COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
PUBLIC LAW DIVISION
2018/PUB/CON/00038

BETWEEN:

(1) KRANSTON KEY
(2) VERNA BROWN
(3) GERARD BURROWS
(4) WENDALL PEDICAN
(5) JOHN ADDERLEY
(6) ANTHONY HARRISS
(7) DENICE BLACK
(8) TARIANO ADDERLEY
(9) ANYA JASMIN
(10) SHANDO JOHNSON
(11) ELLAMAE EVANS
(12) SHARON WHYLLY

APPLICANTS

AND

SENIOR STIPENDIARY AND CIRCUIT MAGISTRATE DERENCE ROLLE-DAVIS

FIRST RESPONDENT

THE ATTORNEY GENERAL OF THE COMMONWEALTH OF THE BAHAMAS

SECOND RESPONDENT

AND

WALTER CAPRON

INTERESTED PARTY

Before:	Mr. Justice Loren Klein
Appearances:	Maria Daxon for the Applicants
	Franklyn Williams for the First and Second Respondents
	Brian Dorsett for the Interested Party
Hearing Date:	21 May 2021

RULING

KLEIN, J.

Constitution—Constitutional Redress—Article 20(8)—Allegations of Breach of Right to Fair Hearing by Magistrate—Eviction Order—Title to Land—Jurisdiction of Magistrate—Magistrate's Act, s. 55—Limitation Act, ss. 16(3), 17(2)—Quieting Titles Act—Res Judicata—Abuse of Process—Henderson v Henderson abuse—Collateral Attack on Decision

of Magistrate—Strike-out application—Reasonable cause of action—Whether Magistrate a proper party to the action—Judicial immunity—Alternative Relief—Proviso to article 28(2)—Costs—Exercise of Discretion—Multiple Representation—Whether more than one set of costs to be awarded.

INTRODUCTION AND BACKGROUND

1. This is an application for constitutional redress arising out of the grant of an Order for vacant possession by a senior stipendiary and circuit magistrate ("the Magistrate") in a long-running dispute over possession of property located at Fleming Street, Nassau. These proceedings have a complex procedural history, involving multiple applications, appeals to the Supreme Court and Court of Appeal and a related quieting titles action.

2. The applicants claim that they were denied the right to a fair hearing during the proceedings before the Magistrate, as they were unrepresented by counsel, not given adequate time to prepare their defence and were not informed of their right to appeal. They also challenged, amongst other things, the Magistrate's jurisdiction to make orders related to title to land, although (as discussed below) many of these complaints are irrelevant to the constitutional claim.

3. The second respondent ("the Attorney General") and the Interested Party ("the IP") filed summonses to strike out the constitutional motion on the traditional *R.S.C. 1978, Order 18, r. 19* grounds, namely that the action discloses no reasonable cause of action, is frivolous or vexatious, or otherwise an abuse of the process of the court. They contend that the applicants' appeal of the Magistrate's decision and the constitutional claim raise the same or similar issues, and therefore the applicants are seeking to litigate issues that have already been decided. The Attorney General also submits, as a procedural matter, that the Magistrate is protected by judicial immunity and is not a proper party to the constitutional motion. Further, it is argued that the claim is an abuse of process as the applicants have not exhausted adequate alternative remedies that were available to them, and they are therefore precluded from making a constitutional claim.

4. As will become apparent from the reasons given below, the application for constitutional redress must fail, and the second respondent's and IP's applications to strike out are granted. I am satisfied that the application is misconceived and indeed precluded by virtue of the proviso to art. 28(2) of the Constitution.

Procedural Background

5. This matter was commenced by Notice of Motion for Constitutional Relief ("the Motion") filed 24 October 2018. That Motion sought a curious admixture of orders and declarations, many of which would have been more appropriate for an action in judicial review, or a common law claim.

6. These included orders for: (i) certiorari to quash the decisions of the 'Respondent', S&C Magistrate Derence Rolle-Davis ("the Magistrate") granting an order for vacant possession; (ii) a stay of the proceedings before the Magistrate (which was heard and determined); and (iii) damages

for "*having unconstitutionally subjected the Applicants to being removed from their homes*". To this was added claims for some 12 declarations, including declarations that:

(i) the order of 4 July 2014 for vacant possession is "*unlawful, void, illegal and of no effect*".

(ii) the Magistrate did not "*have jurisdiction to adjudicate this matter due to the value of the land and the statute of limitations*";

(iii) the Applicants' rights to be treated fairly with due process and in accordance with the Constitution of the Bahamas have been breached;

(iv) "the Respondent" be restrained from treating as valid or acting upon the Orders for vacant and 'immediate' possession (notwithstanding that the sole named Respondent at this point was the Magistrate himself);

(v) the Magistrate's decision was so "*manifestly unreasonable that no reasonable authority or tribunal entrusted with its powers could reasonably have come to that Decision*";

(vi) the Respondent has acted "*unfairly, unlawful, unreasonable, arbitrarily, capriciously and abusive*" (*sic*) towards the Applicants; and

(vii) the claim to rent was statute-barred.

7. The Motion and connected proceedings were supported by a battery of affidavits as follows: (i) the affidavit of Anya Jasmine filed 21 December 2018; (ii) the affidavits of Kranston Key filed 24 October 2018, 4 December 2018, 24 December 2019 and 27 July 2020; (iii) the affidavits of Devin Sears filed 21 October 2018, 21 December 2019 and 27 July 2020; (iv) three affidavits of Daneisha Williams, two filed 19 May 2021 and one filed 20 May 2021; (v) the affidavit of Anthony Harris filed 12 March 2021; and (vi) the affidavit of Dancia Knowles filed 20 May 2021. Mr. Capron filed affidavits on 9 July 2020, 4 January 2021, 8 January 2021 and 22 March 2021.

