

ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.7 OF 2001

BETWEEN:

THE ATTORNEY GENERAL

Appellant

and

THE BARBUDA COUNCIL

Respondent

Before:

His Lordship, The Hon. Sir Dennis Byron

Chief Justice

His Lordship, the Hon. Satrohan Singh

Justice of Appeal

His Lordship, the Hon. Albert Redhead

Justice of Appeal

Appearances:

Mr. A. Astaphan, QC and Mr. C. Roberts with him for the Appellant

Mr. J. McDonald, QC and Mr. J. Nisbett with him; and

Mr. J. Watt, QC and Mr. M. C. Johnson with him for the Respondent

2002: February 12, 13, 14;
May 27.

JUDGMENT

The Barbuda Act

[1] **BYRON, C.J.:** This is an appeal against the judgment of O'Meally J delivered on 28th February 2001, in proceedings brought by the Respondent against the Appellant and Unicorn Development Limited.

[2] The learned trial Judge made the following declaration and order:

"I declare that the lease granted by His Excellency the Governor General Sir James B. Carlisle on behalf of the Government of Antigua and Barbuda and made on 27th November 1997 is null void and of no effect

insofar as its purports to lease land to the second defendant company, inconsistent with the rights of the plaintiff.

I issue a permanent injunction restraining the second defendant whether by itself, its officers or agents or servants from entering the area at Spanish Point comprising 34.72 acres on the island of Barbuda in the State of Antigua and Barbuda for the purpose of breaking ground, mobilising or construction of any sort on the lands at Spanish Point leased to the second defendant by His Excellency the Governor General Sir James B Carlisle on behalf of the Government of Antigua and Barbuda."

The Background facts

- [3] In the early 1990's representatives of Unicorn Development Limited approached the Respondent to obtain its approval for a hotel development project in Barbuda. These representatives were Barbudans who had been living in England. The Council approved the project and a hotel site at Palmetto Point. On 16th August 1996, at a meeting of the Council Mr. Brillheart James applied, on behalf of Unicorn, to change the location of the project site, to Spanish Point, because of damage caused by Hurricane Luis to Palmetto Point. The Council approved the change of location in principle and its secretary issued documents to that effect. At the trial there was evidence that certain members of the Council expected that there would have been further discussions between the Council and Unicorn about the terms and conditions of the lease of the land at Spanish Point.
- [4] Almost immediately after, the representatives of Unicorn appeared before the Cabinet of Antigua and Barbuda with their proposal. On 21st August 1996 the Cabinet made a decision approving the proposal. On 12th March 1997 the Cabinet approved the terms of a lease to Unicorn, and on 13th August 1997 the Cabinet made a correction in respect of the area of land from 25 to 35 acres. On 22nd November 1997 His Excellency the Governor-General executed the lease.
- [5] Party politics intervened. One of the witnesses in the trial was Mr. Hilbourne Frank, the leader of the Barbuda Peoples Movement. He indicated that in August 1996 the majority of the Council were sympathetic to the Antigua Labour Party Government. He was a

member of the Council but his party was in the minority. He testified that he voted in favour of the project at that meeting. There were Barbuda Council elections in March 1997 and control of the Council reverted to the Barbuda Peoples Movement. The newly constituted Council initially decided to affirm its approval of the project. But the political climate changed. The evidence indicated that since 1989 the Council had passed resolutions about making a conservation area on Spanish Point, and concerns about this resurfaced. This was not a live issue on appeal because the respondents conceded that the Council does not have the constitutional authority to establish a conservation area without the sanction and authority of the Cabinet, which was neither sought nor obtained. But at the time it was an emotive issue. The evidence indicated that there was a public perception that there was overlapping of the area so earmarked and the area of land contained in the lease granted to Unicorn. Mr. Frank testified that in his opinion the area designated in the lease exceeded the area which the Council had approved. There were also public meetings that were held on this issue. The dispute included the contention that the lease was issued without the consent of the Council and was therefore illegal. In addition to the public meetings there were interventions through judicial proceedings by way of applications for injunctive relief.

[6] Eventually Unicorn entered on its lease and began to undertake work on the site. These proceedings seek relief aimed at stopping the development on that site. The pleadings were extensive. The writ initiating the claim applied for declarations of the rights to which inhabitants of Barbuda were entitled under The Barbuda Ordinance 1904 as amended and the Barbuda Local Government Act 1976 as amended and for ancillary relief. At the trial, with the approval of the parties, the learned trial Judge narrowed the issues to be determined on trial as follows:

“in essence the plaintiff now seeks a declaration that the granting of the lease was unlawful. It also seeks a permanent injunction restraining the second defendant from proceeding with the development at Spanish Point.”

The Notice of Appeal

- [7] The notice of appeal listed some 18 grounds. These were summarised in the written skeleton argument of the appellant as raising three issues:
- [a] whether the Crown has the authority and power to grant, including the power to lease, lands on the island of Barbuda;
 - [b] whether the Crown is obliged to first obtain the consent or approval of the Respondent, and
 - [c] whether the lease in this case is inconsistent with any alleged right of the respondent and therefore unlawful.

