IN THE COURT OF APPEAL OF BELIZE AD 2014

CIVIL APPEAL NO 46 OF 2011

CARIBBEAN CONSULTANTS &
MANAGEMENT LIMITED **Appellant**

v

ATTORNEY GENERAL
THE HON. DEAN BARROW
MINISTER OF FINANCE
THE HON. GASPAR VEGA
MINISTER OF NATURAL RESOURCES **Respondents**

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BEFORE

The Hon Mr Justice Sir Manuel Sosa	President
The Hon Mr Justice Dennis Morrison	Justice of Appeal
The Hon Mme Justice Minnet Hafiz-Bertram	Justice of Appeal

E A Marshalleck SC for the appellant.
N Hawke, acting Solicitor General, for the respondent.

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11 March 2014 and 5 February 2015.

SIR MANUEL SOSA P

[1] I have had the privilege of reading, in draft, the judgment of Hafiz Bertram JA and wish only to say that I concur in the reasons for judgment given, and the orders proposed, in it.

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SIR MANUEL SOSA P

MORRISON JA

[2] I have had the great pleasure of reading in draft the judgment prepared by my learned sister, Hafiz JA, in this matter. I agree with it and there is nothing that I can usefully add.

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MORRISON JA

HAFIZ-BERTRAM JA

Introduction

[3] The genesis of this appeal arises out of Claim No. 228 of 2006 in which Arana J, in light of the provisions of *section 19(1)(b)* of the *Crown Proceedings Act,* granted a declaration that Caribbean Consultants & Management Ltd. ("the appellant") is entitled to specific performance of an agreement partly in writing, in which the Government of Belize ("GOB") agreed to pay the appellant compensation for certain land which was compulsorily acquired, and to return a certain portion of the land which was available for transfer back to the appellant.

[4] The failure of the respondents to comply with Arana J's judgment resulted in further proceedings, Claim No. 333 of 2008, which is the subject of this appeal. The appellant, by a fixed date claim form, sought a declaration that the failure of the respondents to perform the agreement to compensate them for the compulsory acquisition of their land in the terms set out in Arana J's judgment, amounts to the arbitrary deprivation of their property in breach of *section 3(d)* of the *Belize Constitution*.

[5] Awich J, as he was then, the trial judge in Claim No. 333 of 2008, dismissed the claim. He considered that Claim No. 333 was about enforcing the judgment of Arana J in Claim No. 228 of 2006. He stated "*that it would have been proper and convenient to have brought the part of this claim which is about relief other than constitutional relief in an application for orders for enforcement measures on case file No. 228 of 2006. Alternatively, it would have been convenient to have kept this claim No. 333 of 2008, also in the court of Arana J.*"

[6] The learned trial judge in his determination stated that, although the appellant did not refer to section 17 of the Constitution, it is the section that enforces and gives effect to section 3 of the Constitution. Further, that it cannot be concluded that the facts of Claim No. 228 of 2006 or Claim No. 333 of 2008 disclosed any infraction of section 3(d) or section 17 of the Constitution. He found that the disagreement between the parties could have been taken to court as an application for variation and enforcement of the order of Arana J made on 25 June 2007.

[7] The appellant in its appeal against the judgment of the learned trial judge raised constitutional issues, the issue of *res judicata* and the issue of costs.

Brief factual background

[8] The appellant was duly registered as the proprietor of 127 acres of land ("the land") or thereabouts situate along the Haulover Creek in Belize City, Belize, under and by virtue of Transfer Certificate of Title ("TCT") dated 2 August 1961 and registered in the Land Titles Register, Volume 4 at folio 1005.

[9] On 3 December 1994, GOB compulsory acquired what was then referred to as Parcel 1708, Block 17, in the Caribbean Shores Registration Section, for a public purpose, namely, the expansion of Belize City. The first and second declarations of acquisition were published in the Belize Gazette on the 22 October 1994 and 3 November 1994, respectively.

[10] The land acquired by GOB included the appellant's land, being the 127 acres held under TCT dated 2 August 1961, situated at the Haulover Creek.

[11] The appellant thereafter entered into negotiations with GOB in an attempt to agree to compensation for the land and GOB through the Ministry of Natural Resources reached an agreement with the appellant on 4 April 1997, to pay compensation for the land at the rate of BZ$23,000.00 per acre plus interest at the rate of 8 per cent per annum from December 1996 on the reducing balance until payment in full (see letter dated 4 April 1997 from Barrow & Co for the appellant accepting the offer from GOB).

[12] On 20 May 1997, GOB made a payment of $27,900.00 towards the agreed compensation. On 26 May 1999, GOB paid $20,000.00 interest accrued on the agreed compensation. Correspondence between the parties showed that GOB did not agree to a payment schedule.

[13] On 20 August 1997, GOB caused to be published in the Belize Gazette a corrigendum purporting to amend the schedule to the notices previously published to acquire the land in order to exclude the appellant's land which was compulsorily acquired by them in 1997. By letter dated 21 October 1997 addressed to Barrow & Co., the Commissioner of Lands and Surveys proposed to return the land.

[14] A dispute arose between the appellant and GOB as to the legal effect of the corrigendum. GOB contended that the notice was effective to disacquire the land, while the appellant contended that it was not, and that it was entitled to be paid compensation as agreed for the land.

[15] Notwithstanding the dispute between the parties, GOB agreed to pay to the appellant interest on the agreed value of the land from the date of acquisition to the date of publication of the corrigendum, being 20 August 1997.

[16] On 7 December 2001, the Attorney General agreed to pay all interest then outstanding and due to the appellant, being $787,718.38, in six equal instalments.

[17] Despite the publication purporting to abandon the acquisition, GOB sold and transferred titles to various portions of the appellant's land to private individuals.

[18] The parties continued negotiations to settle the matter and on 25 January 2007, the appellant wrote to the then Solicitor General setting out its terms for a settlement. The proposed settlement terms being: (1) GOB to submit to the appellant for approval a survey of the land which is to be returned to the appellant, within 14 days of the date of acceptance; (2) GOB cause a free grant to be issued to the appellant for the entire 127 acres within 30 days of the date of acceptance; (3) GOB assumes responsibility for all outstanding property taxes, if any, in respect of the land; (4) GOB to indemnify the appellant against all actions and proceedings that may have arisen during the period of the acquisition; and (5) GOB pays to the appellant a last instalment of interest of BZ$754,946.40 as compensation for the deprivation of use and enjoyment of the land during the period of acquisition.

[19] There was no acceptance by GOB of the proposed settlement, but they continued to make payments toward interest in pursuance of the interim arrangement. GOB made several payments towards the interest, the last payment made was on 31 March 2003 and the total interest paid was $817,214.39. Thereafter, they made no further payments.

[20] The Ministry of Natural Resources engaged the services of Mr. Gerald Gill, a licensed private surveyor to survey the entire land that was acquired in 1994. Mr. Gill's survey plan which was authenticated on 7 February 2007 showed that the appellant's land which was acquired was 115.8 acres and not 127 acres. Mr. Gill thereafter met with the parties' representatives to demonstrate how the land was only 115.8 acres.

[21] On 17 May 2006, the appellant commenced Claim No. 228 of 2006 claiming certain declarations in relation to the agreement for compensation made consequent to the compulsory acquisition of the appellant's land.

[22] On 26 January 2007, the respondents delivered a defence, after applying for an extension of time, asserting that the original agreement for compensation had been superseded by a new agreement for compensation which was set out in the terms of the proposal to accept the disacquisition outlined at paragraph 18 above. (It should be noted, as argued by the appellant, that the Act speaks of abandonment of acquisition and not disacquisition).

[23] On 5 February 2007, the appellant filed and delivered a reply to the defence.

[24] On 29 March 2007, a case management order was made by the Registrar General for filing of witness statements. On 8 May 2007, GOB filed and served one witness statement from the Commissioner of Lands and Surveys, Mrs. Noreen Fairweather, in support of the defence. At paragraph 28 of Ms. Fairweather's witness statement, she stated that GOB had agreed to return the land to the appellant not alienated by them, and to pay compensation in respect of the portion that was alienated, together with interest. At paragraph 29, she stated that GOB remains committed to the agreement on compensation and is prepared to complete same. She further stated that GOB had already conducted the necessary survey and had approximately 43 acres of the appellant's land available for transfer back to the appellant.

[25] On 5 June 2007, the appellant filed an application for leave to amend its claim form and statement of claim previously delivered and for judgment to be entered pursuant to CPR 14.4, on the basis of admissions at paragraphs 28 and 29 of the witness statement of Mrs. Fairweather.

[26] By letter dated 5 June 2007, the appellant sent to counsel for GOB, Ms. Nicola Choj, an advance copy of the application. It stated its view that the amendment would

obviate the need for a trial and that summary judgment was now available to the appellants. The reason being was that GOB accepted the appellant's position that they had agreed to accept the return of that portion of its lands that GOB had alienated. The appellant in the said letter also offered to meet and settle the matter.

[27] On 25 June 2007, the application was heard by Arana J in the absence of counsel for GOB and the orders sought were substantially granted.

[28] By a letter dated 28 June 2007, the appellant's attorneys wrote to the Minister of Natural Resources, Minister of Finance (copied to the Legal Counsel, Ministry of Finance), Counsel at Ministry of Natural Resources, the Solicitor General, the Attorney General and the Financial Secretary, informing them that Arana J had given leave for judgment to be entered in favour of the appellant. They also informed GOB that they are giving them a final opportunity to settle the matter before the court orders were perfected.

[29] On 20 July 2007, counsel for the appellant wrote to the Solicitor General and enclosed a copy of Arana J's judgment dated 25 June 2007, in Claim No. 228 of 2006. This letter was copied to the Ministry of Finance, Minister of Natural Resources and Legal Counsel, Ministry of Finance.

[30] On 24 August 2007, the Attorney General made an application for an extension of time to file a notice of appeal against Arana J's judgment. On 12 October 2007, the said application was withdrawn by the Solicitor General.

[31] By a letter dated 24 September 2007, from the Legal Counsel, Ministry of Finance, GOB offered to settle the matter on certain terms. This offer was refused by the appellant.

[32] On 14 February 2008, the appellant wrote to the Minister of Finance requesting settlement of the appellant's rights to compensation.

[33] On 20 February 2008, the Solicitor General sent a memorandum to the Commissioner of Lands urging him to secure the co-operation of the Financial Secretary in order to settle the judgment.

[34] GOB did not pay the compensation due in terms of the judgment. The appellant thereafter issued a new proceeding, Claim No. 333 of 2008, for deprivation of property, which was heard by Awich J and judgment was handed down on 18 November 2011.

[35] On 27 April 2009, before the hearing of the new claim, Claim No. 333, legal counsel of the Ministry of Natural Resources, made available to the appellant, 15 Land Certificates in the name of the appellant representing title to 109.6 acres of the land (a portion of the 127 acres) that had been compulsorily acquired by GOB from the appellant. The appellant accepted the 109.6 acres of the land returned to them by GOB.

Supreme Court Claim No. 333 of 2008

[36] In Claim No. 333 of 2008, the appellants filed a fixed date claim form for relief under the Constitution. The appellants claimed against the respondents for:

> "1. *A Declaration that failure of the Government of Belize to perform the agreement to compensate the Claimant for the compulsory acquisition of the Claimant's land in December, 1994 in the terms set out in the judgment of Madam Justice Arana in Claim No. 228 of 2006 amounts to the arbitrary deprivation of property of the Claimant in breach of section 3(d) of the Belize Constitution;*
>
> *2. A final mandatory injunction compelling the Defendants to perform the aforesaid agreement for compensation within 10 days of any order made herein;*
>
> *3. Further, or in the alternative damages for breach of the Claimant's constitutional right conferred by section 3(d) of the Belize Constitution;*
>
> *4. Further or other relief; and*
>
> *5. Costs."*

[37] The application was supported by four affidavits. N. Barrow deposed to three affidavits sworn on 21 May 2008, 30 October 2008 and 8 July 2009, respectively. Also, Judy Alpuche swore to an affidavit dated 30 October 2008 in support of the application. In response, the respondents filed three affidavits from Philippa Noreen Fairweather sworn on 28 July 2008, 2 June 2010, and 2 June 2010, respectively. They also filed one affidavit from Mr. Gian C. Gandhi sworn on 28 July 2008.

Evidence before the court in Claim No. 333 of 2008

Ms. Barrow's first affidavit

[38] Ms. Barrow in her first affidavit, at paragraph 9, deposed that GOB compulsorily acquired the appellants land pursuant to the provisions of the **Land Acquisition (Public Purposes) Act** in December 1994 and has failed to pay compensation notwithstanding an agreement to do so and notwithstanding the appellant having obtained a declaration in Claim No. 228 of 2006 that it is entitled to specific performance of the agreement with GOB.

[39] At paragraph 10 of the affidavit, Ms. Barrow deposed as to Arana J's judgment in Claim No. 228 of 2006, by which the appellant had obtained a declaration against GOB that it is entitled to specific performance of an agreement with GOB to:

> "(i) *pay to the Claimant compensation for 84 acres of land acquired from the Claimant on the 3rd December, 1994 and thereafter alienated by the Government at the agreed rate of BZ$23,000.00 per acre.*
>
> (ii) *issue to the claimant a free grant for the remaining 43 acres of the land acquired which 43 acres is currently vested in the Government and available for transfer back to the Claimant; and*
>
> (iii) *pay to the Claimant the balance of interest now due on the value of the entire 127 acres acquired (assessed at the agreed rate of BZ $23,000.00*

per acre) at the rate of 8 percent per annum from the 3rd December, 1994 until the date of the issue of the free grant in accordance with (ii) above.

