IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2013 HCV02006

IN THE MATTER of Section 7 of the Commission of Enquiry Act

AND

IN THE MATTER of Part 56 of the Civil Procedure Rules 2002

BETWEEN	**MILTON LLEWELLYN BAKER**	**CLAIMANT**
AND	**THE COMMISSIONER OF FINSAC COMMISSION OF ENQUIRY WARWICK BOGLE**	**1ST DEFENDANT**
AND	**THE COMMISSIONER OF FINSAC COMMISSION OF ENQUIRY CHARLES ROSS**	**2ND DEFENDANT**

IN CHAMBERS

Kent Gammon instructed by Kent Gammon & Co. for the claimant (applicant)

Jerome Spencer instructed by Patterson, Mair, Hamilton for the defendants (respondents)

HEARD: 12 August and 1st October, 2013

JUDICIAL REVIEW - APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW - MANDAMUS- COMMISSION OF ENQUIRY - COMMISSIONERS FAILING TO SUBMIT REPORT ON COMPLETION OF ENQUIRY - LEGITIMATE EXPECTATION - DELAY - TEST TO BE APPLIED FOR LEAVE - WHETHER APPLICANT SATISFIES THE TEST FOR LEAVE TO BE GRANTED - THE CIVIL PROCEDURE RULES 2002 (THE CPR),

56.2 (1); 56.2 (2); 56.3 (3); 56.6 (1); THE COMMISSIONS OF ENQUIRY ACT, SS. 2 ,5, 7, 10 & 13

McDONALD-BISHOP, J

[1] This concerns an application for leave for judicial review that was dismissed by me on 12 August 2013. 1 gave an oral synopsis of my reasons for refusing the application for leave, but given the public interest in the matter with which it is concerned, I promised then to reduce my reasons in greater detail into writing. This, therefore, stands in fulfillment of that promise.

[2] Mr. Milton Llewellyn Baker is named as claimant in the proceeding albeit that, in actuality, he is an applicant for leave for judicial review on the basis that a claim could not have been properly commenced without leave of the Court to apply for judicial review being first obtained.

[3] Mr. Baker has brought this action against persons named as defendants in the proceeding although their real standing ought to be as respondents for the same reason Mr. Baker should be regarded as an applicant. They are the two Commissioners of the FINSAC Commission of Enquiry, Messrs. Warwick Bogle and Charles Ross ("the Finsac Commissioners").

[4] The term FINSAC is the well known acronym for the entity, Financial Services Adjustment Company Limited, that was created by the Government in 1997 in response to the all too familiar financial sector 'melt-down' that occurred during the 1990's.

[5] Mr. Baker, by Notice of Application for Court Orders filed on 25 June 2013, sought the following order:

> "*Leave for judicial review for an order for Mandamus, that the 1st Defendant, FINSAC Commissioner of Enquiry, Warrick Bogle, Chartered Accountant, of Shop 16, Hagley Park Road, Kingston 10 in the parish of St. Andrew and the 2nd Defendant, FINSAC Commissioner of Enquiry, Charles Ross,*

Financial Consultant, of 07 Barbados Avenue, Kingston 5 in the parish of St. Andrew to produce a report whether final or interim from the evidence given and presented before the said FINSAC Commissioners of Enquiry over the material period November 2009-November 2011."

[6] For a fuller appreciation of the decision I had arrived at, it is imperative that the background to the application and the legal context within which it was pursued by Mr. Baker be clearly understood from the very outset. I now undertake the effort to provide an insight into the relevant factual and legal circumstances surrounding Mr. Baker's application for leave for judicial review.

The background: factual and legal context

[7] FINSAC was the entity created by the Government of Jamaica in 1997 to address the now well - known financial institutions 'melt – down' of the 1990's. Its mandate was to restore stability to the turbulent financial sector by resolving "the problems of solvency and liquidity experienced by the financial sector." Its ultimate goal, it could be said, was, purportedly, to restore stability and public confidence in our financial institutions, particularly, those in the banking and insurance sectors.

[8] Mr. Baker is one of those persons who, we could say in popular jargon, was 'finsac'd' (pronounced '*finsacked').* That is to say, he was one of those persons with respect to whom steps were taken by FINSAC and/or its associated entities to recover outstanding debts owed to the troubled financial institutions. Mr. Baker is now a member of the group of persons (or borrowers) who were affected by the activities of FINSAC who formed an Association named the Association of FINSAC Entrepreneurs ("The Association"). He is, in fact, the husband of the President of that Association. He has, evidently, not brought this application in a representative capacity on behalf of the Association.

[9] Mr. Baker and the other persons of the Association faced insolvency in their business operations during the period 1996-2002. They had entered into

mortgage agreements with mortgage institutions that they could no longer service due to what they claimed were the exorbitant variable interest rates that led to an increase in their indebtedness. Mr. Baker deponed that his initial loan of approximately $10,000,000 ballooned to approximately $150,000,000. He was unable to meet the mortgage repayments and the institution foreclosed on two of his properties. Many properties used by other members of the Association to secure loans were lost to them due to foreclosure by the lending institutions.

[10] Much controversy emanated from the activities of FINSAC and attention was directed, through much media publicity, at the welfare of the affected entrepreneurs. This eventually led to the issuance by the Governor - General of a Commission to enquire into the financial melt - down of the 1990's and the activities of FINSAC, among other things. In establishing the Commission of Enquiry concerning FINSAC, the Governor - General acted pursuant to the power vested in him by the Commissions of Enquiry Act (which will be referred to as the "Act" from time to time during the course of my discussion).

[11] The Commissions of Enquiry Act, Section 2 reads:

> " 2. It shall be lawful for the Governor-General, whenever he shall deem it advisable, to issue a Commission, appointing one or more Commissioners, and authorizing such Commissioners, or any quorum of them therein mentioned, to enquire into the conduct or management of any department of the public service or local institution, or the conduct of any public or local officers of the Island, or of any parish, or district thereof, or into any matter in which an enquiry would in the opinion of the Governor-General, be for the public welfare.
>
> Each such Commission shall specify the subject of enquiry, and may, in the discretion of the Governor-General, if there is more than one Commissioner, direct which Commissioner shall be Chairman, and direct where and when such enquiry shall be made, and the report thereof rendered, and prescribed how such Commission shall be executed, and may direct whether the enquiry shall or shall not be held in public. In the absence of a direction to the contrary, the enquiry shall be held in public, but the Commissioners shall nevertheless be entitled to exclude any particular person or persons for the preservation of order, for the due conduct of the enquiry, or for any other reason."