8. It will not be necessary to refer to most of the affidavits filed by the applicants, as much of the content is repetitive. Others merely recite steps taken by counsel for the applicants in connection with the proceedings, or exhibit various correspondence issued by counsel in the course of these proceedings.

9. By summons filed 9 July 2020, Mr. Capron applied to be joined as a party to the constitutional action and for it to be struck out pursuant to the *Ord. 18*, *rule 19* grounds as disclosing no reasonable cause of action, being scandalous, frivolous or vexatious, or otherwise an abuse of the process of the Court. By Order dated 29 July 2020, K. Thompson J. ordered Mr. Capron joined to the proceedings as an interested party, but the strike-out application was adjourned for hearing by another Judge.

10. When the matter came before this Court, Mr. Capron was the sole respondent opposing the application, and apparently there had been no response to the Motion from the Office of the Attorney General on behalf of the named respondent (the Magistrate). The Court therefore, in

early 2021, issued new directions for the hearing of the matter, which included directions for the Office of the Attorney General to be served with the documents and notice of the hearing in the matter, and granting leave to the parties for the filing of any additional evidence and submissions.

11. The Attorney General entered an appearance on behalf of the Respondent and filed a summons on 7 May 2021 pursuant to *R.S.C. Ord. 18, r. 19(1)(a)* and/or *(d),* or under the inherent jurisdiction of the court to strike out the Motion or have it dismissed on the grounds that: (i) the action is frivolous and vexatious and an abuse of process, as the applicants had an alternative remedy available to them at common law (by way of an appeal); and (ii) an order pursuant to *R.S.C. Ord. 15, r. 6(2)(a)*, or under the inherent jurisdiction of the Court that the respondent be removed as an improper party. The summons was supported by the affidavit of Ms. Cordell Frazier.

History of Proceedings

12. Before dealing with the issues that arise on the Motion and the cross-summons to strike out, it is necessary to set out some of the significant history to give context to these proceedings. This history is derived from the numerous affidavits filed in connection with these proceedings, the Ruling of K. Thompson J. in a Quieting Title Action (2014/CLE/qui/013039) (the "QTA") and the Ruling of the Court of Appeal in SSCivApp. No. 83 of 2020.

13. The story begins in or about the 4 July 2014, when it appears that Mr. Walter Capron, pursuant to a summons filed 19 May 2014, obtained an Order for vacant possession against the applicants before the Magistrate (Case No. 5234 of 2014). The applicants are said to be longtime residents of the property, but there is some dispute over how long they have occupied the property or whether they occupied the property as tenants, licensees, or squatters. According to the affidavit of Anthony Harris filed 12 March 2021 ("the Harris Affidavit"), it was indicated to the Court by counsel for Mr. Capron that the applicants owed arrears of rent for some six years, which they disputed, but that Mr. Capron was willing to forgo that rent (if any was due) if the applicants vacated the property. The summons was indorsed with a claim for $5,000.00 in rent and also sought an order for vacant possession.

14. The Harris Affidavit further averred that the last time the applicants paid rent was 1999, and that it was during that same year that they got permission from a Mr. Glee Musgrove (who is identified in the submissions of the applicants as the brother of Eva Musgrove) to remain on the property subject to maintaining it. In the affidavit of Anya Jasmine, filed 21 December 2018, she described Eva Musgrove as "the legal owner" of the property, and said that "*while she was alive, Ms. Musgrove allowed us to remain on the said land undisturbed*."

15. As detailed in the affidavit of Walter Capron filed 4 January 2021, Mr. Capron claims as the sole surviving beneficiary under the will of Eva Nancy Musgrove, in respect of which Letters of Administration with the Will Annexed were granted by the Supreme Court on 25 March 2014. Those documents were said to be before the Magistrate when he made his determination in July

of 2014, and this has not been controverted. For their part, the applicants asserted before the Magistrate a possessory right to the land based on occupation for over twelve years.

16. It appears that the Magistrate pronounced oral judgment on 4 July 2014, but the applicants were nevertheless afforded another date to be heard before any Order pursuant to the judgment was perfected. In this regard, another hearing was scheduled for 15 July 2014, which the applicants attended with their attorney. No transcript or other record of the proceedings were before the Court. However, based on the applicants' affidavit evidence, their counsel made submissions that the Magistrate lacked jurisdiction to hear the matter, as it involved title to land exceeding $200.00, and that the applicants were in the process of filing a Quieting Titles Action. The Magistrate ruled that he had jurisdiction and affirmed his ruling of 4 July 2014. Consequently, a writ of possession in respect of the judgment was sealed on 15 July 2014.

