

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

IN THE HIGH COURT OF JUSTICE

Claim No. BVIHCV 2016/245

BETWEEN

**BERNADETTE MCKELLY
ALBERTO KING
BEVERLY CHRISTOPHER-FRASER**

Claimants

AND

REGISTRAR OF LANDS

Defendant

LORNA FRASER

Interested Party

Appearances: Ms. Bernadette McKelly, in person and unrepresented
Mrs. Sarah Potter-Washington, Counsel for the Defendant

2019: 25th November, 18th December
2020: 29th May

JUDGMENT

[1] **ELLIS J:** Further to the grant of leave to apply for judicial review, the Claimants filed a Fixed Date Claim Form in which they seek the following relief:

1. A declaration that the Chief Registrar's Order of 20th November 2013 (the Missing Order) was illegal and in breach of the principles of natural justice and procedurally unfair;
2. A writ of certiorari quashing the final order;
3. Costs; and
4. Further and other relief.

[2] The background to this claim is relevant and has been summarised below:

- i. On 4th September 2012, an application for partition was filed by the Interested Party, Lorna Fraser on behalf of the family of Blanche Agatha Norman and James Adolph Christopher in respect of the Parcels 1, 5, 7, 12, 19, 20, 32 and 163 of Block 2635B (**“the Properties”**).
- ii. The Properties have multiple registered co-owners many of whom are now deceased. They included Frances Coakley, Henrietta Christopher, Mary Eliza Christopher, Henry Alfred King and Eldridge King, Alphonse Purcell as Trustee, Rosalita Christopher as trustee, Lorna Fraser as Trustee, Mary Rebecca King, Charles Elias Christopher, Mary Rebecca Christopher, Veronica Christopher and Beverly Lorraine Fraser as personal representative of James Christopher.
- iii. The application for partition sought to have the Properties partitioned and subdivided in accordance with Survey Plan No. CA-2635B-088-T dated 22nd April 2004 such that Parcel 12 and Lots 5, 6, 7 and 9 would be registered to Lorna Fraser on behalf of the family of James Adolph Christopher in full satisfaction of his entitlements and the name of Lorna Fraser as trustee on behalf of James Adolph Christopher be removed from the title in respect of Parcels 1, 7, 20, 32 and 163.
- iv. It has been represented that notice of the application was published in several newspapers circulating in the Virgin Islands including:
 - a. The Standpoint Newspaper on 14/03/2013
 - b. The BVI Beacon 28/03/2013
 - c. The Island Sun 30/03/2013
 - d. The Gazette Vol. XVII No. (04/04/2013), No. 21 (11/04/2013 and No. 24 (18/04/13).
- v. The Court was provided with a copy of the Gazette Publication which indicated the named co-proprietors and which invited anyone who *“has just cause to object to the proposed partition of the above mentioned parcel to do so in writing to the Chief Registrar of Lands no later than one (1) month from the 28th March 2013.”*
- vi. By notice addressed to Lorna Fraser and Beverly Christopher-Fraser, the Chief Registrar gave notice that the hearing of the application had been scheduled for 14th November 2013. The notice also urged the addressees to appear in person to give evidence and to be cross examined. The notice also indicated that after thorough inspection of the relevant Survey Plan CA-2653B-088-T and CA-2653B-113-T) any person having a valid reason to object, should within 7 days of the date of the notice, file at the Land Registry and serve on the relevant parties, affidavit evidence with full reasons to support the objection. Upon receipt of that evidence, Lorna Fraser was to file and serve her affidavit in response within 7 days thereafter.
- vii. On 14th November 2013, a hearing was convened but it had to be adjourned. This adjournment was at the request of Beverly Christopher-Fraser who wished to retain legal counsel in order to lodge a formal objection to the application.

- viii. A formal order made by the Chief Registrar permitted Beverly Christopher-Fraser to file her objection by 20th November 2013. Lorna Fraser was to respond within 7 days thereafter and the hearing was adjourned to the first week in December 2013. Beverly Christopher-Fraser was also ordered to pay costs in the sum of \$610.00.
- ix. On 20th November 2013, Beverly Christopher-Fraser filed her formal objection to the application in which she indicated her objection only in respect of the partition of Parcels 5, 12 and 19 of Block 2635B.
- x. On that same date, the Chief Registrar convened the hearing of the application which included a site visit. Present at that site visit Ms. Bernadette McKelly who purported to also represent, Mr. Albato King.
- xi. The notes of the Chief Registrar formed part of the Court's record and they indicate the following important matters:
 - a. The parties who were present at the site visit – Lorna Fraser and her counsel; Mirna Ward and Orby Christopher, sister and brother of Ms. Lorna Fraser, Beverly Christopher–Fraser and her counsel who indicated that he also represented Bernadette McKelly and her sister Lenore Williams. Bernadette McKelly also represented the interest of Albato King.
 - b. Counsel for Beverly Christopher-Fraser sought to challenge the registration of the 2006 Instrument of Transfer on the basis that it was erroneously done and a criminal fraud. The Chief Registrar's notes also indicated that Counsel for Beverly Christopher–Fraser indicated that there was no objection to the relief claimed in respect of certain Parcels.
 - c. Critically, the final page of the Chief Registrar's notes reflected an order in the following terms:
 - 1. Dr. McKelly and/or Mr. Albato King to file and serve within 30 days from today. After reviewing the application in its entirety including the relevant Survey Plans No. CA-2635B-088-T and CA-2635B-113-T. A schematic complete with roads of how they propose the entire family estate comprising Parcels 1, 5, 7, 12, 19, 20, 32 and 163 can be divided in 9 shares and further to how the 1/9th share further divided pursuant to Instrument No. 2294/2006 can be in accordance with that scheme.
 - 2. The applicant to file and serve a response within 14 days.
 - 3. Further directions to be given by the Chief Registrar with a view to concluding the matter within 30 days.

