EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO ANUHCV 2017/0637

IN THE MATTER of the Constitution of Antigua and Barbuda sections 3, 9, and 19

And

IN THE MATTER of the Barbuda Land Act 2007

And

IN THE MATTER of the Barbuda Land Management (Amendment) Act 2017

And

IN THE MATTER of an Application for Administrative Orders

And

IN THE MATTER of an application for leave for judicial review

BETWEEN:

[1] NADIA JOSYANNE FARRAH HARRIS
[2] JOHN MUSSINGTON
[3] TREVOR WALKER
[4] DEVON WARNER
[5] LILROSE A. BURTON
[6] FRANCES BEAZER

Applicants

and

[1] THE PRIME MINISTER OF ANTIGUA AND BARBUDA, THE HONOURABLE GASTON BROWN
[2] THE ATTORNEY GENERAL FOR ANTIGUA AND BARBUDA

Respondents

Appearances:

Mr. Leslie Thomas Q.C. for the Applicants
Dr. David Dorsett with Alicia Aska and Jared Hewlett for the Respondents

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2018: January 4

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DECISION

[1] **HENRY,J.**: The applicants are Barbudans who assert that they represent the views of Barbudans who are opposed to the enactment of the Barbuda Land Management (Amendment) Act 2017 (the Bill). By Amended Fixed Date Claim Form, Amended Notice of Application for Administrative Relief and supporting affidavits the applicants seek the following relief:

(1) Leave to commence judicial review proceedings against the Respondents pursuant to the Civil Procedure Rules (CPR) 56.3

(2) An interim injunction restraining the Prime Minister and Members of the Government of Antigua and Barbuda from promoting and/or progressing the adoption of the Barbuda Land Management (Amendment) Act 2017 into legislation on the ground that there has been no consent given by the Barbudan Council or the people of Barbuda, as is required by section 31 of the Barbuda Land Act 2007 and the Barbuda Land Management (Amendment) Act 2017 is therefore unlawful and ultra vires;

(3) A declaration that the Prime Minister and Members of the Government of Antigua and Barbuda, in tabling the Barbuda Land Management (Amendment) Act 2017 as preparatory steps to enact this Bill into law have acted in breach of the Barbuda Land Act section 32 and in breach of the Constitution sections 3, 9 and 19;

(4) A declaration that the Prime Minister and Members of the Government of Antigua and Barbuda, in tabling the Barbuda Land Management (Amendment) Act 2017 as preparatory steps to enact this Bill into law have acted unreasonably, contrary to the principles of natural justice and democracy and have deprived the people of Barbuda a legitimate expectation to be consulted on matters affecting their rights to land under the Barbuda Land Act 2007 and section 3, 9 and 19 of the Constitution of Antigua and Barbuda 1981.

[2] At the commencement of the hearing, the Fixed Date Claim Form setting out the claim for judicial review and other relief was struck out pursuant to CPR56.3 (1) as no leave had first been obtained prior to the filing of the claim. The CPR does not permit the Application for Leave to be filed simultaneously with the claim. Accordingly, what is now before the court for consideration is the Application for leave to file a claim for judicial review and for an interim injunction.

[3] The affidavits in support of the application assert that the affiants very recently became aware that the Government was going to repeal the Barbuda Land Act 2007 (the 2007 Act). They were taken by surprise since there have been no announcements or debate about the bill. A protest was organised since they believed their constitutional rights were being violated, but despite the protest and attempts at finding out what was happening, they were given very little information. They then

learnt that the Government had tabled a new Bill and was trying to push it through Parliament with very little debate or discussion. It is their understanding that the Prime Minister has tabled the Barbuda Land Management (Amendment) Act 2017 (the 2017 Bill) in the Lower House for its first reading. The 2017 Bill purports to repeal the 2007 Act which guarantees communal land ownership to Barbudans and compulsorily acquires Barbudan land in breach of sections 3, 9 and 19 of the Constitution.

