ANGUILLA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.9 OF 2005

In the matter of sections 1 and 38 of the Roads Act, R.S.A. c. R65
-and-
In the Matter of the public right of way situate at Registration Section North Block 58715B Parcel 2

BETWEEN:

JOHN A. GUMBS

Appellant

and

ATTORNEY GENERAL OF ANGUILLA

Respondent

Before:

The Hon. Mr. Brian Alleyne, SC	Chief Justice [Ag.]
The Hon. Mr. Denys Barrow, SC	Justice of Appeal
The Hon. Ms. Ola Mae Edwards	Justice of Appeal [Ag.]

Appearances:

Mr. Dane Hamilton QC and Ms. Nadine Fleming Kissob for the Appellant
Mr. Ronald Scipio QC and Ms. Eustella Fontaine for the Respondent

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2007: May 15;
October 15.

JUDGMENT

[1] BARROW, J.A.: Both sides appealed against different aspects of the judgment of George-Creque J delivered on 17th June 2005[1] declaring that a right of way existed over the appellant's land. The appellant appealed against the judge's declarations that the right of way existed and that the way was a public road and also against the order restraining the appellant from blocking the road. The respondent cross-appealed against the finding that the Crown had trespassed by

[1] Anguilla Claim No. AXAHCV/2002/0046 Attorney General of Anguilla v John A. Gumbs

widening the roadway from 3 feet to 20 feet and was liable to the appellant in damages to be assessed.

Public nuisance

[2] The Attorney General issued the Fixed Date Claim Form after the appellant, on three separate occasions, on 23rd February 2002, 27th February 2002 and 26th July 2002, blocked the public's vehicular and pedestrian use of that portion of the Limestone Bay Road which traverses the northern boundary of the appellant's undeveloped land situate at Registration Section North Block 58715B Parcel 2. The Attorney General claimed that the road, consisting of a little over one mile from its commencement at the Old Cottage Hospital to its termination at Limestone Bay, was a public road within the meaning of the Roads Act.[2]

[3] There was no disputing that the respondent brought the proceedings to protect the public's interests. This followed a complaint on 26th July 2002 to the Ministry of Infrastructure, Communications, Utilities and Housing by a member of the public who had been affected by the appellant's blockage of the said road.[3] There was also no disputing the respondent's duty, in an appropriate case, to bring proceedings. In his very helpful written submissions Mr. Ronald Scipio QC, counsel for the respondent, highlighted the principle that proceedings to abate a public nuisance, which is committed by obstructing a public right of way, must be brought by the Attorney General. Counsel referred to the following passage in Halsbury's Laws.

> "All civil proceedings brought in respect of public nuisance other than a private action by an individual who, or a public or local authority which, has suffered particular damage or an action brought by a local authority in its own name to protect the inhabitants of its area must be brought with the sanction and in the name of the Attorney General. This rule applies whether it is an individual or a local or other public authority who seeks to proceed." [4]

[2] Revised Statutes of Anguilla, c. R65
[3] Affidavit of Applewaite Lake filed on 29th July 2002, Record of Appeal, Volume 1, Tab 1.
[4] Volume 34 at paragraph 63, 4th edition.

[4] Such proceedings are brought by the Attorney General on the information or relation of some member of the public and are called 'relator' actions or proceedings. Lord Wilberforce described such proceedings in Gouriet v Attorney General:[5]

> "A relator action - a type of action which has existed from the earliest times - is one in which the Attorney-General, on the relation of individuals (who may include local authorities or companies) brings an action to assert a public right. It can properly be said to be a fundamental principle of English law that private rights can be asserted by individuals, but that public rights can only be asserted by the Attorney-General as representing the public. In terms of constitutional law, the rights of the public are vested in the Crown, and the Attorney-General enforces them as an officer of the Crown, and just as the Attorney-General has in general no power to interfere with the assertion of private rights, so in general no private person has the right of representing the public in the assertion of public rights. If he tries to do so his action can be struck out."