- xii. The Registrar contends that this order was made orally on the date of the hearing and that both Beverly Christopher-Fraser and Bernadette McKelly were present at that hearing. However, this is refuted by Bernadette McKelly who states that she left the hearing before the first site visit was concluded. Unlike the previous orders made in this matter, this order does not appear to have been reduced into writing, formalised and issued to the parties.
- xiii. In her Third Affidavit, Bernadette McKelly references a further hearing of 6th December 2013. This appeared to have been convened further to a notice of hearing issued on 27th November 2013 which inexplicably appeared to have only been served on Counsel for Lorna Fraser and Beverly Christopher-Fraser. At paragraph 18 of her Third Affidavit, Bernadette McKelly contends that she was present at that hearing where it was made clear that there was to be a further hearing and that appropriate notice was to be given of that date. She produced her manuscript notes of that hearing.
- xiv. Despite the clear terms of the notice of 27th November 2013, the Registrar asserts that there was no actual was hearing convened on that date. Rather, in his affidavit in response, the Registrar indicated that the notice of hearing *“was to further allow the parties an opportunity to agree among themselves on the disbursement/distribution of the property in accordance with section 103 of the Registered Land Act.”*
- xv. In his affidavit filed on 18th November 2016, the Registrar asserted on the basis of information received from the then Chief Registrar that *“the final decision was to be made pending an agreement of the parties with respect to the property (the schematic to be submitted by the First and Second Defendants).”*
- xvi. The Registrar contends that following the hearing on 20th November 2013, he did not preside over any further hearing in regard to this application. The record reflects that thereafter there was no further action on this matter until 29th September 2015. The extensive delay is unexplained, but by that date the Chief Registrar was no longer dealing with the matter and it is clear that the Registrar of Lands was now seised.
- xvii. In the letter of 29th September 2015, the Registrar wrote to Mr. Albato King copied to Ms. Kelly as his agent and representative, at his U.S. address referencing the 2013 hearings and the purported order made on 20th November 2013. It appears that the Registrar had reviewed the Land Registry records on the matter and had determined that Mr. King had not complied with the terms of the 20th November 2013 order. Purporting to act pursuant to section 6 of the Registered Land Ordinance, the Registrar required Mr. Albato King to produce the said schematic within 30 days of the date thereof. He further provided that failure to do so would result in the issuance of an order that the Properties would be partitioned in the following manner: to take out Lot 1 – Lot 9 of Parcel 5 using Survey Plan No. CA-2635B-113-T and the entire Parcel 12 and Lots 5 – 9 of Parcel 19 using Survey Plan No. CA-2635B-088-T; and thereafter removing the name Lorna Fraser as trustee from Parcels 1, 7, 20, 32, 163 and the remnants of Parcels 5 and 19.

- xviii. The record reflects that the letter of 20th September, 2015 was not in fact posted to Mr. King at his U.S. address but was delivered to Bernadette McKelly *qua* agent for Mr. King. The Registrar's evidence is that this letter was served on Marlene Mercer, sister of Bernadette McKelly at the residence at Pleasant Valley. Bernadette McKelly contends that this letter was only received sometime in October, 2015. There was no similar letter issued to Bernadette McKelly in her own right or to Beverly Christopher-Fraser.
- xix. The Registrar contends that there is nothing irregular about this because the objection lodged by Beverly Christopher-Fraser had been settled and determined in the hearing on 20th November 2013. He further states his belief that Mr. Albato King and Ms. Bernadette McKelly were never objectors in the strictest sense as neither party has placed on record their objections by filing formal responses in the proceedings. He further states that he was informed by the Chief Registrar that there were no oral objections raised at the site visit by either Beverly Christopher-Fraser or Bernadette McKelly or Albato King.
- xx. Bernadette McKelly asserts she only received the Chief Registrar's letter in October 2015. It was only then that they became aware that there had in fact been an order made on 20th November 2013 in the terms set out. At paragraph 15 of the Affidavit of Collette Callwood filed on 14th October 2016 on behalf of the Registrar, she does not dispute that they would not have received or had a hard copy of the order but the Registrar contends that the terms of this order was rendered orally on 20th November 2013 in the presence of the Parties. As previously indicated, this is denied by the Claimants.
- xxi. Following receipt of the letter dated 26th October, 2015, Bernadette McKelly wrote to the Registrar raising a number of concerns. This was followed by oral conversations and correspondence dated 15th April 2016 in which Bernadette McKelly insisted that she had not received a copy of the purported order.
- xxii. By letters dated 26th and 29th October 2015, Beverly Christopher-Fraser also wrote to the Registrar raising concerns regarding the so called "missing order" and soliciting a copy of the same. She also made it clear that she was not in agreement with the proposed application for partition. However, the Respondent denies ever having received that correspondence.
- xxiii. Consequently, on 2nd December 2015, the Registrar made a final order in respect of the application for partition, which order was not personally served on the parties but was subsequently published in the Gazette on 3rd, 7th and 10th December 2015.
- xxiv. Neither the Chief Registrar's order of 20th September 2013, nor the Registrar's decision of 2nd December 2015 was ever appealed in accordance with section 147 of the Registered Land Ordinance. The Claimants also never sought to extend the time for complying with the same. Instead, on 15th April 2016, Bernadette McKelly wrote a further letter to the Registrar informing him that she had not received a response to her previous correspondence and reiterating that she had still not received a copy of the missing order.

- xxv. As the Final Order was published in December 2015, the Respondent contends that the Claimant should be denied the relief claimed on the basis that there was unreasonable delay in bringing this claim.

COURT'S ANALYSIS AND CONCLUSION

- [3] In the Court's judgment, the resolution of this claim must commence with relevant legislative context. In the Virgin Islands, in the absence of agreement, a compulsory partition application can be brought by any co-proprietor. Section 103 (1) of the **Registered Land Ordinance**¹ ("RLO") empowers the Registrar to entertain and grant an application for partition of land which is owned in common. It provides that:

"s103. (1) An application for the partition of the land owned in common may be made in the prescribed form to the Registrar by-

- (a) Any one or more of the proprietors; or
- (b) Any person in whose favour an order has been made for the sale of an undivided share in the land in execution of a decree,

and subject to the provisions of this Ordinance and of any written law by or under the minimum areas or frontages are prescribed or the consent of any authority to a partition is required, the Registrar shall effect the partition of the land in accordance with any agreement to the proprietors in common, or, in the absence of agreement, in such manner as the Registrar may order."

- [4] While the Registrar's jurisdiction to order the partition or sale of land is hedged about by express limitations, the RLO unfortunately does not provide appropriate details of the precise procedure to be followed on an application for partition. The Registrar was unable to provide the Court with any established procedures in this regard, and so in the absence of local statutory rules or established procedures, the court must invariably have regard to the common law of England. This reveals that the first and overriding principle is that the partition order must allot the property among the co-owners so that each allotment is in proportion to the size of the co-owner's respective share.² The proportionality of the allotments is to be determined by the value of the land allotted and not the acreage.³

¹ Cap 229 of the Laws of the Virgin Islands (as amended).

² *Agar v Fairfax* (1811) 17 Ves 533; 34 ER 206

³ *Calmady v Calmady* (1795) 2 Ves Jun 568; 30 ER 780

[5] The principle of division according to equal value has been said to be a rigid rule which must be satisfied in all cases. It is the primary principle against which the court would assess the validity of the partition.⁴ When making the allotments the registrar is bound to consider what would be in the best interests of all the parties.⁵ It is not enough to make allotments which, although they are of proportionate value, are made without regard to the interests of the co-owners. In order to be in a position to do so, the registrar must therefore take submissions from the co-owners about their particular interests and circumstances. This is consistent with the courts general position on fairness by public officers towards persons affected by decisions which they make.

[6] In the context of this present case, dealing as it is with the statutory provisions regarding partitions and undoubted requirements, of fairness, the court is guided by the six principles identified by Lord Mustill in **Doody v Secretary of State for the Home Department**⁶ when he stated at page 96:

“(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 modifications; 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.”

[7] The Court has also had recourse to other statutory provisions found within the RLO. First and foremost, are the provisions of section 161 of the RLO which provides as follows:

“Any matter not provided for in this Ordinance or in any other written law in relation to land, leases and charges registered under this Ordinance and interest therein shall be decided in accordance with the principles of natural justice, equity and good conscience.”

