

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE**

ANTIGUA AND BARBUDA

CLAIM NO. ANUBOA2010/0001

BETWEEN:

H.M.B HOLDINGS LIMITED

Applicant

AND

DAVID MATTHIAS

THE ATTORNEY GENERAL OF ANTIGUA AND BARBUDA

Respondent

APPEARANCES:

Mr. John Carrington, QC, Mrs. Joyce Kentish-Egan QC and Mr. Kendrickson Kentish
Mr. Anthony Astaphan, SC, Mrs. Carla Brookes-Harris and Ms. Joy Dublin

2020: October 28th
Further Relevant Submissions July 2021
2021: December 10th

JUDGMENT

[1] **Robertson J. Introduction.** The applicant, HMB Holdings Limited, obtained a money judgment against the Government of Antigua and Barbuda. The applicant has in the past sought to enforce the judgment and has attained varying levels of success. At this time the entire judgment debt has not been liquidated. The applicant has, on this occasion, made an application under the Civil Procedure Rules (As Amended) 2000 [CPR] for orders that there be attachment of the debts currently due from specific financial institutions to the Government of Antigua and Barbuda. The applicant has also made an application for charging orders to be issued over shares in certain companies which are owned by the Government of Antigua and Barbuda. The total sum sought at this juncture is US\$18, 260,784.01.

- [2] The applicant seeks to recover the sum of US\$18, 260,784.01 as the applicant contends that this sum was admitted by the respondent as being owed to the applicant in an affidavit filed by the Financial Secretary in the Ministry of Finance sworn in proceedings ANUHCv2017/0430.
- [3] The applications before the court run contrary to the provisions of section 21 of the Crown Proceedings Act and Rules 50.2 (3) and 59.7 of the CPR. Part 50.2 provides, among other things, that an attachment of debt order may not be made to attach debts due from the Crown and refers to Part 59.7(3) for an alternate procedure. Part 59.7 provides that Parts 44 to 53, enforcement mechanisms, of the CPR are not applicable to any order against or money due or accruing due or alleged to be due or accruing due from the Crown. In accordance with the provisions of the CPR the application for an attachment order¹, and an application for a charging order are to be considered by the court without a hearing².
- [4] The applicant raised constitutional matters as grounds for the relief sought in the above-mentioned applications. There being constitutional implications, the court heard submissions from counsel for the applicant and counsel from the second-named defendant³.

The Factual Matrix in Summary

- [5] The Government of Antigua and Barbuda acquired the applicant's property⁴ under the provisions of Land Acquisition Act Cap. 233. Specifically, in 2002 the Government passed a resolution in the House of Representatives and Senate to acquire the property. The acquisition was challenged by the applicant through the process of Judicial Review and the Judicial Committee of the Privy Council delivered its ruling on the matter of acquisition on 5th June 2007 and the Privy Council determined that the compulsory acquisition was lawful. The Government of Antigua and Barbuda proceeded with the acquisition.

¹ Part 50.3.

² Part 48.5.

³ Initially heard in October 2020. Further and relevant submissions filed in July 2021.

⁴ The applicant was the registered owner of three parcels of land in the parish of St. Phillip. Registration Section: St. Phillip's South: Block 32 3282A parcels 55, 56 and 57. The property comprised 108 acres of land and was known as Half Moon Bay Resort.

[6] The Government took possession of the property in July 2007. A Board of Assessment was appointed in April 2008⁵ and an award rendered on 5th January 2010. The applicant, being dissatisfied by the award, appealed this decision. The awarded compensation was ultimately determined by the Judicial Committee of the Privy Council in 2014 in the proceedings of Attorney General of Antigua and Barbuda v. HMB Holdings Ltd⁶. In those proceedings the Government was ordered to pay:

- i. Compensation in the sum of US\$26,616,998.00.
- ii. Interest at the rate of 10.25% per annum from 23 July 2007 to 22 January 2011 in the total sum of US\$9,560,000.00.
- iii. Interest at the rate of 4% per annum from 23 January 2011 until payment; and
- iv. Costs.

[7] Subsequent to the decision of the Privy Council, the second respondent applied to the High Court seeking that the payments be made by instalments. The evidence before this court is that that application for payment to be made by installments remains part heard. In that application the second respondent contended that the proposed installments were premised on the anticipated or budgeted revenue. The proposed installments were:

- i. EC\$1,000,000.00 on or before 31st January 2015.
- ii. US\$10,000,000.00 on or before 30th June 2015.
- iii. US\$10,000,000.00 on or before 30th June 2016.
- iv. Six equal monthly installments thereafter to liquidate the balance inclusive of costs awarded and after adjusted for outstanding taxes owed by the applicant as per the Privy Council Order.

[8] The proposal for the payment of the award by instalments was subsequently adjusted by the Deputy Financial Secretary to, according to his evidence, "*accommodate adjustments in budgeted revenue*

⁵ The government consented to the Order for Mandamus to compel the appointment of the Board on 14th May 2008. [See decision of Board Chairman dated January 5th 2010 para.8.]

⁶ [2014] UKPC 5.

and expenditure facilitating the servicing of national debt to the International Monetary Fund and was made in anticipation of the sale of the acquired property”. The new proposed installments were:

- i. US\$10,000,000.00 on or before 1st June 2015.
- ii. US\$10,000,000.00 on or before 1st November 2015.
- iii. US\$5,000,000.00 on or before 1st April 2016.
- iv. US\$5,000,000.00 on or before 1st June 2016.
- v. US\$2,000,000.00 on or before 1st September 2016.
- vi. US\$2,000,000.00 on or before 1st October 2016.
- vii. US\$2,000,000.00 on or before 1st November 2016.
- viii. US\$2,000,000.00 on or before 1st December 2016.
- ix. US\$2,000,000.00 on or before 2nd January 2017
- x. US\$2,000,000.00 on or before 1st February 2017.
- xi. Final payment to include any residual balance following a reconciliation of previous payments on or before March 1st 2017.

