

THE EASTERN CARIBBEAN SUPREME COURT

ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV2010/0001

BETWEEN:

HMB HOLDINGS LIMITED

Claimant/Respondent

and

THE ATTORNEY GENERAL OF ANTIGUA AND BARBUDA

DAVID MATTHIAS

Defendants/Applicants

**Appearances:**

Mr. John Carrington KC with Ms. Stacy Richards and Ms. Cheryl-Lee Bolton for  
the Claimant/Respondent

Mr. Anthony Astaphan SC with Ms. Carla Brookes-Harris and Ms. Cherissa  
Roberts-Thomas for the Defendants/Applicant

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2023: November 10;  
2024: December 24.  
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**JUDGMENT**

[1] **WILLIAMS, J.:** This is an application by the Government of Antigua and Barbuda to pay an award of compensation owed to HMB Holdings Ltd. This marks the latest chapter in that company's efforts to obtain full payment of compensation for the compulsory acquisition of its land in 2007.

[2] This application was first filed on 31st December 2014 and was amended on 30th June 2022. The order sought by the amended Notice of Application is as follows:

"1. The Crown do satisfy the balance of the compensation award owed to the Applicant/Respondent herein as settled by the Privy Council Order dated 27th day of May 2014 by paying semi-annual instalments of US\$734,888.97

over a period of twelve years (12) commencing 30th April 2023 and continuing on the 30th day of each April and October until the debt is liquidated.

2. There be no order as to costs.

## **Background**

[3] A brief background as to what has led to this application is necessary. Lord Hughes giving the judgment of the Privy Council described the dispute (up to that point) in the following terms:

“The respondent company HMB Holdings Ltd (“HMB”) owned some 108 acres by the sea at Half Moon Bay in Antigua. The site included extensive beach frontage on what was described by the Government as a particularly beautiful bay. A hurricane destroyed HMB’s hotel on the site in 1995. After some years had passed with no redevelopment, the Government compulsorily purchased the site. There was unsuccessful litigation to challenge its right to do so which brought the case as far as the Board in 2007, but the Government took possession on 23 July 2007, which was the date as of which the site had to be valued for the purposes of compensation. A three-person Board of Assessment comprising a judge and the nominees of each side made an award of US\$23,820,999 on 5 January 2010. HMB appealed that decision to the Court of Appeal which, on 5 December 2011, allowed its appeal and substituted an award of \$45,499,102.09. This is an appeal by the Government against the determination of the Court of Appeal.”<sup>1</sup>

[4] The Privy Council in its judgment fixed compensation in the sum of US\$26,616,998 plus interest at the rate of 10.25% per annum from 23<sup>rd</sup> July 2007 to 22<sup>nd</sup> January 2011 and thereafter at the rate of 4% per annum. Thereafter there have been further proceedings (both locally and abroad) where the Claimant/Respondent has sought to enforce the judgment obtained in its favour.

[5] It is only necessary to refer to a few of these developments for the purposes of this application. The acquired property was sold and in December 2015 the sum of US\$20 million was paid to the Claimant/Respondent. This sparked proceedings to determine whether that sum should have been applied to the principal or interest.<sup>2</sup> The Court of Appeal by judgment dated 22<sup>nd</sup> July 2022 confirmed that this sum should be applied to

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<sup>1</sup> AG v. HMB Holdings [2014] UKPC 5 at paragraph 1

<sup>2</sup> Reported at (2022) 102 WIR 330

interest. The Government of Antigua and Barbuda has made further payments to HMB Holdings in the intervening period.

- [6] The Claimant/Respondent sought an order of mandamus to compel payment of the entire outstanding balance of the debt. However, the Honourable Justice Drysdale by order dated 8th March 2022 dismissed that application and directed that the instant application for payment by instalments (which had only been partly heard by that point) be listed for hearing.

