THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE
San Fernando

Claim No. CV 2017-03732

BETWEEN

MARGARET ROBERTS

Claimant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

Before the Honourable Mme. Justice Jacqueline Wilson QC

Date of Delivery: September 13, 2019

APPEARANCES:
Mr. Ramesh Lawrence Maharaj SC, Ms. Vijaya Maharaj and Ms. Odylyan Pierre Attorneys at law for the Claimant
Mr. Douglas Mendes SC, Ms. Keisha Prosper and Ms. Kendra Mark Attorneys at law for the Defendant

JUDGMENT

1. On 13 August 2019 I made an order discharging an undertaking given by the Defendant in constitutional proceedings brought by the Claimant. The reasons for the decision are now given.

THE CONSTITUTIONAL PROCEEDINGS

2. The Claimant asserts that she holds an interest in the property that is the subject of the proceedings which is held under a lease (the demised premises). The lease was purportedly terminated by the

Defendant for the purpose of acquiring the demised premises to construct a police station. The Claimant alleges that the Defendant, in so doing, contravened her rights enshrined under sections 4(a), 4(b), 5(2)(e) and 5(2)(f) of the Constitution on the grounds, among others, that the clause of the lease under which notice of termination was given did not confer a right of re-entry on the Defendant for the purpose of compulsory acquisition and that the Defendant failed to comply with the requirements of the Land Acquisition Act.[1]

3. At the time of filing the constitutional proceedings the Claimant filed, separately, an application for a conservatory order and/or an interim injunction to restrain the Defendant from entering upon the demised premises or from otherwise interfering with her right to possession pending the hearing and determination of the substantive claim.

4. On 24 November 2017 the Defendant gave an undertaking in the terms sought on the Claimant's application. Thereafter the parties engaged in discussions with a view to resolving the constitutional proceedings but after a prolonged period were not able to reach agreement. The Defendant ultimately applied to the court to discharge the undertaking which, at the time, had been given more than a year before.

THE APPLICATION TO DISCHARGE THE UNDERTAKING

5. It was accepted by Counsel for both parties that the legal principles arising for consideration on the application were those that apply to the grant of interim relief in constitutional proceedings. As a consequence, if the court were to find that the Claimant did not

[1] Chapter 58:01

satisfy the requirements for the grant of an interim injunction it followed that the undertaking should be discharged.

6. Counsel on both sides also argued that the undertaking, having been given by consent, should be set aside only if subsequent developments were sufficiently material to so warrant. In my view, this argument was not germane to a determination of the application, the material consideration being whether, on the facts, the Claimant satisfied the requirements for the grant of an interim injunction.

7. The legal principles that apply to the grant of interim relief in constitutional proceedings were recently re-stated by the Privy Council in ***Seepersad v Ayers-Caesar and others*** [2019] UKPC 7 in the following terms:

> "12. …..the appellant argues that the Court of Appeal should have adopted the tri-partite test to the grant of interim relief in cases involving constitutional rights applied by the Supreme Court of Canada in *Manitoba (Attorney General) v Metropolitan Stores Ltd* [1987] 1 SCR 110 and *RJR-MacDonald Inc v Canada (Attorney General)* [1994] 1 SCR 311: first, there should be a preliminary assessment of the merits to see whether there was a serious issue to be tried (adopting the less stringent merits test laid down by the House of Lords in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396*;* second, it must be determined whether the applicant would suffer irreparable harm if the application were refused; and third, an assessment must be made as to which of the parties would suffer the greater harm from the granting

or refusal of the remedy pending a decision on the merits.

15. The Board agrees that the tri-partite test in *RJR-MacDonald* is appropriate when considering interim relief in constitutional cases."

8. Further elaboration on the approach to the balance of harm assessment may be found in the dicta of Lord Hoffman in the Privy Council decision of ***National Commercial Bank Jamaica Ltd v Olint Corporation*** (2009) I WLR 1405 at paragraphs 16 to 18:

"16. The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in ***American Cyanamid Co v Ethicon Ltd*** [1975] AC 396, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.

17. In practice, however, it is often hard to tell whether either damages or the cross undertaking will be an adequate remedy and the court has to engage in trying to predict whether the granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. This is an assessment in which, as Lord Diplock said in the ***American Cyanamid*** case [1975] AC 396, 408:

> "It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them."

18. Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking ; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases."