⁴ Dr. Simon Cooper, Partition of Land in the Commonwealth Caribbean CLWR 39 3 (283)

⁵ Canning v Canning (1854) 2 Drew 434; 61 ER 788

⁶ [1993] UKHL 8, [1994] 1 AC 531

- [8] The term “natural justice” is often described as a general concept and in recent times it has largely been replaced and extended by the general "duty to act fairly". In the Court’s judgment, section 161 of the RLO recognises that natural justice and fairness are inimical to good public administration. It recognises that the mere fact that a decision affects rights or interests is sufficient to subject the decision to the procedures required by natural justice.
- [9] Providing further helpful context is the Partition Ordinance Cap 226 of the laws of the Virgin Islands. Although, this Ordinance prescribes procedures whereby applications for partition are to be disposed of before a court, in the Court’s judgment sections 5, 6, 7, 10 and 11 of the Partition Ordinance incorporate principles of natural justice which provide worthy guidance for adjudicators such as the Chief Registrar and the Registrar who are also empowered to resolve applications for partition. Section 5 and 6 of the Partition Ordinance prescribes that notice of the application must be given to all parties interested to appear on such day as is mentioned in the notice being no less than 14 days from the date thereof to show cause why the partition of the lands described should not be made. Section 7 of the Partition Ordinance provides that such notice is to be filed in court at the registrar’s office and a sealed copy or copies thereof served in the same manner as a writ of summons would be served under the rules or laws governing practice and procedure in the High Court.
- [10] Sections 10 and 11 of the Partition Ordinance go on to regulate the procedure at the hearing. Critically, section 10 provides that at the hearing of the matter, the court may direct such inquiries as to the nature of the property and the persons interested and such other matters as it thinks fit **but all parties interested shall be served with notice of the order made on the hearing** and after receiving such notice they shall be bound by the proceedings as if they had been originally parties to the matter. It further provides that they shall be deemed to be parties in the matter and they shall have liberty to attend the proceedings and may apply to vary the order. Section 11 also sets out very important provisions. It gives the court the power to dispense with such service if it appears that notice of the order on the hearing cannot be served on all persons without expenses disproportionate to the value of the property. Instead, the court may direct that advertisements be published at such times and in such manner as the court shall think fit calling upon all persons claiming to be interested in the property, who have not been so served to come in and establish their respective claims in respect of the property. After the prescribed time has expired, persons

who have failed to respond will be considered bound by the proceedings in the matter. Where service has been dispensed and a final order for sale is made, section 12 of the Partition Ordinance regulates the procedure to be followed which again demands that appropriate notice be given to interested persons.

- [11] Turning now to the case at bar, in the Court's view, the starting point for the Registrar ought to have been the provisions of sections 103 – 105 of Division 6 of the RLO which deals with co-proprietorship and partition. From these provisions it is clear that orders made by the Registrar under this Division would impact the property rights of persons. Such persons would therefore need to be given notice of any application which would have the potential to affect such rights. Section 151 of the RLO prescribes how notices under the Ordinance are to be served. It provides:

“151. A notice under this Ordinance shall be deemed to have been served on or given to any person–

- (a) if served on him personally; or
- (b) if served on an attorney holding a power of attorney where under such attorney is authorised to accept such service; or
- (c) if sent by registered post addressed to him at his last known postal address in this territory or elsewhere and a receipt purporting to have been signed by him has been received in return; or
- (d) if service cannot be effected in one of the above-mentioned ways, by displaying it in a prominent place on the land affected and by publishing in three consecutive issues of the Gazette.

- [12] In the Court's judgment, section 151 (d) makes it clear that service of the notice can only be effected in such a way where the Registrar has determined that the persons interested in the property cannot be served by any of the means prescribed at (a) – (c). Further, section 151 (d) makes it clear that this form of service is two-pronged in order to be effective. The notice must be displayed in a prominent place on the land affected and it must be published in three consecutive issues of the Gazette.

- [13] In the case at bar, it appears that there was an attempt made by the Chief Registrar to comply with the notice obligations. The evidence reveals that notice of the application for partition was purportedly advertised in newspapers circulating locally in the Territory. From this, it can be

gleaned that the Chief Registrar would have determined that it was necessary to dispense with notice by the means prescribed under the RLO at section 151 (a) – (c). There is however no confirmation of this and no indication of what factors informed her decision. Moreover, while the notice may have been published in several newspapers in the Territory, there is no indication that it was affixed on the Properties in a prominent place. At the outset therefore, these proceedings are *prima facie* irregular.

[14] Nevertheless, a number of persons came forward and attended the first hearing which was convened on 20th November 2013. At the conclusion of that hearing and site visit, a verbal order was made which invited Bernadette McKelly and Albato King to make written representations. The Order also clearly conceived that a written reply to such representations would then be made by the applicant, Lorna Fraser. The Registrar contends that this order was made verbally at the close of the proceedings and in the presence of the parties who were in attendance. The Claimants denies that this is so. The Court is satisfied on the evidence advanced by Bernadette McKelly that she was not present when the order is alleged to have been made at the close of the proceedings on 20th November 2013. In the Court's view such an order if such an order had been conveyed orally, it should have been reduced into writing in accordance with the previous practice in this matter and delivered to all of the interested parties.

[15] The Court has no doubt that the procedures prescribed by section 10 of the Partition Ordinance were intended to avoid the very doubts which arise in these proceedings and the land registrars would be well advised *qua* adjudicator, to follow the appropriate guidance. The precise terms of the November, 2013 directions order ought to have been reduced into writing and properly served on all interested parties. This did not occur and there should therefore be no surprise that the orders were not actioned.

[16] Thereafter, the matter went dormant for almost 2 years. No reasons were advanced to explain this delay. When the Registrar attempted to resume the matter, as the new adjudicator, he was obliged to bring his own mind to bear on the matter. He was obliged to ensure that he was fully seised of the facts of the matter (including any change of circumstances in the ensuing 2 years) and that he was fully seised of all of the legal implications. Certainly, he was obliged to inform all parties of his intentions. The evidence demonstrates that rather than notifying the Parties of his intention to

resume the matter, he sought to pick up where the matter had left off. He did this, not by formally issuing the November 2013 order, but by referring to it in his letter of 29th September 2015 in which he also extended the time for compliance by 30 days. Inexplicably, that letter was addressed only to Mr. Albato King but it was delivered to the sister for Bernadette McKelly.

[17] In defending this course, the Registrar contends that Bernadette McKelly and Albato King were never objectors in the strict sense as neither party had placed in record their objections by filing formal objections in the proceedings. Given the background, this is a surprising submission. First, the notices of hearing clearly invited the persons interested to appear personally to give evidence and to be cross examined as to the entitlement of Lorna Fraser *qua* trustee on behalf of the family of Blanche Agatha Norman. A hearing was convened and the Claimants were legally represented by Mr. Richard Rowe who at one point clearly indicated an intention to object “*if they [Lorna Fraser] are taking out the best for themselves*”. By any objective criteria, it is clear that the Claimants were interested persons who indicated an intention to fully engage the proceedings. Indeed, it appears that the Chief Registrar was in no doubt of this when she invited them to make representations at the close of proceedings in 2013. In the Court’s judgment it is not open to the Registrar of Lands to now contend that these persons were not “objectors.” They were clearly interested parties who had a legitimate expectation to be heard before any decision was taken which could impact their rights or interests.

