NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

IN CHAMBERS

C.L. 1997 - S170

BETWEEN RT. HON. EDWARD P.G. SEAGA, P.C.,M.P. - PLAINTIFF

AND THE ATTORNEY GENERAL - DEFENDANT

Dr. Lloyd Barnett, Miss Carol Davis and Miss Dorothy Lightbourne for Plaintiff instructed by O.G. Harding & Co.
Dr. Kenneth Rattray, Q.C., Solicitor General, Douglas Leys, Senior Assistant Attorney General and Lackston Robinson for the Defendant instructed by the Director of State Proceedings.

Heard: July 23, 24, 25, 28, 29, 30 & November 7, 1997.

CORAM: WOLFE C.J.

The Plaintiff is the leader of the Jamaica Labour Party and Member of Parliament for the Constituency of Western Kingston. By virtue of the Constitution of Jamaica, the plaintiff is the duly appointed Leader of the Opposition.

During a joint police and military operation in Western Kingston, more particularly, the community known as Tivoli Gardens, between May 6 to May 8, 1997, four citizens were killed, five others injured by gunshots and damage done to the homes and property of several residents.

Acting upon the instructions of the Plaintiff, in his capacity as a Member of Parliament and Leader of the Jamaica Labour Party, Senator Dr. Percival Broderick, the Chairman of the Jamaica Labour Party, wrote to His Excellency, the Governor-General on May 9, 1997. The purpose of so writing was to request the Governor-General to exercise his powers under the Commissions of Enquiry Act and issue a Commission appointing Commissioners to enquire into the conduct of the security personnel involved in the operations referred to earlier herein.

On May 19, 1997, the Governor-General responded, indicating that he had been advised by the Office of the Solicitor-General that he had no power to issue a Commission of Enquiry in the absence of advice from the Prime Minister or the Cabinet of Jamaica so to do.

The plaintiff contends that by virtue of section 2 of the Commissions of Enquiry Act and the provisions of section 32(1)(b) of the Constitution of Jamaica, it is lawful for the Governor-General acting on his own discretion to issue a Commission of Enquiry without the advice of the Prime Minister or the Cabinet of Jamaica.

Arising out of the refusal of the Governor-General to accede to the plaintiff's request, the plaintiff on the 20th day of June, 1997, issued a Writ, against the defendant, endorsed in the following manner.

> "The plaintiff's claim against the defendant is for declarations that:-

1. Section 2 of the Commissions of Enquiry Act and in particular the words, "whenever he shall deem it advisable" contained in the said section confers on the Governor-General the power to act in his own discretion without advice of the Prime Minister or the Cabinet of Jamaica.

2. By virtue of section 2 of the Commissions of Enquiry Act and section 32(1)(b) of the Constitution of Jamaica, the Governor-General is authorised, in his own discretion, to issue a Commission appointing Commissioners of Enquiry and in so doing is not required to act on the advice of the Prime Minister or Cabinet or a Minister.

3. The conduct of members of the Jamaica Constabulary Force and members of the Jamaica Defence Force during the operation in Western Kingston in the parish of Kingston between May 6, 1997 and May 8, 1997, resulting in the death of four citizens, the injuring by gunshot of five others and damage to homes and property of several residents, constitutes conduct of persons and/or of public institutions which falls within the terms of section 2 of the Commissions of Enquiry Act."

Before me now for determination is a summons, issued at the instance of the defendant, to strike out the Statement of Claim and the Endorsement of the Writ and to Dismiss the Action. The summons as amended is in the following terms:

"Application by the defendant for an Order that:

1. The Statement of Claim and the Endorsement of the Writ be struck out and the action be dismissed pursuant to section 238 of the Judicature (Civil Procedure Code) Law and the inherent jurisdiction of the Court on the grounds that:

(a) The Writ of Summons and the Statement of Claim disclose no reasonable cause of action redressable at the instance of the plaintiff against the defendant.

(b) The Writ of Summons and the Statement of Claim disclose no reasonable cause of action against the defendant.

(c) The action is an abuse of the process of the Court.

(d) The Writ of Summons and the Statement of Claim contain no allegations of facts on the basis of which the declaration numbered three can be maintained.

(e) The Court has no jurisdiction to grant the declarations sought."

Let it be noted that this is not a representative action, that is, it is not an action brought for and on behalf of those who suffered loss of life and property as alleged. It is an action brought by the plaintiff on his own behalf as a private citizen.

