, from the date of the award. The State, however, has not paid the award and Rest Haven Limited has brought its own originating motion against the State alleging breaches of its constitutional rights. This matter is not before us and is not of relevance to the present appeal. I will therefore refrain from making any comments on it.
- [6] Kishu participated in the hearing before the Board of Assessment, including cross-examining witnesses and was represented by counsel. Kishu made no claim for compensation and no award was made in relation to him, even though he was awarded his costs of those proceedings. Subsequently, Manohardas, in his capacity as executor of Kishu’s estate, brought an originating motion in the High Court by which he claimed that there were breaches of Kishu’s fundamental right not to be deprived of property without compensation, and sought an order to compel the Minister of Finance to pay compensation to Kishu’s estate.
- [7] As alluded to earlier, both the Minister of Finance and the Attorney General resisted the constitutional claim initiated by Manohardas on behalf of Kishu’s estate. They took issue with the standing of Manohardas (as Kishu’s executor) to bring a claim on behalf of Kishu, as a mortgagee, for alleged breaches of Kishu’s fundamental rights on the basis that as the Board made no award to Kishu. They argued that Manohardas could not properly assert that Kishu’s fundamental rights were breached by the State.

Issues in the Court Below

- [8] Four main issues arose to be determined in the court below:

² Cap. 4.02, Revised Laws of Saint Christopher and Nevis 2009.

- (a) whether Manohardas (as Kishu's executor) had standing to bring the constitutional claim;
- (b) whether Manohardas (as Kishu's executor) was entitled to be paid compensation as assessed for the acquisition of the land by the State;
- (c) whether there was a breach of Kishu's fundamental rights provided for in sections 3 and 8 of the Constitution; and
- (d) alternatively, whether the court should decline to exercise its jurisdiction to grant a remedy under the constitutional rights provisions, even if there was such a breach.

Judgment in the Court Below

- [9] The learned judge, having given deliberate consideration to the competing arguments, held that Manohardas, as the claimant on behalf of Kishu, was not entitled to the declarations that were sought and was not entitled to be paid compensation by the Minister of Finance, since the Board had already made an award of US\$6,415,920.94 together with interest of 6% to him (Kishu).
- [10] It is of sufficient importance to the resolution of this appeal that the relevant orders which were made by the judge be recited in detail. The orders are as follows:
- “(1) The Constitution of Saint Christopher & Nevis gives a Claimant a right to compensation for property which has been compulsorily taken for a public purpose under the provisions of a Law that prescribes principles on which and the manner in which compensation is to be determined and given.
 - (2) The applicable Law in this instant case is the Nevis Land Acquisition Ordinance Cap. 4.02 of the Laws of Saint Christopher & Nevis and the amount awarded by way of interest under the said Ordinance is 6% per annum.
 - (3) The Claimant (Manohardas) representing the Estate of Kishu Chandiramani has already been awarded by the Board of Assessment the sum of US\$6, 415,920.94 with interest at the rate of 6% per annum from the date of possession of the property acquired until the date of payment of the compensation.

- (4) Therefore I will not make a further award in Constitutional damages as the award on interest is adequate compensation for the delay by the first Respondent in payment of the Compensation Award; the Claimant can institute legal proceedings for the enforcement of that Award by way of a Writ of Mandamus against the first Respondent.
- (5) The Claimant is therefore not entitled to the relief sought in the Originating motion by way of fixed date claim at paragraphs 1 and 2.
- (6) Each party is to bear its own costs as this is a matter of Public Law.”³ (Emphasis mine)

Grounds of Appeal

- [11] Manohardas, being dissatisfied with the judge’s decision, has appealed. He has filed numerous grounds of appeal and sub-grounds of appeal. With no disrespect intended, I do not propose to rehearse or recite the grounds of appeal, and the various sub-grounds of appeal flowing therefrom. It suffices to say that they challenge both conclusions of fact and law and the overall disposition of the case. Both respondents opposed the grounds of appeal and sub-grounds. Written submissions were filed by all parties, including supplemental written submissions and authorities filed by each of the parties with leave of the Court on 13th, 16th and 17th November 2020.

Condensed Issues on appeal

- [12] During oral arguments before this Court, the following condensed and refined issues were distilled from the grounds and sub-grounds of appeal:
- (1) whether the judge erred in concluding that Kishu’s constitutional rights, as provided by sections 3 and 8 of the Constitution of Saint Christopher and Nevis, were not infringed.
 - (2) whether the judge erred in concluding that Manohardas (in his capacity as executor) was not entitled to the reliefs that were claimed, namely:
 - (a) a declaration that Kishu’s fundamental rights conferred by sections 3 and 8 of the Saint Christopher and Nevis

³ See paragraph 49 of the judgment below.

Constitution Order 1983 have been infringed as a result of the failure by the Nevis Island Administration to pay him the compensation assessed as due to him in respect of the acquisition by the Nevis Island Administration on or about 8th October 2007 of lands owned by Rest Haven Limited and which were mortgaged to him, and

(b) an order requiring the Minister of Finance of the Nevis Island Administration to issue a warrant authorising payment of the compensation out of the Nevis Island Consolidated Fund; and

(3) whether the judge erred in concluding that Manohardas (in his capacity as executor) had an alternative remedy available and therefore that, in any event, it was not appropriate to grant relief under the Constitution.

Appellant's Submissions

[13] As alluded to earlier, learned counsel, Mr. Damien Kelsick both provided this Court with written submissions and advanced oral arguments. He acknowledged that the property was owned by Rest Haven Limited and mortgaged to Kishu. However, Mr. Kelsick properly argued that, in so far as Kishu was the mortgagee of the property that was compulsorily acquired by the State, it is indisputable that he was an interested party. This, he acknowledged, even though he admitted during oral arguments that the Board of Assessment's award was made to Rest Haven Limited. He nevertheless advocated that the fact that the Board had acknowledged Kishu as the mortgagee and made an order for costs in favour of him was evidence of the fact that an award was made in favour of Kishu.

[14] Further, he acknowledged that Kishu had participated in the Board's hearing but posited that it was merely for the purpose of ensuring that the Board was cognisant of his interest based on the mortgage. Mr. Kelsick accepted that in so far as Kishu had made no claim before the Board it was impossible for any issue of apportionment of

his award to have arisen for the Board's consideration. He accepted that Kishu, during the Board's hearing, was represented by counsel who cross-examined the witnesses. All of this, he said, was with a view to ensuring that Kishu's interests as mortgagee were recognised. He accepted that Kishu took no steps in the Board's hearing to advance a claim for any award, and that the award made was in favour of Rest Haven Limited.