9. In ***Kublalsingh v the Attorney General of Trinidad and Tobago*** CA No. P 142 of 2016 at paragraphs 12 and 13, Justice of Appeal Jamadar, as he then was, discussed the difficulties that arise in public law cases in determining where the balance of harm or injustice lies. The Court placed emphasis on the case specific nature of the exercise and on the relevance of public interest considerations:

> "12. In this context we note the decision whether or not to grant a conservatory order constitutes the exercise of a judicial discretion. The particular circumstances of each case are therefore relevant. In this regard we adopt the comments of Lord Bridge in ***Ex Parte Factortame (No.2)***, as follows:
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> > "A decision to grant or withhold interim relief in the protection of disputed rights at a time when the merits of the dispute cannot be finally resolved must always involve an element of risk. If, in the end, the claimant succeeds in a case where interim relief has been refused, he will have suffered an injustice. If, in the end, he fails in a case where interim relief has been granted, injustice will have been done to the other party. The objective which underlies the principles by which the discretion is to be guided must always be to ensure that the court shall choose the course which, in all the circumstances, appears to offer the best prospect that eventual injustice will be avoided or minimised."
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> 13. We also agree with Lord Bridge that in public law cases, at times "choosing the course which will minimize the risk (of injustice) presents exceptional difficulty." However, what we say, is that in public interest litigation where there are competing claims as to what best serves the public interest

(which competing claims are at the heart of this dispute), the judicial discretion to be exercised must be evidence based and fact and contextually specific. [Emphasis mine]. Put another way, and presuming that there is an arguable case with a real (and not fanciful) prospect of success – the threshold question, the broad discretion to be exercised ought to address the question whether it is just and convenient to grant the conservatory orders sought. In public law matters, the issue of whether damages may be an adequate remedy or not, may not always be either apt or dispositive, though it could be a factor. Often what will really cry out for consideration is the balancing exercise involved in determining where the balance of justice/injustice lies, which is of necessity always case specific. However, as Lord Goff has also pointed out in ***Factortame (No. 2)***, where public interest issues are involved, the scope of inquiry may be broadened "to take into account the interests of the public in general." [Emphasis mine]. In our opinion, in considering whether to grant or refuse an interim conservatory order, an overly formulistic or rigid approach is to be avoided and a more purposive approach to the balancing of all relevant considerations as to minimize the risk of eventual injustice is to be preferred."

10. The application to discharge the undertaking must be considered against the backdrop of the legal principles discussed above. The object and scope of the Land Acquisition Act are material in this regard.

THE LAND ACQUISITION ACT

11. In its long title, the Land Acquisition Act states that it governs the acquisition of land for public purposes. Part II of the Act falls under

the rubric "ACQUISITION OF LAND." Its provisions set out the procedures to be followed consequent upon a determination that land is likely to be required for public purposes. In so far as is material, the steps to be taken and the timelines for their execution may be summarised as follows:

(1) The publication of a Notice in the Gazette and twice in a daily newspaper that land is likely to be required for public purposes (the section 3 Notice);[2]

(2) The service of the section 3 Notice on interested persons, either personally or by affixing a copy to a conspicuous part of the land, no later than seven days after its publication in the Gazette;[3]

(3) The permitted entry upon the land by the Commissioner of Lands for investigative purposes only, no earlier than fourteen days after publication of the section 3 Notice in the Gazette;[4]

(4) No earlier than two months after publication of the section 3 Notice in the Gazette, the issue of an Order by the President authorising the Commissioner to take possession of the land for the public purpose (the section 4 Order) ;[5]

(5) The publication and service of the section 4 Order in the same manner as the section 3 Notice;[6]

(6) Upon the publication and service of the section 4 Order, the Commissioner is authorised to proceed forthwith to carry out works on the land for the public purpose;[7]

[2] S. 3(1)
[3] S. 3(2)
[4] S. 3(5)
[5] S. 4(1)
[6] S.4(2)(d)
[7] S 4(3)

(7) The section 4 Order lapses if the Commissioner fails to take possession of the land within six months of its publication and the powers of the Commissioner cease to have effect;[8]

(8) By way of Order, the making of a declaration by the President that land is required for public purposes (the section 5 Order);[9]

(9) Approval of the section 5 Order by Parliament;[10]

(10) By way of Order, the making of a declaration by the President that the land has been acquired (the section 5 declaration);[11]

(11) The publication and service of the section 5 declaration in the same manner as the section 3 Notice;[12]

(12) The vesting of land absolutely in the State upon the date of publication of the section 5 declaration in the Gazette.[13]

(13) The publication, in the same manner as the section 3 Notice, of a Notice of Completion where the land has been applied to the public purpose for which it was acquired.[14]