[12] Section 5 sets out the terms of the oath or the affirmation that persons appointed as Commissioners should take. Section 7 of the Act then goes on to stipulate the duties that the Commissioners are required to perform in accordance with their oath or affirmation. Section 7 reads:

> "7. It shall be the duty of the Commissioners, after taking such oath or affirmation, to make a full, faithful and impartial enquiry into the matter specified in such Commission and to conduct such enquiry in accordance with the directions (if any) in the Commission; and, in due course, to report to the Governor-General, in writing, the result of such enquiry; and also, when required, to furnish to the Governor-General a full statement of the proceedings of such Commission and of the reasons leading to the conclusions arrived at or reported."

The Act proceeded to provide, in part, in section 10:

> "10. Commissioners acting under this Act shall have the powers of a Judge of the Supreme Court of this Island, to summon witnesses, and to call for the production of books, plans and documents, and to examine witnesses and parties concerned on oath, and no Commissioner shall be liable to any action or suit for any matter or thing done by him as such Commissioner…"

In keeping with the power vested in him by the Act, the Governor-General, having deemed it advisable, on the 24 October 2008 issued the Instrument under the broad seal appointing the Commissioners to the FINSAC Commission of Enquiry.

[13] As indicated in the Jamaica Gazette Extraordinary of Friday 9 January 2009, The Honourable Mr. Justice Boyd Carey (Retired), Mr. Charles Ross and Mr. "Worrick" (not "Warrick" in Gazette) Bogle were appointed Commissioners with effect from 12 January 2009. Mr. Fernando DePeralto was appointed Secretary. At some point, Justice Carey ceased to be one of the Commissioners.

[14] The Commission granted by the Governor - General authorized the FINSAC Commissioners to:

(i) examine the circumstances that led to the collapse of several financial institutions in the 1990's with particular regard to:
    (a) the extent to which these circumstances were directly influenced by domestic or external factors;
    (b) Government's fiscal and monetary policies;
    (c) the management practices and role of Board of Directors of the failed institutions;
    (d) the performance of Government's regulatory functions.

(ii) To consider what actions, if any, could have been taken to avoid this occurrence and to evaluate the appropriateness of the actions which were taken by the authorities in the context of Jamaica's economic circumstances and in comparison to intervention by the State in other countries which have had similar experiences.

(iii) To review the operations of FINSAC in relation to the delinquent borrowers and to determine whether debtors were treated fairly and equally;

(iv) To review the probity and propriety in FINSAC's management, sale and/or disposal of assets relating to delinquent borrowers;

(v) To review the terms and conditions of the sale of non-performing loans to the Jamaica Redevelopment Foundation;

(vi) To review the practices of the Jamaica Redevelopment Foundation in the treatment of delinquent borrowers and in particular, the management, sale, and/or disposal of assets;

(vii) To assess the long term impact of the collapse of these institutions on the economy and on the businesses and individuals whose loans were involved as well as the economic and social impact of the actions taken by the Government with regard to savers, depositors and investors of the failed institutions;

(viii) To review the steps that have subsequently been taken and make recommendations as to what further steps should be taken to prevent a recurrence of such widespread collapse of financial institutions and the resulting hardships.

[15] The Commission issued by the Governor - General contained several directions to the Commissioners. Some of such directions are, for immediate purposes, in the following terms:

> "AND I do further direct you to hold such enquiry and to conduct such examination of witnesses in public unless you, in your judgment, determine that it is advisable to have a sitting in private:
>
> AND I further direct you to report to me in writing as soon as practicable the result of such enquiry and to furnish to me a full statement of the

proceedings and of the reasons leading to the conclusions arrived at or reported:

AND I do further direct that should you find it necessary to do so, you may submit Interim Reports before the submission of your full and final report:…

In his final charge to the appointees, the Governor- General directed, in part:

"AND I also direct that, having made and subscribed to an oath or affirmation as required by law… you do proceed forthwith to make a full, faithful and impartial enquiry into the matters hereinbefore specified at such times and places as you may think fit, and that, should you find it necessary so to do, you shall summon witnesses to appear before you at such times and places as you may appoint, and examine and have them examined before you, on oath, touching the subject of the enquiry:"

[16] The Governor - General from all indications acted within the letter of the enabling statute and appointed the FINSAC Commissioners to carry out the mandate as set out in the Instruments of Appointment and in accordance with the Act. The terms of reference are clear and what the Commissioners were to do in furtherance of this mandate was unambiguous.

[17] It goes without saying, then, that Mr. Baker did not grant any Commission to the Commissioners to investigate the activities of FINSAC or into any related matters. The Governor - General did so in keeping with his statutory power. Also, The terms of reference made no mention of Mr. Baker personally, and over and above anyone else. Mr. Baker would have fallen within a group of persons, that being, the delinquent borrowers, whose interest was to be part of the subject of the Enquiry. As is seen from the terms of reference of the Commission, the probity and propriety of FINSAC's and the Jamaica Redevelopment Foundation's management, sale and or disposal of the delinquent borrower's assets was to be reviewed and it should be determined whether the delinquent borrowers were treated fairly and equally.

[18] Mr. Baker only entered the picture as a direct participant in the proceeding when he was summoned by the Commission in keeping with the power given to it by the Governor - General which was derived from section 10 of the Act. Having been called by the Commission of Enquiry, Mr. Baker participated in the proceedings by giving his evidence on 24 and 25 November 2010.

[19] The Enquiry was completed in or around November 2011. Since then, and certainly up to the date of this hearing, no report has been forwarded by the Commission to the Governor-General in keeping with the Act and the directive of the Governor-General that they forward a report to him in writing upon completion.

[20] The FINSAC entrepreneurs have been agitating for some time since the hearing was completed for the report to be concluded and made available. They have made their position known through the broadcast and print media and, reportedly, through a public forum held at the Emancipation Park which was reported on television on 9 February 2013.

[21] In addition, Mr. G. Anthony Levy, attorney-at-law, who represented some entrepreneurs at the Enquiry, wrote to the Commissioners on the issue but to no avail. It was stated too that the intervention of the Governor - General was sought by the President of the Association by letter but that, too, met with no success. The report remains outstanding after two or so years following the completion of the Enquiry.

[22] It is against this background that Mr. Baker sought leave for him to make an application for judicial review to procure an order of mandamus to compel the Commissioners to complete and submit the report. His application did not expressly state, however, to whom such report must be given.

Leave for judicial review

Locus standi

[23] The application for leave for judicial review was made pursuant to the Civil Procedure Rules, 2002 ("the CPR"), Rule 56.2. Rule 56.2 (1) provides that an application for judicial review may be made by any person group or body which has sufficient interest in the subject matter of the application.

> 'A person with sufficient interest' according to the Rules includes, among others, any person who has been adversely affected by the decision which is the subject of the application [r. 56.2 (2) (a); or any person who has a right to be heard under the terms of any relevant enactment or the Constitution [r. 56.2 (2) (f)].