LOCUS STANDI

The position of the defendant in this ground is that the plaintiff, the Rt. Hon. Edward Seaga, has no locus standi to maintain the action or to seek the relief sought.

Dr. Rattray invited the Court to so conclude, on the basis that the Writ of Summons and Statement of Claim disclose no legal right or interest of the plaintiff which is in issue. The rights which could be asserted for the appointment of a Commissioner of Enquiry under the Commissions of Enquiry

Commissions of Enquiry Act derive any personal rights over and above the general public.

It is further submitted that the plaintiff failed to assert in the Writ of Summons and/or Statement of Claim that he has suffered any loss or damage by reason of the Governor-General's action which he seeks to impugn. The jurisdiction of the Court, he submitted, is limited to declaring contested legal rights of the parties represented in the litigation and not those of anyone else. For this proposition he relies on the dictum of ***Lord Diplock in Gouriet v. Union of Post Office Workers [1978] A.C. 435 at page 501.***

> "Authorities about the jurisdiction of the courts to grant declaratory relief are legion. The power to grant a declaration is discretionary; it is a useful power and over the course of the last hundred years it has become more and more extensively used - often as an alternative to the procedure by way of certiorari in cases where it is claimed that a decision of an administrative authority which purports to affect rights available to the plaintiff in private law is ultra vires and void. Nothing that I have to say is intended to discourage the exercise of judicial discretion in favour of making declarations of right in cases where the jurisdiction to do so exists. But that there are limits to the jurisdiction is inherent in the nature of the relief: a declaration of rights.
>
> The only kinds of rights with which courts of justice are concerned are legal rights; and a court of civil jurisdiction is concerned with legal rights only when the aid of the court is invoked by one party claiming a right against another party, to protect or enforce the right or to provide a remedy against that other party for infringement of it, or is invoked by either party to settle a dispute between them as to the existence or nature of the right claimed. So for the court to have jurisdiction to declare any legal right it

> must be one which is claimed by one of the parties as enforceable against an adverse party to the litigation, either as a subsisting right or as one which may come into existence in the future conditionally on the happening of an event.
>
> The early controversies as to whether a party applying for declaratory relief must have a subsisting cause of action or a right to some other relief as well can now be forgotten. It is clearly established that he need not. Relief in the form of a declaration of right is generally superfluous for a plaintiff who has a subsisting cause of action. It is when an infringement of the plaintiff's rights in the future is threatened or when, unaccomapnied by threats, there is a dispute between parties as to what their respective rights will be if something happens in the future, that the jurisdiction to make declarations of right can be most usefully invoked. But the jurisdiction of the court is not to declare the law generally or to give advisory opinions; it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of anyone else."

The defendant moves the Court to find that essentially the plaintiff is asserting by means of a private law action a matter which is essentially to be resolved by public law. The plaintiff has not been prejudiced over and above the public at large and therefore acquires no legal status as a result of the refusal of the Governor-General to establish the Commission of Enquiry under the Commissions of Enquiry Act. This is so because the Act was not passed for the protection of private persons qua private persons. It is an Act which was enacted to protect the rights of the public at large.

The express language of the Act, it is submitted, confers a jurisdiction which is limited to matters for the welfare of the public. In these

circumstances, the plaintiff cannot claim a private right derived from the Act over and above the public at large so as to sustain a private law action as contained in the Writ of Summons. This proposition, by Dr. Rattray, finds support in ***Heywood v. Hull Prison Board of Visitors and another [1980] 3 All E.R. P. 594 at 599.***

The failure of the Governor General to establish a Commission of Enquiry under the Commissions of Enquiry Act, affects public rights and the Court has no jurisdiction to declare public rights except at the instance of the Attorney General ex officio or ex relatione since he is the only person recognised by public law as entitled to represent the public in a Court of law.

It is the contention of the applicant, that the status of the plaintiff, as Leader of the Jamaica Labour Party and Leader of the Opposition and Member of Parliament for the constituency of West Kingston in which Tivoli Gardens is situated, confers upon him no right to assert a public right in a Court of law as distinct from political rights in the Court of Parliament. To permit the plaintiff, so to do, it is urged, is to contravene a fundamental principle of English Law which states that private rights can be asserted by private individuals but public rights can only be asserted by the Attorney General.

