

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA**

Claim No. **ANUHCv2019/0246**

BETWEEN:

- [1] JAMES SPENCER**
- [2] CLEFERIN COLBOURNE**
- [3] SIR GEORGE RYAN**

-Claimants

And

- [1] THE ATTORNEY GENERAL OF ANTIGUA AND BARBUDA**
- [2] THE ANTIGUA PORT AUTHORITY**

-Defendants

APPEARANCES:

Mr. Anthony Astaphan SC, Mrs. Carla Brookes-Harris and Ms. Alicia Aska, Counsel for the Applicants/Defendants

Mr. Harold Lovell, Counsel for the Respondents/Claimants

2020: February 10th;

March 24th

JUDGMENT

- [1] KELSICK, J [Ag.]:** On 15th May 2019 the Claimants, pursuant to leave granted on 1st May 2019, filed a Fixed Date Claim (“FDC”) seeking various administrative orders pursuant to Part 56 of the Civil Procedure Rules 2000 (“CPR”).

- [2] On 31st May 2019, the Attorney-General, on behalf of the Defendants, applied for the FDC to be struck out. The application eventually came on for hearing before me on 10th February 2020.
- [3] At the opening of the hearing, Mr. Lovell indicated that Sir George Ryan is taking no further part in the proceedings. Notwithstanding that Sir George has not formally applied to have himself removed as a party, the references in this judgment to “Claimants” will be limited to the 1st and 2nd Claimants only.

THE AGREEMENT

- [4] It will be necessary, to understand the issues raised in the application, to set out in some detail the provisions of the agreement which is challenged by the Claimants.
- [5] The Government of Antigua and Barbuda, the Antigua and Barbuda Port Authority and GPH (Antigua) Limited (“GPH”) entered into an agreement dated 31st January 2019 (“Agreement”) under which the Government granted, so far as relevant in the present application, the following concessions to GPH:
- (i) Under clause 4.1, the exclusive right and privilege at the Port¹ to the extent provided for in the Agreement:
 - (a) to design, finance and build the New Pier and New Commercial Properties and such other capital improvements as GPH determines in its discretion to carry out at the Port;
 - (b) to possession and use of the Port and to operate, repair and maintain the Port Equipment and Port Superstructure, and to possession and use of the Port Infrastructure, as well as to optimize the operations, commercial activities and ancillary facilities at the Port including, by using GPH's Personnel or by appointing any other person from time to time in its absolute discretion;
 - (c) to provide the Services to Cruise Lines and passengers at the Port, Falmouth Harbour and Barbuda Island;
 - (d) to operate and manage the Port in accordance with the Agreement and the Lease and to grant sub-leases of the retail and F&B spaces in the Port as GPH considers appropriate in its absolute discretion (subject to the requirements of the Agreement and the Lease);
 - (e) to enter into contracts with third parties for the benefit of GPH or users generally within the Port and at Falmouth Harbour and Barbuda Island,

¹ Capitalised terms appearing in this paragraph, and paragraph [6], are defined in the Agreement. Where necessary the definitions will be set out in the judgment.

including in relation to management and facility management contracts, construction contracts, duty free shopping and operation and maintenance contracts;

- (f) to charge, collect and retain the Cruise Passenger Charge and any other Port Charges, including but not limited to any security, utility, water, and any other fees or charges for Services offered to Cruise Lines or their passengers and other users at the Port and, to the extent applicable, at Falmouth Harbour and Barbuda Island, subject always to GPH's obligations to pay to the Government the Variable Concession Fee and Revenue Share in accordance with the Agreement; and
 - (g) to charge, collect and retain all rents and other fees in relation to facilities within the Port or related services, provided that GPH shall use its reasonable endeavours to give priority to retaining existing Antiguan small business owners and entrepreneurs within the Port, provided that such owners and entrepreneurs are complying with their respective obligations in respect thereto;
- (ii) Under clause 11.1, the Government:
 - (a) agreed to waive all corporate income or equivalent taxes in respect of GPH for the first twenty (20) Years of the Term and to indemnify and hold harmless GPH from and against any corporate income or equivalent taxes levied on GPH in such period in Antigua and Barbuda;
 - (b) confirmed that there were currently no stamp duties, taxes or fees related to the importation of foreign exchange into Antigua and Barbuda in connection with the Agreement and the Services which apply to GPH and agreed to indemnify and hold harmless GPH from and against any such duties, taxes or fees levied on GPH in Antigua and Barbuda that may become applicable in the future;
 - (c) agreed to exempt GPH and its Lenders from the payment of withholding tax under the Income Tax Act as amended, for the first twenty years of the Term, on profits, share transfers, mortgages, repayment of mortgages, commissions, dividends and interest;
 - (d) agreed to waive or reduce stamp duty payable on the transfer of shares or property for the first twenty years of the Term and to provide assistance and support as necessary in obtaining the relevant licence to own or lease property in Antigua and Barbuda; and
 - (e) committed to use its best endeavours to support and assist GPH in relation to tax matters generally and in seeking to obtain exemptions from customs and import duties, Revenue Recovery Charge and Antigua and Barbuda Sales Tax, which would otherwise be applicable on the importation of

material and equipment by GPH's or any contractors to be used for the development of the Port any other facilities associated with the Port.

