

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO: ANUHCV 2018/0320

BETWEEN:

**JOHN MUSSINGTON
JACKLYN FRANK**

Claimants

and

**DEVELOPMENT CONTROL AUTHORITY
THE ANTIGUA AND BARBUDA AIRPORTS AUTHORITY
THE ATTORNEY GENERAL**

Defendants

Appearances:

Mr. Leslie Thomas QC and with him Ms. Michelle Sterling for the Claimants.
Ms. Louann Da Costa for the First Defendant
Mr. Hugh Marshall and with him Ms. Kema Benjamin for the Second Defendant
Dr. David Dorsett and with him Ms. Carla Brookes-Harris for the Third Defendant

2018: November 13th

2019: March 7th

ORAL JUDGMENT

- [1] **WILKINSON J.:** On 6th July 2018, the Claimants filed an application for leave to file a judicial review claim against the Defendants. That application was supported by the affidavit of Mr. John Mussington filed on 6th July 2018, and Ms. Jacklyn Frank filed on 6th July 2018. On 2nd August 2018, the Court heard the application for leave and amongst other orders granted the Claimants leave to file their judicial review claim.
- [2] On 15th August 2018, the Claimants filed their fixed date claim form seeking judicial review against the Defendants in relation to the construction of an airport at Barbuda. The Fixed Date Claim Form was support by the affidavits of Ms. Tassian Brown-Barker and Ms. Jacklyn Frank filed on the said 15th August 2018.

[3] By their fixed date claim form, the Claimants claim that each of the Defendants had failed to follow the proper planning procedures in accordance with the **Physical Planning Act 2003**. They sought judicial review of the First Defendant's failure to properly implement and regulate the conduct of the Second Defendant for compliance with the **Physical Planning Act 2003**. The Claimants sought by way of relief the following:

- (i) an order of mandamus to compel the First Defendant to ensure that the Second Defendant acts in compliance with the **Physical Planning Act 2003**, and within the law when constructing the Barbuda airport.
- (ii) an order of prohibition to prevent any further works taking place until there is compliance with the **Physical Planning Act 2003**.
- (iii) an order of certiorari to quash the decision by the First Defendant to sanction and permit the construction to continue despite the fact that the Second Defendant had not complied with the **Physical Planning Act 2003** and planning procedures - ultra vires and unlawful;
- (iv) such further or other relief as the Court deems fit.

[4] Unusually, the fixed date claim form had 20 grounds set out therein. The grounds were:

- (i) The Second and/or Third Defendants commenced construction of a new airstrip/airport on or about 2017 reference (G19 2017) on Barbuda and this construction is currently underway: see letter dated 4 December 2017 from the Chief Environment Officer at the DoE to Chief Town and Country Planner Mr Frederick Southwell.
- (ii) The DoE as part of a review process visited the site of the works at 28 November 2017, and was able to observe that the works on the project were 'well advanced' and that 'many negative environmental impacts have already occurred': see letter dated 4 December 2017 from the Chief Environment Officer at the DoE to the Chief Town and Country Planner, Mr Frederick Southwell.
- (iii) The purported EIA for the airstrip/airport site was inadequate and not valid. It failed to consider 'critical aspects of the archaeology, biodiversity and geology at the site'. This is contrary to and in breach of s.23 (2) of the **2003 Act**. See letter of 4 December 2017.

- (iv) Further, the purported EIA had no environmental management plan and no mitigation plan.
- (v) The works commenced in breach of the **2003 Act** in that the application for permission was made by the Second Defendant after the commencement of the works and sought to obtain the DoE's permission retrospectively and in clear violation of the **2003 Act**. In a letter of 4 December 2017 from the DoE to Mr Southwell (of the First Defendant), the letter states inter alia: -

“This could have been avoided had the application been received and reviewed by the DoE prior to the commencement of work.”
- (vi) Further, the EIA was deficient in that there were no plans or concept for the access road, nor the terminal buildings and facilities for the airport presented: see the DoE's letter of 4 December 2017.
- (vii) The purported EIA for this airport development failed to deal with 'several key elements such as ground penetrating radar analysis, hydrogeological study and prehistoric site assessments which were not carried out.'
- (viii) The purported EIA failed to consider the construction of a new road, the terminal building for the airport and other ancillary facilities and services which would be required for a properly functioning airport.
- (ix) In short the purported airport EIA was wholly inadequate and failed to comply with the requirements of the **2003 Act**.
- (x) The developers of the airstrip/airport site in Barbuda failed to properly assess the impacts of the development before clearing and earth movement works commenced.
- (xi) The opportunity to quantify prehistorically valuable sites, and critical biodiversity, habits and ecosystems might now be lost: see the DoE's letter of 4 December 2017.
- (xii) No thorough assessment was carried out to determine whether any valuable features remain on or in the vicinity of the site and whether any damage can be mitigated.
- (xiii) No terms of reference were provided before the works commenced in breach of s.23 (4) of the **2003 Act**.

