

**EASTERN CARIBBEAN SUPREME COURT
ANGUILLA**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO. AXAHCV2023/0007

BETWEEN

ANGUILLA BUILDING CONSTRUCTION SUPPLIES LIMITED

Claimant

AND

**THE MINISTER OF FINANCE OF ANGUILLA
GOVERNOR IN COUNCIL (EXECUTIVE COUNCIL)
COMPTROLLER OF INLAND REVENUE**

Defendants

Before: His Lordship The Honourable Justice Ermin Moise

Appearances:

Mrs. Tana'ania Small Davis KC with her Mrs. Josephine Gumbs-Connor, Mr. Carlyle Rogers and Ms. Kathryn Williams of counsel for the claimant
Mr. James Bristol KC with him Mr. Sasha Courtney and Mr. Theon Tross of counsel for the defendants

2023: July 24; 25; 26;
December 18.

Judgment

- [1] **Moise, J.:** This is an application for judicial review. The claimant seeks various administrative orders regarding the Government's implementation and enforcement of a remission on the Interim Goods Tax. This tax was in force in Anguilla until 30th June, 2022, at which point the Goods and Services Tax was fully implemented as a replacement on the island. The claimant therefore seeks the following relief:

- (a) An Order of Certiorari quashing the decision of the First Defendant to impose additional requirements on the Claimant regarding information and documentation required of the Claimant in order for the Claimant to qualify for remission of Interim Goods Tax ("IGT"), contrary to the previously published requirements, and to have done so at a late stage when it was physically impossible for the Claimant to comply by the specified deadline.
- (b) An Order of Certiorari quashing the decision of the Second Defendant to enact the Financial Administration and Audit (IGT Remission) Regulations, 2022 imposing a retroactive date for the submission by the Claimant of the additional requirements referred to in (a) above and which it was impossible for the Claimant to comply with.
- (c) A Declaration that the Financial Administration and Audit (IGT Remission) Regulations, 2022 are null, void and of no legal effect.
- (d) An Order of Certiorari quashing the decision made by the Third Defendant on 30th December, 2022 to deny the Claimant's application for an IGT remission.
- (e) An Order of mandamus directing the Third Defendant to reconsider the Claimant's application for an IGT remission in keeping with the criteria set out in the Second Defendant's letter dated 26th June, 2022 and the First Defendant's letter dated 28th June, 2022.

[2] In order to address the issues raised in this case in full it is important to give careful consideration to the facts which have been pleaded. I note also that despite this being a case for judicial review, there are areas in which the facts are disputed. It will be important therefore to consider whether a reconciliation of those disputes of fact is necessary in order to determine the claimant's entitlement to the relief sought.

The Facts

- [3] On 30th July, 2021, the Legislature in Anguilla enacted the **Goods and Service Tax Act, 2021**. Under this legislation goods and services in Anguilla were to be subject to a 13% tax payable by the consumer at the point of sale. This tax is locally referred to as a GST. The Act also repealed and replaced the previous **Interim Goods Tax Act**, which had imposed a 9% tax on goods in Anguilla. This tax is locally referred to as “IGT” and was payable by local businesses on goods at the port of importation into the country. The coming into force of this **Goods and Services Tax Act** was delayed until 1st July 2022.
- [4] Prior to the full implementation of the GST, some of the local businesses in Anguilla raised a concern regarding the taxes already paid on goods which we were in stock at the time. It was apparent that with the implementation of the GST there would be double taxation on those goods. This was the case, as the local merchants had already in fact paid over the IGT to the government at the point at which the goods were brought into the country. In addition to that, as of 1st July, 2022, those very businesses were duty bound to include the 13% GST to be paid by the customer on the sale of those goods.
- [5] In her affidavit filed on 4th May, 2023, Mrs. Kathleen Rogers (Mrs. Rogers), Permanent Secretary in the Ministry of Finance, stated that in or around February 2022, the business community expressed certain concerns regarding the implementation of the GST. It was her understanding that the business community was concerned about goods already imported on which IGT had already been imposed, but which would attract an additional GST as of 1st July 2022, when the new regime came into effect. In seeking to address these concerns, the Government made certain proposals. It is not necessary to detail those proposals in this judgment as they were not accepted by the business community.
- [6] On 17th June, 2022, a letter was written to the Government in which 3 recommendations were set out by the business community. These were:
- (a) *Retain the 9% GST on imports of future stock and add a 5% sales tax. There will be no claim back on the 5% sales tax or IGT. Retailers will be entitled to 13% GST claim*

backs for services only. Result, compulsory registration of all retail businesses collecting the 5% sales tax.

(b) Introduce the 13% GST on services only on July 01, 2022, with a later implementation date on the goods tax pending a fair and amicable agreement between the Government of Anguilla and the retail sector.

(c) If neither of the reasonable, practical and fair recommendations 1 and 2 above are acceptable, a full credit must be given for the 9% IGT on existing stock.”

[7] The Government did not find proposals 1 and 2 acceptable. However, the Premier held a meeting with the business community on 24th June, 2022. He communicated an interest in exploring the third proposal of a tax credit being given for the 9% IGT which had already been paid on the existing stock of local businesses. Mrs. Rogers was present at that meeting and she stated in her affidavit that the Premier indicated that he needed to meet with the team at the Ministry of Finance in order to consider this request and discuss how and by what method the Government may accommodate it. She goes on to make it clear that *“absolutely no assurances were given to the business community at that time to the effect that this recommendation was accepted as it was also said to them that the Executive Council must meet and decide on the recommendation of a 9% tax credit. It was clear that Government had to consider that recommendation.”*

[8] A meeting of the Executive Council was held and subsequently, on 26th June, 2022, the Premier, in his capacity as Minister of Finance, wrote to the business community indicating that the Government was considering the implementation of transitional provisions allowing for Interim Goods Tax (IGT) paid to be treated as a credit **to offset future tax obligations** (my emphasis). The Premier went on to note that as part of this consideration process, information from registered businesses was required. This included an inventory stock list as at 30th June 2022 (before GST came into effect) and details of annual turnover of the businesses.

[9] The Premier made it clear in his letter that the information requested was needed to inform the framework of the proposed 9% IGT future credit. This framework would consider variations in the fullness of records that respective businesses may ordinarily maintain. It was also stated that the proposed transitory arrangement for credit must be considered alongside the existing package of cost of living support as well as the financial integrity of the Government. It was further noted that Government was minded to consider these credits primarily based on assurances made by the business community that any credits or concessions would be passed on to consumers in the form of lower prices.

[10] Mrs. Rogers went on to state the following at paragraph 12 of her affidavit:

“In relation to the credits or concessions being passed on to consumers, retail businesses had to reduce or lower the prices of their goods and show proof of the same prior to any business benefiting from the 9% IGT future tax refund. The passing on was always discussed as first highlighted in the 1st Defendant’s letter of 26th June 2022 (Exhibit ML2). Further, it was never communicated, neither was it the intent of that letter, that once the businesses submitted their inventory stock list and annual turnover reports, then they would automatically receive the 9% tax credit on account of them simply indicating or assuring that they will lower prices. What that letter suggested (“CONSIDERING”) was that in considering the credit of the 9% IGT Tax, the Government needed information and additionally that businesses had to lower prices for the benefit of consumers.”

[11] Mrs. Rogers went on to indicate that the Government needed the information from the local businesses in order to determine whether to implement the credit proposal. At that point, there was no final decision taken by the Government. This was an information gathering exercise in order for such a determination to be made.

[12] Mrs. Rogers wrote a letter to the business community on 28th June, 2022. She stated in her affidavit that the letter was consistent with the theme of information gathering, in that, the Government sought specific information from the business community relative to inventory stock on hand as at 30th June 2022. Further, that letter indicated two important things:

(a) That regarding the 9% IGT tax future credit proposal, the requested information was needed for CONSIDERATION of that proposal; and

(b) The requested information would INFORM the framework of the proposal consistent with the 1st Defendant's letter of 26th June, 2022.

[13] Mrs. Rogers indicated in her letter that the information, including the inventory of stock, was to be supplied no later than 31st July, 2022. It is apparent from the evidence that Anguilla Building Construction Supplies Ltd. (ABC), as well as other businesses on the island, was unable to provide the information by that deadline and it was therefore extended to 31st August, 2022. ABC however indicated that, given the size of its inventory, it was not possible to provide a full list of stock in keeping with the request by 31st August, 2022. ABC therefore sought an additional extension but this was denied by the Government. It was indicated that the information was necessary in order for the Government to make a full determination on the issue by the end of the financial year in December.

[14] In fact, Mrs. Rogers indicated in her affidavit that *"any tax remit had to be paid before year-end as is the course of usual Government business."* I state at this stage that I do have some concerns with this particular statement and the question of whether it accurately reflects what had been communicated to the business community up until that point. Here in her affidavit Mrs. Rogers is speaking about the payment of a tax remission by year end, whereas what had been under consideration all along was a credit against future tax obligations.

[15] Mrs. Rogers went on to state that she was informed on 30th December 2022, that ABC submitted information purporting to be the information that the Government was requesting. However, in that information, there was no evidence that the ABC had lowered any of its prices.

[16] In his affidavit in support of this claim, Mr. Mitchell Lake for ABC stated that the letter of the Premier did not specify that the businesses were to provide evidence of the actual re-

pricing of the goods in stock by 31st August, 2022. He complained that the initial deadline which had been given for the supply of the information was only 4 weeks after the letter was sent to the business community. In that regard it was stated that only 11 out of 100 businesses had supplied information to the Government. ABC was only able to provide proof of 60% of its actual stock for which IGT had been paid. It is submitted that this was on account of the strict deadline which had been imposed by the Government which made it impossible to do a full inventory. What was eventually provided to the Government proved that \$569,277.61 in tax credits would be claimed by ABC. That was a substantial amount but 40% less than the full inventory.

- [17] Mr. Lake complains further that neither the letter from the Premier nor that of Mrs. Rogers gave any indication as to the level of credit which the business community would be entitled to, when the credit would be received or what they needed to do to show that the credit would be passed on to consumers. Mr. Lake indicates that on 9th December, 2022 an email was sent to Mrs. Rogers as a follow up on the issue. There was no response. However, things took a different turn on 22nd December, 2022 when Mr. Lonnie Hobson, the Comptroller of the Inland Revenue Department visited the premises of ABC. There is here somewhat of a divergence in the evidence which is worth some consideration.
- [18] Mr. Lake states that on 22nd December, 2022, the Comptroller of the Inland Revenue Department and one employee by the name of Kendall Richardson, visited ABC and met with himself and his brother, Mr. Marlon Lake. It was at that meeting that Mr. Lake was informed that the Government had taken a decision to remit the credit for the stock in hand by way of a check rather than a credit on account as previously indicated. The Comptroller also indicated that it was the Government's intention to make all payments by the end of the year; that is 31st December, 2022. Mr. Lake states that at that meeting he informed the Comptroller that ABC intended to pass on this credit to customers in the form of discounted sales and adjusted prices. It was Mr. Lake's evidence that the Comptroller informed him that this intention was acceptable to the Government. Mr. Hobson however denies that he ever said that.

