

THE EASTERN CARIBBEAN SUPREME COURT

IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCVP2018/0006

BETWEEN:

THE ATTORNEY GENERAL

Appellant

and

[1] MCKENZIE FRANK

[2] TREVOR WALKER

Respondents

Before:

The Hon. Mr. Mario Michel
The Hon. Mde. Gertel Thom
The Hon. Mr. Sydney Bennett, QC

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Anthony Astaphan, SC with him, Mrs. Carla Brookes-Harris, Deputy Solicitor General and Dr. David Dorsett and for the Appellant
Mr. Justin L. Simon, QC with him, Mr. Sylvester Carrott for the Respondents

2018: November 30;
2020: June 26

Interlocutory appeal – Whether learned judge erred in dismissing application to strike out constitutional claim – The Barbuda Land Act – Whether Barbuda Land Act changed the regime in relation to the control and ownership of land in Barbuda – Whether the respondents established a right of property in lands in Barbuda by virtue of their status as Barbudans as defined in the Barbuda Land Act – Section 3(1) of Barbuda Land Act – Whether learned judge erred in determining the meaning of “ownership in common” by relying on the meaning in the Registered Land Act – Section 9 of the Constitution of Antigua and Barbuda Order 1981 – Protection from deprivation of property – Whether the rights to property enjoyed by Barbudans by virtue of their status as Barbudans amounts to an interest in or right to or over property protected by the Constitution – Whether such

rights or interests were compulsorily acquired or taken by virtue of the Paradise Found (Project) Act, 2015

The respondents, Mr. McKenzie Frank ("Mr. Frank") and Mr. Trevor Walker ("Mr. Walker") are both nationals of Barbuda who have served as parliamentary representatives in Antigua and Barbuda. They both assert that on 3rd November 2014, the Government of Antigua and Barbuda ("the Government") entered into a lease agreement with a company, Paradise Found LLC ("Paradise Found") to lease land in Barbuda for the purpose of a tourism development project in Barbuda ("the lease agreement").

In order to give effect the lease agreement, the Government passed the Paradise Found (Project) Act ("the Paradise Found Act"). The Paradise Found Act explicitly provides in section 3(3), that the provisions of the Barbuda Land Act, 2007 ("the Land Act" or "the Act") do not apply to the lease of the parcels of land situate in Barbuda leased to Paradise Found, its subsidiaries or affiliates ("the leased land"). The Paradise Found Act also specifically exempted the lease agreement and transaction from the operation of the Land Act. This included the disapplication of the provisions of the Land Act to leases of the leased land and sections 6, 17 and 19 of the Land Act.

Mr. Frank and Mr. Walker claimed entitlement to constitutional relief on the basis that they are Barbudans within meaning of the Land Act, that the land in Barbuda was owned in common by the Barbudan people and that the Crown only held a bare legal title on their behalf and for their benefit. They maintained that if the statutory lease created by the Paradise Found Act is to take effect, it will amount to compulsory acquisition of their interest in the land without compensation. The respondents commenced a claim seeking, *inter alia*, declarations that: (i) the Government compulsorily acquired and took property specified in Schedule 1 of the Paradise Found Act by securing the enactment of same; (ii) the Government did not acquire the land for public use; and (iii) section 3 of the Paradise Found Act and the sections dependent on section 3 violate section 9 of the Constitution of Antigua and Barbuda Order and therefore null and void.

They also sought an order to strike down the Paradise Found Act as being inconsistent with the Constitution of Antigua and Barbuda Order ("the Constitution") and alternatively, determination of the amount of compensation to which the Barbudan people (including themselves) were entitled, if the court found that the Government acquired and took possession of the leased land.

The Attorney General filed an application to strike out the claim on the basis that it disclosed no cause of action against the Government under the Constitution and/or was an abuse of process. The learned judge dismissed the application and found that the claim raised issues that ought to be tried and further that the respondents had the necessary *locus standi* to pursue the claim.

The Attorney General, being dissatisfied with the decision, appealed. The main issue which arises for this Court's determination is whether or not the learned judge erred in dismissing the application to strike out the claim. The resolution of this issue also involves

the consideration of the following sub-issues: (i) whether the Land Act changed the regime in relation to the control and ownership of land in Barbuda; (ii) whether the Land Act conferred rights of ownership or entitlement to lands in Barbuda on the respondents by virtue of their status as Barbudans as defined in the Land Act and therefore as owners in common; (iii) whether the learned judge erred in determining the meaning of “ownership in common” by relying on the definition in the Registered Land Act; and (iv) whether those rights to property enjoyed by Barbudans solely on the basis of their status as Barbudans amount to an interest in or right to or over the property protected by the Constitution.

Held: allowing the appeal; and making the orders set out in paragraphs 81 and 82 of the judgment, that:

1. The jurisdiction to strike out should be used sparingly and only in plain and obvious cases where, even assuming the facts alleged to be true, the statement of case does not disclose a legally recognisable claim against the defendant. This jurisdiction may be exercised even in relation to constitutional claims but an application to strike out such claims should be particularly scrutinised. In the instant case, the respondents’ statement of case does not support, and even if supplemented by further information, is incapable of supporting the conclusion that they had a personal right of property in the leased land which they allege have been compulsorily acquired by virtue of the Paradise Found Act other than for a public purpose and without compensation and therefore should be struck out.

CITCO Global Custody NV v Y2K Finance Inc BVIHCVAP2008/0022 (delivered 19th October 2009, unreported) followed; **Ingraham and Others v Glinton and Another** (2006) 69 WIR 20 applied.

2. The Land Act sets out the functions, duties and powers of the Barbuda Council with respect to land administration and development of land in Barbuda and empowers the Council to grant leases for major developments. The Act essentially established the principle that the Crown holds the legal title to lands in Barbuda, for and on behalf of “the people of Barbuda”, a defined class of people. It does not, however, operate to transfer ownership or entitlement in lands in Barbuda to Barbudans. This is further reinforced by section 5(2) which expressly precludes private ownership of land in Barbuda. Instead, the legislation was primarily concerned with altering the powers and prerogatives of Antigua and Barbuda’s central government and the Barbuda Council in relation to each other with regard to the beneficial ownership and control of land in Barbuda.

Section 5 and Part IV of **The Barbuda Land Act**, Act No. 23 of 2007 applied; Section 18 of the **Barbuda Local Government Act**, Cap 44 of the Laws of Antigua and Barbuda applied; **The Attorney General v The Barbuda Council** (2002) 65 WIR 93 considered.