[6] By clause 2.1, clauses 1 – 5, 14, 21.1, 24 – 26, 28, 29, and the Schedules to the Agreement were made effective as of its date. All other provisions were conditional upon the conditions precedent (“Conditions”) set out in clause 3.2 being satisfied or waived. The relevant Conditions are:

(d) Government shall have procured at its cost that title to all relevant properties and all relevant rights in the Port shall have vested in Government such that Government can grant the rights to GPH as set out in the Agreement and shall have provided satisfactory evidence thereof to GPH and that all pledges, restrictions and security arrangements in respect thereof have been released and rectification of the boundary related issues with respect to parcels contained in the Land Plots;

(f) Government and the Port Authority shall have delivered to GPH a certified copy of the official documentation authorising the entering into by the Government and the Port Authority, as applicable, of the Agreement and the Lease and the grant of the rights, transactions and agreements contemplated therein;

(g) Government and GPH shall have entered into the Lease and registered it with the Land Registry for a period not less than the duration of the Term and in the form of the Lease for a peppercorn rent of US\$1500 per annum for all the Land Plots that will be included in the Lease for the purposes of the Agreement and throughout the Term and Government shall have procured the assignment of its rights under the existing rental agreements in respect of the Heritage Mall Properties in favour of GPH;

(i) Government shall have procured and provided to GPH confirmation that any required Approvals² to proceed with the matters referenced in the Agreement have been granted, including the Approvals related to the New Pier Works;

(j) Government shall have procured the repeal of the Cruise Ship Complex Development Act, No. 13/2001, as amended and the enactment of any legislation which may be necessary to facilitate the grant the rights and the grant of concessions to GPH under Clause 4 and the performance by GPH of its obligations and Services as stipulated under this Agreement.

(k) Government shall have procured and provided to GPH a letter of the Cabinet of the Government granting the tax incentives in favour of GPH as set out in Schedule 4 [Tax Incentives];

² Defined in clause 1 of the Agreement as “any planning permission and all other licences, consents, permissions and approvals in respect of the Works or the Parties' obligations hereunder, including the performance of the Services, as may be required from any statutory, sub-statutory and other regulatory bodies and undertakings”

(n) Government shall have procured the relevant legislation granting all the necessary rights to GPH to empower it to set the Cruise Passenger Charge and the Ports Charges pursuant to Clause 10.

[7] Clauses 4.2 and 4.3 of the Agreement provided:

“4.2 The rights and privileges granted to the Company shall apply with effect from the Services Commencement Date³ until the expiry of the Term or earlier termination of the Agreement.

4.3 In entering into the Agreement and any relevant Project Agreements, the Contracting Authority represents and warrants that all Approvals required for the grant of the rights hereunder by the Contracting Authority in favour of the Company and the exercise of those rights by the Company have been or will be duly granted by GoA and/or the Port Authority and/or any Relevant Authorities, including the relevant Ministerial and the Cabinet approval, and shall provide the certified copies of each to the Company.”

[8] Therefore, notwithstanding clause 2.1 which provided that clause 4 was to have immediate effect, by clause 4.2, the rights and privileges granted by the Agreement (which must include the rights and privileges granted by clause 4 itself) only had effect upon waiver or fulfillment of the Conditions. Further, the rights granted under Clause 4.1 were expressly subject, under clause 4.2, to the requisite Approvals.⁴

THE FDC

[9] The Claimants challenge the decision of the Defendants to enter into the Agreement and in particular:

- (i) the decision of the Defendants (particularly the Government) to enter into the Agreement without first making an application, as required by the Tenders Board Act 1991 (“TBA”), to the Tenders Board either for the Board to invite, on the Government’s behalf, tenders for the supply of cruise facilities and services or for the Board to grant an exemption from the tender procedure;
- (ii) the decision of the Defendants to enter into the Agreement without first consulting and informing those affected or concerned by the decision, including but not limited to the St. John’s Development Corporation, local landowners and

³ Defined as the date set out in the “Services Commencement Certificate” which in turn is defined as “the certificate to be issued by [GPH] pursuant to clause 3.1 once all the Conditions have been satisfied or waived in accordance with the terms hereof..”

⁴ Defined as “any planning permission and all other licences, consents, permissions and approvals in respect of the Works or the Parties’ obligations hereunder, including the performance of the Services, as may be required from any statutory, sub-statutory and other regulatory bodies and undertakings.”

occupiers, and those engaged in local business that would be affected by the decision, “as required by section 14 of the Second Schedule of the St. John’s Development Corporation Act 1986”;

- (iii) the decision of the Defendants (particularly the Government) to provide wide-ranging tax remissions to GPH in breach of section 16 of the Finance Administration Act 2006;
- (iv) the decision of the Defendants (particularly the Government) to undertake to procure that title to all relevant properties and rights are vested in “the Respondent under the Agreement”;
- (v) the decision of the Defendants (particularly the Government) to undertake to enact and/or repeal legislation, both in principle and because such legislation is inadequately identified in the Agreement.