Finding of fact that the path existed

[5] The judge performed a thorough review in her judgment of the evidence that had been adduced in these relator proceedings as to the existence of the road, which "entailed the leading of much memorial evidence, a detailed examination of cadastral survey maps, topographical maps and other drawings, aerial photographs depicting the Land and surrounds over various periods, evidence of two licensed land surveyors as experts, and a site visit."[6] The land adjudication process that was conducted pursuant to the now repealed Land Adjudication Ordinance[7] after 1st July 1974 for the purpose of bringing all lands in Anguilla under the cadastral survey based Registered Land Ordinance[8] provided a significant reference point. After considering the documentary evidence to see whether it showed the existence of the path, at the time of the land adjudication process, the judge concluded that save for one exception the documentary evidence coupled with the evidence of the experts as well as the evidence of Mr. Gifford Connor, who was involved as an assistant surveyor in the adjudication

[5] [1978] AC 435 at 477
[6] Judgment paragraph [1]
[7] No. 2 of 1974, repealed.
[8] Revised Statutes of Anguilla chapter R30

process, tended to suggest that no public footpath existed along the northern adjudicated boundary of the appellant's land (the Land).[9]

[6] It was submitted to the judge that this lack of any indication of a public right of way on the demarcation map or the registry map, along with the absence of any note on the adjudication record, was decisive evidence that the alleged right of way did not exist, otherwise it would have been recorded. However, the judge held that what was revealed by the documentary evidence was not decisive. She stated:

> "[19] Notwithstanding the provisions of the Land Adjudication Ordinance, which required, subject to any general or particular directions issued by the Adjudication Officer, that the boundaries of all public roads and public rights of way be indicated by the Demarcation Officer [10 See: section 11(b) Land Adjudication Ordinance] the existence or non existence of a right of way is a question of fact and the state of the Adjudication Record or of the Demarcation and Registry maps, serve in my view, as merely part of the factual matrix in arriving at a determination as to the existence or not of a public right of way over the Land. I do not consider, therefore, that such documentary evidence as adduced, on an application of the provisions of the Land Adjudication Ordinance, is dispositive of the matter and the memorial evidence must also be considered to which I now turn."

[7] After reviewing the memorial evidence and summarising the observations she made on her visit to the site the judge concluded that the path existed and had existed at the time of the land adjudication. The judge said:

> "[34] Based upon a preponderance of the evidence from the witnesses of the Claimant as well as the Defendant's own witness, Egbert Dunstan Richardson, I am satisfied that a track or path of approximately 2-3 feet in width existed along what is now the adjudicated northern boundary of the Land at the time of the demarcation process and that this is what was observed on the ground by the Demarcation Officer which he drew and indicated on the Instruction Sheet, Exhibit 1. It is quite reasonable, in my view, to infer that what the demarcation officer depicted in Exhibit 1 could only have been gleaned from his field observations on visiting the site for the purpose of the demarcation and adjudication and he so noted."

[8] Her finding that a path existed did not bring the matter to an end, the judge noted; she was required to apply the legal principles of dedication and acceptance which were essential for constituting the path or track as a public right of way as distinct

[9] judgment [15]

from a path used simply as a matter of neighbourly sufferance. Guided by statements of principles that she extracted from a number of cases that she cited, but recognising that the facts of each particular case had to be examined to see what inferences they supported, the judge examined the particular facts of this case and came down in favour of the inference:

> "that the owner of the Land at some point in time presumably dedicated the track or path for use by the public in that he must have been aware that the public believed that the track or path forming the way had been so dedicated and took no steps to disabuse them of that belief. Accordingly, I hold that the said public right of way was in existence at the time of the first registration of the land in 1975 and as such, did not require notation on the register of the Land so as to give it legal efficacy."[10]

The widening of the path

[9] Both sides accepted, the judge found, that the Government widened the track or path over the land in 1980, opening it up to vehicular traffic. It was widened to some 16 feet at that time. In February 2002, the road was extended in width to some 20 feet. The appellant's predecessor in title protested the first instance and the appellant protested the second instance of widening.

[10] The judge found no sufficient evidence from which to infer dedication by the owner of the Land of the widened way. She therefore concluded that the public right of way was a track or footpath that extended to no more than 3 feet in width along the northern registered boundary of the land and the widening of this path by the Government was an unlawful encroachment upon the land of the appellant.[11]

The effect of finality of the adjudication of land

[11] Counsel for the appellant in the court below based the case for the appellant on the proposition that when the boundaries of the land were determined pursuant to the Land Adjudication Ordinance and registered title to the land was issued pursuant to the Registered Land Ordinance, showing no right of way over the

[10] Judgment [41]
[11] Judgment [52]

land, these marked a conclusive judicial determination that no right of way existed. That determination made the issue res judicata – meaning the issue was no longer capable of being litigated. Mr. Hamilton Q.C., who did not appear below, expanded on these submissions on appeal against the background of a comprehensive treatment of the scheme, operation, purpose and effect of the Ordinance. Notwithstanding the amplitude of the submissions I find no need to set them out at great length or to discuss the authorities cited because the core principles are well established and generally familiar. The real issue is the application of these principles to a dispute concerning the existence of a public right of way.