In ***Gouriet's case supra Lord Wilberforce*** at p.477 declared:

> "It can properly be said to be a fundamental principle of English law that private rights can be asserted by individuals, but that public rights can only be asserted by the Attorney General as representing the public. In terms of Constitutional law, the rights of the public are vested in the Crown,

> and the Attorney General enforces them as an officer of the Crown. And just as the Attorney General has in general no power to interfere with the assertion of private rights, so in general no private person has the right of representing the public in the assertion of public rights. If he tries to do so his action can be struck out."

Attempt to controvert this hallowed principle was rejected by the House of Lord per Lord Wilberforce referring to cases cited from the year books. He said:

> "They were not cases of individuals asserting rights belonging to the public. No instance of this could be brought forward, whether in ancient or modern times."

To depart from the distinction between public rights and individual rights said, Lord Wilberforce at p. 482:

> "....is not a development of the law but the destruction of one of its pillars."

It is a cardinal principle that an applicant who seeks a declaration under Order 15 Rule 16 of the English rules which is in pari materia with section 239 of the Judicature (Civil Procedure Code) Law must be claiming a relief from some real liability or disadvantage which affects him and which is justiciable and enforceable through the Courts.

The applicant asserts that the respondent's claim offends this principle, in that he does not seek any real relief from any liability neither does he seek to assert any personal rights which have been violated or any personal liabilities to which he is subject. The Court has no jurisdiction to grant declarations for the

purpose of granting relief in respect of matters which essentially affect social, moral or political rights.

In *Guaranty Trust v. Hannay [1914-15] All E.R. Rep. P.24 at pp 38 -39,* ***Bankers L.J.*** explained that the rule in Order 15 & 16, which is the parallel of section 239 of the Judicature (Civil Procedure Code) Law -

> "must be read in the sense which it had always previously borne - that is to say, a declaration of some right which the plaintiff maintains that he has against the person or persons whom he has made parties to the suit."

In the instant case the plaintiff does not so claim. What he seeks is to have the Court declare under what circumstances the Governor General can set up a Commission of Enquiry under the Commissions of Enquiry Act. He does not assert that any legal rights of his would be violated neither does he seek relief from any liabilities or disadvantages enforceable in the Courts for which a declaration would give relief.

Dr. Barnett on behalf of the plaintiff submitted:

(i) That when an issue arises as to the interpretation of the Constitution or any legislative instrument under our constitutional system it is the Judges of the Court and not the Attorney General or any Minister of Government who have jurisdiction to determine it.

(ii) That the determination of questions of law or the extent of the powers of a public authority or public body are appropriate for

declaratory relief and are now accepted to be among the main purposes of the declaratory judgment.

(iii) The Court's jurisdiction to entertain a claim for a declaration is not dependent on whether the applicant has a cause of action but whether the applicant has a sufficient interest in the subject matter of the declaration.

Addressing the declaratory jurisdiction of the Supreme Court he observed that the superior Courts established in Jamaica were patterned on the English Courts and eventually amalgamated in the Supreme Court, with all the jurisdictions at law and equity of the English Courts. See the Judicature (Supreme Court) Act sections 4, 27, 28, 48(g).

He contends that the plaintiff/respondent has raised a live and important point of law in his pleadings and is therefore entitled to have it adjudicated on at the trial in accordance with the provisions of section 236 of the Judicature (Civil Procedure Code) Law which states -

> "Any party shall be entitled to raise by his pleadings any point of law and, unless, the Court or Judge otherwise orders, any point so raised shall be disposed of by the Judge who tries the case at or after the trial."

The modern development of the declaratory remedy has accorded a wide jurisdiction and flexible discretion to the Courts. This approach, Dr. Barnett contends, is reinforced by section 239 of the Judicature (Supreme Court) Act which states that -

> "no action or proceeding shall be open to objection on the ground that a mere declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed, or not."

In ***Ikebife Ibeneweka v Peter Egbuna [1964] 1 W.L.R. 219 at p. 224*** the Privy Council opined:

> "Generally speaking, the rules of law and practice that he had to follow were those 'for the time being observed in England in the High Court of Justice' (High Court Law, 1956, sections 14 and 15). These rules include the power under Order 25, r 5 of the Rules of the Supreme Court which enables the Court to make 'binding declarations of right, whether any consequential relief is or could be claimed or not'. Much has been said in various reported judgments about the nature of the power thus vested in the Court, but none of these observation detracts from the two primary considerations, that the power to make declarations is conferred, surely not by accident, in wide and general terms, and that which is conferred is a discretion to be exercised according to the facts of each individual case."