[10] The reliefs sought were:

- (i) declarations that the decisions was unlawful in being, essentially, ultra vires for non-conformity with:
 - 1. the Tenders Board Act;
 - 2. the St. John’s Development Corporation Act 1986;
 - 3. the Finance Administration Act 2006;
- (ii) a declaration that the decision was unlawful being made in breach of the Defendants’ obligation to inform and consult those affected by their decision and who had a legitimate expectation to be consulted;
- (iii) a declaration that the decision was unlawful because the Government in granting the tax remissions failed to take into account relevant considerations and took into account irrelevant considerations;
- (iv) a declaration, pursuant to sections 18 and 119 of the Constitution, that the Defendants have contravened the Claimants’ fundamental right of deprivation of property without compensation as guaranteed by section 9 of the Constitution;
- (v) A declaration, pursuant to section 119 of the Constitution, that the Respondents (particularly the Government) contravened the fundamental constitutional principle of the separation of powers in undertaking to enact and/or repeal legislation when law-making is the function of Parliament; and
- (vi) consequential orders for certiorari.

CRUISE PORT FINANCE, DEVELOPMENT AND MANAGEMENT ACT, 2019 (“THE SANCTIONING ACT”)

[11] As stated above, the Sanctioning Act was enacted after the FDC was filed.

- [12] It should be recorded that at the outset of the hearing I asked Mr. Lovell whether the constitutionality of this Act is being challenged in which case an amendment to the FDC would be required. Mr. Lovell indicated that his clients would proceed with the FDC on the basis that the Sanctioning Act was not unconstitutional. As I understood Mr. Lovell, however, his clients were reserving their rights to challenge the constitutionality of the Act in subsequent proceedings.
- [13] However, in their closing submissions filed on 5th March 2020, the Claimants surprisingly submitted, at paragraph 17, that the Sanctioning Act “was passed and enacted in breach of Section of (sic) 46 of the Constitution.” This Submission is simply not open to the Claimants on the pleadings before the Court, especially in light of the exchange referred to in the previous paragraph.
- [14] In the Sanctioning Act, various commitments of the Government in the Agreement are fulfilled. In particular:
- (i) The Agreement was set out in the Schedule to the Sanctioning Act and given statutory force by sections such as the following:
 - 1. In respect of any matter specifically dealt with in the Agreement, if there is any inconsistency between the Agreement and the Port Authority Act, the Agreement shall prevail to the extent of the inconsistency;⁵
 - 2. At the commencement of the Sanctioning Act, the responsibility for the management, operation and development of the Port is to vest in GPH, subject to the provisions of the Sanctioning Act and the terms of the Agreement;⁶
 - (ii) GPH is granted substantially the same concessions and powers are granted by clause 4.1 of the Agreement;⁷
 - (iii) The Agreement was approved by the Cabinet.⁸ The relevant section is headed “Approval of Concessions”.
 - (iv) The Tenders Board Act was disapplied to the Agreement;⁹ and
 - (v) Various amendments were made to the Cruise Passenger Tax Act.¹⁰

⁵ S.3(1)

⁶ S.4(1)

⁷ Part II

⁸ S. 22

⁹ S. 21

¹⁰ S. 23

THE APPLICATION TO STRIKE OUT

[15] The Defendants applied¹¹ to strike out the Claim on the following grounds:

- (i) The FDC does not comply with Part 56.7(2), (3) and (4) in that:
 - 1. the Claimants have failed to provide any particulars or evidence by way of an affidavit as mandated by CPR;
 - 2. the Claimants have failed to head the claim “Originating Motion” as required by CPR 56.7(2); and
 - 3. there is no affidavit evidence to indicate what sections of the Constitution have been breached.
- (ii) The FDC discloses no reasonable cause of action because:
 - 1. the agreement is not effective until fulfillment or waiver of the Conditions;
 - 2. the Claimants have not pleaded or established any basis for any right or legitimate expectation of consultation;
 - 3. the provisions of the St. John’s Development Corporation Act do not apply and there was no requirement or obligation for the Minister to publish any development ordered as alleged;
 - 4. there is no basis in fact or law that the property rights of any of the Claimants have been, are being or will be contravened by the Agreement;
 - 5. there is no evidence to support the standing of the Claimants to bring judicial review;
 - 6. the Attorney General is not a proper party as judicial review proceedings do not fall under the Crown Proceedings Act; and
 - 7. the Defendants have made no decision capable of judicial review.

[16] In their submissions the Respondents rely further on the Sanctioning Act which has become a centerpiece of the application to strike out the FDC.

NON-COMPLIANCE WITH PART 56.7(2), (3) AND (4)

[17] These Rules provide:

¹¹ By Application filed on 31st May 2019

“(2) The claim form in an application under a relevant Constitution requiring an application to be made by originating motion should be headed ‘Originating Motion’.

(3) The claimant must file with the claim form evidence on affidavit.

(4) The affidavit must state –

- (a) the name, address and description of the claimant and the defendant;
- (b) the nature of the relief sought identifying –
 - (i) any interim relief sought; and
 - (ii) whether the claimant seeks damages, restitution, recovery of any sum due or alleged to be due or an order for the return of property, setting out the facts on which such claim is based and, where practicable, specifying the amount of any money claimed;
- (c) in the case of a claim under the relevant Constitution, the provision of the Constitution which the claimant alleges has been, is being or is likely to be breached;
- (d) the grounds on which such relief is sought;
- (e) the facts on which the claim is based;
- (f) the claimant’s address for service; and
- (g) the names and addresses of all defendants to the claim.”