- [15] Surprisingly, in the face of the pleaded case of Manohardas, the originating motion revealed to the contrary. Mr. Kelsick, who indicated orally to this Court that Manohardas was not relying on the award made by the Board, acknowledged that there was no apportionment of Kishu's interest. However, he stated that the originating motion filed by Manohardas was based on the Indenture of Mortgage which indicated that Kishu has an interest in the property that was compulsorily acquired by the State. Mr. Kelsick posited that the Board made an award in favour of Kishu simply to properly recognise his interest in the land which the State had compulsorily acquired.
- [16] Moving along, Mr. Kelsick asserted that the failure of the State to compensate Kishu, as mortgagee, amounts to breaches of his fundamental rights under sections 3 and 8 of the Constitution. He therefore argued that Manohardas, acting in the capacity of executor of Kishu's estate, had standing to file the originating motion on behalf of Kishu's estate, in circumstances where Kishu's fundamental rights had been violated by the failure of the State to compensate him. He posited that the learned judge erred in refusing to grant the reliefs claimed. This Mr. Kelsick insisted, even when faced with the reality that the Board had not apportioned Kishu's interest in the award, and nevertheless felt able to argue that an award had been made to Kishu.
- [17] As alluded to earlier, and as an alternative position, Mr. Kelsick advocated that Manohardas was not relying on the Board's compensation, but on the Indenture of Mortgage itself. He reasoned that the award of the Board could not override or undermine Kishu's interest in the land and neither did it purport to do so. He was

however forced to accept that in the originating motion, Manohardas sought as one of the reliefs:

“A declaration that the Claimant’s fundamental rights conferred by Sections 3 and 8 of the Saint Christopher and Nevis Constitution Order 1983 have been infringed as a result of the failure by the Nevis Island Administration to pay to the Claimant compensation assessed as due to him in respect of the acquisition by the Nevis Island Administration on or about 8th October 2007 of lands owned by Rest Haven Limited and which were mortgaged to the Claimant.”⁴ (emphasis mine)

[18] Mr. Kelsick insisted that it was sufficient for Manohardas to rely on the Indenture of Mortgage in order to assert breaches of Kishu’s fundamental rights, even though counsel’s pleaded case below was vastly different. He said that the nub of the case was that Manohardas had *locus standi* to bring the claim, and the Board’s award did not defeat Kishu’s interest in the property for which he is seeking relief. Mr. Kelsick maintained that even without the Board making an award in favour of Kishu, he had an interest in the land. Mr. Kelsick emphasised that Kishu’s fundamental rights have been breached by the State’s compulsory acquisition of the land, without compensating him. He was adamant that the learned judge ought to have compensated Kishu for his interests in the property which the State had compulsorily acquired for public purposes.

[19] Though accepting that the Board had power to assess and apportion, in its award, sums due to Kishu, Mr. Kelsick rejected the State’s arguments that if Manohardas wished to be heard on the originating motion he ought to have ensured that his claim was placed before the Board and, importantly, that an award was made in his favour. He highlighted that Kishu did not ask the Board to make an award in his favour but opined that this was irrelevant. He reiterated that Manohardas was not relying on the award of the Board to ground his claim. Mr. Kelsick said that the fact that Kishu did not put forward a claim in the Board’s hearing is not fatal to his asserting breaches of Kishu’s fundamental rights, as mortgagee. Mr. Kelsick argued that Kishu having an alternative remedy, which he could have pursued, did not undermine his right to bring

⁴ See Hearing Bundle at pages 28 to 29.

a claim for breach of fundamental rights as a consequence of the State's compulsory acquisition of the property in which Kishu had third party interests, as a mortgagee. He purported to rely on **The Attorney General of Trinidad and Tobago v Ramanoop**⁵ to support his contention. Mr. Kelsick therefore urged this Court to accept that the learned judge erred in holding that Kishu ought to have utilised the alternative remedy that was available to him. In arguing that the learned judge made several errors of law and fact based on the above, Mr. Kelsick implored this Court to allow Manohardas' appeal and grant Kishu's estate the reliefs that it sought in the originating motion in the court below, together with costs in the court below and on the appeal.

First Respondent's Submissions

- [20] Learned Counsel, Mrs. Rhonda Nisbett-Browne, rejected the contention that Kishu's fundamental rights, as provided by section 3 and 8 of the Constitution, were violated as a consequence of the State's failure to pay him compensation for the compulsory acquisition of Rest Haven Limited's land. She urged the Court to uphold the decision of the judge to refrain from granting Manohardas any of the reliefs that were claimed. She said that there was no error of law or fact on the record and therefore there was no basis upon which this Court could impugn the judge's decision.
- [21] Mrs. Nisbett-Browne emphasised that since Kishu sought no award, and neither did the Board make any determination of Kishu's entitlement to compensation, as mortgagee, Manohardas could not properly assert that there were any breaches by the State on account of its failure to pay compensation to Kishu. She reminded this Court that Kishu participated in the assessment hearing before the Board and chose not to advance a claim or to seek an apportionment of the award. The entire award for compensation was made by the Board, and this was done in relation to Rest Haven Limited. She repeated some of the arguments that were launched before the High Court on behalf of the Minister of Finance. Mrs. Nisbett-Browne indicated that it was open to Kishu to take the further steps and seek the Board's monetary determination and apportionment of his interest in the award. She maintained that he failed to do so

⁵ [2005] UKPC 15.

and therefore could not properly claim to be entitled to be compensated for the State's breach by failing to pay him compensation that was assessed in his favour since, the Board had made no such assessment. Mrs. Nisbett-Browne pointed out that the costs order could in no way be equated with an award of the Board.

[22] Mrs. Nisbett-Browne maintained that Manohardas had no standing to bring a claim alleging breaches of fundamental rights on the basis that the State had failed to compensate Kishu, as mortgagee. She submitted that the Ordinance provides a comprehensive legislative scheme through which persons who are aggrieved by the State's acquisition of their land can seek compensation. The Ordinance also provides the procedure which should be followed by affected citizens before the Board of Assessment. She underscored the fact that Kishu did not avail himself of the opportunity to have the Board apportion the compensation in the award to Rest Haven Limited for his interests in the land acquired by the State. Mrs. Nisbett-Brown posited that Manohardas could not now seek to have this Court do so. The correct mechanism for this is the Board of Assessment, she maintained.

[23] Mrs. Nisbett-Browne posited that Manohardas had an alternative remedy available to him by which he could have sought reliefs for his third-party interests in the land and instead chose not to pursue those remedies. She said that he is improperly seeking to get the court to engage in a speculative mathematical calculation which is inappropriate on a claim of this nature, though she accepted that he has third-party interests in the land. She maintained that the court should not exercise its fundamental rights jurisdiction since there is an alternative remedy available to Manohardas, which he chose not to pursue.

[24] She further argued that, in effect, Manohardas is seeking to ground his alleged breaches of Kishu's fundamental rights on compensation that was awarded to Rest Haven Limited and on the basis of the State's acquisition of the same land. Permeating her argument, is the fact that Rest Haven Limited has instituted a separate originating motion in the High Court of Saint Christopher and Nevis, alleging breaches

of its constitutional rights and seeking similar reliefs which Manohardas is presently claiming in his capacity as executor to the estate of Kishu. Mrs. Nisbett-Browne urged this Court to reject the appeal and not countenance a multiplicity of claims in relation to the same acquisition of the same land. She highlighted the fact that Rest Haven Limited's amended originating motion (**Rest Haven Inn Limited v Nevis Island Administration** NEVHCV2015/0142) was determined by the High Court and the decision has since been appealed. The appeal involving Rest Haven Limited's claim is pending. She advocated that, in any event, Manohardas had no *locus standi* to bring the claim or by extension, the appeal, and they both amounted to abuses of the court's process.