[9] The respondent did not meet the proposed payment schedule and contended that the inability to make payments was as a result of the delay by the purchaser of the acquired property in raising the purchase price, shortfalls in revenue including from the Citizens Investment Programme [CIP] and obligations of the government towards the International Monetary Fund [IMF] and the Depositor Protection Trust⁷.

[10] On one of the applications to pay by installments, a court ordered the respondent to make the first instalment of US\$10 million as proposed by the respondent's schedule by 1st June 2015. The respondent applied to vary the order on 29th May 2015 and this application was refused and the respondent was ordered to make the payment within seven days. The respondent's appeal of the order and application to stay the execution were refused by the Court of Appeal. On 5th November

⁷ The Depositor Protection Trust was part of the ABI resolution strategy.

2015 it was ordered by the court that the applicant was to pay the sum of US\$10,000,000.00 on or before 27th November 2015.

[11] Payments have been made to the applicant by the respondent. The payments made by the respondent were:

- | | | |
|--------------------------------------|---|---|
| i. 18 th February, 2015 | - | EC\$ 1,000,000.00 |
| ii. 7 th August 2015 | - | EC\$ 1,100,000.00 |
| iii. 30 th September 2015 | - | EC\$ 100,000.00 |
| iv. 23 rd December 2015 | - | US\$ 20,000,000.00 [proceeds from sale of subject Property] ⁸ |
| v. December 2017 | - | US\$ 3,000,000.00 [balance of proceeds of sale of the subject property paid through applicant's Canadian Counsel] |

[12] Sometime in or about 2015 a dispute arose regarding the allocation of the money paid by the respondent. Specifically, the parties disputed whether the sums paid ought to be allocated to the interest or should be allocated towards the principal. As a consequence of this dispute another claim was initiated by the applicant. The determination of that matter would have obvious implications in the quantification of the sums remaining due and owing to the applicant.

[13] As previously indicated, in these proceedings, the applicant, sought to recover the sum of US\$18,260,784.01 through attachment orders and through charging orders. The attachment orders were directed to the financial institutions such as the Antigua Commercial Bank, Caribbean Union Bank, Eastern Caribbean Amalgamated Bank Limited, The Bank of Nova Scotia, Antigua Development Bank, Royal Bank of Canada and First Caribbean International Bank (Barbados) Limited. The charging orders sought are in respect of shares held by the respondent in National Assets Management Company Limited [NAMCO], West Indies Oil Company Ltd., Eastern Caribbean Amalgamated Bank Limited [ECAB] and State Insurance Company Limited.

⁸ The evidence of the applicant is that the respondent on 23rd December 2015 made two payments totaling the sum of US\$16,628,921.88.

[14] During the process of appeals, whether initiated by the applicant or the respondent, the government made no payments to compensate the applicant. The first payment was in February 2015.

The Evidence

[15] The applicant's evidence presents palpable, and somewhat understandable, frustration at the delay in obtaining the fruits of the judgment received in the company's favour in 2007. The representative for the applicant contends that the applicant had to initiate proceedings to require the government to have the Board of Assessment appointed and has been consistently engaged in litigation to obtain the appropriate level of compensation and to have that compensation paid.

[16] The applicant noted that the applicant was "*forced to file a series of legal actions against the GoAB⁹ to compel it to initiate the process of compensation as laid out by the Land Acquisition Act*". The applicant further indicated that after the decision of the Board of Assessment was delivered the claimant appealed the decision of the Board to the Court of Appeal, but the Government of Antigua and Barbuda did not pay '*the undisputed amount, as established by the Board of Assessment*'. Through an order of Mandamus made in May 2013¹⁰ against the then Minister of Finance it was determined that there was unreasonable delay by the Government in the payment of the funds. Specifically, that court determined and ordered that:

- i. The Minister of Finance was under a public duty to issue a Warrant for payment from the Treasury for the sum awarded to the applicant as compensation, interest, and costs under the provisions of the Land Acquisition Act.
- ii. The Minister wrongfully failed to carry out the said duty to issue the Warrant for payment.
- iii. The court made an order of Mandamus requiring the Minister to comply with his public duty under the Land Acquisition Act, Section 29, to issue a warrant for the payment from the Treasury of the compensation, interest and costs payable to the applicant in relation to the compulsory acquisition of property.

⁹ Government of Antigua and Barbuda.

¹⁰ ANUHCv 2012/0727.

[17] Subsequently, the Court of Appeal on November 28, 2013, ordered, among other things, that there be a declaration that the respondent's continuing failure to satisfy the award of compensation made by the Board of Assessment amounts to a breach of a guarantee to the applicant under section 9 of the Constitution.

[18] The evidence of the applicant is that in proceedings relative to a mandamus order it was discovered that a Warrant for payment of the sum of US\$71,926,497.20, the amount due in the Court of Appeal order was issued along with the corresponding payment voucher dated 9th April 2013. The applicant observed that no payment was made pursuant to the Warrant and voucher although both were certified as to funds being available to pay the entire compensation debt.

[19] It is to be noted that the award of the Court of Appeal was different from the sum awarded as compensation by the Privy Council.

[20] In 2018 the Claimant sought another order of mandamus against the Minister of Finance seeking payment in 21 days. In or around 24th February 2020 there was a representation that cabinet approved an additional payment of US\$2.8 million towards the sums owed.

[21] The respondent maintains that the government is "*committed to pay all outstanding amounts so long as the finances of the State permit it to do so*". In specific detail the respondent contends that the government has not been able to liquidate the debt because of financial constraints.

The Case for the Applicant.