Statutory Interpretation

- [8] The issues in this appeal had been narrowed with the consent of the parties. The technical argument, on locus standi, that the Respondent did not have any legal right to make the claim in this case was withdrawn and we do not have to comment on it further. The argument that the volumes of historical writings introduced by the respondent were inadmissible and should not be considered was also withdrawn by the appellant. The written arguments of the Respondent indicated that they were not relying on any rights other than the statutory rights under the Barbuda Act and the Local Government Act, and that the historical evidence was introduced as an aid to the interpretation of the statutes in this case, under the mischief rule.
- [9] This case is therefore to be resolved on the meaning to be attached to the relevant provisions of the two statutes, the Barbuda Act as amended, and the Local Government Act 1976 as amended. It is necessary to remind ourselves of the principles which a court should apply in order to adjudicate on the meaning and effect of a statute.
- [10] I would adopt the expression of the principle stated by Sir Vincent Floissac, C.J. in the Dominica case of **Charles Savarin v John Williams** Civil Appeal 3 of 1995:

“In order to resolve the fundamental issue in this appeal, I start with the basic principle that the interpretation of every word or phrase of a statutory provision is derived from the legislative intention in regard to the meaning which that word or

phrase should bear. That legislative intention is an inference drawn from the primary meaning of the word or phrase with such modifications to that meaning as may be necessary to make it concordant with the statutory context. In this regard, the statutory context comprises every other word or phrase used in the statute, all implications therefrom and all relevant surrounding circumstances which may properly be regarded as indications of the legislative intention.”

- [11] The Mischief Rule, when properly applied, involves the use of an aspect of the statutory context to indicate the statutory intention. It is of ancient vintage. It was succinctly explained by Lindley M.R. in the case of **Bartlette v MayFair Property Company** [1898] 2 Ch. 28 at 35:

“In order properly to interpret any statute it is as necessary now as it was when Lord Cooke reported Heydon’s Case to consider how the law stood when the statute to be construed was passed, what the mischief was for which the old law did not provide, and the remedy provided by the statute to cure that mischief.”

- [12] The Mischief Rule is an important aid to construction, when there is lack of clarity, or ambiguity in the language in which the statute is expressed. But if the words of the statute are clear and unambiguous there is a real danger that in applying the mischief rule subjective perceptions on the mischief and the remedy may influence the interpretation to be applied by substituting a perceived remedy for the meaning which the legislature intended. A properly drafted statute is capable of conveying its meaning through the actual words used in the statute. It is obvious that in many cases the perception of the mischief, the relevant historical context and what constitutes a desirable solution or remedy is capable of wide variance. And this case was no exception to that concept.

- [13] In the case of **Universal Caribbean Establishment v James Harrison** Civil Appeal 21 of 1993, Antigua the court was faced with interpreting the jurisdiction section of the Industrial Court Act 1976, an act which was generally agreed to have been poorly drafted. In considering the approach to be adopted I had to remind myself, and I do so again, of the following principle

“The first principle to affirm is to recognize the separation of power between the Legislature and the Judiciary. It is the province of Parliament to make the law and for the Court to interpret, without basing its construction of the Statute on a perception of its wisdom or propriety or a view of what Parliament ought to have done.

The dominant purpose in construing a Statute is to ascertain the intention of the legislature as expressed in the Statute, considering it as a whole and in its context. It is only where the words of the Statute are not clear and unambiguous that it is necessary to enlist aids for interpretation....”

The Plain Meaning

- [14] As I embark on the exercise in this case I should indicate that I do not find that the drafting is ambiguous. The language seems quite simple, clear and straightforward. In my view the legislative intention could be derived from the primary meaning of the words in the Statute. However, in deference to the way in which the case was conducted I will go through the exercise of reviewing the historical context of the legislation.

The History

- [15] Antigua and Barbuda were discovered by Columbus in 1493 on his second journey to the New World. Starting in 1632 both islands of Antigua and Barbuda were colonized by the English, who imported slaves to the islands to grow tobacco and sugar. The present villagers and inhabitants [including their ancestors] are not natives or indigenous peoples of Barbuda. They are the descendants of slaves who were brought to Barbuda by force and remained in Barbuda as slaves until slavery was abolished in 1834. The authorities that bind this court establish that when the Crown of England assumed sovereignty over such newly discovered or colonized territory, uninhabited by indigenous peoples or natives, it became the universal and absolute beneficial owner of all lands therein and, so much of the common law as was applicable to the territory became immediately in force. I merely refer to **Attorney-General v Brown** [1847] 1 Legge 312 at pages 316 and 317-318, **Wade v NSW Rutile Mining Co. Pty Ltd** [1969] 121 CLR 177 at page 194 and **NSW v Commonwealth** [1975] 135 CLR 327 at page 438-49 and **Cooper v Stuart** [1889] 14 AC 286 at page 291.

- [16] The evidence relied on by the respondents clearly indicate that the Crown considered itself the universal owner of all lands in Barbuda by its conduct. Starting as early as 1685 it continuously leased all of Barbuda to the Codrington family for upwards of 2 centuries. It was not until 1870 that the Codrington Family eventually surrendered the lease and

possession reverted to the Crown. Folklore and the available documents portray the Codrington family as benevolent. But the documents show that they were never owners of Barbuda and they had ceased to be involved as lessees since 1870. The customs that had been developed by the inhabitants, during that time, had been the customs of slaves and newly freed slaves. I must say that I find it strange that in the 21st century we should be asked to use the mischief of that era to guide interpretation of the legislation.

