[2018] CCJ 3 (AJ)

IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF GUYANA

CCJ Appeal No GYCV2017/013
GY Civil Appeal No. 87 of 2010

BETWEEN

DEORANI SINGH	**APPELLANT**
AND	
THE ATTORNEY GENERAL	**1ST RESPONDENT**
NATIONAL INDUSTRIAL AND COMMERCIAL INVESTMENTS LIMITED	**2ND RESPONDENT**

Before The Honourables **The Rt. Hon. Sir Dennis Byron, President**
Mr. Justice Jacob Wit
Mr. Justice David Hayton
Mme. Justice Maureen Rajnauth-Lee
Mr. Justice Denys Barrow

Appearances:

Sir Fenton Ramsahoye, S.C., Mr. Roopnarine Satram, Mr. Chandrapratesh Satram and Mr. Visal Satram for the Appellant

Ms. Kim Kyte-Thomas, Ms. Oneka Archer-Caulder and Ms. Judy Stuart-Adonis for the 1st Respondent

Mr. Timothy M. Jonas for the 2nd Respondent

JUDGMENT
of
The Right Honourable Sir Dennis Byron, President
and the Honourables Justices Wit, Hayton,
Rajnauth-Lee and Barrow

Delivered by
The Honourable Mr. Justice Barrow
on the 13th day of March, 2018

Introduction

[1] The estate of the late Mohan Pirtam Singh, represented by his widow and administratrix ('the Appellant'), seeks compensation for the violation of the Appellant's constitutional right to protection of property when the State compulsorily acquired commercial premises almost thirty-five years ago. In the shadow of great delay on both sides, this court must decide upon the claim that the State did not comply with the law which permitted the acquisition, that therefore the property never vested in the State, that the income earned from the rental over the period must be paid with compound interest, and possession must be restored to the Appellant.

The history

[2] Mohan Singh carried on a business on property held by Transport No. 1755 of 1967 ('the property') until his death in 1980. After his death, the estate leased the property to Guyana Pharmaceutical Corporation Ltd. ('GPC'), a State entity, for five years. In 1982, during the subsistence of the lease, the Government of Guyana acted to compulsorily acquire the property by making orders for entering the property, pursuant to the ***Acquisition of Lands for Public Purposes Act Chapter 62:05*** ('the Act'), and on 15th March 1983 made the **Acquisition of Land for Public Purposes (Guyana Pharmaceutical Corporation No. 2 Order** ('the Acquisition Order'). On 1st February 1984 the Commissioner of Lands passed Transport No. 72 of 1984 in respect of the property to GPC.

[3] In 1984, at the request of the lawyer then acting for the estate, the Attorney General filed an *ex parte* motion in the High Court, No. 2277/84, for which section 13 of the Act provides, to ascertain the amount of compensation to be paid. An Order dated 16th October 1984 and entered 30th January 1986 records the hearing of this motion by Prem Persaud J, attended by the lawyer for the estate. The judge ordered that notice of the proceedings be advertised by publication in two newspapers and the official Gazette, calling on all persons interested to protect their right in the property, that the value of the property be ascertained by the Chief Valuation Officer and that the matter do stand adjourned to 8th March 1986 in chambers.

[4] An Order made in the same proceedings, dated 5th and entered 18th March 1987, recorded a hearing before Pompey J of the same ex parte motion and affidavit recited in the order of Persaud J, the appearance of counsel for the state and that no one had appeared for "the Respondent". The Order recorded that the judge:

> *"Ordered and Declared that the property … be and is hereby deemed compulsorily acquired"*

and fixed the compensation to be paid for the property at $578,000.00 less the sum of $496,850.13, "which sum has already been paid and received by the said personal representatives".

[5] No attempt was ever made to set aside or appeal the order of Pompey J.

[6] On 9th September 1991 the lawyer for the estate wrote the President of the Republic and asked for the property to be returned to the estate, for a sum to be paid by the estate that should not be exorbitant compared to the amount the Government had paid as compensation. The letter indicated the estate was hopeful because there had been a change in executive policy regarding state-taking of private property, as a result of which the State had started to return compulsorily acquired properties to their former owners.

[7] In 1994, the property was leased to Citizens Bank Limited ('the bank') by GPC and possession was taken by the bank as lessee. In 2003, the property was transferred to the Second Respondent, the National Industrial and Commercial Investments Limited ('NICIL'), a State-owned entity, under the ***Public Corporations Act, 1988***.

The constitutional claim

[8] On 27th March 1997, fourteen years after the acquisition order had been published, the Appellant brought a motion in the High Court contending that her and the estate's fundamental rights and freedoms, as guaranteed by Articles 40 and 142 of the Constitution, had been contravened. She sought the following redress:

i. A declaration that her fundamental rights had been breached;

ii. A declaration that the purported acquisition of the property was unconstitutional, ultra vires, null, void and of no effect;

iii. A declaration that the purported registration of title in favour of the Government of Guyana and in the name of Guyana Pharmaceutical Corporation was also unconstitutional, ultra vires, null, void and of no effect;

iv. A declaration that the property so acquired was never used for the purpose of public works for which it was acquired and that not having fulfilled that purpose, the property remained in the ownership of the estate;

v. A declaration that the Transport in the name of the deceased remained valid and effective; and

vi. A declaration that the said property purported to be acquired could only have been acquired on fulfilment of the conditions set out in the Act, that these had to be strictly observed and the failure to do so rendered the acquisition null, void and of no legal effect.