3. The term “owned in common” as contemplated by the Land Act is conceptually different to that of section 102 of the Registered Land Act, which is a restatement of the common law concept of co-ownership. Under the Land Act, “ownership in common” encompasses the collective right of the Barbudan people, exercised through the Barbuda Council, to control of the administration, development and use of the land and to be consulted on and consent to major developments of land on the island. An individual Barbudan under the Act must apply to the Council for permission to use the land in relation to which he or she is described as a co-owner. Prior to obtaining the grant of a right of occupation, individual Barbudans cannot deal with their interest in the land even in transactions between each other and even after obtaining such grant, their ability to deal with their property is restricted. The Land Act created or confirmed the existence of beneficial interests in the land to which the legal title held by the Crown was subject, such beneficial interests vested not in individual Barbudans, but in the people of Barbuda as a defined class. This is a lesser interest than that which is enjoyed by an owner in common under the Registered Land Act or at common law which both contemplate ownership of land by co-owners who are entitled to immediate use and possession of the whole as an incident of such co-ownership. Accordingly, the learned judge erred in concluding that the term “owned in common” in section 3(1) of the Land Act must be interpreted consistently with that of the meaning accorded in the Registered Land Act.

Sections 7, 8, 11(2) and section 4 of the Second Schedule of **The Barbuda Land Act**, Act No. 23 of 2007 applied; Section 3(2) and 102 of the **Registered Land Act**, Cap. 374 of the Laws of Antigua and Barbuda considered.

4. Section 9 of the Constitution protects against the compulsory taking of property of any description and an interest or right to or over property of any description, except where certain conditions are satisfied. This section can only be properly invoked where property rights already exist and such rights have been compulsorily taken possession of or acquired. In the instant case, even if a generous and purposive interpretation were given to section 9, the rights accorded to Barbudans solely by virtue of that status do not constitute an interest in or right over property since they have no immediate entitlement to use, possess or deal with their interest in such property without permission. Therefore, though within the Constitutional context, a right to exclusive use of land can constitute an interest in or a right to or over property, such an interest or right does not exist until permission is granted. The respondents have made no claim to entitlement of any immediate right to use or occupy any portion of the leased lands and so their statement of claim discloses no personal entitlement to an interest or right which was compulsorily acquired without compensation by the Paradise Found Act. Accordingly, they have no *locus standi* to pursue a claim for relief under section 9 of the Constitution.

Section 9 of **The Antigua and Barbuda Constitution Order 1981**, Cap. 23 of the Laws of Antigua and Barbuda applied; **Attorney General of the Gambia v**

Momodou Jobe (1985) LRC (Const.) 556 applied; **Belfast Corporation v OD Cars Limited** [1960] 2 WLR 148 applied.

Per Michel JA:

5. The Paradise Found Act by virtue of sections 3, 4, 5 and 6 explicitly disapplies the provisions of the Land Act which authorises the Barbuda Council to grant exclusive rights to Barbudans to occupy lands in Barbuda and to lease lands that form part of the Paradise Found project. While it is not inconceivable that this disapplication could affect project lands to which exclusive rights of occupation and/or leasehold interests had already been granted, it is inconceivable that it would not affect project lands with respect to which no such rights and/or interests were granted. Therefore, where the respondents had not been granted exclusive rights to occupy and/or lease any part of the project lands, they could have had no interest in, or right to, or over, project lands, which interests or rights were capable of being compulsorily acquired by the Government, and for which they would be entitled to compensation.

Section 9 of **The Antigua and Barbuda Constitution Order 1981**, Cap. 23 of the Laws of Antigua and Barbuda applied; Sections 3, 4, 5 and 6 of the **Paradise Found (Project) Act**, Act. No. 21 of 2015 applied.

6. On the question of the constitutionality of the disapplying provisions, these sections do not offend section 31(2) of the Land Act which requires an amendment of the Constitution before any amendments can be made to the Act without the prior consent of the Council and the Barbudan people. However, there was no such amendment of the Land Act by the Paradise Found Act but only a disapplication of specific provisions. The effect of the disapplication is that, although the specific provisions of the Land Act are not revoked and remain applicable to other land in Barbuda, they cannot be applied to the leased lands. Accordingly, there are no constitutional hindrances arising from sections 3, 4, 5 and 6 of the Paradise Found Act which could advance the respondents' position as to any compulsory acquisition of their property by the Government.

Sections 3, 4, 5 and 6 of the **Paradise Found (Project) Act**, Act. No. 21 of 2015 applied.

JUDGMENT

- [1] **BENNETT JA [AG.]:** This appeal is against the judgment of the learned judge (or “the judge”) refusing to strike out a claim by the respondents, Mr. McKenzie Frank (“Mr. Frank”) and Mr. Trevor Walker (“Mr. Walker”) for an administrative order,

being an application for declarations and relief pursuant to section 18 of **The Antigua and Barbuda Constitution Order 1981**¹ ("the Constitution").

Background

- [2] Starting in 1632, the islands of Antigua and Barbuda were colonised by the English. In 1685, Barbuda was leased to brothers John and Christopher Codrington, who had founded the town of Codrington. The island was continuously leased to members of their family for upward of 200 years. The present villagers and inhabitants of the island are the descendants of slaves that the Codringtons brought to Barbuda by force and who remained in Barbuda as slaves until slavery was abolished in 1834. The Codrington family surrendered their leasehold interest in the island in 1870 and the land reverted to the Crown. After 1870, the Crown granted a succession of leases to private interests. In that period, Barbuda's administration came to be so closely related to that of Antigua that it eventually became a dependency of that island.
- [3] During the colonial period, the inhabitants of the island used lands all over the island to cultivate gardens, rear livestock and otherwise worked the land with little interference from the Crown. The colonial authorities promulgated a series of enactments to regulate and control this permissive use while preserving the absolute legal and beneficial title that was vested in the Crown. These culminated in the **Barbuda Ordinance 1904/ Barbuda Act of 1904**² as amended. The Ordinance provided a system whereby the population was permitted to use and occupy designated areas of the island as statutory tenants at will.
- [4] **The Barbuda Local Government Act**³ ("the Local Government Act") established the Barbuda Council ("the Council") and laid out a scheme for the sharing of power and responsibility over the administration of Barbuda with the Cabinet, being the executive of the Government of Antigua and Barbuda.

¹ Cap. 23 of the Laws of Antigua and Barbuda.

² Cap. 42 of the Laws of Antigua and Barbuda.

³ Cap. 44 of the Laws of Antigua and Barbuda.