[24] The first hurdle that Mr. Baker would have to, therefore, surmount is that he had the requisite *locus standi* to bring this application. He must be a person who may be regarded as having a sufficient interest in the findings/ decision of the FINSAC Commission of Enquiry and, by extension, in the submission of its report which is the subject of the claim.

[25] The Rules stipulate that a sufficient interest inheres in a person who has been adversely affected by the decision, the subject matter of the application. In this case, there is no decision of the Commissioners that is in issue, strictly speaking, but rather an omission/ failure on their part to submit a report as required by the terms of the Commission.

[26] What constitutes a decision for administrative law purposes was helpfully and thoroughly addressed by Lord Diplock in **Council of Civil Service Unions v Minister for the Civil Service** [1985] A.C. 374 ("The GCHQ case". There, his Lordship, in explaining when a decision can properly be the subject of a judicial review stated that a decision for that purpose typically relates to a decision made

by some person or (body of persons), the decision-maker, or a refusal by that decision-maker to make a decision. So, for a matter to be qualified as a decision, it is not necessarily confined to decisions of a direct kind but include actions or omissions to act. It would mean on Lord Diplock's exposition, that for an omission to qualify as a decision for the purposes of judicial review, it must have consequences which affect some person or body of persons other than the decision - maker in certain specified ways which I have duly noted but will not detail for present purposes. One such way that is relevant to this matter is where the act or omission manages to frustrate the legitimate expectation of an interested person.

[27] There is no direct decision that has been made by the FINSAC Commission that can be said to adversely affect Mr. Baker. It may be said, however, that the claim concerns an omission on the part of the Commissioners to act, that is, to submit a report in which Mr. Baker has an interest since he is one of the beneficiaries of the Enquiry. Furthermore, the Rules show that the remedy of Mandamus could be granted in respect of a "decision or *determination not already made or to hear a case".* (Emphasis added.) The Commission has not yet made any determination.

[28] So, it seems to me that the fact that there is no decision from the Commissioners would not preclude a remedy of mandamus to be granted, if all the conditions necessary for its grant exist. As such, a person, like Mr. Baker, seeking to compel the performance of the act of the Commissioners in submitting the report, could well have sufficient interest in the subject matter of the claim being a person who could be directly or adversely affected by the determination when it is ultimately made.

[29] Since the categories of persons who may be taken as having sufficient interest in a matter which is the subject of an application for judicial review is not closed, I was not minded to exclude Mr. Baker on the ground of him having no

"locus standi" in the circumstances. In fact, there was no issue taken that he did not have sufficient interest in the subject matter of the application, but as a matter of law, I had to consider and be satisfied that all the legal requirements for grant of leave for judicial review were met.

[30] I was also influenced by the guidance afforded by the learned authors of **Halsbury's Laws of England,** 4th edition, 2001 Reissue, Vol. 1 (1), para. 66, that the question whether an applicant has sufficient interest although arising at the permission stage, is, in most cases, left to be dealt with at the substantive hearing for judicial review. The learned authors noted that it is only in obvious cases that the Court may decide that the applicant lacks sufficient interest. So, they stated that "save in simple or clear cases the question whether the applicant has a sufficient interest should not be determined at the threshold stage as a preliminary issue independent of a full consideration of the merits of the complaint.

[31] In all the circumstances, then, I proceeded to deal with the application for leave on the merits on the premise that Mr. Baker possesses sufficient interest in the subject matter of the claim at this threshold stage. The overriding question, however, was whether he had presented enough material to pass the test for leave to be granted for him to apply for judicial review for an order of mandamus to compel the Commissioners to produce the report.

Whether there was delay

[32] The CPR also provide that a claim for leave to apply for judicial review must be made promptly and, in any event, within three months from the date the grounds for the application first arose. [See r. 56.6 (1)]. Mr. Spencer, on behalf of the Commissioners, took the point that the application was not made promptly or, at any rate, within three months since the ground first arose and so without an extension granted by the Court, the application ought not to be entertained. Counsel's argument was that more than three months had elapsed since the

Commissioners failed to submit the report in response to the letter of Mr. G. Anthony Levy on whose affidavit evidence Mr. Baker sought to rely.

[33] I rejected that submission and I ruled that there was no delay in bringing the application. I formed the view that the omission on the part of the Commissioners is a continuing one against the background that no time was specified in the Commission for the completion of the report except as 'soon as is practicable.' The Enquiry was completed roughly two years ago. The omission on the part of the Commissioners complained of is still continuing. What is "as soon as practicable" is still to be determined.

[34] Furthermore, as will be seen later, I found that Mr. Levy, in actuality, made no proper demand on behalf of Mr. Baker *per se,* or at all. He represented other entrepreneurs on whose behalf he wrote. Although Mr. Baker relied on that letter and on what he called his 'entreaties' for the said report from the FINSAC Commissioners of Enquiry made through different avenues, there is no evidence that Mr. Baker, in his own right, and in his own interest, made any demand sufficiently recognised by law (as will be discussed shortly) for the report from the Commissioners. In the circumstances as obtained, I did not see it fit to bar him on the basis that the application was not made within the time limit set by the CPR.

[35] Given the remedy Mr. Baker wished to pursue amidst the prevailing circumstances, I did not believe that the limitation period should be used to bar him. It would have been open to him to go back and make his own demand and, then, if the report is still not produced, he would still have the option open to him to make a new application within time. I held the view, therefore, that it would save time and costs to hear the application and not refuse leave on the ground of a time bar given the continuing default of the Commissioners complained of.

Ground for application

[36] Rule 56.3 (3), in setting out what the application for leave must contain, also provides, in so far as is materially relevant at this juncture, that the grounds on which the application is made should be stated: r.56.3 (3) (c).

[37] In fulfillment of this requirement, Mr. Baker set out several bases on which it seems the application was made to include, in particular, that he has "a legitimate expectation to the report from the FINSAC Commissioners of Enquiry to understand why his business failed as set out in the terms of the FINSAC Commission of Enquiry."

[38] I found, after a consideration of the Rules, that procedurally, Mr. Baker had satisfied the basic requirements to make an application for leave for judicial review. The issue was whether, substantively, and on the merits of the application, he was entitled to leave to apply for judicial review for an order of mandamus to compel the Commissioners.