[17] Evidence of the land usage at that time was presented through the report of The Commonwealth Review Team appointed to review the Operation of the Arrangements between the Government of Antigua and Barbuda and the Barbuda Local Council. The report adopted the description of 18th century life in Barbuda as set out in the work of Douglas Hall, in Five Leeward Islands:

"During those 99 years, under successive Codringtons, Barbuda was developed as a supplier to the Codrington estates in Antigua. A resident agent with two or three other white assistants supervised the island and its slave population. They were employees of the Codringtons, and the island and all its slaves, land, buildings, and stock were the property of the family. Cattle, horses, sheep, and deer were introduced, and, excepting the breeding stock, were allowed to roam wild. The people lived in a small compact village near the lagoon and their provision-grounds on the outskirts and in scattered fertile patches beyond were fenced in against the free-running livestock. Around the coasts fish and turtle abounded. The island was subject to long hard droughts, the supply of water from the brackish springs and wells sometimes ran low; but it supported a small, simple, almost self-sufficient community of a few hundred slaves and their few white overseers."

[18] After the end of the Codrington era the Crown continued to assert its rights as universal and absolute owner. From 1870 until 1894 the Crown granted a succession of leases. The last such lease was to the Barbuda Island Company limited. This was forfeited to the Crown on 18th October 1898 and the Crown recovered possession.

[19] In terms of its governance the evidence is clear that Barbuda was a colonial possession administered by the British Colonial Office as a dependency of its Government in Antigua. In 1858, the Barbuda [Extension of Laws of Antigua] Act was enacted allowing the British Monarch to declare that the island of Barbuda would be annexed to and made a dependency of Antigua and provided that thereafter Barbuda would be subject to the laws

in force in Antigua “in the same manner as if Barbuda had originally formed part of the Colony of Antigua”. In the following year, the British Parliament adopted a statute confirming this legislation and, by Order in Council dated 1st August 1860, Barbuda was made a dependency of the island of Antigua.

- [20] Beginning 1871 Antigua and its dependency, Barbuda, were administered as a Colony of Great Britain, as part of the Leeward Islands, until following a constitutional conference in London in 1966, Antigua acquired the status of an Associated State under the West Indies act 1967. Following a further constitutional conference in 1980 Antigua and Barbuda became a sovereign nation as a unitary state.

The Barbuda Land Act

- [21] The relevant historical context of the enactment of the Barbuda Management and General Tax Ordinance 1901 is that for over 2 centuries the British Crown had exercised its rights as the universal and beneficial owner of Barbuda by assigning the management of the island to lessees of the Crown. Now just three years after the assumption of possession and control by the colonial government it was necessary to make provision for its management and control on behalf of the Crown.

- [22] The first part of the Statutory context is the description of its purpose which is clearly stated as –

“ An Ordinance to provide for the future management, regulation and control of Barbuda and the imposition and collection of taxes in that Island”.

- [23] The preamble confirmed the purpose of the legislation in these terms:

“Whereas the island of Barbuda is the property of the Crown and being a dependency of the island of Antigua, has hitherto been subject to the same laws as obtained in that Presidency, and Whereas by reason of various circumstances it has been deemed not only expedient but necessary for the future well-being of the inhabitants of Barbuda and the due and just administration and government of that island that certain measures should be taken to provide as far as may be for the better management regulation and control of such island”.

[24] This act was very short lived. The respondents contend that the Ordinance introduced a system of "peasant tenantry" which is unique to Barbuda. The scheme was re-enacted with modifications in 1904 by the "The Barbuda Ordinance, 1904 which stated as its purpose "to consolidate and amend the Barbuda Management and Control Tax Ordinance 1901, and the Ordinances amending the same."

[25] It is now necessary to look at the Statutory Scheme, as enacted in 1904. Part I of the Act was entitled Preliminary. This part made provision for the administration of the island. The governance of Barbuda was entrusted to the Governor in Council. The powers conferred included the power to make by-laws and to impose taxes and other dues; to appoint a Manager to be the Chief Executive Officer of the Government in Barbuda whose salary was to be paid from income derived from or allotted to the island of Barbuda; and to appoint other officers and on such terms as he saw fit. The effect of these provisions was to put Barbuda under the direct administration of the Colonial Office through the Government of Antigua. The issue of terminology should be mentioned here because the constitutional arrangements for the administration of the islands changed from time to time and it was not long after that the "Governor" of Antigua became the "Administrator" and the "Manager" of Barbuda became the "Warden". For this exercise however, I am looking at the Act in its pristine form.

Part II was entitled -Tenure of Lands by the Inhabitants of the Island (sections 12-14).
Section 12 of the Act prescribed:

"All lands within the island of Barbuda are hereby vested in the Governor on behalf of the Crown and shall be dealt with in accordance with the provisions of this Ordinance."

[26] The respondent submits that the phrase "dealt with in accordance with the provisions of the Ordinance" imposed restrictions on the universal and absolute ownership of the Crown. In developing this submission it was argued that the crown could not do as it pleased with the land. Counsel did not go so far as to submit that this provision means that the crown was no longer the universal and beneficial owner of the land in Barbuda. The submission, even as far as it went, would require reading a lot into the language which is not

expressed. The ordinary meaning of the words indicate that the Crown is constituted as owner of the land and is empowered to deal with the lands in accordance with the provisions of the Ordinance. These are not words of limitation. The phrase in my view does not contain a prohibition restraining the crown from selling, or leasing or otherwise disposing of land. Any restriction on the powers attendant on the Crown as an owner would require to be prescribed in clear language in the Ordinance. In my judgment, this section does not impose a prohibition on the power of the crown to dispose of land. So let us look at the other provisions of the Act.