- [5] In 1980, the Antigua Constitutional Conference was held at Lancaster House in London. Barbuda was represented by a separate delegation and differences in the proposed arrangements for the constitutional arrangements and for land law were raised and dealt with. Barbuda gained full independence on 1st November 1981 as a constituent part of the sovereign unitary state of Antigua and Barbuda.
- [6] In the period since the attainment of national independence, the issue of control and ownership of land at Barbuda, particularly as between the central government of the State and the Barbuda Council, has been much litigated. In a number of cases, the Eastern Caribbean Supreme Court, both at the High Court and the Court of Appeal, established that the Crown was the absolute and beneficial owner of all land in Barbuda and that the Barbuda Council did not own, and had no right to grant or exercise control over the grant by the Crown of land in Barbuda. These cases included **The Barbuda Council v The Attorney General, Antigua Aggregates Ltd and Sandco Ltd**,⁴ **Unicorn Ltd. v The Barbuda Council**⁵ and **Thomas Hilbourne Frank v The Attorney General**.⁶
- [7] The history of land tenure on the island of Barbuda is set out in great detail in the judgment of Byron CJ in **The Attorney General v The Barbuda Council**.⁷ His Lordship concluded, after close consideration of the historical pattern of land usage in Barbuda, the successive statutes and other legislation regulating or being concerned with such usage, the interpretation of the **Barbuda Act** and the Local Government Act and other pertinent matters, that:

“...The law is that the Crown as the owner of land has the power to grant, including the power to lease, lands on the island of Barbuda. The laws in my view are equally clear that the Council has no role in the transfer of title. There is no requirement in the Barbuda Act, nor the Local Government Act nor in any other Act requiring the Crown to first obtain the consent or approval of the Barbuda Council before exercising its powers

⁴ Antigua and Barbuda High Court Claim No. ANUHCv1988/0456 (delivered 19th September 1994).

⁵ Antigua and Barbuda High Court Claim No. ANUHCv1998/0068.

⁶ Civil Appeal No. 1 of 1990 (delivered 12th December 1994, unreported).

⁷ (2002) 65 WIR 93.

to grant any land. The Council had no legal or other interest in the land contained in the grant of the lease to Unicorn. Neither did the Council have any legal or constitutional status in the process of granting an interest in land to anyone. The legislation as I have shown does not preclude the Crown from behaving as a universal and absolute owner and in that capacity granting an interest in land...”

- [8] In 2007, the **Barbuda Land Act**⁸ (“the Land Act” or “the Act”) was passed. The Act, by its long title, was:

“An Act to confirm that all land in Barbuda is owned in common by the people of Barbuda, to provide for the administration and development control of land in Barbuda, to provide for the confirmation or otherwise of certain leases of land in Barbuda, and for incidental and connected purposes.”

- [9] The Land Act sets out the powers and duties of the Barbuda Council with respect to land administration and the development of land in Barbuda. These powers included the power to control land used for public purposes, to allot land to Barbudans for residential and other purposes, to approve of development plans, to otherwise regulate the development of lands on the island and to designate areas for specific uses including fisheries and forestry. It placed restrictions on land use including the cutting and felling of timber without the Council’s permission. The Land Act further empowered the Council to grant leases of land for major developments and with the consent of the Cabinet, to levy taxes on major developments.

- [10] Provision was also made for the creation of a Barbuda Land Registry and for related matters such as registration of interests in land and the confirmation of existing leases in Barbuda. The Land Act provided for the consequential amendment of other legislations, and in particular, to the Local Government Act.

- [11] Section 18 of the Local Government Act, as amended by the Land Act, sets out the functions, powers and duties of the Barbuda Council. These include

⁸ Act No. 23 of 2007.

addressing matters of agriculture, forestry, public health, medical and sanitary facilities and services, water, electricity, and other utilities, constructing and maintaining roads, and raising and collecting revenue to meet the expenses of the Council's functions. Section 18(2) was amended by the Land Act to confer additional powers to the Council, 'to administer land in Barbuda including the development of land as set out in the Barbuda Land Act, 2007. Section 29(2) was amended to read that all land held for public purposes shall be held by the Barbuda Council under the Land Act.

The claim

- [12] The instant action arises from the following circumstances which are set out in the joint affidavit filed by Mr. Frank and Mr. Walker in support of their claim.
- [13] Mr. Frank and Mr. Walker were both born in Barbuda and are both of Codrington Village in the Parish of Holy Trinity, Barbuda. Both have represented Barbuda in the Parliament of Antigua and Barbuda; Mr. Frank as a Senator representing the people of Barbuda and as Vice President of the Senate, and Mr. Walker as a Member of Parliament for Barbuda, Minister for Barbuda and Minister of Public Works and Transportation in the Government of Antigua and Barbuda.
- [14] They jointly depose that on 3rd November 2014, the Government entered into an agreement with a company, Paradise Found LLC ("Paradise Found") for a tourism development project in Barbuda. The Government agreed to lease Paradise Found LLC a total of 391 acres on Barbuda for 99 years renewable, for 2 further terms of 50 years each at a total cost of US \$6.2 million ("the lease agreement"). There was also proposed an eco-lodge project for 250 acres and an airport for 500 acres.
- [15] They assert that the Government of Antigua and Barbuda ("the Government") purported to lease land in Barbuda to Paradise Found LLC by passing an act, the

Paradise Found (Project) Act⁹ (“the Paradise Found Act”). Section 3(1) of the Paradise Found Act states that, “Notwithstanding the provisions of the Barbuda Land Act, 2007, No. 23 of 2007 or any other law to the contrary, the Government leases to Paradise Found the Leased Land on the terms set out in Schedule 2”. The term “Leased Land” is defined in section 2 as being:

“...those parcels of land situate in Barbuda leased to Paradise Found LLC or its subsidiaries or affiliates for the Project more particularly described in Schedule 1 and includes all lands in Barbuda that may be leased to Paradise Found in the future for purposes of the Project.”

[16] Schedule 1 identifies the Leased Land as:

“All those parcels of land consisting of the former lands held by Dream Company Limited (K Club), being 251 acres, and the lease of lands adjacent thereto, being Crown lease of 140 acres, and any lands leased in Barbuda by Paradise Found in the future for the Project with the approval of the Council.”

[17] They point out that the Paradise Found Act explicitly enacted in section 3(3) that, “the provisions of the Barbuda Land Act, 2007 does not apply to the lease of the Leased Land pursuant to this Act.” and that the Act contained a number of provisions which specifically exempted the lease agreement and transaction from the operation of the Land Act. Those provisions included the disapplication of section 6 of the Land Act (which provides that the Barbuda Council may grant leases with the approval and on the advice of the Cabinet and the consent of a majority of the people of Barbuda), the disapplication of section 17 (which provides that major developments in Barbuda shall not take place without the agreement of the Cabinet and the Council and the consent of the people of Barbuda, and sets out a procedure for obtaining such consent) and the exemption of the lease from section 19 of the Land Act (which sets out time limits on development).

