THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CIVIL APPEAL No. 181 OF 2007
H.C.A. No. 189 of 2004

BETWEEN

TRINIDAD AND TOBAGO SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS
(Incorporated by Ordinance No. 30 of 1946 as the Trinidad Society for the Prevention of Cruelty to Animals)

AND

EILEEN COGDELL

Appellants

AND

SAKAL SEEMUNGAL

Respondent

APPEARANCES: **Mr. G. Delzin for the Appellants and**
Mr. F. Scoon for the Respondent

PANEL: **A. Mendonça, J.A.**
N. Bereaux, J.A.
R. Narine, J.A.

DATE OF DELIVERY: **October 31st, 2012**

I agree with the judgment of Mendonça J.A. and have nothing to add.

N. Bereaux,
Justice of Appeal

I too agree and have nothing to add.

R. Narine,
Justice of Appeal

JUDGMENT

Delivered by A Mendonça, J.A.

1. This is an appeal by the Appellants from the order of the Trial Judge dismissing their claim against the Respondent.

2. By writ of summons the Appellants claimed against the Respondent:

   (a) damages for assault and battery of the second Appellant at 11 Mucurapo Lands, Port of Spain (the Mucurapo premises) on January 21st, 2004;

   (b) damages for trespass onto the Mucurapo premises on the said date by the Respondent whether acting by himself or his servants or agents;

   (c) damages for intimidation of the second Appellant by the Respondent, his servants or agents; and

   (d) damages for trespass to and conversion of the first Appellant's goods on or about the said date.

3. The Appellants also claimed other relief consequential to the above claims:

4. The material averments in relation to the Appellants' claim as contained in the statement of claim were as follows. The Appellants alleged that the first Appellant was at all material times a body incorporated by the Trinidad Society for the Prevention of Cruelty to Animals (Incorporation) Ordinance, 1946 (the Ordinance), as the Trinidad Society for the Prevention of Cruelty to Animals. It was a philanthropic or charitable organization or society involved in the promotion of kindness to and the prevention of cruelty to animals. Its affairs were managed by a

governing council. Initially its operations were limited to Trinidad but later expanded to Tobago. It then began to operate under the name of the Trinidad and Tobago Society for the Prevention of Cruelty to Animals.

5. The Appellants further averred that in connection with its operations, the first Appellant has three branches, the Northern Branch, the Southern Branch and the Tobago Branch. Each branch is managed by an executive committee, the members of which act in the capacity of officers, servants and/or agents of the first Appellant. The second Appellant was at all material times an officer and treasurer of the first Appellant.

6. The Respondent was from around 1989 to December 22nd, 2003 a servant and/or agent of the first Appellant and the Chairman of the executive committee of the Northern Branch. The Northern Branch was located at the Mucurapo premises, in respect of which the first Appellant has a leasehold interest.

7. On December 22nd, 2003 the council of the first Appellant resolved to:

1. suspend and/or revoke all powers of the executive committee of the Northern Branch; and

2. revoke or terminate the authorization of the executive committee of the Northern Branch including the Respondent to transact any business on behalf of the first Appellant or to use the name of the first Appellant for any purpose whatsoever.

On or about December 22nd, 2003 the first Appellant "implemented the resolution" revoking the appointment of the Respondent as Chairman of the executive committee of the Northern Branch. On January, 10th, 2004 the first Appellant "assumed control" of the premises of the Northern Branch.

8. The Appellants alleged that on or about January 21st, 2004 several men, being the servants or agents of the Respondent, entered the Mucurapo premises without the licence or permission of the first Appellant. Some of the men threatened to beat the second Appellant, shoved her and told her to leave the premises. She was thereafter lifted up and "thrown" onto the roadway. They then proceeded to lock the gate to the Mucurapo premises. Later that day however, several officers and servants or agents of the first Appellant with the assistance of the

police gained entry to the Mucurapo premises and the Respondent and his men vacated the premises soon thereafter.

9. The Appellants alleged that before vacating the premises, the Respondent, his servants or agents, issued threats to the second Appellant of bodily harm and threatened to return and retake the premises once the police left the vicinity. The Appellants also alleged that the Respondent removed certain goods and chattels of the Northern Branch from the Mucurapo premises and converted them to his own use or deprived the first Appellant of their use and possession, and has refused to return them to the first Appellant, notwithstanding numerous requests so to do.