[22] The applicant contends that the applicant has consistently sought to obtain fair compensation for the acquired property and to ensure that the outstanding sums be paid within a reasonable period. These attempts resulted in a litigation journey that commenced in 2007¹¹ and remains ongoing. The applicant also contends that despite the determinations by courts, including our Court of Appeal, there has been delayed payment and this delay infringes upon the applicant's rights under the provisions of section 9 of the Constitution. It is only through the aggressive litigation that the applicant has been able to recover the sums recovered. In the applicant's view the government does not intend to honour the debt.

¹¹ This being subsequent to the challenge made by the applicant to the acquisition of the property.

[23] The applicant also notes that the respondent has not taken any action to prosecute the application to pay by instalments in almost five years, that the respondent has not taken any steps to make payments by instalments so that the judgment debt is liquidated; the acquisition of the applicant's property was a discretionary act committed for a public purpose; a recent demand letter was issued by the applicant to the respondent on 22nd November 2019 seeking the liquidation of the debt and the funds are still outstanding and that it is open to the government to borrow funds to satisfy the judgment debt. On the matter of obtaining a loan the applicant notes that there have been reports that the government borrowed sums of US\$15.8 million from the ALBA Bank in Venezuela to finance the purchase of shares in the airline LIAT and a sum of US\$100 million from a consortium of banks in the United States to finance a telecommunications upgrade.

[24] The applicant in its attempt to recover the judgment debt and its use of attachment of debt orders and charging orders against the State concedes that its applications are contrary to the provisions of the CPR. However, the applicant submits to the court that the provisions of the Crown Proceedings Act [the Act] which treat with enforcement proceedings against the State, and consequently the CPR, do not provide effective remedies. The counsel for the applicant contends that the provisions in section 21 of the Act are more in the way of an 'honour code' and leaves the applicant without much recourse. This, counsel further contends is particularly the case as the applicant has in the past sought the mechanism under the provisions of section 21, but the judgment debt has not been paid in full.

[25] Counsel for the applicant submits that the court is empowered under the authorities such as **Maharaj v Attorney General**¹² and **Gairy v The Attorney General**¹³ to fashion effective remedies when fundamental constitutional rights are infringed. In the circumstances of this case an effective remedy is required to be fashioned since the applicant's right not to be deprived of property without the payment of compensation under section 9(1), its right of access to the courts under section 9(2) and under section 15(8) of the Constitution have been infringed by the State's refusal and/or neglect to fulfill its obligations. Counsel contends that the *"...question therefore becomes, how is compliance ensured? The legislature has enacted the Crown Proceedings Act and provided by section 21 the*

¹² Maharaj v Attorney General of Trinidad and Tobago (No. 2) [1979] AC 385.

¹³ Jennifer Gairy (as administrator of the estate of Eric Matthew Gairy deceased v The Attorney General of Grenada [2002] 1 AC 167 (Judicial Committee Privy Council).

mechanism for compliance with Orders of the Court. This case, however, is a paradigm example of the ineffectiveness of the Crown Proceedings Act section 21 as a method of enforcement of judgment against the GoAB as GoAB has simply refused to satisfy the judgment of the Privy Council for 6 years".

Issues for determination.

[26] The issues for determination are:

- i. Whether section 9 of the Constitutional Order is an Exclusive Regime.
- ii. Whether there is another adequate Means of Redress available to the Applicant.
- iii. Whether the provisions of Section 21(4) of the Crown Proceedings Act and Part 50.2(3) and 59.7 of the CPR are unconstitutional. What redress, if any, is available to the applicant.

Whether Section 9 of the Constitutional Order is an Exclusive Regime.

[27] It would assist if the relevant provisions of the Constitution are outlined. Section 9 of the Constitution provides:

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

(2) Every person having an interest in or right to, or over property which is compulsorily taken possession of or whose interest in, or right to or over any property is compulsorily acquired shall have the right of access to the High Court for-

(a) the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right and the amount of any compensation to which he is entitled; and

(b) the purpose of obtaining payment of that compensation:

Provided that if Parliament so provides in relation to any matter referred to in paragraph (a) of this subsection the right of access shall be by way of appeal

(exercisable as of right at the instance of the person having the interest in or right to or over the property) from a tribunal or authority, other than the High Court, having jurisdiction under any law to determine that matter.

(3) The Chief Justice may make rules with respect to the practice and procedure of the High Court or any other tribunal or authority in relation to the jurisdiction conferred on the High Court by subsection (2) of this section or exercisable by the other tribunal or authority for the purposes of that subsection (including rules with respect to the time within which application or appeals to the High Court or applications to the other tribunals or authority may be brought).

(4) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) of this section- ...”.

[28] Schedule 2 section 2(1) provides:

“2. (1) The existing laws shall, as from 1st November 1981, be construed with such modifications, adaptations, qualifications, and exceptions as may be necessary to bring them into conformity with the Constitution and the Supreme Court Order.

[29] Schedule 2 section 9 provides:

Nothing in section 9 of the Constitution shall affect the operation of any law in force immediately before 27th February 1967 or any law made on or after that date that alters a law in force immediately before that date and does not-

(a) add to the kinds of property that may be taken possession of or the rights over and interests in property that may be acquired;

(b) make the conditions governing entitlement to compensation or the amount thereof less favourable to any person owning or having an interest in the property; or

(c) deprive any person of such right as is mentioned in subsection (2) of that section.

[30] Counsel for the respondent submits that section 9 is an exclusive regime for the determination and payment of compensation under the provisions of the Land Acquisition Act. The regime is expressed in the provisions of section 9 of the Constitution and in section 9 of schedule 2 of the Constitution

Order. Accordingly, the applicant is not entitled to constitutional redress save as provided within the regime.