12. Under the Act, an interested person may make representations to the Secretary to Cabinet regarding the possible acquisition of land. The representations are to be made within six weeks of the publication of the section 3 Notice in the Gazette. The Act provides that the President "may take action" on such representations.[15]

[8] S 4(4)(a)
[9] S. 5(1)
[10] S. 5(2)
[11] S. 5(3)
[12] S. 5(3)
[13] S. 5(6)
[14] S. 5(9)
[15] S. 3(4)

13. The Act also provides for the President to make a declaration that the acquisition of land, or any part thereof, has been abandoned. Such a declaration may be made where a section 3 Notice has been duly published and served but no section 4 Order has been issued and no section 5 declaration has been made.[16] Such a declaration is conclusive evidence that the land to which it relates is no longer required for public purposes.[17]

14. There are further procedures under which the acquisition of land, or any part thereof, is deemed to be abandoned. A deemed abandonment occurs where there are grounds for the President to make a section 5 declaration, but no such declaration is made within six months of publication of the section 3 Notice in the Gazette. In such instances, an interested person may serve a notice on the Secretary to Cabinet requiring the President to issue a section 4 Order or make either a section 5 declaration or a declaration that the acquisition has been abandoned.[18] Where no action is taken by the President in respect of a notice by an interested party within two months of its service, the acquisition of the land is deemed to be abandoned.[19]

SERIOUS ISSUE TO BE TRIED

15. The Claimant's case is that the purported termination of the lease by the Defendant was in breach of her fundamental rights as the lease was terminated pursuant to a clause that did not confer a right of re-entry for the purpose of acquisition and the acquisition process invoked by the Defendant was invalid for failure to comply with the Land Acquisition Act.

[16] S. 8(1)
[17] S. 8(3)
[18] S. 9(1)
[19] S.9(3)

16. A determination whether there is a serious issue to be tried involves a preliminary assessment of the merits of a claim. This is discussed further below.

Termination of the Lease

17. The Claimant asserts that the right of re-entry was exercised under clause 4 (b) of the lease, which provides that:

> "….the Lessor reserves to himself if and whenever the necessity should arise (of which the Lessor shall be the sole judge) the right without notice to re-enter occupy and make full use of so long as the necessity shall continue the Demised Premises and/or any building structure or other erection then standing thereon or on any part thereof for public naval military and/or airforce purposes paying to the Lessee however reasonable compensation for all damage (if any) eventually done to the Demised Premises and/or to any building structure and/or other erection standing thereon as a result thereof and for all other loss occasioned to the Lessee by such re-entry use and or occupation."

18. The Claimant contends that under clause 4(b), the right of re-entry is limited to "public naval military and/or airforce purposes" on a temporary basis in cases of war or emergency and does not authorise the Defendant to otherwise take possession of the demised premises or to compulsorily acquire them.

19. An examination of the Claimant's evidence shows that on 5 September 2017 an Advisory Notice was served on the demised premises. The Advisory Notice gave particulars of the tenants and former tenants of the demised premises and recited the provisions

of clause 4(b) of the lease. The Advisory Notice went on to state that the demised premises were "among a number of other parcels…required for the construction of the Carenage Police Station" and concluded with a statement of "the State's intention to acquire the land in accordance with clause 4(b) of the lease." On 20 September 2017 a notice of termination of the lease was served on the premises.

20. Counsel for the Defendant submitted that the land acquisition process had not begun at the time the lease was terminated or when the undertaking was given as the Defendant was then operating under the presumption that a formal acquisition was not necessary if the lease was previously terminated. Counsel submitted that the parties then engaged in extensive discussions with a view to resolving the question of the Claimant's compensation and in the absence of a resolution the Defendant initiated the acquisition process and applied to the court to discharge the undertaking.

21. The acquisition process may be said to have commenced on 19 July 2018 when the section 3 Notice was published in the Gazette. Three parcels of land were identified in the section 3 Notice for possible acquisition, one of which was the demised premises. The section 3 Notice was published twice in a daily newspaper on 27 and 28 July 2018 respectively.

22. The statement in the Advisory Notice of "the State's intention to acquire the land in accordance with clause 4(b) of the lease" is clearly inconsistent with the steps that were subsequently taken by the Defendant to invoke the procedures of the Land Acquisition Act. In my view, this is suggestive that the notice of termination given pursuant to clause 4(b) of the lease, even if misguided, had been overtaken by events.