[18] On 30th December 2015, the Paradise Found Act was assented to by the Governor General.

⁹ Act No. 21 of 2015.

[19] It is urged on their behalf that prior to the passing of the Paradise Found Act, the Government of Antigua and Barbuda had no interest in land in Barbuda; such land was owned in common by the people of Barbuda and the Crown held a bare legal title to such land on their behalf and for their benefit.

[20] They claim to be entitled to constitutional relief on the basis of their assertion that they are Barbudans within the meaning of the Land Act which provides in section 2 that:

“ ‘Barbudan’ means

(a) a person born in Barbuda of whose grandparents at least one was born in Barbuda; or

(b) the child, wherever born, of parents at least one of whom is a Barbudan within the meaning of paragraph (a).”

[21] As such, they claim a proprietary interest in the Leased Land as owners in common.

[22] Accordingly, they say that if the statutory lease created by the Paradise Found Act is to take effect, it will amount to compulsory acquisition of their interest in that land without compensation.

[23] In the premises, they claim, *inter alia*, declarations that:

(i) The Government of Antigua and Barbuda has compulsorily acquired and taken possession of the property specified in Schedule 1 of the **Paradise Found (Project) Act, 2015** by securing the enactment of the **Paradise Found (Project) Act, 2015**;

(ii) The Government of Antigua and Barbuda did not acquire the said property for public use; and

- (iii) Section 3 of **Paradise Found (Project) Act, 2015**, and the sections of the Act which are dependent on section 3 violate section 9 of the Constitution and are therefore void and of no effect.

[24] They further seek an order striking down the Paradise Found Act as being inconsistent with the Constitution and therefore void by virtue of section 2 thereof and alternatively, in the event that, contrary to their contention, the court should find that the Government of Antigua and Barbuda has acquired and taken possession of the property specified in Schedule 1 of the Paradise Found Act for the public good, they seek judicial determination of the amount of compensation to which the people of Barbuda (including themselves) are entitled.

[25] Mr. Frank and Mr. Walker exhibited to their affidavit a schedule entitled "Registered Voters in the Constituency of Barbuda in Support of Application for Administrative Order April 2016" on which were listed the names of some 120 individuals. Mr. Frank and Mr. Walker deposed that the individuals named in the document had the same interest as in the suit and they proposed to seek an order pursuant to rule 21.1 of the **Civil Procedure Rules 2000** ("the CPR") after the claim was filed appointing them to represent them.

The application to strike out the claim

[26] On 13th September 2016, the Attorney General filed an application seeking an order that the claim be struck out because it disclosed no cause of action against the Government under the Constitution and/or was an abuse of process.

[27] The primary contentions on which the application was based were that:

- (i) The **Barbuda Land Act** did not create or transfer any right to property to Mr. Frank, Mr. Walker, or any other person in Barbuda nor did it expressly or implicitly change the right of ownership and ultimate control of the Crown/State over lands in Barbuda;

- (ii) Mr. Frank and Mr. Walker have not pleaded or shown any legal or other right or interest to the property whether conferred by the **Barbuda Land Act** or otherwise which was allegedly acquired by the Government of Antigua and Barbuda by the **Paradise Found (Project) Act**;
- (iii) The **Paradise Found (Project) Act** did not in fact acquire or purport to acquire any legal or other right or interest owned or held by Mr. Frank and Mr. Walker or any other person in Barbuda;
- (iv) Chapter II of the Constitution which deals with Protection of Fundamental Rights and Freedoms of the Individual does not permit representative constitutional claims; and
- (v) Alternatively, even assuming, which was denied, that the Government of Antigua and Barbuda acquired any lands or interest in lands by the enactment of the **Paradise Found (Project) Act**, such acquisition of lands gave legal force and effect to a lease arrangement with the Crown which is in the public interest of the State of Antigua and Barbuda, and more specifically the people of Barbuda, (the development and promotion of tourism, the generation of employment in Barbuda) and accordingly was required for public use within the meaning of Section 9 of the Constitution. In that event the **Land Acquisition Act**¹⁰ provided the remedy of compensation provided by law and the Constitution.

The decision on the application to strike out the claim

- [28] The matter came up for hearing before the learned judge who, by judgment delivered 19th February 2018 dismissed the application. In coming to her decision the learned judge reasoned that:

¹⁰ Cap. 233 of the Laws of Antigua and Barbuda.

- (i) The power to strike out pleadings should be exercised only in clear and obvious cases, where, assuming the facts alleged to be true, the statement of case does not disclose a legally recognisable claim against the defendant.
- (ii) **The Barbuda Land Act** which also repealed and/or amended sections of **The Barbuda Act** and **The Barbuda Local Government Act**, changed the entire regime in relation to control and ownership of land at Barbuda.
- (iii) Section 3(2) of the Land Act provides that land in Barbuda shall vest in the Crown on behalf of the people of Barbuda. Accordingly, the Crown will hold title not for its own benefit or for any wider benefit of the people of the unitary state, but on the behalf of the people of Barbuda. This provision suggests that the Crown holds the land subject to an arrangement not unlike a simple trust with the Crown in the like position of a trustee.
- (iv) The **Paradise Found (Project) Act, 2015** has several provisions which appear to circumvent the requirement imposed by the Land Act for the consent of the people of Barbuda for major development "...so perhaps a question for trial is whether the Crown which is vested with title on behalf of the people of Barbuda, could act without the consent of Barbudans given the tenor of the Act."
- (v) Mr. Frank and Mr. Walker are Barbudans within the definition of the Land Act. As such, they, together with all similarly qualified Barbudans, hold some interest in all lands in Barbuda which by section 3(1) of the Act are "owned in common by the people of Barbuda". As owners in common, they each held an undivided share in the land in Barbuda and each such undivided share was an interest in property protected by the Constitution.

- (vi) Accordingly, the statement of case made in the action raised issues that ought to be tried and Mr. Frank and Mr. Walker had the necessary locus standi to pursue the trial of those issues.