- [25] Mrs. Nisbett-Browne reminded this Court that, in the High Court, the Minister of Finance had asked the court to decline jurisdiction. It is noteworthy that the Minister of Finance had filed an application to strike out Manohardas' originating motion on the basis that it was an abuse of the process of the court. Mrs. Nisbett-Browne's major contention was that the effect of the claim was to re-litigate issues that were already ventilated and decided in NEVHCV2015/0142. In the application to strike, it was highlighted that, in its amended originating motion, Rest Haven Limited sought compensation from the State as a consequence of the compulsory acquisition of its land by the NIA. Rest Haven Limited alleged breaches of its fundamental rights that were guaranteed by sections 3 and 8 of the Constitution, due to the State's failure to make prompt payment of the compensation that it was awarded by the Board. Mrs. Nisbett-Browne adverted this Court's attention to Rest Haven Limited's pleaded claim. However, it is unclear whether the application to strike was dealt with. What is clear however is that the learned judge dealt with the originating motion and held that it was an abuse of process.⁶

- [26] Mrs. Nisbett-Browne relied on **Baldwin Spencer v The Attorney General of Antigua and Barbuda and others**⁷ as authority for her argument that it is an abuse of the

⁶ This can be found at paragraph 39 of the judgment below.

⁷ [1998] ECSCJ No. 19; Civ. App. No 20A of 1997 (delivered 8th April 1998).

court's process for Manohardas to be permitted to bring a claim for alleged breach of Kishu's fundamental right to protection from deprivation of property in the circumstances of the case. Mrs. Nisbett-Browne was adamant that it was not open to Kishu to refuse to utilise the comprehensive procedure that Parliament has provided in the Ordinance in order to obtain compensation for his third-party interests. She opined that had Kishu utilised the proper approach and submitted his claim before the Board, the Board could have made an award in his favour. He has failed to do so. She maintained that it was not open to Manohardas to contend that Kishu's fundamental rights have been breached by the State's alleged failure to pay him the compensation that was assessed.

[27] To buttress her argument, Mrs. Nisbett-Browne referred this Court to the relevant sections of the Ordinance, which indicate that if a person is aggrieved by the decision of the Board there is a right of appeal to the Court of Appeal. She maintained that the judge was correct to dismiss Manohardas' originating motion and to refuse to grant the reliefs that he claimed. As she did in the High Court, similarly in this Court Mrs. Nisbett-Browne submitted that the Ordinance provides an exclusive procedure for the ventilation of the issue of compensation where the State has compulsorily acquired a person's land. It is not to be done by way of an originating motion. Mrs. Nisbett-Browne insisted that, in any event, Manohardas had an alternative remedy available to him in the form of an appeal from the decision of the Board directly to the Court of Appeal and elected not to pursue it. She argued that even if this Court were to conclude that Manohardas' claim is well grounded, since there was undoubtedly an alternative remedy, the judge would have had another basis upon which to refuse to grant the reliefs that Manohardas sought.

[28] Finally, Mrs. Nisbett-Browne reasoned that Manohardas has failed to establish that Kishu had any constitutional rights, based on any award of compensation, which were breached by the State in failing to pay him any monies and consequently entitling him to compensation. She reiterated that section 8 of the Constitution was not engaged. She maintained that the factual circumstances of the underlying case were totally

unsuitable for the court to exercise its fundamental rights jurisdiction. She therefore maintained that the judge was correct in dismissing Manohardas' claim and implored this Court to dismiss Manohardas' appeal and affirm the judge's decision.

Second Respondent's Submissions

- [29] Many of the arguments made by the learned Solicitor General, Mrs. Bullen-Thompson, reinforced and mirrored those made by Mrs. Nisbett-Browne. To prevent the unnecessary lengthening of this judgment, I would refrain from repeating them. In so doing, no disrespect is intended.
- [30] Learned Solicitor General, Mrs. Simone Bullen-Thompson, highlighted that the reliefs sought by Manohardas in his originating motion were based on the premise that an award for compensation was made in favour of Kishu, but that this was far from the case. She emphasised that, to date, no award has been made in favour of Kishu or his estate. Mrs. Bullen-Thompson referred this Court to the affidavit that was filed by Manohardas in support of the claim and opined that the effect of the underlying claim was to request the court to undertake the task of the Board. She pointed out that in the Board's hearing, compensation was awarded to the registered owner of the land – Rest Haven Limited. She reinforced, like Mrs. Nisbett-Browne said, that Kishu sought no compensation before the Board and none was awarded. Mrs. Bullen-Thompson submitted that the wording of section 8(2) of the Constitution clearly indicates that the compensation must have been determined, but pointed out that in so far as there has been no apportionment of the Board's award there could be no sustainable claim of alleged breach of fundamental rights.
- [31] Mrs. Bullen-Thompson also stated that the judge correctly rejected Manohardas' claim for constitutional reliefs, in so far as there were no breaches of Kishu's fundamental rights. She therefore urged this Court to dismiss his appeal since Manohardas is trying to get the court to impermissibly undertake the task which has specifically been assigned to the Board by Parliament. She maintained that Manohardas' claim is deeply and irreparably flawed and posited that the judge did not err in refusing to grant

him the reliefs that he sought. However, the main thrust of Mrs. Bullen-Thompson's submission was that Manohardas could not properly sustain the claim for breach of fundamental rights, as provided by section 3 and 8 of the Constitution and therefore the learned judge did not err in rejecting his claim.

[32] As an alternative position, Mr. Bullen-Thompson said that Manohardas should have sought to intervene in the claim brought by Rest Haven Limited, but did not do so. She argued that the situation is untenable as there is already a claim that has been brought by Rest Haven Limited against the State. Mrs. Bullen-Thompson referred this Court to the affidavit that was deposed to by the Attorney General, and referenced the other originating motion, which Rest Haven Limited has brought against the State (NEVHCV/2015/0142), in which a decision has been rendered in the High Court and there is a pending appeal against that judgment. In the underlying claim, the Attorney General has deposed that in NEVHCV/2015/0142, Rest Haven Limited sought the following reliefs against the State:

- (a) A declaration that the failure of the Nevis Island Administration to promptly pay the compensation awarded by the Board of Assessment appointed under the provisions of the Nevis Land Acquisition Ordinance constitutes a breach of the rights guaranteed to the claimant under section 3 and 8 of the Constitution.
- (b) An order directing the Minister of Finance in the Nevis Island Administration forthwith to pay the claimant all sums awarded to the claimant by the Board of Assessment in its award dated 21st November 2013.
- (c) An order that the Nevis Island Administration pays to the claimant the sum of \$22,941, 640.05 with interest at the rate of 6.5 percent per annum compounded quarterly as damages for the opportunity lose to invest the said compensation monies at the aforesaid rate by reason of the Nevis Island Administration's failure to promptly pay compensation to the claimant.