[18] The Registrar also contends that the objection lodged by the Beverly Christopher–Fraser had been settled and determined in the hearing on 20th November 2013. Having reviewed the notes of the 2013 hearing, the Court is satisfied that at best, Beverly Christopher-Fraser’s position could be described as equivocal. Given that submissions were still being solicited from the other interested parties as to how they proposed to divide the entire family estate including Parcels 1, 5, 7, 12, 19, 20, 32 and 163 into 9 shares, it is clear that submissions and deliberations in the matter would have still been ongoing. In these circumstances, it is difficult to see how any final settlement and determination could be said to have been made.

[19] The Registrar further contends that the Claimants had ample notice and time to comply with the terms of the 2013 order and to make their representations prior to the expiration of the period prescribed because “*Ms. McKelly, agent/representative of Mr. King Jr. had been served the said*

letter of 29th September 2015 on the said date instead of days before the deadline, as claimed in paragraph 5 of the grounds in the notice of application." This is clearly not a completely accurate representation.

- [20] The Registrar ignores a number of critical factors. First, he ignores the fact that a period of almost 2 years had lapsed in these proceedings. In these premises it seems to the Court to be highly irregular for the proceedings to be reconvened in the manner in which the Registrar proposed without notifying all of the parties who were involved in the matter. The Registrar also ignores the deficiencies of the purported 2013 Order which made no mention of Beverly Christopher–Fraser who, as an interested party should have had an opportunity to comment on any proposed schematic submitted. Certainly, the Registrar's letter of 29th September 2015 only exacerbated the unfairness. First, it was addressed only to Mr. Albato King when it was clear that the 2013 Order solicited representations from both Mr. Albato King and Bernadette McKelly or either of them. The logical conclusion was that the Registrar did not wish to entertain any representations from either Bernadette McKelly or Beverly Christopher–Fraser.
- [21] Moreover, notice of that letter was not given in accordance with any of the prescribed procedures mandated by the RLO. Although the Registrar clearly had the U.S. address for Albato King, he chose not to have it posted to that address. Instead, it was delivered to a third party. While Bernadette McKelly agrees that she eventually received the correspondence sometime in October 2015, she was clearly consumed with determining the authenticity and origin of the 2013 Order. This is not surprising given the way in which this matter had proceeded. Unfortunately, she enquires fell on deaf ears as she was essentially ignored by the Registrar who now submits that she ought to have sought an extension of time. Finally, the Registrar ignores the role ostensibly played by Mr. Richard Rowe who appeared as Counsel in the proceedings before the Chief Registrar.
- [22] The Court finds this is wholly unsatisfactory. In English law, natural justice is technical terminology for the rule against bias (*nemo iudex in causa sua*) and the right to a fair hearing (*audi alteram partem*). In this legislative context, the right to a fair hearing requires that individuals should not be penalized by decisions affecting their rights or legitimate expectations unless they have been given prior notice of the case, a fair opportunity to answer it, and the opportunity to present their own case. In the Virgin Islands, the right to a fair hearing is guaranteed by the Virgin Islands

Constitution which incorporates and mandates strict adherence to the principles of natural justice and fairness.

[23] In this context, the Court is satisfied that the right to a fair hearing would necessitate (1) that prior notice of application, the hearing, the reconvened hearing and any order made therein be given to interested parties (2) they should also have been given an opportunity to be heard or to make written representations. When deciding how the hearing should be conducted, the Registrar has to ask himself whether the relevant parties had a proper opportunity to consider, challenge or contradict any evidence or orders made in the proceedings, and whether they were also fully aware of all relevant matters so as to have a proper opportunity to present their case. He ought to have had regard to the provisions of section 152 of the RLO which provides as follows:

s. 152 (1) Where by this Ordinance a thing is to be or may be done after giving a person an opportunity of being heard that person shall be deemed to have been given such an opportunity –

(a) if he attends before the Chief Registrar personally or by a legal practitioner or other agent and is given such an opportunity; or

(b) if he intimates, personally or by a legal practitioner or other agent, that he does wish to be heard; or

(c) if he fails to attend pursuant to a notice in writing indicating the nature of the thing to be done and appointing a day and time **not less than ninety days after service of the notice at which he will, if he attends before the Chief Registrar be heard.**

(2) Where a person or a legal practitioner or other agent on his behalf attends before the Chief Registrar concerning a matter on which he is entitled to an opportunity of being heard, or fails to attend pursuant to such a notice as aforesaid, the Chief Registrar may, if he thinks fit, adjourn the hearing from time to time, and, notwithstanding failure to attend, may, if he thinks fit, hear such person at any time.

(3) Where by this Ordinance all persons interested are to be given an opportunity of being heard, it shall be sufficient if all persons who, according to any subsisting entry in the register, appear to be so interested or affected are given such opportunity.

- [24] In this case, the Claimants would have attended before the Chief Registrar in 2013. At the conclusion of that site visit, it is clear that she could only have formed some preliminary views on the subject matter of the application. These views led her to issue certain directions which were intended to afford the parties an opportunity to make representations. In the Court's judgment, the Registrar was obliged to ensure that the parties affected were provided with notice of the same in a timely manner. This is especially so when he cannot categorically assert that Bernadette McKelly was still present when the terms were dictated.
- [25] Years later, when the Registrar wishes to revive the proceedings and attempts to enforce the terms or the 2013 order, he was obliged to ensure strict adherence to the notice procedures under the RLO for all parties involved. In the Court's judgment, the letter of 29th September 2015 to Albato King and the steps taken to serve it do not satisfy. The records in the case at bar reveal that there were clearly other interested persons who participated during hearings which were convened. The 2013 Order was clearly directed to at least three of the parties and yet the Registrar attempted to give only one such interested person an opportunity to make representations. Moreover, the matter was reconvened without any notice to Beverly Christopher –Fraser and so she would effectively have been excluded from the proceedings after 2013.
- [26] Generally, the Court was dissatisfied with the disjointed and irregular procedures adopted in this matter. In addition to the failure to properly notify the parties, the intervening and inexplicable delay of almost 2 years is of concern. The Court is also concerned that the record of proceedings is decidedly inconsistent as it is unclear whether a further hearing was in fact convened on 6th December 2013. It is indeed curious that the Registrar has no record of such a meeting and yet the Court has been provided with a notice of hearing for that date and copious manuscript notes taken by Bernadette McKelly on that date. The Court was not persuaded with explanation provided by the Registrar. The Chief Registrar and the Registrar may well have been motivated to achieve consensus in the matter, but unfortunately, this was not to be and as a result this case demanded careful adherence to the principles of fairness, which were not applied.
- [27] Adding to the general confusion in this matter was the course adopted in communicating the final decision rendered on 2nd December 2015. Notwithstanding that he would then have had contact details for all of the interested parties, the Registrar instead chose to publish his decision in the

Virgin Islands Gazette. No explanation is provided for this course and no authority, procedure or practice has been advanced in support of this course. Indeed, officials at the land registry would be well advised to bear in mind that publication in the national Gazette is not the standard form of service prescribed by the RLO. It is in fact the default method by which notices may be served, where service cannot be effected by the other methods prescribed under section 151 (a) – (c).