- (xiv) The DoE had to retrospectively develop Terms of Reference to inform additional works required to bring the EIA in line with the national regulatory requirements.
- (xv) The application lacked information on the project scope, concept and methodology of the work.
- (xvi) The development and EIA failed to provide details of the actual preconstruction and earth movement works being carried out.
- (xvii) Further, the DoE discovered that construction works were botched, and some 10 – 12 acres of land were originally cleared at a different site north to the current location for the airstrip. This site had to be abandoned as the area was cavernous and not suitable for airport construction. 'The DoE observed destroyed ruins that were identified as a Plantation Well by the Barbudan locals present.' See the DoE's letter of 4 December 2017.
- (xviii) The DoE requested that an updated EIA be produced based on new Terms of Reference.
- (xix) Further, by a memo dated 6 March 2018, to the General Manager of the Second Defendant, a Mr Potter of the DoE reminded the Second Defendant that the requirements of the **Physical Planning Act 2003** had to be complied with. The Second Defendant was informed that the EIA submitted for the airport development was inadequate; that there needed to be baseline flora and fauna and hydrogeology assessments; that there needed to be a new EIA for the access road, terminal building and other operational aspects of the airport; and that there needed to be consultation meetings.
- (xx) The construction project of the airstrip/airport currently does not have the benefit of a development permit granted pursuant to s.26 of the **Physical Planning Act 2003** and its construction is in breach of planning control.

[5] Ms. Brown-Barker in her affidavit filed 15th August 2018, in support of the fixed date claim deposed that:

"I, Tassian Barker, of Hatton Estate, St. John's, in Antigua and Barbuda make oath and say as follows:

1. I am a Clerk in the law office of Justice Chambers Inc. and I am duly authorized to make this affidavit. Where the matters to which I depose in the affidavit are within my knowledge, they are true. Where the matters contained in this affidavit are based upon facts referred to herein, they are derived from the files within the

possession of our Chambers and true to best of my knowledge, information and belief.

2. Mr. Mussington one of the Claimants herein did swear an affidavit dated July 6, 2018 in support of application for leave to file judicial review.
3. I am informed by Counsel and do verily believe that the application for leave was heard on 2nd day of August 2018 before Madam Justice Rosalyn E. Wilkinson. The court ordered inter alia that leave be granted and the applicants should file their application for judicial review on or before August 15, 2018.
4. I am informed by Mr. Mussington and do verily believe that he is currently outside of the jurisdiction and will not return within the stipulated time to swear this affidavit.
5. I am informed by Counsel and do verily believe that Mr. Mussington will rely on the contents of his affidavit in support of application for leave sworn June 28, 2018 and filed July 6, 2018.

[6] Ms. Jacklyn Frank in her affidavit filed 15th August 2018, in support of the fixed date claim form deposed that:

“I, JACKLYN FRANK, of Codrington Village, Barbuda and retired teacher, MAKE OATH and say as follows:

1. I make this affidavit in my own right as a Barbudan and in support of an application for judicial review of the actions of the Defendants in relation to the construction of an airport on the island of Barbuda. I am a Barbudan by birth and live in Barbuda. The other applicant in this matter is Mr. John Mussington who is also a Barbudan by birth and lives in Barbuda. We both live in Codrington Village.
2. Leave was granted to move for judicial review on 2nd August, 2018 before Justice Rosalyn E. Wilkinson by Order of the Court dated 2nd August, 2018. The learned Judge also granted an interim injunction stopping works in relation to the construction of the airport, until further order.

The name, address and description of the defendant;

3. The First Defendant is the Development Control Authority (DCA), (Cecil Charles BLDG, Cross Street, St. John's, Antigua) and is the established body corporate set up pursuant to s.5 of the **Physical Planning Act 2003 Act** (the **2003 Act**).

4. The Second Defendant is the Antigua and Barbuda Airports Authority (ABAA) a statutory body established pursuant to provisions of the **Airports Authority Act 2006** (hereafter the **2006 Act**) with its offices at Coolidge, Antigua.
5. The Third Defendant is the Attorney General for Antigua and Barbuda and is the legal representative of the Government of Antigua and Barbuda. The Attorney General as the Third Defendant in this action is sued in his representative capacity pursuant to the **Crown Proceedings Act, Cap. 121** of the Laws of Antigua and Barbuda. His office is situated at the Ministry of Justice & Legal Affairs, Government Complex, P.O. Box 118, Parliament Drive, St. John's Antigua. The Second Defendant is answerable in law for any unlawful conduct committed by the ABAA in the performance of its duties.

The nature of the relief sought identifying –

6. The nature of the relief sought is set out in paragraph 4 of the claim form for judicial review. In support of this application the Claimants rely on the affidavits already filed and served in support of our application for leave to move for judicial review. The affidavit of Jacklyn Frank affidavit was sworn June 26, 2018 and file July 6 2018 and the affidavit of John Mussington sworn June 28, 2018 and filed July, 6 2018. I confirm that the facts set out in the matters set out in the fixed date claim form filed in these proceedings are true to the best of my knowledge and where not within my personal knowledge are true to the best of my information and belief.

Any interim relief sought:

7. We sought interim injunctive relief in our application for leave which was granted by order of the Court dated August 2nd, 2018. The injunction was granted restraining the Defendants from carrying on further works on the airport site until further order of the Court. There is no claim for damages.

The facts on which the claim is based:

8. I further rely on the facts and matters stated in the affidavit sworn by Mr. John Mussington sworn 28th day of June, 2018; and affidavit sworn by me on June 26, 2018 filed July 6, 2018. I rely on the same facts.
9. I therefore apply to the Court for relief and I respectfully request that the Court grants the relief sought in the claim filed herein.