[40] Ms. Barrow further deposed that notwithstanding the Arana J judgment and repeated requests for GOB to pay the appellant compensation, GOB has failed since July 2007, to make the required payments or to issue to the appellant the required grant. That, as such, GOB has arbitrarily deprived the appellant of its lands and/or its right to compensation and/or to compensation for the acquisition in breach of section 3(d) of the Constitution.

[41] At paragraphs 13 to 30 of Ms. Barrow's affidavit, she deposed as to the facts of the claim. The undisputed facts are set out in the introduction of this judgment and need not be repeated.

Ms. Fairweather's first affidavit in response

[42] On 28 July 2008, Ms. Fairweather deposed to an affidavit on behalf of the respondents in answer to the appellant's claim. She confirmed that GOB acquired the appellant's land on 3 December 1994. At paragraph 6, Ms. Fairweather deposed that in August 1997, GOB abandoned the acquisition of the land and a "Corrigendum" to that effect was published in the Gazettes dated 23 August 1997 and 30 August 1997, excluding the appellant's land from the original acquisition.

[43] She further deposed that the appellant refused to accept the return of the land but, later accepted payments from GOB which had been made expressly on the basis that the acquisition had been abandoned and that the payments were made towards interest which had accrued for the period GOB had remained in possession of the land, that is from 3 December 1994 to 23 August 1997, which amounted to $682,661.91. Further, due to lack of coordination between various Ministries, there was an overpayment of the interest as, during the period 19 May 1997 to 31 March 2003, GOB paid to the appellant $797,214.39.

[44] At paragraph 9 of her affidavit, Ms. Fairweather deposed that in 2007, the Ministry of Natural Resources caused a survey to be done by Mr. Gill which revealed that the land owned by the appellant was only 115.8 acres and not 127 acres. She exhibited the plan as "PNF7"

[45] Ms. Fairweather deposed at paragraph 10 of her affidavit that GOB inadvertently leased some of the appellant's land and as soon as the error was detected, steps were taken to retrieve the land and return same. By the end of July 2007, 109.6 acres out of the 115.8 acres were made available and formally vested in the appellant as of 1 August 2007.

[46] Ms. Fairweather thereafter deposed that it was incorrect for Ms. Barrow to allege in her affidavit that the appellants have been arbitrarily deprived of their land or right to compensation since 109.6 acres out of 115.8 were returned to them and interest totalling $797,214.39 had been paid to them.

[47] At paragraph 12 of Ms. Fairweather's affidavit, she deposed that there were two factual errors in Arana J's judgment which the appellant was seeking to enforce. The first being that the survey showed 115.8 acres and not 127 acres. The second being, that the judgment was based on the erroneous assumption that only 43 acres of land was available for return to the appellant when 109.6 acres had already been formally vested in the appellant as of 1 August 2007, leaving only 6.2 acres to be returned to the appellant.

[48] Ms. Fairweather also deposed as to the final offer that was made to the appellant by letter dated 24 September 2007 by Legal Counsel, Mr. Gandhi, in the Ministry of Finance, which was refused.

Mr. Gandhi's affidavit evidence in response

[49] Mr. Gandhi, Legal Counsel to the Ministry of Finance, deposed that he was familiar with the facts of this matter as he was the then Solicitor General when the land was acquired in 1994 and he was also consulted on the abandonment of the acquisition. The matter was later referred to him in November 2006 by the then Prime Minister and Minister of Finance. He thereafter held meetings with officials of the Ministry of Natural Resources, and then wrote to Barrow and Co., attorneys for the appellant, on 27 November 2006, offering a settlement of the matter.

[50] Mr. Gandhi deposed that the negotiations continued between the parties to settle the matter and on 25 January 2007, the attorneys for the appellant wrote to him setting out their terms of settlement. He further deposed as to the survey that was done by Mr. Gill showing that the land was only 115.8 acres and not 127 acres. This led to a meeting in Mr. Gandhi's office which was attended by Mrs. Fairweather, Mr. Gill, the surveyor of the land, and Mr. Marshalleck, attorney for the appellant. At the meeting, Mr. Gill demonstrated how the land held by the appellant under the TCT amounted to only 115.8 acres and not 127 acres.

[51] By a letter dated 7 May 2007, Mr. Gandhi wrote to the attorneys for the appellant referring to the said meeting and informed them that efforts were being made to retrieve the entire 115.8 acres of land. He deposed that he was surprised to see the letter dated 28 June 2007 from the attorneys for the appellant informing them of Arana J's judgment in view of the ongoing negotiations between the parties to settle the matter.

[52] At paragraph 12 of his affidavit, Mr. Gandhi deposed that on the instructions of the then Prime Minister and Minister of Finance, he continued negotiations with the attorneys for the appellant with a view to settling the matter, and on the 24 September 2007, he sent a final 'Without Prejudice' letter to the attorneys, offering the following terms of settlement, which were refused by the appellant:

"*Compensation for the remaining 6.2 acres of land not returned to the Claimant at the agreed price of $23,000.00 per acre*	=	*BZ$ 142,600.00*
Balance of interest	=	*BZ$ 504,353.12*
TOTAL	=	***BZ$ 646,953.12***"

[53] Mr. Gandhi deposed at paragraph 15 of the said affidavit that, "*I am authorised by the Minister of Finance to say that the Government stands by its final offer contained in my said letter of 24 September 2007 and is prepared to pay into court the said balance of BZ$646,953.12 in full and final settlement of the Claimant's claim.*"

Ms. Barrow's second affidavit

[54] Ms. Barrow in her second affidavit responded to the evidence of Ms. Fairweather and Mr. Gandhi. She referred to Mrs. Fairweather's assertion in her affidavit that GOB had made more payments towards interest than had been originally agreed in the sum of $797,214.39. However, Ms. Barrow deposed that this was factually incorrect, as GOB had paid $817,214.39. That the payment made on 4 July 2002 was for $151,286.00 and not $131,286.00 as listed in Exhibit "PNF6" by Mrs. Fairweather.

[55] Ms. Barrow further deposed that Mrs. Fairweather's assertion as to interest failed to take account of additional interest accruing over the period it took to pay interest as well as interest which continued to accrue up to the date the lands were allegedly returned. At the date the affidavit was sworn, 30 October 2008, Ms Barrow deposed that $1,750,903.63 remained due and owing by GOB in interest, in addition to a principal balance of $142,600.00, if it is assumed that only 115.8 acres were acquired and 109.6 acres were in fact returned on 1 August 2007 to the appellant.

[56] Ms. Barrow also addressed Mrs. Fairweather's allegation that Mr. Gill's survey shows the land to be 115.8 acres. She deposed that Mr. Gill's survey is of a portion only of the lands of the appellant. She said at paragraph 11 that when all the parcels of

the appellant's land are indentified and the acreage on the registers to the parcels are aggregated, the total acreage is 122.376 acres and this is based on Ministry of Lands records (see **"NB4"** for a statement showing a list of the relevant land certificates, parcels and acreages).

[57] At paragraph 13 of her affidavit, Ms. Barrow deposed that although GOB caused land certificates for a number of parcels comprising in total 109.6 acres of land to be issued in the name of the appellant, they retained possession of all of the original land certificates issued. Further, that by retaining these certificates, GOB had effectively denied the appellant the power to exercise rights of ownership in relation to the land and as such deprived them of their land, as well as the agreed compensation.

[58] As for the allegation by Mrs. Fairweather that Arana J's judgment has two factual errors, Ms. Barrow deposed that it was Mrs. Fairweather who asserted in her witness statement that only 43 acres were available for return and she failed to mention in the said claim that the acreage was 115.8 acres and not 127 acres.

[59] Ms Barrow in the said affidavit deposed that all offers made by GOB to settle the claims of the appellant fell short of their legal entitlements. Further, in accordance with Arana J's judgment, GOB owes the appellant, in addition to the 43 acres to be returned, the sum of BZ$4,107,305.39.

[60] Ms Barrow in response to the affidavit of Mr. Gandhi deposed that he also repeated the factual errors that had been pointed out in Mrs. Fairweather's affidavit.

Ms. Barrow's third affidavit

[61] Ms. Barrow in her third affidavit sworn on 8 July 2009, deposed that on 27 April 2009, Mr. Douglas Carr, Legal Counsel in the Ministry of Natural Resources, made available to the appellant, 15 land certificates in the name of the appellant representing title to 109.6 acres of land that had been compulsorily acquired from the appellant.

[62] She deposed that GOB as of 27 April 2009, returned and the appellant had accepted, the return of 109.6 acres of the land that had been compulsorily acquired by GOB. Further, the appellant had accepted the return of 43 acres as ordered by Arana J as well as the return of a further 66.6 acres in lieu of cash compensation for the same 66.6 acres which the judgment declared payable to the appellant. As such, there remains due and payable, in accordance with Arana J's judgment, compensation for the remaining 17.4 acres of the appellant's land, plus the balance of interest on the value of the entire land from the date of acquisition to 27 April 2009, when the 109.6 acres of land were returned.

[63] Ms. Barrow deposed that, according to her calculations, BZ$2,670,912.67 remains due and payable by GOB in accordance with the judgment of Arana J (see Exhibit "NB2" for spreadsheet showing the details of her calculation). Further, despite repeated requests and a number of meetings with GOB officials and legal personnel, GOB had failed to make any proposal for the settlement of the sum owing.

Affidavit of Judy Alpuche

[64] Ms. Alpuche swore to an affidavit on 30 October 2008 on behalf of the appellant. She deposed that she is a legal researcher in the employ of Messrs Barrow & Co. and that she was asked to do a search at the Lands Registry in Belmopan of all parcels of lands originally belonging to the appellant in the Caribbean Shores Registration Section listed in the schedule to her affidavit. She deposed that, despite exhaustive searches, she could not locate the registers for the first 15 parcels of land as shown in the schedule. She was able to locate the registers for the last four parcels of land and these registers show the history of ownership as well as the acreage (see Exhibit "JA1" to "JA4" for copies of the register).

[65] Ms. Alpuche further deposed that she caused a map to be prepared showing a compilation of all the parcels listed which included all lands belonging to the appellant

that had been compulsorily acquired by GOB. The map shows the acreage of the parcels and proprietors prior to 1 August 2007 (see Exhibit "JA5" for a copy of the map).

[66] Ms. Alpuche deposed that the total acreage as revealed by the registers of all the parcels researched and listed in the map is 122.376 acres. Further, she discovered from the records of the mapping department that the roadway beside the Upthegrove parcels comprise 0.517 acres and the portion of the reserve bordering the Upthegrove and Feinstein parcels comprise 1.7 acres. She further deposed that if the acreages of all lands comprised in the map are aggregated, they yield a total of 124.593 acres and this figure is based entirely on information on the records at the Ministry of Natural Resources.

Second and Third affidavit of Mrs. Fairweather

[67] Mrs. Fairweather deposed in her second affidavit sworn on 2 June 2010, that Ms. Barrow in her affidavits, alleged that she has made statements that are factually incorrect. She deposed that she verily believed that the information in her third affidavit was important for the court to know when seeking to resolve issues in the claim and as such the affidavit should be admitted in the interests of justice and fairness.

[68] The third affidavit by Mrs. Fairweather, sworn on 2 June 2010, was admitted by the learned trial judge. In this affidavit, Mrs. Fairweather deposed that, further to her affidavit of 28 July 2008, she reviewed GOB's file relating to the acquisition of the property owned by the appellant. She also read the affidavit of Judy Alpuche filed on behalf of the appellant dated 30 October 2008.

[69] Mrs. Fairweather deposed that the source of the appellant's title is a Governor's Fiat Grant dated 5 February 1913 which expressly indicates that there is a Crown Reserve of 66 feet along the banks of the Haulover Creek. She exhibited a chain of titles marked P.N.F. 11 "A" thru "E".

[70] She further deposed that the appellant purchased "127 acres or thereabouts" from a Mr. Aguilar who received a First Certificate of Title on 21 May 1995. She exhibited the transfer certificate of title dated August 1961 which is marked P.N.F. "12".

[71] At paragraphs 7 to 13 of her affidavit, Mrs. Fairweather responded to Ms. Alpuche's affidavit evidence where she stated that in her view the appellant owned 124.593 acres of land. Mrs. Fairweather, at paragraph 8 of her affidavit, deposed that Ms. Alpuche's calculation is not correct because she included in her computation the 66 ft. reserve along the banks of the Haulover Creek. Mrs. Fairweather then proceeded to show by her own computations that the acreage of land acquired was 115.79 acres (see exhibit P.N.F. "13"). Further, she added the acreage as shown on the survey by Mr. Gill without including the reserve and she found the total acreage to be 115.82 acres.

Order of Awich J

[72] The claim was heard by Awich J, as he was then, on 1 and 2 June 2010 and by the terms of his decision delivered on 18 November 2011, the learned judge dismissed the claim and ordered that the appellant should pay GOB one-half costs of the proceedings, being prescribed costs based on $2,670,912.67.

The Appeal

[73] The appellant appealed against the whole decision given by Awich J. The grounds of the appeal are:

> "(i) *The learned trial judge erred in law and misdirected himself in finding that the Claim was about enforcing the judgment of learned Madam Justice Arana in Claim No. 228 of 2006 by failing to consider or find, as was submitted by the Claimant both orally and in writing, that the claim was one for constitutional relief arising out of continual refusal of the Defendants as members of the*

executive to act in accordance with the terms of a declaratory order of the Supreme Court of Belize.

(ii) The learned trial judge erred in law and misdirected himself in finding that the main issue in contention was whether an amendment or variation of the order of Arana J could be made in light of facts presented by the parties by failing to entirely consider the constitutional issues arising out of the Defendants' continual refusal to act in accordance with a declaratory order of the Supreme Court declaring the rights of the parties and/or failing entirely to consider or find that the issues sought to be raised by the Defendants as to acreage and/or otherwise were and are res judicata as was submitted by the Claimant both orally and in writing.