- [28] Clearly the Registrar's decisions must maintain a degree of regularity and transparency and for that reason, they must be communicated to the parties affected in the most effective and direct form possible. Where it is impossible, and an alternative method employed consistent with section 151 (d), the Court is satisfied that there should be strict compliance with the procedures mandated. This is clearly not the case here. The implications of this are borne out in the evidence of Bernadette McKelly who states that she only became aware that a decision had been taken in the matter in June 2016, when conducting a search for the 2013 Order at the Land Registry. In light of the findings herein, the Court is satisfied that the application for partition was disposed of in an irregular manner which was contrary to the principles of natural justice and fairness.

RELIEF

- [29] Judicial Review is a discretionary remedy. This means that just because a claimant establishes that a public body has erred in law, he is not automatically entitled to the remedy he seeks, or indeed, any remedy at all. A court has considerable leeway when assessing whether or not relief should be given to a claimant. Lord Justice Hobhouse in **Credit Suisse v Allerdale Borough Council**⁷ explained the court's remit in this way:

"The discretion of the court in deciding whether to grant any remedy is a wide one. It can take into account many considerations, including the needs of good administration, delay, the effect on third parties, the utility of granting the relevant remedy. The discretion can be exercised so as partially to uphold and partially quash the relevant administrative decision or act."

- [30] It follows that any order is at the absolute discretion of the court which may refuse relief if it considers that there has been undue delay in making the application, and that the grant of any relief would cause substantial hardship to, or substantially prejudice the rights of any person, or would be detrimental to good administration.

⁷ [1997] QB 306 at 355D

[31] Part 56.5 of the CPR makes this clear. It provides that:

- (1) In addition to any time limit imposed by any enactment, the judge may refuse leave or to grant relief in any case in which the judge considers that there has been unreasonable delay before making the application.
- (2) When considering whether to refuse leave or to grant relief because of delay the judge must consider whether the granting of leave or relief would be likely to –
 - (a) be detrimental to good administration; or
 - (b) cause substantial hardship to or substantially prejudice the rights of any person.”

[32] Having arrived at its determination, the Court must now consider what relief if any is appropriate in this case. In that regard, the Court cannot ignore the relevant timeline. Bernadette McKelly asserts that she only became aware of the Registrar’s 2nd December 2015 decision in June 2016. Thereafter, the Claimant initiated legal proceedings on 13th September 2016, when the application for leave to apply for judicial review would have been filed.

[33] Counsel for the Respondent has submitted that since December 2015, there have been intervening events which have taken place. In the case at bar, the Registrar asserts that Lorna Fraser made a further application for the subdivision of Parcels 5 and 19 in March 2016. This application was granted with the result that Parcels 5 and 19 were subsequently mutated and registered as Parcels 247 – 257 and Parcels 258 – 262 all registered to Lorna Fraser. The Registrar therefore contends that a judgment in the Claimants’ favour would cause substantial hardship to or substantially prejudice the rights of Lorna Fraser. Unfortunately, the developments do not end there. Bernadette McKelly, now informs the Court that on 31st October 2019, the register for Block 2635B Parcel 253 was amended further to Instrument No. 1209 of 2019, to reflect that the property is now owned by Ashdale Prince and Althea Davis Prince and to record a charge (Instrument No. 1210 of 2019) in favour of First Caribbean International Bank (Cayman) Limited (together referred to as the “Third Parties”).

[34] The Court invited the parties to file supplemental submissions addressing the impact of these important developments. Counsel for the Registrar submitted that Lorna Fraser’s application for subdivision of the partitioned land was granted 5 months after the 2015 Order. The application for judicial review was initiated on 13th September 2016, some 3 months after the granting of the order for subdivision. Counsel submitted that having succeeded on the partition application, Lorna Fraser

was at liberty to do whatever she wished with her allotment including sell or erect a building. He submitted that on the facts of this case, it would be detrimental to good administration and prejudicial to Lorna Fraser and any action which she may have taken subsequent to the subdivision of the partitioned land. Counsel concluded that the order for certiorari denies the court the flexibility of deciding some other relief which would be more appropriate and just.

[35] In responding, Bernadette McKelly first recounted the proprietorship history of the Properties. She submitted that granting the relief claimed would not cause prejudice nor would it adversely affect Lorna Fraser, the Princes or First Caribbean Bank. She noted that Lorna Fraser declined to participate in these proceedings despite the fact that she had ample opportunity to do so following her joinder as an Interested Party. She further noted that the conveyance of Parcel 253 to the Princes and the consequential charge in favour of First Caribbean Bank occurred in October 2019 well after Lorna Fraser would have been joined as an Interested Party and after she would have been served with these proceedings.

[36] Bernadette McKelly further submitted that it is reasonable to expect that in conducting a due diligence process, a purchaser of land would conduct searches at the Town and Country Planning Department and the Survey Department and would interview key employees at the Land Registry Department and other relevant agencies in order to ascertain if there are any adverse matters pending in respect of the subject property. She concluded that if both the Princes and First Caribbean Bank had carried out such enquiries, they would have discovered the pending claim herein. If they then wished to proceed with the transaction, then they would have been fully aware of the potential of a judgment in favour of the Claimants herein. She concluded that in such circumstances it could not be argued that granting relief would prejudice them since they would have willingly assumed the risk. Moreover, she submitted that Lorna Fraser should not be rewarded in circumstances where she failed to act in good faith in deciding not to inform the Princes or First Caribbean Bank of the potential impact of these proceedings. As the final judgment in the matter would have been on the horizon, she submitted that the sale of Parcel 253 should not have been pursued.

[37] The Court has considered the Claimant's submissions that the third parties were obliged to carry out searches and investigate the property which they intended to purchase. Bernadette McKelly contends that had they done so they would have discovered the pending legal proceedings which should have given them some pause. Unfortunately for the Claimants, this submission finds no support in law. The Court cannot ignore the clear and unambiguous wording of section 38 of the RLO which provides that:

- “(1) No person dealing or proposing to deal for valuable consideration with a proprietor shall be required or in any way concerned-
 - (a) to inquire or ascertain the circumstances in or the consideration for which such proprietor or any previous proprietor was registered; or
 - (b) to see to the application of any consideration or any part thereof; or
 - (c) to search any register kept under the Registration and Records Ordinance.
- (2) Where the proprietor of land, a lease or a charge is a trustee he shall, in dealing therewith, be deemed to be absolute proprietor thereof, and no disposition by such trustee to a bona fide purchaser for valuable consideration shall be defeasible by reason of the fact that such disposition amounted to a breach of trust.”