- [19] On the following day, that is 23rd December, 2022, ABC received a letter from Mrs. Rogers which outlined the Government's intention. The letter stated that:

“... to facilitate the payment by the end of the year we are requesting that you provide evidence to demonstrate that the credits were passed on to the consumers in keeping with the correspondence dated 26th June, 2022 from the Premier and Minister of Finance and June 28th, 2022 from the Permanent Secretary Finance. This information is required on or before Tuesday December 27th, 2022.”

- [20] It must be observed that this letter was sent to the business community, including ABC, on 23rd December, 2022. That was a Friday. The following day was Christmas Eve and after that were a number of public holidays. I understand that 27th December, 2022 was also a public holiday in Anguilla. In essence therefore, the information requested in Mrs. Rogers' letter was to be provided to the Government in less than one working day in order for the IGT remission to be paid to the various businesses.

- [21] In addition to this, the letter also stated that the Government had previously committed to allowing a credit for Interim Goods Tax (IGT) paid on stock on hand as at 30th June, 2022 as a transitory measure for the smooth implementation of the Goods and Services Tax (GST). Mrs. Rogers went on to confirm that the majority of the goods which were submitted in ABC's inventory were subject to the IGT. It is ABC's submission that this would therefore mean that what had been submitted was generally eligible for the credit being proposed by the Government.

- [22] Mr. Lake states in his affidavit that on 27th December, 2022, attorneys for ABC wrote to Mrs. Rogers requesting information regarding the precise amount of the credit which will be provided to ABC. The attorney also requested a response on the IGT report submitted by ABC and a date by which the credit would be paid. It was stated in that letter that without that information ABC was unable to calculate the discounts to be passed on to the consumers. ABC also then provided an assurance that once the credit is received it would be passed on to customers in keeping with the letters from the Premier and Permanent Secretary of 26th and 28th June, 2022. Mr. Lake also states that given the urgency of the

matter, follow up emails were sent to Mrs. Rogers requesting a meeting. There was no response to those emails.

- [23] On the same date of Mrs. Rogers' letter of 23rd December, 2022, the Governor in Council enacted the **Financial Administration and Audit (IGT Remission Regulations) 2022**. These regulations were approved by the House of Assembly on 27th December, 2022 and stated that:

"Conditions for remission 3.

(1) A GST registered business shall qualify for a remission under section 1 where the GST registered business has complied with the following conditions –

- (a) The GST registered business must have submitted, on or before 31st August, 2022 a request for consideration of an IGT remission in accordance with the stated protocol referred to in the Schedule;
- (b) The GST Registered Business must have provided on or before 27th December, 2022, to the satisfaction of the Comptroller of the Inland Revenue, written confirmation with supporting documents evidencing the re-pricing of the relevant stock on hand to remove the IGT; and
- (c) The stock referred to in paragraph b must have been re-priced on or before 31st July, 2022.

- [24] Mr. Lake complains that this regulation imposed a retroactive deadline for the supply of information requested by the Government. He goes on to state that on 30th December, 2022 he spoke with the Comptroller of Inland Revenue who told him that the amount of the credit owed to ABC was too substantial for the business to not submit anything. Mr. Lake states that 75 pages from ABC's point of sales system were provided to the Comptroller. In addition to that, the attorney for ABC also submitted the information to the Comptroller as well as Mrs. Rogers. That was on 30th December, 2022. However, on that same day ABC

was informed that the information presented was insufficient to meet the requirements and that ABC had therefore not qualified for the remission.

[25] The Comptroller of Inland Revenue, Mr. Lonnie Hobson (Mr. Hobson) filed an affidavit of his own regarding the facts leading up to the passage of the regulations. Insofar as it relates to the concerns of the business community and the initial meeting with the Premier, Mr. Hobson's evidence is in line with that of Mr. Lake and Mrs. Rogers. He states however that at a meeting on 27th June, 2022 Mr. Mitchell Lake and Mr. Marlon Lake were in attendance as the representatives of ABC. Mr. Hobson suggests that when the discussion began about the provision of tax credits by the Government and information was sought as to whether businesses were able to reduce their prices, Mr. Marlon Lake stated that ABC had a computerized system and that adjusting prices within their system could be done at the click of the button. He stated that Mr. Marlon Lake made a similar assertion on 17th December, 2022. I note however, that Mr. Mitchell Lake denies this and states that ABC was not represented at that meeting. He in fact states that a number of the local businesses in Anguilla did not attend that meeting. He states that ABC never had such technological capabilities.

[26] The assertion that there was a meeting on 27th June, 2022 is important for one other reason. Mrs. Rogers indicated in her own evidence that there was a previous meeting on 26th June, 2022 where two local supermarkets attended. It was asserted that at that meeting the attendees were informed that prices had to be reduced to remove the IGT by 31st July, 2022 in order to be eligible for the remission. It was further asserted that another meeting was to be held on 27th June, 2022 at which businesses such as ABC were to attend. There is some doubt as to whether the meeting even took place on account of the fact that none of the businesses who were to be present had actually attended. It was none the less asserted that the issue of the re-pricing of the goods was either addressed or was to be addressed at that meeting.

[27] As it relates to the information requested subsequent to the Premier's meeting with the business community, Mr. Hobson confirmed that out of 100, only 11 businesses supplied the relevant information. This included ABC. Mr. Hobson states that thereafter, teams from

the Ministry of Finance, Inland Revenue and the Customs Department began the review and analysis of the information submitted by those businesses. Several meetings were held for this purpose. He went on to state that on 20th December, 2022, this process came to an end with a final analysis meeting with a team from Inland Revenue which included himself as the Comptroller, the Deputy Comptroller of Inland Revenue, Ms. Tamika Fleming and the GST Consultant, Ms. Cynthia Castillo and the team from Customs, the Comptroller and Deputy Comptroller of Customs, Mr. Kiel Connor and Mr. Giovanni Francisca. It was there determined that the majority of goods listed on the inventories submitted were subject to IGT at the rate of 9%.

[28] I make just one observation at this stage. Mr. Hobson corroborates one fact also contained in Mrs. Rogers' evidence, in that it was determined that "a majority" of the goods submitted were subject to the IGT at a rate of 9%. However, it is unclear to me as to what the implication of that determination was. Mr. Lake complains that no feedback had been given to ABC as to the assessment of their inventory prior to 22nd December, 2022 and that there was no indication as to precisely the amount of what had been submitted which would have been approved for the tax credit. In saying that a majority of the goods were subject to IGT, it is not clear as to whether the minority of those goods submitted would be flagged as being incapable to attracting the remission or whether the credit would simply be paid over on the full amount regardless.

[29] Mr. Hobson went on to state that his team then met with Mrs. Rogers and the Principal Assistant Secretary of Finance, Ms. Marissa Harding Hodge to finalise the approach to be taken in relation to the IGT credit on existing stock and to come to a consensus as to the way forward. At that meeting it was decided that the best approach would be for the Government to remit the IGT on or before 30th December, 2022. This was as opposed to the provision of credits within the tax collection system. The team was of the view that this was the best approach to take as it ensured that the financial reporting system of the Government would only include accurate GST collection data and not any other data which was not directly related to GST collection.

- [30] Regarding the manner in which the remission was to be paid, it was determined that the IGT remission should only be granted to merchants who have (i) submitted a request for consideration of IGT credit in accordance with stated protocols, as contained in the schedule to the Remission Regulations, on or before the extended deadline of 31st August, 2022, and (ii) by 27th December, 2022 merchants providing the Comptroller of Inland Revenue written confirmation and evidence to show the reduction of pricing on relevant stock on hand on or before 15th July 2022¹.
- [31] Mr. Hobson went on to state in his evidence that himself and Ms. Harding Hodge prepared an Executive Council Submission on behalf of the Premier which included their analysis of the inventory of the eleven (11) businesses which had submitted that information. The submission also included their recommendation that a remission be paid for IGT in the form of a check payout, as opposed to a credit on the tax collection system and the recommendation that the refund be subject to the satisfaction of the specific criteria stated in the paragraph above.
- [32] Prior to the Executive Council meeting on the afternoon of 22nd December, 2022, Mr. Hobson and Mr. Richardson visited a number of businesses including ABC. The purpose of this visit was to inform ABC of the intention to seek Executive Council approval of an IGT refund upon the satisfaction of the earlier stated requirements. Mr. Hobson's evidence was that at that meeting he informed Mr. Lake that the information requested had to be submitted by 27th December, 2022 in order for the amendments to be made to the annual budget on time for the end of the financial year. He denied ever informing Mr. Lake that the information he had on hand was sufficient. Mr. Hobson states that it was not possible for him to do so as he had no information before him and the Executive Council had not yet ratified the recommendation. He states that the 75 page document referred to in Mr. Lake's evidence was not presented to him at that meeting and that he had not seen it until 30th December, 2022.
- [33] The Executive Council met at 5.30pm on 22nd December, 2022 and approved the recommendations put forward by Mr. Hobson and his team. In light of this approval, Mrs.

¹ that date is different from the 31st July, 2022 deadline which was eventually implemented.

Rogers then wrote to the business community on 23rd December, 2022. Mr. Hobson states that at 11:46am on 30th December, 2022, he received an email from the attorney acting for ABC. The content of the email was as follows:-

“Dear Mr. Hobson,

We act for and on behalf of ABC Supplies in this matter.

Further to our discussions between your good self and Mr. Marlon Lake acting for our client ABC Supplies on December 23rd 2022, please find attached documents showing the price reductions for ABC supplies as per your requirements for remittance of IGT credits by GOA.

The discounts and price reductions as discussed will be ongoing through 2023. Given this submission and your authority to act, our client looks forward to settlement of this letter related to the IGT credit.”

- [34] Mr. Hobson states that he immediately noticed that ABC’s application for remission of IGT was done after the deadline of 27th December, 2022 and that it referenced discounts and prices going forward to 2023 which was not a requirement for IGT remission. Nonetheless, in the spirit of good faith, Mr. Hobson examined the documents submitted by the Claimant. He however formed the view that the criteria had not been met. What was submitted did not show that there was a re-pricing of the goods by 31st July, 2022 and that part of what was submitted were discounts provided on the basis of customer loyalty points. He therefore informed ABC that they had not satisfied the requirements for the remission of the IGT to be paid over to them. I note here that Mr. Lake responds to this by saying that no clarity was sought from ABC in relation to this information. He states that had Mr. Hobson engaged in dialogue on the issue, ABC would have been able to explain why the information would have met the requirements. However, even during the course of these proceedings, the court is none the wiser on what would have allowed Mr. Hobson to come to a different conclusion.