### **Grounds of Application**

- [7] The grounds of the Amended Notice of Application filed on 30th June 2022 are as follows:

1. By award of the Board of Assessment dated 5th January 2010 recently settled at a reduced principal sum of US\$26,616,998 by Order of the Privy Council dated the 27th day of May 2014, the Government of Antigua and Barbuda is indebted to the Applicant for the Compulsory Acquisition of property more particularly described as Registration Section: St. Phillips South; Block 32 3282A; Parcels 55, 56, and 57.
2. As a result of the dire economic conditions of the country the Crown has been and remains unable to satisfy the award of compensation by a single lump sum payment as Government revenues have substantially declined over the past few years.
3. Since the Privy Council Order there has been a change in Administration of the Government and the parties have engaged in discussions towards settling the reduced award.
4. The Warrant issued by the previous Minister of Finance dated 11th March 2013 has made provision for the award of compensation herein and in fact exceeds the sum due under the Privy Council order. The reduction of the sum for which that warrant was issued will be a basic accounting function at the time of payment. However, the sum due is not readily available for payment from the Treasury.
5. The Government's source of revenue is taxation and borrowings on the domestic and/or international market. The Government's commitments are such that it will be unable in one year to raise sufficient funds in order to obtain the balance which is necessary to satisfy the Judgment Debt.

10. The Government has sold the acquired property for US\$23,000,000 of which the entire sum has been applied to reduction of the award of compensation.
11. Since the filing of the Privy Council Order and the filing of the application to date the Government has paid a total of US\$26,616,998.00 to the Applicant/Respondent which is equivalent to the principal award.
12. The balance owed remains the subject of an appeal. In the event that the Government is successful the balance owed would be \$15,611,530.93 in interest only by its calculation based on the expressed appropriation of payments.
13. Since the filing of the application a lot has happened which has adversely affected the economic conditions of the State, including most recently adverse economic impact of the Covid-19 pandemic and most recently the war in the Ukraine.
14. The Government acknowledges the debt and is very mindful of it but is unable to settle it in a more expeditious manner due to the exigencies of the State.

[8] It should be noted that paragraphs 1 to 5 quoted above were contained in the original Notice of Application filed in 2014. Paragraphs 6 to 9 of that Notice of Application were deleted in the amended filing in 2022, whilst paragraph 10 was amended. The remaining paragraphs 11 to 14 were also added in the amended filing.

#### **Evidence in Support of the Application- Affidavit of 30th June 2022**

[9] The main evidence in support of the application is contained in the affidavits of the Financial Secretary Mrs. Rasona Davis-Crump filed on 30th June 2022, 1st March 2023 and 3rd June 2023 respectively. In her affidavit of 30th June 2022, the Financial Secretary at paragraphs 3 to 5 outlines the background to this application including the fact that it has not been finally determined.

[10] The Financial Secretary outlines that since the filing of the application (in 2014) “a lot has happened which has affected the economic condition of the country.”<sup>3</sup> She further states that the Government has made payments which total US\$26,616,998.00 which is essentially equivalent to the principal sum awarded. She also refers to prior affidavits

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<sup>3</sup> Affidavit of Rasona Davis-Crump paragraph 7

filed in 2017 and 2018 respectively which in summary outlined that expenditure surpassed actual revenue in the 2016 and 2017 financial years.

[11] At paragraph 16 of the affidavit, she makes the following observations in relation to the public debt as of March 2020. According to her the preferred creditors of the Government include the Peoples Republic of China, the International Monetary Fund (IMF), the Caribbean Development Bank, the World Bank and the European Development Bank. The Claimant is also listed as a creditor which according to the Financial Secretary is important as it means that the Government recognizes the debt.

[12] At paragraph 17 of the said affidavit the Financial Secretary states as follows:

“These debts and the deteriorating revenues of the State requiring the Government to prioritize its debt payments and recurrent obligations. They also make it impossible for the Government to pay the entire sum due to the Claimant or even substantial instalments without severely disrupting the ability of the State to pay among others, wages, pensions, contributions to statutory corporations and other significant debts and provide essential services and functions to the people of Antigua and Barbuda.”

[13] In terms of the current situation, the affidavit addresses the impact of the Covid-19 Pandemic on Antigua and Barbuda. According to her, the country suffered a decline in gross domestic product (GDP) of approximately 20% in 2020. However, although the economy is growing, it has not yet rebounded to pre-pandemic levels and “now confronts the headwinds of the effects of the Russian invasion of Ukraine.”<sup>4</sup>

[14] In terms of future fiscal projections, the Financial Secretary states that assuming no pandemics, hurricanes or major geopolitical disruptions expenditure in Antigua and Barbuda is expected to outstrip revenue until 2025.<sup>5</sup> She states that “The reality is that Antigua and Barbuda is fiscally constrained by an economy that is still recovering and is burdened by unsustainable debt most of which is high cost.”<sup>6</sup> The Ministry of Finance therefore estimates that for the years 2022 to 2024, government operations will achieve primary deficits of -5.8, -5.1 and -3.9 as a per cent of GDP.