[9] The constitutional motion was heard by Roy J in 2002. Judgment was not delivered until 2010. Roy J explained that the delay was 'on account of the fact that the High Court file (together with all exhibits) remain (sic) on the list of missing files from the Registry for a long time'.

[10] Roy J agreed that the Appellant's constitutional right to property had been violated by the purported acquisition. He referred to the 'unless and until' requirement in the proviso to section 7 of the Act, which states that no land which is the subject of an acquisition order shall vest in the State *"... unless and until the National Assembly has voted or agreed to vote the sum estimated to be necessary for the public work for which the land is required."*

[11] The judge held this meant the estimated compensation for the particular acquisition must have been voted by Parliament and the certificate must have been given by the Minister as conditions precedent to enable the land to vest. This was never done and the property did not vest. Consequently, the property remained in the estate of the deceased and the purported passing to GPC was a nullity.

[12] Not only did Roy J decide the title of GPC was a nullity; he made a similar determination in relation to the order of Pompey J, stating:

"14 … The Order purported to declare that the property was compulsorily acquired. That Order was a nullity in that the Court had no jurisdiction to make such an order in respect of property which had not vested in accordance with Section 7 (1) of the Act…"

[13] In his view, any payments of compensation were a mistake of law and could not be attributed to compensation due under the Act for a valid acquisition. The judge also held that Justice Pompey's Order in relation to the assessment and payment of compensation was incorrect. Under section 13 of the Act, the Court was required to determine the value of the land and the distribution of the money to persons interested but, the judge found, the evidence indicated a wholly unlawful exercise was conducted with respect to the value and determination of compensation and the compensation exercise was wasted as a result.

[14] Additionally, Roy J held that the property was not required for public purpose, which is a condition precedent to compulsory acquisition. The Act did not authorize the State to take a property from a private person to transfer to another private person or to a corporation owned by the State and doing business in pharmaceuticals. The judge held that on this basis, as well, the acquisition was unlawful.

[15] In considering the appropriate remedy, Roy J noted that constitutional remedies are discretionary and depend on the circumstances of the case. He held the Appellant had demonstrated an entitlement to a declaration that the estate remains owner of the property, and the estate is constitutionally protected in its ownership, but considered that the State and other persons had been using the property since 1984. Most importantly, he stated, third party interests had become involved and, in the circumstances, '*the estate ought to be satisfied if the present situation remains undisturbed providing that proper compensation for the property is determined'*. He therefore ordered a hearing in Bail Court to assess compensation and, further, that in the event of non-payment of the sum awarded as compensation, within three months from the date of assessment by the Court, a declaration would be granted without further order that the property remained the property of the land owner's estate.

[16] Roy J addressed the Appellant's delay in bringing the constitutional motion. He held that acquiescence does not destroy constitutionally protected property rights and cogent proof would be needed to establish waiver of the right to enforce such property rights. The judge stated there was no such evidence. He stated that the notion that delay may affect the exercise of discretion is a rule of practice and not a rule of law. After considering a number of Indian cases on delay, the judge relied on ***Vora H.D. v The State of Maharashtra***[1] for the principle that "if an action is taken in total disregard to statutory provision or there is colourable exercise of power by the authority, delay or laches cannot be a ground to reject the Application."

The decision of the Court of Appeal

[17] The Attorney General appealed against the decision of Roy J, claiming that the learned trial judge erred in i) finding that Article 142 of the Constitution had been contravened in respect of the property and ii) ordering an assessment of compensation pursuant to that finding of contravention. The present Appellant filed a notice to vary the order of Roy J, seeking wider redress including an order that the property be returned to the estate. On its application, NICIL was added as a party to the appeal to argue specific grounds arising from the notice to vary.

[18] The Court of Appeal comprising Acting Chancellor Carl Singh, Justice of Appeal Cummings-Edwards and Justice Rishie Persaud rendered an oral judgment, agreeing with the High Court that the estate's rights to property protected by Article 142 of the Constitution, had been contravened, and awarded the estate damages of $30 million. However, the court later gave a written judgment and from this it emerges, at [37], that the court limited its finding of breach to the failure of the State to publish notice of the sitting of the High Court to determine compensation.

[19] The Court of Appeal expressly disagreed with the finding of Roy J that the acquisition was not effective because of the "unless and until" proviso to section 7(1) of the Act. The Court of Appeal held this was a procedural requirement that did not go to the constitutionality of the acquisition.[2] The court also decided that the Act satisfied the

[1] 1984 AIR 866.
[2] See paragraphs 20 – 22 of the Court of Appeal of Judgment.

constitutional requirement that a law which provides for the compulsory acquisition of property must fix the principles on which compensation is to be determined.[3] And it decided that Roy J could not order a fresh assessment of compensation, because he could not sit on appeal over the order of Pompey J, who had determined compensation.[4] The award of damages of $30 million that the court ordered was not a new assessment of compensation, therefore, but an award of damages for the particular breach of Article 142 of failing to give proper notice of the compensation hearing.[5]

[20] The court noted the delay in the action for constitutional redress but decided against interfering with Roy J's discretion in granting relief despite the delay. The court dismissed the cross appeal. It declared the property remained vested in the name of NICIL and ordered the State to pay costs of $150,000.00 to the present Appellant.