10. The Respondent in his defence admitted that he is the Chairman of the Northern Branch. He also admitted that the first Appellant was a philanthropic or charitable organization or society involved in the promotion of kindness to and prevention of cruelty to animals and that its affairs are governed by a governing council. He however denied that the first Appellant was the body incorporated by the Ordinance. He contends that it is an unincorporated entity comprising the Northern Branch as well as the Southern and Tobago branches. He contends that the Northern Branch is the entity that was incorporated by the Ordinance.

11. The Respondent further admits that the Northern Branch is managed by an executive committee but denies that the executive committee consisted of persons who were or acted in the capacity of officers and/or servants of the first Appellant. At all material times the Northern Branch functioned autonomously so that, inter alia, it maintained its own banking accounts, managed its own finances and caused them regularly to be audited, never made a financial contribution to the first Appellant, always maintained a list of its members and employed its own staff.

12. The Respondent admitted the resolution passed on December 22nd, 2003 but denied the existence of the grounds on which the first Appellant claimed was the basis for the making of the resolution. The Respondent admitted that there are rules and regulations pertaining to the First Appellant but contended that they do not empower the Council of the first Appellant to suspend and/or revoke the executive committee of the Northern Branch or any branch or to revoke or terminate the authorization of the executive committee to transact any business on behalf of the first Appellant or to use the name of the first Appellant, save and except in accordance with

regulation X(17) of the rules and regulations of the first Appellant. The Respondent therefore contended that the resolution was not made in accordance with the Rules and Regulations of the first Appellant.

13. The Respondent further averred that the Northern Branch maintained an office at 189 Tragarete Road which had always been in the sole and exclusive possession of the Northern Branch. The lease of these premises was surrendered to the Port of Spain City Corporation in consideration of the grant by the Corporation to the Northern Branch of a 99-year lease of the Mucurapo premises and a sum of money which was used to construct a multi-purpose headquarters at the Mucurapo premises. The building was delivered to the Northern Branch on December 12th, 2003. The Respondent contended that the attempt by the servants or agents of the Council of the first Appellant to assume control of the Mucurapo premises was a wrongful and illegal trespass on the property of the Northern Branch. The Respondent also denied that the men who entered the premises were his servants and/or agents. He said that they were in fact employees of a bailiff who was retained by the executive committee of the Northern Branch and instructed and authorized by the executive committee to regain possession of the premises. The Respondent further contended that if, which he denied, the bailiff or his servants and/or agents shoved the second Appellant and put her out of the Mucurapo premises then that was reasonable force employed to eject a trespasser from the premises.

14. The Respondent denied that he removed any of the goods and chattels as alleged by the Appellants.

15. The Trial Judge, in her judgment, noted that both parties agreed that the main issue which had to be resolved was which of the two entities is in fact the body incorporated under the Ordinance. The Appellant identified the issue in this way:

> *"Whether the body incorporated as the Trinidad Society for the Prevention of Cruelty to Animals and the Trinidad and Tobago Society for the Prevention of Cruelty to Animals is the same entity of which the Northern Branch (of which the Defendant is the Chairman) is a constituent party thereof."*

The Respondent put the issue in this way:

> *"The main issue to be determined in this case is exactly what is the relationship between the Northern Branch of the Trinidad and Tobago Society for the Prevention of Cruelty to Animals and the Trinidad Society for the Prevention of Cruelty to Animals. Put another way, the issue to be determined is whether the T&TSPCA is the body incorporated by Ordinance No. 30 of 1946 as the TSPCA as the claimants contend, or whether it is as the Defendant contends, the first Claimant is an unincorporated body with one of its branches as the TSPCA which alone is a body corporated by Ordinance No. 30 of 1946."*

16. The Judge stated that the formulation of what the parties regarded as the main issue indicated that what was truly before her was a dispute over the administration of a charity - which of two competing groups was in fact the charitable organization incorporated by the Ordinance. The Judge stated that she was therefore being asked to determine which of the two rival groups, which each claimed through their executive leaders to be the charity established under the Ordinance, is entitled to control its membership, to retain custody of its books and records and to occupy its property. The Judge noted that the proceedings before her were brought as a common law action instituted by the parties but stated that "*having considered the relevant law I have come to the view that the common law action as brought by the [first Appellant] is wholly inappropriate to attempt it."* The Judge was of the opinion that as this was a case involving the administration of a charity, the Attorney General was the proper plaintiff and the person who should have instituted the proceedings. As the proceedings were not instituted by the Attorney General they ought therefore to be dismissed.