The appeal

[29] The Attorney General now appeals against that decision. It is urged on his behalf that:

- (i) The learned judge erred in finding that “the Barbuda Land Act...changed the entire regime in relation to control and ownership of land at (sic) Barbuda” and that the Land Act did not materially alter the right to land in Barbuda and in any event, permitted the grant of leases for major developments as enacted into law by the Paradise Found Act;
- (ii) The learned judge erred in failing to hold that the respondents had no rights to property as alleged or at all and certainly no rights in the lands which were the subject of the Paradise Found Act that were in any way protected by the Constitution;
- (iii) The learned judge erred in relying on the **Registered Land Act**¹¹ to determine the meaning of the term “ownership in common” in the Land Act when the latter expressly provides that the **Registered Land Act** did not apply to land in Barbuda; and further
- (iv) The learned judge failed to appreciate that the Parliament of Antigua and Barbuda had the constitutional authority to amend or dis-apply provisions of the Land Act.

Intended representative action

[30] Section 18(1) of the Constitution provides:

¹¹ Cap. 374 of the Laws of Antigua and Barbuda.

“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.”

[31] The section operates to provide direct access to the High Court to any person who alleges personal violation of his or her rights.

[32] I am of the view that notwithstanding the fact that Mr. Frank and Mr. Walker have stated their intention to seek an order pursuant to rule 21.1 of the CPR appointing themselves to represent some 120 persons listed in a schedule appended to their statement of case, this appeal is concerned with the question of whether the provisions of section 9 of the Constitution have been contravened in relation to them personally and not in relation to anyone else.

Striking out a claim for constitutional relief

[33] The appeal in this case is against a decision of the trial judge refusing to strike out a claim for constitutional relief.

[34] The jurisdiction to strike out should be used sparingly and only in plain and obvious cases where, even assuming the facts alleged to be true, the statement of case does not disclose a legally recognisable claim against the defendant.¹² This procedure is not appropriate in circumstances where the argument involves a substantial point of law which does not admit of a plain and obvious answer or the law is in a state of development.

[35] The jurisdiction may be exercised even in constitutional claims but an application to strike out a constitutional claim should be subjected to particularly careful scrutiny. In the Privy Council decision of **Ingraham and Others v Glington and**

¹² CITCO Global Custody NV v Y2K Finance Inc BVIHCVAP2008/0022 (delivered 19th October 2009, unreported) per Edwards JA at para. 12.

Another¹³ Lord Brown of Eaton-under-Heywood observed in relation to a claim for constitutional relief, that:

“...But surely no one doubts that those causes of action are amenable to the courts’ strike-out jurisdiction. Of course, the Court of Appeal was right to direct itself that claims should only be struck out in plain and obvious cases and, of course, courts should look with particular care at constitutional claims, constitutional rights emanating from a higher order law...”

- [36] The court would exercise the jurisdiction to strike out the claim brought by Mr. Frank and Mr. Walker only if it is plain and obvious that their statement of case does not support, and even if supplemented by further information would not be capable of supporting, the conclusion that they had a personal right of property in the lands which they allege have been compulsorily acquired by the state other than for a public purpose and without compensation.

Ownership in common

- [37] As previously stated, the learned judge concluded that Mr. Frank and Mr. Walker could establish a right of property in all lands in Barbuda by virtue of their status as Barbudans and consequently as co-owners of those lands.

- [38] In coming to this conclusion the judge reasoned that the term “owned in common” in section 3(1) of the Land Act must be interpreted consistently with the meaning ascribed to the term in the **Registered Land Act**, “because to do otherwise would certainly lead to uncertainty if 2 Acts dealing with a common matter of land within Antigua and Barbuda prescribed different interpretations for the same lot of land held by title as ‘owners in common’.” The judge recited the **Registered Land Act**, section 102 of which provides:

“(1) Where any land, lease or charge is owned in common, each proprietor shall be entitled to an undivided share in the whole, and on the death of a proprietor his share shall be administered as part of his estate.

¹³ (2006) 69 WIR 20.

(2) No proprietor in common shall deal with his undivided share in favour of any person other than another proprietor in common of the same land, except with the consent in writing of the remaining proprietor or proprietors of the land, but such consent shall not be unreasonably withheld.”

[39] She concluded at paragraph 40 of her judgment that:

“The term ‘owned in common’ as interpreted with the assistance of the Registered Land Act therefore means that Mr. Frank and Mr. Walker own an undivided share in the land at Barbuda. This of course also means that their undivided share in the land at Barbuda would be captured under the Constitution. The Court does not believe that given the nature of the application, that it need say more on such constitutional right at this time.”

[40] The appellant pointed out that the **Registered Land Act** applies only to land registered thereunder. Thus section 3(2) of the **Registered Land Act** provides that, “[t]he provisions of this Act shall apply only to land, interests in land or dealings in land registered under this Act.”.

[41] Correspondingly, section 4 of the Second Schedule of the Land Act provides:

“The Registered Land Act (Cap. 374) shall be amended by inserting at the end of section 3 the following subsection:

‘Act not to apply to Barbuda

(3) The provisions of this Act do not apply to land in Barbuda, except to the extent set out in the Barbuda Land Act, 2007.”

[42] In my view, section 102 of the **Registered Land Act** restates the essential features of the common law concept of ownership in common.

[43] At common law, as in section 102 of the **Registered Land Act**, ownership in common relates to individual private ownership of undivided shares in land. Thus, such ownership entitles the co-owners to absolute ownership of the land whereby they, or any of them with the consent of the others are entitled to sell, rent or otherwise deal with or use the land in such manner as they see fit. Such co-owners are free to deal with their undivided shares in transactions between

themselves although they require the consent of their other co-owners to enter into transactions with third persons. On the death of an owner in common at common law or under the **Registered Land Act** "...his share shall be administered as part of his estate".

[44] In my opinion the "ownership in common" contemplated by the Land Act is different in concept. Section 3(2) provides that, "Subject to sections 4 and 20, the title to all land in Barbuda shall vest in the Crown on behalf of the people of Barbuda."

[45] Section 5 stipulates that no land in Barbuda shall be sold nor can any person acquire the ownership of any land by prescription or otherwise.

[46] For emphasis, the Land Act, as earlier stated in paragraph 9 above, sets out powers and duties of the Council with respect to land administration and development of land in Barbuda and further empowers the Council to grant leases of land for major developments and to levy taxes on said major developments with the consent of the Cabinet. The term 'major developments' is defined in the Act as:

- "(a) a development which will cost in excess of five million four hundred thousand dollars; or
- (b) a development which in the view of the Council or of the Cabinet will have a significant impact on the economy, environment or infrastructure of Barbuda;"

[47] The development which is the subject of the instant litigation clearly falls within that definition.