[38] The reality is that there is no evidence before the Court that these third parties are anything other than bona fide purchasers for value without notice. It follows that the third parties here were under no obligation to check anything other than the land register. In circumstances where the Claimants herein chose not to take any steps to record their interest against the relevant registers by way of a caution or restriction, they cannot seek to raise these submissions here.

[39] In the case at bar, the so called missing order would have been made in 2013. The Court finds that the terms of that order would have come to the attention of the Claimants in October 2015. Despite failed efforts to obtain a perfected order, the Claimants only commenced proceedings in October 2016, 4 months after they became aware of a final order of partition which would have been granted in December 2015. It is therefore clear that there has been some delay on the part of the Claimants.

[40] In **R v Dairy Produce Quota Tribunal for England and Wales Ex p. Caswell**⁸ Lord Bridge noted:

“Lord Diplock pointed out in *O'Reilly v Mackman*: ‘The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision.’ I do not consider that it would be wise to attempt to formulate any precise definition or description of what constitutes detriment to good administration. This is because applications for judicial review may occur in many different situations, and the need for finality may be greater in one context than in another. But it is of importance to observe that section 31(6) recognises that there is an interest in good administration independently of hardship, or prejudice to rights of third parties, and that the harm suffered by the applicant by reason of the decision which has been impugned is a matter which can be taken into account by the court when deciding whether or not to exercise its discretion under section 31(6) to refuse the relief sought by the applicant. In asking the question whether the grant of such relief would be detrimental to good administration, the court is at that stage looking at the interest in good administration independently of matters such as these. In the present context, that interest lies essentially in a regular flow of consistent decisions, made and published with reasonable dispatch; in citizens knowing where they stand, and how they can order their affairs in the light of the relevant decision. Matters of particular importance, apart from the length of time itself, will be the extent of the effect of the relevant decision, and the impact which would be felt if it were to be re-opened.”

[41] While there can be no quarrel with that statement of Lord Bridge it must be appreciated that the legislative context in England within which that statement of the law operates must be cautiously applied when interpreting CPR 56.5(2). The critical distinction was highlighted by Edwards JA in **Roland Browne v the Public Service Commission**:⁹

“The absence of any rigid time limit for invoking the supervisory jurisdiction in Saint Lucia is salutary, subject of course to the Court’s insistence on reasonable promptness in all the circumstances of each particular case, and rejection of stale claims.”

[42] At paragraph 24 of that judgment the learned Judge went on to hold:

“It would seem therefore from the authorities mentioned that at the hearing of the judicial review claim, apart from considering the merits of the claim (usually on the grounds of either illegality, irrationality, and or unfairness) the judge may revisit the issue of unreasonable delay where the claim has merit in determining whether to grant the relief sought. Where the claim lacks merit there is no need to apply the considerations under CPR 56.5. Even if the court accepts that the defendant has acted unlawfully, there is no unqualified right to any of the remedies claimed. In exercising its discretion as to whether to grant any relief the court can take into account other factors including that there was unreasonable delay before making the application, whether the claimant acted promptly, or whether it would be detrimental to good administration or cause substantial hardship to the

⁸ [1990] 2 A.C. 738 at p. 749

⁹ HCVAP 2010/023

rights of any person, or substantially prejudice the rights of any person. To sum it up, despite the success of the judicial review claim, the relief may be refused where the judge applies CPR 56.5 and makes a positive finding under that rule.

- [43] In the case at bar, the claimant seeks declaratory relief in respect of the 2013 Order and an order for certiorari in respect of the final December 2015 order. When issued, certiorari quashes a past decision or action. The order is thus issued when the body in question has disposed the matter and rendered a decision or taken action on the matter in issue. The nature of certiorari has been summarised in the case of **Captain Geoffrey Kujoga Murungi v Attorney General**¹⁰ as follows:

“Certiorari deals with decisions already madeSuch an order can only be issued where the court considers that the decision under attack was reached without or in excess of jurisdiction or in breach of the rules of natural justice, or contrary to law. Thus an order of certiorari is not a restraining order. “

- [44] The effect of the order of certiorari is to restore the status quo ante. Accordingly, when issued, an order certiorari restores the situation that existed before the decision quashed was made. The Court of Appeal expressed itself on this position in the case of **Central Organisations of Trade Unions (K) v Benjamin K Nzioka and others**¹¹ thus:

“...The quashing of the Registrar’s decision meant as we have already stated that the status quo that existed before the bad decision of the Registrar was made is revived and if there is any formal act that is required on the part of the registrar to bring this about, he should have done so at once, if he has not, then he must do so now or risk the censure of this court for contemptuous behavior.”

- [45] In light of this, before granting such relief, a court must consider whether it would be detrimental to good administration or cause substantial hardship to or substantially prejudice the rights of any person. In this regard, the English case of **R v Secretary of State for the Environment ex parte Walters** is instructive.¹² That case involved applications by tenants of the Chalkhill Estate in the area of Brent Council. The council wished to redevelop the Estate in a particular way. The applicant/tenants opposed to the council's proposals. In order to act, the council required various consents from the secretary of state for the environment. The secretary of state gave his consent to the proposals. The tenants asked the court to quash the consent of the secretary of state. The respondent submitted that there is no illegality involved in what was done and, in the alternative;

¹⁰ Misc. Civil Application No. 293 of 1993

¹¹ No NAI 249 of 1993 (108/93 UR)

¹² [1997] EWHC Admin 266; (1997) 10 Admin LR 265 at 295 The Times 2 September 1997

any illegality is of such a minor nature that it would be inappropriate for the court to use its discretion to quash the administrative actions under attack.

[46] On discretionary grounds, Lord Justice Schiemann at first instance refused the application by Mr. Walters for judicial review of the decision of the secretary of state consenting to the redevelopment. He thereafter granted leave to appeal and ordered an expedited hearing.

[47] On appeal, Judge LJ, who delivered the judgment of the English Court of Appeal observed:

“In our judgment however the exercise of the discretion to grant or refuse judicial review usually, and in this case certainly does, involve close attention both to the nature of the illegality of the decision, and its consequences.....Similarly where, as here, there is overwhelming evidence that the effect of judicial review will not be limited to requiring the authority to repeat the process in the prescribed form, but will certainly damage the interests of a large number of other individuals who have welcomed the proposals and acted on the basis that they will be implemented it would be absurd for the court to ignore what Schiemann LJ rightly described as the relevant “disbenefits”.....**However when there are other genuine interests which will be adversely affected, the court is not prevented from analysing precisely the rights of which a single or a few individuals have been deprived, and their consequent loss (in whatever form it takes) and the consequences of upholding their rights contrary to the interests of many others. As the grant of judicial review may have substantial adverse consequences for a large number of blameless individuals beyond the applicant himself, in an appropriate case, of which this is one, the exercise of discretion permits account to be taken of these conflicting interests.....**The discretion of the court is a broad one to be exercised in the light of the varied and sometimes conflicting circumstances of each individual application, with particular attention in cases where delay is a significant factor, to be paid to the circumstances expressly specified in s 31(6).”