[35] Kendal Richardson's evidence largely corroborated what Mr. Hobson had to say and there is no need to repeat it here in any detail. I refer however to paragraph 7 of the affidavit where he states that ABC's *"representative did state that they preferred to have savings and discounts for the customers carried out after the IGT credit was received. But to my mind, this was a statement of intent, not a proposal made and we did not agree to that being sufficient for the purpose of remission of IGT Credits."*

[36] Given these chain of events, Mr. Lake complains in his affidavit that Mrs. Rogers' letter of 28th June, 2022 was clear and unambiguous. That letter stated that the Government was considering interim measures in allowing IGT paid on the goods to be treated as a credit to offset future tax obligations. He states that this letter outlined clear guidelines and deadlines for the submission of the stock on hand. This took place after consultation with the business community. Mr. Lake goes on to complain that ABC had an expectation that it would have received the credit once it had submitted the information required in that particular letter. He did not expect that additional requirements would be imposed later on in the process and on such short notice. Mr. Lake went on to state that the Government's change of policy was sudden and implemented peremptorily and not in keeping with the discussions it had with the local businesses prior.

[37] Mr. Lake also went on to complain that from a business perspective, ABC was being asked to lower its prices and charge a GST whilst not knowing precisely what the Government's credit was going to be. In light of this, if there was a change of policy regarding the IGT credit, Mr. Lake states that he fully expected to have been consulted.

[38] Mrs. Rogers responds to this by stating in her own affidavit that:

"... up and until the IGT Remission Regulations came into effect on 30th December 2022, there was no binding deadline for the submission of evidence of re-pricing or lowering of stock to show that discounts had been passed onto customers. Prior to IGT Remission Regulations coming into force, Government conducted an evidence and information gathering process for the purpose of considering a tax credit and methodology for implementing same. The date, or as the claimant puts it as a deadline of 27th December, was first mentioned in my letter of 23rd December 2022,

but as stated above in paragraphs 17 and 18 hereinabove, this was in the context of the premier's letter. The consideration of the tax credit and the methodology came to fruition and was given legal effect only on the coming into force of the IGT Remission Regulations which only then gave effect to the deadline of 27th December 2022. In the circumstances, it is denied that there was any newly imposed deadline. In fact, the Claimant again submitted further information on 30th December 2022. However, there was no evidence of re-pricing and in any event, that information, even if amounted to evidence of re-pricing, was submitted after the 27th December 2022 deadline, and therefore not in conformity with the IGT Remission Regulations. We refer to paragraph 29 herein below."

- [39] I pause here to make one point in relation to Mrs. Rogers' statement here. Insofar as it relates to the regulations which were passed and later ratified by the House of Assembly, there are in fact two important deadlines contained therein. There is the deadline of 27th December, 2022 for the presentation of evidence of re-pricing of the goods. However, there is also a perhaps more important deadline; that is the date of 31st July, 2022 by which time the inventory of stock of the local businesses had to have been re-priced. I understand ABC's case to address both of those deadlines as being either retroactive on the one-hand or insufficient on the other, in order to comply with the conditions which had been placed in the regulations which were ratified by the House of Assembly.
- [40] ABC filed 3 additional affidavits in this matter. Those were from 3 local businesses whose management outlined the challenges they experienced in complying with the timelines placed by the Government even in June of 2022. Those affidavits were from Conrad Wilbert Fleming, Connie Brooks-Facey and Esperancia Magdalena Carty-Provenza. Those affiants were managing directors of Anguilla Trading Company Limited, Ashley and Sons Limited, Supermarket and Anguilla Mega Imports Limited dba Big Store, respectively.
- [41] For the most part, the evidence of those persons were that due to the size of their stock and the nature of the inventory systems they were managing, they were simply unable to provide the inventory information requested by the Government by the deadline of 31st

August, 2022. This was especially the case given the manpower and resources needed to conduct such an exercise in such a short period of time and also without any firm commitment from the Government as to what the tax credit was likely to be. There was a complaint here that the Government did not provide much guidance and that the process of consultation was somewhat combative and insensitive to the challenges being faced by the local businesses; especially given the fact that this possible double taxation on the goods in stock was being introduced at a time of high inflation and increased shipping costs.

[42] In the interest of brevity I will not go through the content of each affidavit in full. However, I wish to highlight some of what was contained in the affidavit of Mrs. Esperancia Magdalena Carty-Provenza (Mrs. Carty-Provenza). In that affidavit Mrs. Carty-Provenza gave evidence regarding numerous attempts which were made in order to seek clarity from the Government regarding certain aspects of the information which was being requested. The evidence was that the company needed to figure out how to carry out this inventory, as it would have needed to locate all import entry documents which corresponded to 4460 references in relation to the stock on hand. In her email to the Inland Revenue Department and the Ministry of Finance dated 29th June, 2022 the company sought clarity on how the Government planned to deal with the situation, how the inventory should be presented and when would the IGT credit be effective. There was no response to that email.

[43] An email was sent to Mrs. Kathleen Rogers on 1st July, 2022 in which a reply to the previous email was sought. There was again no response. Although an email was received by the company from Mrs. Rogers on 1st July, 2022, this appeared to be a generic email to all businesses and did not respond to the direct request for information solicited by this company. A further email was therefore sent on the same day seeking a response to the enquiry made on behalf of the company. There was again no response to that email. There were further emails sent on 4th, 5th and 11th July, 2022 to which there was again no response.

[44] On 19th July, 2022 an email was sent to the Permanent Secretary in a different Ministry, who responded and copied the emails to personnel from the Ministry of Finance who were dealing with the matter. Despite this, there was no response to the queries being made on

behalf of this company. It was therefore determined that the company would be unable to meet the deadline of 31st August, 2022 and simply gave up on that process. I highlighted this evidence to make one simple point. Regardless of the outcome of this case, it is important to underscore the need for communication channels with the Government to remain open during consultations of this nature. It is someone unacceptable for there to have simply been no response to those inquiries.

- [45] Although the court had granted leave to the defendants to file additional affidavit evidence in response to the evidence presented by the managers of those local businesses, the affidavits in response did not specifically address the allegations being raised; especially as it relates to the attempts to communicate with ministry officials and seek clarity on what was required to comply with the requests outlined in the letter of 28th June, 2022. For her part, Mrs. Rogers indicated that she was unable to comment on the internal accounting and stock keeping systems of the various businesses and simply wished to repeat the content of her previous affidavits. Mr. Hobson as well simply referred to the content of Mrs. Rogers' letter of 28th June, 2022.

The Issues

- [46] I have already outlined the specific orders and declarations which the claimant seeks. However in order to determine the outcome of this case, the court will consider the issues under 3 broad headings as set out below:

- (a) Whether there has been a breach of a legitimate expectation which has arisen in favour of the claimant;
- (b) Whether there was procedural or substantive unfairness in relation to the decisions taken by the various agents of the Government in relation to the remission of the IGT, sufficient for the court to intervene as is requested by the claimant; and

- (c) Whether the decisions taken in relation to the requirements set for eligibility of the remission of the IGT are unreasonable and/or irrational.

The Law

(a) Legitimate Expectation

[47] Counsel for both parties referred the court to the case of ***Council of Civil Service Unions and others v Minister for the Civil Service***² where it was stated that “[l]egitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue.” The facts of that case dealt with an issue relating to the latter category of legitimate expectation. Before addressing the test in that category, it is important to give further consideration to the broad principles of the law as it relates to Legitimate Expectation in general.

[48] Counsel for the claimant referred the court to the case of ***Regina v North and East Devon Health Authority, Ex Parte Coughlan***³. In that case the judge considered what “*is the court's role when a member of the public, as a result of a promise or other conduct, has a legitimate expectation that he will be treated in one way and the public body wishes to treat him or her in a different way.*” It was determined that “*the starting point has to be to ask what in the circumstances the member of the public could legitimately expect.*” It was stated there that “*this can involve a detailed examination of the precise terms of the promise or representation made, the circumstances in which the promise was made and the nature of the statutory or other discretion.*” The court then went on to make the following comments on the manner in which the issue is to be addressed:

There are at least three possible outcomes, (a) The court may decide that the public authority is only required to bear in mind its previous policy or other

² [1984] 3 All ER 935

³ [2000] 2 WLR 622

representation, giving it the weight it thinks right, but no more, before deciding whether to change course. Here the court is confined to reviewing the decision on Wednesbury grounds ... This has been held to be the effect of changes of policy in cases involving the early release of prisoners... (b) On the other hand the court may decide that the promise or practice induces a legitimate expectation of, for example, being consulted before a particular decision is taken. Here it is uncontentionous that the court itself will require the opportunity for consultation to be given unless there is an overriding reason to resile from it ... in which case the court will itself judge the adequacy of the reason advanced for the change of policy, taking into account what fairness requires, (c) Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy.

- [49] Counsel referred the court to the case of *The United Policyholders Group and others v The Attorney General of Trinidad and Tobago*⁴. There Lord Neuberger outlined some basic principles regarding the doctrine of legitimate expectation as follows:

37. In the broadest of terms, the principle of legitimate expectation is based on the proposition that, where a public body states that it will do (or not do) something, a person who has reasonably relied on the statement should, in the absence of good reasons, be entitled to rely on the statement and enforce it through the courts. Some points are plain. First, in order to found a claim based on the principle, it is clear that the statement in question must be “clear, unambiguous and devoid of relevant qualification”, ...

⁴ [2016] 1 WLR 3383

38. Secondly, the principle cannot be invoked if, or to the extent that, it would interfere with the public body's statutory duty: ... Thirdly, however much a person is entitled to say that a statement by a public body gave rise to a legitimate expectation on his part, circumstances may arise where it becomes inappropriate to permit that person to invoke the principle to enforce the public body to comply with the statement. This third point can often be elided with the second point, but it can go wider: for instance, if, taking into account the fact that the principle applies and all other relevant circumstances, a public body could, or a fortiori should, reasonably decide not to comply with the statement.