The applicable test

[39] The starting point for any consideration of this application for leave on substantive grounds is the test that must be satisfied for the grant of leave. In **Sharma v Browne Antoine** [2006] UKPC 57, delivered 30 November 2006, the test was made even clearer by the Privy Council. It was stated, in part, at page 5 of their Lordships' opinion:

> "…The ordinary rule now is that the Court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to the discretionary bar such as delay or an alternative remedy: *R v Legal Aid Board, Ex p Hughes (1992) 5 Admin LR, 628; Fordham, Judicial Review Handbook, 4th ed. (204),* p. 426. But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application…
> It is not enough that a case is potentially arguable: an applicant cannot plead potential arguability to "justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the

> interlocutory processes of the Court may strengthen": *Matalulu v Director of Public Prosecutions [2003] 4 LRC 712, 733."*

[40] My learned sister, Mangatal, J, quite helpfully, explained the approach of the Courts to these matters in the unreported judgment **Hon. Shirley Tyndall, O.J. and Others v Hon. Justice Boyd Carey (Ret'd) Claim No. 2010 HCV 00474** delivered 12 February 2010**.** At paragraph 11 of that judgment, the learned judge stated:

> "It is to be noted that an arguable ground with a realistic prospect of success, is not the same thing as an arguable ground with a good prospect of success. The ground must not be fanciful or frivolous. A ground with a real prospect of success is not the same thing as a ground with a real likelihood of success. The Court is not required to go into the matter in great depth, though it must ensure that there are grounds and evidence that exhibits this real prospect of success. "The discretion that the Court is exercising at this stage is not the same as that which it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application." – Per Lord Wilberforce at page 6 of the House of Lords' decision in **Inland Revenue Comrs v. National Federation of Self – Employed and Small Business Limited** [1981] 2 All ER 93."

[41] The relevant authorities are clear beyond question that the Court's function at the application for leave stage is to eliminate claims which are hopeless, frivolous, and vexatious. A claim should only proceed to a substantive hearing upon the Court being satisfied that there is a case fit for consideration. The evidence relied on must disclose that arguable case with the realistic prospect of success of a ground on which the claim is based. Such a case would then be such as to merit full investigation at a substantive hearing.

[42] The crucial question was whether the evidence put forward by Mr. Baker managed to disclose an arguable case of the quality contemplated by the authorities that would merit a full investigation on a substantive application for judicial review.

[43] The core ground advanced by Mr. Baker on which he wished to seek judicial review is that he has a substantive legitimate expectation to the report from the FINSAC Commissioners to understand why his business failed as set out in the terms of the Commission.

[44] In this regard, Mr. Baker relied on the evidence contained in the affidavit of Mr. Levy. In that affidavit, Mr. Levy, indicated that he represented Therma Plastics Jamaica Limited and several other persons who were affected by the financial melt-down which resulted in the establishment of FINSAC. According to him, in so far as is relevant, he wrote to the Commissioners on 18 May 2012 and he exhibited his letter. The contents of that letter are important to this application and so warrant full disclosure. It reads under the names and addresses of the two Commissioners:

> "Gentlemen:
>
> **Re: "Finsac" Commission of Enquiry**
>
> It has been reported that the work of the commission has come to a complete halt as it is alleged that the commissioners, since the change of the government in December 2011, have been unable to receive any funding from the government. I also understand that there are no funds provided in the budget to pay the expenses of the commission.
>
> Gentlemen, would you expect a government formed by the party in power to continue to fund the commission after which senior members of the party and officers of Finsac Limited tried successfully through the Courts to derail?
>
> Your failure to provide even an abbreviated interim report prior to the 29th day of December 2011 was a great dis-service to the people of Jamaica.
>
> You, as commissioners, have received substantial monies from the people of Jamaica to act as commissioners and to seek the truth and report on what caused the Financial Sector meltdown of the Financial Sector and losses to thousands of Jamaicans, including some of whom committed suicide as a consequence of being Finsaced.

> Be that as it may, I would like to suggest to you as honourable men that you write the report based on the evidence that you have obtained. I believe that it is your duty as honourable citizens, to whom the people of Jamaica entrusted the responsibility to make an Enquiry and write a report.
>
> I suspect that the government will be legally obligated to honour your invoices for the time you spend on completing your report.
>
> I have not yet seen copies of the terms of your appointment as commissioners. However, it is my intention to try to obtain this from the government under the Access to Information Act. I also intend to seek from the government under the said act information as to how much money has been paid to each of you to date and how much money the commission has cost the people of Jamaica.
>
> Be that as it may, I anticipate that as honourable men you will feel it to be your duty to complete writing your report (even if abbreviated) and ensure that copies of the report are sent to the Governor General who appointed you, the Prime Minister, the Leader of the Opposition and ***to*** **the Press so that the report will be published and made available to the people of Jamaica from whom you have received substantial sums.**
>
> I await hearing from you
>
> Yours Faithfully,
> **G. Anthony Levy & Co.**
>
> *Per: (Sgd) G. A. Levy*
>
> Attorney for Thermo-Plastics (Jamaica) Limited)
>
> *(His emphasis added).*

This letter, according to Mr. Levy's affidavit, was delivered by his bearer to the offices of the two Commissioners.

[45] Mr. Baker contended that he did not know if any consideration has been given to this letter by the two Commissioners. He sought to rely on it ,however, to establish the default of the Commissioners in not responding to requests for the report.

The Commissioners' case in response

[46] The Commissioners' response to the application for leave to apply for judicial review is terse and pointed. Their contention is, basically, that they do not owe Mr. Baker any duty to produce a report from the evidence given and presented at the Enquiry.

[47] Mr. Charles Ross deponed, in part, in so far as is relevant at this point:

> "Under our terms of appointment, we were charged with, inter alia, reporting to the Governor General in writing as soon as is practicable the results of the enquiry and a full statement of the proceedings together with the reasons for conclusions arrived at…"

[48] He relied on the Instrument of Appointment of 24 October 2008 and the Gazette of 9 January 2009. He contended further that on the advice of his attorneys-at-law, he "verily believes that having regard to [our] stated responsibilities under our Instruments of Appointment, there is no basis whatsoever for the Claimant to seek to compel us to produce a report on the circumstances which led to the collapse of several institutions in the 1990's."

[49] Mr. Spencer submitted that the only duty to report owed by the Commissioners under the Commissions of Enquiry Act is to report to the Governor-General and to no-one else. He maintained that the Commissioners' Instruments of Appointment confirmed that they have an obligation to report only to the Governor-General. Mr. Baker has no basis in law to seek the remedy of mandamus as the Commissioners owe him no duty to produce a report. Counsel concluded on this line of reasoning that the Governor-General is the only individual that can compel the Commissioners to submit the report. That represents the stance taken by the Commissioners in the matter.

Legitimate expectation

[50] Mr. Gammon in seeking to push the application for leave for judicial review strenuously argued that Mr. Baker is a proper applicant for judicial review for a mandamus based on the principle of legitimate expectation and in the light of the inordinate delay on the part of the Commissioners to produce the report.