[31] Additionally, counsel for the respondent further submits that there is no basis for a declaration that the existing law is unconstitutional. Accordingly, the applicant is required to secure or enforce payment under the Crown Proceedings Act, an existing law in Antigua and Barbuda.

[32] In support of these submissions the court was referred to the cases of the Attorney General of Antigua and Barbuda v HMB Holdings Limited¹⁴ and the case of Blomquist v Attorney General of the Commonwealth of Dominica¹⁵. In the case of the Attorney General of Antigua and Barbuda v HMB Holdings Limited, Lord Hughes noted, among other things, that the existing law found in paragraph 9 of Schedule 2 detracts from the fundamental rights accorded by the Constitution. Specifically, Lord Hughes indicated that:

“Late as the point has been taken, it is plain that the Government is right. The Board so held in Blomquist v AG of Dominica in relation to provisions which were materially identical in the Constitution of Dominica. The point is one of pure law, and it is not and cannot be suggested that HMB’s conduct of the argument, or the presentation of evidence was in any way affected to its detriment by reliance on the Government’s mistaken concession. True it is, as Mr. Corner submitted, that paragraph 9 of Schedule 2 is contained not in the Constitution itself but in the Order, but it is, via article 3 of the Order, a condition subject to which the constitution comes into effect. It is not possible to read paragraph 9, as Mr. Corner submitted it should be read, as not detracting from the fundamental rights accorded by the Constitution. On the contrary, paragraph 9’s only content, at least in relation to pre 1967 laws, is that it does exactly that. For essentially the same reason, it is not possible to deploy either section 19 of the Constitution or paragraph 2(1) of Schedule 2 to the order to sidestep paragraph 9. Certainly section 19 provides that

“Except as is otherwise expressly provided in this Constitution, no law may abrogate, abridge or infringe or authorise the abrogation, abridgement or

¹⁴ [2014] UKPC 5 at paragraph 18.

¹⁵ [1987] 2 WLR 1185.

infringement of any of the fundamental rights and freedoms of the individual hereinbefore recognised and declared”.

However, the Constitution and the fundamental rights incorporated in it are expressly made subject to schedule 2 and thus to paragraph 9. Likewise, paragraph 2(1) of Schedule 2 to the order requires “the existing laws” to be construed with such modifications as may be necessary to bring them into conformity with the constitution but this general provision has to be read with the specific one in paragraph 9 of the same Schedule which makes particular, and contrary, provision for the purposes of section 9 of the constitution (which contains the fair compensation rule). A similar submission made in relation to an existing law providing a mandatory death penalty for murder failed in **Boyce and another v The Queen** [2004] UKPC 32; [2005] 1 AC 400; the fact that the equivalent to paragraph 9 of Schedule 2 to the order in the present case was in that case contained within the constitution itself cannot make the difference for which Mr. Corner contends; the constitution and order must clearly be construed together and the former is made subject to the latter.

[33] In this court’s view the decision of the Judicial Committee of the Privy Council has addressed the matter of the existing law provisions as it relates to section 9 of the Constitution comprehensively. Counsel for the applicant sought to draw a distinction and indicated that the Judicial Committee was specifically treating with the withdrawal of a concession, the 4% interest rate under the **Land Acquisition Act** and whether such withdrawal was unconstitutional. Their Lordships found that the concession could be withdrawn, and the correct legal position was that the rate was saved under the savings clause in Schedule 2 paragraph 9. This court notes that the Judicial Committee of the Privy Council left no space for such contention as the Privy Council extended the application to the principle of fundamental rights provisions by its reference to the case of **Boyce and another v The Queen**¹⁶.

[34] Counsel for the applicant has asked the court to consider that the proceedings before this court treat with other fundamental issues such as access to the court and the protection of the law. It is noted that existing law provisions are construed narrowly so that as full effect as possible can be afforded

¹⁶ [2004] UKPC 32.

to the rights provided under the Constitution. Conversely, the interpretation of the fundamental rights provisions is of an expansive and unique nature¹⁷. Upon such consideration the court can address its mind to these proceedings as they relate to sections 3, 15(8) and 18 of the Constitution.

[35] The applicant contends that the applicant's rights under section 15(8) remain alive as the applicant pursues its right of enforcement and that the right of access to the court necessarily includes the right of effective enforcement. Section 15(8) provides that "Any court or other authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other authority the case shall be given a fair hearing within a reasonable time". It is settled law that the access to the courts is not limitless. Reference is made to the dicta of Byron CJ in the case of **Capital Bank Investment Ltd. v Eastern Caribbean Central Bank**¹⁸ where the honourable Chief Justice referred to section 6(1) of the European Convention for the Protection of Human Rights and adopted the dicta of Lord Bingham in **Brown v Brown** that:

"Article 6 contains no express right of access to the court, but in **Golder v United Kingdom** (1975) 1 EHRR 524, 536, para 35 the European Court held that it would "inconceivable" that article 6 should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it possible to benefit from such guarantees, namely access to a court. The court added, at p. 537 para 38:

"The court considers...that the right of access to the courts is not absolute. As this is a right which the Convention sets forth without, in the narrower sense of them, defining, there is room, apart from the bounds delimiting the very content of any right, for limitation permitted by implication."

This expression of view was repeated in **Ashingdane v United Kingdom** (1985) 7 EHRR 528, 546, para 57 where the court ruled:

¹⁷ The court in **Ministry of Home and Affairs v Fisher** [1979] 2 WLR 889 at 894 H noted that "These antecedents and the form of Chapter 1 itself, call for a generous interpretation avoiding what has been called "the austerity of tabulated legalism" suitable to give individuals the full measure of the fundamental rights and freedoms referred to".

¹⁸ GDAHCV2002/0013 and 0014 at paragraph 13.