[21] The State did not appeal to the CCJ and, in response to this court's inquiry at the beginning of the hearing, counsel for the State accepted that it was bound by the orders for damages and costs. The estate, however, appealed virtually the entire decision.

The estate's appeal

The government's breach of Article 142 and the consequential reliefs

[22] In fairness to counsel for the Appellant, it must be recorded that because the written judgment of the Court of Appeal was not available to counsel until literally a day or so before the hearing in this Court, the grounds of appeal and the written and oral submissions directed themselves to the oral judgment delivered by the Court of Appeal, as recorded in the transcript which formed part of the Record of Appeal. The disconnect between the case counsel for the Appellant presented, and the written decision given by the Court of Appeal, was clearly a result of the disadvantage of not seeing the written judgment in time. This observation also applies to the Respondents.

[23] The entire foundation of the Appellant's case, was that both the High Court and Court of Appeal correctly considered the purported acquisition to be unconstitutional, as violating Article 142. The Appellant argued that while the Act permitted an acquisition,

[3] Ibid, 26.
[4] Ibid, 35.
[5] Ibid, 55.

the government had failed to comply with the provisions of the Act and this made the purported acquisition unconstitutional, null, void and of no effect, with the consequence that all the taints and impediments which were placed upon the owner's title were unconstitutional and illegal.

[24] As the Appellant's submissions pitched it, this made the estate entitled, inexorably, to:

a. a declaration that the ownership of the property remains vested in the estate of Mohan Pirtam Singh, deceased;
b. an order removing from the title all indorsements made or caused to be made by the State or its agencies upon the title;
c. damages and/or compensation for the loss of income and profits from the property, including the cost of restoration, to which the estate became entitled and remains entitled from the time of the purported acquisition of the property by the State to the present time and until payment;
d. an account of all dealings by the State with respect to the property; and
e. compound interest at such rate as may be just on all sums awarded to the estate or such further or other interest as may be appropriate for such time as may be just.

The error of the Court of Appeal

[25] The Appellant submitted that the Court of Appeal, having upheld the ruling of the High Court that the purported acquisition was unconstitutional, erred when it set aside the order for assessment of damages which Roy J had made, and when it purported to make an arbitrary award of $30,000,000 in respect of the property itself. There was no evidence to support that award of damages and the Court of Appeal gave no reason for it. Additionally, the Appellant submitted, the refusal to grant an order that the property be returned to the deceased's estate was both unconstitutional and oppressive, since the land remained vested in the landowner as the government failed to lawfully acquire it. The landowner's right, to not be deprived of his property as provided in Article 142, therefore, remained undisturbed.

[26] Furthermore, since the landowner's title was protected by the Constitution, the Court of Appeal was not entitled to use the jurisdiction granted by article 153 of the Constitution to make an award of compensation in the sum of $30,000,000.00 for the property,

because the property could not be taken away by unlawful action. Rather, the Appellant argued, the jurisdiction was to be used to compensate the estate for the income and benefits it lost by the unconstitutional taking. The Appellant also sought damages and/or compensation for the delay caused and/or expected to be caused by the manner in which the jurisdiction conferred by article 153 of the Constitution had been exercised, by the judicial branch of government. The delay has resulted in continuing legal process without relief or remedy, in contravention of article 144(8) of the Constitution, and the Appellant asked, further, for an interim award.

The appropriate relief in these circumstances

[27] The Appellant relied on the decision of ***Attorney General of Trinidad and Tobago v Ramanoop***[6] for the proposition that when the court is exercising its jurisdiction to grant relief it should seek to uphold or vindicate the constitutional right which has been contravened. In some cases, the violation of a constitutional right adds an extra dimension to the wrong against the applicant and an additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage and emphasize the importance of the constitutional right and the gravity of the breach as well as deterring further breaches. It was also said in that case that the word "redress" in the Constitution is apt to encompass such an award, if the court considers that it is required, having regard to all the circumstances. The Appellant submits that in this case, the estate is entitled to such an award.

[28] The Appellant further argued there was no reason why, in the exercise of the constitutional jurisdiction under article 153, the court should not award compound interest as part of the compensation for breach of a constitutional guarantee, in the same way a court could do at common law, in cases of contract and tort, and relied on ***Sempra Metals Ltd. v Her Majesty's Commissioner of Inland Revenue***.[7] At common law compound interest may be awarded to enable the court to grant full and effective relief in an action for the recovery of money paid under a mistake of law and in the exercise of the constitutional jurisdiction, the court is also concerned to give full and effective relief. Therefore, the Appellant urged, in this case where income was being received

[6] 2005 UKPC 15.
[7] [2007] UKHL 34.

during the period following the acquisition but was not paid over to the estate, because the State wrongly regarded itself as owner, the compensation payable to the estate, if it is to be fair and just, must include compound interest. The jurisdiction to grant such an award does not depend on the common law, but the common law may offer some guidance. To this end the Appellant asked this court to order the State to disclose the income earned since the purported acquisition.

AG's Submissions

Whether title can be restored to the Appellant

[29] The Attorney General relied on section 22(1) of the ***Deeds Registry Act, Cap 5:01*** and ***Rosie Blanchfield and others v the Attorney General of Trinidad and Tobago and Chagaruaramas Development Authority***[8] to argue that every transport of immovable property, other than a judicial-sale transport, shall vest in the transferee the full and absolute title to the immovable property. By statute, therefore, the transports in favour of GPC and NICIL were absolute and their validity could not be challenged.