[18] In my view there is no merit in the challenges under these Rules.

[19] CPR 56.7(3) and (4) must, of course, be read together. Detailed affidavits were filed by the Claimants in support of their application for leave to bring judicial review proceedings. It is unnecessary to set out the detailed provisions of these affidavits. I find that they contain sufficient detail to comply with CPR 56.7(3) and (4).

[20] However, no affidavits were filed with the FDC. It is this to which the Defendants object.

[21] The Claimants stated in the FDC that the facts relied upon are contained in the Affidavits of the Claimants sworn to and filed in April 2019.¹²

¹² The particular day is not indicated although there is a dotted line where this was to be inserted. However, this caused no embarrassment to the Defendants who were well aware that the affidavits referred to were those in support of the Application for leave to bring judicial review proceedings: para 9 of their submissions filed on 23rd September 2019

[22] The Defendants relied upon **The Attorney-General v Jon Miller Claim No. MNIHCVAP2012/011**.¹³ The Court is reported to have said:

“Further, the Court was satisfied that while it is a requirement of the CPR that evidence on affidavit must be filed with the fixed date claim form, where the affidavits that were going to be relied on were, as in this case, extensive and consequently expensive to reproduce and the respondents having indicated on the fixed date claim form that they would be relying on the affidavits which were filed with the application for leave, it would be an unnecessary burden to require that these affidavits, in identical or similar form, be refiled with the fixed date claim form.

The Court felt it prudent to place on record that where applicants intend to rely on affidavits or pleadings filed earlier in the same matter or in an application which is a precursor to the claim the applicants must seek the leave of the Court to do that.”

[23] There is no indication when such an application should be made.

[24] Attention must always be paid to CPR 1.1(1) which provides that the “overriding objective of these Rules is to enable the court to deal with cases justly.” Dealing with cases justly means¹⁴–

- (i) ensuring, so far as is practicable, that the parties are on an equal footing;
- (ii) saving expense;
- (iii) dealing with cases in ways which are proportionate to the –
 - 1. amount of money involved;
 - 2. importance of the case;
 - 3. complexity of the issues; and
 - 4. financial position of each party;
- (iv) ensuring that it is dealt with expeditiously; and
- (v) allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases.

[25] CPR 56.9(3) provides that:

- (3) If leave has been given to make a claim for judicial review, the claimant must also serve a copy of the –

¹³ <https://www.eccourts.org/2nd-4th-december-2013/>

¹⁴ CPR 1.1(2)

- (a) application for leave;
- (b) affidavit in support; and
- (c) order giving leave.

- [26] In many, if not most, instances the affidavit in support of an application for leave to bring judicial review proceedings contain the same averments contained in the affidavit in support of a Fixed Date Claim brought pursuant to such leave. To require the Claimant in all instances to file an affidavit containing the same averments as that which he is already required to serve on the Defendant pursuant to CPR 56.9(3)¹⁵ might be said to serve no useful purpose, especially where (as in the present case) there is an express statement in the Fixed Date Claim that the same averments are to be relied upon.
- [27] Once it is established (as the Court of Appeal has held) that the former affidavits can be relied upon with leave, then the overriding objective requires that leave be liberally granted. In fact, it is difficult to conceive of a circumstance in which leave would be refused where the same evidence is relied upon. Further, there is no reason in principle, or logic, why such leave cannot be sought, and granted, after the time limited to the Defendants to provide an answer to the Claim.
- [28] The requirement that a Fixed Date Claim seeking constitutional relief be headed “Originating Motion” does not sit entirely happily with CPR 8.1(5)(d) which states that a Fixed Date Claim must be used where any enactment requires a matter to be initiated by originating motion. Why would the heading not be required in all instances where an originating motion is required by statute?
- [29] The most likely reason for the requirement in CPR 56.7(2) is to ensure that any formal requirement of the Constitution as to the proper procedure.
- [30] A Defendant can suffer no prejudice from the omission to comply with the formal requirement of heading a Fixed Date Claim “Originating Motion” where the body of the Claim makes it clear that constitution relief is being sought.
- [31] CPR 26.9 provides:
- “(1) This rule applies only where the consequence of failure to comply with a rule, practice direction, court order or direction has not been specified by any rule, practice direction or court order.
 - (2) An error of procedure or failure to comply with a rule, practice direction, court order or direction does not invalidate any step taken in the proceedings, unless the court so orders.

¹⁵1515 Which requires the Claimant to serve a copy of the application for leave and the affidavit evidence in support

(3) If there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.

(4) The court may make such an order on or without an application by a party.”

[32] Where there has been such an omission, the Court’s power under CPR 26.9 should be utilised to cure any procedural defect. To strike out the claim for non-compliance with this requirement is an entirely disproportionate response.

[33] Finally, the ground that there is no affidavit evidence to indicate what sections of the Constitution have been breached presupposes that a particular section of the Constitution is relied upon. The Claimants rely upon the alleged breach of the separation of powers. This constitutional principle is implied and not express.¹⁶ There is therefore no section to which reference can be made.

[34] I therefore find that there is no proper basis to dismiss the FDC on these grounds.