[48] With regard to major developments the Land Act further provides in section 6 that:

"6. Leases of land for major developments

- (1) The Council, with the approval and on the advice of Cabinet and having obtained the consent of a majority of the people of Barbuda, may grant leases of land for major developments in accordance with this section and Part VI.

- (2) A person proposing to develop land in Barbuda shall apply to the Council in accordance with the regulations and pay the application fee set out in the regulations.
- (3) Before the Council grants a lease under subsection (1) it shall obtain the consent of a majority of the people of Barbuda.
- (4) The Council may grant a lease of land in Barbuda for a major development for a maximum period of 50 years, or any longer period that the Council may, by regulation fix in accordance with this Act.
- (5) Leases granted under this section may be used as security for loans.
- (6) Full details of any mortgage or other security referred to in subsection (5) shall be registered with the Council and in the Land Registry for Barbuda.”

[49] The Act further provides in sections 17 and 18 that:

“17. Major developments

(1) Major developments in Barbuda shall not take place without the agreement of the Cabinet and the Council and the consent of the people of Barbuda in accordance with this Part.

(2) The procedure for considering whether consent should be given to major development proposals for Barbuda shall be that

- (a) firstly, the Council shall obtain the consent of the people of Barbuda to the principle of the proposal;
- (b) secondly, the proposal shall be considered and approved in detail by the Council;
- (c) thirdly, if the proposal is approved in detail by the Council the proposal shall be considered by the Cabinet;
- (d) fourthly, if the Cabinet agrees to the proposal, the Council shall then obtain the consent of the people of Barbuda.

...

18. Obtaining the consent of the people of Barbuda

(1) The Council shall be responsible for consulting the people of Barbuda and obtaining their consent under this Act either by a meeting of the people of Barbuda or by a vote of the people of Barbuda.

(2) The Council shall make regulations to provide for the manner in which the consent of the people of Barbuda under this Act is obtained.

...

[50] Regulation 10(17) of **The Barbuda Land Regulations, 2010**, enacted pursuant to the Land Act provides that:

“[a] Certificate signed by the Chairman or Deputy Chairman and Secretary of the Council certifying the results of the votes at a meeting of the people of Barbuda, shall be conclusive evidence of the decision of the people of Barbuda on the proposal before it.”

[51] It can be seen from the foregoing that:

- (i) As previously recounted, there had been a series of decisions in the High Court and the Court of Appeal in the Eastern Caribbean Supreme Court culminating in the judgment of Byron CJ in the Court of Appeal in **The Attorney General v The Barbuda Council**¹⁴ in which the former Chief Justice made pronouncements upon the legal effect of the Barbuda Act and the Local Government Act and as to the legal and beneficial ownership of land in Barbuda. Those cases had established that the Barbuda Council did not own, and had no right to grant leases or exercise control over the grant of leases of Crown land in Barbuda.
- (ii) The apparently intended effect of the Land Act was to reverse, by legislation, the legal position as declared in those decisions, to establish the principle that all lands in Barbuda were beneficially owned by a defined class of persons identified as “the people of Barbuda”, and to establish the principle that the Crown held legal title to such lands in Barbuda for and on behalf of that defined class of persons.

¹⁴ Supra n. 7.

(iii) Accordingly, under the scheme of the Act, while legal title to land in Barbuda continued to vest in the Crown, the power to grant leases of land for major developments on the island was now given to the Barbuda Council although such power was made subject to the Council obtaining the approval of the Cabinet and the consent of the people of Barbuda. The power to collect rents and to enforce the terms of such leases was an incident of the Council's position as lessor. Moreover the Council was, by section 21 of the Land Act, empowered to collect rents payable in respect of leases created prior to the coming into force of the Act, the validity of which were confirmed by that statute.

(iv) The Attorney General contends that the Land Act expressly preserves the right and title of the Crown to legal ownership of lands in Barbuda and that the words "on behalf of the people of Barbuda" add nothing as all Governments hold lands and other assets of the Crown or State for the benefit of the people. I respectfully disagree. To the extent that the assets of the Crown or State are ultimately held for the benefit of the people such assets would have been held for the benefit of the people of Antigua and Barbuda, and not just on behalf of a section of that polity defined as 'the people of Barbuda'.

[52] The provisions of the Land Act were, in the main, directed at altering the powers and prerogatives of the central government of the State of Antigua and Barbuda and of the Barbuda Council *vis-à-vis* each other with regard to the beneficial ownership and control of land in Barbuda.

The rights of property vested in individual Barbudans

[53] I now look at the right of property vested in individual Barbudans as putative owners in common of the lands in Barbuda.

[54] In **The Attorney General v The Barbuda Council**, Byron CJ analysed the statutory scheme of the **Barbuda Act** and concluded at paragraph 29:

“The statutory intent as evidenced by the words of the statute frustrates any aspiration to the acquisition of title by the inhabitants. After vesting title in the crown it states that the interest of the inhabitants is restricted to that of tenants...in addition to the statutory prohibition against holding land save as provided by the Ordinance [which made no provision for holding prescriptive or other title], as statutory tenants their occupation of land is permissive...”.

[55] Prior to the coming into force of the Land Act, the inhabitants of Barbuda had no proprietary interest in lands on the island other than the limited rights that had been accorded to some of them as individual statutory tenants of the Crown. There was no question of them enjoying ownership of the land in undivided shares or at all. The concept of their “ownership in common” of lands in Barbuda by virtue of their status as Barbudans can only arise from that Act. Any interest in property incidental to such ownership must have been created by that Act.

[56] My starting assumption is that the words “ownership in common” on their face impute an interest in property - that is the plain meaning of the word “ownership.” Further, since the reception of the common law in Barbuda in 1632, those words used in the context of property in Barbuda would without more connote the co-ownership of property in undivided shares.

[57] I note however that section 5(2) of the Land Act precludes private ownership of land in Barbuda by providing that, “[n]o person shall acquire the ownership of any land by prescription or otherwise.” I further note that the Act sets out the rights enjoyed by Barbudans as owners in common of the land in Barbuda. It is these rights which define the attributes of ownership in common as the term is used in the Land Act.

[58] Section 7 of the Act set out the entitlements of individual Barbudans as follows:
“Barbudans of the age of 18 years and over shall, subject to availability, be entitled

- (a) to the grant of an exclusive right of occupation of a plot of land for a dwelling in the areas of land in Barbuda designated by the Council for residential development;
- (b) to graze animals in the areas of land in Barbuda designated by the Council for grazing;
- (c) to the grant of an exclusive right of occupation of a plot or plots of land in Barbuda for cultivation in the areas in Barbuda designated by the Council for cultivation; and
- (d) to the grant of an exclusive right of occupation of land in the areas in Barbuda designated by the Council for commercial purposes other than major developments.”