(d) An order that the Nevis Island Administration pays damages, including vindictory damages to the claimant for its breach of rights guaranteed by the Constitution.

(e) An order that the Nevis Island Administration pays the sum of \$4,034,699.64 being interest accrued due to Kishu Chandiramani from the claimant (Rest Haven Limited) as at 7th December 2015 together with the sum of \$1, 353.02 per day until payment in full.

[33] Adverting this Court's attention to the evidence deposed to by the Attorney General in answer to Manohardas' claim, Mrs. Bullen-Thompson highlighted the duplication in the claims. She posited that if this Court were to entertain Manohardas' appeal favourably, there is a real risk of the State having two judgments against it in relation to the same land acquisition and the same outstanding debt.

[34] Finally, however, the main plank of Mrs. Bullen-Thompson's argument was that there was an alternative remedy provided by the Ordinance, and the judge was correct in refusing to grant Manohardas the reliefs that he had sought. In support of her contention she referred this Court to **Ramanoop**. She further argued that it was an abuse of process for Manohardas to seek to invoke the special fundamental rights jurisdiction of the Court and relied on the cases of **Durity v Attorney General of Trinidad and Tobago**⁸ and **Jaroo v The Attorney General of Trinidad and Tobago**⁹ in support of this proposition. Mrs. Bullen-Thompson also referred to **Rosie Modest v The Attorney General and another**¹⁰ to reinforce her assertion that in the context of a compulsory acquisition of property, it is the Ordinance which is the applicable law. She emphasised that since Manohardas' claim did not comport with the provisions of the Ordinance, the judge was correct to refuse the various reliefs which he sought, on the basis that his claim was an abuse of the court's process.

⁸ [2009] 4 LRC 376.

⁹ [2002] UKPC 5.

¹⁰ [1989] ECSCJ No. 4, Civil Appeal No.4 of 1988 (delivered 2nd May 1989).

Discussion and Conclusions

- [35] It is of sufficient importance, and necessary, to recite the relevant constitutional and statutory provisions to which I now turn.

Constitution of Saint Christopher and Nevis

- [36] Section 3 of the Constitution provides as follows:

“Fundamental rights and freedoms

Whereas every person in Saint Christopher and Nevis is entitled to the fundamental rights and freedoms, that is to say, the right, whatever his or her race, place of origin, birth, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely,

- (a) life, liberty, security of the person, equality before the law and the protection of the law;
- (b) freedoms of conscience, of expression and of assembly and association; and
- (c) protection for his or her personal privacy, the privacy of his or her home and other property and from deprivation of property without compensation,

the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any person does not impair the rights and freedoms of others or the public interest.”

- [37] Section 8 of the Constitution stipulates, in part, as follows:

“Protection from deprivation of property

- (1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except for a public purpose and by or under the provisions of a law that prescribes the principles on which and the manner in which compensation therefor is to be determined and given.
- (2) Every person having an interest in or right over property that is compulsorily taken possession of or whose interest in or right over any property is compulsorily acquired shall have a direct access to the High Court for —

- (a) the determination of his or her interest or right, the legality of the taking of possession or acquisition of the property, interest or right and the amount of any compensation to which he or she is entitled; and
- (b) the purpose of enforcing his or her right to prompt payment of that compensation:

Provided that, if the legislature so provides in relation to any matter referred to in paragraph (a), the right of access shall be by way of appeal (exercisable as of right at the instance of the person having the interest in or right over the property) from a tribunal or authority, other than the High Court, having jurisdiction under any law to determine that matter.”

[38] The protection afforded by sections 3 and 8 of the Constitution is the right not to have land or any interest in or right over land compulsorily acquired, except where such acquisition is made for a public purpose and pursuant to the provision of a law which prescribes the principles on which compensation therefor is to be determined and given.

[39] In relation to Nevis, section 103 of the Constitution outlines the authority of the Nevis Island Legislature to make laws as follows:

“Power to make laws.

- (1) Subject to the provisions of this Constitution, the Nevis Island Legislature may make laws, which shall be styled Ordinances, for the peace, order and good government of the island of Nevis with respect to the specified matters.
- (2) A law made by the Nevis Island Legislature may contain incidental and supplementary provisions that relate to a matter other than a specified matter but if there is any inconsistency between those provisions and the provisions of any law enacted by Parliament, the provisions of the law enacted by Parliament shall prevail.”

[40] Paragraphs 2 and 15 in Part 1 of Schedule 5 of the Constitution give the Nevis Island Legislature exclusive power to make laws for tourist amenities and land and buildings other than land and buildings vested in the Crown, and specifically appropriated to the use of the Government, including holding of land by persons who are not citizens.

Paragraph 23 of the said Schedule gives the Nevis Island Legislature exclusive power to make laws in relation to any matter that is incidental or supplementary to any matter referred to in Part 1 of the said Schedule. Paragraph 1(c) of Part 2 of the said Schedule further provides that references to incidental and supplementary matters include, without prejudice to their generality, the compulsory acquisition and tenure of land.

The Nevis Land Acquisition Ordinance

- [41] The Ordinance authorises the acquisition of lands for public purposes on the island of Nevis and makes provision for related or incidental matters. Section 3 provides for the acquisition of land by declaration of the Governor General acting on the advice of the Cabinet of Ministers of the NIA. The Ordinance provides for the appointment of an authorised officer by the Governor General acting on the advice of the Cabinet. The authorised officer is responsible for entering on the land acquired and taking possession of the same.

- [42] Section 8 of the Ordinance provides that the authorised officer may require:
- “... the owner or occupier of, or any person interested in, any land, or in any part thereof, in respect of which a declaration or a notification has been published in a newspaper of general circulation in Nevis under section 3 or section 4 to deliver to him within a time to be specified in the notice, being not less than twenty-one days after service of the notice, a statement in writing containing, so far as may be within his own knowledge, the name of every person possessing any interest in the land, or any part thereof, whether as a partner, mortgagee, lessee, tenant or otherwise, and the nature of such interest.”

General Observations

- [43] It is imperative that there is acknowledgment of the fact that the Notice of Acquisition issued by the Governor General specifically indicates that the property which belonged to Rest Haven Limited was compulsorily acquired by the State for the

purpose of the touristic development of Nevis. Equally of importance is the fact that the filings before the Board of Assessment were intituled as follows:

“In the Matter of the Nevis Land Acquisition Ordinance Cap: 4.02 of the Laws of Nevis

AND

In the matter of the acquisition by the Nevis Island Administration of that property commonly known as ‘Rest Haven’ or ‘Rest Haven Inn’ owned by Rest Haven Limited, and registered as #11075 in the Nevis Register of Deeds in CR Volume 50 Folios 249 to 252.”¹¹

[44] It is of further note that the award indicates that the mortgagee, Kishu, participated through counsel in the Board’s hearing. Importantly, at paragraphs 37 and 38 of the Award of the Board it is stated thusly:

“[37] The Board therefore HEREBY AWARDS the sum of United States Currency six million, four hundred and fifteen thousand, nine hundred and twenty dollars and ninety-four cents (USD 6,415,920.94) as compensation for compulsory acquisition of that property commonly referred to as “Rest Haven Inn” to the registered owner thereof, Rest Haven Ltd.