[51] He maintained, in essence, that there has been inordinate delay on the part of the Commissioners having taken evidence from the last witness in 2011. He relied on several authorities to show that the Commissioners have a duty to produce the report within a reasonable time and so their failure to do so means that there has been inordinate delay on their part that would warrant the intervention of the Court by way of judicial review. He cited, for instance, **Collector of Land Revenue South West District Penang v Kam Gin Paik and Others** [1986] 1 W.L.R., 412 in which it was held by the Privy Council that an acquiring authority had a duty to complete the compulsory acquisition of land within reasonable time. So, a delay of seven years between publication of the declaration under the relevant statute and the giving of the notice of the Enquiry was held to have invalidated the award due to the delay.

[52] Learned counsel also noted the dictum of Upjohn, J in **Simpsons Motor Sales (London) Limited v Hendon Corporation** [1963] Ch. 57 , 82-83 cited in **Collector of Land Revenue South West District Penang** that what is a reasonable time for this purpose must depend upon the facts and circumstances of each case."

[53] It is against this background of the delay that Mr. Gammon held steadfast to the view that there is inordinate delay in the submission of the report and that Mr. Baker has a legitimate expectation to the report within reasonable time. He relied on the principle of substantive legitimate expectation.

[54] A legitimate expectation arises in circumstances where a person has been led by a public authority to believe that he will receive or retain some benefit or

advantage. Lord Fraser of Tullybelton in the **Council of Civil Service Unions v The Minister of Civil Service,** cited earlier, noted on this subject:

> "But even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege and, if so, the Courts will protect his expectation by judicial review as a matter of public law, This subject has been fully explained by Lord Diplock in *O'Reilly v Mackman* [1982] 3 All E.R. 1124, [1983] 2 A.C. 237.
>
> Legitimate or reasonable expectation may arise either from an express promise given on behalf of a public body or from the existence of a regular practice which the claimant can reasonably expect to continue."

[55] Lord Diplock, in the same case, again, provided invaluable guidance on the subject which is in keeping with what Lord Fraser had extracted from his reasoning in **O'Reilly v Mackman**. These dicta have been so often cited that I believe that they do not warrant repetition in any great detail at this time.

[56] The authorities have established that in legitimate expectation cases, three practical questions arise as follows:

(a) To what has the public authority, whether by practice or by promise, committed itself;
(b) Whether the authority has acted or proposes to act unlawfully in relation to its commitment;
(c) What should the Court do?

(See **R v Newham London Borough Council, exp Bibi** [2002] 1 WLR 237 and Eddy Ventose, *Commonwealth Caribbean Administrative Law* pp. 213-217).

[57] Eddy Ventose explains the principle of substantive legitimate expectation at page 210 of his useful text, *Commonwealth Caribbean Administrative Law***,** in the following terms:

> "The question of substantive legitimate expectation is a more exacting one, because unlike the case of procedural legitimate expectations, where the applicant claims a right to be heard before a benefit is taken away or a public

> authority resiles from a promise, the applicant in such cases argues that he is entitled to the actual benefit and that the public authority is bound by that promise or cannot change a policy. Substantive legitimate expectations are in a sense more important because they constrain, in a more intimate way, the actions of public authorities. Here, the Courts could direct the public authority to give effect to a promise or representation made to a person or direct them to continue to apply an old policy in the face of their attempt to introduce a new one. Many questions arise in this context. In what circumstances is a public authority bound by a promise made to a person that is of a substantive benefit? What test should the Courts apply in determining whether to allow the legitimate expectation to trump the actions of the public authority? The standard is a high one for the claimant."

[58] In looking at what constitutes substantive legitimate expectation as a matter of fact and law, I failed to find any proper basis on which Mr. Baker could claim production of the report on the basis of substantive legitimate expectation. He might have had an expectation, in the ordinary sense of the word, to hear from the Commissioners concerning their findings but that would not amount to a legitimate one within the meaning of the law, in my view. This is so because the Commissioners, in the first place, owe him no duty to submit a report to him. By the Commissions of Enquiry Act, their Instruments of Appointments and the mandate given therein, the Commissioners are duty bound to submit that report to the Governor - General and the Governor General only.

[59] The Commissioners have made no specific and express promise or representation to Mr. Baker to produce the report to him upon which it was reasonable for him to rely. Furthermore, there is no evidence of any substantial benefit or advantage that Mr. Baker will derive from the production of the report or will be taken away from him. His case does not fall within the situations that would give rise to any form of legitimate or reasonable expectation on which the right to seek judicial review would rest on the basis that the Commissioners have failed to file the report.

Whether there is arguable case for leave to be granted

[60] In the absence of any finding as to the existence of legitimate expectation, the remaining question was whether Mr. Baker had passed the test to obtain leave. Mr. Spencer submitted that Mr. Baker has no right to compel the Commissioners. He said any such right to compel the Commissioners would reside in the Governor-General only. I agree. Only the Governor- General has the right to receive the report from the Commissioners, so if any one were to take any steps to compel the Commissioners to produce the report, it would have to be the Governor-General who appointed them and authorized them to conduct an Enquiry within the terms of reference of the Commission he granted. The Governor- General acted by virtue of statutory authority and that statute gives no right to any other person to call for the report of the Commission of Enquiry either in his own right or on behalf of the Governor-General. If the Commissioners were to be made answerable before the Court for the production of the report, it would have to be at the instance of the Governor-General.

[61] This is not to indicate the existence of any rule of general application that the Commissioners can never be challenged in carrying out their work by anyone else but it all depends on the nature of the act complained of and their terms of reference under the Commission. It is well established on cases from the Commonwealth, including Jamaica, that Commissions of Enquiry are subject to the jurisdiction of the Court by way of judicial review. Wolfe, CJ in **Edward Seaga and Another v Julius Isaac and Others suit no. M134 of 2001 delivered 5 October 2001** explored this issue, as far back as a decade ago, by reference to cases from other jurisdictions. The learned Chief Justice cited, for example, the Court of Appeal of New Zealand case, **Re Erubus Royal Commission, Air New Zealand v Mahon No. (2)** [1981] 618, which was affirmed by the Privy Council in **Mahon v Air New Zealand and Others** [1984] 3 WLR 884. In that case, the Court held that the rules of natural justice had been breached in that those rules had not been observed by the Commission of Enquiry.

[62] The Commission, of course, is given wide powers on the same standing as a Supreme Court Judge in certain regards rendering them self-regulatory. As such, they are given wide latitude to do all things as are consistent with their Commission to conduct the Enquiry. This does not mean, however, that they are at liberty to act *ultra vires or* illegally, procedurally improperly, unfairly, irrationally or in breach of the principles of natural justice. If they were to do so, they would be amenable to judicial review. The power to appoint them and to give them the mandate was given by the Governor-General by an Act of Parliament. It does not emanate from the Prerogative. The actions and decisions of the Commissioners are, thus, subject to judicial scrutiny.