[4] Further, they assert that the tabling of the 2017 Bill was done without any consultation with the people of Barbuda, the Barbuda Counsel and/or members of the public. This they say is contrary to the principles of natural justice, transparency, the parliamentary procedures for tabling bills and the principles upon which a free and democratic society are governed. Lastly, they assert that the respondents are acting in a surreptitious manner. If an interim injunction is not granted as an emergency measure, their constitutional rights and rights under the 2007 Act will be further eroded, undermined and there is a real risk that these rights will be extinguished.

[5] Counsel for the respondents asks that the court decide preliminarily whether Parliament is amenable to judicial review. He submits that notwithstanding that the claim names the Prime Minister, the complaint is that something unlawful has been done by the Legislative Branch. It is the members of Parliament who table Bills. It is a Member of Parliament who takes the action and the actions of Parliament when it sits, is not amenable to judicial review. Further, a provision in an Act cannot bind a successor Parliament. Parliament can change laws. This is its business to make and change laws. He refers the court to the cases of **Glenister v President of the Republic of South Africa**[1] and the **Methodist Church in the Caribbean and the Americas (Bahamas District) v Symonette**[2]. He submits that the ordinary rule is that Parliament acts then the courts review. Further, that even if Parliament does as the applicants allege they intend, what would hinder the applicants from bringing a meaningful action for relief. Is there some irreversible harm or damage?

[6] Counsel for the applicants replies that the tabling was done by the Prime Minister. If the Parliament is doing something that is unlawful, then the court can intervene. He refers to the case of **R (Jackson) and Others v Attorney General**[3]. He submits that the court may intervene if there is no remedy when the legislative process is complete and the unlawful conduct will by then have achieved its object. This, he says, is the very case before the court. The 2017 Bill is seeking to fundamentally change the method by which all land held by Barbudans can be subdivided into freehold lots and sold. According to him, as soon as the 2017 Bill is passed the Government will be selling off the land. He points to the evidence contained in Ms Ladoo's affidavit, 2nd exhibit.

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[1] [2008] ZACC 19
[2] (2000) 59 WIR 1
[3] [2005] UKHL 56, [2006] 1 AC 262

The Law

[7] In the Privy Council case of **Methodist Church in the Caribbean and the Americas (Bahamas District) v Symonette**[4] their Lordships clearly set out the approach to be taken by the courts in these matters. Having noted that the Constitution is the supreme law of the Commonwealth of the Bahamas and that Chapter V of the Constitution made provision for a Parliament of the Bahamas, which may make laws for the peace, order and good government of the Bahamas. Their Lordships stated that "The courts have the right and duty to interpret and apply the Constitution as the supreme law of the Bahamas. In discharging that function the courts will, if necessary, declare that an Act of Parliament inconsistent with a constitutional provision is, to the extent of the inconsistency, void. That function apart, the duty of the courts is to administer Acts of Parliament not to question them".

[8] Their Lordships further noted that so far as possible, the courts of the Bahamas should avoid interfering in the legislative process. The primary and normal remedy in respect of statutory provision whose content contravenes the Constitution is a declaration, made after the enactment has been passed, that the offending provision is void. . . Exceptionally, there may be a case where the protection intended to be afforded by the Constitution cannot be provided by the courts unless they intervene at an earlier stage. For instance, the consequences of the offending provision may be immediate and irreversible and give rise to substantial damage or prejudice. If such an exceptional case should arise the need to give full effect to the Constitution might require the courts to intervene before the Bill is enacted. In such a case parliamentary privilege must yield to the courts' duty to give the Constitution the overriding primacy which is its due".

[9] Their Lordships also addressed the situation where the complaint alleges an irregularity in the legislative process. Their Lordships stated that that the principles stated above are equally applicable to this complaint. If after enactment the court would have power to declare that the Act is void for contravention of the Constitution, it would be only in exceptional cirumstances that the court would intervene at an earlier stage.