17. In the event that she was wrong in coming to that conclusion the Judge went on to consider other aspects of the Appellants' claim and concluded that there were reasons why the claim must fail. She gave five such reasons.

18. First, she stated that the Respondent was sued in his personal capacity and at all times it was known to the first Appellant and its Council that the Respondent was acting in his capacity as Chairman of the Northern Branch. The proper defendant ought therefore to have been members of the Northern Branch and not its Chairman in his personal capacity.

19. Second, the Appellants wrongly framed their case on the premise that the Respondent was a servant or agent of the first Appellant. That however was not so as the Northern Branch

operated with a significant degree of independence and autonomy, which was known to the first Appellant. Accordingly the claim that the Respondent was the first Appellant's servant or agent was untenable.

20. Third, there was no express power of expulsion in the rules and regulations governing the first Appellant. In those circumstances "in the absence of an express power of expulsion, the decision of the [first Appellant] to expel the [Respondent] as a member of the executive of the Northern Branch is null and void and of no effect and all consequential actions were therefore wanting in legal authority."

21. Fourth, on the issue of trespass, the first Appellant was never in possession of the premises through the Northern Branch. It was the Northern Branch in its own right that occupied the premises. Having regard to the history of the Respondent's occupation as the Chairman of the Northern Branch, the fact of his Executive lawfully carrying on the operation of the branch and the first Appellant never having been in possession of the premises, the claim for damages for trespass could not succeed.

22. Fifth, as regards the claim of the second Appellant, which was for damages for assault only, that claim must fail since in the absence of the lawful authority to assume possession of the premises, the Respondent as Chairman of the Northern Branch was well entitled to take reasonable steps to exclude the second Appellant and if there was any use of excessive force it was the members of the executive of the Northern Branch and not the Respondent in his personal capacity who would be liable to the second Appellant.

23. In the circumstances the Judge dismissed the action with costs to be paid by the Appellants to the Respondent.

24. The Appellants submitted that the Judge was wrong to consider whether the Northern Branch and the first Appellant were one and the same. That was not an issue that the Judge should have been concerned with as that issue was determined in this action prior to the trial by another judge so that there was created an issue estoppel. Even if it was not determined by the other judge, the Appellant contended that the issue ought to have been raised for determination before that judge. In that scenario too there was an estoppel. In those circumstances the issue

ought not to have been considered by the Trial Judge. In any event there was no need for the Attorney General to be a party to the action. The Appellants further submitted that on the evidence there were admissions by the Respondent to the claims of the Appellants and accordingly the Judge ought not to have dismissed the Appellants' action but should have been given judgment in their favour.

25. As to the first submission, Counsel for the Appellants contended that the issue whether the first Appellant and the Northern Branch were the same or separate bodies was determined by Tam, J when he adjudicated on an interlocutory application filed in the action. That application was made by the Respondent and sought several relief including an order that the Trinidad Society for the Prevention of Cruelty to Animals, a "body corporate and created" by the Ordinance be joined as a defendant in the action and a declaration that the Trinidad Society for the Prevention of Cruelty to Animals "is an autonomous independent body corporate" created by the Ordinance, a separate legal entity and incorporated body independent of the first Appellant.

26. Where an issue has already been decided by a court of competent jurisdiction it cannot be litigated again. This is so whether the issue is sought to be relitigated in the same action in which it was decided or a different one. The parties are bound by the determination of the issue. This is referred to as issue estoppel. In **Thoday v Thoday** [1964] 1ALL ER 341 Diplock LJ (as he then was) said:

> *"There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the Plaintiff in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation upon one such cause of action, any such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfillment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the Court in its first litigation determined that it was."*

And in **Fidelitas Shipping Company Ltd. v V/O Exportchleb** [1965] 2 All ER 4,10 he stated:

> *"In the case of litigation the fact that a suit may involve a number of different issues is recognized by the Rules of the Supreme Court which contain provision enabling one or more questions (whether of fact or of law) in an action to be tried before others. Where the issue separately determined is not decisive of the suit, the judgment on that issue is an interlocutory judgment and the suit continues. Yet I take it to be too clear to need citation of authority that the parties to the suit are bound by the determination of the issue. They cannot subsequently in the same suit advance argument or adduce further evidence directed to show that the issue was wrongly determined. Their only remedy is by way of appeal from the interlocutory judgment and, where appropriate, an application to the appellate court to adduce further evidence; but such application will only be granted if the appellate court is satisfied that the fresh evidence sought to be adduced could not have been available at the original hearing of the issue even if the parties seeking to adduce it had to exercise due diligence. This is but an example of a specific application of the general rules of public policy nemo debet bis vexari pro una et eadem causa. The determination of the issue between the parties gives rise to what I venture to call on* ***Thoday v Thoday*** *an "issue estoppel". It operates in subsequent suits between the same parties in which the same issue arises. A. fortiori it operates in any subsequent proceeding in the same suit in which the issue has been determined.*

27. Diplock LJ in **Fidelitas** suggested that issue estoppel may extend to not only issues that were actually decided but to every point which properly belonged to the subject of the litigation and which the parties exercising reasonable diligence might have brought forward at the time. This is best described as "Henderson abuse" which takes its name from **Henderson v Henderson** (1843), 3 Hare and is an authority for that proposition. However the scope of the ruling in **Henderson** was restated in **Johnson v Gore Wood and Company (a firm)** [2001] 2 AC 1 where it was said that failing to raise a matter that could have been raised in other proceedings does not necessarily render the raising of it in a subsequent matter abusive. The Court should adopt "a broad-based merits approach" and there will rarely be a finding of abuse unless the Court regards the subsequent proceedings as unjust harassment of a party. Lord Bingham in that case stated (at p. 498-499):

> *"The underlying public interest is the same; that there should be finality in litigation and that the party should not be twice vexed in the same manner. This public interest is reinforced by the current emphasis on efficiency and*

economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the Court is satisfied (the onus being on the party alleging abuse), that the claim or defence should have been raised in the earlier proceedings if it were to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because the matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

28. In the affidavit in support of the summons before Tam, J. it was clearly stated that the Northern Branch is the body incorporated by the Ordinance and not the first Appellant, which was said to be an unincorporated association (see for example paragraphs 9, 11,16 and 33 of the affidavit of the Respondent filed on February 2nd, 2004) and is different from the Northern Branch. As this was raised on the summons it seems to me this is not a case where **Henderson** abuse need be considered. What needs to be considered, however, is whether Tam, J decided that the first Appellant was the same entity as the Northern Branch.

29. Tam, J dismissed the summons. He did not grant any of the relief claimed by the summons. Unfortunately written reasons for the Judge's decision were not produced and there is no evidence before the Court as to his reasons for the dismissal of the summons. The only evidence as to what the Judge said on the determination of the application suggested that he did not decide the issue.

30. The Appellants argued that in adjudicating upon the application the Judge must have considered that the Northern Branch and the first Appellant were one and the same. I do not agree. It is possible that the Judge might have declined to decide the issue leaving it instead to be determined at the trial of the action. Indeed it seems unlikely that in view of the factual disputes on the issue that the Judge would have determined it on the hearing of the summons.

31. It is in my view relevant to note that no one thought the issue was decided at the time. I have already referred to the issues as formulated by the parties in their written submissions before the Judge. They clearly include as an issue for determination by the Trial Judge whether or not the first Appellant and the Northern Branch are the same entity. Further, if reference is made to the statement of issues filed by the parties prior to the trial but after the determination of the summons, they also reflect, not surprisingly, issues as formulated in the parties' submissions before the Judge. It is curious that if the issue as to whether the two bodies were one and the same was determined on the summons that no one thought so at the time.

32. In view of the above, I cannot say that the issue was previously determined and consequently I cannot accept the Appellants' first submission that there was an issue estoppel so as to prevent the issue being raised before the Trial Judge.

33. I turn now to consider whether the Attorney General was a necessary party. The Judge indicated that both sides were in agreement that the Trinidad Society for the Prevention of the Cruelty to Animals is a charity - that also was not disputed on this appeal. The Judge stated that in those circumstances what was truly before her was a dispute over the administration of a charity. It was in essence a dispute between two rival groups as to which one was in fact the charitable organization incorporated by the Ordinance. The State as parens patriae is the protector of the charity and the Attorney General who represents the state was the proper person to take proceedings on behalf of and to protect the charity. As I mentioned, the Judge concluded that as the proceedings were not taken by the Attorney General they ought to be dismissed.