[12] Against the background of the Ordinance Mr. Hamilton submitted, as his first central ground of appeal, that the judge failed to give proper weight to the evidence of Mr. Gifford Connor, who had been the assistant surveyor to the Demarcation Officer for the land adjudication process and at the time of trial was the Registrar of Lands. Mr. Connor accepted that the alleged public right of way was not indicated on any of the relevant maps and that, as he understood the law, the demarcation exercise required public roads and ways to be indicated. It made no difference, counsel submitted, that Mr. Connor also stated that there were a number of other public roads and rights of way that were not recorded. This did not make the demarcation and adjudication process any less final, Mr. Hamilton submitted, and could not be used almost thirty years later to disturb the absolute and indefeasible title of the appellant.

[13] Mr. Hamilton's second central ground of appeal was that the principle of res judicata applied to adjudications made under the Land Adjudication Ordinance. He submitted that the judge failed to take into account the finality of the land adjudication process and that the purpose of that process was to adjudicate upon all rights and interests in land in Anguilla, inclusive of public rights of way existing at the time. Counsel added: "The statutory adjudication process came into effect for the express purpose of enabling title to all lands to be brought onto a registered land title system through a quasi-judicial process. This process entailed determining, declaring, adjudicating and recording "any and all claims and

interests" , existing in and over any and all lands in Anguilla as of July 1974 including rights of way, public or private. The process as laid down is judicial in nature. Per Lewis JA in POTTER v. FRETT (1973) 2 WIR 543:*"The Ordinance contemplates that an inquiry undertaken by the Adjudication Officer should be of a judicial nature.""*

[14] Closely allied to the res judicata point was the appellant's point that the title issued to him was final and indefeasible[12], incapable of being challenged except for mistake or fraud in the registration process[13], neither of which was alleged in this case. Counsel therefore submitted that the judge "erred in allowing memorial evidence to override the tenets of the LAO which were the *sole* apparatus for identifying and determining what rights and interests in land in Anguilla would become first registration rights and be protected as such." It is to be noted that the appellant does not challenge the credibility of the memorial evidence – which was overwhelming – that the path had long existed and been enjoyed. The appellant's challenge was that such evidence was not, as a matter of law, capable of being received to contradict the adjudication record, which the appellant maintained proved that no right of way existed.

[15] The third central ground of appeal had two limbs. The first limb was that "under [the Land Adjudication] Ordinance, the mandatory requirement under Section 11 that the Demarcation Officer shall record all public roads, rights of way and Crown land within the adjudication process combined with the specific inclusion of the Crown as a party who if aggrieved could appeal against decisions of any of the Officers and who as a party was subject to the same finality in the record goes against the grain of the finding of the Learned Trial Judge that the existence or non existence of a right of way was purely a matter of fact."

[12] Frazer v Walker [1967] 1 All ER 649 at 651-652 and 655; Gardener v Lewis (1998) 53 WIR 236 at 239
[13] Webster v Fleming (unreported) Anguilla Civil Appeal No. 6 of 1993

[16] The second limb of this ground of appeal was that "the existence or non-existence of a right of way after the compilation of the Register is an interest that affects the certainty of the record. Certainty of the record was the raison d'etre for the promulgation of the Registered Land Act."

[17] The appellant further submitted: "The late claim to a right of way over [the land] has the capacity to disturb the sanctity of the [appellant's] registered title and thus attacks the very core of what the Land Adjudication Ordinance and the Registered Land Act were designed to do – i.e. create absolute and indefeasible title to land in Anguilla save for a challenge mounted under Section 140 of the Registered Land Act. Ruoff & Roper on Registered Conveyancing at paragraphs 2-01 has this important note:

> " Past defects of title no longer vex each successive owner after the date of first registration with an absolute title because thenceforth, in the case of freehold land, the proprietor who is entitled for his own benefit is deemed to have vested in him the fee simple absolute in possession together with all its appurtenances and subject only to the incumbrances that appear on the register of title and to any overriding interests that affect it, but free from all other estates and interests whatsoever."