(iii) The learned trial judge erred in law and misdirected himself in finding that the Government has made tender of payment into Court of the correct sum that it considered owing by failing to appreciate the difference between an indication by the Defendants of their willingness to pay and/or an offer of payment and/or a tender of payment into Court.

(iv) The learned trial judge erred in law and misdirected himself in finding that the Claimant insists that the acreage of land owned was 127 acres and that the sum owed to it was $2,670,912.67 inclusive of interests by failing to sufficiently appreciate or consider or find, as was submitted by the Claimant both orally and in writing, that the issues of acreage as well as of the balance owing were already decided by Arana J and were therefore res judicata.

(v) The learned trial judge erred in law and misdirected himself in failing to properly consider or find as submitted by the Claimant both orally and in writing that the Defendants' continual refusal to abide by the terms of an order of the Supreme Court of Belize was in breach of the Claimant's constitutional right conferred by section 3(d) of the Constitution not to be

arbitrarily deprived of property, that is, the payment to which it was entitled, and/or the declared right to such payment.

(vi) The learned trial judge erred in law and misdirected himself in finding that the Claimant did not refer to section 17 of the Constitution and that section 17 gives effect to section 3(d) of the Constitution by failing to consider whether the scope of protection afforded by section 3(d) exceeded that provided for by section 17 as was in fact submitted by the Claimant both orally and in writing and/or as found in a number of decided cases.

(vii) The learned trial judge erred in law and misdirected himself in finding that section 3(d) of the Constitution guarantees the right to own private property as opposed to prohibiting the arbitrary deprivation of property already privately owned.

(viii) The learned trial judge erred in law and misdirected himself in ordering costs against the Claimant without advertence to or considering Rule 56.13(6) of the Civil Procedure Rules.

(ix) The learned trial judge erred in law and misdirected himself in assessing costs against the Claimant other than in accordance with rule 64.11 and/or 64.12 of the Civil Procedure Rules.

(x) The decision of the learned trial judge, in light of the delay of over one year in the delivery of judgment after trial, is so aberrant that no reasonable judge having applied his mind to the claim and evidence presented could have come to the decision reached."

Relief sought

[74] The appellant sought an order that the decision of the trial judge be set aside and that the declaration sought and reliefs claimed against the respondents in the claim be granted.

Notice by Respondents

[75] On 30 December 2011, the respondents filed a notice of intention to contend that the decision of the court below should be affirmed not only for the reasons given in the judgment by the learned trial judge but, also on the following additional grounds:

1. That as the declaration and mandamus are discretionary remedies it would have been inequitable in the circumstance of this case to grant a declaration in this case that failure to compensate the claimant for the compulsory acquisition of the claimant's land in December 1994 in the terms set out in the judgment of Madam Justice Arana in Claim No. 228 of 2006 amounts to the arbitrary deprivation of property of the claimant in breach of section 3(d) of the Belize Constitution, and to grant mandamus to compel compliance.
2. That the appellant's plea of *res judicata* could not apply where the circumstances has so changed that it was both reasonable and just for the defendants in Claim No. 333 of 2008 to raise the issue of the correct acreage of land owned by the appellant and payments already made.

[76] The respondents relied on the following grounds:

Inequitable to grant a declaration, mandamus or damages

1. The order of Arana J that the appellant seeks to enforce was obtained in breach of natural justice and as well as factual errors.
2. Further, both parties have moved away from Arana J's order in material particulars and the dispute now relates to the calculation of interest and not a failure to compensate for the acquisition.

3. Respondents have already paid compensation in the amount of $817,214.30, formally vested 109.6 acres of land in the appellant, and on 24 September 2007 offered the sum of $142,600.00 for the remaining 6.2 acres and $504,353.12 for the balance of interest up to that date.

4. (i) That when Arana J granted the appellant permission to amend its claim form and statement of claim, it was done in breach of CPR Rule 20.1(4) as the amended claim was not served on the respondents;

(ii) Arana J proceeded on the same day, in the same hearing and in the absence of the defendant, in breach of natural justice to declare that the appellant is entitled to specific performance of the agreement between the parties.

(iii) When Arana J made her orders there was no authenticated survey of the appellant's property before the court. There was thus no conclusive evidence of the acreage of land acquired.

(iv) It can be seen at paragraph 13 of the appellant's amended statement of claim that the appellant itself required that "*the Government of Belize provide to the Claimant a proper survey that shows exactly what lands were compulsorily acquired, what lands are to be retained by the Government and what lands are to be returned."* GOB provided the appellant with a survey by Mr. Gill.

(v) 109.6 acres have already been formally vested in the appellant as of 1 August 2007, leaving only 6.2 acres out of the 115.8 acres.

(vi) GOB has also paid the appellant $817,214.30 towards interest.

(vii) Compensation for the remaining 6.2 acres of land not returned to the appellant at the agreed price of $23,000.00 per acre is $142,600.00. As of 24 September 2007, the balance of interest was $504,353.12, making a total of $646,953.12 offered to the appellant. This payment was to be in addition to the sum of $817,214.30 already paid to the appellant, bringing the total compensation to $1,464,167.40 plus the return of 109.6 acres of land. The appellant has refused to accept the above offer.

Res judicata is displaced in circumstances of this case

5. There was no adjudication before Arana J in Claim 228 of 2006 as to the acreage that was acquired from the appellant. The amount of 127 acres was simply assumed into Arana J's order. However, the appellant requested that GOB produce a survey of the acreage it had acquired from the appellant.
6. On 26 January 2007, the authenticated survey of the appellant's property by Mr. Gerald Gill showed the appellant as having title to 115.8 acres and not 127 acres on which the judgment of Arana J was based. Then by mutual agreement, 109.6 acres of land were formally vested in the appellant as of 1 August 2007 and the land certificates therefore duly delivered to the appellant, instead of 43 acres of land stated in Arana J's order.
7. At trial the appellant itself on affidavit altered the acreage from 127 acres to 124.5 acres of land.
8. Courts have consistently held that *res judicata* is a rule of justice and does not apply where circumstances have so changed to make it both reasonable and just for a party to raise an issue in question in later proceedings.
9. The change of acreage and the vesting of 109.6 acres of land as opposed to 43 acres, fundamentally altered the bases of Arana J's order.

Determination of the grounds of appeal

Ground 1: Whether the appellant should have applied for an enforcement order

[77] Learned senior counsel, Mr. Marshalleck, argued that the learned trial judge erred and misdirected himself in finding that the claim was about enforcing the judgment of Arana J by failing to consider that the claim was for constitutional relief arising out of the continual refusal of GOB to act in terms of a declaratory order of the Supreme Court of Belize. The learned trial judge, at paragraph 2 of his judgment said that the claim before him was about enforcing the Arana J judgment and it seemed to him that it would have been "*proper and convenient to have brought the part of this claim which is about relief other than constitutional relief in an application for orders for enforcement measures on case file No. 228 of 2006. Alternatively, it would have certainly been convenient to have kept this claim No. 333 of 2008, also in the court of Arana J.* At

paragraph 17 of his judgment, the learned trial judge said that where there has been a court order for payments by instalments, the proper action to take is to apply to court for enforcement order.

[78] Mr. Marshalleck contended that the appellant's case proceeded before the learned trial judge on the fundamental basis that the declaratory judgment of Arana J was not capable of enforcement and was conclusive of the rights of the parties. In this appeal, the appellant repeated the submissions made before the trial court. The appellant referred to section 19(1)(b) of the **Crown Proceedings Act** which provides:

> *"19(1) In any civil proceedings by or against the Crown, the Court shall subject to the Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require*:
>
> *Provided that (b) where in any proceedings against the Crown any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties."*

[79] Learned senior counsel submitted that in light of the provisions of section 19(1)(b) of the **Crown Proceedings Act**, Arana J granted the declaration that the appellant is entitled to specific performance of the agreement between them and GOB. Further, this was founded on the sole witness statement of Mrs. Fairweather, in particular paragraphs 28 and 29 of the statement which state:

> *"28. Pursuant to the new agreement on compensation, that is the return of land not already alienated by Government and payment of compensation on those alienated and payment of interest in respect of both categories, Government made five payments in the sum of approximately one hundred and thirty one*

thousand dollars on the 21st day of March 2002, 4th July 2002, 24th September 2002, 7th January 2003 and 31st March 2003 as evinced by Government of Belize Payment Vouchers of the same dates.

"29. *For whatever reason, Government neglected to continue pay interest, principal for the portion of the land retained and alienated, and to conduct the necessary survey in order to transfer back to the appellant the land available for return, until institution of this Action. The Government, however, is committed to the new agreement or compensation and prepared to complete the same. In fact, subsequent to the institution of this action, the Government conducted the necessary survey and has determined that approximately 43 acres of the Appellant's land that was acquired is still currently vested in the Government of Belize and available for transfer back to the Appellant."*

[80] Mr. Marshalleck further contended that Arana J's judgment was not capable of enforcement as it simply recognised the existence of the right to performance. Learned senior counsel relied on **The Attorney General et al v Jeffrey J Prosser et al.** Civil Appeal No. 7 of 2006 to show that declaratory judgments are not capable of enforcement. In that case, the reliefs granted at the lower court were only declaratory orders and on appeal the appellant sought a stay of execution of the judgment. The court at paragraph 29 of that judgment said that the judgment was entirely non-coercive in nature and the consequences of that are significant, as shown in the case of **Chief RA Okoya & ors v Santilli & ors, SC 200/1989,** Supreme Court of Nigeria, in which one of the issues considered was '*whether a defendant who has filed an appeal purely against declaratory orders made against him is entitled to apply for a stay of execution of those orders pending the hearing and determination of the appeal.'* Agbaje J. who dealt with this issue in the leading judgment referred to the following as being a '*consensus*' among academic writers cited by counsel for the plaintiffs:

"*First: (i) Executory judgment declares the respective rights of the parties and then proceeds to order the defendant to act in a particular way, eg. To pay*

damages or refrain from interfering with the plaintiff's rights, such order being enforceable by execution if disobeyed.

Declaratory judgments, on the other hand, merely proclaim the existence of a legal relationship and do not contain any order which may be enforced against the defendant.

Second: A declaratory judgment may be the ground of subsequent proceedings in which the right having been violated, receives enforcement but in the meantime there is no enforcement nor any claim to it."

Agabje J then had this to say:

"It appears to me that the starting point …. is the consensus that a declaratory judgment may be the ground of subsequent proceedings in which the right …violated receives enforcement but in the meantime there is no enforcement nor any claim to it. So, until subsequent proceedings have been taken on a declaratory judgment following its violation or threatened violation there cannot on the clear authorities I have referred to above, be a stay of execution of the declaratory judgment because prior to the subsequent proceedings, it merely proclaims the existence of a legal relationship and does not contain any order which may be enforced against the defendant."

[81] The conclusion reached by Agabje J was that there cannot be a stay of execution of declaratory judgments when an appeal has been filed against such judgments, and an application under such circumstances will be misconceived.

[82] Mr. Hawke, the learned Solicitor General (ag) correctly stated in his submissions that it is evident that Parts 44-53 of the CPR and section 25 of the Crown Proceedings Act, preclude enforcement proceedings being brought against the Crown.

[83] Pursuant to section 19(1) (b) of the **Crown Proceedings Act**, Arana J made a declaration that the appellant is entitled to specific performance of an agreement partly in writing for GOB to do certain things. Section 19(1) as shown above, prohibits orders for specific performance against the Crown but, allows the court to make an order declaratory of the rights of the parties. The authorities cited by the appellant above clearly show that declaratory orders merely proclaim the existence of a legal relationship and do not contain any order which may be enforced against any party.

[84] In my view, the appellant could not seek enforcement proceedings in relation to Arana J's judgment and that they correctly issued new proceedings since GOB did not fully honour the declaratory orders. The appellant could not file enforcement proceedings as no coercive orders were made by Arana J. As shown by the learned authors of *Zamir & Wolf, The Declaratory Judgment*, an authority relied on by the appellant, if a defendant acts contrary to a declaration, the plaintiff will not be able to challenge the unlawfulness of his conduct in subsequent proceedings. "*By contrast, the plaintiff may then again go to court, this time for damages to compensate for the loss he has suffered or to seek a decree to enforce the rights established by the declaration."* The appellant by the constitutional proceedings before the learned trial judge sought decrees to enforce the rights established by Arana J's declaration.

[85] In my respectful opinion, the learned trial judge erred when he determined that the proper action to take is to apply to court for an enforcement order. If the appellant had made an application for orders of enforcement on the Claim No. 228 of 2006, as suggested by the learned trial judge, that application would have been misconceived as the Arana J judgment was declaratory in nature and could not be enforced on anyone.