34. The Judge, in coming to the conclusion that the Attorney General was the proper plaintiff, referred to several statements found in 4 Halbury's Laws (second edition) as informing her opinion. These included:

> *"(a) The Crown as parens patriae is the protector of all property subject to charitable trust, such trust being essentially matters of public concern. And the Attorney General who represents the crown for all forensic purposes is accordingly the proper person to take proceedings on behalf of and to protect charities. Actions brought in the absence of the Attorney General are dismissed.....*

(c) Where action is necessary to enforce the execution of a charitable purpose, to remedy any abuse or misapplication of charitable funds, or to administer a charity, (emphasis supplied by the Judge) the Attorney General is the proper plaintiff.

(d) Actions of this kind, if instituted by parties other than the Attorney General, or, in the event of his illness or a vacancy in office, the Solicitor General, are dismissed.

35. The case of **Strickland v Weldon** [1885] 28 Ch. D 426 provides an example of an action that was held to be defective because the Attorney General was not a party. In that case the Judge stated that "the Attorney General is the only person who can really represent a charity and sue on its behalf and on that simple ground I must refuse to make any order upon this summons." (see also **In the matter of West Retford Church and Poor Lands** (1839) 10 SIM. 101 and the **AG v Corporation of Bristol** (1845) 60 ER 510.)

36. The Appellants submitted that the Attorney General was not a necessary party as the proceedings were brought under an express statutory power enabling the Trinidad Society for the Prevention of Cruelty to Animals to sue in its own name. The Ordinance incorporating the Trinidad Society for the Prevention of Cruelty to Animals gave to the incorporated body a right to sue and be sued in its own name. This may be found at section 2 which provides as follows:

> *"The Association known as the "Trinidad Society for the Prevention of Cruelty to Animals" shall be and is hereby created a body corporate and by that name shall have perpetual succession, and may sue and be sued in all courts of justice in the Colony by that name, and shall have and use a common seal with power from time to time to change such seal."*

Counsel submitted that in view of the express power enabling the society to sue in its own name that meant that the parens patriae jurisdiction does not apply and proceedings may be brought by the charity and not the Attorney General. Counsel submitted that the authority for that proposition is **Prestney v Mayor and Corporation of Colcheter and the Attorney General** [1882] 21 Ch. D. 111.

37. That case is however distinguishable. The statutory provision which the Court considered in that case gave a right to the claimants to property of the corporation for their private benefit and was not in the nature of a general power to sue as in this case. The judge in his judgment

stated he could not say that the claim was in the nature of a charity or that the claimants claimed only as charitable objects. He said that he could not:

> *"see why these parties should not sue, like any other persons having common rights and being a body of persons, or why they should not have their rights, which for this purpose must be taken to be as they are alleged, protected without going to the Attorney General."*

38. Counsel's argument seems to assume that so long as the charity can sue on its own behalf then the Attorney General may not be a party. That however is not the case. There are instances where the Attorney General may not be a party, for example, where the question is whether the charity is entitled to a particular legacy or not (see **Ware v Cumberlege** (1855) 20 Beav. 504). Indeed, even where the Attorney General is a necessary party and he refuse to interfere, it is appropriate for the charity to commence proceedings making the Attorney General a defendant. The right of the charity to sue does not therefore appear to be inconsistent with the parens patriae jurisdiction.

39. The authorities do support the proposition that in cases involving the administration of a charity the proceedings ought to be instituted by the Attorney General (see **Ware**, supra). Similarly I**n the matter of West Retford Church and Poor Lands**, supra, it was decided that where two classes of persons claim, adversely to each other, the right of administering the funds of a charity, the Court will not decide the question on petition but on information, which is the mode by which, at the time of that case, the Attorney General instituted proceedings. Informations are now abolished (see the **State Liability and Proceedings Act** section 15(1)) and the proceedings by the Attorney General must now be instituted by claim form but that does not affect the principle regarding the parens patriae jurisdiction.

40. In the circumstances I am not persuaded that the Appellants' submission provides an answer to the Judge's conclusion that the proceedings ought to have been commenced by the Attorney General. This issue was raised by the Judge in the course of the trial and she correctly invited submissions on the point. Neither party however supported it. The Appellants argued that the Attorney General had no role in the matter and the Respondent's position was that the issue did not arise. The Judge's conclusion was arrived at from "her own researches". Before this Court both parties were of the view that the Judge's decision on this point was wrong but the

Respondent merely supported the argument of the Appellants and advanced no other argument. The upshot is that this Court did not receive the fullest assistance on this question. It is, however, unnecessary for me to decide the issue because I think other points decided by the Judge effectively dispose of this matter.