Compliance with the Land Acquisition Act

23. The section 3 Notice was served on the Claimant's Attorneys on 25 July 2018 and a copy was affixed to the demised premises on 28 July 2018.

24. On 29 August 2018 the Claimant's Attorneys made representations to the Secretary to Cabinet regarding the proposed acquisition. They gave details of the history of dealings with the land and the basis upon which it was asserted that the Claimant held an interest in the demised premises. They contended that in light of the undertaking given by the Defendant in November 2017, the Defendant could not interfere with the Claimant's possession of the demised premises using its powers under the Land Acquisition Act.

25. They stated further that the Defendant had not shown that it considered whether alternative sites existed for the construction of a police station and alleged that the acquisition of the demised premises would be unlawful if such sites existed in the vicinity of the demised premises and were owned by the State.

26. On 3 September 2018 the Secretary to Cabinet acknowledged receipt of the Claimant's letter and indicated that the matter was referred to the Solicitor General for advice. There was no further response.

27. Counsel for the Claimant submitted that the Defendant failed to comply with the Act as it failed to give proper consideration to the Claimant's representations. Counsel argued that the Claimant's representations were not a mere formality and that the Defendant's failure to properly consider them deprived the Claimant of the protections afforded by the Constitution and the Act and was thereby unlawful.

28. When questioned by the court on what fairness required in the context of the Claimant's representations, Counsel for the Claimant asserted that fairness required a meaningful inquiry into the representations and an opportunity for the Claimant to be heard on them, either orally or in writing.

29. While I accept that the Defendant should take account of representations that are considered to be of merit, I do not agree that there was a need to carry out the exercise advocated by the Claimant regarding a further hearing, whether oral or in writing. There was no dispute by the Claimant that the demised premises were required for a public purpose. In essence, the Claimant's contention was that the availability of alternative sites should be fully explored and acted upon, if identified. There was no firm statement or evidence in the representations that any such site did in fact exist.

30. The Act clearly contemplates that steps towards the compulsory acquisition of land may be undertaken in the face of representations. In particular, section 3(5) provides that within fourteen days after the publication of a section 3 Notice, whether or not representations have been made, the Commissioner may enter upon the land for investigative purposes and take certain action. The potential action includes a range of both intrusive and non-intrusive measures.

31. Having regard to the nature of the Claimant's representations and the Defendant's discretion to proceed with an acquisition notwithstanding that representations may have been made, I am of the view that the Claimant's argument that the Defendant failed to comply with the relevant statutory provisions is not compelling.

32. The Defendant's evidence is that on 15 January 2019 section 4 Orders were served on the owners of the two other parcels of land that were

subject to acquisition and a similar Order in respect of the demised premises was published in the Gazette on 11 January 2019. The section 4 Order was not served on the Claimant due to the terms of the undertaking.

33. The Defendant asserted in its evidence that if the Commissioner failed to take possession of the demised premises within 6 months of the publication of the section 4 Order in the Gazette, the Order would lapse, and the acquisition process would have to start afresh.

34. In reliance on the above statements in the Defendant's evidence, Counsel for the Claimant argued that the Commissioner's powers of entry upon the demised premises were extinguished and the land acquisition process was deemed to be abandoned. Counsel for the Claimant argued that the Act contemplates the contemporaneous publication of a section 4 Order in the Gazette and in a daily newspaper and that it would be an abuse of process if the publication in a newspaper were delayed for a substantial period after publication in the Gazette.

35. Counsel for the Defendant submitted that in the absence of publication of the section 4 Order in a newspaper and in light of the terms of the undertaking the Commissioner did not have power to take possession of the demised premises.

36. Counsel for the Defendant resiled from the position taken in the evidence that the section 4 Order would lapse in the absence of possession by the Commissioner within six months of its publication in the Gazette. Counsel submitted that in light of the failure to publish the section 4 Order in a newspaper there was no effective publication and the pre-conditions under which the Order would lapse were not fulfilled. Counsel submitted that it remained open to

the Commissioner to proceed with the publication of the Order in a newspaper and to continue the acquisition process.

37. Counsel for the Defendant submitted further that the procedures of the Act under which the acquisition of land is abandoned or deemed to be abandoned were not satisfied and that the Claimant's assertions of abandonment were not made out.

38. There is no doubt that the Defendant's compliance with the Land Acquisition Act is material to a determination of the constitutional claim. Compulsory acquisition is recognised as an exception to the protection afforded to the right to the enjoyment of property on the ground that the public interest outweighs the landowner's interest. However, the acquisition process must be carried out in keeping with the statutory requirements.