“Certainly, the right of access to the courts is not absolute but may be subject to limitations; these are permitted by implication since the right of access, ‘by its very nature calls for regulation by the state, regulation which may vary in time and place according to the needs and resources of the community and of individuals’. In laying down such regulation, the contracting states enjoy a certain margin of appreciation. Whilst the final decision as to observance of the convention’s requirements rests with the court, it is no part of the court’s function to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this field”.

[36] Similarly, the right of access to the court and the right of access to enforcement mechanisms are not without limits. The right to access to the courts can be limited for public interest considerations.

[37] **Protection of Law.** It is noted that the protection of law is not only a fundamental right as identified in section 3 of the Constitution, but it is also a fundamental principle upon which the Constitution is grounded. In this regard reference is made to the preamble, a normative feature of a Constitution, where it is stated that, “WHEREAS the People of Antigua and Barbuda- d. recognize that the law symbolizes the public conscience, that every citizen owes to it an undivided allegiance not to be limited by any private views of justice or expediency and that the State is subject to the law”.

[38] Specifically, considering the matter of the *protection of the law* reference is made to the dicta of eminent jurist Anderson JCCJ in the case of **Maya Leaders Alliance and others v Attorney General of Belize**¹⁹ where it was noted that:

“The law is evidently in a state of evolution but we make the following observations. The right to protection of the law is a multi-dimensional, broad and pervasive constitutional precept grounded in fundamental notions of justice and the rule of law. The right to protection of the law prohibits acts by the government which arbitrarily or unfairly deprive individuals of their basic constitutional rights to life, liberty or property. **It encompasses the right of every citizen of access to the courts and other judicial bodies established by law to prosecute and demand effective relief to remedy any breaches of their constitutional rights. However,**

¹⁹ [2016] 2 LRC 414 at [47].

the concepts go beyond such questions of access and includes the right of the citizen to be afforded, 'adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power'. (A-G v Joseph [2007] 4LRC 199 at [314]. See also Lord Diplock 'The Protection of the Law (1978) WILJ 11 at 13.) The right to protection of the law may, in appropriate cases, require the relevant organs of the state to take positive action in order to secure and ensure the enjoyment of basic constitutional rights. In appropriate cases, the action or failure of the state may result in a breach of the right to protection of the law. Where the citizen has been denied rights of access and the procedural fairness demanded by natural justice, or where the citizen's rights have otherwise been frustrated because of government action or omission, there may be ample grounds for finding a breach of the protection of the law for which damages may be an appropriate remedy." [Emphasis Added].

[39] Accordingly, it is noted that it is also open to the court to consider the matter under provisions of the Constitution which treat with the protection of the law and right of access to the courts. On these matters there is a case to be answered.

Whether There is Another Adequate Means of Redress available to the Applicant.

[40] The Constitution permits a Court to decline to exercise its powers under section 18 of the Constitution if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law. The Court of Appeal in the case of **The Attorney General v Sharon Braveboy et al** at [29] noted that:

"Caribbean Constitutions endow the High Court with jurisdiction to provide effective remedies for breaches of fundamental rights and freedoms. However, this jurisdiction ought not to be invoked where there are other, less far reaching, avenues for redress available to the party seeking to invoke the jurisdiction of the High Court for redress under the Constitution. On this point I note the salutary counsel of Lord Nicholls of Birkenhead at paragraph 25 of the judgment of the Privy Council in the case of **The Attorney General of Trinidad and Tobago v Siewchand Ramanoop**, wherein His Lordship stated that:

“In other words, where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule, there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse of the court’s process. A typical, but by no means exclusive, example of a special feature would be a case where there has been an arbitrary use of state power.”

[41] In the circumstances of this case there is a regime available for the enforcement of money judgments against the State. The counsel for the respondent has accurately stated that the courts have shown that the grant of an order of mandamus against the Minister of Finance is an available²⁰. In the case of **Jennifer Gairy v The Attorney General of Grenada**²¹ Lord Bingham noted that [24] to [25] that:

“The expression is also used to describe mandatory orders to which there attaches a sanction (whether explicit or implicit), such as committal, for non-compliance. Such orders, regularly made against private individuals, are not made against ministers and public officials. There is no need. Experience shows that if such orders are made there is compliance, at any rate in the absence of most compelling reasons for non-compliance. That is so in the United Kingdom, and the Board has no doubt it is so in Grenada also. But the Board would caution against the view that a mandatory order made against a minister (or government or a public official) may be disregarded with impunity: a court charged under the Constitution with securing effective protection of fundamental rights cannot be denied such power of enforcement as proves necessary for its task.

In this case the Minister of Finance is the minister upon whom there rests the obligation to ensure that the debt owed by the state to the appellant is discharged. There is no one to whom the court’s order can more appropriately be addressed.”

[42] In this context it is noted that the remedy of an order of mandamus ought to be effective.

²⁰ Gairy v The Attorney **General** of Grenada (1999) 59 WIR 174 (Court of Appeal).

²¹ Jennifer Gairy (as administrator of the estate of Eric Matthew Gairy, deceased) v The Attorney General of Grenada [2002] 1 AC 167.

[43] Counsel for the respondent submits that having regard to the dicta of the Court of Appeal in the case of **Braveboy** and of the Privy Council in the case of **Ramanoop** there ought to be evidence of arbitrary use of state's power or some other conduct for the constitutional regime to be adopted instead of a less intrusive approach. There is merit in the submissions of the respondent. This court also notes the submission of the counsel for the respondent that the applicant continues, in parallel litigation, to pursue an order for mandamus²². This suggests that, if not indicative of the fact that, although the applicant expressed frustration at the arduous process for receiving compensation, the applicant in the pursuit of an order for mandamus maintains that, that course continues to present an effective remedy.