THE ATTORNEY GENERAL IS NOT A PROPER PARTY

[35] The Defendants rely on cases such as **Quorum Island (BVI) Ltd. V. Virgin Islands Environmental Council HCVAP 2009/021 (BVI)** where it was held¹⁷:

“Prerogative or ‘Crown side’ proceedings are not civil proceedings under the laws of the Virgin Islands. There is no provision in the laws of the Virgin Islands that requires the Attorney General to be a necessary or proper defendant in prerogative type proceedings. However, the Attorney General may be a necessary and proper party in civil proceedings against the Crown, by virtue of section 13 of the Crown Proceedings Act. The proper defendant in prerogative proceedings is the person or authority whose decision is challenged; in the present case, the Minister.”

[36] In the present case, the FDC seeks both constitutional and judicial review relief. In respect of the Constitutional challenge, the Attorney General is a proper, and necessary, party.

[37] There is therefore no merit in this challenge.

NO REASONABLE CAUSE OF ACTION

[38] I will first address the Defendants challenges to the Claimants’ claims under the constitution, and then the challenges under judicial review principles.

¹⁶ See paragraph [44] below

¹⁷ As summarized in paragraph 1 of the headnote

Constitutional Challenges

a) Breach of Fundamental Rights

[39] This ground covers the allegations that under the Agreement the Government undertook to obtain title to lands which amounts to a breach of Section 9 of the Constitution. This challenge has no real prospect of succeeding.

[40] Section 119(1) of the Constitution provides:

“Subject to the provisions of sections 25(2), 47(8)(b), 56(4), 65(5), 123(7)(b) and 124 of this Constitution, any person who alleges that any provisions of this Constitution (**other than a provision of Chapter II**) has been or is being contravened may, if he has a relevant interest, apply to the High Court for a declaration and for relief under this section.” (emphasis added)

[41] Section 9 is in Chapter II of the Constitution. Section 18(1) of the Constitution states:

“If any person alleges that any of the provisions of sections 3 to 17 (inclusive) of this Constitution has been, is being or is likely to be contravened **in relation to him** (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter that is lawfully available, **that person** (or that other person) may apply to the High Court for redress.” (emphasis added)

[42] The Claimants have not asserted that there is any risk that any of their property will be, has been, or is likely to be acquired in breach of section 9 of the Constitution. The Claimants therefore have no standing to make any such challenge.

b) Separation of Powers

[43] This ground covers the allegations that the Government by entering into the Agreement undertook to pass or repeal legislation and thereby trespassed on the domain of Parliament.

[44] There is no controversy between the parties as to the scope of the constitutional principle of separation of powers. The sole issue is whether the Government has breached it by entering into the Agreement. It is therefore sufficient to quote a recent statement of principle. In *Ferguson v AG of Trinidad and Tobago* [2016] UKPC 2, Lord Sumption said:

“15. One of the fundamental principles of the Constitution is the qualified separation of powers. It is qualified because the “Westminster model” has never required an absolute institutional separation between the three branches of the state. But the relations between them are subject to restrictions on the use of its constitutional powers by one branch in a manner which interferes with the exercise of their own powers by the others. In *Hinds v The Queen* [1977] AC 195, 212-213 Lord Diplock, speaking of the Constitution of Jamaica, said:

‘... a great deal can be, and in drafting practice often is, left to necessary implication from the adoption in the new constitution of a governmental structure which makes provision for a legislature, an executive and judicature. It is taken for granted that the basic principle of separation of powers will apply to the exercise of their respective functions by these three organs of government. Thus the constitution does not normally contain any express prohibition upon the exercise of legislative powers by the executive or of judicial powers by either the executive or the legislature. As respects the judicature, particularly if it is intended that the previously existing courts shall continue to function, the constitution itself may even omit any express provision conferring judicial power upon the judicature. Nevertheless it is well established as a rule of construction applicable to constitutional instruments under which this governmental structure is adopted that the absence of express words to that effect does not prevent the legislative, the executive and the judicial powers of the new state being exercisable exclusively by the legislature, by the executive and by the judicature respectively. ...’

All Constitutions on the Westminster model deal under separate Chapter headings with the legislature, the executive and the judicature. The Chapter dealing with the judicature invariably contains provisions dealing with the method of appointment and security of tenure of the members of the judiciary which are designed to assure to them a degree of independence from the other two branches of government What ... is implicit in the very structure of a Constitution on the Westminster model is that judicial power, however it be distributed from time to time between various courts, is to continue to be vested in persons appointed to hold judicial office in the manner and on the terms laid down in the Chapter dealing with the judicature, even though this is not expressly stated in the Constitution: *Liyanage v The Queen* [1967] 1 AC 259, 287-288.’

The separation between the exercise of judicial and legislative or executive powers has been described as a ‘characteristic feature of democracies’: *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 at para 50 (Lord Steyn); *Director of Public Prosecutions of Jamaica v Mollison* [2003] 2 AC 411 at para 13 (Lord Bingham of Cornhill). In *Seepersad v Attorney General of Trinidad and Tobago* [2013] 1 AC 659, Lord Hope of Craighead applied these principles to the Constitution of Trinidad and Tobago. He observed at para 10:

‘The separation of powers is a basic principle on which the Constitution of Trinidad and Tobago is founded. Parliament cannot, consistently with that principle, transfer from the judiciary to an executive body which is not qualified to exercise judicial powers a discretion to determine the severity of the punishment to be inflicted upon an offender. The system of public law under which the people for whom the Constitution was provided were already living when it took effect must be assumed to have evolved in accordance with that principle.’”