[27] Section 13 of the Act :

“From and after the coming into operation of this Ordinance, all persons inhabiting the island of Barbuda shall be and are hereby declared to be tenants of the Crown, and such persons shall neither hold nor deal with any land save and except as hereinafter appears by the provisions of this Ordinance, and subject to any by-law made by the Governor in Council in that behalf.”

[28] Section 14 of the Act:

“All persons inhabiting the island of Barbuda shall hereafter live and reside within the confines of the village; and no person shall on any pretence whatsoever save and except with the written permission of the Governor given under his hand, live or reside or inhabit any house, hut, or other building elsewhere than within the confines of such village aforesaid.”

[29] The language of these sections is clear and unambiguous. 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 my view this provision puts paid to the idea of future prescriptive ownership because, 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. The intention of restriction is further evinced by stating that the tenants shall neither hold nor deal with any land save as permitted by the Ordinance. This wording is in direct contrast to the section dealing with the Crown, which does not state that the crown shall not deal with any land except in accordance with the statute. Another indication of the intent at restriction is

expressed in the prohibition against residing outside of the confines of the village without specific permission

- [30] Part III of the Act in its pristine form deals with "Allotments Buildings and Provision Grounds". [sections 15 – 23] Section 15:

"It shall be lawful for the Manager with the sanction and approval of the Governor in Council, to allot distribute and divide all land within the village amongst Villagers subject to the following conditions."

There were four conditions. The land was to be laid out in such dimensions as the Manager directs; every allotment shall be used exclusively for residence; each allottee shall pay rent; and the Manager to have power of eviction for arrears of rent payments.

- [31] Sections 16, 17 and 18, gave further management and administrative powers. It authorized the Manager, acting with the Sanction and authority of the Governor, to set aside land for public purposes and for highways and paths throughout the island, and gave the Governor in Council power to make building regulation by-laws.

- [32] Section 19:

"It shall be lawful for the Manager with the sanction and approval of the Governor to set apart such portions of lands without the confines of the Village as may be deemed expedient for the purpose of such land being used and cultivated by the Villagers as provision grounds.

Section 20:

"All such lands as aforesaid when so set apart for such purposes as aforesaid may be allotted and divided amongst the villagers in such plots as the manager shall deem expedient."

- [33] Section 21 prescribes the rent payable as one shilling per acre from the date of allotment.

- [34] Section 22 gives powers and procedures for eviction on non-payment of rent.

- [35] Section 23 prohibits the cutting of timber and the burning of charcoal without a permit from the manager.

- [36] The other provisions of the Act dealt with other aspects of regulating and managing the island. Part IV dealt with Deer and other Game, basically prohibiting hunting without a permit from the Governor and regulating and taxing permitted hunting. Part V dealt with the taxes and the collection thereof, and these taxes were applicable to dogs, boats and livestock, and provided carefully crafted and comprehensive regulations, vesting control over all activities relating to the same in the Governor. Part VI dealt with guns and basically prohibited the possession of firearms without permission from the Governor. Part VII dealt with Highways, enclosures and sanitary regulations, giving extensive powers to the manager in these areas. Part VIII regulated Coasting Trade. And there was a miscellaneous part covering a number of matters.
- [37] Counsel for the respondent spent much time reviewing, through the extensive collection of archival documents adduced at the trial, the conditions of Barbuda in the 19th century as a guide to the interpretation of sections 19 and 20 dealing with the provision grounds. He contended that the evidence showed that in the years leading up to 1901 the inhabitants of Barbuda had provision grounds whose locations changed periodically so that when the soil in one ground was exhausted the villager moved on and chose another ground. He argued that the soil in Barbuda is thin, the rainfall scarce, and the inhabitants needed to be able to choose plots from a wide area to be able to keep growing provisions. He advocated that the mischief rule required an interpretation of the legislation to perpetuate these admittedly inefficient agricultural practices because that is what the inhabitants wanted, and according to him still want.
- [38] These arguments induced the learned trial Judge to misunderstand the constitutional structure that this legislation evidenced or introduced and caused him to observe:
- “it is true that there was detailed reporting prior to 1901, but it is clear that following the 1901 Ordinance responsibility became local and the necessity for dispatches or reports on all matters, to some degree evaporated.”
- [39] This false perception of the constitutional arrangements affected his conclusions. This legislation indicated that Barbuda was being administered by the Colonial Office through

the Governor in Council in Antigua who functioned through the Manager he appointed. The manager was not a local functionary. He was a colonial officer.

[40] The learned trial Judge concluded that the documents supported the conclusion that the wire fence which had been erected separating the southern section of the island from the northern was evidence that under the provisions of the ordinance the area to the south of the fence had been "set apart as provision grounds" thereby conferring rights on the inhabitants and the Council. These findings were not based on credibility, they were based on inferences drawn from the documents in evidence and we are in as good a position as the learned trial judge to evaluate and draw inferences from them. In my view, the documents on which the learned judge relied are open to other rational interpretations. For example they show that the Government had extensive agricultural holdings including livestock in Barbuda. It is significant that in a report much relied on by the respondents Dr. Pierez, a colonial officer, in May 1897, assessed the total area of the provision grounds being worked by the inhabitants annually at 2,000 acres. Bearing in mind that Barbuda is 68 square miles this is a very small area. A number of the documents relied on included reports by various colonial officers of the result of investigation and observation while visiting Barbuda and the opinions they formed and the advice they gave towards the formation of the colonial policy towards Barbuda. The learned trial judge used these documents to ground certain findings of fact as well to inform his interpretation of the legislation. In my view the conclusions he drew were not supported by the material on which he purported to rely. I now briefly examine this material.