Adjudication of public rights of way

[18] The essence of the submissions of Mr. Scipio QC, counsel for the respondent, was that the Land Adjudication Ordinance did not direct itself to the adjudication of public rights of way because the object of the legislation was to demarcate and adjudicate boundaries and title to private lands. On that basis, counsel submitted, it was entirely insignificant that the right of way was not shown on any map, record or register.

[19] Mr Scipio accepted that the land adjudication process was final as it related to the demarcation and recording of boundaries of parcels of land, but did not accept that it was final in determining the existence or not of public rights of way in 1975. Counsel submitted that the circumstances giving rise to a claim for the existence of public rights of way were such that the land adjudication process could not be determinate, nor was it intended on a strict interpretation of the Land Adjudication

Ordinance that it would be determinate, of such issues. This, he submitted, was because the existence or not of a public right of way may not arise as an issue until such time as a landowner took steps to block access and the public objects. That was exactly what happened in the case at bar, counsel submitted.

[20] Further, a public right of way was not an interest in land and could not be registered, submitted Mr. Scipio, and the finality of the adjudication record was not diluted by the public's assertion of a public right of way over the northern boundary of the appellant's land. The nature of a public right of way was expressed in St. Mary, Newington v Jacobs[14] by Mellor, J. as follows:

> "The owner who dedicates to public use as a highway a portion of his land, parts with no other right than a right of passage to the public over the land so dedicated, and may exercise all other rights of ownership not inconsistent therewith; …"

So understood, counsel submitted, a public right of way has no effect on the demarcation of the boundaries of land or the title of the proprietor. I should note that while this is the position at common law a different position may be established by legislation.[15]

[21] In his submission that the adjudication process required public rights of way to be entered on the record Mr. Hamilton had relied in particular on section 11 of the Ordinance. That section read:

> "11. Subject to any general or particular directions issued by the Adjudication Officer, the Demarcation Officer shall within each adjudication section:
>
> (a) see that the boundaries of each piece of land which is the subject of a claim, are indicated or demarcated in accordance with the requirements of the notice given under section 10;
>
> (b) indicate or cause to be indicated the boundaries of:
>
> (i) public roads, public rights of way and other Crown Land; and
>
> (ii) unclaimed land."

[14] (1871-1872) L.R. 7 Q.B. 47, quoted in The North London Railway Company v The Vestry of St. Mary, Islington [1872] LT 672 at 676

[15] See section 4 of the Roads Act, discussed at [32] and [33], below

It may be noted that, contrary to the submission of Mr. Hamilton that this section required the Demarcation officer to "record all public roads, rights of way and Crown land"[16] (emphasis added), the section requires the Demarcation Officer to indicate these features and lands.

The object of the land adjudication process

[22] In considering this submission that public roads and rights of way were required to be recorded it is important to appreciate that the overall object of the land adjudication process was to ascertain and record interests in land in accordance with the provisions of the Ordinance.[17] The principal basis of the process was to "require any person who claims any interest in land … to make a claim …"[18] and require "all claimants to land … to mark or indicate the boundaries of the land claimed in such manner and before such date as shall be required by the demarcation Officer."[19] Section 8 of the Ordinance provided that every person who claimed any land or interest in land should make his claim in the manner and within the period prescribed. Section 9 made provision for dealing with persons who did not make claims but had claims. Section 10 required the Demarcation Officer to give notice of an intended demarcation and to require every claimant to indicate the boundaries of the land affected by his claim.

[23] From the foregoing it appears that what was intended to take place under section 11 (a) was no more than that the Demarcation Officer should ensure, before boundaries were adjudicated, that claimants indicated[20] the boundaries they were claiming, as they were required to do by the notice issued under section 10 and the obligation imposed by section 6. What was intended to take place under section 11 (b) was that the Demarcation Officer should himself indicate (or cause

[16] See [15], above, for this submission
[17] s. 6 (1) (b)
[18] s. 6 (1) (d)
[19] s. 6 (1) (f)
[20] The reference in section 11 (a) to the Demarcation Officer seeing that boundaries were demarcated probably addressed the situation, contemplated by section 6 (1) (c), of persons who held land which was already registered under the Title by Registration Act, and which would therefore have already been demarcated. That subsection permitted the Adjudication Officer to declare that the interests of such persons would be carried forward to the new register established under the Registered Land Ordinance 1974.

to be indicated), since there was no claimant to do so, again before there was any adjudication of boundaries, the boundaries of "public roads, public rights of way and other Crown Land" and also the boundaries of unclaimed land.