[38] Interest shall be paid on the sum awarded at the statutory rate of 6% per annum from the date on which the authorized officer entered into possession of the subject property until the date of payment thereof, pursuant to Section 21 of the Ordinance.”¹²

That was the award upon which Manohardas sought to ground his claim despite the oral arguments to the contrary made on his behalf before this Court. It is apparent that the land that was compulsorily acquired by the State was owned by Rest Haven Limited and the Board’s award was made to Rest Haven Limited.

Issues 1, 2 and 3

[45] With that factual and legal context firmly in mind, I propose to address issues 1, 2 and 3, which are interrelated and will be dealt with together for convenience. I will repeat them for clarity:

¹¹ See Hearing Bundle at page 59.

¹² See Hearing Bundle at page 67.

- (1) whether the judge erred in concluding that Kishu's constitutional rights, as provided by sections 3 and 8 of the Constitution, were not infringed.
- (2) whether the judge erred in concluding that Manohardas (in his capacity as executor) was not entitled to the reliefs that were claimed.
- (3) whether the judge erred in concluding that Manohardas (in his capacity as executor) had an alternative remedy available and therefore that, in any event, it was not appropriate to grant relief under the Constitution.

[46] In addressing these issues, it is apposite to recite section 18 of the Constitution, which is at the heart of this appeal and provides as follows:

“Enforcement of protective provisions.

- (1) If any person alleges that any of the provisions of sections 3 to 17 (inclusive) has been, is being or is likely to be contravened in relation to him or her (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter that is lawfully available, that person (or that other 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); and
 - (b) to determine any question arising in the case of any person that is referred to it in pursuance of subsection (3)

and may make such declarations and orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 3 to 17 (inclusive):

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.”

[47] Cognisance must be paid to the fact that it has long been established that the fundamental rights jurisdiction is a special jurisdiction that should only be utilised in appropriate circumstances. There is a consistent stream of jurisprudence where the highest courts have refused to countenance the misuse or abuse of this special jurisdiction. In **Kemrajh Harrikissoon v The Attorney-General of Trinidad and Tobago**,¹³ the Privy Council strongly cautioned against the misuse of this special fundamental rights jurisdiction. This has remained good law and has been consistently applied and faithfully followed by the courts of this jurisdiction.

[48] Another important consideration is the question of whether, in the present case, Manohardas, as executor of the estate of Kishu, the mortgagee, had standing to bring the originating motion against the Minister of Finance and the Attorney General. Very useful guidance has been provided by the learned Chief Justice Sir Dennis Byron [Ag.], as he then was, in **Baldwin Spencer v The Attorney General of Antigua and Barbuda and others**, as to the approach the courts should adopt in circumstances in which the standing of the claimant to bring a constitutional claim has been challenged. Sir Dennis Byron stated as follows at paragraphs 114 and 115:

“[114] [T]he common premise on which all these decisions seem to have been based was that before any question of locus standi can arise, there must be a sustainable allegation that a provision of the constitution has been or is being contravened, and that the alleged contravention affects the interests of the applicant. On my reading of section 119(5) it says exactly the same thing. The limitation contained therein effectively makes locus standi a question of statutory interpretation. In my view it is essential that the two requirements of the alleged contravention of the constitution and a resultant effect on the interest of the applicant must both exist.

[115] In this case the finding of the learned trial Judge that there was no allegation of any infringement of any provision of the Constitution of which the Court could take cognisance is conclusive. The appellant therefore failed the test established by section 119(5) of the Constitution. I therefore conclude, that the learned trial Judge was wrong to find that the appellant had locus standi.”

¹³ [1979] 3 WLR 62.

[49] Applying the above guidance, it is clear to me that it is only where Manohardas was able to prove that there is a sustainable allegation that Kishu's fundamental rights were breached or likely to be breached that he would be able to assert standing to bring the claim. In the underlying claim, I fail to apprehend how Manohardas could have pleaded in his originating motion that he was seeking relief in the form of a declaration that his (Kishu's) fundamental right as provided by sections 3 and 8 of the Constitution had been breached as a result of the failure by the NIA to pay Kishu 'compensation assessed as due to him in respect of the acquisition by the Nevis Island Administration' of the property which was mortgaged to Kishu. This relief claimed was based on a very false premise. There is nothing in the Board's award which indicates that any compensation was due to Kishu. By way of emphasis to the contrary, the Board made no such assessment in favour of Kishu, the award was made in favour of Rest Haven Limited.

[50] The affidavit which Manohardas deposed to in support of the originating motion was very short on evidence. The affidavit sets out, in short form, the procedural history of Manohardas' originating motion, including Manohardas' role as executor of Kishu's estate, the circumstances surrounding the Indenture of Mortgage by which the Rest Haven property was mortgaged to Kishu, and the proceedings before the Board of Assessment. The affidavit then speaks to the amount that was due to Kishu in accordance with the mortgage, and goes on to aver that the State has failed to pay any compensation to Kishu since the completion of the proceedings before the Board. I fail to see on what basis Manohardas could have properly grounded a claim for failure to pay compensation assessed as due to Kishu when, neither the Board's award or Manohardas' affidavit show that any award had been made by the Board to the Kishu. In my view, given the Board's award and the affidavit evidence of Manohardas, it was not open to Mr. Kelsick in his oral submissions before this Court to seek to rely on the costs order that was made in Kishu's favour as a basis to argue that there was an award made to him. In my opinion, Kishu and by extension Manohardas, in his above-mentioned capacity, had no basis to ground his breach of

fundamental rights claim. It is of significance that Manohardas was careful in his affidavit not to state incorrectly, as he did in the originating motion, that the award for compensation was assessed as due to Kishu. At paragraph 9 of the affidavit in support of the originating motion Manohardas merely stated thusly:

“In the Award:

- (a) it was noted at paragraph 4 that Kishu ‘as mortgagee of the [Property], is an accepted interest[ed] party with standing based upon his Mortgage interest in the [Property]’; and
- (b) At paragraph 39, costs were awarded to Kishu.”¹⁴

[51] At the very least, it is cause for pause that Kishu, having appeared before the Board of Assessment and participated in the proceedings therein, chose not to make a claim for compensation, yet his executor, Manohardas, found it possible to file the underlying claim on the erroneous basis that an award for compensation was made in his favour. I fail to see on which basis Manohardas could have sustained the claim as pleaded. There was no evidential basis to undergird the originating motion. The affidavit that Manohardas deposed to in support of the originating motion clearly did not support his claim, and could not have possibly been the basis upon which the court could have sought to exercise the special fundamental rights jurisdiction.

[52] In my considered view, the totality of the circumstances of the underlying claim could have afforded the court the jurisdiction to strike out the claim on the grounds of failure to provide any evidential basis as a foundation of the originating motion. This notwithstanding, the matters raised by earlier discussed application to strike out the Manohardas’ originating motion are not in issue before this Court. In any event, I am fortified in that view there was no evidence before the judge to support the claim and, importantly, the reliefs sought by Manohardas.