- [45] The Claimants assert that it is for Parliament, and not the executive, to enact laws. There can be no quarrel with this. Section 46 of the Constitution states that “[s]ubject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Antigua and Barbuda.”
- [46] The Claimants then assert that clauses 3(2)(j) and (n) of the Agreement¹⁸ breach the principle because in these clauses the Government is committing itself, or undertaking, to ensure that certain legislative measures are taken. In so committing itself, it is said, Government is trespassing on the authority of Parliament.
- [47] *Spencer v The Attorney-General of Antigua and Barbuda et al* Civ. App. No .20A of 1997 (Antigua and Barbuda) considered agreements entered into by Government which include a commitment to procure legislation. On page 9 Byron CJ summarized the relevant challenge by the Claimant and the decision of Saunders J in the court below:

“[Para 12]¹⁹ [a]lleges that the agreement is discriminatory against the people of Antigua and Barbuda in that it treats the development and persons concerned with it as a separate class and community **by committing the government to grant special exemptions from laws regulating taxation and good government** for its own convenience and profit thereby discriminating against the people of Antigua and Barbuda contrary to section 14 of the Constitution.

In effect the learned trial Judge decided that this paragraph did not give rise to a cause of action **because the agreement was inchoate in the sense that it did not affect any rights – it merely evidenced the intention of the parties;** and in any event no allegation of discrimination was made in the sense in which the Constitution described the term.”

- [48] Byron CJ dealt with the “inchoate” issue on page 22 where he stated:

“The appellant challenged the learned trial Judge’s conclusion that the Agreement and the Bill were inchoate and that the action was premature because they did no more than evidence an intention to cause future breaches of the Constitution. In my view the definition of completion in the agreement itself which required effective legislation to transfer title and enact the proposed concessions and privileges, licences and permits make the issue rhetorical. It is equally so with regard to a Bill which essentially does not have the force of law.

I think that a necessary consequence of the wording of section 119(1) is that unconstitutionality cannot be based on the entry into an agreement nor a bill prior to the passage of the enabling legislation. There could be no allegation that a provision of the Constitution has been or is being contravened as is required

¹⁸ Set out at paragraph [6] of this judgment

¹⁹ Of the grounds of Appeal

under section 119(1). **The allegation would of necessity be that a provision is likely to be contravened.** As I have demonstrated, it is only in matters falling under the jurisdiction of section 18 of the Constitution that such an allegation could give rise to a justiciable issue. In the premises, I support the conclusion of the learned trial Judge. Invalidity could only arise if effect was given to the agreement before Parliament had enacted the necessary legislation. See *New South Wales v Bardolph* (1934) 52 C.L.R. 455.” [emphasis added]

[49] Finally, on page 19, Byron CJ said:

“The agreement made provision for extensive fiscal concessions from duties and taxes. In addition it made provision for the developer to undertake certain works, on terms which would enable the developer to set of (sic) the costs incurred from taxes due up to \$5,000,000.00, the said sums to be held in a special account for that purpose. The provision included a requirement that these terms would only come into effect on the passage of enabling legislation.

...

In addition, the agreement did not purport to grant any exemptions nor to make any remissions. It evidenced the agreement of the Government to seek passage of legislation giving effect to the proposed concessions and remissions. Legislation of such nature is specifically permitted by the constitution sections 53(2) (a) (iv); 56 (1); 90 and 93. I agree with the learned trial Judge’s conclusion that no cause of action was disclosed in this paragraph of the Statement of Claim.”

[50] In my view, these statements apply equally to a challenge based on separation of powers which also is brought under Section 119 of the Constitution.

[51] No provision of the Agreement purports to create or modify existing law. In clauses 4.1(a) and 11 the Government does indeed grant various rights and concessions but, as indicated earlier in this judgment, the operation of clauses 4 and 11 were made subject to the fulfillment or waiver of the Conditions. Clause 4.1(a) is further subject to clause 4.1(c) which states that in entering into the Agreement the Government and Port Authority “represent and warrant that all Approvals required for the grant of the right [under the Agreement by the Government and Port Authority] have been or will be duly granted ...” by the relevant authority.

[52] The Agreement does not therefore purport to arrogate to itself the exercise of legislative power. Rather it agrees to procure that such exercise occur, but this is not the same thing. If the legislation is not passed, then Government will have breached the Agreement and if the legislation is passed, then Parliament will have acted.

