

NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV 2156/2005

BETWEEN	VINCENT GREEN	CLAIMANT
AND	THE ATTORNEY GENERAL	1 ST DEFENDANT
AND	NATIONAL WORKS AGENCY	2 ND DEFENDANT
AND	THE COMMISSIONER OF LANDS	3 RD DEFENDANT
AND	NEVILLE RATTRAY	4 TH DEFENDANT
AND	MICHAEL DOUSE	5 TH DEFENDANT

Mr. Gordon Robinson instructed by Mrs. Winsome Marsh for Claimant

Mr. Stewart Stimpson instructed by Director of State Proceedings for 1st, 2nd and 3rd Defendants

Heard: October 9, 2006 and November 27, 2006

Straw J

APPLICATION TO EXTEND TIME TO FILE DEFENCE; APPLICATION FOR LEAVE TO ENTER JUDGMENT; APPLICATION TO SET ASIDE

Mr. Vincent Green, the claimant injured himself while working along a portion of the Warsop Road in Trelawny. He was severely injured when the existing road collapsed on him whilst he was working on the site. The road improvement was a project of the National Works Agency, the 2nd defendant. The road is part of lands vested in the Commissioner of Lands, the 3rd defendant on behalf of the Government.

A Claim Form and Particulars of Claim dated and filed on July 28, 2005 were served on the 1st, 2nd and 3rd defendants on August 17, 2005. The Director of State

Proceedings acknowledged service on behalf of the 1st, 2nd and 3rd defendants by way of an Acknowledgement of Service filed in August 30, 2005. Since that date no defence has been filed.

Correspondence passed between both parties in August 2005 to February 2006 concerning the filing of a Defence. A request for information on behalf of the 3rd defendant was also filed.

On February 27, 2006, the claimant made an application to the court for leave to enter judgement against the 1st and 2nd defendants.

Request was also made for judgment to be entered against the 3rd defendant. This was entered on September 28, 2006.

On March 21, 2006, the 1st defendant filed a Notice of Application for permission to file their Defence within 14 days of the application being heard.

On September 28, 2006, a second Notice of Application was filed by the 1st defendant on behalf of the 3rd defendant that the Default Judgment entered by the claimant against the 3rd defendant be set aside and secondly that the 3rd defendant be removed as a Defendant to the Claim.

All three applications are now before the court for consideration.

In the interest of expediency, I will deal firstly with the Application to set aside Default Judgment against the 3rd defendant and to remove the 3rd defendant as a party to the action.

Submission by Counsel on behalf of the third defendant

Mr. Stimpson, on behalf of the 3rd defendant, has sought to argue that the Default Judgment should be set aside as the defendant has a real prospect of success (per Rule 13.3(1) of the Civil Procedure Rules (CPR) 2002.

He submits that the Commissioner of Lands is not a party to be sued by virtue of Sections 3 (1) and 4 (2) of the Crown Property (Vesting) Act, 1960 and Section 3 (1) (c) and Section 13 of the Crown Proceedings Act.

Section 3 (1) and 2 of the Crown Property (Vesting) Act, 1960 states as follows:

- 3 (1) “The Governor General may from time to time appoint a fit and proper person to be Commissioner of Lands.
- (2) The Commissioner for the time being shall be a corporation sole by the name of the Commissioner of Lands and shall have power to acquire, hold and dispose of land and other property of whatever kind.”

Section 4 (1) of the Crown Property (Vesting) Act states that all lands acquired on or after the commencement of this Act for the use of the Government are to be vested in the Commissioner and held by him and his successors in the said office in trust for her Majesty, her heirs and successors.

Mr. Stimpson argues that the Commissioner of Lands holds land for the benefit of the Government and he is therefore an officer of the Crown and although he is described as a corporation sole, he is not empowered to sue or to be sued; that he is therefore entitled to the protection of the Crown Proceedings Act.

Section 3 (1) (c) of said Act reads as follows:

- 3 (1) “Subject to the provisions of this Act, the Crown shall be subject to all these liabilities in tort to which if it were a private person of full age and capacity, it would be subject:

- a. in respect of torts committed by its servants or agents;
- b. in respect of any breach of these duties which a person owes to his servants or agents at common-law by reason of being their employer; and
- c. in respect of any breach of the duties attaching at common-law to the ownership, occupation, possession or control of property.