Ground 2 : Whether an amendment or variation of the order of Arana J could be made in light of facts presented by the parties

[86] The appellant argued that the learned trial judge erred in finding that the main issue in contention was whether an amendment or variation of Arana J's order could be made in light of facts presented by the parties, by failing to entirely consider the

constitutional issues arising out of GOB's continual refusal to act in accordance with a declaratory order of the court. At paragraph 3 of his judgment, the learned trial judge said:

> *"The main issue in contention in this claim may be reduced to whether an amendment or variation of the order made by Arana J could be made in light of the facts now presented by the parties. The question of fact to be answered is whether the acreage of the land owned by the claimant, and compulsorily acquired by the Government, was erroneously stated in the order made by Arana J on 25 June 2007, in claim No. 228 of 2006, or has since changed, and if so, what the total sum payable as compensation was, or should now be. From that question the vexed issue is whether after the return of more land to the claimant, the sum payable under the order made on 25 June 2007, is $2,670,912,67, stated by the claimant, or $646,953.12 stated by the Government."*

[87] At paragraph 18 of his judgment, the learned judge determined that payments were being made by instalments pursuant to an agreement that was made a court order, and the parties varied that order by their own free will, by the return and acceptance of a larger portion of land than was stated in the judgment given by Arana J. At paragraph 19, the learned trial judge further determined that, "*the disagreement between the parties is one that could have been taken to court as an application for variation and enforcement order of the order made on 25 June 2007. The matter might have required alteration or even correction of the order made. Arana J who made the order of 25 June 2007, would be better suited to do that, or to make further orders for enforcement."*

[88] Learned senior counsel, Mr. Marshalleck, contended that Arana J's judgment was conclusive since it had been faired, perfected and filed. Further, it could not be amended or varied pursuant to the Supreme Court (Civil Procedure) Rules 2005 (CPR), Rule 42.10, the slip rule, since there was no clerical error in the judgment. Learned senior counsel further contended that since GOB abandoned the appeal against Arana

J's judgment, it was conclusive as to the rights of the parties under the compensation agreement and the learned trial judge had no jurisdiction to consider any variation to it. Also, Arana J was *functus officio* and lacked any power to vary the judgment. Learned senior counsel relied on the authority of **Antoine Alcindor v Christina Alcindor [2012] SCCA 4,** where the Seychelles Court of Appeal considered similar issues. In that case, the parties agreed to settlement of matrimonial property on the basis of an evaluation and after the judgment was given, sought to dispute the evaluation by application to court to order a re-evaluation. The court found that the trial court had no jurisdiction to consider or order any re-evaluation of the property as it had become *functus officio* after the first judgment. The court at paragraph 5 of its judgment said:

> "….. *The authorities are clear on functus officio in relation to Amendment after entry of judgment or order "As a general rule, except by way of appeal, no court, judge or master has power to rehear, review, alter or vary any judgment or order after it has been entered either in an application made in the original action, or matter or in a fresh action brought to review the judgment or order. The objection of the rule is to bring litigation to finality."*

[89] I agree with learned senior counsel, Mr. Marshalleck that Arana J was *functus officio* and lacked the power to vary the judgment. As such, Arana J could not consider any application for variation and enforcement as determined by the learned trial judge. The new claim brought before the learned trial judge was not a claim to review Arana J's judgment. It was for breach of their constitutional rights and they sought, not only a declaration, but coercive orders or alternatively damages for the breach of their constitutional rights.

[90] In my opinion the learned trial judge erred when he stated that the main issue in contention was whether an amendment or variation of Arana J order could be made in light of the facts presented before him since Arana J was *functus officio* and lacked the power to vary the judgment. The learned trial judge further erred when he stated that the question of fact to be answered is whether the acreage of land compulsorily

acquired by GOB was erroneously stated in the order made by Arana J. In my respectful opinion, the question of error does not arise as Arana J's judgment was based on evidence which was before her. That is, at the time, GOB had only 43 acres of land to return to the appellant. In my respectful opinion, the learned trial judge could have considered the evidence on the change in acreage of land and properly make a determination on that issue because of the change in circumstances since Arana J's judgment. This issue of change in circumstances will be fully considered under ground 4, which deals with *res judicata.*

Ground 3: *Whether there was a tender of payment by GOB*

[91] The appellant argued that the learned trial judge erred in law and misdirected himself in finding that GOB had made tender of payment into court of the correct sum that it considered owing, by failing to appreciate the difference between an indication by GOB of its willingness to pay and/or an offer of payment and/or a tender of payment into Court. The learned trial judge at paragraph 18 of his judgment said that, "…. *I see no evidence that payment is being delayed beyond reasonable time when the amount has become uncertain, and the government has tendered the sum it considered to be the correct sum".*

[92] I agree with the appellant's argument that there was no evidence before the court that there was tender of funds by GOB. An offer was made by GOB to pay certain monies to the appellant but this was rejected by them. The payments by instalments which were made by GOB were in relation to interest owing (and which continues to accrue) and not compensation for the land taken. Accordingly, the learned trial erred in finding that GOB had made tender of payment into court.

Ground 4: Whether the issue of the acreage of land being 127 acres was *res judicata* in the new proceedings for constitutional relief

[93] The appellant stated at ground 4 that the learned trial judge erred in law in finding that the appellant insisted that the acreage of land owned was 127 acres and that the

sum owed to them was $2,670,912.67 inclusive of interests by failing to consider or find, as was submitted by the appellant both orally and in writing, that the issues of acreage as well as of the balance owing were already decided by Arana J and were therefore *res judicata.* The learned judge at paragraph 8 of his judgment said that, "*The claimant insists that the acreage of the land that it owned was 127 out of the total of 200 compulsorily acquired. It also insists that the sum owed to it is, according to its calculation, $2,670.912.67 inclusive of interests. So the claimant has made this claim No. 333 of 2008, for the following reliefs…..*"

[94] The respondents in their respondent's notice at ground 2 stated that the appellant's plea of *res judicata* could not apply where the circumstances have so changed that it was both reasonable and just for the respondents in the new proceedings, Claim No. 333 of 2008, before the learned trial, to raise the issue of the correct acreage of land owned by the appellant and payments already made.

[95] The principle of *res judicata* is aptly laid out in **Elroy Garraway v Ronald Williams [2011] CCJ 12,** paragraphs 14 to 17:

> " [14] *As is well known, the principle of res judicata is intended to give finality to judicial decisions. Literally, the term means that a matter has already been finally settled by judicial decision and is not subject to further appeal. In order for the doctrine to be applicable three essential conditions must be satisfied: there must be an earlier decision covering the issue; there must be a final decision on the merits of that issue; and the earlier suit must involve the same parties or parties in privity with the original parties. Once satisfied the principle bars the same parties from litigating on the same claim or any other claim arising from the same transaction or subject-matter that was or could have been raised in the first suit. Thus is precluded continued litigation between the same parties in respect of essentially the same cause of action. The concomitant waste of judicial resources is avoided.*

[15] *The eminently reasonable and indeed indispensable proposition of law embodied in the doctrine of res judicata has been examined in numerous cases including* ***Henderson v Henderson*** [1843-60] All ER 378*; .... **Gairy v Attorney General*** [2001] UKPC 30; *The authorities make abundantly clear that res judicata covers two quite different effects of final judgments. In the first place it forecloses the relitigation of matters that have once been litigated and decided. In the academic literature the bar to which this gives rise is sometimes referred to as 'collateral estoppel' or 'issue preclusion'. Secondly, the doctrine also forecloses any litigation of matters that have never been litigated but which could and should have been advanced in an earlier suit. This foreclosure is sometimes referred to as 'true res judicata' or 'claim preclusion'*.

[16] *A classical exposition of the governing principles was enunciated by Wigram VC in* ***Henderson v Henderson*** *(supra) where he stated:*

> *"I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not* ***(except under special circumstances****) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, <u>except in special cases</u>, not only to points on which the court was actually required by the parties to form an opinion and pronounce a judgment, 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".*

[17] *The fundamental rule in Henderson v Henderson (supra) has stood the test of time, albeit it has been restated in more flexible terms in more recent times. There remains a basic obligation on a litigant to present the entirety of his case all at once rather than in a piecemeal fashion. Failure by one party to present the whole case at once is detrimental to the interests of the other parties and the efficiency of the judicial system. In assessing whether a defence of res judicata will succeed in barring new proceedings, the courts adopt a broad merits-based approach which takes into account all the relevant facts in order to decide whether in all the circumstances of the case a party is misusing or abusing the processes of the court by bringing proceedings in respect of issues that should reasonably have been brought in earlier proceedings (see Lord Bingham of Cornhill in Johnson v Gore Wood & Co [2002] AC 1 at p. 24.)*"

[96] In the case of ***Gairy v Attorney General*** (relied on by the CCJ in the above case cited), Lord Bingham of Cornwall, at page 81, referring to the Minister's pleas of res judicata and abuse of process, said at paragraph 27:

"[27] *There is authority, which was not challenged, that a consent order may found a plea of res judicata even though the court has not been asked to investigate and pronounce on the point at issue (see Spencer Bower and Turner and Handley, Res Judicata, 3rd ed 1996, Ch 2, para 38), and it may well be abusive to raise in later proceedings an issue or claim which could and in all the circumstances should have been raised in earlier proceedings. But these are rules of justice, intended to protect a party (usually, but not necessarily, a defendant) against oppressive or vexatious litigation. Neither rule can apply where circumstances have so changed as to make it both reasonable and just for a party to raise the issue or pursue the claim in question in later proceedings."*

[97] The learned trial judge, in my respectful view, was required to examine the principle of *res judicata* and apply same to the circumstances of this case. Further, the

court had a duty to give effect to the overriding objective of dealing with cases justly and take into consideration all the relevant circumstances of this case, pursuant to the CPR. In the proceedings before Arana J, the issue as to whether the acreage of the land was 127 acres or 115 acres, which is an issue of fact, was not raised by the respondents and therefore, could not have been determined by Arana J. The judgment did not cover the issue and so a decision could not be taken on the merits of the issue.

[98] The question to be asked therefore, is whether the respondents could have raised the issue of the acreage before Arana J. As shown in ***Henderson v Henderson,*** the parties to litigation must bring forward their whole case and not in a piecemeal fashion, unless there are special circumstances. The respondents by their respondents' notice and their arguments have shown to the court that there are special circumstances in this case. They also argued that there was a change of circumstances in this case. I will now examine those special circumstances and the change of circumstances which the learned trial judge should have examined in the court below.

Circumstances under which the default judgment was obtained

[99] The evidence shows that when Arana J granted leave to amend the Claim Form and the Statement of Claim, the respondents were not afforded the opportunity to file an amended defence. The appellants made an application before Arana J to amend the statement of case and that application was granted in the absence of the respondents. Immediately thereafter, the appellant sought a default judgment based on admissions, which they said were contained in the witness statement of Mrs. Fairweather. The respondents were not served with the amended statement of case until after judgment was given by Arana J. In my view, there was a breach of the CPR rules by the appellant in relation to service of an amended claim. Rule 20.1 (4) of the CPR provides that a party amending a statement of case must forthwith serve a copy on all other parties and file at the court's office the amended statement of case endorsed with a certificate of service. The respondents were not served with the amended statement of case and judgment was entered by Arana J based on the amended claim.

[100] The evidence further shows that the appellant was indeed aware that at the time the judgment was made by Arana J, that the respondents disputed the acreage as being 127 acres and that Mr. Gill's survey showed that it was 115.8 acres. This survey was however, not evidence before Arana J. Further, the evidence shows that at the time the judgment was entered, the authenticated survey of Mr. Gill which showed 115.8 acres was the subject of the negotiations between the parties. Further, the appellant had not put into evidence an authenticated survey of its property.

Change in circumstances

[101] The learned trial judge at paragraph 3 of his judgment correctly stated an alternative issue is whether the acreage of land has since changed and if so, the total sum payable as compensation. However, the learned judge did not consider the issue of *res judicata* but instead wrongfully determined, in my view, that there could have been an application for variation and enforcement of the Arana J order. There were several change of circumstances after the Arana J judgment as shown by the evidence of both parties in relation to the acreage, namely: (i) 109.6 acres of land were formally vested in the appellant as of 1 August 2007 (though the Land Certificates were handed over to the appellant in 2009) instead of 43 acres of land stated in the Arana J judgment; (ii) although the appellant had raised the issue of *res judicata* in the new proceedings, the evidence showed that they also changed the acreage of the land from 127 to 124.593 acres after a search was conducted by Ms. Alpuche and found to be such. Thus, the appellant itself has shown that there was a change of circumstances.

[102] Under such special circumstances as shown above, I agree with the respondents, that *res judicata* cannot apply and that it was reasonable and just for the respondents to raise the accuracy of the acreage of land acquired, in the new proceedings before the learned trial judge. Accordingly, it is my respectful opinion, that it was open to the learned trial judge to find that the issue of the acreage of land being 127 acres was not *res judicata* in the new proceedings for constitutional relief.

Whether the matter should be remitted to the court below to decide the issue of the acreage of land?

[103] The finding that the issue of the acreage is not *res judicata* calls for a determination of the acreage of land acquired. The question that arises is whether the matter should be remitted to the trial court for such determination. In my respectful view, it would be a waste of judicial time to remit this matter back to the trial court for a determination on this issue. Further, the learned trial judge is no longer in the court below and it would not be logical to cause any further delay in this matter as interest continues to accrue daily. The appellant themselves have calculated interest based on 127 acres and also on 115.68 acres. As such, I accept the only authenticated survey of the land which was done by Mr. Gill and shows that the acreage is 115.8 acres. (This survey was evidence before Awich J in the proceedings for constitutional relief). I find that, based on the evidence before the court, the acreage of the land acquired is 115.8 acres.

Grounds 5, 6 and 7: Whether there was an arbitrary deprivation of the appellant's property pursuant to section 3(d) of the Constitution

[104] In the claim before the learned trial judge, the appellant claimed a declaration that the failure of GOB to perform the agreement to compensate it for the land in the terms set out in Arana J's judgment amounts to the arbitrary deprivation of its property in breach of section 3(d) of the Belize Constitution. The learned trial judge, in his determination of the matter, considered sections 3 and 17 of the Constitution and said:

> 10. *On these facts, and assuming that Government was wrong to have discontinued making payment under the order made on 25th June 2007, in claim No. 228/2006, it is difficult to see how one can claim that the constitutional right in s: 3(d) of the Constitution of Belize has been breached in regard to the proprietary interest of the claimant.* …..

11. *Although the claimant did not refer to s: 17 of the Constitution, it is the section that enforces and gives effect to s:3. It must be read together with s:3.* :…..