39. Quite apart from these points, like most widely expressed propositions, the broad statement set out at the beginning of para 37 above is subject to exceptions and qualifications. It is, for instance, clear that legitimate expectation can be invoked in relation to most, if not all, statements as to the procedure to be adopted in a particular context... However, it is unclear quite how far it can be applied in relation to statements as to substantive matters, for instance statements in relation to what Laws LJ called "the macro-political field (in *R v Secretary of State for Education and Employment, Ex p Begbie* [2000] 1 WLR 1115, 1131), or indeed the macro-economic field.

[50] Halsbury's Laws of England⁵ also summarises those broad principles at paragraph 649 of volume 61:

A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though there is no other legal basis upon which he can claim such treatment. The expectation may arise either from a representation or a promise made by the authority, including an implied representation, or from consistent past practice. In all instances the expectation arises by reason of the conduct of the decision maker, and is protected by the

⁵ (5th edition, 2010)

courts on the basis that principles of fairness, predictability and certainty should not be disregarded.

The existence of a legitimate expectation may have a number of different consequences; it may give standing to seek permission to apply for judicial review, it may mean that the authority ought not to act so as to defeat the consequences of the expectation without some overriding reason of public policy to justify its doing so, or it may mean that, if the authority proposes to act contrary to the legitimate expectation, it must afford the person either an opportunity to make representations on the matter, or the benefit of some other requirement of procedural fairness. A legitimate expectation may cease to exist either because its significance has come to a natural end or because of action on the part of the decision maker.

In appropriate circumstances the existence of a legitimate expectation may require a public body to confer a substantive, as opposed to procedural, benefit. In such cases, the court will not permit the public body to resile from the representation if to do so would amount to an abuse of power.

- [51] As noted by counsel for the claimant, a legitimate expectation can also give rise to a duty to consult persons who may be affected by the decision of a public authority. For the law on that issue I return briefly to the decision of ***Council of Civil Service Unions and others v Minister for the Civil Service*** where Lord Fraser went on to make the following comment in relation to the practice of prior consultation:

“The test of that is whether the practice of prior consultation of the staff on significant changes in their conditions of service was so well established by 1983 that it would be unfair or inconsistent with good administration for the government to depart from the practice in this case. Legitimate expectations such as are now under consideration will always relate to a benefit or privilege to which the claimant has no right in private law, and it may even be to one

which conflicts with his private law rights. In the present case the evidence shows that, ever since GCHQ began in 1947, prior consultation has been the invariable rule when conditions of service were to be significantly altered. Accordingly, in my opinion, if there had been no question of national security involved, the appellants would have had a legitimate expectation that the minister would consult them before issuing the instruction of 22 December 1983. The next question, therefore, is whether it has been shown that consideration of national security supersedes the expectation.”

[52] Finally, as it relates to the authorities referred to by counsel for the claimant, I refer to the case of ***R (Bhatta Murphy) v Independent Assessor***⁶ where it was stated that there may be 3 circumstances where a legitimate expectation can arise. These are circumstances where:

- (a) a substantive benefit will be continued or applied in their case, arising from a distinct promise to that effect.
- (b) a substantive benefit will not be removed before consultation with them, arising from a distinct promise or clear practice to that effect.
- (c) a substantive benefit will not be removed before consultation with them, in the absence of a distinct promise or clear practice to that effect but arising instead from the pressing and focused impact on them of such a change.

[53] It is submitted that the case for the claimant falls into category (a) in that a substantive benefit has been promised to ABC and that they have acted on that promise to their detriment.

[54] Counsel for the defendants generally take no issue with the authorities relied on by the claimant. However counsel submits that as it relates to the doctrine of legitimate

⁶ [2008] EWCA Civ 755

expectation, the court must also consider whether the public body even has the statutory authority to make the promise which was relied on in the first place. In support of that submission counsel refers to the case of **BCB Holdings Limited & Anr v. The Attorney General of Belize**⁷ where Saunders JCCJ (as he then was) made the following statement:

***“[43] Section 68 of the Constitution empowers the National Assembly to make laws. The power to impose, alter, regulate or remit taxes and duties is a power constitutionally vested in the legislature. Only Parliament, or a body specifically delegated by Parliament, may lawfully grant exceptions to the obligation to obey the country’s revenue laws. Counsel for the companies submitted that the deed merely resolved ‘uncertainties and ambiguities’ in the law, but the executive branch, whether for the purpose of ‘settling’ claims made against it or otherwise, has no sovereign power to resolve such uncertainties and ambiguities. That is the function of the Parliament and the courts. Governments in the region are authorised to make promises to public or private bodies that the latter may enjoy derogations from the revenue laws of the state, but whenever this occurs the promises must be sanctioned by the legislature or a body specifically authorised by the Constitution or the legislature, before they can be implemented.*”**

[44] There is and must continue to be a healthy relationship among the arms of government. The state certainly cannot function effectively with its three mighty branches strictly compartmentalised and sealed off one from the other. Indeed, to facilitate the efficient operation of government, the Constitution permits some overlap in the functions carried out by each branch. But the judiciary has an obligation to uphold and promote the constitutional mandate that one branch must not directly impinge upon the essential functions of the other. The principle that only Parliament should impose, alter, repeal, regulate or remit taxes

⁷ [2014] 2 LRC 98 (CCJ)

is paramount. The National Assembly may in particular instances delegate aspects of its taxing powers but, absent such delegation, which in all cases must be strictly construed, the executive branch is forbidden from engaging in such activity. To hold that pure prerogative power could entitle the minister to implement the promises recorded in the deed without the cover of parliamentary sanction is to disregard the Constitution and attempt to set back, over 300 years, the system of governance Belize has inherited and adopted.”

[55] In balancing this decision with the one currently before me, it is important to place the facts of that case into context. In 2005, the Government of Belize entered into a settlement deed with BCB Holdings Ltd and Belize Bank Ltd. This deed was executed as a means of settling a legal dispute which had arisen between the Belizean Government and the two companies involved. However, the deed made provision for what was described in the judgment of Saunders J as a tax regime specially crafted for the companies at variance with the tax laws of Belize. Although the Belizean Government had honoured the agreement for 2 years subsequent to its execution, a change in Government after a general election in 2007 led to a change in approach. The Government then refused to honour the agreement. In keeping with the settlement deed, the companies commenced arbitration proceedings at the London Court of International Arbitration. The Belizean Government did not participate in the arbitration and the companies were awarded damages which they subsequently sought to enforce in the courts in Belize.

[56] It was against this backdrop that Saunders J come to the conclusions referred to at paragraph 49 above. The matter was not one of judicial review, but the enforcement of an agreement entered into without the consent of Parliament. It was also clear on the facts of that case that the Government, in entering into the agreement on the terms set out in the deed, had no intention to seek parliamentary approval, despite the fact that Parliament had the sole constitutional authority to legislate for the remissions and exemptions referred to in the deed. This was because the parties to the deed itself agreed that its terms were to remain confidential. I will return to the specific submission of counsel on that point later on

in the judgment. However, it was important to assess the decision of Saunders J in light of the specific facts of that case.

- [57] In furtherance of submissions made however, counsel for the defendants referred the court to the ***Financial Administration and Audit Act***⁸ where the following is provided for in section 16:

Remission of money paid or payable

16. (1) When the Governor in Council is satisfied that it is in the public interest to do so or that hardship or injustice has resulted or is likely to result, the Governor in Council may, by regulation applicable to a class or classes of persons or by certificate in a specific case and subject to subsection (4), remit all or part of any tax, fee or other amount (other than the amount of a penalty or forfeiture due to a conviction within the meaning of section 76(d) of the Constitution of Anguilla) that is imposed, or authorised to be imposed, under this or any other Act.

(2) The remission of money may be conditional or unconditional, and may be granted— (a) before, after or during the course of, any proceeding for the recovery of the money; (b) before or after the payment has been made or enforced by process or execution; or (c) in the case of a tax, fee or other amount, before the liability arises.

(3) When a condition of a remission is not performed, the authorisation of the remission has no effect, and all proceedings may be taken as if it had not been made.

(4) A remission of a tax, fee or other amount referred to in subsection (1) shall not exceed \$1,000 or such greater amount in any financial year as may be

⁸ R.S.A c.F27

prescribed by regulation by the Governor in Council with the approval of the House of Assembly

- [58] Essentially, the legislation grants power to the Governor in Council to remit taxes or other fees by way of regulation up to a value of \$1,000.00. If the intention is to remit taxes or other fees above this value, then the regulations must be approved by the House of Assembly. These provisions are in keeping with the **Constitution of Anguilla** which states in section 47 that ***“[s]ubject to the provisions of this Constitution, the Governor, with the advice and consent of the Assembly, may make laws for the peace, order and good government of Anguilla.”*** Counsel also referred the court to section 55(2) of the Constitution which states that:

(2) Except on the recommendation of the Governor, the Assembly shall not—

- (a) proceed upon any Bill (including any amendment to a Bill) which in the opinion of the person presiding in the Assembly, makes provision for imposing or increasing any tax, for imposing or increasing any charge on the revenues or other funds of Anguilla or for altering any such charge otherwise than by reducing it or for compounding or remitting any debt due to Anguilla;***
- (b) proceed upon any motion (including any amendment to a motion) the effect of which, in the opinion of the person presiding in the Assembly, is that provision would be made for any of the purposes aforesaid; or***
- (c) receive any petition which, in the opinion of the person presiding in the Assembly, requests that provision be made for any of the purposes aforesaid.***

- [59] Counsel for the defendants went on to refer to the case of ***CCSU v. Minister for the Civil Service*** but specifically requested that the court take notice of the following principles espoused therein:

- (a) The public authority must be first charged with the duty of making the decision to which the promise may attach: see ***Attorney-General of Hong Kong v. NG Yuen Shiu*** [1983] 2 AC 629 at page 629 (Lord Fraser);

- (b) the expectations may be based upon some statement or undertaking by or on behalf of the public authority, which has a duty of making the decision...”
- (c) “...the public body would be bound provided that the promise was not in conflict with its statutory duty...”: NG Yuen Shiu at page 638 c-d (Lord Fraser): see also United Policyholders Group and others at para [38]:
- (d) ...it is necessary to begin by examining the court’s role where what is in issue is a promise as to how it would behave in the future made by a public body when exercising a statutory function...”: Ex Parte Coughlan at para 55 (as per Lord Woolf MR):
- (e) “...the court will only give effect to a legitimate expectation within the statutory context in which it has arisen...”: Ex Parte Coughlan at para 82 (as per Lord Woolf MR);

(b) Procedural Fairness

[60] As it relates to the issue of procedural fairness, counsel for the claimant referred the court to the case of *Lloyd v McMahon*⁹ where Lord Keith made the following comment:

“... if the district auditor had reached a decision adverse to the appellants without giving them any opportunity at all of making representations to him, there can be no doubt that his procedure would have been contrary to the rules of natural justice and that, subject to the question whether the defect was capable of being cured on appeal to the Divisional Court, the decision would fall to be quashed.”