Section 13 (2) of the said Act provides that civil proceedings against the Crown are to be instituted against the Attorney General.

Mr. Stimpson argues that the Commissioner of Lands is entitled to the protection of the said Act and ought not to be sued in his own capacity. He cited two authorities in support of his interpretation of the Commissioner as an officer of the Crown. These are **L.C. McKenzie Construction Ltd v The Ministry of Housing and the Commissioner of Lands** (unreported) E200/72, 13th November 1972 and **Linton Thomas v The Minister of Housing; Ivanhoe Jackson v The Minister of Housing** (1948) JLR 240.

In the case of **L.C. McKenzie Construction Ltd** (supra), the plaintiff had applied for an injunction against the Minister of Housing and The Commissioner of Lands in circumstances where the Minister of Housing had made an order under Section 4 (1) of the Housing Act, 1968 declaring a particular piece of real estate to be a housing area. This action was a prelude to compulsory acquirement of the property.

The Commissioner of Lands, acting under the direction of the Minister of Agriculture had published a notice in the Jamaican Gazette to the effect that he had taken proceedings for the acquisition of the lands and on the directions of the Minister of Agriculture had taken possession on October 4, 1972 and that the said land now vested in the Ministry of Housing in trust for her Majesty.

The issue in the case was whether or not both defendants, the Commissioner of Lands and the Minister of Housing were entitled to the protection of the Crown Proceedings Law 1958, and in particular Section 17 (1) which provides that the court cannot grant an injunction in any court proceedings against an officer of the Crown if the effect of granting the injunction or making the order would be to give relief against the Crown which could not have been obtained in proceedings against the Crown. Secondly, whether if any action lay, it should have been brought against the Attorney General.

The court considered the questions concerning the Commissioner of Lands. The effect of Section 3 (1) of the Crown Property (Vesting) Law was considered. Duffus, C.J. stated that the Commissioner of Lands is clearly an officer of the Crown within the meaning of the Crown Proceedings Law, that the Act deems him to be a corporation sole and he has the power to acquire, hold and dispose of land and property but he is not given the power to sue or be sued.

However, the learned Chief Justice did narrow the issue to whether the Commissioner of Lands was acting at the time as an agent of the Minister of Housing. He found that what he did (The Commissioner) was on the instructions of the Minister of Agriculture who is not a corporation sole but is a Minister of the Crown and the Minister entrusted with the responsibility for putting in motion the Land Acquisition Law.

The Chief Justice stated as follows at page 5 of the judgment:

“The law therefore makes it abundantly clear that when the Commissioner of Lands takes possession of land under the Land Acquisition Law he does so on behalf of her Majesty in the right of her Government in this island.

...all the evidence in this case points to one conclusion only and that is that the Commissioner of Lands acted strictly within the provisions of the Land Acquisition Law in his capacity as a servant of her Majesty ... and is entitled to the protection of the Crown Proceedings Law....”

Mr. Gordon Robinson, in his submission on behalf of the claimant, has stated that a distinction is to be made between the role of the Commissioner in the above-mentioned case and the present one under consideration. In the facts as outlined above, he is acting on the instructions of the Minister of Agriculture. In the present case, the land is vested in him as a corporation sole.

It is of interest to note that in the **McKenzie** case (supra), the Chief Justice went on to consider the status of the Minister of Housing.

Under the Housing Act, 1968, the Minister of Housing is also deemed a corporation sole and allows for the Minister of Housing to have perpetual succession with a capacity to acquire, hold and dispose of land and other property. The Act does not give him the power to sue or the liability to be sued.

The Chief Justice considered the issue of whether the Minister of Housing functioned under the Act as an autonomous and completely independent body or as a servant or officer of her Majesty. Having examined the Housing Act, 1968, in detail, the Chief Justice made the following statement at page 7 of the judgment:

“... I am unable to accept the proposition that the mere fact of incorporation by itself puts an end to the relationship of principal and agent in respect of acts done by the Minister pursuant to the powers given to him by this Act. In my view whatever functions he performs under the Act is performed as a servant or agent for the Crown.”

In the case of **Linton Thomas v The Minister of Housing, Ivanhoe Jackson v the Minister of Housing** (supra), the Court of Appeal, in considering the same issue, agreed with the decision of the then Chief Justice in the **McKenzie** case.