[105] The learned trial judge then said at paragraph 12 that, "*Section 3(d) of the Constitution guarantees the right to own private property. Section 17 provides the law by which the right is protected."* He then went on to look at the facts of the case, that is, that compensation was the subject of negotiations between the appellant and GOB and that they agreed on several things, namely, how to calculate the sum, interest payable, and payment of instalments. Further, that after Arana J's judgment, there were further developments and the appellant accepted the return of 109.6 acres of land that had been acquired by GOB. The learned trial judge also considered that GOB said that it discovered the correct acreage to be 115.8 and not 127 acres. The learned judged then determined at paragraph 15 that:

"15. *By any stretch of imagination, no one can conclude that the facts of this claim No. 333/2008, or of Claim No. 228/2006 disclosed any infraction of s: 3(d), or s: 17 of the Constitution by which the right in s: 3(d) is protected. Land was acquired under a law, namely, the land Acquisition (Public Purpose) Act, which prescribed among others, principles on which and the manner in which reasonable compensation therefor is to be determined and given within a reasonable time. So, the acquisition itself was not carried out arbitrarily.*"

[106] It can be seen that the learned judge in the above paragraph considered the acquisition itself and he was correct to say that the acquisition was not arbitrarily done. The crux of the complaint, however, was the payments to the appellant and the learned trial judge determined that there was no breach of either section 3 (d) and section 17 of the Constitution. At paragraph 17 he said:

"17. *As to whether failure to pay one or more instalments is a breach of the Constitution, there has been no evidence to prove the date on which the total compensation sum would be paid. That would be determined based on when payment of instalments would end. In any case, if there has been failure in payment of an instalment in a case such as claim No. 228/2006 where there has been a court order for payments by instalments, the proper action to take is apply to court for enforcement order. It does not follow automatically that payment of compensation has not been made within a reasonable time, and there has been breach of ss: 3(d) and 17 of the Constitution.*"

[107] It was for the above reasons that the learned trial judge refused the declaration sought that the failure of GOB to perform the agreement to compensate the appellant amounts to arbitrary deprivation of property in breach of s: 3(d) of the Constitution.

[108] The evidence shows that GOB has not fully honoured the terms of Arana J's judgment (which is the declaration that the appellant is entitled to specific performance of an agreement for compensation), despite many requests to do so by the appellant. The question is whether this refusal to fully honour the judgment amounts to a breach of section 3(d) of the Constitution. The appellant says that the learned trial judge erred in law and misdirected himself in finding that the appellant did not refer to section 17 of the Constitution and that section 17 gives effect to section 3(d) of the Constitution by failing to consider whether the scope of protection afforded by section 3(d) exceeded that provided for by section 17. The appellant further submitted that it did not allege any compulsory taking in breach of section 17. It was submitted that the arbitrary refusal by GOB to pay compensation in accordance with Arana J's judgment is an arbitrary deprivation of the compensation as well as a practical nullification of the right to compensation recognised in the judgment. Further, the withholding of payment and the denial of the right to payment are in breach of section 3(d) of the Constitution. The appellant submitted that the rights protected by section 3(d), the arbitrary deprivation of property, are wider in scope than compulsory takings under section 17. The appellant

relied on **Jeffrey J Prosser et al v Attorney General et al, Claim No. 338 of 2005,** in which Conteh CJ recognised that section 3(d) is wider in scope than section 17.

[109] The appellant contended that the additional rights conferred by section 3(d) are independently justiciable, as section 20 of the Constitution expressly provides for access to redress for breach of the rights enshrined in sections 3 to 19 of the Constitution.

[110] In response, the learned Solicitor General submitted that it is section 17 of the Belize Constitution which prescribes the right not to be deprived of property and not section 3(d) which stands alone. Alternatively, the learned Solicitor General submitted that section 3(d) has to be read in conjunction with section 17 of the Constitution. Further, assuming that the appellant relied on section 17, there was no deprivation of property as a large portion of the land was returned to it and compensation granted for the period it was in the possession of GOB. The learned Solicitor General further submitted that section 3(d) of the Constitution is not justiciable as it operates as a preamble or precursor to the 'Fundamental Rights' provisions to the Constitution. He relied on the case of **Boyce v The Attorney General of Barbados** (2006) 69 WIR 104 at paragraphs 58 to 60, a judgment of the Caribbean Court of Justice (CCJ), in support of his argument.

Discussion

[111] Section 3 of the Constitution which forms a part of the preamble of the Constitution provides for the 'Protection of Fundamental Rights and Freedoms' and section 3(d) provides for protection from arbitrary deprivation of property. Section 3 provides:

> *"Protection of Fundamental Rights and Freedoms*
>
> *3. Whereas every person in Belize is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of*

origin, political opinions, colour, creed or sex, but subject to respect for the right and freedom of others and for the public interest, to each and all of the following namely –

(a) Life, liberty, security of the person, and the protection of the law;
(b) Freedom of conscience, of expression and of assembly of association;
(c) Protection for his family life, his personal privacy, the privacy of his home and other property and recognition of his human dignity; and
(d) <u>Protection from arbitrary deprivation of property,</u>

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

Protection from deprivation of property

[112] In this appeal we are concerned with section 3(d) which relates to arbitrary deprivation of property. The section in Part II of the Constitution impacting on this broad right is section 17, which provides for compulsory taking in defined circumstances, with compensation and without compensation. Section 17 provides:

"*17 (1) No property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired except by or under a law that –*

(a) prescribes the principles on which and the manner in which reasonable compensation therefore is to be determined and given within a reasonable time; and

(b) secures to any person claiming an interest in or right over the property a right of access to the courts for the purpose of -

(i) establishing his interest or right (if any);

(ii) determining whether that taking of possession or acquisition was duly carried out for a public purpose in accordance with the law authorising the taking of possession or acquisition;

(iii) determining the amount of compensation to which he may be entitled; and

(iv) enforcing his right to any such compensation."

……

Provision for the enforcement of fundamental rights

[113] Section 20 of the Constitution provides:

> *"If any person alleges that any of the provisions of sections 3 to 19 inclusive of this Constitution has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other persons alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the Supreme Court for redress."*

[114] Section 20 of the Constitution thus makes it clear that there could be a breach of section 3. The appellant submitted that it has been arbitrarily deprived of property in breach of section 3(d) of the Constitution. Whether section 3 is separately enforceable would depend on the detailed provisions in the Act.

The scope of section 3(d)

[115] The learned trial judge, as shown above, said that, although the appellant did not refer to section 17 of the Constitution, it is the section that enforces and gives effect to section 3. Further, the learned judge said that, "*Section 3(d) of the Constitution*

guarantees the right to own private property. Section 17 provides the law by which the right is protected." The appellant in its submissions before the learned trial judge argued that it was not challenging the compulsory acquisition of the property. Thus, it was not bringing its claim under section 17 of the Constitution. In my respectful opinion, section 17 provides only for a taking of property of any kind or acquisition of property and does not address a situation as in this case where there has been and continues to be refusal to fully honour the terms of a court order for payment. As for section 3(d), it is my respectful opinion, that it is broader than just ownership of private property. There is no definition of 'property' in the **Land Acquisition Act** and as such a purposive approach must be given to that section. In the **Jeffrey J Prosser** case, the learned Chief Justice (at the time) recognised that section 3(d) is wider in scope than section 17. The backdrop to this proceeding as stated by Conteh CJ (as he was then) was '*the management and control of Belize Telecommunications Ltd., its shareholdings in particular, the Special Share created by its Articles of Association and the inspection of its affairs in the face of shifting control of the company. These issues have given rise to the constitutional challenges in this case*. *They concern amending legislation enacted in August 2005 relating to Public Utilities Commission Act, Chapter 223…"* The Minister of Public Utilities had issued two Statutory Instruments Nos. 108 and 109 of 2005, pursuant to the Public Utilities Commission (Amendment) Act, 2005, which was enacted on 13 August 2005. In SI No. 109, the Minister declared the special share in BTL an entrenched right which is unlawful and no effect and as a consequence to that first declaration, he declared the special share unlawful.

[116] The Claimants launched constitutional proceedings against the Act and the Statutory Instruments and one of the reliefs sought was a declaration that the declaration and confirmation made by the Minister of Public Utilities comprised in Statutory Instrument (SI) No. 109 of 2005, was a violation of their constitutional rights enshrined in sections 3(d) and 17(2) of the Belize Constitution and was therefore unlawful and void. They complained that the declaration made by the Minister denied them equal protection of the law and resulted in their being deprived of the Special Share contrary to sections 3(d) and 17 of the Belize Constitution. The defendants

argued that that there was no deprivation or taking of property from the claimant within the contemplation of the Constitution. It was argued that no reliance could be placed on section 3(d) of the Constitution as this is not a free-standing provision and that there is no stand-alone right to protection from deprivation of property which is not in section 17 of the Constitution which provides for compulsory acquisition or compulsory taking of property. It was further contended that there was neither compulsory acquisition nor compulsory taking of the Special Share as there is no free-standing right to protection from arbitrary deprivation of property and that the extinction of the special share does not amount to acquisition.

[117] The learned Chief Justice at paragraphs 57 - 59 of his judgment said:

57. *"There may be some attraction in the argument plausibly advanced …that in this case that there was no taking or acquisition of the Special Share…It simply ceased to exist or was extinguished. I however, respectfully think that it would defy common sense and logic and do violence to language to say by the Minister's action, the Claimants were not deprived of the Special Share. I am of the considered view that the protection afforded to property by the provisions of the Constitution is to ensure that its owner is not deprived of it improperly or arbitrarily…The Defendants and the Interested Parties understandably, did not try to justify section 22A of Act No. 30 of 2005 or Statutory Declaration No. 109 of 2005, under any of the heads listed in subsection (2) of section 17. The seeming attraction in the arguments…therefore, loses their appeal, when it is realised that the Constitution's protection of property encompasses more than its compulsory acquisition or taking. It does not mean and cannot mean that* ***other acts*** *of deprivation of property other than by compulsory acquisition or taking or those provided for in section 17(2), are allowed or do not offend the Constitution's protection of property. The constitutional protection afforded to property is, I believe, to ensure that its owner is not disposed or deprived of it, whether by compulsory acquisition or taking* ***or other forms or acts of deprivation*** *without compensation save as provided for in subsection (2) of section 17. This*

protection I find is generic: it is protection from deprivation of property. This is so whether the deprivation results in the property becoming vested in or acquired by another or not. It is not the vesting of the property in another or its acquisition by that other that is prohibited by the Constitution; it is the ***arbitrary deprivation*** *of the property or interest in it. It is therefore no less a deprivation to argue that the property has not been acquired by or vested in another. The deprivation is arbitrary and therefore impermissible if it is without compensation and cannot be justified under any of the paragraphs of subsection (2) of section 17.*

58. *I am fortified in this conclusion by the need to give a generous and purposive interpretation of the provisions of the Constitution regarding fundamental human rights:* ***Minister of Home Affairs v Fisher (1980) A.C. 317*** *at 328; and* ***Attorney General of The Gambia v Momodu Jobo (1984) A.C. 689*** *at 700. This is why I said earlier that I do not think it necessary to decide whether or not the rights mentioned in section 3 of the Constitution are distinctly and separately enforceable apart from the rights enumerated in ensuing sections of the Constitution in Part II. I find however, that there is an animating link between section 3 and the several fundamental human rights set out in the sections following it…*

In my view, therefore, the great purpose of both section 3 and the ensuing sections of the Constitution on the protection of fundamental human rights in Part II is a declaration of entitlement to the rights and freedom mentioned ***and*** *their protection and enforcement. It therefore, does not, at the end of the day, make any difference whether section 3(d) of the Constitution is free-standing and separately enforceable. This is so because though the effect of section 22A of Act No. 30 of 2005 and SI No 109, the determination and declaration of the Minister of Public Utilities, may not, as correctly argued by both the Solicitor General and Mr. Plemming QC, be compulsory acquisition or taking of the Special Share, but only its extinguishment or nullification, but can it equally*

seriously be argued that this was not an act of arbitrary deprivation in the circumstances of this case?

59. *I am therefore of the considered view that the compulsory acquisition or taking of property without compensation prohibited in section 17(1) of the Constitution is but a species of the genus of arbitrary deprivation of property proscribed in section 3(d). There is therefore in my view, a connection between the two sections but not a complete overlap."*

[118] It was for these reasons that the learned Chief Justice held that the determination and declaration of the Minister as stated in SI No. 109 arbitrarily deprived the Claimants of the Special Share in BTL, contrary to the Belize Constitution. It was the nullification of the share which was the arbitrary deprivation of property and not compulsory acquisition or takings under section 17 of the Constitution. In the case at hand, GOB has returned 109.6 acres of the land compulsorily acquired in April of 2009 (out of a total of 127 acres that were compulsorily acquired in December of 1994) to the appellant, but has not compensated them for the remaining acreage and has not, since 2003, paid any more interest as agreed. The respondents have partly honoured Arana J's judgment, but failed to give any good reason for not fully honouring the judgment. This action by the respondents cannot be justified under any of the paragraphs of section 17(2) of the Constitution.

[119] I am not in agreement with the learned Solicitor General's argument that section 3(d) merely operates as a preamble or precursor to the Fundamental Rights provisions. Although section 3 begins with the word "Whereas", which is indicative of a preamble rather than a separate enactment, there should be a generous and purposive interpretation of the provisions of the Constitution regarding fundamental human rights, as stated in **Minister of Home Affairs v Fisher [1980] A.C. 317** at 328; and **Attorney General of The Gambia v Momodu Jobo [1984) A.C. 689** at 700. This principle is applied when the rights conferred in the later provisions are not exhaustively stated as

in the case of section 17 which deals only with compulsory acquisition or taking of property.