[59] Section 8 which provides for the conversion of rights into leases, states that:

“ (1) The Council may, on the application of a person to whom an exclusive right of occupation has been granted, grant a lease to that person for the purposes for which the exclusive right was granted and for a maximum term of ten years.

(2) The lease may be renewed for additional periods of ten years.

... ”

[60] Section 11(2) of the Act states that the Council shall grant an exclusive right of occupation to a Barbudan who wishes to exercise his or her rights under section 7.

[61] Section 15 of the Act provides as follows:

“15. Allotment of residential land

- (1) Residential land shall be laid out in plots of such dimensions and areas as the Council shall direct with a view to the exercise of rights under section 7.
- (2) A Barbudan may apply to the Council for a grant of exclusive rights of occupation over a plot of residential land.
- (3) Exclusive rights of occupation granted under this Act over residential land may not be sold but the grantee may permit another person to occupy all or part of the land comprised in the grant on a weekly or monthly tenancy at a full commercial rate.

- (4) On the death of a Barbudan, the exclusive rights of occupation of residential land which have been granted to him or her shall pass by operation of law, or by will, to his or her next of kin or heirs.
- (5) If a Barbudan has died intestate without leaving next of kin, any exclusive rights of occupation granted to him or her shall immediately expire and the land shall be vested unencumbered in the Crown on behalf of the people of Barbuda.”

[62] It is axiomatic that ownership of an undivided share in land at common law or in the **Registered Land Act** contemplates ownership of a parcel of land by two or more persons each of which is entitled to the immediate use and possession of the whole as an incident such co-ownership. Under the Land Act however, a Barbudan is not by virtue of that status so entitled. An individual Barbudan must apply to the Council for permission to use the land in relation to which he or she is described as a co-owner. This is so even in relation to rights of exclusive occupation which, by section 11(2) of the Land Act must be granted upon application.

[63] Prior to obtaining the grant of a right of occupation of specific land, individual Barbudans cannot deal with their interest in the land even in transactions between each other. Even after obtaining the grant of such a right, their ability to deal with their property is restricted. Thus, except with regard to land allotted for residential purposes (which may be sublet),¹⁵ the Act does not permit individual Barbudans to deal with their interests in the land either between themselves or with third parties.

[64] Whereas at common law or under the **Registered Land Act**, the undivided share of a co-owner is, on his or her death, administered as part of his or her estate, under the Land Act, what is administered as part of a Barbudan’s estate on his or her passing is not his or her undivided share in the entirety of the lands but only his or her right to exclusive occupation of such specific lot or lots of land as may have been allotted to him or her for residential purposes. Notably, no provision is made for subletting or for succession with regard to land allotted for grazing of

¹⁵ See section 15(3) of the Barbuda Land Act, 2007.

animals, commercial ventures, agricultural cultivation, or other activities permitted by the Council.

[65] I conclude that in so far as the Land Act operated to create or to confirm the existence of beneficial interests in the land to which the legal title held by the Crown was subject, such beneficial interests vested not in individual Barbudans, but in the people of Barbuda as a defined class. The Act gave no greater interest in land to individual Barbudans than that to which they had been entitled under the **Barbuda Act**. Their occupation of land continues to be permissive.

[66] Essentially, “ownership in common” as envisaged by the Act encompasses the collective right of the people of Barbuda as a community, exercised through the Barbuda Council, to control of the administration, development and use of land on the island, inclusive of the collective right to be consulted and to have the final say on major developments of land on the island.

[67] It also encompasses the individual entitlement of every Barbudan who had attained the age of 18 years to vote on proposals for the carrying out of major developments on the island; to enjoy, upon application to the Council and subject to availability, the exclusive right to occupy specific plots of land in specially designated locations in Barbuda for purposes of residence, cultivation or commercial ventures and to seek, and subject to availability to obtain permission to graze animals and to carry out such other activities as the Council may have permitted on lands designated for those purposes. In this connection, the Land Act empowered the Council to convert rights of occupancy into leases renewable for successive terms of ten years in each instance.

[68] In summary, “ownership in common” as defined by the Land Act connotes a kind of communal control of a usufruct, notionally shared by the people of Barbuda as a defined class, whereby, subject to certain powers granted to the Barbuda Council to manage the same on their behalf as a common resource, members of that

community over the age of 18 years had the right to apply for, and subject to availability, to obtain grants of leasehold or lesser interests in the land and/or to occupy or use designated portions of the same for approved purposes. This, to my mind, is a lesser interest than that which is enjoyed by an owner in common under the **Registered Land Act** or at common law. It does not amount to the ownership of undivided shares in the land by members of the defined class.

“Property of any description”

- [69] In the skeleton argument filed on behalf of the Attorney General, it was submitted that the mere right to use property is not property. The case of **Belfast Corporation v O.D. Cars Limited**¹⁶ was cited as authority for that proposition. In that case Viscount Simmonds stated that

“...I hope that I do not over-simplify the problem, if I ask whether anyone using the English language in its ordinary signification would say of a local authority which imposed some restriction upon the user of property by its owner that that authority had “taken” that owner’s “property.” He would not make any fine distinction between “take,” “take over” or “take away.” He would agree that “property” is a word of very wide import, including intangible and tangible property. But he would surely deny that any one of those rights which in the aggregate constituted ownership of property could itself and by itself aptly be called “property” and to come to the instant case, he would deny that the right to use property in a particular way was itself property, and that the restriction or denial of that right by a local authority was a “taking,” “taking away” or “taking over” of “property.”

- [70] My observation is however, that in that case, Viscount Simonds was concerned with the Government of Ireland Act 1920, where the protection is against the “taking of property”. Section 9 of the Constitution protects not only against the compulsory taking of possession of “property of any description” but also against the compulsory acquisition of an “interest in or right to or over property of any description” except where certain conditions are satisfied. The right of access to the Court is guaranteed to “[e]very person having an interest in or right to or over property which is compulsorily taken possession of or whose interest in or right to or over any property is compulsorily acquired”.

¹⁶ [1960] 2 WLR 148.