[53] In *Ferguson*, at paragraph 43, Lord Sumption stated:

“... The difficulty about this is that any supposed injustice was the result of Parliament’s decision to pass the Amending Act. It is axiomatic that the legal consequences of a valid Act of Parliament cannot properly be categorised by the

courts as an injustice for this purpose. Nor can the conduct of the DPP be treated as unjust simply because it may be thought to have brought the repeal about. In *Hoani te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308, an indemnity was sought against a statutory charge as damages for the defendant's breach of duty in promoting the bill. Viscount Simon LC, delivering the advice of the Privy Council, expressed the principle as follows, at pp 322-323:

'It is not open to the court to go behind what has been enacted by the legislature, and to inquire how the enactment came to be made, whether it arose out of incorrect information or, indeed, on actual deception by someone on whom reliance was placed by it. ... Before the court can accede to the appellant's claim for an indemnity against the charge imposed by section 14 of the Act of 1935, the court will require not only to find that the respondent board owed to the native owners the duty alleged, and that it committed the breaches of that duty which are alleged, but also that the enactment of section 14 was the reasonable and natural consequence of such breaches, and, even assuming the duty and breaches to have been established, the third and last essential step for the appellant's success would involve an inquiry by the court of the nature prohibited ...'.

- [54] This was said in response to a submission that the conduct of the DPP in making public statements and being engaged in the drafting of the Bill in question rendered it an abuse for him to proceed with the prosecutions against the Appellants. It is therefore not direct authority for the issue in this case, but it does in my view illustrate the fallacy of the Claimants' argument. Their submission is that it was improper for the executive to agree to promote legislation. Nevertheless, the Sanctioning Act was enacted. The Court cannot inquire into the circumstances in which the Act, the constitutionality of which is not challenged in this case, was passed.
- [55] If an Act cannot be impugned due to the Agreement by Government to promote it, it is difficult to understand how the Agreement to procure it can be said to be a breach of the separation of powers principle.
- [56] For these reasons, I find that the Claimants have no reasonable prospect of succeeding on this ground.

Judicial Review Challenges

a) TBA

- [57] The relevant provisions of the TBA are:

"3. This Act applies to the Government and any statutory body notwithstanding any general or special power or authority vested in such statutory body by an Act of Parliament.

4(2). The Board may exempt the Government or any statutory body to which this Act applies from the tender procedure under this Act.²⁰

20(1). Whenever articles or works or any services in connection therewith are required to be supplied or undertaken on behalf of the Government or a statutory body to which this Act applies, the Government or such statutory body shall apply in writing to the Board to invite on its behalf tenders for the supply of those articles or for the undertaking of the works or services in connection therewith.

20(3). On the receipt of any such application, the Board shall either-

(a) invite members of the public in general to make offers for the supply of such articles or for the undertaking of such works or the provision of services, as the case may be, by notice published in the Gazette and in local or overseas newspapers, or

(b) subject to the approval of the Minister, invite such bodies or persons as may be selected by the Board to make offers for the supply of such articles or for the undertaking of such works or services, as the case may be, whenever the Board considers it expedient or desirable so to do.”

[58] There was no contention by the Defendants that any application was submitted to the Tenders Board pursuant to Section 20(1) nor that any exemption pursuant to section 4(2) was granted. The rights conferred on GPH under clause 4.1(a) of the Agreement²¹ are no doubt the types of works contemplated by the TBA to be submitted to the Tenders Board.

[59] There might have therefore been grounds to challenge this concession granted to GPH as being ultra vires the TBA.

[60] However, by section 21 of the Sanctioning Act, the TBA is disapplied to the Agreement. In paragraph 12 of their submissions filed on 5th March 2020, the Claimants submit that the Sanctioning Act “cannot retrospectively render the Agreement lawful, when it was unlawfully entered into.”

[61] In *Lawrence v Financial Services Commission* [2009] UKPC 49, the Financial Services Commission issued a notice against the appellant, purportedly pursuant to Financial Services Commission Act 2001. For reasons not necessary to state, at the time the notice was issued the relevant provisions of the Act had not been brought into effect but none of the parties was aware of this. The Appellant challenged the notice on natural justice grounds in the High Court. After the matter was tried, the defect was discovered resulting in the passing of the Financial Services Commission (Insurance Services) (Validation and Indemnity) Act 2006 the effect of which was, inter alia, to

²⁰ Added by the Tenders Board (Amendment) Act 2002 (No. 8 of 2002)

²¹ See paragraph [5](i)(a) of this Judgment

validate the notice. When the matter came before the Court of Appeal, it was argued as a preliminary issue whether the notice was indeed validated by this Act. It was common ground that at the time the notice was issued it was void and of no effect and that if the matter had been brought to the attention of the High Court it would have been quashed.²²

[62] Nevertheless, the Privy Council held that the notice was effectively validated by the 2006 Act. The issue was treated as one of construction of the 2006 Act, and in particular whether it was sufficiently indicated to have had retroactive effect.²³ There was no question that the Act could render the notice, initially void, valid.

[63] In the present case, any defect in the Agreement under this head is based on the failure submit the matter to the Tenders Board. If indeed the Agreement was vulnerable for this reason, that vulnerability was removed by section 21 of the Sanctioning Act.

[64] There can be no doubt that Parliament intended the Sanctioning Act to have retroactive effect with respect to the Agreement which was set out in Schedule to it. The intent of section 21 must have been to cure any potential defect in the award of the concession to GPH arising from non-compliance with the TBA.

[65] I therefore find that there is no real prospect of successfully establishing that Agreement contravened the TBA.

b) Consultation

[66] The Claimants base their right to consultation on:

- (i) section 14 of the Second Schedule of the St. John's Development Corporation Act 1986; and
- (ii) the Defendants' obligation to inform and consult those affected by their decision and who had a legitimate expectation to be consulted.