17. On 23 July 2014, shortly after the Magistrate's Order, the applicants filed the QTA requesting the Court to investigate their title to the land. Just over a month later, on 29 August 2014, they filed a Notice of Intention to Appeal ("NOIA") in the Supreme Court (APP/00018/2014), but failed to appear on 2 July 2015 when the matter came on for hearing and also did not pay the required bond (i.e., enter into the recognizance) for the due prosecution of the appeal. The appeal was therefore dismissed by Winder J. (as he then was) on 2 July 2015, pursuant to a Notice of Motion filed by the Respondent on 27 February 2015. On an application by summons to set aside the Order of 2 July 2015 and restore the appeal, which was heard 27 June 2017, Winder J. struck out the summons as the bond for the appeal still remained outstanding at the time (Civ.App. No. 14 of 2014). The Court commented as follows:

> "4. The Intended Appellants say they have a good argument as to why the appeal ought not to be struck out. The Appeal was struck out on the ground that there was no bond entered into by the Intended Appellant. That fact, of the absence of a bond, remains the case and has been confirmed by Counsel for the Intended Appellants. They say that they made efforts, unsuccessfully, to have the Magistrate settle the terms of the bond. I am satisfied that no formal application was made prior to or after the expiry of the time limited by the statute, to cause the compliance by the Magistrate either directly to the Magistrate or a higher court."

18. On 14 November 2017, the IP filed and subsequently served on the applicants a renewed writ of possession to enforce the earlier Order for vacant possession, which was sealed on 25 October 2017. It appears that attempts were made at some point subsequent to the service of the Order in November of 2017 to have the applicants evicted from the property, but these were met with resistance. Then, on or about 22 December 2017, Grant-Thompson J. granted an injunction *ex pa*rte prohibiting their eviction from the property pending the hearing of the QTA. That injunction was later set aside on 6 December 2018, apparently after a non-appearance by counsel for the applicants on the adjourned date.

19. On 24 October 2018, the applicants filed a Notice of Originating Motion for Constitutional Relief (2018/PUB/Con/00038), which is the current action with which this Court is concerned. Pursuant to an *ex parte* summons and certificate of urgency filed under that Motion, on 24

December 2018, K. Thompson J. stayed the Orders of the Magistrate made on 4 July 2017 and 25 of October 2017, for vacant possession of the property, and also restrained the enforcement of any eviction of the applicants pursuant to the Magistrate's Orders.

20. By a judgment dated 16 June 2020, K. Thompson J. struck out the QTA, and awarded costs to the adverse claimant/respondent (Mr. Capron). The Court also ordered that a separate application be made to dissolve the injunction granted pursuant to the constitutional claim. In striking out the petition, the Court made the following observations:

> "I cannot help but recall that when the injunction application came on for hearing before me on December 24th, 2018, counsel did not disclose to the Court that there was another action involving the same parties and the same subject property. Neither did counsel disclose to the Court that there was an appeal from the Magistrate's decision to evict and that there was an eviction order. Nothing was said about the series of events which took place in reference to the outstanding court's order and dismissal of the appeal and application to resolve the appeal which was within the personal knowledge of counsel for the Petitioners/Applicants. Counsel was privy to everything which took place regarding the matter and the parties. I say counsel deliberately misled the Court to obtain an injunction under the disguise of a constitutional issue knowing well at the time that there was a quieting action before my sister judge for the same subject property involving the same parties. To make it worse, the Court specifically asked counsel why she was bringing the matter under sections of the constitution and she squandered that opportunity to make full and frank disclosure."

21. The application to discharge the injunction followed shortly thereafter, and on 28 July 2020, after hearing the parties, the Court ordered Mr. Capron joined to the constitutional proceedings and discharged the *ex parte* injunction granted 24 December 2018.

22. The applicants appealed the decisions of K. Thompson J. to the Court of Appeal. First, they filed an appeal on 28 July 2020 against the decision striking out the Quieting Title Action. Another appeal was filed 30 July 2020 against the Order made 28 July 2020. Both appeals were numbered SCCivApp. No. 83 of 2020. The latter appeal was dismissed in a Judgment delivered by Sir Michael Barnett, P. on 13 August 2020. In dismissing the appeal, the Court of Appeal said:

> "26. The grant, refusal or discharge of an injunction is a matter of discretion. Regrettably, we do not have a note of the reasons of Thompson J. for discharging the injunction that he granted 19 months earlier. However, given they evidence that the intended applicants/appellants did not do anything to prosecute this action after they obtained the *ex parte* injunction, there is no real prospect that an appellate court would interfere with the exercise of the trial judge's decision to discharge the injunction."

23. The Court of Appeal made a few other observations that are of some import for the matter currently before the Court. At paras 10-11, the Court said:

> "10. An obvious question is the propriety of this action [the Constitutional Action]. The decision of the magistrate had already been appealed and that appeal had already [been] dismissed by the court.

> 11. More importantly, however, it is inexplicable that an ex parte order should be directed against a Magistrate and/or against Mr. Capron, who was not even made a party to the proceedings."

24. Counsel for the applicants sought leave from the Court of Appeal to appeal to the Privy Council, but failed to appear at the hearing of the application, which was dismissed and costs ordered against the applicants in the amount of $1,000.00.

25. It appears that further attempts were made to evict the applicants on or about 2 December 2002, based on a writ of possession sealed 27 November 2020, but again these were resisted by the applicants and their attorneys. However, the renewed attempts to enforce the Magistrates Order seem to have galvanized the applicants to once again seek to challenge it by appeal. In this regard, and notwithstanding that the constitutional Motion was still pending, the applicants filed a Notice of Intention to Appeal on 4 December 2020 and a Notice of Appeal on 17 December 2020 (Supreme Court Appeal No. 0023 of 2020). The Court's disposition of that Appeal is the subject of a separate Ruling being delivered at the same time as this Ruling.