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<sup>4</sup> Affidavit of Rasona Davis-Crump at paragraph 21

<sup>5</sup> Affidavit of Rasona Davis-Crump at paragraph 22

<sup>6</sup> Affidavit of Rasona Davis-Crump at paragraph 23

[15] The revised proposal was therefore for the judgment debt to be amortized over a period of twelve years at an annual rate of 2% with payments of principal and interest made annually. This proposal was based on the calculation of the total due which is interest only in the sum of US\$15,611,530.93. The proposal was therefore for semi-annual payments of US\$734,888.97 to be made on the 30th day of each April and October commencing 30th April 2023 until the debt is liquidated.

### **Supplemental Affidavit of 1st March 2023**

[16] In this supplemental affidavit, the Financial Secretary gives an update on developments which took place since her previous affidavit of 30th June 2022. She states at the time of her previous affidavit there was an appeal pending on the issue of appropriation of payments towards interest.

[17] In light of the Court of Appeal on 29th July 2022 ruling in favour of the Claimant/Respondent the Financial Secretary states as follows:

“We have revised our schedule of payments to take into account the impact of the Court of Appeal’s decision and exhibit it hereto as “RDC4” The intent is to maintain the proposed semi-annual payments but the period for payment would be affected as the outstanding sum would be indeterminate given the continued accrual of interest. The revised schedule now tendered for approval extends to a period of over 20 years and includes the Privy Council annual interest of 4%. While this may not be the most ideal or favourable arrangement the GoAB is unable to commit to higher installments at this time.”

[18] The proposed schedule of payments exhibited as RDC 4 begins with an opening balance of US\$20,498,617.89 and proposes semi-annual payments of US\$735,000.00. Based on this schedule, the debt will not be liquidated until 31st October 2046.

[19] The Financial Secretary also addresses a counter-proposal by Ms. Natalia Querard a director of the Claimant/Respondent which was submitted under cover of an affidavit filed on 26th January 2023. The Claimant/Respondent’s counter-proposal calls for payments to be made as follows:

1st Payment February 1, 2023-----US\$10,000,000.00

2nd Payment February 1 2024----US\$5,000,000.00

3rd Payment February 1 2025----US\$4,000,000.00

4th Payment February 1 2026----US\$2,242,191.86

[20] The Financial Secretary states that the Government is not in a position to pay in the manner proposed by HMB which would require what would be in effect an immediate payment of US\$10,000,000.00.

### **Supplemental Affidavit of 3rd June 2023**

[21] The Financial Secretary filed a further supplemental affidavit in support of the application on 3rd June 2023. She states that since her affidavit of 30th June 2022, the 2023 budget had been approved. At paragraph 2 of the further affidavit, she outlines that wages, salaries, pensions, statutory contributions and interest payments of government accounts represent over 70% of government revenue. She further states that the financial gap for 2023 which represents the difference between the total revenue and expenditure is anticipated to be \$676.7 million. She therefore states that the Government is unable to commit to an instalment schedule which exceeds what has been proposed.

### **Issues**

[22] I agree with the Defendants/Applicants that the issues to be determined should be framed as follows:

1. Whether an order to pay by instalments is justified in the circumstances of the inability of the Government of Antigua and Barbuda to pay due to the continuous state of public finances as expressed by the Respondent/Applicant?
2. If so, is the schedule of instalments proposed reasonable in the circumstances of the State's fiscal condition?

### **Discussion**

**Whether an order to pay by instalments is justified in the circumstances of the inability of the Government of Antigua and Barbuda to pay due to the continuous state of public finances as expressed by the Respondent/Applicant?**

[23] Compensation in this case was assessed pursuant to the provisions of the **Land Acquisition Act**.<sup>7</sup> However, for the purposes of this application, the starting point is **section 9(1)** of the **Antigua and Barbuda Constitution** which provides as follows:

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<sup>7</sup> Cap. 233 of the Revised Laws of Antigua and Barbuda

“No property of any description shall be compulsorily taken possession of, and no interest in or right to or over property of any description shall be compulsorily acquired, except for public use and except in accordance with the provisions of a law applicable to that taking of possession or acquisition and for the payment of fair compensation within a reasonable time.”