[53] In keeping with Bryon CJ’s guidance in **Spencer**, it is against the above-outlined background that the question of whether Manohardas would have been able to establish the requisite standing must be addressed. Based on the manner in which

¹⁴ See Hearing Bundle at page 35.

the appeal has been argued, it is doubtful that he did. However, it is unnecessary to decide this issue. If it were required to resolve the issue of standing based on the principles in **Spencer**, I am of the view that Manohardas had no standing to bring the originating motion in which he alleged breaches of Kishu's fundamental rights. He has simply failed to adduce any evidence to substantiate the claim for breach of constitutional rights. I am therefore in full agreement with the submissions of learned counsel for the respondents, Mrs. Nisbett-Browne and Mrs. Bullen-Thompson, that in the absence of the assessment of compensation as pleaded by Manohardas, there was nothing to ground his originating motion for a breach of fundamental rights.

[54] On the above basis, I would conclude that Manohardas has failed in prosecuting his appeal. This conclusion would, in other circumstances, be dispositive of the appeal. This is not to be, however, since in oral arguments before this Court, learned counsel, Mr. Kelsick, indicated that reliance was not placed on any assessment or compensation by the Board, but rather on the Indenture of Mortgage itself in order to ground the claim. I fail to see how such an argument could have been advanced in the face of the clear words of the originating motion. However, in so far as counsel has adopted that position and there were submissions in reply, out of deference to those submissions I would proceed to address them.

[55] Even if Mr. Kelsick is correct that the claim was not grounded on the compensation that was assessed by the Board, which it is evident that I do not accept based on what I have foreshadowed, that could give Manohardas no comfort. Kishu ought to have asserted his right to compensation and sought apportionment in the assessment conducted by the Board. He failed to do so. I am entirely in agreement with Mrs. Nisbett-Browne and Mrs. Bullen-Thompson's submission that this is fatal to his claim for constitutional breach. It is trite law that where Parliament has provided a legislative scheme for the resolution of a claim, it is not open to a litigant to seek to utilise another method. No authority is needed for this proposition, but if one is required it could be found in **Small v Saul and Saul**¹⁵ in which it was held that where

¹⁵ (1965) 8 WIR 351.

Parliament provides a comprehensive legislative scheme for the ventilation of issues, that scheme must be adhered to.

[56] Section 8(1) of the Constitution affords persons the right to protection from the deprivation of their property and prevents compulsory acquisition except where provision is made by law for the payment of compensation. Parliament, through the Ordinance, has provided a comprehensive scheme that must be followed for the payment of compensation. Sections 3 and 8 of the Ordinance are applicable and do not need to be recited. Suffice it to say that it was clearly open to Kishu to present a claim to the Board for compensation. He chose not to do so and should not be allowed to complain. Contrary to what was advanced by Manohardas, the Board of Assessment has jurisdiction to hear and determine the question of compensation and apportionment consequent upon the compulsory acquisition by the State of persons' property.

[57] In so far as Kishu chose to appear before the Board, but not as a claimant, and failed to seek compensation, and by extension apportionment of the award, I am of the view that he could not properly ask the High Court, on the basis of an originating motion, to carry out such an exercise which falls within the purview of the Board of Assessment. Section 11 of the Ordinance enables the Board of Assessment to determine all questions and claims relating to the payment of compensation and the apportionment of that compensation. Specifically, section 11(2) of the Ordinance provides that the Board of Assessment 'shall have full power to assess, award and apportion compensation'.

[58] Given the deliberate failure to ask the Board to assess his compensation, it clearly is not the function of the High Court on an originating motion for breach of constitutional rights, or the Court of Appeal on an appeal flowing therefrom, to determine the amount of compensation that is owed to Kishu and to apportion the award that was made by the Board. All of these matters fall within the remit of the Board and are the usual functions that are carried out by the Board where claims for compensation and

apportionment are made. It was clearly open to Kishu to claim for compensation and assessment at the Board's hearing, but he chose not to do so. The Board's award was made to Rest Haven Limited, and no one else.

[59] In **Grande Anse Estates Limited v His Excellency Sir Leo Victor De Gale et al**,¹⁶ the appellant's property was compulsorily acquired by the State. The High Court, and Court of Appeal affirming its decision, held that the relevant provisions of the Land Acquisition Ordinance of Grenada under which the appellant's land had been compulsorily acquired were adequate and satisfied the requirements of section 6(1) of the Constitution of Grenada. Section 6(1) provides as follows:

"No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation."

The Court of Appeal, having examined the relevant provisions of the Land Acquisition Ordinance in Grenada, which was the law applicable to the acquisition in question, held that the sections of that Land Acquisition Ordinance relating to the payment of compensation did not contravene section 6(1) of the Constitution of Grenada.

[60] Returning to the appeal at bar, the Ordinance, which is the relevant law in question, gives jurisdiction to the Board, with the right of appeal to the Court of Appeal. In my view, it is untenable for Manohardas, in circumstances where Kishu participated in the Board's hearing, cross-examined witnesses and then failed to pursue any claim for compensation or apportionment of the award, to then come to the High Court asserting a breach of Kishu's fundamental right not to be deprived of property. The law is clear that the State can deprive someone of their right to property once certain conditions are satisfied, including the payment of compensation which must be provided for by the relevant law.

¹⁶ Grenada Civil Appeal No. 3 of 1976 (delivered 7th October 1977, unreported).

[61] I find the judgment of learned Rex McKay JA, as he then was, in **Rosie Modest v The Attorney General and another**¹⁷ very instructive, and I can do no more than adopt the helpful pronouncements made at paragraph 30 where the learned McKay JA expressed himself thusly:

“[W]hen a compulsory acquisition of property is made, the Government must act within the provisions of the Ordinance. Notwithstanding the Government’s failure to comply with its provisions, the Ordinance nevertheless does not cease to be a law applicable to the acquisition.”

[62] At paragraph 31, the learned McKay JA further stated:

“If there is non-compliance with the provisions of the Ordinance and a consequent contravention of section 6 of the constitution the land owner has a right of direct access to the High Court for constitutional redress. See *Thomas and MacLeod v. A.G. of Grenada et al* (1977) 23 W.I.R. 491; *Blomquist v. A.G. of Dominica* (1987) 1 A.C. 489.”

[63] I can do no more than apply the helpful enunciations of McKay JA in this appeal. Any non-compliance with the Ordinance will probably be in relation to Rest Haven Limited, if at all. It is clear that since the compensation award was made in relation to Rest Haven Limited, the issue of any subsequent breaches by the State must also be addressed in relation to Rest Haven Limited. I will refrain from making any further comments on this aspect since this Court was advised that there is a pending appeal by Rest Haven Limited which is likely to engage our attention.