ANALYSIS AND DISCUSSION

26. In their written submissions, the applicants identified some nine issues (summarized below) which they say are relevant for the Court's determination:

(i) Whether the decision of the Magistrate to order delivery of vacant possession to the respondent (Mr. Capron) on 4 July 2014 is "*void, [il]legal and of no effect*", in that it was in breach of the right to a fair trial guaranteed by Article 20(8) of the Constitution.

(ii) Whether the decision of the Magistrate to order immediate possession to the respondent on 25 October 2017 was "*unconstitutional, unreasonable, unlawful, null and of no legal effect*".

(iii) Whether the Magistrate informed the applicants that their matter was appealable and whether he provided them with the "necessary steps" to pursue the appeal.

(iv) Whether the Magistrate should have suspended his decision until the appeal was completed.

(v) Whether arrears of rent can be recovered after six years from the date on which the arrears became due.

(vi) Whether the Magistrate had jurisdiction to hear the matter.

(vii) Whether the Magistrate "acted out the scope of *functus officio*?" (*sic*).

(viii) Whether the Magistrate had the authority to evict the applicants who were in possession for over 12 years.

Allegation of breach of the right to a fair hearing

27. It should immediately be apparent that for the most part, what are stated as issues for determination in the constitutional motion are issues that conceivably could have been raised on a proper appeal or, alternatively, a claim for judicial review. However, they do not give rise to any

constitutional grievances. The only claim that might found a claim for constitutional redress is the complaint that the applicants were denied the right to a fair hearing, as guaranteed by article 20(8), during the hearing before the Magistrate. This is said to have come about because on the date for the hearing of the summons on 4 July 2014, the Magistrate refused to adjourn the matter notwithstanding that the applicants' attorney was engaged in the Supreme Court at the time and could not be present. As stated in the founding affidavit of Kranston Key:

> "5. On the date of court, Ms. "X" [our lawyer] was not able to appear at the time of the hearing, because she was dealing with another matter before the Supreme Court. That we informed the Respondent that we had an attorney and that she was in the Supreme Court, but he insisted that the matter proceed without our attorney.
>
> […]
>
> 7. […] The Judge [Magistrate] never gave us the opportunity to take the stand to state our case. I was put at a disadvantage because my attorney was not present and I honestly believed that if the judge had heard the matter he would have been able to make a determination that Mr. Capron had no right to claim that property after the statute of limitation was already past."

28. For the following short reasons, there is no merit in this point. Firstly, whatever the Magistrate's reasons were for exercising his discretion to proceed with the hearing on the 4 July 2014 in the absence of counsel for the applicants, those cannot be impugned by this Court, as this is not an appeal or judicial review of the Magistrate's decision. In any event, s. 7 of the *Magistrate's Rules of Court 1934* provides that the magistrate may proceed to hear a matter and give judgment in the absence of the defendant if he is satisfied on oath that the defendant was served. In any event, the defendants were present, and their evidence indicates that they did make representations to the Magistrate at the hearing, as recorded in the Kranston Key affidavit:

> "7. The Respondent [the Magistrate] then asked us to give him reasons why we should be allowed to stay on the property. We informed him that we had a right to the property, because we were on the property for over twelve (12) years without paying rent to anyone and that we truly believed that we were the owners of the property and not Mr. Capron. The Respondent responded by saying 'so'."

For balance, I would observe that in the affidavit of Anthony Harris filed 12 March 2021, the Magistrate's response is recorded as follows: "*So, what grounds make you believe that you own the property?*"

29. More importantly, as emerges from the applicants' evidence, that although the Magistrate ordered vacant possession on 4 July 2014, they were further heard by the Magistrate on 15 July 2014, when their counsel was present and able to make submissions on their behalf (see Key founding affidavit, and the Harris Affidavit, referred to above). The Key affidavit records that the Magistrate, after hearing submissions from both attorneys, "*ruled that he did have jurisdiction to adjudicate the matter and went on to rule that me and the other Applicants are to vacate the premises*."

30. The writ for possession in this regard was made and sealed by the Magistrate on 15 July 2014, following the second appearance before the Magistrate, and therefore any possible claim to unfairness based on a failure to hear the applicants by counsel (if there were any merit in this claim) was cured by the subsequent hearing.

31. Secondly, the right to a fair hearing must be assessed as part of a composite trial process, which includes the appellate process (see **Boodram v AG of Trinidad and Tobago** [1996] AC 842). Even assuming, *ad arguendo,* that any shortcomings might have occurred during the first hearing, that by itself does not ineluctably lead to an unfair hearing. In **Independent Publishing Company Ltd. v Attorney General of Trinidad and Tobago et. al.** [2004] UKPC 26, considering whether contempt orders against journalists and a media publishing houses for violating a non-publication order made by the judge in a high profile multiple murder case violated the right to fairness and due process, their Lordships said [88]:

> "In deciding whether someone's section 4(a) "right not to be deprived [of their liberty] except by due process of law" has been violated, it is the legal system as a whole which must be looked at, not merely one part of it. The fundamental right, as Lord Diplock put it, is to "a legal system ...that is fair". Where, as in Mr. Maharaj's case, there was no avenue of redress (save only by special leave direct to the Privy Council from a manifestly unfair committal to prison), then, despite Lord Hailsham's misgivings on the point, one can understand why the legal system should be characterized as unfair. Where, however, as in the present case, Mr. Ali was able to secure his release on bail within 4 days of his committal—indeed, within only one day of his appeal to the Court of Appeal—their Lordships would hold the legal system to be a fair one.