[24] Far from being dispositive as to the existence of any rights, as Mr. Hamilton claimed it to be, section 11 was purely preparatory. The indications of boundaries that claimants of land were required to make, and when there was no claimant the indications that the Demarcation Officer was required to make, were preliminaries to the dispositive stage, which was the adjudication of boundaries. There was a major difference between seeing that claimants had indicated their boundaries, as per section 11 of the Ordinance, and the demarcation and adjudication of boundaries, that was subsequently to take place as per sections 16 to 19 of the Ordinance.

[25] The provision in section 11 for the Demarcation Officer to indicate the boundaries of public roads, public rights of way and other Crown land may also be seen as express recognition by the Ordinance that no claim needed to be made in respect of public roads, ways and lands.

Interests capable of being recorded

[26] Part IV of the repealed Ordinance, which began with section 16, was headed "Principles of Adjudication and Preparation on Adjudication Record". Section 16 laid down the principles of adjudication and provided for four categories of adjudication. The Recording Officer was required to record a person with a good possessory or documentary title to a parcel as owner of the parcel and declare his title to be absolute. If the Recording Officer was satisfied that any Crown land was entirely or sufficiently free from private rights he was required to record the land as Crown land. The Recording Officer could also have recorded a person in possession of or having a right to a parcel with provisional title to that parcel. And finally section 16 (1) (c) provided:

> "(c) if the Recording Officer is satisfied that any land is subject to any right which is registrable as a lease, charge, easement, profit or restrictive

> agreement under the Registered Land Ordinance 1974, he shall record such particulars as shall enable the right and the name of the person entitled to the benefit thereof to be registered, and if such right is registered under the Title by Registration Act Chapter 279, he shall record such particulars as appear in that register;"

[27] This latter provision bears out Mr. Scipio's submission that the Ordinance provided only for private rights to be registered. Every one of those rights is a private right. This provision was echoed in section 18 which stated that the adjudication record should consist of a form in respect of each parcel of land, which form should show various particulars of ownership including:

> "(c) such particulars of any right registrable under the Registered Land Ordinance 1974 as shall enable it to be registered as a lease, mortgage, charge, easement, profit or restrictive agreement, as the case may be, affecting the parcel together with the name and description of the person entitled to the benefit thereof and particulars of any restriction on his power of dealing with it;"

It is significant that the (private) rights listed were described as "registrable". The absence of any provision for registering any public right is conspicuous. Such rights were not "registrable".

[28] The absence of any provision for registering public rights is made even more conspicuous by the existence of provision for recording a private right of way. The relevant provision is section 12 (1) (d) which provided that the Demarcation Officer may:

> "(d) make a declaration of such existing rights of way over any land in the adjudication section and may direct the manner in which such rights of way are to be exercised and in such case he shall direct that such rights of way be recorded in the adjudication record in respect of the dominant land and the servient land".

The implication of that provision requires little exposition: there is no dominant and no servient land in the case of a public right of way.[21] This provision could only have spoken to recording private rights of way.

[21] Volume 14 Halsbury's laws of England 4th edition, reissue, 41

[29] The conclusion that private but not public rights were required to be recorded under the Land Adjudication Ordinance accords with the intention stated at the very beginning of the Ordinance. The short title of the Ordinance identified it as "An Ordinance to provide for the adjudication of rights and interests in land and for purposes connected therewith and incidental thereto." In section 2 "interest in land" is defined to mean "any right or interest in or over land which is capable of being recorded under the provisions of this Ordinance." In accordance with the intention that only some and not all rights should be 'recordable', the Ordinance excluded public rights from those that were capable of being (and needed to be) recorded and subsequently registered.

[30] The conclusion that a public right of way was not capable of being recorded under the provisions of the Ordinance destroys the fundamental premise of the appeal. Common to all the grounds of appeal was the appellant's proposition that because the public right of way was not shown on the adjudication record for the Land the right of way did not exist. That proposition is incorrect, in my view, and I would dismiss the appeal. I now consider the cross-appeal.