[63] Indeed, even if the power had emanated from the Prerogative, it is well - established on the authority of their Lordships' dicta in the **Council of Civil Service Unions v The Minister of Civil Service** (Lords Diplock, Scarman and Roskill) that the Courts have shown themselves ready to control by way of judicial review, the actions of a tribunal or body set up under the Prerogative but that it all depends on the circumstances and the nature of the act complained of. All this serves to show that the Commission of Enquiry is not above judicial scrutiny.

[64] Furthermore, the Commissioners have, pursuant to the Act, subscribed to an oath or affirmation, to "*faithfully, fully, impartially, and to the best of his ability discharge the trust and perform the duties devolving upon him by virtue of such Commission.*) (See section 5). (Emphasis mine) If there is any allegation that the Commissioners have failed to carry out their duties in accordance with the Act that clothe them with authority, then the Court cannot be stripped of its power to subject such conduct to judicial scrutiny. If a Commissioner should fail to do that which he swore or affirmed to do, then he must be held accountable even by Court proceeding. (**See the Hon. Shirley Tyndall and others v Hon. Justice**

Boyd Carey and Others) Claim No. 2010 HCV 00474 delivered 2 September 2010.)

[65] Mr. Baker's complaint concerns the time it has taken for the report to be disclosed. In looking at the requirement as to time for the report to be submitted, the express directions from the Governor - General in the Instrument of Appointment was that the Commissioners were "to report [to me] in writing *as soon as practicable* the result of such Enquiry and to furnish me a full statement of the proceedings and of the reasons leading to the conclusions arrive at." The Governor – General further directed that if the Commissioners *"shall find it necessary"* they may submit Interim Reports before the submission of the full report. (Emphasis mine)

[66] These provisions established, beyond any question, that the report must be furnished to the Governor- General as soon as is practicable. What is practicable, I believe, would depend on all the circumstances in which the Enquiry was conducted and the duties of the Commissioners executed. With regards to the provision of interim reports, that was left to the absolute discretion of the Commissioners because they were directed to do so if they considered it necessary. It would follow that if they do not consider it necessary, they need not give an interim report. There is, therefore, no legal obligation on their part to give an interim report.

[67] The Commissioners have furnished no explanation in this proceeding for the failure to furnish the report or an interim one. They took the position that they are not answerable to Mr. Baker concerning the readiness of the report. This seems to be a defensible stance on the terms of the Commission granted.

[[68] However, it was borne out on the affidavit evidence relied on by Mr. Baker that it was stated in the local news by the Commissioners that they needed an additional $14,000,000 to complete the report. The letter of Mr. Levy also

exhibited in the case and set out at paragraph 44 above, made mention of issues with funding of the Commission. This has not been stated by the Commissioners themselves in this case. But, again, even if there are outstanding expenses to be satisfied in respect of the work of the Commission, the Act has empowered the Governor-General to deal with that.

[69] The Governor-General is given the express power under the Act to ensure that funds are available for the work of the Commission to progress and be completed. This is clear and unambiguous from the provisions of section 13 of the Act which reads:

> *"13. The Governor-General may direct what remuneration, if any, shall be paid to any Commissioners acting under this Act, and to their secretary, and to any other persons employed in or about any such Commission,* ***and may direct payment of any other expenses attendant upon the carrying out of any such Commission,*** *or upon any proceedings for any penalty under this Act.* ***Such sums, so directed to be paid, shall be paid by the Accountant-General out of the ordinary cash balance on the Treasury.*** (Emphasis added).

[70] The power given to the Governor-General in dealing with the remuneration of the Commissioners and the expenses attendant on the work of the Commission is in keeping with the obvious necessity to insulate the Commission from interference from outside influences to include that of the executive whose decisions and polices are under scrutiny. This was obviously intended to guarantee the independence of the Commission so that the Commissioners would remain objective, fair and impartial in the execution of their functions as they swore to do.

[71] The Governor-General, therefore, could take steps to exercise the power vested in him to ensure the work is completed by giving the necessary directions as prescribed under section 13. This could lead to the Accountant-General making the necessary payments as authorized by law for the report to be

released. This is an avenue that is available to be pursued for the report to be obtained by the Governor-General if, in truth and in fact, funding is the cause of the delay. All this has taken me to the point to declare that there is no legally recognizable ground that would justify Mr. Baker obtaining leave for judicial review on the basis of legitimate expectation or otherwise.

Mandamus

[72] I will go a bit further to say that the statutory power bestowed on the Governor-General has been discussed at length, up to this point, because I found such matters to be relevant, ultimately, to the question whether Mr. Baker was entitled to leave to make an application for an order of mandamus. That was the remedy he wished to pursue by his application for judicial review.

[73] In **Halsbury's Laws of England**, Third edition, Volume II, para. 159, mandamus is described thus:

> "The order of mandamus is an order of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation, or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to supply defects of justice; and accordingly it will issue, to the end that justice may be done, in all cases, where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."

[74] The grant of mandamus is discretionary, that is to say that, as a general rule, it is a matter for the discretion of the Court. It is, therefore, not an order granted as of right and it is not issued as a matter of course. Accordingly, the Court may refuse the order, not only upon the merits, but also by reason of the special circumstances of the case. (**Halsbury's Laws of England** (supra), para. 161).

Pre-conditions for issue of Mandamus

[75] There are certain conditions-precedent for the grant of the remedy. For clarity and expediency, they are set out *seriatim* along the lines recorded in **Halsbury's Laws of England** (supra) paras.194- 200.

(1) A legal right must exist in the person seeking the remedy. The person seeking mandamus must show that there resides in him a legal right to the performance of a legal duty by the party against whom the mandamus is sought. In order, therefore, that a mandamus may issue for something to be done under a statute, it must be shown that the statute imposes a legal duty. It is only in respect of a legal right that mandamus will lie. The Court will not enforce an equitable right by this remedy.

(2) The duties of the person to be compelled must be a public duty as the order is only granted to compel the performance of duties of a public nature.

(3) The legal right to enforce the performance of a duty must reside in the applicant himself. The Court will only enforce the performance of the statutory duties by public bodies on the application of a person who can show that he has himself a legal right to insist on such performance. The mere fact that a person is interested in the performance of a duty as member of a class of persons, all of whom may be regarded as equally interested, but he having no particular ground for claiming performance, will not be sufficient ground for claiming performance.