[7] Ms. Frank's affidavit of 6th July 2018, and which was used to support the application for leave to file this judicial review claim and on which she now says that she also relies to support the fixed date claim, therein she deposed:

"I, JACKLYN FRANK, of Codrington Village, Barbuda and retired teacher, MAKE OATH and say as follows:

1. I make this affidavit in my own right as a Barbudan and in support of an application for judicial review of the actions of the Respondents in relation to the construction of an airport on the island of Barbuda. I have reason to believe for the reasons as stated below and in the affidavit of John Mussington that the Respondents have started or permitted the construction of the airport without going through the proper planning procedures.

2. I confirm that the facts set out in the matters set out in the fixed date claim form filed in these proceedings are true to the best of my knowledge and where not within my personal knowledge are true to the best of my information and belief.

3. I do not repeat the facts set out in the fixed date claim nor in the affidavit of Mr. Mussington which I have seen. I am in agreement with Mr. Mussington and would add that the construction of the airport of Barbuda is very distressful. From a personal point of view I am confused about the following whether permission has been properly granted, and secondly whether the proper procedures have been followed. It is upsetting to think that the proper planning stages have not been gone through.

4. There is no doubt in my mind that this is a major development.

5. I know that John Mussington has asked for a copy of the Environmental Impact Assessment (EIA).

6. I cannot understand the following, if the Government has a proper and valid EIS (believes she means EIA) and have gone through the correct procedures they should simply say so. Despite numerous request they have failed to respond. Unless and until they do, I am other Barbudans can only assume that they have not complied with the law.

7. In the absence of any satisfactory answers and in circumstances where there seems to be no development permit, or proper no planning permission, or valid environmental impact assessment and hence no proper compliance with the

provisions of the **Physical Planning Act** I am advised and believe that the construction of the airport on Barbuda is unlawful.

8. I therefore apply to the Court for relief and I respectfully request that the Court grants the relief sought in the claim filed herein.”

[8] The Court reminds itself that the affidavit of Mr. John Mussington filed 6th July 2018, and referred to by both Ms. Tassian Brown-Barker and Ms. Jacklyn Frank was filed to support the application for leave to file a judicial review claim. In his affidavit in support of the application for leave to file judicial proceedings Mr. Mussington deposed:

“I, JOHN MUSSINGTON, of Codrington Village, Barbuda and Principal of Sir McChesney George Secondary School, Codrington Barbuda, MAKE OATH and say as follows:

1. I make this affidavit in my own right as a Barbudan and on behalf of the other applicant named in this matter in support of an application for judicial review of the actions of the respondents in relation to the construction of an airport on the island of Barbuda.
2. I confirm that the facts set out in the matters set out in the Fixed Date Claim Form setting out the grounds for the judicial review and filed in these proceedings are true to the best of my knowledge and where not within my personal knowledge are true to the best of my information and belief. I repeat the factual matters set out in the grounds at paragraph 6.
3. On or about Thursday 19 October 2017, I learnt that lands were being cleared with heavy duty equipment on Barbuda for the construction of an airport at the area east of Beazer Well and North of Freshwater Pond in Barbuda. This work started when the majority of Barbudans were off the island during the state of emergency which was declared following Hurricane Irma which struck Barbuda in September 2017.
4. At all material times, the consent of Barbudans for the construction of an airport, which constitutes a “major development”, was required under the Barbuda Land Act 2007. I have no knowledge that that consent was ever obtained and without this the construction would be unlawful. There were no public meetings advising what the airports works would consist of. As far as I know nothing was ever published in the Gazette.
5. Further under the Physical Planning Act, 2003 this requires an Environmental Impact Assessment under schedule 3, paragraph 1 when an airport is being

constructed in Antigua and Barbuda. For the reasons outlined below this procedure has not been followed to the best of my knowledge and belief.

6. On Wednesday 1 November 2017 I visited the site area where these works were being conducted at Beazer Well, and North of Freshwater Pond extending East to Piecrust Road, which I do believe was being cleared for the construction of the airport, and I spoke to an Indian gentleman who identified himself as the project manager and who confirmed that the lands were being cleared for the construction of an airport.
7. As a Barbudan, I am familiar with the area which is being cleared and it is within my personal knowledge that this area is the feeding ground for the Barbudan Fallow deer habitat and breeding area for the red footed tortoise and other wild life such as the wild boar, Barbuda Warbler, other birdlife and associated ecologically important vegetation. I have also seen from my visit that ancient trees including the White Wood have been cleared for the airport development. This caused me extreme concern and distress. Years of history and what was a site of environmental beauty was being devastated in my opinion. I could not understand why this was happening and it made me concerned as to whether the proper procedures had been followed.
8. I asked the project manager if he had planning permission and whether an Environmental Impact Assessment had been done. He did not give me a straight answer and avoided the question. This made me even more concerned. I asked him to me any planning permission that he had and he could not.
9. On 22 November 2017 I was visited at my home on Barbuda and told by two police officers namely Corporal Isaac and Corporal George who told me that they were delivering a warning from the Commissioner of Police that I should not trespass on the airport construction site and that I was not to return to the site without permission.
10. I found this strange, as at all material times all Barbudans own Barbuda and have an interest and a right in all lands in Barbuda under the Barbuda Land Act 2007.
11. I was also made aware by Miriam Harris who has farm lands in the vicinity of Beazer Well that her provision grounds were damaged by agents of the Government of Antigua and Barbuda during the construction works for the airport and that she was been prevented from cultivation her farm lands as a direct consequence of the development of lands for the construction of the airport.