[48] **R v Secretary of State for the Environment ex parte Walters** has since been applied in **Gulf Insurance Limited v Central Bank of Trinidad and Tobago**.¹³ In that case, the issue was whether the decision of the Central Bank to facilitate the transfer of assets and undertakings of the one financial entity to another (FCB) was ultra vires the Central Bank Act. The Court stated that even if it had held that the decisions of the Central Bank were ultra vires, it was now impractical to quash the decisions some 8 years later, since to do so would affect innocent third parties, namely the depositors and other creditors of the FCB. The Court further observed in these circumstances even if the decision were ultra vires; the court might consider that the claimant should be left to its remedies at common law or in corporate law generally.

¹³ TT 2002 CA 35 per Nelson JA

- [49] Similar reasoning was also applied in **R v Monopolies and Mergers Commission ex parte Armin Plc**¹⁴ where relief was refused because:

“...good public administration requires decisiveness and finality, unless there are compelling reasons to the contrary. The financial public has been entitled to rely upon the finality of the announced decision to set aside the reference and upon the consequence that, subject to any further reference, Guinness were back in the ring, from 20th February until at least 25th February when leave to apply for judicial review was granted, and possibly longer in the light of the learned judge's decision. This is a very long time in terms of a volatile market and account must be taken of the probability that deals have been done in reliance upon the validity of the decisions now impugned.

- [50] In circumstances where a decision of a public body may affect not only the applicants but third parties who may have acted in the belief that the decision was a valid one, it is therefore clear that even where an order for leave has been obtained, a court may decline to grant the relief claimed. It is also clear that a court may have regard to the interests of such third parties whether or not they are before the court in deciding whether to exercise their remedial discretion to refuse relief.¹⁵

- [51] In **Credit Suisse v Allerdale Borough Council**¹⁶ Hobhouse LJ reiterated the general principle that:

“The discretion of the court in deciding whether to grant any remedy is a wide one. It can take into account many considerations, including the needs of good administration, delay, the effect on third parties, the utility of granting the relevant remedy.”

Hobhouse LJ however, went on to observe:

“The discretion can be exercised so as partially to uphold and partially quash the relevant administrative decision or act: see, for example, *Agricultural, Horticultural and Forestry Industry Training Board v. Aylesbury Mushrooms Ltd.* [1972] 1 W.L.R. 190.”

- [52] Such a conclusion was also drawn in **R v Greenwich London Borough Council ex p. Guiney**.¹⁷ That case concerned an application for permission which was rolled up with the substantive hearing for judicial review of the defendant's planning permission. The claim alleged a failure to consult, an alleged failure to take account of relevant policies, considerable admitted delay and the consequences for any remedies which might be available. The court took into account that:

¹⁴ [1986] 1 WLR 763

¹⁵ *R v Monopolies and Mergers Commission ex p. Argyll Group* [1986] 1 WLR 763; *R v Panel on Takeovers and Mergers ex p. Datafin* [1987] QB 815; *R v Secretary of State for Education and Science ex parte Avon County Council* [1990] C.O.D. 237

¹⁶ [1997] QB 306 at 355 D

¹⁷ [2008] EWHC 2012 (Admin)

“...there are overwhelmingly legitimate grounds for the interested parties to contend that they would be seriously prejudiced by a quashing of this planning permission, so obvious that I do not enumerate them further. Moreover, an overall quashing would have the effect of raising all sorts of problems in relation to potential breach of planning agreements; difficulties with education and employment training grants which have already been partly paid, there would be dilemmas about what was to happen to that; and a range of other practical nightmares which the interested parties should not have to face, bearing in mind the circumstances in which they came to hold the interests which they did.”

- [53] The court then considered the competing submissions by the parties. Counsel for the defendant submitted that there was undue delay in the making of the application and he reminded the court of the crucial need in cases where a grant of planning permission is challenged by way of judicial review for the greatest possible urgency. He referred to the interests of good administration, which he said made it inappropriate to undermine the basis upon which people have acted. Counsel further submitted that it was wrong to focus only on the developer alone and others may have relied on planning permission and ordered their affairs accordingly. Counsel for the defendant was supported in those submissions by counsel who appeared on behalf of the interested parties. Reliance was also placed by the interested parties on a decision of the House of Lords, **Kent County Council v Kingsway Investments**,¹⁸ where, on the question of the entirety and integrity of planning consents, the majority, whose decision was expressed succinctly in the words of Lord Guest, found as follows:

“Planning permission is an animal sui generis not to be compared with licences and similar permissions. It seems to me that planning permission is entire. If a condition as to its grant flies off owing to its invalidity, the whole planning permission must go; and it is impossible to separate the outline permission without the time limit from the grant.”

- [54] Counsel for the claimant **in ex parte Guiney** responded that in all the circumstances the court should grant relief as the substantive issue was of public importance and the merits of the claimant's case were strong. First, Counsel denied that there was any undue delay on the facts before the court. In regard to the appropriate relief, he submitted that it has to be accepted that a quashing or partial quashing will never get back to a clean sheet but it is the duty of the court, where it might otherwise grant total relief, to grant partial relief to reflect the merits. He submitted that, while this is not a question of severance as such, there are legitimate grounds for rescuing the planning consent, and by a process akin to severance, in a situation where one would simply be striking down the bad and retaining the good. Counsel for the claimant concluded that the court

¹⁸ [1971] AC 72, [1970] 1 ALL ER 70, 68 LGR 301

should indicate that it is minded to quash and then invite the parties to negotiate a new agreement.

- [55] In the Court's view, it is not surprising that in that case the Claimant's submissions did not find favour with the court. The court in **ex parte Guiney** noted that planning permissions, particularly those as complex as the one before the court, contain a large number of interdependent features. If one were to strike out or strike down one aspect of the planning consent, one would never know how dependent upon it other aspects and features of the permission were. The court noted that all the features of the planning consent seem to be part of a package deal and it is not a question of striking down the bad and rescuing the good because, if one severs from the good what is said to be bad, one is removing a key feature, both of what was agreed before the planning application was put in and also a key feature of what had been approved by the Council. Instead, the court relied heavily on the decision of Richards J: in **R (on the application of Seamus Gavin) v London Borough of Haringey and Wolseley Centres Ltd.** where, at paragraph 91, he noted:¹⁹

"The same considerations against the grant of relief do not apply to the declaration sought by the Claimant as an alternative to a quashing order. To declare that the council failed to comply with the relevant publicity requirements and EIA requirements would serve to underline the council's failings and would provide some satisfaction to the Claimant, but without affecting the validity of the planning permission itself or therefore of works carried out pursuant to it. It may not be strictly necessary, since this judgment can speak for itself, but I think it appropriate in all the circumstances to grant such a declaration."

- [56] Although the court acknowledged that the right to be consulted about a development affecting one's home is an important one and that in this case the defendant denied it to the claimant, the court also noted that the development had a considerable impact on the claimant and those other residents in the block closest to it. In those circumstances the court determined that it should:

"...issue a declaration as between the claimant and defendant in terms which I will consider but on the basis that the terms of that declaration are to have no impact whatsoever upon the interests of the interested parties."