Dr. Rattray concedes that where private rights are in issue the Court is vested with wide powers to make declarations defining the rights of the parties and points out that the cases of ***Guaranty Trust Co. Of New York v. Hannay (supra)*** and ***Ikebife Ibeneweka v. Peter Egbuna (supra)*** are examples of the Court using its wide power to make declarations defining the rights of the parties, where private rights were in issue.

I am of the view that the point is validly made. In Gouriet's case (supra) Lord Fraser at page 522, said -

> "There is no doubt that when private rights are in issue the Courts have very wide powers to make declarations defining the parties' rights - see Guaranty Trust Co. Of New York v. Hannay & co. [1915] 2 K.B. 536 and Ibeneweka v. Egbuna [1964] 1 W.L.R. 219,225 where Lord Radcliffe accepted that the power of the Court in such matters was 'almost unlimited', but that wider power cannot avail the plaintiff in these proceedings because his action is not concerned with defining his private rights."

Continuing at p. 523, Lord Fraser observed:

> "The case of London Association of Shipowners and Brokers v. London and India Docks Joint Committee [1892] 3 Ch. 242 might at first sight appear to support a wider power to make declarations but that is not really so. All the learned judges who took part in the decision thought the plaintiff would only be entitled to a declaration if their private rights were being injured or threatened. See Lindley L.J. at pages 258-259, Bowen L.J. at page 1261 and Kay L.J. at page 272."

Further on, in his judgment, Lord Fraser pointed out that all the cases cited, where declarations concerned with public rights were made at the instance of private citizens suing alone, were cases in which either their private rights were infringed or they had suffered special damage by the infringement of the public rights.

Referring to the Statement of Claim, Dr. Barnett points to the Constitutional status of the plaintiff, to his relationship to the constituency affected and the legitimate interest in the subject matter. He submits that the plaintiff is no busy-body, but someone whose constitutional status and position invest him with a proper interest in the resolution of an issue of law as to the functions of the local "Head of State" and he is entitled to have access to the

Courts for that purpose. He contends that a person with a legitimate interest in the resolution of that question will not be barred from access to the Courts.

For this proposition he relied on three cases, which I shall examine:

1. ***Tonkin and Others v. Brand and Others and Attorney General for the State of Western Australia (1962) W.A.R. 2.***

This was an action brought by the plaintiffs, each being a member of the Legislative Assembly of the Parliament of Western Australia against each member of the Executive Council (excluding His Excellency, the Governor) and against the Attorney General in his Office, claiming a declaration that in the events as pleaded the defendants and each of them were under a duty to advise the Governor to issue a proclamation under the provisions of the Electoral District Act 1947 - 1955 and to consent to his so doing.

The plaintiffs had more than 'a legitimate interest' they had a right which was being denied. Wolff, C.J. said:

> "In my opinion, each of the plaintiffs has a right as a voter for the electorate which he represents to have the matter brought before the Court for its determination. Section 17(3) of the Electoral Act 1907-1959 states that any member of the Legislative Assembly and the wife of any member of the Legislative Assembly may claim to be enrolled, for the district represented by such member and when so enrolled shall be deemed to live in such district and if that district is wholly or partially included pursuant to the provisions of any Act in another district however named that member and the wife of that member may claim to be enrolled for that other district and if that member is a candidate for election in respect of that other district while so enrolled may vote at the general election next following the inclusion and while so enrolled and

> while that member is such a candidate be deemed to live that other district."

The right to vote is one which is recognised by law as furnishing a ground of action if it is denied or threatened. See ***Ashby v. White (1704) 2 hd. Raym. 938.***

2. ***Law Society of Lesotho v Minister of Defence and Internal Security and Attorney General [1988] L.R.C. (Const.)***

> "Three legal practitioners, while pursuing a habeas corpus application in respect of a client, were themselves detained by police officers - no charges were preferred against them. Two were released after one day, the third was released after two days when the High Court granted a rule nisi in habeas corpus, but he was re arrested the following day and released only three days later after the Court had granted a second rule nisi.
>
> The Law Society of Lesotho applied for declarations.

The matter came before the Court by way of Judicial Review.

Cullinan C.J., said:

> "Under Order 53 in England an application for judicial review need show no more than "sufficient interest".

Order 53 has no application in Jamaica. In this jurisdiction we are bound by the common law position which requires an applicant for a declaration to show that some right which is vested in him has been infringed or is being threatened.

In Lesotho's case the Court held that the applicant had a statutory interest in the subject matter and therefore was an "interested person" within the meaning of section 2(1) of the High Court Act 1978.