[61] In that case, Lord Bridge also noted the following as it relates to a decision maker’s duty to observe the rules of natural justice:

⁹ [1987] A.C. 625

“...the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when anybody, domestic, administrative or judicial, has to make a decision which will " affect the rights of individuals depends on the character of the decision making body, the kind of decision it has to make and the statutory or other framework in which it operates.”

- [62] Reference was also made to the case of ***R. v Secretary of State for the Home Department Ex p. Doody***¹⁰ where 6 principles were highlighted as requirements for consideration when a public body is making a decision which may be adverse to an individual in order for this decision to be fair. These are:

“(1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.”

¹⁰ [1994] 1 A.C. 531

[63] In essence therefore, the court is discouraged from viewing the principles of fairness and natural justice with any measure of rigidity. The issues are fact sensitive and the context of the decision under review must be considered along with the statutory authority being exercised by the decision maker. Insofar as the statute is concerned, the court should consider *the shape of the legal and administrative system within which the decision is taken*. There is also the right to be heard and to make representations. This also encompasses a general duty to consult. Again it must be observed that these are not written on tablets of stone. The circumstances of the case and the legislative framework must be taken into account in determining whether this duty exists and whether it has been breached. Insofar as it relates to the duty to consult, counsel for the claimant referred the court to **Halsbury's Laws of England**¹¹ where the following was stated at paragraph 61:

“A duty to consult before reaching a decision or exercising a function may be imposed by statute or may arise because of a legitimate expectation possessed by a potential consultee. Legislation has over the years imposed a variety of obligations to consult, or to take similar steps. It may impose a duty to ascertain the views of specific persons, or to give public notice of proposals and to consider any representations received. Where consultees are specified by legislation, others will not normally be able to argue that they should also have been consulted. Legislation may give the decision-maker some discretion as to whom he should consult. In such a case, the court will not interfere with the choice of consultee unless it was based on a misinterpretation of the relevant provision, was made in bad faith or was one which no reasonable decision-maker could have made. Sometimes consultation may take place through a representative organization. A duty to consult may be a continuing one but it will not normally arise until there are in existence proposals sufficiently well formulated for sensible consultation about them to take place. A statutory (or similar) requirement to consult will normally be construed as a mandatory one. Consultation is a word which is in general use and its meaning is well understood. The decision-maker must consult with an open mind, but he

¹¹ (5th Edition) Volume 61

is not bound by the views expressed to him, nor is he normally obliged to enter into a dialogue with those who express them. Those consulted must be provided with sufficient information to enable them to express their views, and they must be allowed sufficient time in which to do so.”

- [64] Counsel also referred to the case of ***R v Brent London Borough Council, ex p Gunning***¹² in support of the submissions that the scale, complexity and importance of the subject matter are factors in assessing how much time is required for consultation.

(c) Unreasonableness and/or Irrationality

- [65] In general, the principles of unreasonableness and irrationality are well known and established in case law. Reference was made for example to the judgment of Lord Green in the often cited case of ***Associated Provincial Picture Houses Ltd v Wednesbury Corpn***¹³. In that case, Lord Green noted the following as it relates to the exercise of a discretion afforded to a public authority by statute:

“When discretion of this kind is granted the law recognizes certain principles upon which that discretion must be exercised, but within the four corners of those principles the discretion, in my opinion, is an absolute one and cannot be questioned in any court of law. What then are those principles? They are well understood. They are principles which the court looks to in considering any question of discretion of this kind. The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act make it clear that certain

¹² (1985) 84 LGR 168).

¹³ [1948] 1 KB 223

matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters...

- [66] There is nothing controversial in these principles. If a public authority is mandated by statute to consider certain issues and/or interests in exercising a discretion he is duty bound to so. Conversely, if he is obligated to disregard certain issues or interests he ought to ensure that his mind is not prejudiced by such interests. The courts are entitled to enforce these obligations. Lord Green goes on in this judgment to address the principal of reasonableness in more detail when he states as follows:

“... a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting “unreasonably.” Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J. in Short v. Poole Corporation [1926] Ch 66, 90, 91 gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another...”

- [67] Lord Greene was also careful to point out that public authorities are often entrusted with duties and responsibilities in specialized areas where the knowledge and expertise of persons endowed with such responsibilities must be taken into account. The courts ought not to be too quick to undermine that authority unless there is good reason to do so. He went on to state that ***“if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere...”***

[68] Insofar as it relates to the issue of unreasonableness, counsel for the defendants referred to the case of **Kruse v Johnson**¹⁴ where Lord Russell noted that when the court comes to consider the reasonableness of by-laws which are promulgated by public representative bodies, the court should approach them from a different standpoint, in that they ought generally to be supported. Lord Russell went on in this judgment to note that:

"I think courts of justice ought to be slow to condemn as invalid any by-law, so made under such conditions, on the ground of supposed unreasonableness. Notwithstanding what Cockburn C.J. said in Bailey v. Williamson (1), an analogous case, I do not mean to say that there may not be cases in which it would be the duty of the Court to condemn by-laws, made under such authority as these were made, as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, "Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires." But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded.

[69] Essentially, Lord Russell made the point here that the court may interfere with a decision of a public authority if it is satisfied that there has been partiality and inequality among different classes of people; if there is evidence of bad faith or that the decision was manifestly unjust, oppressive or a gratuitous interference with individual rights. In such cases, the court is entitled to find that this could not have been the intention of Parliament. By setting aside such a decision it would seem that the courts were not undermining Parliament's intention, but rather enforcing an overriding objective of Parliament; which is to ensure that the public authority does not act in bad faith or in a manner which is unduly oppressive. Lord Russell went on to note that:

¹⁴ [1898] 2 Q.B 91

“A bylaw is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there. Surely it is not too much to say that in matters which directly and mainly concern the people of the county, who have the right to choose those whom they think best fitted to represent them in their local government bodies, such representatives may be trusted to understand their own requirements better than judges. Indeed, if the question of the validity of by-laws were to be determined by the opinion of judges as to what was reasonable in the narrow sense of that word, the cases in the books on this subject are no guide; for they reveal, as indeed one would expect, a wide diversity of judicial opinion, and they lay down no principle or definite standard by which reasonableness or unreasonableness may be tested.”

- [70] This dicta is compatible with the general mantra that courts are not best suited to address the macro-economic and macro-political issues which the Government of the day may necessarily confront. It also encourages judicial restraint in recognizing that the people of the territory have elected those who they entrust with certain decisions and it is best to leave those decisions for them or those to whom the authority is lawfully delegated. In the case of ***The Queen on the application of Milton Keynes Council & Ors v Secretary of State for Communities and Local Government***¹⁵ the court addressed this issue when the following was noted:

“...the Secretary of State clearly had a political agenda and the decision to make the statutory instruments was overtly political. The Secretary of State was entitled to inject a degree of urgency into the perceived need. Mr. Morshead relies on the approval by Laws LJ in R v Secretary of State for Education and Employment ex parte Begbie [2000] 1 WLR 1115, at 1130, [2000] ELR 445, of the statement in Wade and Forsyth Administrative Law, 7th edn (1994), p 404: “Ministers’ decisions on important matters of policy are not on that account

¹⁵ [2011] EWCA Civ 1575

sacrosanct against the unreasonableness doctrine, though the court must take special care, for constitutional reasons, not to pass judgment on action which is essentially political.

[71] The court went on to put the issue more succinctly when it was stated that ***“[t]he more the decision challenged lies in what may inelegantly be called the macro-political field, the less intrusive will be the court’s supervision.”*** It is therefore important for the court to always be mindful of the role which the various branches of Government play. Matters which are clearly political or even economic in nature are best left to the political branches of Government to decide upon. The public officials who are endowed with the statutory and/or constitutional authority to address such issues are in the best position to make such decisions and the court should be slow to interfere with the exercise of that discretion unless it can be shown that there was bad faith or an improper motive which drove the decision maker to implement the policy.

[72] The court may also interfere if the decision was manifestly absurd. In light of this counsel for the defendants referred to the case of ***R v Environment Secretary, Ex P. Hammersmith LBC***¹⁶:

“The restriction which the Nottinghamshire case [1986] A.C. 240 imposes on the scope of judicial review operates only when the court has first determined that the ministerial action in question does not contravene the requirements of the statute, whether express or implied, and only then declares that, since the statute has conferred a power on the Secretary of State which involves the formulation and the implementation of national economic policy and which can only take effect with the approval of the House of Commons, it is not open to challenge on the grounds of irrationality short of the extremes of bad faith, improper motive or manifest absurdity. Both the constitutional propriety and the good sense of this restriction seem to me to be clear enough. The formulation and the implementation of national economic policy are matters

¹⁶ [1990] 1 AC 521

depending essentially on political judgment. The decisions which shape them are for politicians to take and it is in the political forum of the House of Commons that they are properly to be debated and approved or disapproved on their merits. If the decisions have been taken in good faith within the four corners of the Act, the merits of the policy underlying the decisions are not susceptible to review by the courts and the courts would be exceeding their proper function if they presumed to condemn the policy as unreasonable.”

- [73] It would therefore be essential for the court to consider the statutory authority which underpins the decision in order to even determine whether its powers of judicial review should be exercised. The nature of the decision as one which may fall into the category of a discretion exercised on the basis of political judgment is one in which the courts should be slow to intervene unless it is done in bad faith, or it is so manifestly unreasonable so as to be absurd. I turn now to analyse the facts of this case and the submissions made by counsel for both sides in light of the authorities referred to.

Analysis

Legitimate Expectation

- [74] In light of the authorities presented, counsel for ABC submitted that there is a clear and unambiguous promise made to ABC by the 1st and 2nd defendants. As was pointed out by counsel, the court must consider the terms of the representation made by the Government and what would reasonably have been understood by those to whom it was directed. In light of this, specific reference was made to the terms outlined in the Premier’s letter of 26th June, 2022 and the subsequent letter of Mrs. Rogers dated 28th June, 2022.

- [75] The Honourable Premier, after consulting with the business community noted that:

“My administration’s priority remains to protect the people of Anguilla from excessive inflationary pressures whilst also ensuring the continued viability of Anguillan businesses. My administration has listened to your concerns, as set out in your letter

of 17 June 2022, and as further articulated at our meeting last Friday. In listening to your concerns, we have given due consideration to all your proposals, in particular how recommendation #3 in your letter could be adopted.”