[120] In **Boyce's** case, which was cited by the learned Solicitor General, the broad right of 'the protection of the law", section 11(c), was not comprehensively addressed in the detailed sections that followed. Section 18 which dealt with protection of the law was different from the other detailed sections. As such, Boyce and Joseph in the Court of Appeal, were able to rely on section 11(c). The learned Solicitor General in his submissions quoted a part of paragraph 60 of the **Boyce case** where it is stated *"the jurisdiction conferred by s 24 on the High Court to adjudicate allegations that any particular right has been, is being or is likely to be contravened and to fashion appropriate remedies for any contravention or likely contravention that it finds, is limited to cases which involve a contravention of one or other of the detailed sections".* The latter part of paragraph 60, which was not quoted by the learned Solicitor General, shows that section 11(c) was not comprehensively addressed by section 18, the detailed section.

[121] In that case, Joseph and Boyce were found guilty of murder of a man who had been brutally beaten to death. They were sentenced to death by hanging and their appeals were allowed by the Court of Appeal. The Attorney General appealed to the CCJ. One of the issues argued before the CCJ was that, "in accordance with *de Freitas v Benny*, no constitutional rights of the respondents were *infringed or at risk; that any entitlements they might have were neither rights that could be enforced by virtue of s 24 of the Constitution nor, indeed, rights for which a court could give constitutional relief*;…" The Court at paragraphs 58 – 60 of the judgment said that:

> *[58] These submissions call into question the nature and extent of the rights to which a condemned man is entitled. The particular right of the condemned man most heavily relied on by the respondents, was the right to the protection of the law. That right is referred to in s 11 of the Barbados Constitution. Section 11 is part of Chapter 3, the chapter in the Constitution devoted to the protection of fundamental rights and freedoms*

of the individual. Chapter 3 embraces ss 11 through 27. Section 11, which is in the nature of a preamble, states the rights in the following manner:

> '11. *Whereas every person in Barbados is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely -*
>
> *(a) life, liberty and security of the person;*
>
> *(b) protection for the privacy of his home and other property and from deprivation of property without compensation; and*
>
> *(c) The protection of the law; and*
>
> *(d) Freedom of conscience, of expression and of assembly and association'*
>
> *The following provisions of this chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.*

[59] Sections 12 to 23 of the Constitution (which we will refer to as 'the detailed sections') contain specific provisions for the enforcement of rights which either correspond exactly with those enumerated in s 11 or may be regarded as corollaries or components of them. By way of illustration, s 12 is expressly concerned with the right to life; and s 16 with the right not to be deprived of property without compensation, both of which are referred to in s 11. On the other hand, the protection afforded by s 14 against slavery or forced labour,

and by s 15 against torture or inhuman and degrading punishment or treatment, is not linked as a matter of language to any of the rights enumerated in s 11. But those rights are in substance connected with the liberty and security of the person, which are included in the rights listed in s 11(a). In the case of the right to the protection of the law, the only express link between that right and any of the detailed sections is provided by the marginal note to s 18 which reads: 'Provisions to secure protection of law'. It is important to know that the pattern followed in these detailed sections is that each section normally begins with a prohibition against conduct which would violate the right or freedom that is being protected, followed by a fairly detailed exposition of the exceptions which the law may create to that prohibition. In other words, there is a broad statement of the right or freedom followed by a number of limitations on the protection afforded that right or freedom. Those exceptions or limitations serve to put into more specific and concrete terms the qualifications contained in s 11 to the effect that persons in Barbados are entitled to the fundamental rights and freedoms enumerated 'subject to respect for the rights and freedoms of others and for the public interest'. It is not unexpected, therefore, that the redress which s 24 of the Constitution provides for the violation of these fundamental rights and freedoms should be structured so as to take account of the exceptions and limitations contained in the detailed sections. Thus, the jurisdiction conferred by s 24 on the High Court to adjudicate allegations that any particular right has been, is being or is likely to be contravened and to fashion appropriate remedies for any contravention or likely contravention that it finds, is limited to cases which involve a contravention of one or other of the detailed sections. The question which arises is whether the court's power to enforce the right to protection of the law, and to grant a remedy for its breach, is limited to contraventions of s 18, that being the only one of the detailed sections which by its subject matter and its marginal note is linked to the protection of the law.

[60] In a fundamental respect, s 18 is different from the other detailed sections. In each of the others, the Constitution deals comprehensively with the relevant right of freedom. Where the extent or content of the right requires elucidation, that is provided (see for example, s 19) and, in all cases, any limitations on the enjoyment of the right are set out quite fully. <u>There is therefore, no scope for enforcement of the relevant right outside the four corners of the detailed sections.</u>"

(This is the point where the learned Solicitor General ended his quote as shown in his submissions. But, it goes further to show that it is not applicable in all cases. The court then said the following which is quoted below).

"*In the case of the right to the protection of the law, however, it is clear that s. 18 does not provide, nor does it purport to provide, an exhaustive definition of what that right involves or what the limitations on it are. There is no mention in that section of the protection of the law, which is in itself an indication that s 18 is not intended to be an exhaustive exposition of that right. Indeed, the right to the protection of the law is so broad and pervasive that it would be well nigh impossible to encapsulate in a section of a constitution all the ways in which it may be invoked or can be infringed. Sections 18 deals only with the impact of the right on legal proceedings, both criminal and civil, and the provisions which it contains are geared exclusively to ensuring that both the process by which the guilt or innocence of a man charged with a criminal offence is determined as well as that by which the existence or extent of a civil right or obligation is established, are conducted fairly. But the right to the protection of the law is, as we shall seek to demonstrate, much wider in the scope of its application. The protection which this right was afforded by the Barbados Constitution would be a very poor thing indeed if it were limited to cases in which there had been a contravention of the provisions of s 18.*"

[122] It can be seen from the above authority that although section 11 of the Barbados Constitution appears to be a perambulatory clause, a generous and purposive

interpretation was given to section 18, the provision for the fundamental right to protection of the law. The court did not rely on the four corners of the detailed section. The appeal by the Attorney General was dismissed (against the decision of the Court of Appeal which allowed the appeals of Joseph and Boyce).

The dissenting judgment of Schreiner JA in **Dow v AG** [1992] LRC (Const) 623,

[123] Sometime in August of this year, the parties on both sides were requested by the Registrar (on instructions given by the court), to file further written submissions in relation to the relevance if any, of Schreiner JA's dissenting judgment in **Dow v AG** [1992] LRC (Const) 623, (2001) AHRLR 99 (BwCA 1992) which the Board in **Grape Bay** said, is a "persuasive dissenting judgment." Submissions were sent to the court from the appellants on 13 August 2014, and from the respondents on the 18 November 2014.

[124] Learned senior counsel, Mr. Marshalleck, for the appellant submitted that:

> "1. The Privy Council in **Grape Bay** while indicating that the dissenting decision of Schreiner JA was a persuasive one did not indicate that it was persuaded by it. To the contrary the Privy Council continued to treat the issue before it as unresolved. In the sentence immediately following the one in which the decision of Schreiner JA was identified as persuasive, Lord Hoffman stated "Even if the majority were right in treating section 3 as separately enforceable" making it clear that the Court was by its previous remarks making no determination on the issue. He then went on to expressly state that it was unnecessary for their Lordships to decide the issue in the case because there had been no deprivation of property. There was therefore no binding decision made by the Privy Council in relation to the Constitution of Bermuda and no adoption of the dissenting decision of Schreiner JA in relation to the Constitution of Botswana. The Court merely indicated that the Schreiner decision was persuasive.

2. The **Grape Bay** decision did find that it is a question of construction of the particular constitution as to whether the general statement of fundamental rights and freedoms at the beginning of the chapter is independently justiciable. It is therefore the provisions of Section 3 of the Belize Constitution which must be construed by the court and while assistance might be derived from decisions by other courts construing similar provisions those decisions cannot be conclusive.

3. Albeit the word “whereas” in our Section 3 may impliedly suggest that the section is intended as perambulatory for the reasons posited by Schreiner JA in his dissenting decision, the provision of section 20 which expressly includes a reference to section 3 goes to the contrary conclusion and is clearer in language and effect. It should be noted that Schreiner JA conveniently ignored a similar provision in the Botswana Constitution so that that conflict was never confronted nor resolved.

4. Further, by reason of the ordinary meanings of the words used, the arbitrary deprivation of property is necessarily wider concept than a compulsory taking so that the general statement of the right to protection from the arbitrary deprivation of property necessarily offers protection to a broader scope of rights than the provisions of section 17. The Constitution ought properly to be generously interpreted to secure the greater protection of fundamental rights.

5. The Appellant submits that the provisions of Section 3 of the Belize Constitution recognizes, and by way of that recognition, guarantees justiciable rights to the extent that those general rights have not been curtailed by qualifying provisions of the Constitution. This is manifest from the provisions of Section 3 itself where it is provided that “the provisions of this Part shall have effect for the purpose of affording protection to those rights and

> freedoms subject to such limitations of that protection as are contained in those provisions …" Section 3 of course is one of the "provisions of this Part" referred to."

[125] Learned senior counsel further submitted that the issue has to be resolved by the court, applying principles of constitutional interpretation. He submitted that the dissenting decision identified, offers one approach but is not binding on the court since it was described by the Privy Council as persuasive. Learned senior counsel further contended that CJ Conteh (as he was then) adequately summarized the contrary view in the **Prosser** decision so that both sides of the argument are before the court.

[126] The learned Deputy Solicitor General, Mr. Hawke submitted that the respondents completely associate themselves with the dissenting views of Schreiner JA in the **Dow** case with respect to section 3 of the Constitution of Botswana which is identical to that of Belize. Learned counsel submitted that the correct interpretation is that stated by Schreiner JA at page 689 where he stated:

> "In my view, section 3 does not create specific rights and freedoms which do not fall within those declared and enacted in detail in the later sections of Ch II. Section 3 is a preamble or recital and may be used to assist in the construction of any of the provisions of ss 4 to 15."

[127] Learned counsel, Mr. Hawke further submitted that in **Grape Bay Ltd v AG Bermuda** [2000] 1 WLR 574 at 582, the Board followed their decision in **Olivier v Buttigieg** [1967] 1 AC 115, that in circumstances where the section commences with 'whereas' it is a preamble and is prefatory in nature. As such, it is an aid to construction. He further contended that the dissenting opinion of Schreiner JA was approved.

[128] Learned Counsel further relied on the case of **Campbell-Rodrigues and others v Attorney General of Jamaica** [2007] UKPC 65, where the court considered section

13 of the Jamaica Constitution which he contended is similar in language to the Constitution of Belize. He relied on paragraphs 7 to 12, where the court said:

> "[7] It was contended on behalf of the Appellants that s 13 had independent effect in the conferment of constitutional rights, which their counsel Mr James described as "declaratory force". Alternatively, as a minimum he submitted that it was to be given effect as an aid to construction of s 18. Both the Constitutional Court and the Court of Appeal rejected the argument that s 13 had the function of an instrument for providing redress. They relied in particular on the wording of s 25(1), providing for redress in the event of contravention of any of the provisions of s 14 to 24 of the Constitution, without reference to s 13.
>
> [8] In *Grape Bay Ltd v A-G* [2000] 1 WLR 574, [2000] 1 LRC 167, 175 Lord Hoffmann adverted to the "family resemblance" between certain constitutions of UK Overseas Territories and former British possessions, now independent states. He went on:
>
> > "Typically they contain a chapter on the protection of the fundamental rights and freedoms of the individual which is introduced by a provision such as section 1 of the Bermuda Constitution, stating those rights and freedoms and their limitations in general terms, followed by a series of sections dealing with particular rights and more detailed exceptions and qualifications. Finally, there is an enforcement provision which gives any person who alleges a contravention of some or all of the provisions of the chapter the right to claim constitutional relief from the court.
> >
> > On the other hand, the constitutions differ in detail and also on whether the general statement of fundamental rights and freedoms at the beginning of the chapter is separately enforceable."
>
> [9] Some assistance may be obtained from decisions of the Board in relation to different constitutions, which Lord Hoffmann discussed in some detail in the Grape Bay case. At one end of the spectrum is that of Mauritius, considered in *Société United Docks v Government of Mauritius* [1985] AC 585, [1985] 1 All ER 864, [1985] LRC (Const) 801. Section 3 of the Constitution of Mauritius contains a general statement declaring the existence of a number of rights, including that of protection from deprivation of property without compensation. Section 17(1) provides for application for constitutional relief "where any person alleges that any of ss 3 to 16 has been . . . contravened in relation to him". In the opinion of the Board, given by Lord Templeman, the wording of s 3 was "only consistent with an enacting section", rather than a mere preamble or introduction, and its ambit was not to be curtailed (p 841).
>
> [10] At the other end of the spectrum is the Constitution of Dominica, which bears significant resemblances to that of Jamaica. The opening words of s 1, "Whereas

. . . each and all of the following", are identical with those of s 13 of the Constitution of Jamaica. The rights and freedoms specified are phrased differently, but include protection from deprivation of property without compensation, then the final portion referring to limitations is in almost identical terms. It was considered by the Board in *Blomquist v A-G of the Commonwealth of Dominica* [1987] AC 489, 1987] 2 WLR 1185. Section 6 of the Constitution provided for protection from compulsory acquisition without compensation in terms which were in the material respects exactly the same as those of s 18 of the Jamaican Constitution. Section 16 gave a right to apply for redress to any person who alleged a contravention of any of the provisions of ss 2 to 15 (inclusive), but did not refer to s 1. The Board held, in a judgment given by Lord Mackay of Clashfern, that the power to provide such redress was limited to that provided for in s 6 and rejected the argument that s 1 conferred an independent and wider power which was separately enforceable.