The plaintiff in the instant case alleges no infringement or threatened infringement of any right vested in him. His status as Leader of the Opposition, Member of Parliament for West Kingston and Leader of the Jamaica Labour Party confers no vested right in him in this matter. As Dr. Rattray quite rightly pointed out, the plaintiff's status does not confer upon him any standing to assert a public right in a court of law as distinct from political rights in the Court of Parliament.

See ***Gouriet v. Union of Post Office Workers (supra) per Lord Wilberforce at p.80.***

> "It can be properly said to be a fundamental principle of English Law that private rights can be asserted by individuals but that public rights can only be asserted by the Attorney General as representing the public."

Whether or not the Governor-General can act independently of the Prime Minister or the Cabinet in appointing Commissioners of Enquiry under the Commissions of Enquiry Act, is essentially a matter of Public Law.

3. ***Park Oh Ho and Others v Minister of Immigration and Ethnic Affairs [1990] L.R.C. (Const) 607.***

This was a case of judicial review pursuant to section 16 of the Administrative Decisions (Judicial Review) Act 1997 (Cth.)

Dr. Barnett concedes that a person whose only interest is in a theoretical or hypothetical question will have no locus standi. He also concedes that if there is no dispute or if the dispute has no factual foundation or is based on hypothetical facts or if the dispute ceased to be of any practical importance, the Court will decline to adjudicate. See ***Re Barnato (deceased) Joel and Another v. Sanges and Others (March 12, 1949) All E.R. [vol. 1] 515.***

As between these two positions, it is contended, the matter as to locus standi has to be determined on a case by case basis. Even where no action has yet been taken, if a person has a genuine need to know the legal position, the Courts will permit him to seek a declaration.

I find the submission untenable.

The case of ***Ealing Borough Council v. Race Relations Board*** [1972] 2 W.L.R. 71 which is cited in support, does not in my view support this submission. It is not every person who desires or needs to know the legal position, who will be permitted to seek a declaration. In the cited case, section 19 of the Race Relations Act 1968, empowered the Race Relations Board to bring an action for any act alleged to be unlawful by virtue of Part 1 of the said Act

Lord Diplock's observations in ***Inland Revenue Comrs v. National Federation of Self-Employed and Small Business Ltd. [1981] 2 All E.R. 93 at p.103 letters g-h*** are to be seen in the light of Order 53 which I have already stated has no relevance in this jurisdiction. It may very well be that the time has

arrived for the Order 53 procedure to be enacted in Jamaica. Until it is so enacted, we are bound to follow the pre Order 53 position.

Neither in the Endorsement on the Writ nor in the Statement of Claim has the plaintiff alleged that he has any vested right which has been infringed or which is being threatened. In the circumstances, I hold that he has no locus standi to seek the declarations sought.

ABUSE OF THE PROCESS OF THE COURT

The applicant has submitted that a person who seeks to establish that a decision of a public authority infringes rights which are entitled to protection under public law must in Jamaica proceed by way of application for Judicial review by means of one of the prerogative orders of mandamus, prohibition or certiorari in accordance with section 564 of the Judicature (Civil Procedure Code) Law.

In proceeding by way of Writ of Summons, the plaintiff is guilty of an abuse of the process of the Court by evading the safeguards provided for in section 564.

The safe guards include the following:

(i) The need to obtain leave thereby providing an opportunity of weeding out groundless or unmeritorious claims.

(ii) The need to support the application by affidavit thereby requiring the utmost good faith (uberrimae fides).

(iii) The ability to have a simple and speedy procedure for the determination of matters of public interest which is available by section 564.

It is urged by the applicant that the public interest in good administration requires that public authorities and third parties, who may be indirectly affected by the decision, should not be kept in suspense as to whether it has the effect of a decision that is valid in public law. To proceed by way of writ of summons could prolong the period of determination of the issue.

In support of this proposition reliance is placed upon the dictum of ***Lord Diplock in O'Reilly v Mackman and Others and Other Cases [1982] 3 All E.R.*** 1124 at 1133.

> "An action for a declaration or injunction need not be commenced until the very end of the limitation period; if begun by Writ, discovery and interlocutory proceedings may be prolonged and the plaintiffs are not required to support their allegation by evidence on oath until the actual trial. The period of uncertainty as to the validity of a decision that has been challenged on allegations that may eventually turn out to be baseless and unsupported by evidence on oath, may thus be struck out for a very lengthy period, as the actions of the first three appellants in the instant appeals show. Unless such an action can be struck out summarily at the outset as an abuse of the process of the court the whole purpose of the public policy to which Order 53 was directed would be defeated."