[76] Counsel submits that these opening paragraphs immediately convey that a decision has been taken to give IGT relief as requested by the business community. Counsel also based this submission on specific responses to questions put to various witnesses during the course of cross-examination. In particular Mr. Hobson, when he answers yes to the question of whether the government had decided to give IGT relief by that date as well as various statements made by Mrs. Kathleen Rogers during her cross-examination.

[77] Reference was also made to the fact that the Premier’s letter goes on to state that the *“Executive Council met on Sunday 26 June 2022, to consider the implementation of transitional provisions allowing for Interim Goods Tax (IGT) paid to be treated as a credit to offset future tax obligations.”* It was therefore submitted that the paragraph makes the fact of that decision clear. The Executive Council had met to consider how the IGT relief would be implemented. Counsel therefore submitted that this was a clear representation by someone with ostensible authority to make it and constitutes a clear and unambiguous promise made to the business community that a tax credit against future obligations had been approved by the Executive Council.

[78] However, I do express my own view here that a decision to remit IGT does not necessarily constitute a clear and unambiguous promise to the business community in the manner submitted by the claimant. There is no doubt that after consultation the government had considered, and perhaps determined, that a tax remission was the best option in order to address the concerns of the business community, as well as, and perhaps even more importantly, the impact that inflation would have had on the consumer in general. But, when considering the specific nature of the expectation claimed by ABC, that in and of itself is not a binding promise for which a legitimate expectation can arise.

[79] The Premier’s letter went on to state that *“[a]s part of this process, GST Registered businesses desirous of seeking IGT credits will be required to submit to the Inland*

Revenue Department the following information/documents I. Listings of inventory as at 30 June 2022 evidencing the IGT paid, exclusive of zero rated & exempt items. Stock must be valued on a first in-first out basis, based on import values; and II. Details on annual turnover.” Mrs. Small-Davis KC makes the argument here that the Premier was plainly setting out the information that was required to process the claim for the IGT credit. However, the Premier went on to note the following in his letter:

“All information would need to be submitted electronically as spreadsheets by 18th July 2022. [This deadline was eventually extended to 31st August 2022]. The requested information will inform the framework of the proposed IGT credit. This framework will consider variations in the fullness of records that respective businesses may ordinarily maintain, with special consideration for those without complete records.

Understandably, this support to businesses will come at a cost and reduces Government’s fiscal space to be able to respond further to rising inflation and the broader global economic shocks this might create. Consequently, Government is minded to consider these credits primarily based on assurances made by the business community that any credits or concessions will be passed on to consumers in the form of lower prices.”

[80] Counsel’s submission is that the terms of this letter communicated a clear and unambiguous promise or representation made by or on behalf of the public authority. It was also noted that a fair reading of the Premier’s letter would reasonably have been understood by everyone to whom it was directed that a substantive benefit will be applied by way of a credit for the IGT that had been paid on its stock on hand as at 30th June, 2022.

[81] It was noted in counsel’s submissions that in Mrs. Rogers’ letter of 28th June, 2022 to the business community, she also made a clear and unambiguous statement that the Government of Anguilla had proposed interim arrangements allowing for IGT paid to be treated as a credit to offset future tax obligations. Mrs. Rogers’ letter specifically stated that *“in order to prevent excessive increases in prices, due to the application of GST on stock*

on hand for which IGT has been paid, the Government of Anguilla had proposed interim arrangements allowing for IGT paid to be treated as a credit to offset future tax obligations.”

Mrs. Rogers then goes on in the letter to outline various requirements needed for the Government to consider the remission of IGT for the various businesses.

[82] Counsel for ABC argues that Mrs. Rogers’ letter does not contain any requirement for the actual re-pricing of goods for eligibility for the tax credit. Counsel went on to argue that ABC believed that protocols stated in the letter would be the relevant requirements. The claimant therefore expected that it would receive the IGT credit once it satisfied the criteria outlined in the 28th June, 2022 letter. ABC therefore did not expect to be subjected to further requirements being imposed at a later date as a condition for the credit and especially not at short notice.

[83] Insofar as it relates to the defendants’ own submissions on whether there was an actual promise made, two issues were raised for the court’s consideration. The first relates to the question of whether there was any statutory authority for the Premier to have made the promise in the first place. In the event that the court is not in agreement with this submission, counsel goes on to argue that there was no clear and unambiguous promise made prior to 23rd December, 2022.

[84] It is submitted on behalf of the defendants that the Premier had no statutory authority to remit taxes as that authority is vested in the House of Assembly (the Legislature) under section 47 of the Anguilla Constitution 1982. This would be the case as on the particular facts of this case, the remission of IGT on goods exceeded the \$1,000.00 limit. Any remission above that amount needed the sanction of the Legislature in accordance with section 16 of the ***Financial Administration and Audit Act***. On the authority of the case of ***BCB Holdings Limited & Anr v. The Attorney General of Belize*** counsel argued therefore that the Premier’s letter cannot constitute a promise as the remission of the IGT at that point had not been approved by the House of Assembly.

[85] It was submitted that ABC cannot seek to justify the Premier’s alleged promise on the basis of the exercise of prerogative power as statute overrides the prerogative by the taxing provisions in the Anguilla Constitution, being section 55(2)(a) thereof. This provides a

procedure for imposing tax and altering tax and which is reinforced under statute. The argument is that even if it were to be assumed that a promise was made in the Premier's letter, such promise was not given pursuant to the exercise of any statutory power, or pursuant to the exercise of a prerogative power. In the result, if the Premier did make a promise to remit the IGT in his letter of 26th June, 2022, which is denied, then any attempt to uphold this promise would be unconstitutional, void and contrary to public policy in the absence of Parliamentary approval.

[86] As it relates to this specific point I state that I do not agree with that submission. To my mind the decision in ***BCB Holdings Limited & Anr v. The Attorney General of Belize*** does not establish the proposition being made by counsel for the defendants. In fact, Saunders J was careful to point out that “***Governments in the region are authorised to make promises to public or private bodies that the latter may enjoy derogations from the revenue laws of the state, but whenever this occurs the promises must be sanctioned by the legislature or a body specifically authorised by the Constitution or the legislature, before they can be implemented.*** There is nothing here to suggest that a promise cannot be made by the Premier for which he may be held accountable. What must be understood by those who expect to benefit from such promises is that the Premier or other public authority would at the very least attempt to seek the parliamentary approval which is necessary to ensure that the contract or the legitimate expectation of the person in whose favour the promise was made would be sought. It would be doubtful that the court would turn a blind eye to a circumstance where someone has acted to his or her detriment on a promise made by a public authority who simply does nothing to seek the relevant approval for the implementation of the promise he had made.

[87] In the ***BCB Holdings*** case, it was clear on the face of the contract that the Government had no intention to seek the necessary legislative approval and that the appellants had in fact consented to that position. This was the case as the terms of the settlement deed were to have remained confidential. Parliament does not conduct its affairs in private and a settlement deed for the remission of taxes which in itself circumvents the parliamentary approval necessary to implement it was therefore void. In the circumstances of the case before me however, the Premier did in fact seek parliamentary approval and never

expressed any intention not to. However, the quarrel which ABC has with this process is that they allege that the Government directly sought approval on terms which were contrary to what it had promised and insisted upon new requirements which had not previously been agreed. I doubt very much that a public authority which makes a promise for the remission of taxes or entered into some form of contractual arrangement as was done in ***BCB Holdings Limited & Anr v. The Attorney General of Belize***, can avoid scrutiny if he puts a bill before Parliament which is contrary to what he had promised in the first place to the extent of undermining the very nature of the agreement which had been entered into. That may very well be subject to judicial scrutiny.

[88] However, having said that, I agree with counsel for the defendants where it is argued that there was no clear and unambiguous promise in the Premier's letter of 26th June, 2022 for which a legitimate expectation had arisen. I say so for a number of reasons. In my view, the court must put into context the nature of the legitimate expectation which is being claimed by ABC. The submission is that the terms of the Premier's letter, coupled with that of Mrs. Rogers on 28th June, 2022, set out a clear promise to remit IGT and set out the full ambit of the requirements upon which that promise would be honoured. In my view, a fair reading of the letter of the Honourable Premier and that of Mrs. Rogers could not have drawn the claimant to that conclusion.

[89] The Premier's letter clearly indicated that he had consulted with the business community and that the Government had given due consideration to all of the proposals, in particular how recommendation #3 could be adopted. The letter seems to make it quite clear that whilst the Government had given consideration to the proposal of an IGT remission and sought Executive Council approval of it, the information which was requested from the business community was necessary to give consideration to the framework in which an IGT remission could have been implemented. In giving consideration to that issue, the requested information was designed to inform the framework of the proposed IGT credit. The Premier went on to outline a major priority of the Government in giving consideration to any remission; and that was ensuring that there would have been a reduction of the price of goods to the consumer so as to ease the inflationary burden which the new tax would have imposed on them. The letter specifically stated that the Government was minded to

consider these credits primarily based on assurances made by the business community that any credits or concessions will be passed on to consumers in the form of lower prices.

[90] There was some debate in the hearing of this matter as to whether ABC and other businesses had already given a verbal assurance at a consultation meeting that the prices would have been lowered in keeping with the Premier's request. However, for my part I would be disinclined to encourage such an approach. The notion that a verbal assurance at a public consultation would be enough to raise and enforce a legitimate expectation of this nature should not receive the sanction of the court. It is therefore unnecessary to reconcile this debate as to whether this assurance was given, as I would find that such an assurance cannot give rise to a legitimate expectation for tax payer funds to simply be handed over to members of the business community in this way. In any event, at one point in his own evidence Mr. Lake contradicts this as he argued that ABC had in fact not received information from the Government as to what it expected in the lowering of the prices. At paragraph 14 of his affidavit in support of this claim he noted that neither the Premier's nor Mrs. Rogers' letter gave any indication of what the level of the credit would be, when it would be received, nor what needed to be done post consultation to receive the credit. To my mind, those were issues open for determination in the framework referred to by Mrs. Rogers, once the information requested had been examined. It cannot therefore be said that providing the inventory was all which was needed to be done in order to be entitled to a remission of the IGT.

[91] Mrs. Rogers starts off her own letter by making it clear that *"in order to prevent excessive increases in prices, due to the application of GST on stock on hand for which IGT has been paid, the Government of Anguilla had proposed interim arrangements allowing for IGT paid to be treated as a credit to offset future tax obligations."* That had been a proposal made by the Government. Mrs. Rogers' letter goes on to outline the protocols which apply for the proposed arrangements but also went on to point out that those requirements were designed to inform the framework of the proposed IGT credit.