39. The question whether the Defendant's failure to publish the section 4 Order in a daily newspaper affects the validity of the Order and, by extension, the acquisition process is an important matter for determination on the claim. The circumstances giving rise to the failure to so publish the Order are relevant. So too are the objectives of the Land Acquisition Act and the mechanisms which it provides for the payment of compensation to persons who have suffered loss or damage arising from the acquisition process.

WHETHER DAMAGES ADEQUATE

40. Counsel for the Claimant argued that the question whether damages were an adequate remedy was not a key factor in public law cases.

41. Counsel for the Defendant submitted that the Claimant's interest in the demised premises remained to be determined consequent upon which her only entitlement was to compensation.

42. The Claimant's assertions that damages would not be an adequate remedy must be considered in the context of the statutory regime. As indicated earlier, the Act governs the acquisition of land for public purposes. It provides for the payment of compensation to persons who suffer damage as a result of the exercise of powers under the Act. It also for provides for an acquisition to proceed when the entitlement to and level of compensation are not known, the implication being that the Defendant is entitled to rely upon compensable loss being adjudicated upon in due course before an independent tribunal. However, the protections afforded by the Act are contingent upon due compliance with its provisions.

43. To the extent that the prejudice to the Claimant may not be limited to financial loss and may require a vindication of her fundamental rights, the constitutional court in the exercise of the plenitude of powers conferred by section 14(2) of the Constitution has the power to provide appropriate redress.

BALANCE OF HARM

44. While it is clear that the Claimant wishes to retain possession of the demised premises the difficulty for the Claimant is that there was very little in her evidence to indicate that she would suffer serious or irreparable harm consequent upon a compulsory acquisition. I understood Counsel for the Claimant's argument under this head to be that the risk of harm to the Claimant was, in effect, the risk of a permanent dispossession of the demised premises in circumstances where a breach of her fundamental rights was asserted.

45. Counsel argued that if the undertaking were discharged and the Defendant were to take possession of the demised premises the Claimant's claim would be rendered nugatory.

46. The risk of harm to the Claimant, as identified above, must be weighed against the risk of harm to the Defendant.

47. The Defendant's evidence is that the premises where the police station was previously housed were vacated due to deterioration and that the station was currently operating from rented premises which were not fit for purpose and inadequate to meet operational requirements. The Defendant stated that having regard to the strategic importance of a fully functional police station in the Western Peninsula, the delay in commencing the project was affecting national security.

48. The Defendant stated that the validity of the bids received for the Construction and Fit-out Works Contract had been extended on three occasions between September 2018 and February 2019 and that further extensions were unlikely having regard to the potential prejudice to the bidder who was found to be ultimately successful. The Defendant stated that, failing the award of a contract by 28 February 2019, a new tender process would have to be implemented, resulting in additional costs and further delay to the project.

49. The Defendant alleged that the full scope of works for the site preparation could not be established without taking possession of the demised premises, in the absence of which formal Cabinet approval of the required funds could not be obtained.

50. In so far as the balancing exercise is concerned, if the undertaking is discharged and the Claimant succeeds on the claim, the legal

mechanisms of the Act provide for the payment of compensation for any loss she may have sustained as a result of the exercise of the Defendant's rights of entry on the demised premises during the intervening period.

51. Conversely, if the undertaking is not discharged and the Defendant prevails at the hearing of the claim, the acquisition process would have been delayed and the underlying public interest considerations, as outlined in the Defendant's evidence, would be potentially frustrated.

52. The following extract puts the matter in its appropriate context:

> "For at least two hundred years, compulsory acquisition of land has been essential for economic and social development in the United Kingdom. Our canals, railways, roads, electricity generation and transmission, water supply, sewage disposal, schools and hospitals are but the most obvious examples of the types of development which would not have been capable of achievement if it had not been possible to acquire all the land required without the consent of the owners. The need to acquire land compulsorily will continue into the future and may well prove to be an important factor in achieving more sustainable development…"[20]

53. There is no dispute that the demised premises are required for a public purpose. In the absence of evidence by the Claimant that she would suffer irreparable harm as a result of the acquisition and having considered the merit of the Defendant's argument that the section 4 Order was not published in the newspaper due to the terms of the undertaking and that there is no legal bar to its further

[20] ***The Law of Compulsory Purchase***, at p. 5

publication, I formed the opinion that the scales were tipped in favour of the Defendant.

54. In the circumstances, I ordered that the undertaking be discharged.

Jacqueline Wilson QC

Judge