It is further contended on behalf of the applicant that the plaintiff/respondent lacked the necessary title to represent the public interest, consequently, the action commenced by Writ of Summons constituted an abuse of the process of the Court. Further, the Writ discloses no right of the

plaintiff/respondent under either public law or private law, which has been violated or threatened, hence the Writ is an abuse of the process of the Court and should be struck out.

Dr. Barnett submitted that the applicant's case is based on a misconception as to the nature of the plaintiff-respondent's action. Whereas a person seeking to establish that a decision of a public authority infringes rights which are entitled to protection under public law should proceed by way of application for a prerogative order, the plaintiff-respondent as is stated in his pleadings, is seeking a determination of the scope and extent of the powers of a constitutional authority. The prerogative order proceedings in these circumstances, Dr. Barnett argues are not appropriate. The essential question, it is argued, is whether the plaintiff-respondent has acted legally and properly in seeking a determination of the issue as to the Governor-General's power in an action commenced by Writ.

I cannot agree with Dr. Barnett that the plaintiff-respondent's action seeks, simpliciter, a determination of the scope and extent of the powers of a constitutional authority. Whichever way the pleadings are couched, in fact what is being challenged is the decision of the Governor General that he cannot constitute a Commission of Enquiry without the advice of the Prime Minister or the Cabinet. The Governor-General has made a decision. The declaration sought is to say whether or not that decision is correct.

The refusal of the Governor-General to constitute a Commission of Enquiry is a decision which sounds in public law. The question as to whether or not he can exercise the statutory power under section 2 of the Commissions of Enquiry Act and Section 32 (1)(b) of the Constitution of Jamaica is purely a legal one.

Does this therefore mean that the plaintiff is bound to proceed by way of the prerogative order proceedings as opposed to by way of Writ and Summons. Dr. Rattray had pointed to the need to have a simple and speedy procedure for the determination of matters of public interest. This need is met by section 564 of the Judicature (Civil Procedure Code) Law. Section 564 is not the only procedure which can ensure a speedy resolution to the matter. The Judicature Civil Procedure Code provides that the Court can make a speedy trial order in an ordinary action.

The point is well made by Dr. Barnett that where a party has a legal right of access to the Court it is rarely that such a party will be barred from proceeding because there is an alternative remedy unless there is some statutory provision which seeks to compel him to opt for one particular method.

Any pleadings or endorsement of writ which is an abuse of the process of the Court may be ordered to be struck out or amended. This express power conferred on the Court is derived from, and is parallel with the inherent jurisdiction of the Court to prevent the abuse of its process.

Abuse of process is often used inter-changeably with the terms frivolous or vexatious. An action is an abuse of the process of the Court where it is pretentious or absolutely groundless. See ***Castro v. Murray 1875 L.R. 10 Ex. 213 per Bramwell B at p 218 and Dawkins v. Price Edwards of Saxe-Weimar (1876) 1 Q.B.D. per Blackburn J*** at 502.

In such circumstances, the Court has the power to stop it summarily and prevent the time of the public and the Court from being wasted. The term abuse of the process of the Court connotes that the process of the Court must be carried out properly, honestly and in good faith. The injunction is that striking out on the basis of abuse of the process should not be lightly done, yet it may often be required by the very essence of justice to be done. See ***Metropolitan Bank v. Pooley [1885] 10 App. Cas. 210 per Lord Blackburn at*** 221.

In the light of the above had the locus standi of the plaintiff been established so as to make him a proper party to commence the proceedings, I would have refrained from striking out the action as being an abuse of the process of the Court.

WRIT OF SUMMONS AND STATEMENT OF CLAIM DO NOT DISCLOSE ANY CAUSE OF ACTION AGAINST THE DEFENDANT

The plaintiff's case is that the Governor-General is empowered under the Commissions of Enquiry Act to constitute a Commission of Enquiry, independent of any advice from the Prime Minister or the Cabinet. If this contention is correct, Dr. Rattray submits that the Governor-General would be

acting as a persona designata and as such his acts would be personal acts, in which case, the action would not be maintainable against the Attorney General but against the Governor-General himself.