[44] The respondent submits that there is no evidence of misconduct by the state since there is evidence by the respondent that there is an inability to pay the entire debt at one time as a consequence of shortfalls in income and increased expenditure. The financial constraints were explained thus,

- i. There was a requirement to make an application to pay by instalments and to revise the payment schedule since the budget estimates for 2016 anticipated revenue of \$1.01 billion. However, the government's actual revenue collection was \$950.8 million while the expenditure, which included debt obligations, was \$1.4 billion. Therefore, there was a shortfall of \$426 million in covering the expenses for 2016. The government was able to identify \$265 million in additional financing to 'cushion the shortfall'²³.
- ii. In the revenue budgeted for 2016 it was anticipated that \$117 million would be raised from the Citizens Investment Programme the actual sum raised was \$74.9 million.
- iii. The 2017 budget included a projection of \$981.6 million representing projected revenue but the sum actually collected as at September 30th 2017 was \$802.9 million and the debt payments were estimated to be \$1.3 billion. Therefore, there was an expected shortfall of \$522.8 million. On this occasion only \$254.3 million of additional financing was identified to address the shortfall.

²² See affidavit of the Financial Secretary filed on 9th March 2020 at paragraph 4 xi. which indicates that, "On the 7th September 2018 the Claimant filed Claim No ANUHCV2017/0430 seeking an order of mandamus against the Minister of Finance Gaston Browne seeking payment in 21 days".

²³ See affidavit of Financial Secretary filed on 9th March 2020 at p. 7.

- iv. Revenue concerns also arose having been impacted by Hurricane Irma in 2017. Specifically, the impact of the hurricane resulted in an additional estimated expenditure of US\$225 million for post-hurricane relief. Although the 35% of the post recovery needs relate to housing donor agencies have stipulated how funds are to be spent and have stipulated that the sum was not to be used for housing. The implication of this is that \$215 million was required to be identified by the government to address the housing reconstruction efforts in Barbuda.
- v. The government of Antigua had an actual funding gap in 2018 of EC\$486.12 million dollars and a preliminary projected funding gap for 2019 of EC\$590.67 million. A funding gap of EC\$586.67 million is budgeted for 2020.

[45] As evidence that the respondent intends to pay the judgment debt the respondent noted, among other things, the proposals for payment by instalments and the Warrant being issued by the Minister of Finance for the sum that was stated by the Court of Appeal as being due. This sum was subsequently reduced by the Privy Council, thus that Warrant would not have corresponded with the sum required to be paid.

[46] It is noted that compensation to the applicant remains only partially paid and there are areas for which the government's actions may be criticized. These areas include delay in payment, non-adherence to either of the proposed payment schedules offered by the government, absences of explanations regarding loans taken for the purchases such as the purchase of shares in LIAT instead of payment to the applicant. Additionally, a court determined that the respondent's failure to issue a Warrant for payment was in breach of duty. Collectively, these circumstances give rise to consideration on the constitutional matters raised.

Whether Section 21(4) of the Crown Proceedings Act and Part 50.2(3) and 59.7 are Unconstitutional.

[47] The Crown Proceedings Act finds its roots in the Crown Proceedings Act 1947 UK. The Act substantially altered both the procedure to be followed in civil proceedings by and against the Crown and the substantive law governing the rights and liabilities of the Crown²⁴. Its object was to remove

²⁴ Halsbury's Laws of England ; Crown and Crown Proceedings (Volume 29 (2019)); 2. Crown Proceedings: (2) The Crown Proceedings Act 1947 ; 90. Overview of the Crown Proceedings Act 1947.

certain historical impediments to the bringing of civil proceedings against the Crown²⁵. As a consequence, the legislation enables individuals to engage in litigation including enforcement proceedings, subject to certain restrictions, against the Crown as any other juridical person.

[48] Chief Justice Byron in the case of **Gairy** noted that:

“The Crown Proceedings Act was passed in England in 1947. It should be noted that the purpose of the legislation was to make it easier for the Crown to be a party to litigation. It was intended to facilitate, not restrict, the right of the citizen to gain redress against the Government. Thereafter Acts in similar terms were passed throughout the Dominions. ...”²⁶

[49] The Crown Proceedings Act was enacted prior to the enactment of the Constitutional Order. The applicant contends that the restrictions imposed in enforcement litigation against the State constrains the applicant’s ability to obtain effective redress arising from an infringement of the applicant’s constitutional rights.

[50] Part 59.7(1) of the CPR which provides that “Parts 44 to 53 do not apply to an order against, or money due or accruing due or alleged to be due or accruing from the Crown.” follows from the provisions of the Crown Proceedings Act.

[51] **The Constitutionality of the Provisions.** There are several authorities which provide guidance on the approach to be adopted when treating with the constitutionality of enactments. These authorities include the Canadian case of **R v Oakes**²⁷ and the case of **de Freitas v Permanent Secretary**²⁸ which indicate the approach to be adopted when consideration is given to enactments which purportedly limit guaranteed rights afforded under the Constitution.

[52] In **R v Oakes** the Supreme Court of Canada noted that:

“Two central criteria must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the objective to be served by the measures

²⁵Jennifer Gairy (as administrator of the estate of Eric Matthew Gairy, deceased) v The Attorney General of Grenada [2002] 1 AC 167 at 85.

²⁶ Ibid. at [11].

²⁷ [1986] 1 S.C.R. 103.

²⁸ (1998) 53 WIR 131.

limiting a Charter right must be sufficiently important to warrant overriding a constitutionally protected right or freedom. The standard must be high to ensure that trivial objectives or those discordant with the principles of a free and democratic society do not gain protection. At a minimum, an objective must relate to societal concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important. Second, the party invoking s.1 must show the means to be reasonable and demonstrably justified. This involves a form of proportionality test involving three important components. To begin, the measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to the objective. In addition, the means should impair the right in question as little as possible. Lastly, there must be proportionality between the effects of the limiting measure and the objective- the more severe the deleterious effects of a measure, the more important the objective must be.”