[64] I am however fortified in the above view and take comfort in **Rosie Modest**, which is of great significance. I note also that the learned McKay JA, further stated at paragraph 42 as follows:

“In my view the refusal of the applicant to enter into negotiations or co-operate with the authorised officer at that early stage [and] his failure to establish any breach of the provisions of the Ordinance deprived him of the right to obtain constitutional redress and the trial judge could properly have refused the declarations sought on the ground that it was frivolous and vexatious and an abuse of the process of the Court.”

¹⁷ See n.10 herein.

[65] I also remind myself of the admonitions of Lord Diplock in **Harrikissoon** also stated that

“[T]he 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 [subsection 6(1) of the Trinidad constitution] if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court...”¹⁸

[66] The above pronouncements of Lord Diplock and McKay JA reinforce, in my clear view, that Manohardas’ originating motion was baseless and, had the strike out application been heard, the State ought to have been successful. On any view of the appeal, I am not persuaded as to the correctness of the arguments advanced in support of the appeal and, on that basis, I would dismiss this appeal.

[67] For the sake of completeness, I must state that it is trite that, as the mortgagee, Manohardas (in his capacity as executor of Kishu’s Estate) has an interest in the property. Section 8 of the Constitution protects against the compulsory acquisition of property and interest in or right over property without compensation. Judicial recognition was given to the fact that property should be interpreted to mean not only concrete rights to property but also abstract rights.¹⁹ I have no doubt that, in an appropriate case, a mortgagee may bring a claim or have standing to bring a claim for alleged breaches of fundamental rights. This, however, for the reasons I have already indicated, is not such a case. The appeal at bar is fact sensitive and the totality of the circumstances strongly indicates that Manohardas does not have standing to bring his claim and, even if he did, it is frivolous, vexatious and an abuse of the court’s process.

[68] The Board of Assessment made no award in Kishu’s favour, he having not asserted any claim before the Board for either compensation or apportionment, a decision which he must have taken having actually appeared before the Board, and having

¹⁸ [1979] 3 WLR 62 at page 64.

¹⁹ See *Attorney General v Lawrence* [1985] LRC (Const) 921.

participated in the proceedings which led to the award of compensation to Rest Haven Limited. The State acquired the property acting in accordance with the Ordinance. The Board provided a hearing to persons who indicated their interests in participating. Kishu did not file a claim and chose only to cross-examine the witnesses and make submissions. There was no award, more so, there was no apportionment of his interests. If Kishu was dissatisfied, the Ordinance makes provision for him to appeal to the Court of Appeal, and he did not. Manohardas, given the totality of circumstances, cannot properly assert that there was any breach of Kishu's fundamental rights which could have facilitated him obtaining the reliefs that he sought in the High Court, which rights or entitlement he did not pursue before the Board of Assessment.

- [69] It is evident that the reasons I have given are sufficient to dispose of the appeal. However, since arguments about the appropriateness of utilising the special fundamental rights jurisdiction, which is created by the Constitution, have permeated this appeal, I propose to discuss them briefly.

Alternative Remedies

- [70] The arguments on alternative remedies make it apposite that I should reinforce my above observations. The ability to seek redress for breaches of fundamental rights or the likely breaches of fundamental rights, as provided in section 18 of the Constitution, are a prominent feature of the Constitution. There is a consistent line of authority dating back to **Harikissoon** which establishes that the fundamental rights jurisdiction of the court should only be utilised in appropriate cases, namely where there is or is likely to be a breach of one of the fundamental rights, like those provided in sections 3 and 8 of the Constitution.
- [71] Cognisance must be paid to the fact that the proviso to section 18(2) of the Constitution gives the court the power to decline to exercise its jurisdiction if it is satisfied that there is an adequate alternative means of redress. Indeed, the misuse of this special jurisdiction is discouraged by the courts and is often and

disapprovingly referred to as an abuse of the court's process. As far back as 1979, the Privy Council in **Harrikissoon** admonished litigants against this misuse. Indeed, Lord Diplock warned against the misuse of applications for constitutional relief as a substitute for utilising the normal procedure for bringing civil claims. Furthermore, the court should not exercise its constitutional jurisdiction where an alternative means of redress exists. These admonitions remain appropriate today and ought to be adhered to.

[72] More recently, in **Ramanoop**, the Privy Council yet again had reason to underscore the importance of the special fundamental rights jurisdiction and enjoined litigants to refrain from misusing this jurisdiction. The Privy Council in **Ramanoop** at paragraphs 23 to 26 enunciated as follows:

"[23] The starting point is the established principle adumbrated in *Harrikissoon v Attorney-General of Trinidad and Tobago* [1980] AC 265. Unlike the constitutions of some other Caribbean countries, the Constitution of Trinidad and Tobago contains no provision precluding the exercise by the court of its power to grant constitutional redress if satisfied that adequate means of legal redress are otherwise available. The Constitution of The Bahamas is an example of this. Nor does the Constitution of Trinidad and Tobago include an express provision empowering the court to decline to grant constitutional relief if so satisfied. The Constitution of Grenada is an instance of this. Despite this, a discretion to decline to grant constitutional relief is built into the Constitution of Trinidad and Tobago. Section 14(2) provides that the court "may" make such orders, etc, as it may consider appropriate for the purpose of enforcing a constitutional right.

[24] In *Harrikissoon* the Board gave guidance on how this discretion should be exercised where a parallel remedy at common law or under statute is available to an applicant. Speaking in the context of judicial review as a parallel remedy, Lord Diplock warned against applications for constitutional relief being used as a general substitute for the normal procedures for invoking judicial control of administrative action. Permitting such use of applications for constitutional redress would diminish the value of the safeguard such applications are intended to have. Lord Diplock observed that an allegation of contravention of a human right or fundamental freedom does not of itself entitle an applicant to invoke the section 14 procedure if it is apparent this allegation is an abuse of process because it is 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".

[25] In other words, 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. 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.

[26] That said, their Lordships hasten to add that the need for the courts to be vigilant in preventing abuse of constitutional proceedings is not intended to deter citizens from seeking constitutional redress where, acting in good faith, they believe the circumstances of their case contain a feature which renders it appropriate for them to seek such redress rather than rely simply on alternative remedies available to them. Frivolous, vexatious or contrived invocations of the facility of constitutional redress are to be repelled. But "bona fide resort to rights under the Constitution ought not to be discouraged".

[73] In **Jaroo** the Privy Council emphasised the well-established principle that the fundamental rights jurisdiction of the court should only be utilised in exceptional circumstances, and definitely not if there is an alternative remedy. At paragraph 29 Lord Hope of Craighead stated as follows:

"[29] Nevertheless, it has been made clear more than once by their Lordships' Board that the right to apply to the High Court which section 14(1) of the Constitution provides should be exercised only in exceptional circumstances where there is a parallel remedy. In *Harrikissoon v A-G of Trinidad and Tobago* [1980] AC 265, [1979] 3 WLR 62, 268 of the former report, Lord Diplock said with reference to the provisions in the Trinidad and Tobago (Constitution) Order in Council 1962:

'The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter I of the Constitution is fallacious. 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. In an originating application to the High Court under section 6(1), 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.”