12. I decided to seek further information about what was going on and made a number of inquiries.
13. The matter was raised with some members of the Barbuda Council and also many other Barbudans. It was decided to write to the Prime Minister's office direct by letter dated 20 February 2018 about these matters and specifically requesting whether there was indeed a development permit granted under the Physical Planning Act 2003, also whether an Environment Impact Assessment had been conducted, and finally whether consent of the Barbudan People had been sought, which I understand is necessary both under the Barbuda Land Act 2007 and also under s. 24(1) of the Physical Planning Act 2003. The letter was signed by 22 of my fellow Barbudans. There is now shown and produced to me marked exhibit [JM1] a bundle of all the correspondence in this matter. The letter of the 20 February can be found at pages 1 – 3 of [JM1].
14. There was and has been no response or reply to this letter to date.
15. I therefore telephoned the office of the Development Control Authority (DCA) on Wednesday 28 February 2018 and spoke to a Mr. Fredrick Southwell, the Chief Town and Country Planner.
16. I enquired of Mr Southwell whether an environmental impact assessment was submitted for the construction of an airport in Barbuda and whether a development permit was issued for the construction of this airport.
17. During this telephone call Mr Southwell, informed me of the following matters which I do verily believe:
 - (i) That no environmental impact assessment was carried out prior to the development of lands in Barbuda for the construction of the new airport site;
 - (ii) An application for a development permit was submitted to the Development Control Authority after the development of lands for the construction for the airport commenced and which was not approved because of environmental concerns raised by the Department of Environment;
 - (iii) That no development permit has been issued by the Development Control Authority for the development of lands for construction of an airport.
18. On 5 April 2018, a further copy of the letter that was sent to the Prime Minister dated 20 February 2018 was sent again and also copied to the Attorney General from Mr

Trevor Walker MP for Barbuda. The letter of 5 April 2018 can be found at pages 4 - 5 of [JM1]. Again there was no reply or response to this letter.

19. I therefore decided to instruct attorneys to act on my behalf and on 11 May 2018 my Attorney Mr Leslie Thomas QC of Justice Chambers sent copies of both letters the one dated the 20 February together with Mr Walker's letter dated the 5 April 2018. The letter of the 11 May 2018 can be found at pages 6 – 7 of [JM1].
20. Again to date there has been no knowledge or reply to these letters.
21. I decided to approach both the DCA and the DOE to see if I could get further information from these bodies, and on 26 June 2018, I delivered two letters to each department by hand. They can be found at pages 8 – 10 of JM1. I am still awaiting a reply to these letters. My letter to the DCA of the 26 June 2018 asks the following questions namely
 1. Has the developer prepared and submitted an application to the DCA which includes the masterplan of the proposed development, outlining the site/location, the purpose/nature of the development, the components of the development and the development timeline (timing of works) and does this should include drawings?
 2. If a masterplan and development application was received by the DCA, when was this?
 3. When was this development registered on the system?
 4. Did the DCA receive the application?
 5. Did the DCA approve the application?
 6. Did the DCA forward the concept application to the Environment Division? If so, when was this done?
 7. Did any Environment Officers conduct a preliminary site assessment in the presence of the developer or in the presence of a designated representative? If so when did this take place?
 8. Did the DCA ever receive a hard copy of the general concept design to gain an in-depth understanding of the proposal?

9. Were, the Terms of Reference for an Environmental Impact Assessment drafted by the Environment Officers detailing the types of studies to be conducted in order to address any concerns of environmental hazards?
10. Did an Assigned officer write to the DCA outlining their assessment of the development masterplan and decision, with respect to whether an EIA is required or not and did this include any bespoke Terms of Reference drafted for that development.
11. Has the DCA been in a position to submit the letter from the Environment Division in its entirety to the developer so that a decision regarding the applicability of an EIA is clear to the developer and that the full Terms of Reference is delivered?
12. As far as the DCA is aware did, the developer instruct a competent specialist to undertake the EIA process as outlined in response to any Terms of Reference issued?
13. Has any EIA be completed satisfactorily, that the DCA have seen as per Terms of any Reference and any Environment Impact Statement prepared by the competent specialist and submitted to the developer?
 - (a) The Environmental Impact Statement (EIS)
 - (b) The final application document
 - (c) The full project online and any revisions to the plans following the findings of the EIA process.
14. On 28 June 2018 I received a reply to my letter from the DOE. This contained several documents which are found at pages 11 -33 of [JM1]. I rely on the contents of those letters herein. I was shocked at what I saw. In relation to the works going on in Barbuda on the proposed airport or airstrip as it is referred to in a letter from the Department of Environment at pages 11 – 13 of JM1, it is abundantly clear that there was no proper EIA, there was a failure to follow the procedure in the Physical Planning Act 2003 in that no terms of reference had been provide, there was no input from the DCA before the works commenced, more heart-breaking was the fact that the works that have been conducted have been done incompetently and without any due regard for the environment in that 10 – 12 acres of land was cleared which destroyed ancient ruins that were identified as a Plantation Well. This is an environmental disaster. The letter also makes clear on page 12 2nd paragraph that:-

“Since the site was not properly assessed prior to clearing and earth movement works, the opportunity to quantify prehistorically valuable sites, and critical biodiversity, habitats and ecosystems might have already been lost.”