[53] The Court of Appeal reminds that there is an important qualification that the fundamental right cannot be limited in such a way to make the right itself nugatory²⁹. In the High Court decision of **Sanatan Dharma Maha Sabha of Trinidad and Tobago Inc and others v Attorney General of Trinidad and Tobago**³⁰, Justice Jamadar [as he then was] noted that the ‘more substantial the interference with a protected fundamental right the greater must be the justification for any limitation or inhibition’.

[54] Thus, a court considering this question must therefore consider (i) whether the objective is sufficiently important to justify the limitation of a fundamental right, (ii) whether it is rationally connected to the objective or reasonably justified; (iii) whether there is a less intrusive measure; (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.

Whether The Objective of Legislation is Important to Justify the Limitation.

[55] The obligations of the State to a populace in most democratic societies are wide ranging and are owed both to the individual and to the collective. These obligations apply similarly in this jurisdiction. The preamble to the Constitution states, among other things, that the operation of the economic system should result in the material resources of the community being distributed to serve the

²⁹ GDAHCVAP 2019/0020 The Attorney General of Grenada v Muhammed Ehsan at [67].

³⁰ (2009) 76 WIR 378 at 441.

common good. The text of the Constitution provides that the fundamental rights are subject to respect for the rights and freedoms of others and for public interest.

[56] In every democratic society there is a requirement that the state so manages the resources for the benefit of the population. This, one would imagine, would be particularly important in small island states where the limitations in available resources may be a very real matter at issue. The provisions of the Act may have had its origins in treating with the immunity of the Crown where the provisions create a platform whereby the State is treated as a juridical person, but the legislation also recognizes the peculiar position of the State. The specific provisions being challenged seek to create a structure that aligns with the juridical nature of a person but permit the fulfillment of the obligations to the collective population. It is a balancing exercise.

[57] In this court's view the objective of the section is sufficiently important to justify that there be a limitation.

Whether the Legislation is Rationally connected to the Objective.

[58] The court is required to address its mind to whether the measures used in the legislation are rationally connected to the objective sought. Section 21 specifically provides that:

“(1) Where in any civil proceedings by or against the Crown or in connection with any arbitration to which the Crown is a party, any order (including an order for costs) is made by any court in favour of any person against the Crown, the proper officer of the court shall, on application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order:

(2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the particular officer of the Crown concerned, or the Attorney-General as the case may be.

(3) If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and it shall be lawful for the Governor-General by warrant under his hand to direct the amount appearing by the certificate

to be due, to be paid to the person entitled thereto or to his solicitor, together with the interest, if any lawfully due thereon:

Provided that the court by which any such order as aforesaid is made or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such directions to be inserted therein.

(4) Save as aforesaid, and subject to rules of court, no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Crown of any such amount or costs as aforesaid and the Attorney-General or other officer of the Court as the party in whose name civil proceedings by or against the Crown have been instituted shall not be personally liable under any other for the payment by the Crown, or the Attorney-General or other officer of the Crown as such, of any such money or costs.

[59] On the matter of whether the provisions are rationally connected to the objectives, this court notes the marginal note which indicates that the provisions treat with the “satisfaction orders against the Crown”. Reference is also made to the dicta of Chief Justice Byron in the **Gairy** case to which reference was previously made at [48] above. This court concludes that the provisions rationally meet the objective of the legislation.

[60] Further, this Court notes that not every Act of Parliament which impinges in any way upon the fundamental rights are for that reason alone unconstitutional. In this regard reference is made to the dicta of Privy Council in the case of **Surratt and others v Attorney General of Trinidad and Tobago**³¹ where the Privy Council considered the Constitution of Trinidad and Tobago and noted that:

“It cannot be the case that every Act of Parliament which impinges in any way upon the rights protected in sections 4 and 5 of the Constitution is for that reason alone unconstitutional. Legislation frequently affects rights such as freedom of thought and expression and the enjoyment of property. These are both qualified rights which may be limited, either by general legislation or in the particular case, provided that the limitation pursues a legitimate aim and is

³¹ [2008] 2 WLR 262 at [58].

proportionate to it. **It is for Parliament in the first instance to strike the balance between individual rights and the general interest. The court may on occasion have to decide whether Parliament has achieved the right balance.**” [Emphasis Added]

Was the Correct balance achieved? Is there a less intrusive measure?

[61] It is to be noted that on the matter of the correct balance the court again notes the dicta of Jamadar that “the more substantial the interference with a protected fundamental right the greater must be the justification for any limitation or inhibition”³². This statement underscores the fact that there is a correlation between the fundamental right and the justification offered for the limitation of that right.

[62] In this context this balance must be taken in the context of the operations of the public service as well as the State’s general obligations to the populace. In this regard specific reference will be made to the items at issue in these proceedings, NAMCO, West Indies Oil Company, Eastern Caribbean Amalgamated Bank Limited and State Insurance Company. Reference will also made to the financial institutions for which attachment proceedings are sought.

[63] The evidence of the Financial Secretary is that the West Indies Oil Company and the ECAB and State Insurance provide critical functions in the public interest. The specific evidence of the Financial Secretary is that:

“19. NAMCO was set up by the Government as an investment vehicle to assist the Government in properly managing its investment in state owned or controlled companies in order to prevent losses, generate revenues for the State, and exercise strategic policy intervention in critical sectors of the economy.

23. With respect to the government shares in West Indies Oil Company Ltd., the Government has been able to influence company policy in tangible ways which directly address poverty alleviation issues. For example, it is because of government’s leverage why 25lb cylinders of cooking gas, which are primarily used by working class citizens, remain among the least expensive in the Region.