In ***Hochoy v N.U.G.E. And Others [(1964), 7 W.I.R. T] 174, Wooding C.J.*** held that the Governor General of Trinidad and Tobago was a proper defendant in a action for a declaration. In the exercise of powers conferred on him by section 2 of the Commission of Inquiry Ordinance Cap. 7 No. 2 (T) the Governor-General of Trinidad and Tobago appointed a Commission of Inquiry into certain matters set forth in the Gazette Extraordinary published on September 26, 1963. Three separate actions were brought by the respondents in which the appellant was named as a defendant and by which, as against him, a declaration was claimed that the appointment was ultra vires and of no effect. To the three writs he entered conditional appearance and thereupon applied to set them aside. A judge in chambers refused to do so. On appeal it was argued - (i) that as against the Queen's representative in this country he was immune from suit, and that the Court had no jurisdiction over him, and (ii) that the Court had no jurisdiction to make the declaration sought for the reason that Order 26 R 5 of R.S.C. [T] was not binding on the Crown.

> Held (i) The Courts of the country are the Queen's Courts and not that of her representative and as her immunity from suit in her courts was essentially personal, the appellant as her representative could lay no claim to such a privilege.

(ii) When questions arise as to the quality and validity of an act done by the appellant, on the assumption that it is within his powers as Governor-General, it is within the province of the courts to determine its true character and his competence to do it.

(iii) The appellant as the person designated by the ordinance to exercise the statutory power to appoint a Commission of Inquiry was a proper defendant to answer the challenge that the appointment made by him was ultra vires and accordingly, null and of no effect.

Wooding, C.J. and Hyatali J.A. both expressed the view that although the Governor-General was a proper defendant, in future the Attorney General should be sued.

Per Wooding, C.J.

> "Nevertheless, having discharged my duties as a judge, I would suggest that in future the practice be followed of naming the Attorney General as defendant whenever the validity of any act of state done by the Governor-General is being called in question. It is not in dispute that the appointment by the appellant of the commission of inquiry which is said to be in excess of the statutory power is one which by section 63 of the Constitution can only have been made in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet. Accordingly, although the appointment of the Commission was his act by reason that the Ordinance names him as the person to perform it, it is really an act of the Government, or as it may be called, an act of State. In my personal view, the ordinary civilities dictate that the same course should be followed in this country as was followed in New Zealand when Cook

> and others challenged the validity of an appointment made there by the Governor in Council under its Commissions of Inquiry Act 1908. They sued the Attorney General. Sec. 28 N.Z.L.K. 504. I think that the same procedure might commendably be adopted here. I recommend accordingly."

Per: Hyatali J.A.

> "As a footnote merely, to this judgment, I would add that the constitutional status of the State is now such that it would be more in keeping with its dignity, if matters of this kind were litigated against the Attorney General. No prejudice is likely to result from adopting this procedure and I join with the learned Chief Justice in commending it for acceptance."

The essential difference between the cited case and the instant case as pointed out by Dr. Rattray, is that, in that case the Court found that the statutory power was exercisable by the Governor General on the advice of the Cabinet or a Minister. In the instant case, the plaintiff seeks a declaration that the statutory power is exercisable by the Governor-General independently of any advice by the Prime Minister or the Cabinet.

Dr. Barnett has submitted that the executive authority of Jamaica is exercisable by virtue of section 68(2) of the Constitution by the Governor-General, either directly or through officers subordinate to him. By virtue of section 79 of the Constitution, the Attorney-General is the principal legal adviser to the Government of Jamaica. The Governor-General acted on the advice of the Attorney-General and on that basis alone, the Attorney General is a proper party to be sued.

I disagree with that proposition. If the contention of the plaintiff is correct, then the power is by statute that of the Governor-General to exercise. He is not bound to act upon the advice of anyone. The discretion would be his to exercise and a party advising the Governor-General cannot be made liable when he exercises or fails to exercise his statutory power.

In my view, reliance on section 13(2) of the Crown Proceedings Act affords the plaintiff/respondent no haven of rest. The definition of "civil proceedings" therein -

> "does not include proceedings which in England would be taken on the Crown side of the Queen's Bench Division."

The proceedings in the instant case are concerned with Public Law and as such would be taken on the Crown side of the Queen's Bench Division in England.

The contention that the plaintiff/respondent does not have to show a cause of action against the Attorney-General in the traditional sense by virtue of sections 236 and 239 of the Judicature (Civil Procedure Code) Law is in my view untenable. If the Governor-General is empowered to act independently of anyone then the act is not an act of State. It is an executive act for which he is liable. If the contention of the plaintiff/respondent is correct, no one can tell the Governor-General how he is to exercise his discretion, re the constituting of a Commission of Enquiry under the Act. Such a decision, the plaintiff/respondent contends is his and his alone.