15. I cannot understand why the Government would have allowed works to commence without proper enforcement of the planning laws. The EIA produced by the developer is inadequate and not a proper EIA. This much is clear from the DoE's letter. They have subsequently produced terms of reference which can be found at pages 22 – 31 of JM1.
16. On 28 June, 2018, in my presence my attorney rang the DOE to find out whether an updated EIA has been submitted which complies with the terms of reference for the work on the airstrip in Barbuda. I spoke with a Mr Ato Lewis. Mr Lewis confirmed to me and my attorney that no updated EIA has been submitted. Accordingly, there is an ongoing breach under the Physical Planning Act 2003. The Government of Antigua and Barbuda are fully aware of this and yet have done nothing to stop this work. The works to the airstrip on Barbuda continue.
17. Given the absence of any reply to any of the letters identified above and in circumstances where I have been specifically told there was no development permit, granted before any EIA, and the fact that this has now been confirmed in writing by the DoE and there does not appear to be any compliance with the terms of reference for an updated EIA I have good reason to believe that there appears to be several serious breaches of the Physical Planning Act 2003. I am advised and believe that in the light of the above that the construction of the airstrip/airport on Barbuda is unlawful and stop until there is compliance with the laws of Antigua and Barbuda. My complaints are as follows: -
 - a. The second and/or third respondents commenced construction of a new airstrip/airport on or about 2017 reference (G19 2017) on Barbuda and this construction was without proper consultation.
 - b. The second and/or third respondents commenced those works in breach of the procedure under the Physical Planning Act 2003.
 - c. Mr Frederick Southwell has not used his regulatory as the statutory watchdog to ensure compliance, despite knowing about the breaches.

- d. The Department of Environment (DoE) as part of a review process visited the site of the works on 28 November 2017 and was able to observe that the works on the project were 'well advanced' and that 'many negative environmental impacts have already occurred'. See the letter dated 4 December 2017 from the Chief Environment Officer at the DoE to the Chief Town and Country Planner Mr Frederick Southwell at the first respondent (see page 11 of exhibit JM1 to my affidavit).
- e. The EIA that purports to be valid was never submitted by the second respondent to the first respondent before any works commenced.
- f. Moreover no terms of reference to ensure that the environment was protected were drawn up before works commenced.
- g. The purported EIA for the airstrip/airport site was in any event inadequate and not valid. In that it failed to consider 'critical aspects of the archaeology, biodiversity and geology at the site'. This being contrary and in breach of section 23(2) of the 2003 Act. See letter of 4 December 2017 exhibit JM1 to my affidavit at page 11.
- h. Further the purported EIA had no environmental management plan.
- i. The purported EIA had no mitigation plan.
- j. The work commenced in breach of the 2003 Act in that the application for permission was sent in by the respondents after the commencement of the works and sought to obtain the DoE's permission retrospectively and in clear violation of the 2003 Act.
- k. Further, the EIA was deficient in that there were no plans or concept for the access road, nor the terminal buildings and facilities for the airport presented.
- l. The purported EIA for this airport development failed to deal with 'several key elements such as ground penetrating radar analysis, hydrogeological study and prehistoric site assessments were not carried out.'
- m. The purported EIA failed to consider the construction of a new road, the terminal building for the airport and other ancillary facilities and services which would be required for a properly functioning airport.

- n. In short the purported airport EIA was wholly inadequate and failed to comply with the requirements of the requirements of the 2003 Act.
- o. The second and/or third respondents namely the developers of the airstrip/airport in Barbuda failed to properly assess before clearing and earth movement works.
- p. The opportunity to quantify prehistorically valuable sites, and critical biodiversity, habits and ecosystems might now be lost. See DoE's letter of 4 December 2017 at p.12 exhibit JM1 to this affidavit.
- q. No thorough assessment was carried out to determine whether any valuable features remain on or in the vicinity of the site and wither any damage can be mitigated.
- r. No terms of reference were provided before the works commenced in breach of section 23(4) of the 2003 Act.
- s. The DoE had to retrospectively develop Terms of Reference to inform additional works required to bring the EIA in line with the national regulatory requirements.
- t. The application lacked information on the project scope, concept and methodology of the work.
- u. The development and EIA failed to provide details of the actual pre-construction and earth movement works being carried out.
- v. Most heartbreakingly is the fact that the DoE discovered that the initial airstrip/airport construction works were botched, and some 10 – 12 acres of land was originally cleared at a different site north to the current location for the airstrip. This had to be abandoned as the area was cavernous and not suitable for airport construction. 'The DoE observed destroyed ruins that were identified as Planation Well by the Barbudan locals present.' See DoE's letter of 4 December 2017 at page 12 of exhibit JM1.
- w. The DoE requested that an updated EIA be produced based on new Terms of Reference. Those terms of reference are to be found at pages 22 – 31 of exhibit JM1 to my affidavit.

- x.** Further by a memo dated 6 March 2018 to the General Manager of the second respondent a Mr Potter, from the DoE the second respondent were reminded that the requirements of the Physical Planning Act 2003 had to be complied with.
- y.** They were informed that the EIA submitted for the airport development was inadequate.
- z.** That there needed to be baseline flora and fauna and hydrogeology assessments.
- aa.** That there needed to be a new EIA for the access road, terminal building and other operational aspects of the airport.
- bb.** There needed to be consultation meetings.
- cc.** To my knowledge none of these steps have been taken.
- dd.** This construction project of the airstrip/airport currently does not have the benefit of a development permit granted pursuant to section 26 of the Physical Planning Act 2003 and its construction is in breach of planning control.