(4) The application must be made in good faith. Not only must it appear that the applicant is himself a person having a real interest in the performance of the duty sought to be enforced, but also that he

makes the application in good faith and not for an indirect purpose. If it appears that the application for mandamus is really on behalf of a third party, the order will be refused.

(5) The demand for performance must precede the application. As a general rule, the order will not be granted unless the party complained of has known what it was he was required to do, so that he has the means of considering whether or not he should comply. So it must be shown by evidence that that there was a distinct demand of what the party seeking mandamus desires to enforce and that that demand was met with a refusal. This requirement that before the remedy will be granted there must be a demand to perform the act sought to be enforced and a refusal to perform it cannot be applicable in all possible cases. The rule does not apply where a person had, by inadvertence, omitted to do the act complained of which he was under a duty to do and the time for performance had passed.

(6) It is said too, that although a mere withholding of compliance with the demand is not sufficient ground for a mandamus, yet it is necessary that there should have been a refusal in as many words. All that is necessary in order that a mandamus may issue is to satisfy the Court that the party complained of has distinctly determined not to do what is demanded.

(7) For mandamus to issue there must be possibility of effective enforcement. This is to say that the Court will not order something that is impossible of performance by reason of the circumstances that the doing of the act would involve a contravention of the law or because the party against whom the mandamus is prayed does not, for some other reason, possess the power to obey. A

mandamus will not be granted if the party complained of has powers which would enable him to make the order inoperative.

(8) There must also be no other legal remedy. As a general rule, the Court in the exercise of its discretion, may refuse an order of mandamus when there is an alternative specific remedy at law which is not less convenient, beneficial and effective. Alternative remedies that exclude the remedy are proceedings against the Crown which are substituted by the Crown Proceedings Act.

(9) Where a statute creates an obligation and enforces its performance in a specified manner, the performance cannot be enforced in any other manner. So the remedy will not be available when a specific remedy is given by the Act imposing the duty that is sought to impose.

[76] It was in the light of the foregoing that the ultimate question was considered as to whether Mr. Baker had raised an arguable case for the issuance of a mandamus with a realistic prospect of success. He must establish that he is an aggrieved party in the sense that he has been denied a legal right that the Commissioners had a legal duty to do or to refrain from doing. He would have had to satisfy the Court that he has a legal right to compel the Commissioners to produce the report by satisfying all the pre-conditions necessary for the grant of such remedy.

[77] However, having looked at the legal requirements necessary for the grant of the remedy of mandamus Mr. Baker was seeking, I found that Mr. Baker failed to establish that he was entitled to such a remedy on several fundamental fronts. These are outlined below.

[78] In the first place it is observed that the Commissioners were directed by the Governor-General to submit a report to him. This is in keeping with the words of the statute that would have vested the Governor-General with the power. The duties of the Commissioners arose under the Commission that was issued by the Governor-General.

[79] The duty was, indeed, a public duty but the act being sought to be compelled is for the production of the report following the Enquiry. The Commissioners' duty to produce the report is a legal one owed to the Governor-General, solely. Mr. Baker appeared to a summons as set out under the Schedule to section 10 of the Act. Nowhere on this summons that is prescribed to be issued to witnesses needed during the course of the Enquiry is there anything to indicate the assumption of a legal duty by the Commissioners to produce a report to such a witness.

[80] Flowing from this, is my finding that the legal right to enforce the performance of the duty complained about is not in Mr. Baker. It would have to inhere in the Governor-General who appointed the Commission. I am guided by the exposition in **Halsbury's Laws of England** (supra) at para. 196, and say that the mere fact that Mr. Baker is interested in the performance of the duty, as a member of a class of persons, all of whom may be regarded as equally interested, does not give him the legal right to the report. This is so because, he himself, has no particular legal ground, over and above anyone else, for claiming performance by the Commissioners.

[81] It was the Commission who called Mr. Baker as a witness. He had no dealing with the Governor-General who appointed them. While he might be a beneficiary of the report, he is not a party to the dealing to which the report relates. If one were to argue on principle analogous to contract law, then, it could be said that there is no privity of contract between Mr. Baker and the Commission. The parties to such a ‘contract’ would have been the Governor-

General and the Commissioners. In keeping with this analogy, Mr. Baker would have had no legal standing to intervene in the 'contract' between the Governor-General and the Commissioners and to enforce the 'contract'. Even if one gets creative and argues that he has an equitable right to the report as a beneficiary of the Enquiry, that cannot ground a basis for mandamus to issue because an equitable right is not sufficient for the Court to invoke that remedy.

[82] So, Mr. Baker failed to satisfy me that there resides in him a legal right to the performance of the legal duty of the Commissioners to forward their report to the Governor- General or to anyone else. There is no specific right that inheres in Mr. Baker to be issued with the report of the Commission. It means he has no right to an order to compel them to produce such a report.

[83] I will go on to say, too, that I found that even if Mr. Baker had the legal right to compel the Commissioners to act, he would still have failed in his legal quest for the remedy of mandamus. As previously noted, one of the pre-conditions that must be satisfied is that the demand for performance must precede the application for the order of mandamus.

[84] Mr. Spencer, for the Commissioners, relied on the authority of **Re Maharaj and the Constitution of Trinidad and Tobago** [1966) 10 WIR, 149. In that case, the appellant sought an order of mandamus directed at the Governor-General to declare the seats of four senators to be vacant and to appoint three others. The Court found that nowhere on the evidence there was any allegation of any demand having been made to the Governor-General for performance of the duty. The Court, through the words of Wooding, CJ, reiterated the point, made clear on all the authorities, that it is not merely because a duty arises which it becomes the obligation of an officer to discharge and that duty is a public duty that mandamus may issue to perform it, but that there must also be evidence of a distinct demand for the performance of the duty and a refusal to perform it.

[85] Wooding, CJ also relied on an extract taken from GRIFFITH'S GUIDE TO CROWN OFFICE PRACTICE, p. 161, that one of the conditions - precedent to the Court making such order is:

> "There has been a distinct demand and refusal to do the act… It is therefore advisable that the demand should be made in writing, and should state that failure to comply with such demand within reasonable time therein specified will be treated as refusal for the purposes of an application for mandamus"

[86] The learned Chief Justice, after citing useful principles from some authorities, further noted at page 151:

> "But, however, the duty may be created, the obligation thereupon arises for the officer to perform it. If he should fail to perform it, it is thereafter competent for anybody interested in its performance to demand that he do his duty. And it is only when there is such a distinct demand and it is followed by a refusal that the prerogative writ of mandamus can issue.
>
> So the mere failure, or refusal to act on the advice, which is what the appellant alleged in his affidavit, will not entitle him to a writ of mandamus. He must be able to show, over and above that, that a distinct demand was made requiring the officer to perform the duty which he has omitted to do."