[41] In a document bearing date 20th August 1901, the Attorney General reporting to the Colonial office on the 1901 Ordinance stated:

"The ordinance which has been recently passed will, if properly worked, place a useful and beneficial check and control over them at the same time legalizing their holdings and practically giving them grazing rights under proper supervision at the very moderate rate charged by way of licence in the schedule to the Ordinance."

[42] In a document bearing date 7th October 1909, the Acting governor reported to the Secretary of State for the Colonies. The report included the following extract:

"An interesting experiment is being conducted as regards the sum of L50 which appears in the current estimates for fencing. After consultation with the Manager a couple of months ago it was decided to change the direction of the fence and to run one which would allow all the cattle, horses and mules whether belonging to the Government or the villagers being kept to the Northern part of the Island leaving the Southern part for provision grounds for the villagers. Some such action as this is necessary as the fences erected by the villagers round their provision grounds have entirely failed to keep out the Mysore cattle belonging to the Government and practically all the provision grounds have been destroyed by these animals."

[43] In a document bearing date 7th April 1916 and written by a Mr. Tempany who was commissioned by the Governor to report there are the following comments:

"For at any rate a very long time the villagers have been allowed the privilege of working lands almost indiscriminately all over the island. No rent appears to have been paid in return."

"As I have already said the standard of cultivation of the peoples ground in Barbuda is of the lowest description. This is largely the result of the condition under which the land has been worked by the peasantry whereby they are allowed to cultivate such land as they wish without let or hindrance. As a result a false feeling of proprietorship has grown up amongst the people combined with the idea that the soil is of very little value, a view which a visit to the Government plantation readily demonstrates to be erroneous. I am of the view that some restrictions on the tenure of land are likely to be in the best interest of the people themselves and of the Government."

"Provision would be required to be made for the registration of the holdings worked under such a scheme to a much greater extent than at present."

[44] It is certainly open from those documents to infer that the fence was for the purpose of preventing livestock, whether owned by the Government or villagers, from destroying the cultivation of the inhabitants rather than any formal act of designating or setting apart provision grounds. More importantly, however, on my interpretation of the statutory intent, the statutory empowerment to set apart lands for provision grounds did not convey any interest in or over those lands to anyone. It was merely the method of designating the area within which allotments of land could be made for provision grounds. The learned trial judge erroneously concluded that the Manager and the Warden were predecessors of the Council. But that is clearly wrong as the former were colonial officers and the latter an independent local authority.

- [45] The ideas expressed in Mr. Tempany's report, to which reference was made above, found legislative expression in The Barbuda [Working and Upkeep of Provision Grounds] By-Law No.1 of 1915 made by the Governor in Council. It made provision for the payment of rental at the rate of \$1.20 per acre per annum in respect of every provision ground, provided that in lieu of such rent any tenant may provide one labourer per acre to work at the usual current rate of wages to the satisfaction of the Manager for not fewer than twenty days in each half year, as the Manager shall direct. Every Provision ground shall be provided with a notice board bearing the registered number of the provision ground and the name of the tenant. Sanctions were prescribed.
- [46] This by-law demonstrates that, certainly from the position of the crown and probably the usage of the times, the inhabitants of Barbuda had no right to use the provision grounds except after an allotment by the crown, and then only as tenants under strict control and regimes laid down by statute. The legislation did not impose any restrictions on the Government's use of the land. The inhabitants had no interest in or over any land except that to which they were allotted, and then only on the narrow statutory terms. I would now summarise the effect of that legislation in so far as it is relevant to this case.
- [47] The Rights of the Tenant of the Crown under the Barbuda Ordinance 1904, and by-laws. A tenant of the Crown shall neither hold nor deal with any land except so far as provided by the Ordinance or any by-law. He shall live within the confines of the village and on no pretense live outside the village without written permission from the Governor. He shall be eligible to be allotted land in the village by the Manager with the sanction and approval of the Governor subject to the following conditions: [i] the allotment must be in such dimensions as the manager directs; [ii] the allotment must not be used for any purpose other than residence; [iii] the allottee must pay rent; and [iv] the allottee is liable to eviction for non payment. The tenant of the Crown is eligible to be allotted plots to be used as provision grounds, in any area set apart as such on the following terms: He must pay rent, either in cash or by the provision of a labourer to work on the Government lands, he must

exhibit a notice board bearing the registration number of the provision ground and the name of the tenant.

The Rights of the Barbuda Council

- [48] I find it necessary to explain that the Barbuda Council did not exist. The legislation clearly prescribed that Barbuda was administered by the Governor in Council through the officers he appointed.