[92] Nothing in this letter satisfies me that a fair minded person to whom this letter was written would conclude that all ABC or any other business needed to do was present the inventory

without more in order to be entitled to a remission of taxes from the Government. I say so for two (2) reasons. Firstly, the proposal which was on the table at the time was that there would be an offset of the IGT payments against future tax obligations and secondly there had to be an assurance that the remission would have been passed on to the consumer in the form of lower prices. To my mind, it would at least be very likely from that letter that, even after submitting one's inventory, a local business would have had at some point to also present evidence that its prices had been lowered prior to the actual offsetting of the tax obligation when it arises in the future. It is doubtful that the Government would have agreed to be that lackadaisical with the financial affairs of the island to simply not demand proof that prices had in fact been lowered before allowing such an offset. In any event, if that was what was promised by the Government, there would be clear public policy reasons for the court to be disinclined to demand compliance by way of judicial review.

[93] Whilst the Premier's letter also references the impact which the implementation of the GST would have on local businesses, I do agree with the submission of counsel for the defendants where they state that the issues in this case center around the policy decision of the Government of Anguilla to alleviate the hardship faced by consumers on account of excessive inflationary pressures, through the conduit of the Anguilla Business Community reducing and repricing stock on hand to reflect the removal of Interim Goods Tax ("IGT"), in exchange for the subsequent remission of tax by the Government of Anguilla. I also agree with the submission that the remission was not necessarily designed to create a direct financial benefit to the business community. What it was designed to do was to repay to businesses the IGT which they had paid to the Government on the importation of the relevant goods in order to ensure that these sums would be passed on to the consumer by lowering the prices of those goods. In light of this, I agree that the letters of the Premier and Mrs. Rogers could not have given the impression that simply presenting an inventory was all that was necessary in order to qualify for the remission.

[94] However, I am also of the view that even if there had been a promise of a tax remission on the requirements outlined by the claimant, I would not have been minded to interfere with a decision to resile from it. I am of the view that such a decision and the reasons for that decision fall within the macro-political and macro-economic policy agenda of the political

branches of Government and as such, the court should be very slow to intervene and interfere with such decisions. I would even go as far as to say that a demand for an actual re-pricing of goods to reflect the removal of the IGT prior to obtaining a check from the Government for a remission can hardly be described as an ignoble demand. If anything it comes across as the more responsible way to ensure that the Government fulfills its duty in ensuring that the tax payer resources are properly managed.

[95] The evidence suggests that having obtained the inventory the Government assessed what had been presented by the business community and made a number of decisions. The first was to remit the taxes as a one-time pay-off by way of check rather than as a credit against future tax obligations as it had previously articulated. Mr. Hobson and Mrs. Rogers stated that the reason for doing so was that it would assist in alleviating any uncertainty regarding the taxes likely to be collected by the Government in the future. By simply closing this matter off within the financial year, the Government would be capable of moving forward in a new budgetary cycle without the uncertainties that an offsetting of future tax obligations would create. I note that this would have created a very narrow window within which the government was to implement such a policy. I will address this time frame later on in this judgment. However, when it comes to the question of the decision itself, I can again find nothing ignoble about it and it does not appear to me that ABC is concerned with the question of whether it was to receive a check as opposed to a credit against future tax obligations. That aspect of the decision can hardly be impugned.

[96] The second aspect of the decision which was made by the Government was that there needed to be proof that the goods had been re-priced before a check can be paid over to the local business. Again there are issues which can be raised regarding the timeframe within which the re-pricing had to have taken place and the proof submitted to the Government. I find that these fall to be considered on the ground of unreasonableness. However, insofar as it relates to any legitimate expectation, I do not find that it was ever represented to the business community that the inventory was all which was required. The issue of the repricing of goods was always on the table during consultations and this requirement would come as no surprise to ABC. I also find that there would be no reason

for the court to interfere with that requirement as it is a policy decision made by the Government for economic and political reasons.

- [97] I find therefore that there was no legitimate expectation that ABC would have been entitled to a remission on the basis of the provision of an inventory to the Government. The requirement that businesses had to lower their prices in order to qualify for the IGT remission was not new in that it was always expected that prices had to be lowered. I also find that even if this was a new requirement, I would not interfere with that specific decision on the ground that it was a macro-economic or macro-political decision which the Government was entitled to make. I would therefore dismiss this element of the claim.

Procedural Fairness and the Duty to Consult

- [98] It was also submitted on behalf of the claimant that one of the grounds of legitimate expectation is a duty to consult those affected or potentially affected by the decision. It was further submitted that if there was to be a change in the manner in which a benefit would be conferred further consultation ought to have taken place. Counsel argues that, where a public authority promises that a consultation will be conducted in a particular way or on a particular basis, or has conducted consultation in a particular way, departing from that constitutes a breach of a legitimate expectation.
- [99] Counsel for the claimant went on to submit that ABC had a legitimate expectation that it would be consulted in a fair and reasonable manner regarding the implementation of the IGT remission. It was suggested that the evidence of Mrs. Rogers, that at a meeting at which representatives of ABC was not present, the business attendees were told of the need to re-price their stock right away. Mrs. Rogers was of the view that those who chose not to attend had themselves to blame. That was their problem. This, it was argued, demonstrates that the process of consultation was not conducted fairly.
- [100] The submissions went on further to state that in imposing a further requirement by letter dated 23rd December, 2022 for ABC to provide written confirmation with supporting documents evidencing the repricing of relevant stock on hand to remove the IGT by 27th December, 2022, a significantly short time frame, and then by later on passing regulations

with a retroactive deadline, the defendants' consultation with the claimant was wholly unfair and a breach of the claimant's legitimate expectation to due process and fair consideration. Counsel submitted that the defendants' change of policy was sudden and implemented peremptorily and not in keeping with the discussions the claimant had with the defendant's representatives. Consultation was illusory and therefore meaningless and the claimant was not given sufficient information to enable them to effectively participate in the decision-making process.

[101] It was therefore submitted that the principle of legitimate expectation is grounded in fairness in public administration, and the actions of the defendants in preventing the claimant from accessing a remission of IGT after creating a legitimate expectation on the part of the claimant that such remission of IGT to it would be forthcoming based on the terms of the Permanent Secretary's 28th June 2022 letter to the business community including the claimant, is wholly unfair. Further, the denial of the credit to the claimant was done in circumstances where the 3rd defendant acknowledged to the claimant's representatives that the claimant was entitled to a large credit based on its records, with which no fault had been identified.

[102] In addressing those submissions I make the point firstly that I have already concluded that there was no legitimate expectation that ABC would be entitled to a remission on the IGT purely on the provision of its inventory as was required by the letters from the Premier and Mrs. Rogers in June of 2022. The requirement therefore that a re-pricing of the goods had to take place before the tax was remitted was not new in the sense that a fair reading of the various letters made it clear that the remission had to be passed on to consumers and that the Government was considering the framework within which the remission would be granted. I also do not accept that a verbal assurance was given at the meeting that ABC would lower its prices.

[103] Insofar as it relates to the meeting which was held at which the issue of re-pricing was raised, I make two points here. I do not agree with counsel's criticism of Mrs. Rogers' response to the fact that some local businesses were not present at the meeting. To my mind, if the Government embarks on a consultation it would be equally important for those

who are affected by the decision to attend those meetings. The evidence does not suggest to me that this meeting was conducted in secret and ABC provided no reason in the evidence as to why it was not present at the meeting; if it did in fact take place. In fact it appears that two businesses attended a previous meeting of the same character held for supermarkets. They appeared to have been the only two who had actually lowered their prices prior to 31st July, 2022. Though it is not quite clear to me, I understand that the subsequent meeting may have been abandoned due to non-attendance of various businesses. In my view, it would have been proper for ABC to have attended this meeting in order to fully participate in the consultation process. Something must therefore be said about the willful non-participation in certain aspects of the consultation process whilst at the same time seeking to move the court to interfere with a public authority's decision on the grounds of the lack of sufficient consultation.

[104] The second point I wish to make on that issue is that I do agree that even if an issue of the nature of re-pricing was discussed at a meeting, it ought to have been placed into writing. Just as the court would not accept a verbal assurance at a meeting by local businesses that prices would have been lowered, the court would not accept that the Government had effectively communicated that the re-pricing had to take place at a meeting without formally crystalizing this requirement into writing.

[105] However, having said that, I do not agree that this is an issue which falls to be considered under the grounds of a lack of consultation. To my mind, the Government had done its consultation and had collected the information which was necessary to make an informed decision. Thereafter the team charged with the responsibility to assess the issue came up with a general framework which the defendants were entitled to decide upon. As I have already decided, the decision to require a re-pricing of the goods is one which this Court will not interfere with. On the question of the timelines within which to do so however, I am of the view that this is an issue which ought to be considered under the principles of the reasonableness and rationality of the decision. There was no need for any further consultation and there was no promise or expectation that the claimant would have been further consulted prior to a determination of the framework within which the remission would have been granted.

[106] For the same reasons I do not find that there was procedural unfairness in relation to the decision made by the Government. The claimant was able to participate in the consultation process and provided the information which was necessary to assist the Government in establishing the framework within which the remission was to take place. The qualifications for the remission are generally not such that the court would interfere with. I am of the view that the main thrust of the complaint which is left to be determined here, is the reasonableness of the timelines imposed for the re-pricing of the goods.

[107] I make one other point here. I believe a distinction is to be drawn between the procedure adopted in making a decision of this nature and a procedure enshrined in the actual decision made for qualification for the IGT remission. The process of consultation, collection and collation of data and information is one thing. The requirements of procedural fairness during that process are designed to ensure that a reasonable opportunity is given by those who may be affected by the decision to state their views before a decision is made. However, the requirements for qualification of the IGT remission in the regulations are part and parcel of the decision itself. It is not a procedural issue insofar as it relates to the process leading up to the making of the decision. It is for this reason I am of the view that the timelines in the regulations fall to be considered on the question of unreasonableness and irrationality and not in the question of procedural fairness. The claimant had an opportunity to present its case during consultations and presented its inventory for consideration of the framework. Whilst there may be valid criticisms of the process, I do not find there to have been procedural unfairness in that process.

Unreasonableness and Irrationality

[108] It is on this ground that I agree with the submissions of counsel for the claimant to some extent. It is however, important to carefully assess the submissions in order to explain the conclusions I have come to.