- [57] This Court is respectfully guided by the reasoning here.

¹⁹ [2003] EWHC 2591 (Admin), [2004] 2 P & CR 209

- [58] Having set out the various factors referred to in argument as being relevant to the exercise of the court's discretion; it remains for the Court to determine whether the overall balance favours the grant or withholding the relief sought. In applying the relevant principles to the facts of this case, the Court has attached substantial weight to the fact that the failure to comply with the service requirements under the RLO was a serious procedural error which violated the Registrar's duty to act fairly. In the Court's judgment, the 2013 directions should have been directed to all of the claimants who were clearly interested parties who had come forward to make representations as to the partition application. The fact that these 2013 directions were not reduced into writing and properly served on the Claimants means that they would have been denied an opportunity to make representations on the application for partition. This flaw would not have been assisted by the Registrar's cursory letter to Albato King in 2015. That letter issued some 2 years after the original proceedings were begun was directed only to Mr. Albato King and even then, was not delivered in a manner which was consistent with established and accepted practice. The fact that Bernadette McKelly admits receipt of the same does not cure the problem because she received no letter in her own right inviting representations. It is further clear to the Court that if there were any representations to be made, then Beverly Christopher-Fraser should have been afforded an opportunity to make representations as well. As it is she was effectively excluded from the proceedings after 2013 because she was not properly notified that proceedings had resumed.
- [59] When it became clear to the Registrar that he would ultimately have to make the decision in this matter, he was obliged to direct his own mind to the issues. Had he done so, he would have appreciated that he had a duty to act fairly in circumstances where any reasonable person would have assumed that the application had been stale dated after an interruption of almost 2 years.
- [60] The Court is aware that judicial review claims must be brought promptly, but the Court has also borne in mind that the Claimants are not to blame for much of the delay. The Claimants were not aware of the decision to build until July 2016 and due to the manner of service applied could not have been deemed to have had notice of the decision any earlier. It is also clear that the reason the Claimants were not aware of this decision was due to the actions of the Registrar. On becoming aware of the decision under challenge, the Claimants filed their application for leave to apply for judicial review well within three months.

[61] Nevertheless, it cannot be denied that there has been a significant lapse of time since the Registrar's final decision of December 2015. To quash that decision after such a lapse of time and in the circumstances now existing would in the Court's judgment cause very substantial hardship or prejudice to not only Lorna Fraser but to the Princes and First Caribbean Bank, who are innocent third parties. Even taken at their lowest, the adverse consequences are significant and are not to be discounted by a blithe contention that third parties are the author of their own misfortune or by the equally blithe reference to the speculative possibility that any losses might be recouped by a claim in damages against the Registrar. The Court takes the view that the hardship or prejudice to Lorna Fraser and the third parties is a sufficient reason for the refusal of a quashing order.

[62] Since **Calmady v Calmady**²⁰ the courts have made it clear that regardless of the source of co-ownership, there must be some mechanism to escape the ties of perpetual contention between co-owners. The obvious method for doing so against the wishes of the other co-owners is via an application for compulsory partition. In the absence of agreement, a compulsory partition application can be brought by any co-proprietor. Once an application for partition is successful, the Registrar is obliged to implement the partition by closing the register of the parcel or parcels partitioned and opening new registers in respect of the allotments created by the partition.²¹ This may include demarcating a new boundary for the physical division of the land in order to demarcate the limits of possession but it is clear that the registrar's power must be taken as broader than that. In **Lister v Lister**²², Alderson B when confronted with a submission that partition commissioners could not create a new right of way, concluded that: "Making such an easement *is a part of the partition*. It is not like laying out money on the property."

[63] It follows that implicit in the statutory powers vested in the Registrar, is the power to carry out all the supplementary powers which are reasonably necessary to implement the partition. In order to make the most convenient partition, or to secure equality in the allotments, it is submitted that the Registrar's powers on partition should be interpreted to extend to those formerly recognised by

²⁰ (1795) 30 ER 780

²¹ Section 103 (2) of the Registered Land Ordinance

²² (1839) 3 Y & C (Ex.) 540 at 543; 160 ER 816 at 81

the English courts in partition, which could include the creation of new proprietary interests, including rights of way.²³

- [64] The Registrar's decision in December 2015, ordered a partition which took out "Lot 1 – Lot 9" of Parcel 5 using Survey Plan No. CA-2635B-113-T, the entire Parcel 12 and Lots 5 – 9 of Parcel 19 using Survey Plan No. CA-2635B-088-T, all in full satisfaction of the family of Blanche Agatha Norman and James Adolph Christopher's entitlement to the lands in Parcels 1, 5, 7, 12, 20, 32 and 163. The Order further removed the name "Lorna Fraser as Trustee" from Parcels 1, 7, 20, 32, 163 and the remnant for Parcels 5 and 19. Finally, the order granted Lorna Fraser permission to undertake such severance, partition of subdivision (as the case may be) or to such further action as may be necessary to effectuate the order hereby granted.
- [65] The record reveals that an application for subdivision soon followed on 1st March 2016, which sought the mutation of Parcel 5 to remove Lot 1 – Lot 9 and a mutation of Parcel 19 to remove Lot 5 – Lot 9. There followed the consequential closing and opening of registers. The record further reveals that the Parcels were in fact mutated in May of 2016. The registry map for Block 2635B was consequently amended by the Chief Surveyor with numerous easements/rights of way created and recorded consistent with that indicated on the approved Survey Plans No. CA-2635B-113-T and CA-2635B-088-T. In these premises and for the reasons already indicated, it is also clear to the Court that an order for certiorari would be detrimental to good administration.
- [66] The Court has also considered whether a partial quashing order could be made. Such an order would only be appropriate where the decision is made up of many elements but only some of which are unlawful.²⁴ This is not the case here. The breaches in this case are central to the decision and touch every aspect of the same. Moreover, given the ultimate aim of a compulsory partition the terms on which the 2015 final order was granted coupled with the ensuing actions, make it is clear that there are complex interdependent features which operate here.

²³ *Lister v Lister*

²⁴ *R v Inner South London Coroner, ex p Kendall* [1988] 1 WLR 1186

[67] Following the guidance in **R (on the application of Seamus Gavin) v London Borough of Haringey and Wolseley Centres Ltd.** the Court is satisfied that the Claimants should succeed to the extent of obtaining declaratory relief but that a quashing order should be refused. The Claimants are free to pursue their other remedies at law and in equity which may address any proven inequities in the allotment.

[68] The matter will therefore be disposed of in the following terms:

- i. **This Court issues a declaratory order that the actions and decisions of the Registrar which resulted in final partition order on 2nd December 2015 was in breach of the principles of natural justice and procedurally unfair.**
- ii. **The Claimants who were legally represented for only a part for these proceedings are entitled to their costs for that part of the proceedings to be assessed in accordance with CPR Part 65.12.**

**Vicki Ann Ellis
High Court Judge**

By the Court

Registrar