The Rights of The Crown

- [49] The legislation vested the universal and beneficial ownership of the Crown in the Governor on behalf of the Crown with the power to deal with the land in accordance with the provisions in the Ordinance.
- [50] The modern context is heralded in 1951 with universal suffrage when the Antigua Constitution and Elections Ordinance was enacted and Barbuda was constituted a constituency of Antigua. In 1967, the advent of Associated Statehood introduced the concept of a written constitution declaring and providing for the human and civic rights of the inhabitants of the islands. This also marked the end of direct colonial administration of Antigua and Barbuda, as the constitutional status of Associated Statehood carried with it the rights of internal self-government. It also marked the end of the constitutional status of Barbuda as a dependency of Antigua and made it a part of the unitary State of Antigua and Barbuda. This is the relevant context from which to view The Barbuda Local Government Act passed in 1976. The concept of interpreting this Act in the light of some perception of a mischief suffered towards the end of the 19th century must be erroneous. The concept of looking at this act as making provision for the Barbuda Island Council to inherit the powers of the Manager or the Warden is equally erroneous. Similarity of the powers is coincidental. This legislation marked an important step towards self-determination. In 1980 the Antigua Constitutional Conference was held at Lancaster House in London. The report presented to the British Parliament by the Secretary of State for Foreign and

Commonwealth Affairs was tendered in evidence. Issues with regard to Barbuda were dealt with. The conference revealed that while the Government, under the Antigua Labour Party, stated that Barbuda was an integral part of the State of Antigua and fragmentation was not acceptable, the Barbuda delegation, led by the Barbuda Peoples Movement, demanded autonomous status within the new State. The conference received memoranda from the respective parties and there were differences in the proposed arrangements for the constitutional arrangements and for land law.

[51] I do not think that it is necessary to review these proposals in detail at this time. I should add that this is not an appropriate forum to settle these issues.

[52] In this context one needs to look at certain amendments made to the Barbuda Act in 1982 and 1983 which are relevant to this case. It is not necessary to review all the amendments to nomenclature and other procedural matters that were consequent to the new constitutional status and the changing times. The act was also revised and the numbering of the sections changed somewhat.

[53] The issues which were relevant to this case were the following provisions:
Section 5 – [In the original version of the act this was section 13]. The amendments are contained in the introduction of the new subsections [2] – [8].

[1] All persons inhabiting the Island of Barbuda shall be and are hereby declared to be tenants of the Crown; and such persons shall neither hold nor deal with any land situate within the said island save and except as hereinafter appears by the provisions of this Act and subject to any by-law made by the council in that behalf.

[2] Nothing in this section shall be construed as precluding the grant by the Crown of any interest in or over any piece of land within Barbuda to any person whether or not that person is an inhabitant of Barbuda.

[3] Notwithstanding the provisions of any other law, no person shall acquire the ownership of any piece or parcel of Crown land within Barbuda by prescription.

[4] If any inhabitant of Barbuda can show to the satisfaction of the Crown that a grant by the Crown to any other person of any interest in or over an piece or parcel of

land within Barbuda has caused him any material loss in respect of any use that he has been making of that piece or parcel of land by virtue of the provisions of subsection [1] of this section, that inhabitant shall be entitled to fair compensation in respect of that loss within a reasonable time.

[5] – [8] mechanisms for compensation.

[54] The section dealing with the provision grounds in the current revised edition of the act is section 9: [in the 1904 Ordinance these provisions were contained in sections 19 and 20] Section 9.

“[1] It shall be lawful for the Council with the sanction and approval of the Cabinet to set apart such portions of land, without the confines of the village, as may be deemed expedient for the purposes of such lands being used and cultivated by the villagers as provision grounds.

[2] All such lands as aforesaid when so set apart for such purposes as aforesaid may be allotted and divided amongst the villagers in such plots as the Council shall deem expedient.

[3] (deals with rental).”

[55] In my view the new section 5[2] did not change the law. It merely declared it. As I have explained earlier the 1904 legislation did not preclude the Crown from granting any interest in or over any piece of land in Barbuda. The context of that provision could be found in the written submissions by the Barbuda delegation at the 1980 constitutional conference, Paragraph 8 of which stated:

“There is no power reserved by the Crown or the Antiguan Government to grant leases or sell land otherwise than in accordance with the Ordinance and the proper customary law.”

[56] I assess that the statutory intent was to clarify the existing law. Counsel for the respondent accepted that this was the legal position because in his written skeleton he contended at paragraph 7.11:

“the Council does not seek to challenge the Crown’s right to make grants, it merely says that any grants the Crown makes are subject to existing grants”.

[57] I should just mention for completeness that the argument advanced by the respondent in relation to section 5[3] was that its terms should not be held to be retrospective, relying on

the cases **Yew Bon Tew v Kenderan Bas Mara** [1983] AC 553 per Lord Brightman at 558F and **Pearce v Secretary of State for Defence** [1988] 1 AC 755. Nothing in the case turns on that issue and it is unnecessary for me to examine this proposition.

[58] The provisions of section 5[4] and following are directly related to the Constitutional provisions guaranteeing property rights, and provide a scheme for the protection of any interest in or over property with which the crown may deal. The effect of this provision affirms the right of the crown to deal with interests in and over the land but makes provision for compensation for the interests of any one who may have suffered any material loss as a result of the crown's actions. This is therefore an important development on the 1904 legislation. The statutory context of these provisions includes the Constitution which introduced standards for legislation with regard to the provision of compensation for property rights that are taken away by state action.

[59] The provisions of section 9 did not change in any material way from the Ordinance of 1904.

[60] In my view, the amendments to this act clarified the existing law. Its major difference was that it made provision for compensation to be paid to any inhabitant of Barbuda who suffered any material loss, in respect of any use being made of the land, by virtue of a grant of the land by the crown to another person. Thus instead of the position being that any grant by the Crown is subject to existing rights, the Act provides for compensating existing rights affected by such a grant. Nothing in that legislation imposed or proposed any sort of involvement of any authority in the process of dealing with land by the Crown. The contention that the Council must approve the terms of a lease, or consent to the disposition of land is not based on any provision of the Barbuda Act.