[67] Section 14 provides:

"If the Minister is satisfied, after consultation any person or group of persons in Antigua and Barbuda which appears to him to be concerned, that it is expedient in the national interest that any area of land within the designated area should be developed by the Corporation, he may make an order designating that area for the purposes of this Act."

²² Para 9 of the Judgment

²³ See paras. 27 to 29

[68] This ground has no real prospect of success. The Agreement does not contemplate any development works being undertaken by the St. John's Development Corporation, but by GPH.

[69] With respect to legitimate expectation, the Claimants state that the Defendant had a duty to inform and consult those affected by their decision and who had a legitimate expectation to be consulted. This submissions appears to suggest that the right to be consulted is derived from the fact that the Claimants may be affected by the decisions. This is not the law. The law is stated in Halsburys Laws of England:²⁴

"A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though there is no other legal basis upon which he could claim such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent past practice or policy. **In all instances the expectation arises by reason of the conduct of the decision-maker**, and is protected by the courts on the basis that principles of fairness, predictability and certainty in administration should not be dis-regarded and that a legitimate expectation should not be disappointed." [emphasis added]

[70] Secondly, the relevant development rights are expressly conferred on GPH by the Sanctioning Act. Those rights, specifically and unconditionally conferred by a valid Act of Parliament, cannot be struck down for any alleged breach of the right to consultation arising under a different, and earlier, piece of legislation, which if inconsistent with the Sanctioning Act must be held as impliedly repealed insofar as inconsistent, or by virtue of judicial review principles.

c) Ultra Vires

[71] This ground covers the clauses in the Agreement dealing with remission of taxes. These are contained in clause 11 of the Agreement and as explained above, clause 11 is subject to the Conditions which include that all due approvals for the grant are obtained.

[72] Again, there has been no purported attempt by the Government to act outside the relevant legislation dealing with tax remissions.

[73] In this connection, section 22 of the Sanctioning Act²⁵ should be mentioned. This is a curious provision which on its faces records a fact rather than legislates anything. No submissions were directed by the Respondents on the meaning to be attributed to this provision.

²⁴ Halsbury's Laws of England/Judicial Review (Volume 61A (2018))/2, para 50

²⁵ See paragraph [14](iii) above

[74] It can be perhaps treated as deeming that Cabinet has taken a decision to grant the tax concessions pursuant to Section 80 of the Income Tax Act Cap. 212 which provides:

“The Cabinet may, if satisfied that it is just and equitable to do so, remit-

(a) the whole or any part of the tax payable by any person;

(b) any penalty, fee or charge imposed for or as the result of non-payment thereof, including any expenses of levy and sale of and of commission payable to the Provost-Marshall;

(c) any additional penalty or interest payable or paid under the provisions of subsection (3) of section 65.”

[75] Section 80 of the Income Tax Act ought to be compared with Sections 9(3) and (4) of the Stamp Act, Cap. 410 which state:

"(3) Notwithstanding subsection (1) and Schedule 9, the House of Representatives may by resolution remit in part or in whole the duty payable on conveyance or transfer of any property (not being any stock or funded debt)

(4) The remission in part of the duty payable on conveyance or transfer granted to the persons named in the Schedule hereto is hereby ratified.

[76] Therefore, whatever effect flows from Section 22 of the Act, it does not effect the ratification of the exemptions from stamp duties contemplated by clause 11(1)(d) of the Agreement. This requires ratification by the House of Representatives and the Act does not purport to amend Stamp Act in this regard.

[77] However, for reasons already explained, there has been no attempt by the Government in the Agreement to grant the requisite remission but merely to procure that it be granted.

[78] There is therefore also no real prospect of success on this ground.

APPROACH TO APPLICATIONS TO STRIKE OUT

[79] The Claimants properly submitted that:

- (i) The court's power to strike out should be used only in clear cases;
- (ii) in judicial review matters where leave has been granted, it is “almost always” preferable for the judge to let the review take place; and
- (iii) it is inappropriate in this case as it involves substantial points of law and the facts need to be fully investigated in order to draw conclusions.

- [80] I accept all of these propositions. However, the power can and should be used in clear cases. A clear case is where there is no real prospect of succeeding. I have held that the Claimants have no real prospect of succeeding on the challenges which they have advanced.
- [81] In relation to the need for restraint where leave has previously been granted, if the issues were not argued on the application for leave, then such permission should not deter the court in acting in otherwise clear cases.
- [82] In relation to the assertion that facts will need to be ascertained and conclusions drawn for the Court to make a determination, the Agreement is before the Court and it is the entry into, and terms of, the Agreement upon which the Claimants primarily rely. The Claimants have not suggested any other facts the determination of which would affect the conclusions I have come to.
- [83] While I agree that the case involves substantial points of law, there is no uncertainty as to what this law is nor how it should be applied in the present case.

ORDERS

[84] As a result, it is ordered as follows:

- (i) The Fixed Date Claim filed on 15th May 2019 is struck out.
- (ii) In accordance with CPR 56.13(6), there shall be no order as to costs.

Damian Kelsick

High Court Judge (Ag.)

By the Court

Registrar