[30] The State further argued that the Appellant contributed to the status quo by waiting almost 15 years to file the constitutional motion and, as Roy J had decided in the High Court, it would be unfair and unjust to disturb the rights of bona fide third parties, citing ***Ramchandra Shankar Deodhar & Ors v the State of Maharashtra & Ors.***[9]

Whether the Court of Appeal adequately redressed the breach of Article 142

[31] The State submitted that compensation must be assessed as at the date of acquisition, and the Court should consider the market value at the date of the publication of the acquisition order. On this basis, the compensation awarded by the Court of Appeal was more than sufficient. Additionally, this Court ought to consider that the estate had already been awarded $578,000.00, a sum that was not deducted from the award made by the Court of Appeal.

[32] On the Attorney General's submission, the $30 million award in 2017 provided more than adequate and sufficient compensation. An additional reason why the current market

[8] [2002] UKPC 1
[9] 1974 SCR (2) 216; 228.

value cannot be used as a basis for compensation is that the value of the property has been enhanced by the extensive improvements of bona fide third parties and to use that value would produce unjust enrichment. The Attorney General urged this Court to consider the decision of Cockburn CJ in ***Stebbing v The Metropolitan Board of Works***[10] where it was held that compensation should be to the extent of the loss.[11]

Delay in seeking constitutional redress

[33] Having regard to the period of time that elapsed before the Appellant brought this action, the Attorney General submits that the issue of laches arises. He submitted the Appellant never challenged the validity of the order made by Justice Pompey, by utilizing the available avenues of redress, but instead opted to file a constitutional motion, thereby misleading a court of coordinate jurisdiction to sit as an appellate court over Justice Pompey's order.

[34] The delay in this matter is unreasonable, the State submitted, and this court should consider that the Appellant chose to file proceedings after the great delay without explanation for it. In ***Smith (Alvin) v Commissioner of Police and Another***[12] it was held:

> "That (in the alternative) a person aggrieved by a breach of constitutional rights should seek redress with the utmost expedition; if there should be delay in bringing the motion, the applicant was obliged to explain the delay; in this case the delay of twenty-two months in instituting the proceedings called for an explanation and such had not been forthcoming."

[35] The Attorney General also argued that the excessive delay should have led to the dismissal of the claim notwithstanding it was a constitutional claim, because such claims were not exempt from the consequence of this form of abuse. Reliance was placed on the following extract from ***Durity v. Attorney General of Trinidad and Tobago***[13]:

> "…Clearly, the inherent jurisdiction of the High Court to prevent abuse of its process applies as much to constitutional proceedings as it does to other proceedings. And the grant or refusal of a remedy in constitutional proceedings is a matter in respect of which the court has a judicial discretion. These

[10] (1870) LR 6 QB 37, 42.
[11] See also: Re Macdonald and Toronto (1912) 27 OLR 179, 182; Nelungaloo Pty Ltd v Commonwealth [1947] HCA 58; 75 CLR 495, 571; Waters and other v Welsh Development Agency [2004] 2 All ER 915, 922.
[12] (1997) 51 WIR 409.
[13] [2002] UKPC 20.

> limitations on a citizen's right to pursue constitutional proceedings and obtain a remedy from the court are inherent in the High Court's jurisdiction in respect of alleged contraventions of constitutional rights and freedoms. But the Constitution itself contains no express limitation period for the commencement of constitutional proceedings. The court should therefore be very slow indeed to hold that by a side wind the initiation of constitutional proceedings is subject to a rigid and short time bar. The very clearest language is needed before a court could properly so conclude…. When a court is exercising its jurisdiction… and has to consider whether there has been delay such as would render the proceedings an abuse or would disentitle the claimant to relief, it will usually be important to consider whether the impugned decision or conduct was susceptible of adequate redress by a timely application to the court under its ordinary, non-constitutional jurisdiction. If it was, and if such an application was not made and would now be out of time, then, failing a cogent explanation the court may readily conclude that the claimant's constitutional motion is a misuse of the court's constitutional jurisdiction."[14]

NICIL's Submissions

The Appellant's delay in these proceedings

[36] NICIL, to which the property was transported in 2003, also submitted fully on the issue of delay and quoted the passage reproduced immediately above from ***Durity v. Att-Gen of Trinidad.***

[37] NICIL cited, as well, ***Dindayal v. Attorney General of Trinidad and Tobago***[15], where Alexander J dismissed an application for relief under the constitution because of the delay of the applicant, who said that he did not take legal action earlier because he was unable to afford to do so. Alexander J found that this statement, without more, was no proper explanation for the applicant's delay. He therefore dismissed the application citing ***Warris v. The Comptroller of Customs and Excise and The Attorney. General of Trinidad and Tobago***[16] and ***Smith v. COP*** where the courts found unexplained delays, of 6 years in the former and 22 months in the latter, were fatal to the success of constitutional motions. NICIL further cited the decision in ***Re Ramsaroop***[17], where Edoo J decided that the principles applicable in equitable private law proceedings may be applied by analogy to defeat a constitutional motion.