[24] Similar provisions have been interpreted by the courts in **Jennifer Gairy (as Administratrix of the Estate of Matthew Gairy) v. Attorney-General**<sup>8</sup> and **San Jose Farmers’ Co-operative Society Ltd. v. Attorney General**.<sup>9</sup> In **San Jose Farmers’ Co-operative Society Ltd. v. Attorney General**<sup>10</sup> the Belize Court of Appeal stated as follows:

“Compensation within a reasonable time can only mean that payment must be made in full as soon as is reasonably practicable after the amount of compensation has been finally settled.”

[25] In this case the amount due as compensation was determined by the Privy Council in 2014 and despite payments being made, a substantial amount of the compensation remains unpaid. Both parties rely on the case of **Jennifer Gairy (as Administratrix of the Estate of Matthew Gairy) v. Attorney-General** where Lord Bingham giving the judgment of the Privy Council stated as follows:

“If the exigencies of public finance prohibit the immediate payment to the appellant of the full sum outstanding, the Attorney General, representing the Minister of Finance, may apply to the judge for approval of a schedule of payment by instalments. The Board would however stress that the payment is already overdue and no deferment should be approved save on the basis of full, clear and compelling evidence.”<sup>11</sup>

[26] Mr. Astaphan SC on behalf of the Defendants/Applicants submits that “full, clear and compelling evidence” has been submitted in support of the application. He further states that the Court ought not to impose a mandatory order for payment in full or in an amount the State could not afford without serious disruption to the state’s resources and obligations. He relies heavily on the data provided in the affidavits of the Financial Secretary in support of his submissions.

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<sup>8</sup> Gairy v. Attorney General of Grenada (2001) 59 WIR 174

<sup>9</sup> San Jose Farmers’ Cooperative Society v. AG (1991) 43 WIR 63

<sup>10</sup> San Jose Farmers’ Cooperative Society v. AG (1991) 43 WIR 63 at pg 83 per Liverpool JA

<sup>11</sup> Gairy v. Attorney General of Grenada (2001) 59 WIR 174 at paragraph 31

[27] In oral submissions, Mr. Astaphan expressed the view that the high level of the debt outstanding is due to the Claimant/Respondent's decision to apply the US\$20 million payment towards interest. He also proposed that a schedule of payments could be approved with a review by the court every two years to ascertain whether increased payments could be made.

[28] Mr. Carrington KC on behalf of the Claimant/Respondent interprets the evidence in a different manner. According to him, "The background to this current Application therefore demonstrates extreme reluctance on the part of GoAB (Government of Antigua and Barbuda) to comply with (i) its constitutional and statutory responsibilities (ii) any and all orders of the court and (iii) with proposals made in its own Applications to the Court. While the GoAB produces an ever-growing list of debts and obligations, non-payment of its debt to HMB is yet to face any consequences.' <sup>12</sup>

[29] The Claimant/Respondent's written submissions emphasize that the projected revenue of EC\$1,125,429, 524 (exhibited as RDC5) is clearly sufficient to make the payment if priority is given to it over all other obligations. In particular, according to the Claimant/Respondent no evidence it (meaning the Government) "could not reasonably and consistently with its obligations to other creditors also postpone those obligations and (ii) why it has chosen for 18 years to postpone the HMB obligation and give precedence to other obligations that clearly arose subsequent to this obligation, which was voluntarily imposed due to the compulsory acquisition."<sup>13</sup> The Claimant/Respondent therefore submits that the test in **Jennifer Gairy (as Administratrix of the Estate of Matthew Gairy) v. Attorney-General** has not been satisfied.

[30] Having considered the evidence submitted by the Financial Secretary, I believe that the Defendants/Applicants have provided compelling evidence of being unable to immediately liquidate the balance of the judgment debt. Firstly, it has not been disputed that Antigua and Barbuda has a high debt burden. This is clearly outlined at paragraph 21 of the Financial Secretary's affidavit of 30th June 2022 where she states that debt as a percentage of GDP stood at 96%.

[31] Secondly, expenditure is expected to outstrip revenue at least in the short-term. In this regard, the Financial Secretary states the fiscal gap for 2023 was expected to be \$676.7 million. Finally, although the country's economy is improving, it still has not recovered to

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<sup>12</sup> Claimant/Respondent's written submissions at paragraph 9

<sup>13</sup> Claimant/Respondent's written submissions at paragraph 16

2019 levels. Taking all of the foregoing into consideration, I am satisfied that the Defendants/Applicants have provided full, clear and compelling evidence of the Government's inability to immediately settle the judgment debt.