In ***Rupert S. Wilmot - Francis v. Sir Howard Cooke, O.N., G.C.M.G., G.C.V.O., et al Suit E.154/94 (unreported) Judgment delivered on June 20, 1995.*** ***Harrison J,*** as he then was, held:

> "When the Governor-General issued his writ of election under section 3 of the Representation of the People Act, in satisfaction of the requirements of section 45 of the Constitution, he was performing an official act, on the directive of the Hon. Prime Minister, an executive function. He had no power or discretion to do otherwise than to comply with the directive. He was performing the function and duties of Her Majesty, as her representative in Jamaica. On a challenge of the issue of such a writ of election, it is unnecessary to sue the Governor-General, in pursuance of one's claim - see section 3 of the Crown Proceedings Act, supra. Furthermore, the status, power and lofty level of the Office of Governor-General portrays a constitutional flavour that demands that it be free from suit."

In concluding Harrison J. stated:

> "This Court is of the view that the Governor-General is in the circumstances of his office, in the performance of his duties as Her Majesty's representative in Jamaica, under the said Constitution, immune from suit."

With deference to the learned Judge, I would not be prepared to go as far as he has gone. I prefer to abide by the wise counsel of Wooding C.J. and Hyatali J.A. in HoChoy v. N.U.G.E. and others (supra) and to hold on that basis that the Attorney-General has been properly joined as a party in the instant proceedings.

THE WRIT OF SUMMONS AND STATEMENT OF CLAIM CONTAIN NO ALLEGATIONS OF FACTS ON THE BASIS OF WHICH THE DECLARATION NUMBERED 3 CAN BE MAINTAINED.

The applicant has submitted that the declaration which is sought to wit:

> "That the conduct of Members of the Jamaica Constabulary Force and Members of the Jamaica Defence Force during the operation in Western Kingston in the parish of Kingston between May 6, 1997 and May 8, 1997, resulting in the death of four citizens, the injury by gunshot of five others, and damage to homes and property of several residents, constitutes conduct of persons and/or of a Public Institution which falls within the terms of S 2 of the Commissions of Enquiry Act."

would essentially have the Court give a ruling as to the meaning of words contained in section 2 of the Commissions of Enquiry Act and in particular, whether the conduct of members of the Jamaica Constabulary Force and members of the Jamaica Defence Force during the operation in Western Kingston in the parish of Kingston between May, 1997 and May 8, 1997, resulting in the death of four citizens, the injuring by gunshot of five others, and damage to homes and property of several residents constitutes conduct of persons and/or of a Public Institution which falls within the terms of section 2 of the Commissions of Enquiry Act.

Such a declaration, the applicant contends, is objectionable in law in the circumstances of the instant case for the following reason:

> "There is nothing in the Writ of Summons and Statement of Claim constituting a dispute as to whether the enquiry into the conduct referred to would be 'for the public welfare'."

The Governor-General, the applicant urges, has not expressed his views on this matter and the Court will not answer questions which are academic or hypothetical.

See (i) ***Russian Commercial and Industrial Bank v. British Bank for Foreign Trade [1921] 2 A.C. 438.***

(ii) ***Re Barnato (dec'd) Joel v. Sanges [1949] 1 All E.R. 515.***

I entirely agree with the submission of the Learned Solicitor General. All that the Governor General has said is that he has been advised that he cannot lawfully constitute a Commission of Enquiry without being advised so to do by the Prime Minister or the Cabinet. It would be most inappropriate in the circumstances to grant the particular declaration in terms sought in paragraph 3 of the reliefs asked for.

Finally, I find that there is really no factual basis upon which the declaration could be granted. As Dr. Rattray quite rightly pointed out, the purpose for requiring the Commission of Enquiry is to ascertain how the men of the Jamaica Constabulary Force and the Jamaica Defence Force conducted themselves during the operations.

THE COURT HAS NO JURISDICTION

Having regard to my findings herein, I find it unnecessary for the determination of the issues raised in this application to deal with the question of the Court's jurisdiction to grant the declarations sought.

Finally, for the reasons contained herein, I order that the Writ of Summons, the Endorsement and Statement of Claim be struck out.

The Action is accordingly dismissed.

Subject to any arguments which might be raised, in the circumstances of the case, I Order that each party bears its own costs.