[14] Ibid, 30.
[15] TT 2008 HC 285.
[16] HCA No 2534 of 1990.
[17] TT 1985 HC 146.

[38] NICIL recited the now familiar chronology of acquisition on March 15, 1983, the application filed by the Government in 1984 to assess compensation, the determination of compensation in 1987, the acceptance of payment, and the transport of the property to GPC in 1984. NICIL emphasized the fourteen years' delay before the application for constitutional relief, the thirteen years elapsed since transport of the property passed to a State Company, and the ten years that passed since the (part) payment of the compensation assessed by the High Court.

[39] NICIL also relied of the fact that, faced with the interests of third parties that had arisen during the period of delay, the learned trial Judge in his discretion awarded compensatory damages as the appropriate form of 'redress'. It highlighted that it was the Attorney-General who appealed from the decision of the trial judge, and that it was not until May 15, 2015 that the Appellant applied to the Court of Appeal to vary the decision by challenging the award of damages and asking the Court of Appeal to order that the property be restored to the appellant. It highlighted that this was more than 30 years after the acquisition by the State in 1983. In the circumstances of the case, NICIL submitted, the appellant's delay should be fatal to its action.

The appropriate remedy in these circumstances

[40] NICIL submits that the availability of remedies under Article 153 is limited to those remedies which the Court thinks may be appropriate. Citing the decision in ***Maharaj v. Attorney General of Trinidad and Tobago (No 2)***[18] and ***Jaundoo v. Attorney General of Guyana***[19], NICIL submitted that where an infringement of the Constitution is threatened, the Court will readily use its coercive powers to prevent that infringement from taking place. Where, however, the transaction is "past and complete", compensation is the more obvious remedy, NICIL submitted, relying on the statement of Lord Diplock in ***Jaundoo***[20], a case concerning acquisition of property.

No jurisdiction

[41] We begin our discussion of these submissions with the observation that the decision of the Court of Appeal, that Roy J could not sit as an appellate court over Pompey J, expressed the fundamental rule of our system of law that High Court judges exercise

[18] [1979] AC 385.
[19] [1971] AC 972.
[20] Ibid, 985-6.

coordinate jurisdiction and that one High Court judge does not have jurisdiction to reverse or overrule another. It was based on this principle that the Court of Appeal reversed the decision of Roy J to treat as a nullity the order for compensation made by Pompey J. But the Court of Appeal failed to consider the wider consequence of that jurisdictional limitation, which was whether Roy J had jurisdiction to pronounce that the compulsory acquisition was made in violation of article 142 of the Constitution, in direct contradiction of the order made by Pompey J in 1987.

[42] That Order declared and ordered that the property *be and is hereby deemed compulsorily acquired*. The appellant's claim in the High Court, as adroitly crafted in the notice of motion and supporting affidavit, simply ignored that court order. Instead, the claim targeted the acquisition effected by the order of 1983 and sought declarations that the acquisition thereby made was a nullity. But it remains inescapable that the order of Pompey J, formally made, drawn up, perfected and sealed was never set aside or appealed. It was, always, and remains today, a valid, binding and effective order. Pompey J, by his order, deemed the property compulsorily acquired and it was not competent for another High Court judge to determine that the property had been only purportedly acquired and thus taken in violation of the law.

[43] Challenged with this reality, that there was this standing order of the High Court that pronounced the acquisition to be valid and effective, it was surprising to hear counsel submit in response that if an order "is unconstitutional" there is no need to apply to set it aside. That is simply wrong, as was definitively stated in ***Isaacs v Robertson***[21]**.** In that case the defendant disobeyed an injunction issued by a High Court judge and, when the claimant applied for the defendant to be committed for his contempt, the judge who heard the application dismissed it on the basis that the order for the injunction was a nullity because, at the time when that order was made, a rule of court had already operated to deem the claim abandoned. The Court of Appeal allowed the claimant's appeal, holding that although the order for the injunction ought not to have been made, and the defendant would have been entitled to succeed if he had applied to have it set aside, he was in contempt in disobeying it. The Privy Council upheld that decision, stating:

[21] [1984] 3 All ER 140.

> "Their Lordships would, however, take this opportunity to point out that in relation to orders of a court of unlimited jurisdiction it is misleading to seek to draw distinctions between orders that are "void" in the sense that they can be ignored with impunity by those persons to whom they are addressed, and orders that are "voidable" and may be enforced unless and until they are set aside. Dicta that refer to the possibility of there being such a distinction between orders to which the descriptions "void" and "voidable" respectively have been applied can be found in the opinions given by the Judicial Committee of the Privy Council in the appeals ***Marsh v. Marsh [1945] A.C. 271, 284*** and ***MacFoy v. United Africa Co. Ltd. [1962] A.C. 152, 160***; but in neither of those appeals nor in any other case to which counsel has been able to refer their Lordships has any order of a court of unlimited jurisdiction been held to fall into a category of court orders that can simply be ignored because they are void ipso facto without there being any need for proceedings to have them set aside. The cases that are referred to in these dicta do not support the proposition that there is any category of orders of a court of unlimited jurisdiction of this kind, what they do support is the quite different proposition that there is a category of orders of such a court which a person affected by the order is entitled to apply to have set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity and give to the judge a discretion as to the order he will make. The judges in the cases that have drawn the distinction between the two types of orders have cautiously refrained from seeking to lay down a comprehensive definition of defects that bring an order into the category that attracts *ex debito justitiae* the right to have it set aside, save that specifically it includes orders that have been obtained in breach of rules of natural justice.
>
> The contrasting legal concepts of voidnesss and voidability form part of the English law of contract. They are inapplicable to orders made by a court of unlimited jurisdiction in the course of contentious litigation. Such an order is either irregular or regular. If it is irregular it can be set aside by the court that made it upon application to that court; if it is regular it can only be set aside by an appellate court upon appeal if there is one to which an appeal lies."[22]