³² Sanatan Dharma Maha Sabha v Attorney General of Trinidad and Tobago (2009) 76 WIR 378 at 441.

24. In respect of its investments in ECAB, the Government utilizes its shares as security for loans which were critical in resolving financial sector stability issues that arose when ABI Bank Ltd. was being recused. Any altering of current arrangements will have direct implications for financial sector stability, for economic growth and for government's revenue potential.

25. With regard to State Insurance Company, an encumbrance of government shares would deprive the company of the freedom to deploy its equity in whatever manner it decides in the strategic interest of the company. There would likely be implications for the cost of providing insurance coverage to Government of Antigua and Barbuda, which is its largest customer, as well as for the costs of providing insurance coverage generally.

[64] The Secretary in the Ministry of Finance has adduced this evidence. The body within which this information resides is that ministry. The state of finances, the relevance and importance of financial entities, the general financial obligations, national, regional and international, of the State, the appropriate approach for the servicing of national debts, the identification of essential assets, the identification of assets which may be more important than essential are all matters which are best left with authorities of that arm of state. Additionally, the management of the financial resources properly rests with the executive with whom the population, in whom beneficial interests in resources lie, have given over the management of the financial affairs of the State to that particular directorate. The court's duty is to ensure that there are no abuses or misuse of the authority for which the arm has been entrusted but not to interfere in the execution of duties.

[65] In giving consideration to the constitutionality of legislation, the court is required to consider whether there is an approach which is less intrusive which would support a justifiable legislative objective. In this context it is theoretically conceivable for an executive to be required to identify assets which are non-essential and make those assets available for enforcement mechanisms, however, this court questions the practical implications of such an approach. Specifically, how does one identify non-essential assets for which the public may have present and future beneficial interests in small state economies. Additionally, how does one treat with changing policies which arise from evolving national and international circumstances. There are further considerations as it relates to international evolutions and cultural evolutions which may affect the perception of what constitutes essential assets.

Was a Fair Balance Struck between the Rights of the Applicant and the Public Interest, Having regard to the Matters indicated and to the Severity of the Consequences.

[66] In considering whether a fair balance was struck between the rights of the applicant and the interests of the wider community this court further considers the evidence before the court and the options which are available to the applicant.

[67] In this regard it is noted that the obligations which fall under the provisions of section 21 of the Crown Proceedings Act are legal obligations. The Honourable Chief Justice Byron [as he then was] in the dicta in the Gairy³³ case noted that:

“[30] It has become commonplace for counsel to complain about the difficulty of collecting money judgments against the Government. In my view, these complaints are based on a misinterpretation of the statutory provisions. There is sufficient statutory protection for the constitutional principle of the separation of powers to ensure that the executive does not refuse to comply with court orders for money payments with impunity. The relevant statutory duty is not placed on any Minister of Government but on a senior civil servant, in the person of the Permanent Secretary (Finance). The Crown Proceedings Act makes such provision for the enforcement of money judgments against the Crown. These provisions impose a specific statutory duty enforceable by mandamus on a public official. I will ...

[31] In my view the duty imposed on the Permanent Secretary (Finance) in s 21(3) is mandatory and, once the procedure has been followed, he must perform that duty or be at risk. There was some argument that s 21(4) operated to prevent an order enforcing the statutory duties imposed by s 21(3). I respectfully reject that. The prohibition is against other methods of execution or attachment to enforce payment by the Crown. It does not prevent coercing compliance with s 21(3). This makes sense in the context of an Act intended to facilitate proceedings against the Crown and eliminate the procedural pitfalls that had previously plagued such litigation.[32] This section seems to me to be designed as a foolproof method of providing for the enforcement of court orders for the payment of money against the Government. Had the appellants followed the procedure laid out in the section, the Permanent Secretary would have been under a statutory duty to perform, and the law is

³³ (1999) 59 WIR 174 at [30].

clear that mandamus will be issued to compel the performance of a statutory duty. The Minister of Finance ...”

[68] In the circumstances of this case the applicant has been attempting to obtain the fruits of the award for some time. An order of Mandamus was issued requiring the then Minister of Finance to comply with his public duty under the Land Acquisition Act to issue a warrant for the payment from the Treasury of compensation, interest, and costs. Subsequent to this there was an application by the respondent to make payments by installments. The evidence before the court is that the application as amended, remains part-heard and that an order for mandamus is again being sought in parallel litigation. This court contends that the relief under the legislation is restricted but it does offer remedy that is effective.

[69] As it relates to the interest of the community, the respondent has indicated that the executive intends to pay its debt but has encountered financial difficulties. Some of the financial difficulties have been previously highlighted. The respondent also noted as it relates to the public debt, the creditors of the government include preferred creditors such as the Peoples Republic of China, the International Monetary Fund, Caribbean Development Bank, the World Bank and European Investment Bank³⁴. There is also evidence that the government “is obliged to repay several bonds, make contributions to several statutory boards that perform essential services in the public interest”. These evidence the relevant wide ranging public interest considerations.

Separation of Powers.

[70] A fundamental principle upon which the Westminster constitutional societies are structured is the separation of powers doctrine. This doctrine requires that each arm of the state operate within the full breath of the authority of that arm. The matter of the general obligations of the State [national and international], the debt serving ratio, the periodization of debt, the determination of essential assets, are best determined by the executive. It is the executive which is the repository of information on the allocation of resources with public interest implications.

³⁴ See Affidavit of Financial Secretary of the Ministry of Finance filed 9th March 2020, paragraph 15.

[71] For the reasons indicated herein this court dismisses the application for attachment orders and charging orders with costs. This court has also determined that the enforcement provisions of the Crown Proceedings Act are not unconstitutional and consequently Parts 50.2(3) and 59.7 of the CPR shall continue to stand.

M. Robertson
High Court Judge

Registrar.