The Local Government Act

[61] The Local Government act 1976 as amended in 1979 and 1981 marked important step towards self-determination and introduced a completely new constitutional arrangement.

Instead of the administration of Barbuda coming through the Administrator in Antigua and then through the Warden, the arrangements changed. The Barbuda Council was established, on democratic principles, by the Local Government Act which laid out a scheme for the sharing of power and responsibility over the Administration of Barbuda with the Executive of the Central Government of the State of Antigua and Barbuda, the Cabinet. This statutory scheme and its effects are to be determined by the wording of the statute itself.

[62] The Act established and prescribed for the composition of the Council; regulated the membership of the council and made provision for elections to the council. The function and powers of the council were prescribed in Part V, sections 18-21. Which is directly relevant to this case.

[63] Section 18:

[1] "The Cabinet may, save as respects the matters and things specified in subsection [2] of this section, give general or special directions to the Council as to the policy the Council should follow in the exercise of the powers and functions of the Council under this Act and any other law.

[2] In the exercise by the Council of its powers and functions under this Act it shall be the responsibility and duty of the Council -

[a] to administer agriculture and forestry;

[b] to administer public health, medical and sanitary facilities and services;

[c] to administer and regulate the provision of electricity and water services and other public utilities;

[d] to construct improve and maintain roads;

[e] to raise and collect revenue pursuant to the provisions of this Act to enable the Council to meet expenses necessarily incurred or to be incurred in the performance of its powers and functions under this subsection except to the extent that financial provision in that behalf may be made from time to time by Parliament.

- [64] Subsection 3 makes the general duty of the Council to provide for collection and expenditure for the benefit of Barbuda of monies authorized to be raised.
- [65] Subsection 4 sets out a number of other duties of the Council subject to subsection [1] and further to subsection [2]. These include maintenance of public buildings and harbor facilities; promotion of hotel and tourist development "in accordance with and subject to "any law relating to the alienation of land, foreign investment or tax incentives"; and a number of other headings.
- [66] Section 19 confers power to the Council to make by-laws in relation to matters specified.
- [67] Section 20 confers power to borrow money.
- [68] Section 21 provides clear evidence of the legislative scheme of the relationship between the Central Government and the Barbuda Council with regard to dealing with land. So I quote:
- "Section 21:
- [1] The Council may, with the sanction of the Cabinet, acquire by lease or purchase lands and buildings for any purpose of public utility, and in particular for the purpose of water works, markets, streets, road, parks and places of recreation.
- [2] The Council may accept, hold and administer any gift or property for any public purpose, or for the benefit of the inhabitants of Barbuda or any part thereof and may execute any works [including works of maintenance on the exercise and improvement] incidental to or consequential on the exercise of the powers conferred under this subsection."
- [69] Part VI of the Act sections 22 to 29 deal with Finances of the Council. Part VII sections 30 to 33 deal with staffing. Part VIII sections 34 to 38 deal with Council meetings and part IX sections 39 to 44 deal with assessment of taxes and part X is the miscellaneous provisions from section 45 to the ending section 47.
- [70] In my view section 18 is limited to regulating the policy which the Barbuda Council is required to follow in the exercise of its powers and functions. It draws a distinction between

those issues on which it must follow directives given by the Cabinet and those on which it need not.

- [71] The learned trial Judge observed that the provisions of section 18[2][b] meant that no directions could be given to the Council by the Cabinet in matters relating to agriculture and forestry. He reasoned that the duty to regulate agriculture necessarily involved the power to regulate where agricultural pursuits may be carried out and that since the Council's powers were exclusive once land had been set apart as provision grounds their character could not be changed without the consent of the Council. This reasoning carries potential for conflict. For example, under section 18[4][b] one could argue that the power to promote hotels and tourism carries the right to determine where these projects should be located. This is a power which the Council is required to exercise in accord with the policy of the Cabinet. Therefore, there could be conflicting regimes regarding the allocation of land for agricultural and tourism purposes. In this case, for example, the question could be whether Spanish Point is to be used for the Agricultural purpose of provision grounds or the tourism purpose of the Unicorn development.
- [72] The real answer is that the Local Government Act does not deal with issues relating to land tenure and land usage. Certainly there is nothing in Section 18 which regulates land usage or tenure or the disposition of Crown land in Barbuda. There is no provision in the Local Government Act which regulates that issue.
- [73] The Legislation which regulates land usage is the Barbuda Act. In my view the learned trial Judge was in error when he concluded that section 18[2] of the Local Government Act required that the consent of the Council was required by the Cabinet in order to deal with any land, whether or not it was set aside for agricultural purposes.
- [74] There has been jurisprudence expressing similar interpretation of the legislation but the learned trial Judge quite erroneously failed to consider the previous judicial decisions on the issue of the rights over the lands in Barbuda and the powers of the Council in relation thereto, on the basis that he considered that they were

irrelevant to the issue under consideration in this case. This was far from accurate, as specific rulings and finding of the learned trial judge were inconsistent with previous rulings of the Court, without apparently recognizing that there was a difference and consequently without any discussion or explanation of the reasons for differing. The Eastern Caribbean Supreme Court both at the High Court and Appeal Court has consistently held that the Respondent does not own, and had no right to grant or exercise control over the grant by the Crown of land in Barbuda. A few brief extracts from some of the litigation on the issue will exemplify.