Rowe, JA, in delivering the judgment of the court stated (at page 248) that each statute creating a corporation sole must be individually examined to discover whether from its terms, the corporation sole is empowered to sue and is liable to be sued.

Review of the Crown Property (Vesting) Act

Section 3 (1) of the Crown Property (Vesting) Act authorizes the Governor General to appoint a Commissioner of Lands.

Section 3 (2) deems him a corporation sole with the power to acquire, hold and dispose of land and other property of whatever kind.

Section 4 (1) states that all lands which immediately before the commencement of the Act were vested in or held by the Chief Secretary are hereby transferred to and vested in the Commissioner.

Section 4 (2) reads as follows:

“All lands acquired by whatever means on or after the commencement of this Act, for the use of the Government of this island, other than lands acquired by the Minister of Housing for the purposes of this Housing Act, shall be vested in the Commissioner ... in trust for her Majesty, her heirs and successors.

Although the Act states that the land is held by the Commissioner in trust for her Majesty, Section 4 (4) restricts the Commissioner from dealing with any land without either specific or general authority in writing from the Minister except where he is

specifically empowered by an enactment or by powers or directions contained in any transfer, conveyance, will or other instrument.

Section 5 defines the Minister as the Minister responsible for Crown Lands.

The very function of the Commissioner of Lands is one of a servant or officer of the Crown. He is the owner of the property on behalf of the Crown.

It is of interest to note that Section 6 of the Crown Property (Vesting) Act deems the Accountant General also as a corporation sole with the power to hold and dispose of land and other property. Section 6 (3) puts similar limits on the Accountant General except that the responsible Minister is the Minister for Finance.

I do not agree therefore with the submissions of Mr. Robinson that the Commissioner can sue or be sued in his own right. The context and text of the Act which deems him a corporation sole, suggests otherwise. I am fortified in this view by an examination of Section 7 of the Main Roads Act which reads as follows:

“The property in the main roads, and in the land pertaining thereto and in all the erections and buildings, mileposts, fences and other things, erected upon and provided for and upon such roads, with the conveniences and appurtenances thereto respectively belonging and the materials of which the same consist and the materials, tools and implements, provided for the repairing of the said roads shall be vested in the Commissioner of Lands or the Accountant General as the case may be for the time being, for the use of her Majesty, the Queen in right of the Government of Jamaica and in all legal proceedings it shall be sufficient to state generally such roads and things to be the property of her Majesty, the Queen.”

It seems clear that Parliament intended both the Accountant General and the Commissioner of Lands to be officers of the Crown. Any claims being made against the

Commissioner are to be made against the Crown and the Attorney General is the party to be sued.

Notice of Application for Court Orders dated September 28, 2006 is therefore granted. The Judgment in Default entered against the third defendant is set aside.

The third defendant is to be removed from the records as a party to the action.

Application for leave to enter judgment against the first and second defendants.

Application by the first and second defendants for extension of time to file Defence.

I now turn to consideration of the above-mentioned applications. On the one hand, the claimant is seeking leave to enter judgment against the first and second defendants for failure to file a defence. On the other hand, the first and second defendants are applying for an extension of time to file their Defence.

Since filing an Acknowledgement of Service on August 30, 2005, the defendants have failed to file a defence. Under Rule 10.3(1) of the Civil Procedure Rules (CPR), they are allowed 42 days to do so. However, the rules allow both parties to consent to an extension of time but this is limited to a maximum of 56 days (per Rule 10.3(9)).

The claimant's attorney wrote to the defendants in November 2005 requesting consent to file their defence out of time. On November 25, 2005, the Attorney General communicated to the claimant that their instructions were incomplete. Counsel for the claimant advised the defendants that she would be proceeding to Default Judgment.

On March 8, 2006, the Counsel for the defendants sent a letter by way of facsimile that permission would be sought to file Defence out of time.

On March 9, 2006, Counsel for the claimant filed a Notice of Application for leave to enter judgment against the first and second defendants. The facsimile was not seen by Counsel for the defendants until sometime on March 9, 2006.

On March 21, 2006, the defendants filed their application requesting permission to file their Defence within 14 days.

Rule 10 (3) (9) of the CPR 2002 allows a defendant to apply for an order extending the time for filing Defence. The rules do not specify particular conditions that must be considered by the court in order to grant or refuse such an application.