Breaches of sections 9 and 11

- ee.** So far as I am aware there have been breaches of section 9 and 11 of the 2003 Act.
- ff.** There has been no publication of public meetings in the Gazette or other media.
- gg.** There has been no opportunity to respond to this development plan.
- hh.** There has been no proper approval of these plans in accordance with the 2003 Act.
- ii.** Each of the Respondents are put to strict proof that there has been compliance with section 9 and section 11 of the 2003 Act.

- jj. There is a continuing breach of section 11 as no development plans or amended development plans have been put before or allowed to be considered by the Barbuda Council.
- kk. At the date of this application for judicial review the construction of the airstrip/airport is continuing and on going yet there has been no compliance or consultation with the new Terms of Reference drafted by the DoE in the light of the previous failures committed before the development plan was submitted.
- ll. It is clear that the works commenced without a development permit in breach of s.17 and 23(7) of the 2003 Act.
- mm. There has been a failure to comply with section 24(1) in that when the DoE imposed new terms and conditions and required a new EIA there has been a failure to consult with the Barbuda council.

Urgency and emergency injunction

- nn. Given the above I would ask the court to consider the granting of an emergency injunction to prevent any further environmental damage from occurring until the Respondents comply with their statutory duties.
- oo. I who live in Barbuda am directly affected by the construction of this new airport and there is also a wider public interest, in that the respondents and each of them breached the planning laws of Antigua and Barbuda in commencing the development and construction works of this airport and continuing with its construction. Over 300 acres of lands at the new airport construction site have been cleared for the construction of the airport. This area comprised forest lands in Barbuda that were used for grazing, farming and hunting by the Barbudans. I and other Barbudans, are no longer able to access, use and enjoy these lands as a direct result of the construction of the airport. The forest lands that have been cleared for the construction of the airport were the habitat of the rare red footed tortoise and the feeding grounds for the Barbudan Fallow deer. Rare ancient forest trees, including the white sap tree have also been cleared. I have a legitimate expectation that the airport development undertaken by and/or on behalf of the third respondent by the second respondent and overseen by the first respondent complies with planning laws of Antigua and Barbuda.

18. I therefore apply to the Court for an order of prohibition stopping any further works, an order of mandamus requiring the Government to ensure compliance with the requirements of Physical Planning Act 2003 and an injunction to prevent any further works being conducted until compliance under the Physical Planning Act 2003 has taken place. In the circumstances, I believe I have an arguable case for judicial review and that leave should be granted. I therefore respectfully request that the Court grants the relief sought in the claim filed herein.

[9] On 18th September 2018, the Second Defendant filed its strike out application seeking the following relief:

1. The fixed date claim form filed on 15th August 2018 be struck out as against the Second Defendant.
2. Such further and other relief as the Court deems appropriate.
3. The costs of the application be borne by the Claimants.

The grounds of the application are:

1. The Respondents/Claimants have by the fixed date claim form filed on 16th August 2018 alleged non-compliance with the provisions of the **Physical Planning Act 2003**.
2. No particulars or evidence of the non-compliance have been set out in accordance with the strict provisions of the **Civil Procedure Rules** and rule of law which govern the bringing of judicial review proceedings.
3. The claim discloses no cause of action against the Second Defendant or at all;
4. No interest has been pleaded or established in the claim form nor in the affidavits to show that the Claimants have standing to bring this claim for judicial review.
5. The Claimants have no sufficient interest to establish standing to bring a claim for judicial review.
6. The fixed date claim form filed on 15th August 2018 and affidavit in support filed on the 16th August 2018 do not comply with **CPR 56.2 (1) and (2)** in that there is no indication as to whom, if anyone has been affected by the decision which is the subject of the application.
7. The fixed date claim form filed on 15th August 2018 does not comply with **CPR 56.7 (3)** in that an affidavit in support was not filed with the said fixed date claim form

[10] The Second Defendant's application was supported by the affidavit of Mr. Stanley E. Smith. The Second Defendant's chief executive officer. Mr. Smith deposed:

1. "I am the Chief Executive Officer of the Applicant / 2nd Defendant, the Antigua and Barbuda Airports Authority. This is a statutory corporation charged with the development and management of airports within the State of Antigua and Barbuda. Though we are so charged, it is the Government of Antigua and Barbuda that are the developers of the relevant Airport on the sister Island of Barbuda.
2. I am duly authorized on behalf of the Board of Directors of the Corporation to make this affidavit on its behalf and I do so from facts within my own knowledge, information and belief and where not I shall state the source of my knowledge, information, and belief.
3. The purpose of this affidavit is to support the application to strike out the fixed date claim form for reason that the Claimants John Mussington and Jacklyn Frank have not set out in the fixed date claim not set out the Applicant/2nd Defendant's alleged non-compliance with the **Physical Planning Act 2003**, failed to set out the particulars of the non-compliance in breach of the rules of the Court that govern judicial review proceedings and have not established standing or sufficient interest to bring this claim.
4. I am advised by Counsel and do verily believe that the purpose of judicial review proceedings is to have the Court examine the decisions and/or omissions of public officials/public bodies. I have read the fixed date claim form and affidavits of both John Mussington and Jacklyn Frank and have not seen the particulars of the breach the Applicant/2nd Defendant is alleged to have committed. The Claimants simply claim that breaches of the **Physical Planning Act** have been committed without saying what the breaches are or how they were committed by the Applicant/2nd Defendant.
5. I have been advised by Counsel and do verily believe that Applicants for Judicial review need to show on the face of the claim form or in the affidavit in support of the claim for judicial review that they are affected by the breaches complained of. It is not sufficient that they are aggrieved. It is necessary that their interest be materially affected.
6. I have read the affidavits in support of the claim form and none show that any of the Claimants are in any way materially affected by the failure of the 1st Defendant as alleged to properly have an Environmental Impact Assessment. They have not asserted that they own any property, in or around the airstrip or that how or if the failure would indeed affect any property or anything.
7. I am advised by Counsel and do verily believe that the rules of the court governing judicial review proceedings mandate that the claim form must be accompanied by an affidavit. The fixed date claim form filed on 15th August 2018 was not accompanied by an affidavit. The Respondents/Claimants did not file an affidavit or affidavits along with the fixed date claim form but have indicated that they will be relying on the affidavit of John Mussington filed on 2nd July 2018, in breach of the rules of the court.

8. In the circumstances, I humbly pray that the application be granted in the terms as prayed for.”

The Law

[11] **CPR 2000 Part 56** deals with administrative law. After leave to file judicial review proceedings is granted pursuant to rule 56.3 and rule 56.4, rule 56.7 (1) states that an application for an administrative order such as judicial review must be made by a fixed date claim and rule 56.7(3) states that the fixed date claim is to be supported by evidence on affidavit. The matters to be set out in the affidavit are as follows:

“56.7(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 the claim is based:
- (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.

(5) **The general rule is that the affidavit must be made by the claimant** or, if the claimant is not an individual, by an appropriate officer of the body making the claim.

(6) If the claimant is unable to make the affidavit it may be made by some person on the claimant's behalf but must state why the claimant is unable to do so.

(7) On issuing the claim form the court office must fix a date for a first hearing which must be endorsed on the claim form.

(8) The general rule is that the first hearing must take place no later than 4 weeks after the date of issue of the claim.

(9) Notwithstanding paragraph (8), any party may apply to a judge in chambers for that date to be brought forward or for an early date to be fixed for the hearing of the application for an administrative order.

(10) The application may be made without notice but must be supported by evidence on affidavit. (My emphasis)

[12] **CPR 2000** Part 30 addresses the matter of contents of affidavits. It provides:

“30.1(1) The court may require evidence to be given by affidavit instead of, or in addition to oral evidence.

30.3 The general rule is that an affidavit may contain only such facts as the deponent is able to prove from his or her own knowledge.

(2) An affidavit may contain statements of information and belief –

(a) if any of these Rules so allows: and

(b) if the affidavit is for use in an application for summary judgment under Part 15 or any procedural or interlocutory application, provided that the affidavit indicates –

(i) which of the statements in it are made from the deponent's own knowledge and which are matters of information or belief; and

(ii) the source of any matter of information and belief.

(3) The court may order that any scandalous, irrelevant or otherwise oppressive matter be struck out of any affidavit.

(4)” (My emphasis)

- [13] On the matter of affidavits, **Halsbury's Laws of England Vol.17 Evidence** 4th edition (1976) provides:

"314. Contents of affidavit. Affidavits filed in the High Court may generally contain only such facts as the deponent is able of his own knowledge to prove; but in interlocutory proceedings, or on an application for summary judgment, or with leave, an affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof. For the purpose of this rule, those applications are considered interlocutory which does not decide the rights of the parties, but are made for the purpose of keeping things in status quo until the rights can be decided, or for the purpose of obtaining some direction from the court as to the conduct of the cause."

Findings and Analysis

- [14] To commence, it is important to note, as is required pursuant to **Part 56** that a fixed date claim for judicial review must be supported by affidavit as opposed to a statement of claim which is later supported by a witness statement/s. That being the case, the evidence of the Claimants to support their judicial review claim is before the Court. This is not the evidence of an interlocutory nature, but evidence to support and upon which, as **Halsbury's** states, the rights of the Parties will be decided.
- [15] The first rule on affidavit evidence is found at **CPR 2000 rule 30.3(1)** and which provides that the general rule is that affidavit may contain only such facts as the deponent is able to prove from his or her own knowledge. This has been a long-standing rule.
- [16] An exception to the rule of thumb has been made in a limited and circumscribed circumstances. At 1976 when **Halsbury's Volume 17 Evidence** para. 314 was published, the rule was that it was only where an application was for use in interlocutory proceedings that a deponent's affidavit could contain statements of information and belief.
- [17] **CPR 2000 Rule 30.3 (b) (i)** applies the **Halsbury's** exception to the rule by permitting that it is only where an affidavit is for use in summary judgment, or procedural or interlocutory applications can a deponent state that what he is deposing to is information and belief and set out the sources of such.
- [18] The Second Defendant's application calls for the Court to consider the Claimants' fixed date claim and evidence in support of their claim against the Second Defendant.
- [19] The Court starts its examination of the affidavits of Ms. Frank and Ms. Brown-Barker in support of the fix date claim form to see whether they comply with the requirements of **Rule 56.7(4)**. In

addition, the contents of an affidavit being in the form of written evidence must also comply with **Rule 30(3)**.