The width of the right of way

[31] The judge declared the 3 feet wide track, that she found had been in existence for in excess of 30 years before the cadastral survey[22] (presumably 1974), to be a public road within the meaning of the Roads Act.[23] Section 1 of that Act states:

> ""road" means any public road mentioned in the Schedule and includes any public rights of way existing in Anguilla as at 1st July 1974, or which came into existence after that date and also includes the roadway, water tables, any bridges and culverts, and the land on each side of the roadway including road drainage works and water tables up to the boundary of any road."

As I understand it, contrary to the written submissions for the appellant, the declaration by the judge did not make the road a public road. Whether or not a road is a public road is a question of fact, as the judge decided. The judge

[22] Judgment [40]
[23] Judgment [53]

declared the fact; she did not confer the status. By section 3 of the Act the Governor is empowered, by proclamation published in the *Gazette*, to declare a new road. That declaration confers status. The status so conferred is to make such road liable to be constructed and maintained at the public expense.

[32] Mr. Scipio submitted the judge overlooked the consequence of the finding that she made, that the road was a public road, as regards the width of the road. As earlier indicated[24] the judge found that the Government committed an unlawful encroachment upon the Land of the appellant when it widened the path. However, as Mr. Scipio observed, section 17 of the Roads Act provides:

> "17. The boundary of any road shall be the fence, which may be erected by the Chief Engineer, running along it on either side, and where there is no such fence, the boundary shall be a line at all points 16 feet from the centre of the roadway measured in a direction at right angles to the road."

[33] Adding to the impact of that provision is the declaration in Section 4 of the Roads Act, that:

> "All roads and all land taken for their construction are the property of the Government of Anguilla."

This is the explanation, it seems to me, for the proposition that was expressed in the requirement in section 11 (b) of the Land Adjudication Act that the Demarcation Officer should indicate the boundaries of "public roads, public rights of way and <u>other</u> Crown land". That provision could only mean that the Demarcation Officer was required to indicate the boundaries of these pieces of Crown Land (public roads and public ways) as well as the boundaries of other Crown Lands. Section 11 of the Land Adjudication Ordinance and section 4 of the Roads Act leave no doubt that a public right of way (and hence a road, as defined in section 1 of the Roads Act) is Crown Land.

[34] The conclusion that a public road is Crown Land renders untenable the finding that the Government unlawfully encroached upon the appellant's land when it widened the road. Since by force of legislation the boundary of the road extended to 32 feet

[24] Paragraphs [9] and [10], above

(16 feet from the centre of the roadway in each direction) the widening of the surface of the road to 20 feet was not an encroachment.

[35] Even if the widening would have been an encroachment, section 8 of the Roads Act provides that whenever it appears to the Governor that any land is required for laying out a new road or widening or diverting any part of an existing road a declaration to that effect shall be published in the Gazette. Section 9 permits the Governor, after a declaration has been published, to enter upon the land and proceed with the widening without further notification. The Act provides for the payment of compensation. Implicitly, the widened or diverted road becomes Crown land.

[36] It is therefore the case that what would otherwise be an encroachment, if done by a private citizen, amounts or may amount to the compulsory acquisition of land, when done by the Government. I say 'may' because what occurred in the process of the widening of the instant road – whether it was the exercise of the right of property in the road, under sections 4 and 17, or the acquisition of land, under section 9 – is entirely unknown and, so far as the Record of Appeal shows, was never in issue. The statement by the appellant in his affidavit[25] that the Government made a proclamation declaring the road to be a public road that was published in the *Gazette* in 1983 and withdrawn in 1984 does not speak to the authority or power in right of which the widening took place in 1980 and 2002.

The counterclaim

[37] That last observation brings me to the final point on which I wish to touch. Mr. Scipio submitted that it was entirely inappropriate that the appellant should have been allowed, in the public nuisance claim brought by the Attorney General, to counterclaim for damages for trespass by widening the road. His point was that the Government, which widened the road, was not a party to the public nuisance proceedings. The Attorney General did not bring the proceedings as the

[25] Paragraphs 55 and 56, affidavit sworn 16th August 2002

representative of the Government. He brought them pursuant to the principle of law that the Attorney General is the custodian of the rights of the public and may bring a claim to abate a public nuisance.[26] In this Mr. Scipio is perfectly correct and he is confirmed in his submission by section 1 (2) of the Crown Proceedings Act[27] which states:

> "(2) … but the Crown is not for the purposes of [the sections relating to the bringing of civil proceedings by the Crown] deemed to be a party to any proceedings by reason only that they are brought by the Attorney General upon the relation of some other person."