And continuing at 92:

> "[G]iven that Mr. Ali had a right of appeal, their Lordships regard him as having enjoyed the benefit of due process. As in *Hinds*, so too here: any shortcomings in the first hearing could be made good on the appeal and by the grant of bail meanwhile. The system as a whole was fair."

32. Thus, if the applicants were of the view that their right to a fair hearing had been breached, they had a right of appeal (which was in fact exercised), and which would have been a part of the entire trial process providing for a fair hearing. Further, as is made clear from the nature of a number of reliefs sought in the Motion—and I observe here that many of these are reliefs more properly sought by way of judicial review—the applicants alternatively could have pursued a claim for judicial review.

Other points

33. As mentioned, the other points on which the applicants rely really do not raise any constitutional issues and may be given short shrift. For example, the applicants attempt to set up the claim that because the Magistrate proceeded with the first hearing in the absence of counsel

for the applicants, they were discriminated against under art. 26(2). That article provides as follows:

> "No person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or authority."

34. However, this is an impossible argument to make. 'Discriminatory' is a term of art defined by the Constitution and a claim is only actionable on one of the enumerated grounds (art. 26(3)). The point is neatly made in the West Indian case of **Nielsen v Barker** [1982] IR 254 (at pg. 280) (quoted with approval by the Bahamian Supreme Court in **Fawkes v Attorney- General and another** [1994] BHS J. No. 1) as follows:

> "The word 'discriminatory' in Article 149 [identical to art. 26(3) of the Bahamas Constitution] does not bear the wide meaning assigned to it in a dictionary. It has a precise connotation. Although it contains the elemental constituent of favouritism, or differentiation in treatment, its application is confined only to favouritism or differentiation based on 'race, place of origin, political opinions, colour or creed'. No other kind of favouritism is 'discriminatory' within the narrow constitutional definition of that word in Article 149(2). It is to be profoundly in error to think that there has been a contravention of a person's fundamental right under Article 149 where the alleged discrimination is based on some grounds other than those referred to above, no matter how reprehensible such grounds may appear to be. Such a situation clearly does not come within the purview of the constitutional guarantee, although there may well be other means for its investigation and for securing redress."

35. Thus, an allegation of unconstitutional discrimination must specify the particular ground in art. 26(3) on which the discrimination is said to be based. The applicants have not indicated the constitutional basis on which it is alleged they were discriminated against, nor shown how any comparators in similar situations were treated differently from them. This ground is not made out.

36. The contention that the Magistrate alleged failure to inform the applicants of their right of appeal pursuant to s. 55 of the Magistrate's Act amounted to a constitutional breach is also unmeritorious. It is a point regurgitated from the appeal, as may be discerned from the form in which it appears in the Constitutional motion—that the Magistrate "*erred in law and fact by not informing the Applicants that his decision in this matter was appealable*."

37. Section 55 of the Act provides as follows:

> "55. A magistrate upon giving any decision which is appealable, shall inform the party to whom the decision is adverse that he has a right of appeal therefrom, and what steps must be taken by a party wishing to appeal, and a note shall be made at the time by the magistrate that such information has been given by him to such party as aforesaid; and every such note shall be conclusive as to the provisions of this section having been complied with."

38. The provenance of s. 55 was clearly intended to ensure that persons appearing before a magistrate, especially those unrepresented by counsel, were informed of their right to appeal any adverse decision. Counsel for the applicants exhibited numerous letters to the Magistrate, the Chief Magistrate and the Registrar of the Supreme Court seeking to obtain the Magistrate's notes of the proceedings although, as indicated, nothing was put before the Court in this regard. But even if the magistrate did not inform them of this right (and, as mentioned, there was no evidence of this one way or the other), it does give rise to any constitutional issues. That is because it is common ground that the applicants were represented by senior counsel on the second appearance before the Magistrate, who would have been familiar with the appeals process. Further, the applicants did in fact appeal the Order, although that appeal was dismissed on procedural grounds. So the issue of whether the requirements under s. 55 issue were complied with is really otiose.

39. The question of whether or not the Magistrate should have suspended his decision "until the appeal was completed" is also neither here nor there. The effect of s. 57 of the *Magistrate Act* automatically has the effect of "*suspending the execution of the decision appealed from until the case shall have been determined*". Thus, the appeal had this effect and the decision was suspended by operation of law until the appeal was dismissed by Winder J. on 27 June 2017.

40. The other points raised in the claim—i.e., (i) whether arrears can be recovered after 6 years; (ii) whether the magistrate had jurisdiction; (iii) whether the magistrate was *functus officio*; and (iv) whether the magistrate had authority to evict the applicants after an alleged 12 years' possession—were all points to be taken on appeal, on in other actions for that purpose. For example, the 12 years' possession would have been relevant to the Quieting Titles Action, and many of the declarations sought might have been appropriate for judicial review proceedings. However, they do not raise any constitutional issues with which this Court ought to be concerned on this Motion.

The strike-out applications

41. The issue of whether the applicant is able to assert a constitutional claim for relief has to be considered against the backdrop of the strike-out applications. As mentioned, both the Attorney General and the IP sought to strike out on the grounds that the claim disclosed no reasonable cause of action, and was otherwise an abuse of process. The Attorney General also pressed the point that the claim was a collateral attack on the Magistrate's decision and in any event precluded by the proviso to article 28(2) of the Constitution, as alternative relief was available to the applicants.