[11] In an intermediate position come the Constitutions of Malta and Bermuda. Section 5 of the Constitution of Malta, like s 1 of the Constitution of Dominica, was framed in terms identical with those of s 13 of the Constitution of Jamaica in the opening and closing portions of the section. Section 16 contained an enforcement provision similar to that contained in s 17 of the Constitution of Mauritius, applicable to all of the preceding provisions conferring rights and freedoms. Section 5 was not excluded by the wording of s 16. The case did not turn on the enforceability of s 5, but Lord Morris of Borth-y-Gest, giving the judgment of the Board in *Olivier v Buttigieg* [1967] 1 AC 115, [1966] 2 All ER 459, [1966] 3 WLR 310, observed at p 128:

> "It is to be noted that the section begins with the word 'Whereas'. Though the section must be given such declaratory force as it independently possesses, it would appear in the main to be of the nature of a preamble. It is an introduction to and in a sense a prefatory or explanatory note in regard to the sections which are to follow. It is a declaration of entitlement – coupled however with a declaration that though 'every person in Malta' is entitled to the 'fundamental rights and freedoms of the individual' as specified, yet such entitlement is 'subject to respect for the rights and freedoms of others and for the public interest'. The section appears to proceed by way of explanation of the scheme of the succeeding sections . . . ."

The provisions of the Constitution of Bermuda are very similar in material respects to that of Malta. They were considered by the Board in *Grape Bay Ltd v A-G* [2000] 1 WLR 574, [2000] 1 LRC 167. Lord Hoffmann, giving the judgment of the Board, did not find it necessary to decide whether the general statement in s 1 was to be a preamble or to have independent force, but reviewed the cases to which their Lordships have referred and drew a clear distinction between provisions such as those in ss 13 and 25 of the Constitution of Jamaica and those contained in the Constitution of Mauritius.

> [12] Both the Constitutional Court and the Court of Appeal rejected the Appellants' argument that s 13 conferred separate and independent rights. They regarded it as in essence a preamble and accepted the Respondent's submission that its declaratory force was confined to declaring that the rights set out in Ch III of the Constitution were not being created de novo but existed prior to the Constitution. Their Lordships are satisfied that s 13 does not confer any freestanding rights and that on the clear interpretation of the provisions of Ch III the rights and freedoms enforceable under s 25 are to be those set out in ss 14 to 24 inclusive. They agree with Cooke JA when he said (Record, p 379) that "a 'generous and purposive interpretation' does not permit a distortion of the explicit relevant constitutional provisions".

[129] Mr. Hawke further contended that the position is further strengthened in the case of **Newbold v Commissioner of Police; Curry v Commissioner of Police; and another** [2014] UKPC 12. He submitted that the Board considered section 15 of the Bahamas Constitution which was similar in language to the Belize Constitution and concluded at paragraph 32 that:

> "32. The Board does not consider that these three authorities assist the appellants in the present case. They are emphatically not authority for any proposition that article 15 of the Bahamian Constitution operates as and provides a general source of protection of human rights, overlapping with the substance of all the rights provided by the subsequent specific articles. They address a completely different subject-matter to the present, and at best support the view that the concept of "protection of the law" can extend to matters outside the scope of article 18 of the 1973 Constitution. In the present case, the relevant substantive rights are to be found in articles 21 and/or 23 or not at all. Article 15 is in this respect no more than a preamble, as the Board held it to be in Campbell-Rodriques. There is a distinction between on the one hand constitutions in the form adopted in The Bahamas, Jamaica and Malta, in which the equivalent of article 15 is wholly or predominantly a preamble, and on the other hand constitutions in the form adopted in Trinidad and Tobago and Mauritius, which contain instead an enacting provision. The distinction was recognised by the Board in Société United Docks v Government of Mauritius [1985] 1 AC 585, 600D-G as well as in Campbell-Rodriques, paras 9 to 12. In re Fitzroy Forbes (no 498 of 1990), Hall J was in the Board's view wrong to conclude that that distinction did not, or did not any longer, exist, and wrong to treat the Société United Docks case as an authority applicable on its facts to article 15 of the Bahamian Constitution."

[130] Learned Counsel contended that the above authorities have made it clear that section 3 of the Constitution of Belize is a preamble to the other rights that follow. Further, that the language of the Constitutions of Belize, the Commonwealth of the Bahamas, Jamaica and Botswana are similar and fundamentally different from the Constitutions of Trinidad and Tobago and Mauritius.

Discussion on additional submissions

[131] In the **Grape Bay case**, Lord Hoffmann spoke of the "family resemblance" between certain constitutions of UK Overseas Territories and former British possessions which are now independent states as shown at paragraph 128 above. The Belize constitution is no different as it contains the typical provisions and differ in detail from other constitutions. The issue addressed in the additional submissions concerns the dissenting judgment of Schreiner JA in the **Dow case**. This is a case from Botswana and the constitutional provision which gave rise to the dispute was section 3 in Chapter II which provides for the fundamental rights and freedom of the individual.

Botswana Constitution

[132] Section 3 of the Botswana Constitution states:

> "3. Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and the public interest to each and all the following freedoms, namely
>
> (a) life, liberty, security of the person and the protection of the law;
>
> (b) freedom of conscience, of expression and of assembly and association; and
>
> (c) protection for the privacy of his home and other property and from deprivation of property without compensation, the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are

contained in those provisions, as being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

[133] This provision is similar to the Belize provision on the protection of fundamental rights and freedoms. It begins with the word "Whereas" and the wording in relation to the limitations is that "*the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions..".*

[134] In the said Chapter II of the Botswana Constitution, section 18(1) provides for redress. It states:

"18. (1) Subject to the provisions of subsection (5) of this section, if any person alleges that any of the provisions of sections 3 to 16 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress."

[135] Section 3 which provides for fundamental rights and freedom is included in the redress provision so that if it is contravened then an individual may apply for redress. This section is also similar to section 20 of the Belize Constitution which provides for enforcement of fundamental rights. In the Belize Constitution, the fundamental rights provision is section 3. Section 20 includes section 3 as an enforcement provision. It states: "If any person alleges that any of the provisions of sections 3 to 19 inclusive of this Constitution has been , is being or is likely to be contravened.."

[136] By a majority decision in the **Dow case** (Amissah JP, Aguda and Bizos JJA), it was held that it was clear from section 3 of the Constitution itself and from section 18 which provides for enforcement of breaches of the Constitution that section 3 was not a preamble and actions could be brought for breaches. Amissah JP in the leading judgment said that the first impression gained from the opening of the word 'whereas'

in section 3 is that it is a preamble but a closer look at the section shows that it was not so intended. He looked at the structure of the sentence. He stated that:

> "[29] A careful look at the section, however, shows that it was not intended merely as a preamble indicating the legislative intent for the provisions of Chapter II at all. The internal evidence from the structure of the section is against such an interpretation. Although the section begins with whereas', it accepts that every person in Botswana is entitled to the fundamental rights and freedoms of the individual, ... whatever his race, place of origin, political opinions, colour, creed or sex' is, and continues to enact positively that the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms (that is, the rights and freedoms itemised in (a), (b) and (c) of section 3), subject to such limitations as are contained in those provisions (that is, the provisions in the whole of Chapter II) being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest'. That positively enacted part of section 3 alone should be sufficient to refute a suggestion that it is a mere preamble. But section 18(1) of the Constitution which finds itself in the same Chapter II put the matter beyond doubt. It provides that:
>
> > 'Subject to the provisions of subsection (5) of this section, if any person alleges that any of the provisions of sections 3 to 16 (inclusive) of this Constitution has been, is being or is likely to be contravened ….. that person may apply to the High Court for redress.
>
> [30] If a preamble confers no right but merely provides an aid to the discovery of legislative intention, it is impossible to hold otherwise than that from section 18(1), it is clear that contravention of section 3 leads to enforcement by legal action.
>
> [31] From the wording of section 3, it seems to me that the section is not only a substantive provision, but that it is the key or umbrella provision in Chapter II under which all rights and freedoms protected under that chapter must be subsumed. Under the section, every person is entitled to the stated fundamental rights and freedoms. Those rights and freedoms are subject to limitations only on two grounds, that is to say, in the first place, limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others', and secondly on the ground of public interest'. Those limitations are provided in the provisions of Chapter II itself, which is constituted by sections 3 (but effectively, section 4) to 19, of the Constitution."

[137] Schreiner JA in his dissenting judgment did not address section 18 (the enforcement provision) which included section 3. He addressed section 3 as shown at paragraph 126 above where he said that that section does not create specific rights. (Section 18 was addressed by Amissah JP as shown above). Learned Counsel, Mr. Palacio contended that the Board in the **Grape Bay** case approved the dissenting judgment of Schreiner JA. This statement however, does not paint a clear picture as the Board though indicating that the dissenting decision was a persuasive one did not indicate that it was persuaded by it. Learned senior counsel, Mr. Marshalleck has rightly stated that the Board did not make a binding decision as to whether section 1 was separately enforceable. Lord Hoffmann in his judgment said the following on the issue:

> "…..Mr Diel has drawn their Lordships' attention to other Commonwealth cases in which a different view has been taken of provisions beginning with the word 'Whereas'. For example, in *Dow v A-G*[1992] LRC (Const) 623 the Court of Appeal of Botswana held by a majority that the general statement in s 3 of the Constitution, though also commencing with the word 'Whereas', was not a preamble but a separate enacting section. There was, however, a persuasive dissenting judgment by Schreiner JA, with whom Puckrin JA agreed. Even if the majority were right in treating s 3 as separately enforceable, the actual decision would appear to be contrary to the opinion of this Board in *Poongavanam v R* (6 April 1992, unreported), to which reference was made in *Matadeen v Pointu* [1998] 3 LRC 542 at 561.
>
> It is, however, unnecessary for their Lordships to decide in the present case whether the general statement in s 1 of the Constitution is to be a preamble or to have independent force, because their Lordships have no doubt that the effect of the Prohibited Restaurant Act 1997 on Grape Bay was in any event not a 'deprivation of property' within the meaning of that section.

Bermuda Constitution

[138] It is to be noted that the Bermuda constitutional provisions discussed in the **Grape Bay** case is not similar to Belize constitutional provisions and the Botswana constitutional provisions discussed in the **Dow case**. In the **Grape Bay** case, the fundamental rights and the redress provisions as shown at page 579 states:

" 'Fundamental rights and freedoms of the individual

1. Whereas every person in Bermuda is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely: (a) life, liberty, security of the person and the protection of the law; (b) freedom of conscience, of expression and of assembly and association; and (c) protection for the privacy of his home and other property and from deprivation of property without compensation, **the subsequent provisions of this Chapter** shall have effect for the purpose of affording protection to the aforesaid rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.'

'Protection from deprivation of property

13(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied, that is to say …'

There follow various conditions such as a requirement should be in the public interest, that there should be provision for prompt payment of adequate compensation and that there should be a right of appeal.

Finally there is the provision for the enforcement of fundamental rights.

'15(1) If any person alleges that any of the foregoing provisions of this Chapter has been, is being or is likely to be contravened in relation to him … that person may apply to the Supreme Court for redress.' "

[139] The phrase "***the subsequent provisions*** *of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights*" which appears in section 1 of the Bermuda Constitution, as shown above, is very different to that of section 3 of the Belize Constitution. The phrase used in section 3 of the Belize Constitution is "*the provisions of this part shall have effect for the purpose of affording protection to those rights".*

[140] Lord Hoffmann in looking at examples of Constitutions that differ in detail and also whether the general statement of fundamental rights and freedoms at the beginning of the chapter is separately enforceable, discussed Dominica and Mauritius Constitutions but did not make a determination on the issue as the court found that there was no deprivation of property. Lord Hoffmann said that in in **Blomquist v A-G of the Commonwealth of Dominica** [1988] LRC (Const) 315, the Board considered the Constitution of Dominica, which contains a general statement in s 1, followed by particular rights and freedoms in ss 2 to 15.

Dominica Constitution

[141] The redress provision is section 16(1) which provides:

> 'If any person alleges that any of the provisions of sections 2 to 15 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him … then, without prejudice to any other action with respect to the same matter which is lawfully available, that person … may apply to the High Court for redress.'

[142] Lord Hoffmann said that the Constitution therefore made it clear that s 1 is not to be separately enforceable and the Privy Council so held. In the Belize Constitution, unlike the Dominica Constitution, the general statement provision, section 3, is included in the redress provision.

Mauritius Constitution

[143] Lord Hoffman, in contrast, considered the Constitution of Mauritius. He said that the general statement in s 3 states:

> 'It is hereby recognised and declared that in Mauritius there have existed and shall continue to exist without discrimination by reason of race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, each and all of the following human rights and fundamental freedoms namely—(a) the right of the individual to life, liberty, security of the person and the protection of the law; (b) freedom of conscience, of expression, of assembly and association and freedom to establish schools; and (c) the right of the individual to protection for the privacy of his home and other

> property and from deprivation of property without compensation, **and the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms** subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.'

[144] Lord Hoffmann then went on to say that, "*Unlike the Dominican enforcement section, s 17(1) of the Mauritius Constitution provides that 'Where any person alleges that any of sections 3 to 16 has been … contravened in relation to him', he may apply for constitutional relief. Thus the Constitution makes it clear that s 3 is intended to be separately enforceable. In Société United Docks v Government of Mauritius [1985] LRC (Const) 801 Lord Templeman, giving the judgment of the Board, said (at 841):*

> *'The wording of section 3 is only consistent with an enacting section; it is not a mere preamble or introduction. Section 3 recognises that there has existed, and declares that there shall continue to exist, the right of the individual to protection from deprivation of property without compensation, subject to respect for others and respect for the public interest. Section 8 sets forth the circumstances in which the right to deprivation of property can be set aside but it is not to curtail the ambit of section 3. Prior to the Constitution, the government could not destroy the property of an individual without payment of compensation. The right which is by section 3 of the Constitution recognised and declared to exist is the right to protection against deprivation of property without compensation. A Constitution concerned to protect the fundamental rights and freedoms of the individual should not be narrowly construed in a manner which produces anomalies and inexplicable inconsistencies.'*

[145] The general statement in the Belize Constitution and the Mauritius Constitution are similar, for the most part. Section 3 of the Mauritius Constitution does not begin with the word 'Whereas" like the Belize constitution. However, the material aspect in my view is similar. The Mauritius constitutional provision states: "(c) It is hereby recognised ….deprivation of property without compensation, and **the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions**…". The Belize provision states: "Whereas …. (d) Protection from deprivation of property … ***the provisions of this part shall have effect for the***

purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions.." The words, "the provisions of this Chapter" and "the provisions of this part" are significant and should not be overlooked. Further, the general statements in both Constitutions are included in the enforcement provisions and this is confirmed by the enforcement provisions itself which included section 3 (the general statements in both Constitutions).