[44] While counsel did not describe the order of Pompey J as void, his description of it as 'unconstitutional' and subject to being ignored, with no need to apply to set it aside, purported to reduce the order to the same thing. As the Court of Appeal rightly held, another High Court judge has no competence to sit in appeal over an order of the High Court and declare it a nullity so, manifestly, neither can a lawyer or a litigant impose a consequence of nullity upon a court order. It was, therefore, an abuse of process for the Appellant to bring the claim for constitutional relief directed to obtaining declarations of invalidity of the acquisition orders issued by the Executive branch of government,

[22] Ibid, 143.

when that acquisition had been validated and given effectiveness by the judicial order of Pompey J. The failure of Roy J to appreciate, of his own accord, that he had no jurisdiction to pronounce the order of Pompey J to be a nullity was a fundamental error.

Collateral attack

[45] As submitted by counsel for both respondents, it was an abuse of the court process for the claimant to ignore or evade the requirement of making an application to set aside the supposedly unconstitutional order of Pompey J and, instead, seek to have that order declared a nullity for allegedly having been made in breach of natural justice and without compliance with procedural requirements. It is fundamental that it was not open to the Appellant to collaterally attack the order of Pompey J instead of appealing or seeking to set aside the order and, therefore, this court will not engage in any discussion, in these proceedings, which questions the facts and findings that informed the Order of Pompey J.

[46] The proceedings before Roy J took the wholly impermissible course of a review of the decision of Pompey J. The written submissions of the Appellant before Roy J had as a central premise that the Appellant was deprived of the opportunity to be heard on the hearing of the motion for assessment of compensation. The submissions purported to rely on 'evidence' that the Appellant was not informed of the date of the hearing. The record of the proceedings before Roy J shows that testimony was received from the lawyer for the estate in proof of the fact that he received no notice of the hearing before Pompey J. The obvious purpose of that evidence was to impeach the integrity of the order made by Pompey J.

[47] It is based on this material, the record discloses, that Roy J declared the order of Pompey J a nullity. Unfortunately, it is necessarily based on this same material and exercise that the Court of Appeal made its finding of breach of Article 142 by the State, in failing to give notice to the Appellant of the compensation hearing.

[48] Once this is stated, it becomes immediately apparent that a grave error was committed by the Court of Appeal in failing to advert to the fundamental rule of our court structure and system of appeals, that the review of the proceedings of a superior court of record must be based on an examination of its record. It was repugnant to fundamental process

that the Court of Appeal should act on the testimony in the court below of a partisan as to the alleged defects in the proceedings of a court of record and not insist, instead, that there could be no review without the production of the court's record. Perhaps, if the court had thought that it was highly irregular to conduct a review of the proceedings without the record of proceedings that were to be reviewed, this would have brought the recognition that there was no record of the proceedings before Pompey J because there was no appeal before them from the order of Pompey J, as there had been none before Roy J. That recognition would have left the court with little choice but to strike out the entire claim by the appellant.

[49] As a final note on this aspect, we permit ourselves to engage for a moment with the formal order made by Persaud J, dated 16th October 1984 and entered 30th January 1986, which gave directions for further dealing with the application to determine compensation, because that order ended by stating the specific date when the adjourned application was to be heard. The order of Persaud J recited that the lawyer for the estate was in attendance when the order was made. In his testimony before Roy J the lawyer did not say what happened on the adjourned date in March 1986 and why he did not know of further adjournment dates. The Appellant has sought to impugn the hearing before Pompey J, nuancing it as "an ex parte motion which was heard ex parte," because the lawyer for the estate was not present. If the review by Roy J of what happened before Pompey J were at all permissible, it would be expected that an explanation for that non-appearance should have come from the lawyer for the estate. And since the lawyer did not attend before Pompey J, necessarily he was in no position to state what took place at that hearing. Further, as a matter of basic fairness, Roy J as a self-constituted reviewing tribunal should surely have been concerned to have before him and consider the material that was before Pompey J which made that judge decide to proceed in the absence of the lawyer for the estate, who had entered an appearance and had previously appeared on the hearing of the application. This demonstrates why collateral attacks upon court orders must be rejected.

Acquiescence in the acquisition

[50] Turning to the merits of the claim, it is a matter of record that the Appellant accepted that the property had been compulsorily acquired because, through her lawyer, she

participated in the process of determining compensation, and it is remarkable that she should have been permitted in 1997 to attack the validity of the acquisition. The testimony of the appellant's then lawyer, before Roy J, fully established that the estate, acting through its lawyer, had accepted the acquisition. As mentioned in his testimony, it was this lawyer who prompted the Attorney General to make the *ex parte* application to the High Court to assess compensation and the lawyer stated he entered an appearance for the estate in those proceedings, which therefore ceased to be ex parte. The lawyer testified that he attended court on several occasions for the hearing of that application. More significantly, the lawyer testified that he collected payments to the account of that compensation, and the order of Pompey J specifically stated the sum collected to account. The lawyer offered no hint of a suggestion that he had collected the compensation payments 'without prejudice'.