As noted at the outset, the Attorney General brought the proceedings in the court below on the relation of a member of the public.

[38] In this regard it is important to appreciate that the fundamental issue in this litigation was at all times whether, as a matter of fact, a public right of way existed over the appellant's land. There was never any issue whether the vesting in the Crown of title to the public right of way or road by the provisions of the Roads Act infringed the Constitution. There was never any issue whether the proper procedure was followed by the Crown before widening the 3 foot wide track into a 20 foot road or any similar issue. Ignoring for present purposes whether it was still open to the appellant to do so at the time of this litigation, the appellant would have needed to bring his own claim under the Constitution to challenge the validity of the title to the road over the appellant's land that the Roads Act conferred on the Crown. On the state of the pleadings, the evidence and the framing of the issues in this claim by the Attorney General it was simply impossible for the High Court or this court to engage on any consideration of these matters.

[39] The confusion that crept into the proceedings below by the 'counterclaim' would have been avoided if counsel for the appellant had heeded rule 18.7 of CPR 2000, which provides:

> "(1) A counterclaim may not be made or set-off pleaded in proceedings by the Crown if the –
>
> (a) proceedings are for the recovery of; or

[26] Volume 21 Halsbury's laws of England, 4th edition, Reissue, 455
[27] R.S.A. c. C160

(b) the counterclaim or set-off arises out of;
a right or claim to repayment in respect of any tax, duty or penalty.
(2) A counterclaim may not be made or set-off pleaded in any other proceedings by or against the Crown without the permission of the court or the consent of the Attorney General."

[40] Because the instant proceedings were not proceedings by or against the Crown, that rule was not applicable. But on the (false) premise on which the counterclaim was allowed to proceed, that the Crown was the claimant, that rule should have been considered and should have prevented the bringing of the counterclaim without permission or consent first having been obtained. The requirement for obtaining permission or consent would perhaps have served to draw attention to the fact that the Crown was not a party and no counterclaim was possible.

[41] In any event, even though not applicable, the rule provides valuable guidance in showing how fundamentally impermissible was the counterclaim. If there may be no counterclaim without permission or consent in a case when the Crown is actually a party to proceedings, then it must be even more the case that there can be no counterclaim when the Crown is not a party. It seems fairly clear that what occurred in the instant case was that the defendant simply got away with making a counterclaim, by affidavit, against a non-party to the proceedings. It is interesting to see how this occurred.

[42] The Record of Appeal does not indicate that any case management order was made permitting the appellant to advance a counterclaim by his affidavit. The judge referred to the appellant's counterclaim[28] but, as is now recognized, in reality there was and could be no counterclaim because the Crown made no claim against the appellant for him to counter. Further, there was no document, whether or not identified as a Counterclaim, which satisfied the fundamental requirement of setting out all the facts on which the appellant relied[29] so as to inform the Attorney General of the case the Crown had to meet and in response to which the Crown could plead the defences that were undoubtedly available to it. At the very end of

[28] Judgment [3] and [54]
[29] rule 8.7 (1)

his affidavit in answer to the claim the appellant simply stated he prayed for certain declarations and for damages for trespass to be assessed. The claimant did not even purport, when he "prayed' for damages, to be counterclaiming. The claim for trespass and damages was a side wind that ought to have been resisted.

The result

[43] On my view the appeal fails and the cross-appeal succeeds. Mr. Scipio very properly accepted that if the respondent won there should be no order as to costs. This approach accords with the general rule that applies to claims for administrative orders that no costs should be awarded against an unsuccessful applicant for such an order.[30] The purpose of the rule is to reduce the inhibition to members of the public against bringing public interest litigation by the prospect that an award of costs will be made against them. Although not strictly applicable to these proceedings, which the Attorney General brought to oppose the appellant's assertion of a private right to what was in fact a public road, I think the underlying purpose of the rule makes it appropriate in this case not to award costs against the appellant. On the basis of that reasoning and Mr. Scipio's indication, and on the authority of rule 64. 6 (2) which permits the court to depart from the general rule that costs should be paid by the unsuccessful party, (which should always be for a stated reason lest the departure appear to be arbitrary) I would make no order as to costs.

Denys Barrow, SC
Justice of Appeal

I concur .

Brian Alleyne, SC
Chief Justice [Ag.]

I concur.

Ola Mae Edwards
Justice of Appeal [Ag.]

[30] rule 56.13 (6)