[87] Mr. Gammon, in an effort to save the application for leave to apply for mandamus to issue, relied on the letter written by Mr. Levy to the Commissioners. As already indicated, Mr. Levy did not purportedly act on behalf of Mr. Baker. His letter expressly shows that he signed as Attorney-at-law for Thermo-Plastics. But even if it could be said that the interests of all the entrepreneurs were identical, and so the demand by one stood as the demand for others, Mr. Levy's letter was not in the nature of a demand as required by law. I say that for the following reasons. He did not specify any time by which the act that Mr. Baker now wishes to compel should have been done. He did not make a specific and distinct demand for performance of that act. He failed to impress on them that if they should refuse to perform, then, he would take legal action to compel them to do so. In closing he stated:

> "…I anticipate that as honourable men you will feel it to be your duty to complete writing your report (even if abbreviated) and ensure that copies are sent to the Governor General who appointed you, the Prime Minister, the Leader of the opposition and to the Press so that the report will be published and made available to the people of Jamaica from whom you have received substantial sums.'

[88] In my view this was by no means a distinct demand for the report to be submitted within the contemplation of the authorities. He would have still left it up to the Commissioners, in their own conscience, and at their own discretion, to furnish the report and to do so at their own time.

[89] Mr. Gammon had also submitted that the service of this application for leave for judicial review would have served as such a distinct demand. I rejected that submission as one without merit as the demand must precede the commencement of legal proceedings.

[90] Furthermore, even if Mr. Levy's letter could be taken as a distinct demand, there is no evidence of a refusal on the part of the Commissioners to perform it. A failure to perform does not necessarily constitute a refusal to perform. There must be shown, by the evidence, that the Commissioners have "distinctly determined not to do what is demanded."

[91] Mr. Baker was not able to show, by evidence, a distinct refusal on the part of the Commissioners to perform the duty he requires them to perform. What is said on the evidence advanced by Mr. Baker is that the Commissioners, through the media, had indicated that they were not placed in a position to complete due to additional funds needed and that was not forthcoming.

[92] This has managed to raise as an issue whether there is, in fact and in law, a refusal to perform the duty as distinct from an inability to do so brought about

by factors extrinsic to the conduct of the Commissioners themselves. Mr. Baker had not established that it is clearly the former reason than the latter. As can be seen in looking at the pre-requisites necessary for the grant of such remedy, it is established that the Court will not, by mandamus, order something which is incapable of performance, for instance, where the party to be compelled does not possess the power to obey.

[93] I am not satisfied by evidence that the Commissioners have the wherewithal to complete the report in the light of what is disclosed by Mr. Baker as a likely reason for the delay. If it is outside the power and ability of the Commissioners to complete the report for its submission, then mandamus cannot issue to compel them to do so when circumstances outside their control persist to affect them in the proper execution of their duties.

[94] In the end, there has been no clear, distinct and compellable evidence from Mr. Baker of any distinct demand made by him (or indeed, anyone else for that matter) in writing to the Commissioners for the report to be submitted and that there was a refusal or a distinct determination by the Commissioners not to comply with the demand. He has failed to show that what is required is within the power and capability of the Commissioners to do and that they have refused to do so.

[95] I would go further by way of reminder to point out again that the Commissioners, by the terms of the Commission, had no time limit set for the report to be submitted. The Commission, according to the Act, could have specified when it should be rendered. All the Commission stated was for it to be done as “soon as is practicable”. It means therefore, that it would have to be established that circumstances had rendered it practicable for the report to be furnished prior to the application for leave for judicial review but that the Commissioners have failed or refused to submit it. There is no such evidence, however.

[96] Also, an order to compel the Commissioners to furnish even an interim report could be rendered futile since the Commissioners have the power to render it inoperative by saying they do not consider it necessary to furnish one. That assertion would be in keeping with the terms of their Commission. Again, the principle is that mandamus ought not to be granted where effective performance can be thwarted by the power vested in the person being compelled to perform.

Conclusion

[97] I found, in the light of the prevailing state of affairs as described, that some of the pre-conditions required for the issue of an order of mandamus were not, *prima facie*, established on the evidence placed before me. I found on the material disclosed, that there was no arguable case with a realistic prospect of success advanced by Mr. Baker.

[98] It is the duty of the Court at this stage to filter from the system hopeless or frivolous claims without any real prospect of success or which are bound to fail. This I found to be one of them. In the circumstances, I was constrained to refuse the application for leave to apply for judicial review.

[99] In disposing of the matter, and being mindful of the genuine concerns of Mr. Baker, and given the general public interest component of the matter, I proferred the opinion that steps could be taken by Mr. Baker to bring his concerns in writing directly and distinctly to the Governor-General for his attention and intervention. The procedure adopted by persons to just speak through the media is an inappropriate mode to formally bring the concerns to the attention of the Governor-General. The Governor-General is the only person to whom the Commissioners should report and to whom they are at, first instance, accountable with respect to the submission of this report.

[100] Furthermore, if it is the funding of the work of the Commission that is the issue, then the Governor-General has the statutory authority by virtue of section 13 of the Act to direct that all expenses associated with the completion of the report be made available by the Accountant-General. It seems from the provisions of the statute that the Governor-General is given the necessary authority to ensure the work of the Commission is done to include the submission of the report. The options available need to be explored for the necessary steps to be taken to bring the work of the FINSAC Commission of Enquiry to finality. The public interest in the Enquiry demands it.

Order

[101] The following orders were made:

1. The Application for leave for judicial review for an order of mandamus, that the 1st Defendant, FINSAC Commissioner of Enquiry, Warrick Bogle, and the 2nd Defendant, FINSAC Commissioner of Enquiry, Charles Ross, produce a report whether final or interim from the evidence given and presented before the said FINSAC Commissioners of Enquiry over the material period November 2009 - November 2011, IS **REFUSED**.

(2) In the special circumstances of the case, no order made as to costs.

The fixed date claim form

[102] In my original order, I had failed to address the fixed date claim form that had been filed by Mr. Baker seeking judicial review before the application for leave was made. The Commissioners had raised a preliminary objection and asked that the claim be struck out on the ground that leave would first have to be obtained before the claim could commence. I agreed. There was no leave of the Court obtained which was a pre-condition for a claim to be instituted.

[103] Mr. Gammon, however, had clearly accepted this procedural error because the instant notice of application for leave for judicial review was filed after the claim form was filed. The hearing proceeded on that notice of application for leave. The claim should have been discontinued or struck out then. It was made clear during the hearing, however, that the claim is a nullity it having been commenced without leave of the Court.

[104] Inadvertently, I failed to make a formal order that it is struck out so that it be removed from the system. I now make that order that the fixed date claim form filed on 28 March 2013 is struck out.