- [20] The Court starts with that of Ms. Brown- Barker. The first 3 paragraphs of her affidavit add nothing to the claim. At paragraphs 4 and 5 she deposes in to 'information' and 'belief', in relation to Mr. Mussington and that she is informed and verily believes that he is currently out of the jurisdiction and secondly, that she is informed by Counsel and verily believes that Mr. Mussington will rely on the contents of his affidavit sworn on 28th June 2018 and filed 6th July 2018. This is the substance of her affidavit in support of the fixed date claim – one based on matters coming to her by way of information and belief.
- [21] There are 2 issues here. First, it appears that Ms. Brown-Barker's affidavit is in breach of **Rule 30.3 (2)**. An affidavit may only contain statements of information and belief in the limited and circumscribed number of circumstances described therein. None of those circumstance apply in the instant proceedings as the fixed date claim form is neither an interlocutory procedure nor an application for summary judgment. It therefore appears that Ms. Brown-Barker's affidavit cannot be allowed to rely on paragraphs 4 and 5 of her affidavit.
- [22] Also problematic for the Court is the statement of Ms. Brown-Barker that she was informed by Counsel and do verily believe (Counsel). The case of **Casimir v. Shillingford and Pinard (1967) 10 WIR 269** although not on all fours with the facts in Ms. Brown-Barker's affidavit, cautions against Counsel inserting themselves in matters in which they appear. The Court is of the view that the principle holds true here.
- [23] The second issue relates to the reference to Mr. Mussington's affidavit. The Court will address this shortly.
- [24] This brings the Court to Ms. Frank's affidavit filed 15th August 2018 in support of the fixed date claim form. Therein Ms. Frank sets out the matters of (a) her affidavit being in support of the application for judicial review, (b) that leave was granted to file a judicial review claim, (c) sets out the nature of each of the Defendants, (d) the nature of relief sought, (e) the nature of the interim relief sought, and (f) the facts upon which the claim was based.
- [25] As to the facts deposed by Ms. Frank, she simply deposes that she relies on the facts and matters stated in her first affidavit (filed 6th July 2018) and that stated in Mr. Mussington's affidavit sworn on 28th June 2018.
- [26] This brings the Court to the affidavits of Mr. Mussington filed 6th July 2018 and Ms. Frank filed 6th July 2018, and which both Ms. Frank and Ms Brown-Barker seek to use to support the fixed date claim.

- [27] Mr. Mussington's affidavit filed 6th July 2018, like that of Ms. Frank's filed on 6th July 2018, were used in support of the application for leave to file judicial proceedings. As the Court sees it, once the order was made granting leave to file the judicial review claim those affidavits were to put it "spent". There could be no further use of those affidavits to support further proceedings unless the Court gave permission for their use perhaps on the grounds of saving costs and time. There was no permission applied for or granted.
- [28] Secondly, the Court believes that even if any consideration were to be given for use of Mr. Mussington's affidavit filed on 6th July 2018, in support of the fixed date claim form, then such application for use could only come from Mr. Mussington himself and leave granted to him. It is after all his evidence in the prior proceedings.
- [29] The Court will not allow the use of Mr. Mussington's "spent" affidavit which was filed on 6th July 2018.
- [30] The same principle applies to Ms. Frank's affidavit filed 6th July 2018, in support of the application for leave to file judicial proceedings. It is "spent" and ought not to be used in support of the fixed date claim form filed 15th August 2018.
- [31] The Court finds support for its position on "spent" affidavit in the Court of Appeal decision **MNIHCVAP 2012/0011 The Attorney General et al v. Jon Miller et al** and where the Court of Appeal's digest¹ records that the Court thought 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.
- [32] At this juncture as it relates to Ms. Frank, even if the Court were minded to have regard to her affidavit filed 6th July 2018, under the present proceedings of the fixed date claim form, there are a number of issues arising (a) the fixed date claim form referred therein was struck out as being filed without the leave of the Court, (b) reference is made to Mr. Mussington's affidavit which was used to support the application for leave but it certainly cannot be had regard to under the fixed date claim form for the reasons stated prior, namely that it is "spent", (c) at paragraph 5 she says that she knew Mr. Mussington to have asked for the EIA, this would be hearsay evidence, (d) paragraph 6 seems to be posing a question to the Court and so is argumentative, it takes the matter no further, and (e) paragraph 7 is a submission and so takes the matter no further. Having regard to the matters raised, the Court sees no good reason for allowing Ms. Frank to use her affidavit filed 6th July 2018, in support of the application for leave to now support the Fixed Date Claim. The Court will not allow the use of Ms. Frank's affidavit filed 6th July 2016.

¹ See Court of Appeal digest for sitting at Montserrat 2nd – 4th December 2013, pages 21 -22.

[33] At this juncture, following the Court's analysis and findings on Mr. Mussington's affidavit filed 6th July 2018, and Ms. Frank's affidavit filed 6th July 2018, and the Court finding nothing in Ms. Frank and Ms. Brown-Barker affidavits filed on 15th August 2018, to support the claim against the Second Defendant, the claim against the Second Defendant must be struck out.

[34] Court's order:

- i. The claim against the Second Defendant is struck out.
- ii. The Claimants are to pay the Second Defendant costs of \$1000.00 on the application within 21 days.

Rosalyn E. Wilkinson
High Court Judge