[51] Apparently, it was not until 1997 that the appellant's son consulted leading counsel (who appeared in the courts below but not before this court) and the decision was taken to challenge the acquisition. As the respondents have emphasized, this was thirteen years after the Attorney General had filed the application for the court to determine the amount of compensation and after payment had been made of more than four fifths of the compensation. It was also after the lawyer for the estate had written the President on 9th September 1991, asking him for the State to sell the acquired property back to the former owners at a reasonable price.

[52] In his judgment, Roy J stated there had been no evidence presented of the estate's acquiescence in the acquisition or that it had waived its right to challenge the validity of the acquisition. That finding was clearly wrong. It simply ignored the oral and documentary evidence, summarized in the preceding paragraph. As aptly stated in the Appellant's written submissions in reply to the Attorney General's submissions, "If the alleged victim of a contravention so conducts his affairs as to lead the contravener to believe he does not complain or wish to complain the Court may conclude that he acquiesced in the contravention. Having so acquiesced he cannot be entitled to redress." Contrary to the remainder of those submissions, however, the 'victim's' very belated assertion that there was a contravention does not operate, in these circumstances, to militate against acquiescence.

Delay and discretion

[53] Roy J also considered the submission of the Respondent that the Appellant had been guilty of laches and delay and should be denied relief. He decided to exercise his discretion in favour of upholding the appellant's claim for relief. The general rule that an appellate court will not interfere with the exercise of discretion of a trial court is subject to the well-known exception, that if that exercise of discretion was based on a wrong appreciation of the evidence, among other things, then the appellate court may set aside the exercise of discretion by the lower court and itself exercise the discretion.[23] The complete failure of Roy J to consider the evidence of the appellant's acceptance of the acquisition, as demonstrated by her pursuit of compensation, means that he misled himself as to the implications and consequences of that conduct and gave no consideration to it, when he considered delay. It is fundamental that delay has to be explained[24], before a court can decide to disregard it; and if there is not only inaction by a litigant, which allows delay to continue, but positive action by the litigant by way of acceptance instead of challenge to the now-impugned conduct, a court would be acting contrary to principle by failing to consider the impact of the delay.

[54] The principle was helpfully presented by the Attorney General in reliance on the following quote from **Halsbury's Laws of England**[25]**:**

> "A Plaintiff in equity is bound to prosecute his claim without undue delay. This is in pursuance of the principle, which has underlain the statutes of Limitation. A Court of Equity refuses to aid stale demands, where the Plaintiff has slept upon his right and acquiesced for a great length of time. He is then barred by his laches. In determining whether there has been such delay as amount to laches, the chief points to be considered are (1) acquiescence on the Plaintiff's part and (2) any change in the position that has occurred on the defendant's part. Acquiescence in this sense does not mean standing by while the violation of right is in progress, but assent after the violation has been completed and the plaintiff became aware of it. It is unjust to give the Plaintiff a remedy where, by his conduct, he has done that which might fairly be regarded as equivalent to a waiver of it, where by his conduct and neglect, though not waiving the remedy, he has put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in such cases lapse of time and delay are most material."

[23] See: Supreme Court Practice 1972 at 59/1/14 and Sir Vincent Floissac's comments in Dufour v Helenairs Corporation Ltd (1996) 52 WIR 188.
[24] See the extract from Durity at paragraph [35] above.
[25] Equitable Jurisdiction, Vol 47 (2014) para 253.

The effect of delay

[55] Junior counsel for the Appellant submitted that this court should not concern itself with delay in this case because neither respondent pointed to any prejudice caused to it by delay, and the Appellant was the only party who had been prejudiced by the delay. This is a serious misconception which must be firmly corrected. Beyond the harm parties may suffer when there is delay, there is the deeper harm that is caused by such extraordinary delay as occurred in this case, and that is to a country's judicial system. The blight of delay began with the order made by Persaud J, when the lawyer for the estate appeared before him, on 16th October 1984. That order was not entered until 30th January 1986. It would be only speculation to suggest what were the specific consequences that this delay caused but it gives rise to uncertainty as to what, if any, impact it had on the absence of the lawyer for the estate from the hearing before Pompey J.

Delay in entering the order for the adjourned compensation hearing

[56] As now revealed, the absence of the lawyer for the estate is the factor that has been used, even in the Court of Appeal, to found the determination of the breach of Article 142, and that the order made by Pompey J was made in breach of natural justice. It is left to be wondered whether this whole case, involving twenty years of litigation, may have come about because of the delay in entering the order of Persaud J, which stated the adjourned date for the further hearing of the application for the court to determine compensation.

Delay in the constitutional claim

[57] The fourteen years from the publication of the acquisition order, in 1983, until the Appellant brought proceedings in 1997, must be regarded as all the more remarkable because the Appellant gave no explanation for the delay and, as it appears, the judge accepted that failure without comment. The third-party rights which came into existence during the earlier years of delay persuaded Roy J to withhold the grant of declarations sought by the Appellant that title did not vest in the State and that the estate remained the owner of the property. However, the judge failed to appreciate that the creation or accruing of third-party rights was enabled by the delay, and that he should have

considered this particular effect of delay, when deciding whether to exercise discretion to dismiss the claim because of delay and not only when deciding on remedies.