Jamaica Constitution

[146] The **Campbell-Rodriques** case relied on by learned counsel, Mr. Hawke concerns the interpretation of the Jamaica constitutional provisions. The "Fundamental Rights and Freedoms" provision, section 13, begins with the word 'Whereas' and the ending speaks to "….the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of that protection.." The enforcement provision, section 25(1) provides: "…if any of the provisions of sections 14 to 24 (inclusive) is likely to be contravened .." It is clear that the general statement, section 13, is not included in the enforcement provision. The position in Belize is different as section 3 which is similar in language to section 13 of the Jamaica Constitution, is included in section 20 of the Belize enforcement provision.

Bahamas Constitution

[147] The learned Solicitor General, Mr. Hawke, as shown in his additional submissions, relied also on the case of **Newbold v Commissioner of Police, Curry v Commissioner or Police and another** and contended that the Board considered section 15 of the Bahamas Constitution which was similar in language to the Belize Constitution.

[148] I respectfully disagree with the position taken by learned counsel, Mr. Hawke as the provisions of the Belize Constitution is not similar to that of Bahamas. Section 13 of

the Belize Constitution providing for the protection of fundamental rights and freedoms speaks of **"this part**" and the Bahamas Constitution at section 15, speaks about the **subsequent provisions.** Section 15 provides that:

> "15 Whereas every person in the Bahamas is entitled to the fundamental rights and freedoms… and
>
> (c) protection from … deprivation of property without compensation,
>
> the **subsequent provisions** of this chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms subject to such limitations …."

[149] Section 28, the enforcement provision, makes it absolutely clear that section 15 is not included and that it is the subsequent provisions. Section 28(1), provides: "If any person alleges that any of the provisions of Articles 16 to 27 inclusive….". The Belize Constitution in comparison, included in the enforcement provisions (section 20) the fundamental rights and freedoms provisions (section 3). Additionally, section 3 speaks of "this part" and not the subsequent provisions. Therefore, I am in agreement with learned senior counsel, Mr. Marshalleck that section 3 of the Belize Constitution recognises and by way of that recognition, guarantees justiciable rights to the extent that those general rights have not been curtailed by the qualifying provisions.

<u>Conclusion in relation to the additional submissions</u>

[150] I am not convinced that the Schreiner JA dissenting judgment can be applied to the construction of the section 3 of the Belize Constitution. A generous and purposive interpretation of the provisions of the Constitution must be given in relation to fundamental human rights. See: **Minister of Home Affairs v Fisher** and **Attorney General of The Gambia v Momodu Jobo**. In my view, the word "Whereas" in the said section cannot be construed in isolation. Regard must be had to the entire section and also the enforcement provision which makes it clear that section 3 is included.

Disposition of the issue – Arbitrary deprivation of property pursuant to s 3(d)

[151] In relation to "Protection from deprivation of property", in section 3(d) which is the broad right, the qualifying provision is section 17 which addresses compulsory acquisition of property. The appellant is challenging the non-payment for part of the property acquired and not its compulsory acquisition. In my view, deprivation of property is wider than compulsory acquisition and includes matters such as the appellant's claim for payment. I will not go as far as to say that section 3 is separately enforceable since there is the provision for compulsory acquisition in the detailed section (s 17). A generous and purposive interpretation must be given to the provisions of the Constitution. I adopt, with respect, the statement of the learned Chief Justice (as he was then) in the **Prosser** case, where he stated at paragraph 59 of his judgment that, "… *the compulsory acquisition or taking of property without compensation prohibited in section 17(1) of the Constitution is but a species of the genus of arbitrary deprivation of property proscribed in section 3(d). There is therefore in my view, a connection between the two sections but not a complete overlap."* Accordingly, I am in agreement with the appellant that the learned trial judge erred when he said that section 3(d) of the Constitution guarantees the right to own private property and section 17 provides the law by which the right is protected. I find that section 3(d) proscribes arbitrary deprivation of any property and should not be limited to compulsory takings or acquisitions under section 17(1). Having so found, I will now consider whether there was an arbitrary deprivation of the appellant's property.

Was there an arbitrary deprivation of the appellant's property?

[152] Arana J declared that the appellant is entitled to land and compensation as agreed. Since that judgment, there has been a change of circumstances as found under issue 4 above. It has been proven by way of the authenticated survey done by Mr. Gill that the land acquired is 115.8 acres and not 127 acres. GOB has returned 109.6 acres and as such, there is an outstanding payment for 6.2 acres of land which amounts to $142,600.00. ($23,000 per acre x 6.2). There are also outstanding interest

payments which continue to accrue and constitute the bulk of what is owing. GOB had made payments towards interest on ten occasions commencing 20 April 1997 and the last payment was made on 31 March 2003, which amounted in total to $817,214.39. GOB formally vested in the appellant as of 1 August 2007, 109.6 acres of the land, but the appellant was given the Certificates of Title in relation to the 109.6 acres of land in April of 2009. As such they have been deprived of the 109.6 acres of land from the date of acquisition to April 2009. According to the agreement, as shown by Arana J's judgment, the appellant has to be paid 8% per annum as interest for the duration of the period for which it has been deprived of its property.

[153] The respondents have not provided sufficient reasons for (i) not making the payments for the remaining land not returned and (ii) why they have discontinued the interest payments. The dispute between the parties as to the acreage is not sufficient reason to stop making payments especially since interest continued to accrue at 8% per annum under the agreement. The appellant was deprived of the use of its property for many years and as such is entitled to compensation as agreed and as declared by Arana J, except that the calculation of the acreage and interest should now be calculated in relation to the finding of this court under the new claim which was before the learned trial judge, Awich JA, that the acreage of land acquired by GOB is 115.8 acres.

[154] It is my respectful opinion, that the failure by the respondents to fully compensate the appellant for the balance of the acreage that was compulsorily acquired and the balance of the interest payments, amounted to an arbitrary deprivation of property pursuant to section 3(d) of the Constitution. Accordingly, the learned judge erred by not considering whether GOB's continual refusal to fully compensate the appellant for the land acquired amounts to an arbitrary deprivation of the appellant's property pursuant to section 3(d) of the Constitution.

Grounds 8 and 9:

Whether the learned trial judge (a) erred in ordering costs against the appellant without considering Rule 56.13(6) of the CPR; and (b) erred in law in assessing costs against the appellant other than in accordance with rule 64.11 and/or 64.12 of the CPR.

[155] The learned trial judge in dismissing the appellant's claim said at paragraph 23 of his judgment that, "*The claim is dismissed. But, the court informs parties that it considered their disagreement over the remaining acreage to be compensated for a matter that belongs on the case file for Claim No. 228/2006. It may still be raised as part of the enforcement proceedings in that claim."* He dealt with the issue of costs at paragraph 24 where he said that:

> "*Usually costs follow cause. I have considered that this claim is an attempt to enforce a judgment order against the successful claimant in claim No. 228/2006. But I also considered that the claimant was nevertheless wasteful to have brought this claim as a separate claim rather than as part of enforcement proceedings in claim No. 228/2006. The claimant shall pay to the defendants one-half costs of these proceedings. The costs are prescribed costs based on $2,670,912.67, the value of the claim."*

[156] The appellant submitted that the learned trial judge in making the award as to costs did not advert to CPR **Rule 56.13(6)** or invite any submissions in relation to costs. But he expressed the view, as shown at paragraph 24 of his judgment, that he considered it wasteful that the appellant brought the claim as a separate claim instead of enforcement proceedings. The appellant's main contention was that the award of costs failed to recognise the finality of Arana J's judgment. **Rule 56.13(6)** of the CPR provides as follows:

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

[157] The learned trial judge did not make a finding that the appellant acted unreasonably in making the application or in the conduct of the application. He ordered the appellant to pay one-half of the costs on the basis that they had not sought enforcement proceedings. Based on his findings, he could not have applied Rule 56.13(6). The error therefore, in my respectful view, flowed from the finding of the learned trial judge that the matter should have been enforcement proceedings.

[158] The appellant further submitted that the learned trial judge assessed costs otherwise than in accordance with CPR, Rules 64.11 and 64.12 by awarding prescribed costs and fixing a value for the claim. The appellant contended that the claim before the court was for a declaration and a mandatory injunction and therefore had no monetary value. Further, even if an order for prescribed costs was appropriate, the learned trial judge had no discretion to fix the value of the claim in the absence of an application to do so at case management conference.

[159] Rule 64.11 provides for assessment of costs for procedural applications and Rule 64.12 provides for costs which are to be assessed in relation to any matter or proceedings other than a procedural application. It is my respectful opinion, that the learned trial judge's error in ordering prescribed costs flowed from the finding that the matter should have been part of enforcement proceedings and not a separate claim. The appellant therefore, succeeds on both grounds in relation to costs.

Ground 10: Whether the judgment should be set aside on the basis of the delay in delivery of the judgment

[160] This court does not condone delay in handing down of judgments, nor does it investigate the reason for the delay. But, I would reiterate, as has been done in several judgments of this court, that unreasonable delays cause disrepute to both judges and lawyers. However, it is my respectful view, that the delay in this case does not justify the setting aside of the judgment. The appellant was successful in all of their grounds of appeal, except for the *res judicata* ground, based on issues of law, and for this

reason the appeal should be allowed and the judgment of the learned trial judge set aside.

The Reliefs sought

[161] The reliefs sought by the appellant in this appeal are the same as sought in the court below (see paragraph 36 above). The first relief is for a declaration, which will be granted since the appellant has succeeded on the ground that there has been an arbitrary deprivation of its property, but not in the terms as sought, as the finding of the court is that the land that was acquired by GOB is 115.8 acres and not 127 acres. Further, 109.8 acres of the land was returned since Arana J's judgment. This will therefore, affect the amount of compensation owing on the balance of acreage and the interest that is now owing and due to the appellant.

[162] The second relief sought is for a final mandatory injunction compelling the respondents to perform the agreement for compensation within 10 days of any order made by the court. The granting of such an injunction by this court would be unrealistic as the interest owing is a very large sum which has to be paid from the Consolidated Revenue Fund. Further, the respondents have already paid compensation in the amount of $817,214.30 (in interest payments) which was done by instalments and formally vested 109.6 acres of land in the appellant. The bulk of the debt owing to the appellant is in relation to interest which is unfortunate and lies squarely at the feet of the respondents. The failure by the appellant to accept the offer made in 2007 did not prevent the respondents from continuing making the interest payments which continued to accrue on a daily basis. Nevertheless, the special circumstances in this case, which I need not repeat, do not warrant such an order.

[163] At the trial before the learned trial judge, Ms. Barrow in her affidavit evidence for the appellant said that, according to her calculations, BZ$2,670,912.67 remains due and payable by GOB in accordance with Arana J's judgment. After the appeal was heard by this court, I received from the Registrar General an electronic mail attaching a letter

dated 14 March 2014 from learned senior counsel, Mr. Marshalleck, in which he requested that it should be brought to the attention of this court that the interest owing up to 12 March 2014 is $3,921,270.00, assuming the acreage is 127 acres as found by the Arana J judgment. Further, if the acreage is calculated at 115.8 acres as contended by the respondents, the interest is $3,266,450.80. Learned Senior Counsel attached two spreadsheets showing the calculation of interest based on the 115.8 acres and the other on 127 acres. The difference in acreage is 11.2 acres (127 acres less 115.8 acres). The respondents who received copies of the spreadsheets have neither rejected nor accepted the accuracy of the calculation of interest.

[164] Accordingly, I would propose that the following orders should be made in conclusion of this appeal:

1. The appeal is allowed and the judgment of the learned trial judge is set aside.

2. It is declared that the failure of GOB to fully perform the agreement to compensate the appellant for the compulsory acquisition of the appellant's land in December 1994, in the terms set out in Arana J's judgment given on 25 June 2007, except for the change in acreage and its impact on interest owing, as held above, amounts to an arbitrary deprivation of property in breach of section 3(d) of the Belize Constitution;

3. It is ordered that the respondents do pay to the appellant within three months of this judgment, compensation for the remaining acreage of land compulsorily acquired, that is 6.2 acres at 23,000.00 per acre being a total sum of $142,600.00.

4. It is ordered that GOB pay to the appellant the balance of the interest now due and owing on the value of 115.8 acres of land acquired at the rate of 8 percent per annum from 3 December 1994. In relation to the 109.8 acres of land, the interest shall be calculated from 3 December 1994 to 27 April 2009 when the

appellants received the Certificates of Title (and not 1 August 2007 when the Land Certificates were issued). For the balance of the 6.2 acres, interest will run until the date of this judgment.

5. It is further ordered that the parties are to agree on a schedule of payments by instalments in relation to the interest due and owing. In the event, the parties cannot agree on a payment plan, the respondents may make an application to a Supreme Court judge for approval for a schedule of payments by instalments.

6. It is further ordered that if any issue arises in relation to the calculation of interest accrued, this shall be determined by a Supreme Court judge based on evidence from an expert in the field of accounting.

7. It is ordered that the appellant is entitled to costs in this court and the court below which is to be paid by the respondents. The costs are to be taxed, if not agreed.

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HAFIZ-BERTRAM JA