- [71] The question is whether the rights enjoyed by individual Barbudans by virtue of their status as Barbudans as defined by the Land Act amount to an interest in or right to or over property protected by the Constitution.
- [72] The word "property" is not a term of art, but takes its meaning from its context and from its collocation in the document or Act of Parliament in which it is found and from the mischief with which that legislation or document is intended to deal.¹⁷ The present context, is the construction of the Chapter dealing with the Protection of Fundamental Rights and Freedoms of the Individual in the Constitution of Antigua and Barbuda. In the case of **Attorney General of the Gambia v Momodou Jobe**,¹⁸ Lord Diplock stated in relation to Section 18(1) of the Constitution of the Republic of the Gambia that:
- “A constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the State are to be entitled, is to be given a generous and purposive construction. "Property" in section 18(1) is to be read in a wide sense...”
- [73] Section 18(1) of that constitution is worded in identical terms to section 9(1) of the Constitution of Antigua and Barbuda.
- [74] I entertain no doubt that in the context of Chapter II of the Constitution, a right to exclusive use of a plot of land can constitute an interest in or right to or over property. The difficulty, as I see it, is that an individual Barbudan does not have such a right merely because of his or her status.
- [75] I respectfully disagree with the submission made by learned counsel for the respondents to the effect that the right to apply for the grant of an interest in land is in itself an interest in property which, if taken away, entitles one to compensation. In the first place it is not possible to infer that any right was taken away by reason

¹⁷ See Kirby (Inspector of Taxes) v Thorn EMI plc [1988] 2 All ER 947 per Nicholls LJ.

¹⁸ [1985] L.R.C. (Const.) 556.

of the lease: the rights accorded to individual Barbudans were expressly made subject to availability. Even assuming that the respondents' right to apply for some benefit relating to occupation or use of land in Barbuda was diminished by reason of the lease complained of, such a right is, to my mind, a personal privilege which is incidental not to any interest in the property but to membership in the class of persons defined as "the people of Barbuda".

[76] In my view, however generously the concept of 'an interest in or right over property' is construed, the benefit or privilege so described must at least be exercisable immediately and as of right.

[77] An individual Barbudan cannot assign or transfer his or her right to apply for a grant to another person. As was noted by Mummery LJ in the English Court of Appeal decision of **Dear v Reeves**:

"The distinguishing feature of a right of property, in contrast to a purely personal right, is that it is transferable: it may be enforced by someone other than the particular person in whom the right was initially vested."¹⁹

[78] I conclude that even if section 9 of the Constitution is given a generous and purposive construction, the rights accorded to individual Barbudans solely on account of their status as Barbudans within the meaning of the Land Act do not constitute an interest in or right over property: such persons have no immediate entitlement to use or possess, or to deal with their interests in such property without permission. Rather the statute confers eligibility upon such persons to obtain such an interest upon application and subject to availability. Their position is loosely analogous to that of beneficiaries under a discretionary trust who can have no proprietary interest in the trust fund unless the trustees decide on a distribution. The benefit of an exclusive right to occupy a specific plot of land for residential, agricultural or commercial purposes is 'an interest or right over property' but such an interest or right does not come into existence until it is granted by allotment of the relevant plot. Section 9 of the Constitution can only be properly invoked in

¹⁹ [2001] 1 BCLC 643.

cases where: (a) property rights already exist; and (b) such rights have been compulsorily taken possession of or compulsorily acquired.

[79] Mr. Frank and Mr. Walker do not claim to have been entitled to any immediate right to use or occupy any portion of the lands which are the subject matter of their claim. For that reason, it is clear to me that their statement of case does not disclose their personal entitlement to an interest in or right to or over property which has been compulsorily acquired without compensation.

[80] I therefore conclude that Mr. Frank and Mr. Walker lack the necessary standing to pursue a claim for relief under section 9 of the Constitution.

[81] In the premises, I would allow the appeal, set aside the judgment and order that the claim be struck out.

[82] I would set aside the order for costs made in the court below, but, bearing in mind rule 56.13(6) of the CPR, I would make no further order as to costs as I do not consider that the respondents acted unreasonably in making their application for administrative Orders herein.

I concur.
Gertel Thom
Justice of Appeal

[83] **MICHEL JA:** I have read the judgment of my brother, Bennett JA [Ag.], and I agree with his proposed disposition of the appeal. I want to add, though, that in addition to the reasons given by Bennett JA [Ag.] for allowing the appeal, I would also allow the appeal specifically on the basis that the Paradise Found Act explicitly disappplies the provisions of the **Barbuda Land Act** ('the Land Act') which authorises the Barbuda Council to grant exclusive rights to Barbudans to occupy lands in Barbuda and to lease the lands to them, so far as these lands form part of the Paradise Found project ('the project lands' or 'project lands'). This has the

effect of revoking the authority of the Barbuda Council to grant exclusive rights to occupy lands in Barbuda and to grant leases of these lands, to the extent that the lands form part of the project lands.

[84] It is not inconceivable that the disapplication of the relevant provisions of the Land Act could affect project lands to which exclusive rights of occupation and/or leasehold interests had already been granted, but it is inconceivable that it would not affect project lands with respect to which no rights of occupation and/or leasehold interests had already been granted. Once therefore, the respondents had not been granted exclusive rights to occupy any part of the project lands and/or had not been granted any leases of the lands, they could have had no interest in, or right to, or over, project lands, which interests or rights were capable of being compulsorily acquired by the Government, and for which the respondents would be entitled to compensation.

[85] I should probably add also that on the issue of the disapplication of specific provisions of the Land Act by the Paradise Found Act, questions were raised by the respondents about the constitutionality of the disapplying provisions. The sections of the Paradise Found Act which disapply provisions of the Land Act are sections 3, 4, 5 and 6. The respondents have argued that these sections run counter to section 31(2) of the Land Act which requires an amendment of the Constitution of Antigua and Barbuda before there can be any amendment to the Land Act without the prior consent of the Barbuda Council and the people of Barbuda. This argument is based on there having been an amendment of the Land Act by the Paradise Found Act. There is no such amendment however, only a disapplication of specific provisions of the former Act by provisions of the latter Act, and only prospectively and with respect only to certain identified lands to be leased for the undertaking of a major tourism project in Barbuda. The effect of the disapplication is that, although the specific provisions of the Land Act are not revoked and remain applicable to other land in Barbuda, they cannot be applied to lands forming part of the Paradise Found project. There are no constitutional

hindrances therefore arising from the enactment of sections 3, 4, 5 and 6 of the Paradise Found Act which could enhance or advance the position of the respondents as to any compulsory acquisition of their property by the Government of Antigua and Barbuda.

[86] I too would therefore allow the appeal, set aside the order of the judge in the court below refusing to strike out the claim, and would myself strike out the claim. I would also set aside the award of costs to the respondents made by the judge in the court below and, given the nature of the proceedings, I would order that the parties shall bear their own costs both here and in the court below.

By the Court



Chief Registrar