[58] In this case, the State and GPC were allowed, by the long delay in bringing the challenge to the acquisition, to believe they were accepted by all the world as the lawful and genuine owner of the property; they rented the property and spent that income with no thought of paying it to another. Considerable works were done on the property. There were two transfers of ownership of the property. It is inescapable that allowing the State and its successors to act on the belief that they were accepted as the owners, and to now permit the Appellant to seek an order from the court pronouncing that the property was never acquired or vested, would be a great injustice.

Delay by the courts

[59] The judicial process itself bears considerable blame for delay. The constitutional claim was filed in 1997 and it took five years for it to be heard. A constitutional claim is, by its very nature, of the utmost gravity and should be heard expeditiously. For that very reason, the procedure designed for bringing such a claim is an expedited one. The five years delay was wholly unacceptable. Worse, it is egregious that after the claim was heard, beginning in April 2002, the judgment was not delivered until August 2010, some eight years later. The judge apologized for that delay and explained that the file with all exhibits had gone missing but, with respect, that is a wholly unacceptable excuse. It is not sufficient for the judiciary to wait for a missing file to be found; the file must be recreated, and whatever needs to be done in that regard must be promptly done.

[60] There was also great delay at the level of the Court of Appeal. The appeal was filed in 2010 and an oral judgment was given on 22nd February 2017, followed by the written judgment bearing that date, but which was not received by counsel or this Court until a day or so before the hearing, on 7th February 2018. It is regrettable that the observer is left to conclude that the inordinate wait in the High Court for the file to be found, and the excessive time it took for the matter to be disposed of in the Court of Appeal, reflect an attitude of insufficient concern and commitment to avoiding excessive delay. It is a conclusion that the judiciary must do its utmost to guard against and, where the attitude does exist, to stamp out, for both itself and the legal community and, most of all, for the

public good. Today's public is, rightly, increasingly demanding of greater accountability of its public officials, including judges.

Improvement

[61] It is, therefore, the painful duty of this court to insist on improvement in the way our Caribbean courts perform our function of doing justice, even while conscious of weighty performance inhibitors beyond the judiciary's control, and to provide guidance, encouragement, support and leadership. This Court's position has long been that "excessive delay in adjudication of disputes results in significant distortion of justice". To paraphrase various statements made by the President, the Right Honourable Sir Dennis Byron in a number of cases[26], this Court is forced to bemoan the delays which have characterised the conduct of cases in the courts below. Such glaring illustrations of inordinate delay serve to not only undermine public perceptions of the judiciary and the administration of justice, but also adversely impact the ability of this Court to dispense justice to the parties before us. These delays are particularly troubling in cases which, by their very nature, call for speedy relief. The rendering of judgment within a reasonable time is not merely a courtesy which is provided to the litigants in a particular matter, it is a duty which extends to the public at large to do so expeditiously. The delays that occur in too many cases are cause for grave concern to this Court.

Prescriptive title

[62] A final matter we would raise in relation to delay is the impact of this court's decision in ***Toolsie Persaud v Andrew James Investment Ltd.***,[27] which confirmed that the State may acquire prescriptive title, after twelve years' possession, in the same way as any person. Counsel for the Appellant urged this court not to consider this point, because it was not raised before in the proceedings and would now operate unjustly. As pointed out from the bench, the record of appeal shows this matter was fully raised, in NICIL's submissions, before the Court of Appeal and the court ruled on it. In addition, the point is raised not with a view to this court awarding a prescriptive title to the State, but rather to draw attention to the consequences of the Appellant's great delay. Not only does such

[26] See: Ramdehol v Ramdehol [2017] CCJ 14 (AJ); Marinor Enterprises Ltd et al v First Caribbean International Bank (Barbados) Limited [2017] CCJ 2 (AJ); Mitchell v Wilson [2017] CCJ 5 (AJ).
[27] [2008] CCJ 5 (AJ).

great delay give to a defendant the right to assert a defence of limitation of action but it brings into operation section 13 of the ***Title to Land (Prescription and Limitation) Act Cap 62:02***, which extinguishes the title of a former owner. Delay which results in the creation of a new title in a person in possession as owner, is delay which is far too great to be overlooked. This is another reason why the High Court should have dismissed the claim from long ago, soon after it was filed in 1997.

The outcome

[63] None of the Appellant's grounds of appeal succeeds and the appeal is dismissed. Notwithstanding our consideration of the further bases upon which the Court of Appeal could have allowed the State's appeal to that court, and should have dismissed the entire claim, the forensic reality is that the State was content to accept the decision reached by the Court of Appeal and, accordingly, we do not disturb that decision. We provisionally award basic costs and disbursements to the Respondents, with permission to the parties to apply, within 21 days of the date of this judgment, to vary this order as to costs, failing which the order stands absolute, without further application.

/s/ CMD Byron
The Rt. Hon Sir Dennis Byron (President)

/s/ J. Wit
The Hon Mr Justice J Wit

/s/ D. Hayton
The Hon Mr Justice D Hayton

/s/ M. Rajnauth-Lee
The Hon Mme Justice M Rajnauth-Lee

/s/ D. Barrow
The Hon Mr. Justice Barrow