**Is the schedule of instalments proposed reasonable in the circumstances of the State's fiscal condition?**

[32] The fact that the court accepts that the Government of Antigua and Barbuda cannot immediately satisfy the award of compensation does not mean that the proposed schedule of payments must be accepted. In this case as previously noted if the proposed schedule is accepted the debt will not be liquidated until 2046 which is over twenty years from now.

[33] Section 9 of the Constitution calls for the payment of compensation in a reasonable time. The Constitution is the supreme law of Antigua and Barbuda. Thus, even where the court grants the Government permission to pay by installments in accordance with the guidance given in Gairy, the debt should still be liquidated within a reasonable time as contemplated by the Constitution.

[34] There is no specific timeframe as to what constitutes a reasonable time for the purposes of the Constitution as the circumstances of each compulsory acquisition will differ. I note that in **San Jose Farmers' Co-operative Society Ltd. v. Attorney General** the Belize Court of Appeal struck down a provision which permitted the Minister to pay compensation over a period of ten years. This was found to offend a similar provision in the Constitution of Belize which is similar to Antigua and Barbuda's section 9.

[35] In this case the Government of Antigua and Barbuda took possession of the property in 2007 and the quantum of compensation was finally determined by the Privy Council in 2014. This means that it is now over ten years since compensation was finally assessed by the Privy Council. Based on the guidance provided by the Gairy and San Jose Farmers Cooperative cases, I find that payment has not been made within a reasonable time as provided by section 9 of the Constitution.

[36] The High Court in considering this application is not exercising the jurisdiction conferred by section 15 of the Constitution to enforce the Fundamental Rights Provisions. Despite this, the court cannot approve what would in effect be a continuing breach of the Constitution by approving a payment schedule which would see payment being

completed thirty-two years after the Privy Council's decision. The instant application must therefore be dismissed.

[37] This does not prohibit the Government of Antigua and Barbuda from submitting revised proposals to the court for approval. The court is mindful of the challenges which are faced by the Government in terms of revenue collection and prioritization of critical expenditure. However, any revised proposal must as of necessity provide for the judgment debt to be liquidated in a significantly shorter period than is contemplated by the instant application. Given the size of the debt and the length of time that has elapsed, any proposal submitted should provide for the debt to be liquidated within a period not to exceed ten (10) years.

[38] At this point it is necessary to highlight an observation made by the Financial Secretary at paragraph 24 of her affidavit of 30th June 2022. The relevant portion of which reads as follows:

“...The fiscal situation along with the debt overhang make it a tenuous proposition for Antigua and Barbuda to be bogged down by debt which provides no immediate return. Unfortunately, this has been the experience with the HMB debt. Whilst we acknowledge our obligation to pay, we think it only the responsible thing to do propose what it is realistic, doable and sustainable, given our fiscal and debt positions.”

[39] Respectfully, the above excerpt does not take into account the fact that the obligation to pay compensation within a reasonable time is imposed by the Constitution itself. It is therefore immaterial whether the debt provides a return or not. The primary concern must be to ensure that the debt is liquidated in a timeframe which is consistent with the relevant constitutional provisions.

[40] I also decline to approve the payment schedule which was submitted under the cover of Ms. Natalia Querard's affidavit of 26th January 2023. Directing payments to be made as the Claimant/Respondent proposes would be in effect ordering the Government of Antigua and Barbuda to divert expenditure from approved budgetary allocations to pay the Claimant/Respondent. This may have unintended negative consequences in terms of the Government's operations and the provision of essential services. The court is therefore unable to approve the Claimant/Respondent's counter-proposal.

## **Order**

[41] The court therefore orders as follows:

1. The Defendants/Applicants application to pay the balance of the compensation filed on 31st December 2022 and amended on 30th June 2022 is hereby dismissed.
2. The Defendants/Applicants are at liberty to submit a revised payment schedule which provides for the debt to be liquidated in a period which does not exceed ten (10) years to the court for approval.
3. Costs to the Claimant/Respondent to be assessed if not agreed within 21 days of this order.

**Rene Williams**

High Court Judge



**By the Court**

**Registrar**