General principles of law in striking-out applications

42. The principles regulating striking-out applications are well settled and are only reiterated here for convenience. *Order 18, r.19 (1)* of the *Rules of the Supreme Court 1978* (*RSC 1978*) provides that the court may, at any stage, strike out any pleading on a number of well-known grounds, namely that it discloses no reasonable cause of action, it is scandalous, frivolous or vexatious, it may prejudice or delay

the fair hearing of the matter, or is otherwise an abuse of the process of the court. The latter is a catch-all for a variety of circumstances in which a court might find it necessary to put a halt to proceedings to protect its process.

43. Apart from the above rule, the Court has an inherent jurisdiction to stay all proceedings before it which are obviously frivolous or vexatious or an abuse of its process (see *The Supreme Court Practice 1997 (White Book)*, Vol. 1, at para. 18/19/18; *Reichel v Magrath* (1889) 14 App. Cas. 665).

44. The requirement of a reasonable cause of action has been described as *"…a cause of action with some chance of success, when…only the allegations in the pleadings are considered. If when those allegations are examined it is found that the alleged cause of action is certain to fail, the statement of claim should be struck out"*: **Drummond-Jackson v British Medical Association** [1970] 1 All ER 1094, CA, per Lord Pearson at p. 1101-F.

45. Furthermore, claims seeking relief under Article 28 of the Constitution are not immune from the strike-out jurisdiction of the court under *RSC Ord. 18, r. 19,* or in the exercise of the Court's inherent jurisdiction (see the Privy Council's decision in **Maurice Glinton and Leandra Esfakis v. Rt. Hon. Hubert A. Ingraham, et al.,** [2007] 1 WLR 1, (2006) UKPC 40, on appeal from this jurisdiction.)

Respondent not a proper party and action against him should be struck out

46. This issue can be given short shrift, as in the case management hearings it was accepted by counsel for the applicants that the Attorney General was the proper party to represent the Crown in proceedings seeking constitutional redress. In this regard, the applicant filed a summons two days before the hearing (19 May 2021) to join the Attorney General as a respondent in a representative capacity for the Respondent. This was not opposed by counsel for the Attorney General, although the summons did not seek to substitute the Attorney General for the named Respondent.

Judicial immunity

47. The principle of judicial immunity holds that judges, including magistrates, are immune from liability in respect of any acts or omissions in the discharge of their judicial functions: see, **Sirros v Moore and Ors.** [1975] 1 QB 118; **O'Reilly v Mackman** [1983] 2 AC 237 (applied in **Gomez v Klonaris** [1992] BHS J. No. 48, and **Higgs v Blackman and others** (2011/PUB/Con/0002)). In the more recent case of **Re McC (A Minor)** [1984] AC 628, the House of Lords confirmed the principle that a magistrate is immune from liability for acts performed within their jurisdiction.

48. In **Sirros v Moore,** Lord Denning MR, in the Court of Appeal, exploded the distinction which had been drawn between judges of higher and lower courts with respect to immunity, and enunciated the doctrine of judicial immunity as follows (136 B-E):

> "Every judge of the courts of this land—from the highest to the lowest—should be protected to the same degree, and liable to the same degree. If the reason underlying this immunity is to ensure "that they may be free in thought and independent in judgment," it applies to every judge, whatever his rank. Each should be protected from liability for damage when he is acting judicially. Each should be able to do his work in complete independence and free from fear. He should not have to turn the pages of his books with trembling fingers, asking himself: "If I do this, shall I be liable in damages?" So long as he does his work in the honest belief that he is within his jurisdiction, then he is not liable to an action. He may be mistaken in fact. He may be ignorant in law. What he does may be outside his jurisdiction—in fact or in law—but so long as he honestly believes it to be within his jurisdiction, he should not be liable. Once he honestly entertains this belief, nothing else will make him liable. He is not to be plagued with allegations of malice or ill-will or bias or anything of the kind. Actions based on such allegations have been struck out and will continue to be struck out. Nothing will make him liable except it be shown that he was not acting judicially, knowing that he had no jurisdiction to do it."

No cause of action/abuse of process

49. The IP argues that the constitutional action is "*…a backdoor attempt to get another bite at the cherry*", after the applicants have failed in their appeal to the Supreme Court and on the QTA. In this regard, counsel argues (as noted in the Ruling of K. Thompson J. striking out the QTA) that basically the same issues raised in the Constitutional motion were raised in the Appeals and the QTA. Further, the IP submits that these actions were filed mainly to create delays and obtain injunctions preventing enforcement of the Magistrate's Orders. For example, although the QTA was filed on 23 July 2014 and an injunction obtained thereunder, nothing was done to progress the hearing of that Petition, which resulted in the application to strike it out. There is also an extant appeal to the Court of Appeal against the striking out, but it was indicated that the appeal is in abeyance pending the applicants satisfying certain costs orders.

50. The IP submits further that these and other actions by the applicants make out a classic case of abuse of process, relying both on the principle of "*res judicata*" and the *Henderson* abuse principle (**Henderson v Henderson** (1843-60) All ER Rep. 378). The principle laid down in that case is that a party will be prevented from bringing proceedings to open matters which could have been litigated in earlier proceedings, but for inadvertence or negligence. In this regard, the IP argues that it was well within the capacity of the applicants to have dealt with these issues once and for all in the hearing in the Magistrate's Court, the appeals to the Supreme Court, as well as the QTA. The Constitutional claim is therefore an impermissible attempt to re-litigate those issues.

51. The Attorney General also argues that the claim does not raise any reasonable cause of action and is nothing more than a collateral attack on the decision of the Magistrate, citing several well-known decisions of the Privy Council for the latter proposition: **Jaroo v Attorney-General of Trinidad and Tobago** [2002] 1 A.C. 871, paras. 29-40; **Chokolingo v Attorney General of Trinidad and Tobago** [1982] 1 WLR 106.