- [109] Counsel for the claimant submits that the defendants' decisions were so unreasonable and/or perverse that no rational decision-maker could have come to them. This, it was argued, was because the decision made it impossible for ABC to comply with the deadline imposed. It is alleged that the defendants imposed additional requirements on ABC regarding information and documentation required of ABC in order for them to qualify for remission of IGT, contrary to the previously published requirements, and to have done so at a late stage when it was physically impossible for ABC to comply by the specified deadline was unreasonable and irrational. It was argued further, the enactment of regulations which imposed a retroactive deadline of 27th December, 2022 for GST registered businesses to provide written confirmation with supporting documents evidencing the repricing of relevant stock on hand to remove the IGT was manifestly unreasonable and irrational.
- [110] It was submitted that ABC had used significant resources to conduct an extensive inventory exercise to meet the requirements of the Government for the IGT credit. The expenditure of substantial hours by management and staff, the purchase of inventory storage racks, the purchase of software upgrades to facilitate the inventory process, the purchase of extra scanners for staff to scan thousands of the items, the purchase of additional computer equipment as well as hiring additional staff to work on the inventory are just some of the costs incurred by the business to comply with the Government's request.
- [111] It was submitted further that, in lieu of the IGT credit, ABC's prices reflect an additional 9% on stock on hand as at 1st July, 2022. The GST tax has negatively impacted sales because the cost of goods is now higher for the customer. The claimant has reduced the frequency of container shipments due to reduced sales. This has affected the claimant's ability to service its customers who are contractors and sub-contractors who cannot receive materials in a timely manner.
- [112] I must state however that I am not of the view that the full extent of some of those submissions has been established by the facts. I do understand that the inventory came at a cost to ABC and this was a factor which the defendants ought to have had in their

contemplation when making a final determination. However, the evidence did not go on to establish that there was a reduced frequency of containers and no evidence was presented to the court to substantiate the notion that there was a negative impact on sale of goods as a result of the IGT. While these broad assertions were being made, there was not much by way of evidence to prove this. In fact I would find that if the goods were actually sold at a price inclusive of the IGT then it would be difficult to argue that ABC should be entitled to funds from the Government on account of stock which had been passed on to the consumer at a higher price.

[113] Mr. Lake insisted that ABC was placed at a competitive disadvantage but did not go further to elaborate on this issue, given that the evidence suggests that only two businesses had managed to secure the IGT credit. It is apparent that no other business in ABC's field of commerce had complied. The court is asked to infer that, given the size of its stock, ABC was left at a disadvantage. However, given that what is being requested here is an interference with the tax policies of the political branches of Government, the court should proceed with that type of assertion with some measure of caution. It is doubtful that the court can impose on the Government a duty to concern itself with a competitive disadvantage on ABC's part, given the broad economic considerations under review here. Ultimately the imposition of a new tax will come with its challenges and the manner in which this is to be implemented is a matter best left to the political branches of Government to consider.

[114] However, the claimant also submits that the regulations were ratified by the Legislature on 30th December, 2022. Given that the deadline for the supply of the information was 27th December, 2022, the legislation was therefore retroactive and as such void under the provisions of section 26(2) of the **Interpretation and General Clauses Act**. In fact, counsel went as far as to argue that the regulations passed by the House of Assembly on 30th December, 2022 were unconstitutional and therefore void. However, I state briefly that there is nothing unconstitutional about the regulations. The proper procedure was followed and the policies enshrined therein do not fall foul of the general powers of the Legislature.

[115] The defendants on the other hand have argued that the court cannot interfere with this decision on the ground of irrationality and or unreasonableness because it is a decision which is inherently political in nature. It falls within the macro-political and macro-economic decisions of the State. The court was reminded of the case of *Kruse v Johnson* where it was stated that the court should only interfere with such a decision on the grounds of how unreasonable the decision makers were:

“... found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, “Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires.” But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded.”

[116] As far as counsel for the defendants are concerned “[t]he question for consideration is this, is there bad faith, improper motive or manifest absurdity? Indeed in his affidavits Mr. Mitchell Lake accuses the Government of acting in bad faith. He argues that the Government never intended to ensure that ABC was capable of complying with the requirements for receiving the IGT credit and took decisions which made it impossible to do so. However, I am not of the view that there is evidence of bad faith on the part of the defendants. It is again important to put the actual decision on the part of the Government into context.

[117] Firstly, as I have already stated, the decision to offer a one-time check payment as opposed to a credit against future tax obligations was a decision which was within the discretion of the Government to make and I see no reason to interfere with it on the grounds of unreasonableness. The reasons given to making such a determination were that it would assist in alleviating any uncertainty in the budgetary and financial process moving forward. I see nothing wrong with that consideration and find that there was no bad faith or improper motive in coming to that conclusion.

- [118] The decision to require proof of actual re-pricing of the goods to remove the IGT is viewed in a similar vein. The business community had always known that the IGT credit was being considered on assurances that prices would have been reduced. There was no bad faith or improper motive in imposing this requirement and I see no reason to interfere with it.
- [119] It is on the question of the time lines contained in the regulations which I find myself in agreement with the claimant. However, I do not find that there was bad faith or an improper motive for imposing such deadlines. It was argued that the 27th December, 2022 deadline for the supply of information was necessary in order to bring this issue to an end before the financial year ended on 31st December, 2022. It would also seem that the defendants were of the view that businesses ought to have lowered their prices on the premise of trust of the Government's commitment to remit the IGT once the framework had been worked out. Indeed this appears to have been the main theme of the Premier's address to the House of Assembly which was tendered into evidence in this case. I do not find that this constitutes bad faith or an improper motive on the part of the defendants.
- [120] However, I find that the time-lines contained in the regulations are manifestly absurd for a number of reasons. Firstly, I do agree with the claimant that consideration ought to have been given to the costly and time consuming efforts to present the inventory to the Government in the first place. The evidence suggests that the defendants would have been aware that ABC's stock was sizeable and the time spent on accounting for that stock was significant. In fact it was so significant that additional time was requested and denied. It was also not denied that ABC was only able to complete an inventory of 60% of its outstanding stock. That ought to have been in the defendants' contemplation when the time lines were being considered.
- [121] The second issue is the arbitrary deadline of 31st July, 2022 by which all stock on hand had to have been re-priced. I agree that this was retroactive and that on the face of it this deadline had not been communicated to a majority of business owners prior to 22nd December, 2022. This is further compounded by the fact that the defendants would have been well aware that ABC and other businesses were not even capable of completing the inventory process by that date. So much so, that the Government agreed to an extension

to 31st August, 2022 for the completion of the inventory. It seems more than merely implausible to expect that prices ought to have been reduced by a date in which the very inventory to inform the framework of that process had remained incomplete.

[122] In addition to that, I agree with the claimant where it is argued that the Government had not by then given a clear indication of what the credit was likely to be and what was genuinely expected in relation to the price reduction. For example, what if the Government had rejected 50% of the stock inventory as being eligible for the credit? On which goods exactly would the local businesses be expected to remove the IGT? It was unclear as to how this would have been implemented and the imposition of a backdated timeline of this nature is manifestly unreasonable.

[123] Further to this, the defendants ought to have taken into account the size of the stock and the question of whether there was significant stock on hand at the time of the decision in December, 2022. I agree that any stock sold without the lowering of prices to remove the IGT ought not to attract a remission. However, no opportunity was given to actually reduce prices for goods which remained on-hand at the time the decision was made. This was compounded by the fact that the decision was communicated to the business community on Friday 23rd December, 2022. The following day, a Saturday, was Christmas Eve. The Sunday, Monday and Tuesday would have therefore been public holidays. This was not reasonable.

[124] Taking these into account, I do agree that these time-lines were manifestly unreasonable and unfair. Whilst I do not find this to be in bad faith and I am satisfied that there was no improper motive, this aspect of the decision is unreasonable in the Wednesbury sense of the term and rises to the level of manifest absurdity, sufficient to allow the court to interfere with it. I have considered the motive of trying to have this issue brought to an end by the end of the financial cycle and before a new one began, but that is not enough to cure the unreasonableness of the time lines which were being imposed. The Government had to have considered that it had been four months since it had collected the information from the business community. There was a natural uncertainty here regarding the actual requirement to reduce prices and the date by which it had to be done. No consideration

was given to the ability to reduce prices after 31st July 2022, or even at the point when regulations were being contemplated, and this ought to have been considered.

[125] I am prepared therefore to find in favour of the claimant on the sole ground that the timelines imposed in the regulations were unreasonable and remit the matter back to the defendants for further consideration. However it is important to underscore that the claimant cannot expect a remission on goods which were passed on to the consumer inclusive of the IGT. If there had not been a reduction in the price on account of this, then there can be no expectation of a remission. If there was a re-pricing and/or there remain goods in stock which is capable of being re-priced, then some consideration ought to be given as to how this is to be treated at this stage.

[126] I make just a few further points in relation to the issues raised in this case. Firstly, as it relates to the decision of the 3rd defendant to reject the evidence provided by ABC on 30th December, 2022, I see no reason to interfere with this. I take notice of the fact that the terms of the regulations were in fact a recommendation by Mr. Hobson and his team. However, at the time he considered ABC's evidence he had no other option but to comply with the terms of the regulations. In any event, I agree that the information presented to Mr. Hobson on behalf of ABC was insufficient to qualify for the IGT remission. Customer loyalty points and other discounts which fall within the usual business practice of ABC cannot be sufficient to qualify for a remission. There must be a reduction of the price to remove the IGT which was paid. I am cognizant of the fact that some seventeed months have passed since the implementation of the GST. It would be left for the parties to now consider how this issue is to be treated in light of the court's decision.

[127] There was also a request for general damages in the claim form. However no submissions were placed before me or evidence presented for the court to consider this issue. I will therefore make no further comments on this. I am also of the view that both sides have enjoyed a measure of success in this case and I would therefore order that each party bear its own costs.

Orders and Declarations

[128] In the circumstances, I make the following orders and declarations:

- (a) that there was no legitimate expectation that the claimant would have been entitled to a remission of the IGT solely on the requirements outlined in the letters of the Premier and the Permanent Secretary dated 26th and 28th June, 2022 respectively.
- (b) That adequate consultation had been done by the defendants in order to inform the framework for the implementation of the IGT remission. There was no need for further consultation.
- (c) That even if a legitimate expectation had arisen and there was a resiling from that expectation, the decisions of the defendants were among the macro-political and macro-economic decisions which they were entitled to make without interference by the courts;
- (d) That the timelines contained in the **Financial Administration and Audit (IGT Remission Regulations) 2022** were unreasonable. Although not imposed in bad faith nor with an improper motive, the timelines were manifestly absurd and on that ground subject to review by the court.
- (e) That section 3(1) (b) and (c) of the **Financial Administration and Audit (IGT Remission Regulations) 2022** are therefore modified so as to remove the timelines contained therein on the grounds of their unreasonableness.
- (f) The matter is remitted back the defendants for consideration in light of the decision of the court.

(g) Each party should bear their own costs.

Ermin Moise
High Court Judge

By the Court

Registrar