However, in considering every application, the court will have regard to the overriding objective of the CPR 2002 (per Rule 1.1 (1) and 2) to deal with cases justly.

In his submissions, Mr. Stimpson has asked the court to consider the application under two limbs.

Firstly, that there is a good explanation for the failure to file a defence within the time required by Rule 10.3(1). Secondly, that the defendants have a good defence to the claim.

Good Explanation for Failure

In her affidavit in support of the application for extension of time, Ms. Julie Thompson deposed that she sought instructions from the relevant Government agency on August 29, 2005, September 29, 2005 and again on November 24, 2005. Her requests continued between December 5, 2005 to January 24, 2006.

Some instructions were received in January but these were insufficient to prepare a defence. Sufficient instructions were received by February 2, 2006 and she advised Counsel for the claimant of this fact by letter dated March 8, 2006. As was stated

previously, the application for leave to enter judgment was filed on March 9, 2006. I have no difficulty in coming to the conclusion that the defendants filed their application for extension within a reasonable time (filed on 21.03.06) after the claimant had applied for leave.

I do not, however, have a very charitable view of the explanation for the delay in filing the defence. Instructions were requested from August 29, 2005. While their attorneys may have sought instructions on a timely basis, it is quite clear that the second defendant did not deal with the matter in a timely way or attached too great an importance to the urgency required.

However, the issue of a good explanation is just one aspect of the totality of circumstances to be considered. In **Finnegan v Parkside Health Authority** (1997) EWCA 2774, the court held that a judge must still consider all the circumstances of the case even in the absence of cogent reasons for the delay as the absence of a reason was only one factor which the court ought to take into account.

Reasonable Prospect of Success of the Defence

In the affidavit of Ms. Julie Thompson, she states that she has been informed by the second defendant that they contracted with D. R. Foote Construction Limited to undertake the construction of the wall and that D. R. Foote Construction Limited subcontracted the work to the fifth defendant. They are contending that the main and sub-contractors are independent contractors and therefore the ones responsible for any injury to Mr. Green.

Mr. Gordon Robinson has submitted on behalf of the claimant that there is no affidavit of merit to ground the defence for the court's consideration as Ms. Thompson is

one of the attorneys for the second defendant and has no knowledge of the facts to which she speaks (per **Ramkissoon v Olds Discount Co. Ltd.** 1961 4 WIR, pg. 72)

However, there are no requirements listed under Rule 10.3 (9) in order to ground the application for extension. It does not even require that the application be in written form. Sections 11(9)1 and 2 of the Civil Procedure Rules (CPR) 2002 read as follows:

“11.9 (1) The applicant need not give evidence in support of an application unless it is required by:

- a. a rule
- b. a practice direction, or
- c. a court order.

11.9 (2) Evidence in support of an application must be contained in an affidavit unless:

- a. a rule
- b. a practice direction, or
- c. a court order.”

otherwise provides.

Since there is no requirement for a written application under Section 10 (3) (9), a fortiori, there is no requirement for affidavit evidence in support of the application. The issue therefore, as to whether there is an affidavit of merit is irrelevant in the present context.

In considering whether there is in fact a good defence, Mr. Robinson has asked the court to consider Section 6 of the Main Roads Act which reads as follows:

“Subject to the directions of the Minister, the laying out, marking, repairing, widening, altering, deviating, maintaining,

superintending and managing of main roads and the control of the expenditure of all moneys ... shall be vested in the Director, with such permanent staff of engineers, superintendents and other subordinate officers as the Governor General may from time to time appoint, and such temporary staff of superintendents and other subordinate officers as may from time to time be appointed, all of whom shall be deemed to be officers of the Public Works Department..."

In my opinion, this section would not disqualify the defendants from a presentation of their defence which ought to be considered by a judge at trial.

The court also bears in mind than an application by the claimant was granted on October 9, 2006 for an extension of the validity of the claim form for six months in order to effect service on the fifth defendant.

In all the circumstances as presented above and in view of the overriding objective of dealing with cases justly, I will therefore refuse the application for leave to enter judgment against the first and second defendants.

The Notice of Application dated March 21, 2006 for an extension of time to file Defence is therefore granted in terms of paragraph 1.

Cost to be costs in the claim.