41. The crux of the first Appellant's claims turns on the validity of the resolution of December 22nd, 2003. As is apparent from the averments in the Appellant's statement of claim set out earlier in this judgment, it is that resolution that suspended and revoked the powers of the executive committee of the Northern Branch. On the Appellants' case, the first Appellant held a lease of the Mucurapo premises. The Respondent disputes that contention. He contends that it was the Northern Branch that held the leasehold interest of the Mururapo premises. That dispute notwithstanding, there is no disagreement between the parties that the Northern Branch was located at the Mucurapo premises and that the Northern Branch was in exclusive possession of same. As the Appellants aver in their statement of claim:

> *"At all material times the premises of the Northern Branch were located at Lot 11, Mucurapo Road Extension."*

42. The resolution of December 22nd, 2003 did not purport to remove the Northern Branch from possession of the premises. What it purported to do was to terminate the authority of its executive committee. Accordingly, up to the date of the resolution there is no dispute that the members of the executive of the Northern Branch were entitled to enter and remain upon the Mucurapo premises. There is therefore no issue on the Appellants' case that, as a member of the executive committee of the Northern Branch, the Respondent could have entered and remained upon the Mucurapo premises. Similarly, there can be no contention that the Respondent was, as Chairman of the Northern Branch, in wrongful possession of the goods or chattels of the Northern Branch unless his authority was revoked. It follows that unless the powers of the executive committee, of which the Respondent was a member and its Chairman, were revoked or terminated, as the resolution purported to do, the first Appellant could not maintain an action in trespass against the Respondent even on its own case. Similarly, the first Appellant without more could not complain of the Respondent being in possession of the goods and chattels of the Northern Branch and his refusal to deliver them to the first Appellant. What, from the Appellants' point of view gave them the locus to allege that the Respondent had trespassed upon

the goods and chattels of the Northern Branch and, by refusing to deliver them to the first Appellant, had converted them to his own use was the resolution of December 22nd, 2003, which purported to revoke the powers and authority of the executive committee of the Northern Branch and accordingly the authority to retain possession of the property of the branch.

43. The Appellants' position is that the resolution was passed pursuant to the first Appellant's rules and regulations. According to the Appellants the resolution was passed by the Council of the first Appellant. The Respondent, in his defence, contends that the rules and regulations do not empower the Council to suspend or revoke the power and authority of the executive committee, as the resolution purported to do. The Respondent therefore says that the resolution was not in accordance with the rules and regulations and is null and void. The Judge agreed with that submission for the reasons set out earlier on in this judgment, namely, that the rules and regulations did not contain an express power of expulsion.

44. The Appellants' submissions on this issue are that the Court should not entertain this issue as it did not arise in the Court below and in any event there is an issue estoppel as it came before Tam, J. or should have come before him. I do not agree with those submissions.

45. There is no doubt that the matter was raised in the Court below. It was raised both on the pleadings and on the issues the parties put before the Judge. I have already referred to the defence of the Respondent, where he clearly avers that the resolution was contrary to the rules and regulations of the first Appellant. So far as the issues before the Judge are concerned, the Respondent formulated the issues relating to the resolution in this way:

> *"Further whether the General Council of the T&TSPCA is empowered by any Rules and Regulations of the T&TSPCA to suspend and/or revoke the powers of the Executive Committee of the Northern branch, or of any branch, or to revoke or terminate the authorization of the Executive Committee of the Northern Branch, or any branch, to transact any business on behalf of the T&TSPCA or to use the name of the T&TSPCA?"*
>
> *"Whether the resolutions made on the December 22nd, 2003 were made in accordance with section X(17) of the Rules and Regulations of the T&TSPCA and/or in accordance with any rules of the T&TSPC and whether the said resolutions are ultra virus of the said section X(17) and if so whether such resolutions were null and void and of no effect."*

46. So far as the issue estoppel point is concerned, it must be demonstrated that the issue has been litigated and has been decided. It was said that this issue was decided by Tam, J. on the summons before him. There is no indication from the summons, evidence and arguments that this point was raised and I have already mentioned that there is no record of what the Judge decided other than that he dismissed the summons.