[75] In **The Barbuda Council v The Attorney General, Antigua Aggregates Ltd and Sandco Ltd** HC 456 of 1994, the learned trial Judge in that case Redhead J, had to consider the effect of section 18 of the Local Government Act. He said, at page 51:

"I am of opinion, that "to administer agriculture and forestry" does not give the Council control over the land in Barbuda. I cannot agree therefore with Learned Counsel, Mr. Clarke that sections 18 and 19 of the Barbuda Council Act give the Council wide and extensive powers over lands in Barbuda. The powers given as I have said are prescribed by the Barbuda Act."

[76] In **Unicorn Ltd v The Barbuda Council** HC No 68 of 1998 in proceedings relating to an injunction concerning access to the lands in dispute in this case, the learned trial Judge Georges J concluded at page 11:

"The Council can only exercise jurisdiction and control as given to it under and by virtue of the Act. It follows therefore that the Council cannot grant a lease or concur in the grant of a lease of lands which it does not itself own. That power vests in the Crown alone and is unfettered. And the power of the Council to set apart lands for public purposes [e.g. to establish conservation areas and national parks] can only be exercised lawfully with the sanction and approval of Cabinet and with its concurrence. No lawful act of reservation was demonstrably done by the Council in respect of lands at Spanish Point."

[77] In the case of **Hilbourne Frank v The Attorney General** Civil Appeal No 1 of 1999, Sir Vincent Floissac CJ had to consider an appeal in which the declarations applied for were similar to the declarations applied for in this case. In explaining why Mr. Frank had no locus standi to move the court to answer those questions, Sir Vincent referred to the evidence of Mr. Frank in which he indicated that he had brought the proceedings to get a clear understanding on the rights of the people of Barbuda because the issue of their rights

to the land was not concluded at the 1980 Constitutional Conference and continued at page 5:

“This is an admission by the Parliamentary and professed juridical representative of the inhabitants of Barbuda that the proprietary rights and interests claimed on behalf of those inhabitants have not yet been legally established. The appellant wishes the Court to prescribe those rights and interests or to grant relief which amounts to legislation in regard to those rights and interest. This is not the function of a court of law. The Court can only declare and protect legally established rights and interests.”

[78] The statutory intention in my view is very clear. The Barbuda Act as amended always provided that the setting apart of provision grounds required the sanction and approval of the Governor or the Cabinet. The legislation does not confer any interest in any one in land set aside for provision grounds. Certainly the Barbuda Council is not given any interest in such land and neither is any inhabitant given such interest. If there was a setting aside no process is mandated to reverse the decision. No evidence was adduced to indicate that any one was using the land in dispute at Spanish Point as provision grounds. In fact the evidence was that the land was rocky and infertile and unsuitable for agricultural pursuits. The real issue in this case had nothing to do with agriculture. It was essentially a contest as to the extent of the authority of the Barbuda Council in the exercise of the State's power to dispose of land in Barbuda. This is exemplified by the evidence which indicated that the Council had agreed that the hotel could be built at Spanish Point, although there was some dispute as to the exact area to which the approval related. If land had been allotted to an inhabitant the provisions of section 5[4] would have enabled the dispossessed inhabitant to apply for compensation. What is equally clear is that the Council was allotted no interest in the Land, and therefore it had no interest in land which was affected by the grant to Unicorn.

[79] The lands over which the Crown enjoyed universal and absolute ownership as a result of being vested in the Governor in 1901 did not change hands when the constitutional status of Antigua and Barbuda changed on Associated Statehood or Independence. The powers associated with such ownership which the Crown was entitled to exercise when administrative control was exercised by the colonial office are the same powers which are retained under the new constitution now that Antigua and Barbuda is a sovereign unitary

state with executive power in the Cabinet. As I understand the underlying issue, The people of Barbuda, do not want the land of Barbuda to be an asset of the unitary state, they want it to be the asset of the people of Barbuda. In my view that is not the kind of issue suitable for adjudication in a court of justice. This requires a change in the constitutional status of the nation and these proceedings do not permit consideration of that issue.

[80] The facts of this case reveal to me that Unicorn Development Limited did the proper thing. They got the approval of the Council before going to the Cabinet although nothing in the legislation made that a legal necessity. It was simply common sense and good practice. It seems from the evidence that the relationship between the Council and the Cabinet could be improved, as I get the impression that effective lines of communication could have made this litigation unnecessary.

[81] I would now summarise my answers to the issues raised on this appeal. 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 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. The evidence indicates that the proper processes required by law were observed and the lease was properly issued by His Excellency the Governor General. In my view the granting of the lease was not unlawful.

[82] For the reasons I have expressed, I would allow the appeal. I order that the judgment of the learned trial judge be set aside. In deciding what order to make as to the costs of this litigation I have taken into account that the dispute relates entirely to the sharing of power

between two branches of the same Government, and the payment of legal costs will inevitably be borne by the taxpayers. In this case the position is also affected by the fact that the central government has been successful in the litigation and any order made would be borne by the taxes from a local government. Because in my view the legal position was always clear I do not think that this is a case where I should exercise discretion to award the losing party its costs of action. I think that in these circumstances the appropriate order is no order as to costs.

[83] The appeal is allowed the order of the learned trial Judge is set aside. There is no order as to costs.

Sir Dennis Byron
Chief Justice

I Concur.

Satrohan Singh
Justice of Appeal

I Concur.

Albert Redhead
Justice of Appeal