[74] At paragraph 39 of **Jaroo**, Lord Hope of Craighead also stated:

“The appropriateness or otherwise of the use of the procedure afforded by section 14(1) must be capable of being tested at the outset when the person applies by way of originating motion to the High Court. All the court has before it at that stage is the allegation. The answer to the question whether or not the allegation can be established lies in the future. The point to which Lord Diplock drew attention was that the value of the important and valuable safeguard that is provided by section 14(1) would be diminished if it were to be allowed to be used as a general substitute for the normal procedures in cases where those procedures are available. His warning of the need for vigilance would be deprived of much of its value if a decision as to whether resort to an originating motion was appropriate could not be made until the applicant had been afforded an opportunity to establish whether or not his human rights or fundamental freedoms had been breached.”

[75] Further, the Privy Council, in **Durity**, quite helpfully reinforced the court’s disposition against the misuse of the special fundamental rights jurisdiction of the court. At paragraph 28 Lord Nicholls stated thusly:

“It was open to [the appellant] to challenge the legality of the decision immediately by means of judicial review. Taken on its own, therefore, this complaint is not one that stands up to examination as an infringement of the appellant’s constitutional rights. In any event, as a remedy by way of judicial review was available from the outset, a constitutional motion was never the right way of invoking judicial control of the commission’s decision to suspend him. The choice of remedy is not simply a matter for the individual, to decide upon as and when he pleases. As Lord Diplock observed in *Harrikissoon v A-G of Trinidad and Tobago* (1979) 31 WIR 348 at 349, the value of the safeguard that is provided by s 14 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.”

[76] It is clear that the right to apply to the High Court utilising this special fundamental rights jurisdiction should only be utilised in appropriate circumstances. Those principles are applicable to the appeal at bar and I can do no more than apply them

to the appeal at bar. Based on all of the above judicial pronouncements, which are applicable, and the circumstances of this appeal as I have outlined them in the preceding paragraphs, I am of the view that Kishu had alternative remedies available to him as provided for by the Ordinance, such as an appeal against the Board of Assessment's award of which he did not avail himself. As a matter of law, he was required to utilise the procedure, which was provided to him by the statute, namely making a claim during the Board's hearing, and possibly obtaining an award in his favour together with the apportionment. This procedure was certainly available to him. Consequently, I am of the view that Manohardas' resort to the procedure of an originating motion (on behalf of Kishu's estate) was inappropriate. In so concluding, I am persuaded by and accept the arguments of Mrs. Bullen-Thompson and Mrs. Nisbett-Browne.

- [77] For completeness, I observe in passing that the learned judge held that Kishu had already been awarded US \$6,415,920.94 with interest at the rate of 6% per annum. As indicated earlier, the Board's decision does not evidence that any such award was made to Kishu. The Board's decision instead indicates that Kishu was only given his costs for the proceedings. The Board's award in the sum of US\$6,415,920.94 with interest at the rate of 6% per annum was made to Real Haven Limited. I also agree with Mrs. Bullen-Thompson that section 29 of the Ordinance is relevant. The section provides as follows:

“All amounts which have been awarded by way of compensation under this Ordinance, including interest and costs to be paid by the authorised officer, and all other costs, charges and expenses which shall be incurred under the authority of this Ordinance, shall be paid out of the Nevis Island Consolidated Fund on the warrant of the Minister of Finance.”

- [78] In my view, Mrs. Bullen-Thompson has quite professionally and properly asserted that Manohardas could have brought a claim to compel the Minister of Finance to pay him (on behalf of Kishu's estate) the costs that the Board had ordered. What was inappropriate was for him to have improperly invoked the special fundamental rights jurisdiction of the High Court, which is reserved for exceptional circumstances,

in view of the parallel remedies provided for under the Ordinance. As seen in the case of **M v Home Office**,²⁰ the House of Lords stated:

“...the fact that proceedings for contempt are ‘essentially personal and punitive’ meant that it was not open to a court, as a matter of law, to make a finding of contempt against the Home Office or the Home Secretary. While contempt proceedings usually have these characteristics and contempt proceedings against a government department or a minister in an official capacity would not be either personal or punitive... this does not mean that a finding of contempt against a government department or minister would be pointless. The very fact of making such a finding would vindicate the requirements of justice. In addition an order for costs could be made to underline the significance of a contempt.”

[79] It is apparent that these reasons provide additional and adequate bases for the rejection of Manohardas’ claim and more importantly for the dismissal of his appeal. Given the totality of circumstances, in my considered view, it was entirely inappropriate for Manohardas to file the originating motion seeking the reliefs which he sought. I would therefore dismiss the appeal.

[80] This brings me now to make some observations on the question of costs.

Costs

[81] The question of costs in these proceedings falls to be considered under rule 56.13 of the **Civil Procedural Rules 2000** (CPR). Rule 56.13(6) states that:

“The general rule is that no order for costs may be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application.”

The effect of this rule is to prohibit the court from awarding costs to the State in public law matters, even when it is successful, unless the court is of the opinion that the claimant acted unreasonably in making the application. However, if the State loses the claim or appeal, it has to pay its costs, as it should.

²⁰ [1994] 1 AC 337.

- [82] It does not appear that either the Minister of Finance or the Attorney General sought costs in the High Court, and indeed the judge made no order as to costs. Furthermore, the Minister of Finance and the Attorney General have not sought to challenge the learned judge's costs order before this Court. Neither have they made an application to this Court to have their costs on the appeal. In those circumstances, the appropriate order, in my view, is that each party is to bear their own costs.
- [83] I would conclude by simply observing that, in this case, it may well have been that the Minister of Finance and Attorney General did not apply for costs in the court below, or before this Court, because of the seemingly high standard of 'unreasonableness' imported upon such applications for costs under rule 56.13(6). Even though one readily appreciates the policy reasons for the creation of rule 56.13, a more flexible approach might now be required to the question of costs in matters of this nature given the proliferation of public law claims, many of which are not genuine.
- [84] With increasing frequency, litigants seem to be opting to assert breaches of fundamental rights in circumstances where it is inappropriate to do so. This is particularly egregious bearing in mind that public law claims are dealt with on an expedited basis by way of the procedure established for the determination of fixed date claims. The result of this is that baseless fundamental rights claims unfortunately divert the court's resources from genuine public law and other claims, with the ultimate costs being borne by the citizens. This practice is to be discouraged.
- [85] Notwithstanding these observations, had the respondents applied for costs before us, that application may have been favourably considered given my findings that the underlying originating motion was frivolous, vexatious and an abuse of the court's processes. In other words, this would ordinarily have been an appropriate case for an award of costs in favour of the respondents.

Conclusion

[86] For the above reasons, I would accordingly dismiss the appeal by Manohardas Devidas Chandirmani (in his capacity as sole executor of the estate of Kishu Chandiramani - Deceased) and order each party to bear their own costs.

[87] I gratefully acknowledge the assistance of all learned counsel.

I concur.

Gerard St. C. Farara
Justice of Appeal [Ag.]

I concur.

John Carrington
Justice of Appeal [Ag.]

By the Court

Chief Registrar