47. As regards the submissions that the point ought to have been raised before Tam, J., it really does not arise, but I see no merit in this submission at all. There is, in my view, no basis for arguing that on the summons before Tam, J. the Respondent ought to have brought forward any issue relating to the validity of the resolution.

48. This brings me to the issue of whether the resolution was made in accordance with the rules and regulations of the first Appellant. The resolution is said to have been passed at an extraordinary meeting of the Council of the first Appellant. The rules and regulations do make reference to the Council. They provide that the affairs of the Appellants shall be conducted by a Council and it provides for its composition. The rules and regulations also refer to branches, which have been identified as the Northern Branch, Southern Branch and the Tobago Branch. In relation to the branches the rules and regulations provide that an executive committee shall be formed to carry on the work of the branches. The question that arises however is whether the rules and regulations empower the Council of the first Appellant to pass a resolution providing for the suspension and/or revocation of the powers and authority of the executive committees of the branches, more particularly the executive committee of the Northern Branch.

49. There is no doubt that the rules and regulations do not contain an express provision authorizing the Council to make such a resolution. The question therefore that must be asked is whether such a power may be implied.

50. In **Attorney General of Belize v Belize Telecom Ltd. and Another** [2009] UKPC 10, the Privy Council considered whether a particular term should be implied in articles of association of a company. The Board was of the view that in considering whether a provision ought to be implied in an instrument, the Court has no power to improve upon the instrument. It cannot introduce terms to make it fair or more reasonable. The implication of a term is not an addition to an instrument, it only spells out what the instrument means. In every case in which it

is said that a provision ought to be implied, the question for the Court is whether such a provision would spell out in express terms what the instrument, read against the relevant background, would reasonably be understood to mean. Lord Hoffman, in giving the judgment of the Board, concluded (at para 21):

> "*There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?"*

That therefore is the question that must be determined if the authority or power to pass the resolution of December 22nd, 2003 can be implied in the rules and regulations of the first Appellant. The question is to be answered from the rules and regulations read as a whole against the relevant background.

51. In the rules and regulations, the branch acts in accordance with the policy of the Society but there is no denying that the branch enjoys a great deal of autonomy from the control of the Council. So that it is provided that the executive committee of the branch comprises four officers who are elected at the annual general meeting of the branch. It seems also that other members of the executive committee are elected at the annual general meeting. The branch may appoint a branch secretary who shall be a voluntary member of the executive committee but shall appoint an administrative secretary who shall be remunerated by the branch. The branch may also appoint inspectors and other staff who shall be responsible for their remuneration. In relation to inspectors, the rules and regulations provide that:

> *"The wages and travelling expenses of all inspectors and also the costs, charges and all other expenses incurred in or incidental to the conduct of all promotions and legal responsibility arising out of the work of the inspectors within the scope of their duties shall be borne by the Branch concerned..."*

The rules and regulations further provide that the branch may for the purpose of facilitating its work divide its area in subsidiary branches to be called "auxiliaries" and every auxiliary shall for the purpose of the rules and regulations, be regarded as forming an integral part of the branch. The branch may hold property in its name and all monies received by a branch shall be placed in a bank to the credit to the credit of the branch. The rules and regulations further provide for the holding by the branch of general meetings and the preparation of reports and financial

statements, which are to be provided to its members and copied to the Council for inclusion in the Society's Annual Report.

52. The rules and regulations also provide for the dissolution of the branch by the Council but only after a resolution have been passed at a general meeting of the branch requesting the Council to dissolve the branch.

53. According to the evidence before the Court, the autonomy given to the branch by the rules and regulations was a true reflection of the way it operated. In the witness statement of Judith Gonsalves she states that:

> *"The Chairman of a Branch is elected at an Annual General Meeting of the Branch by members of that Branch. There is a membership list for each Branch which stipulates the names of the members... The list is under the custody of the Chairman of each Branch."*

Mr. Lennox Sankersingh who was at one time the Chairman of the first Appellant stated in his witness statement that "the branches were in charge of their own affairs and were autonomous bodies." According to the Respondent the Northern Branch functioned autonomously before and after the rules and regulations were made. On the evidence before the Court there could be no argument against the Judge's conclusion that the Northern Branch "at all material times operated with a significant degree of independence and autonomy."