52. In **Chokolingo**, deprecating the use of a constitutional application to make a collateral attack on a criminal appeal decided by the Court of Appeal [111-112]:

> "Acceptance of the applicant's argument would have the consequences that in every criminal case, in which a person who had been convicted alleged that the judge had made any error of substantive law as to the necessary characteristics of the offence, there would be parallel remedies available to him: one by appeal to the Court of Appeal the other by originating application under section 6(1) of the Constitution to the High Court with further rights of appeal to the Court of Appeal and Judicial Committee. These parallel remedies would also be cumulative since the right to apply for redress under section 6(1) is stated to be 'without prejudice to any other action with respect to the same matter which is lawfully available.' The convicted person having exercised unsuccessfully his right of appeal to a higher court, he could nevertheless launch a collateral attack (it may be years later) upon a judgment that the Court of Appeal had upheld, by making an application for redress under section 6(1) to a court of co-ordinate jurisdiction, the High Court. To give to Chapter I of the Constitution an interpretation which would lead to this result, would in their Lordships' view, be quite irrational and subversive to the rule of law which it is a declared purpose of the Constitution to uphold." [Emphasis supplied.]

53. In a series of later cases from the Caribbean, their Lordships have more and more emphasized the exceptionality of the availability of constitutional relief where other remedies, including the appellate process, are available (see, for example, **Hinds v A-G of Barbados** [2002] 1 AC 854; **Forbes v A-G** [2003] 1 LRC 350, and **Independent Publishing Co. Ltd. v. A-G of Trinidad and Tobago** [2005] 4 LRC 301. In **Hinds**, Lord Bingham of Cornhill said (para 24):

> "It would be undesirable to stifle or inhibit the grant of constitutional relief in cases where a claim to such relief is established and such relief is unavailable or not readily available through the ordinary avenue of appeal. As it is a living, so must the Constitution be an effective, instrument. But Lord Diplock's salutary warning remains pertinent: a claim for constitutional relief does not ordinarily offer an alternative means of challenging a conviction or a judicial decision…".

Breach of proviso to Article 28 (failure to exhaust alternative remedies)

54. The Attorney General submits further that, in any event, the applicants have improperly resorted to the use of the constitutional process for redress when they failed to exhaust alternative remedies, as required by the proviso to article 28(2) of the Constitution. The proviso to article 28(2) of the Constitution declares that the Court "*shall not*" exercise its powers of redress in respect of any infringements of any of the provisions of Article 16-27 if it is satisfied that "…*adequate means of redress are or have been available to the person concerned under any other law*."

55. In **Malcolm Johnatty v AG of Trinidad et. al.** [2008] UKPC 55, the Privy Council upheld the decision of the lower courts that a teacher who had brought both judicial review and constitutional proceedings in respect of his suspension pending investigation on disciplinary charges and the stoppage of his salary had abused the process of the court. Lord Hope of Craighead, delivering the advice of the Board, said (paras. 20, 21):

> "20. The courts below were agreed that the appellant's constitutional motion was an abuse of process, although for different reasons. Narine J. said that he had an alternative remedy in the form of an action for damages against his employer for breach of contract. The Court of Appeal said he had a parallel remedy in the proceedings for judicial review. Their Lordships agree with them both. It would have been open to the appellant to seek a private law remedy against his employer for non-payment of his salary. It was also open to him to seek judicial review, as is demonstrated by the fact that his constitutional motion was based on the same facts as those in the proceedings for judicial review."

Applicants' objections to striking out

56. The applicants seek to repel the strike out action by resort to the principle that the strike out action is a draconian remedy which is only to be used in cases that are plainly unsustainable, relying on the Court of Appeal case of **Bettas Limited v Hong Kong and Shanghai Banking Corporation Ltd.** (SCCivApp. No. 312 of 2013). There the Court of Appeal repeated the principle that the jurisdiction to strike-out a litigant's case is "…*a draconian remedy which should only be used in clear and obvious cases where it is possible to say at that stage that a certain allegation is incapable of proof*."

57. The applicants contend that the current application is not such a case, and rely on **Rocky Farms Nurseries Ltd. v Brett Stubbs** (2017/CLE/gen/00535), which they contend is on all fours with their case. In that case, Winder J. (as he then was) refused to strike out the defendant's defence or, in the alternative, grant summary judgment on a summons in a writ action in which the defendant asserted a possessory interest in disputed property pursuant to section 16(3) of the Limitation Act. That provision precludes claims to recover land after the expiry of twelve years from the date on which the action accrued.

Court's conclusions

58. There is no dispute that the striking-out remedy is only to be properly deployed in the plainest of cases, and that a litigant with some semblance of a claim is not to be driven from the judgment seat on a summary basis. However, I agree with the submissions of the Attorney General and the IP that this is a plain and obvious case for striking out, for the reasons which have been given.

59. Firstly, the applicants' reliance on **Rocky Farms** is completely misplaced, and that case is easily distinguishable from the application before the court. As mentioned, that was a writ action in which the defendant claimed a possessory interest, which depended on whether he was able to establish his interest by cogent evidence at trial (tested on cross-examination), and it is on that basis that Winder J. refused to strike out the defence. The reliance on that case seemingly overlooks the point that what is before the Court is a claim seeking constitutional redress, not the determination of any property rights, even if a property dispute is a factual backdrop to the constitutional claim. The issue is simply whether or not the applicants have a reasonable cause of action that one or more of their constitutional rights have been breached. The claim is intituled

under several articles of the Constitution, including arts. 15, 17, 20(8), 21, 27 and 28(3). But the rights allegedly breached under these articles (with the exception of art. 20(8)), were never articulated. As previously discussed, the one potential constitutional claim (that they were denied a fair hearing under art. 20(8)) goes nowhere, and is contradicted by their own evidence and admissions.

60. As to the claim of *res judicata*, I am not persuaded that it applies in the strict sense to these proceedings, as one of the conditions for invoking the doctrine is that there was a hearing on the merits (see Lord Sumption's summary of the principles relating to *res judicata* in **Virgin Atlantic Airways v Zodiac Seats UK Ltd.** [2013] UKSC 46). Neither the appeals nor the QTA was heard on the merits.

61. But even if *res judicata* does not apply in its classic form, the *Henderson* abuse principle applies. Under the *res judicata* doctrine, parties are estopped from seeking to re-litigate in subsequent proceedings issues which have been litigated and decided in a first action, or from bringing causes of actions identical to a cause in the first action. The rationale behind the *Henderson* principle is that a party is also estopped from seeking to raise issues that *could* have been determined in an earlier action. As contended by both the Attorney General and the IP, the constitutional motion raises the same issues that were taken in the appeal from the Magistrate's decision, and the QTA. Had the Appeals or QTA been litigated to conclusion, the applicants would have been able to have these issues determined, and there would have been some finality to these actions. The Appeals were not prosecuted because of the applicants' procedural non-compliance, and it has been alleged that the applicants did not take any action to progress the QTA, including failing to comply with the statutory requirements applying to such claims. This was clearly an abuse of process in the *Henderson* sense.

62. Secondly, and even more importantly, there was also "constitutional abuse" of process in that the Motion was brought in the face of an extant appeal and the possibility of a claim for judicial review. In this regard, it is important to point out that **Johnatty** and several of the other cases cited on the principle of alternative relief were decided in the context of Trinidad and Tobago, where the Constitution provides for a discretion to be exercised by the Court to grant redress even where there is an adequate parallel remedy. In a recent case from this jurisdiction (**Ricardo Farrington v The King** [2025] UKPC 21, the Privy Council explained that, while the purpose behind the formulation in the Constitutions of both The Bahamas and Trinidad and Tobago is to prevent abuse of process, the proviso in the Bahamian context has the effect of *precluding* constitutional redress where adequate alternative remedies were available. There, Lord Stephens, delivering the advice of the Board, said:

> "80. In The Bahamas, the proviso to article 28(2) of the Constitution provides that where the court is satisfied that adequate means of redress are available elsewhere it "shall not" grant any relief under article 28(2). If there is doubt as to the adequacy of the alternative means of redress, so that the court is not so satisfied, then the possibility of constitutional relief remains open. However, if the court is so satisfied, then the proviso shuts out completely the grant of constitutional redress.

> 81. The rationale underpinning the proviso to article 28(2) of the Constitution of The Bahamas is the same rationale that underpins the discretion under the Constitution of Trinidad & Tobago, namely, to prevent "misuse, or abuse, of the court's process." The proviso to article 82(2) in The Bahamas and the discretion of Trinidad and Tobago are both forms of the abuse of process doctrine. However, in The Bahamas the parameters of the abuse of process doctrine is fixed by the Constitution. The proviso is expressed in mandatory terms so that circumventing another adequate means of redress and instead seeking constitutional redress is an abuse of process."

CONCLUSION AND DISPOSITION

63. In all the circumstances of this case, I find no merit in any of the constitutional claims raised by the applicants. I will grant the strike-out applications sought by the Attorney General and the IP, on the basis that the Motion does not disclose any reasonable cause of action and constitutes an abuse of the process of the court, for the reasons that have been given.

64. By way of postscript, this case is a salutary reminder that applicants should exercise restraint in making recourse to Constitutional claims when ordinary common law actions might not only be adequate, but provide more efficacious ways of vindicating their rights. For example, even if this Court had come to the conclusion that the hearing before the Magistrate breached the fundamental requirements of a fair hearing (and as made clear there was no basis for such a finding), the Court could have so declared and/or awarded damages. However, the applicants would not have been one step closer to vindicating any asserted possessory interest in the property, as the claim before the Court was not for the adjudication of title to land. As the Privy Council has recently reminded in the **Farrington** case, "*…circumventing another adequate means of redress and instead seeking constitutional redress is an abuse of process*."

Costs

65. As to the question of costs, there is a general principle applied in public law claims to award only one set of costs where there is multiple representation by respondents or interested parties (see **Bolton Metropolitan DC v Secretary of State for the Environment** [1996] 1 All ER 184). As explained, the Attorney-General is the competent party to represent the Crown in an application for constitutional redress, as is the case in judicial review applications. Although the IP sought an order to be joined to the proceedings, the Court cannot lose sight of the fact that the applicants only sought to join the Attorney General at the last minute, and then on the directions of the Court. The IP was forced to shoulder the defence of the action for much of its life before the Court. In the circumstances of this case, and in the exercise of my discretion, I am of the view that it would be just to award both the Attorney-General and the IP their costs, although I will do so on a proportional basis. The Attorney General is thus awarded forty percent (40%) of his costs, and the IP is awarded sixty percent (60%) of his costs, both to be taxed if not agreed.

Klein J.

2 May 2025