54. Having regard to the autonomy given to the branch by the rules and regulations, the implication of a term giving the Council of the first Appellant the power to pass the resolution it purported to do would be inconsistent with the rules and regulations read as a whole. There is nothing in the relevant background that would suggest otherwise. In my judgment, therefore, having regard to the rules and regulations and the relevant background as to the manner in which the Northern Branch functioned, the rules and regulations cannot be reasonably understood to include, by implication, such a term. They therefore cannot be understood to mean that the Counsel of the first Appellant had the lawful power to pass the resolution it purported to do on December 22nd, 2003.

55. As there is no express power in the rules and regulations to pass the resolution the Council purported to do and such power not being capable of implication,, the Council had no lawful authority to pass the resolution. In my judgment the resolution is of no effect. This means that the claims of the first Appellant against the Respondent cannot be maintained. The first Appellant, therefore, cannot maintain the claims in trespass to the Mucurapo premises and trespass to and conversion of the goods and chattels of the Northern branch.

56. But even if the resolution were valid the first Appellant's claims are still open to challenge. So far as the claim for trespass to and conversion of the goods and chattels of the Northern Branch is concerned, the evidence does not establish any title or right to possession in the first Appellant to the goods and chattels which is independent of the Northern Branch. It seems to have been assumed by the Appellants that the revocation of the powers and authority of the Northern Branch would somehow vest its property in the first Appellant or give it the right of possession of same but that does not follow. There is no dispute that the branches were entitled to own their property. The revocation of the power and authority of its executive, even if valid, cannot without more alter the right to title and possession of that property.

57. So far as the claim in trespass to the Mucurapo premises is concerned, it is well settled that trespass is an injury to a possessory right and the proper claimant is the person who is deemed to be in possession at the time of the trespass. There is no issue on the evidence that the Northern Branch was at all times in possession of the Mucurapo premises. What the first Appellant purported to do is to terminate the authority and the powers of the Executive of the Northern Branch. The letter from the first Appellant authorizing its secretary to enter upon the Mucurapo premises after the resolution was passed stated that it was for the purpose of taking over the premises from the executive of the Northern Branch. There is no question of taking possession of the Mucurapo premises from the Northern Branch.

58. Therefore even if the resolution were valid it seems to me that the first Appellant's claims, framed as they were in trespass and conversion, are misconceived. I am, however, firm in my view that the resolution was not valid. The invalidity of the resolution also impacts on the claims of the second Appellant for assault and battery and intimidation.

59. The second Appellant entered the premises of the Northern Branch under the assumed authority of the resolution. She had no right to be there. The Northern Branch was entitled to possession and the second Appellant was an intruder and as against the Northern Branch a trespasser. The Northern Branch was therefore entitled to take steps to remove her from the premises including force provided that the degree of force is properly matched to the circumstances of the trespass. Only the minimum force required by the circumstances may be employed. (See **Hemmings v The Stoke Poges Golf Club** [1920] 1 K.B. 720), this may be referred to as the remedy of self-help. The person entitled to possession may however lose this remedy if he acquiesces in the occupation of the trespasser. Acquiescence may be inferred from delay. In this case, however, I do not consider there was delay so as to give rise to any acquiescence on the part of the Respondent. The executive of the Northern Branch acted within 11 days to turn out the second Appellant. The question therefore in this case is whether the force used was the minimum required in the circumstances.

60. In this case the second Appellant was told to leave by the bailiff and his men when they entered the Mucurapo premises. She did not do so. According to her witness statement she was surrounded by the bailiff's men who grabbed her by her arms and lifted her and threw her onto the roadway. She was also verbally threatened with bodily harm. In cross-examination she indicated that two of the men held her by her arms and threw her out. She stated she sustained more bruising than anything but she did not require a medical certificate from her doctor. In the statement of claim there are no allegations that the second Appellant sustained any injuries.

61. It is a reasonable inference from the evidence that the second Appellant was not prepared to leave the premises at the simple request of the bailiff's men. The second Appellant thought she was in the premises as a matter of right and unless some force were used it is unlikely she would have left. The force however as I have mentioned must be properly matched to the circumstances of the trespass and must be no more than necessary. On the evidence in this case I cannot say that excessive force was used and in my judgment the force used matched the circumstances of the trespass and was no more than the minimum force required.

62. In the circumstances I think the Judge was correct to dismiss the Appellants' action. This appeal is therefore dismissed.

63. We will hear the parties on costs.

Dated this 31st day of October, 2012.

Allan Mendonça,
Justice of Appeal