[10] Their Lordships expressed the view that their approach is consistent with the preponderant view expressed in the High Court of Australia in **Cormack v Cope**[5]. That case concerned an alleged constitutional irregularity in the law-making process. Barwick CJ noted that ordinarily the court's interference to ensure due observance of the Constitution in connection with the making of laws is effected by a post-enactment declaration that what purports to be an Act is void.

[11] In the **Glenister** case, the applicant appealed to the constitutional court of South Africa seeking an order declaring that the decision taken by Cabinet to initiate legislation disestablishing the Directorate of Special Operations (DSO) is unconstitutional and invalid; and (2) directing the relevant ministers to withdraw the National Prosecuting Authority Amendment Bill (NPAA Bill) and

[4] (2000) 59 WIR 1
[5] (1974) 131 CLR 432

the South African Police Service Amendment Bill (SAPSA Bill) from the National Assembly. The court framed the sole question for decision as "whether it is appropriate for this court to intervene at this stage of the legislative process". The court stated that it was prepared to accept, for the purposes of argument, that a court may intervene in parliamentary proceedings. The question that arises, however, is in what circumstances may the court do so. The court, citing the Privy Council case of **Rediffusion (Hong Kong) Ltd v Attorney General of Hong Kong and Another**[6] noted that the ordinary rule is that courts will ordinarily not intervene until the process is complete. However a court may intervene if there is "no remedy when the legislative process is complete and the unlawful conduct in the course of the legislative process will by then have achieved its object". The constitutional court concluded that having regard to the doctrine of separation of powers, this test would be the appropriate test to apply. Intervention would only be appropriate if an applicant can show that there would be no effective remedy available to him or her once the legislative process is complete, as the unlawful conduct will have achieved its object in the course of the process. The applicant must show that the resultant harm will be material and irreversible. Such an approach, the court stated, takes account of the proper role of the courts in our constitutional order. While duty-bound to safeguard the Constitution, they are also required not to encroach on the powers of the executive and legislature.

[12] The case of **Trinidad and Tobago Civil Rights Association v The Attorney General of Trinidad and Tobago**[7] was highlighted as a case where the High Court did intervene to prevent the enactment of a Bill. The impugned Bill proposed to abolish the jurisdiction of the court to consider public interest applications for judicial review. The High Court held that the legislation would have impaired the rights of the public to challenge legislation, causing immediate prejudice and affecting the powers of the judiciary. The High Court therefore found that these were sufficiently exceptional circumstances to warrant interference by the courts.

[13] However, on Appeal, the Court of Appeal of Trinidad and Tobago reversed. The test it formulated is whether it has been shown that, if a Bill is enacted, an applicant will not be able to access relief because the Bill's object would have been achieved[8]. It held that if the Bill in question were enacted, the courts would have the power to declare it void if it offended the Constitution. The High Court had therefore erred in holding this was an exceptional case because it had not been shown that irreversible consequences, damage or prejudice would result. The Court of Appeal reiterated the sentiment expressed by the Privy Council decisions that courts should, as far as possible, avoid interfering with the pre-enactment legislative process.

[14] Having reviewed several cases, the Constitutional Court in **Glenister** expressed the view that the cases warranting intervention on this approach will be extremely rare. The court recognized that

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[6] [1970] 2 WLR 1264

[7] [2005] TTHC 66 HCA No. S 1070 of 2005 delivered on 7th November 2005

[8] The Attorney General of Trinidad and Tobago v The Trinidad and Tobago Civil Rights Association Civ. App No 149 of 2005, delivered 18 July 2007, at para 20

before the law has been enacted, it would be extremely unusual to be able to demonstrate harm. The court concluded that in that particular case it was not appropriate for the Judiciary to intervene.

[15] The 2005 House of Lords case of **Jackson** referred to by the applicants takes the matter no further. There the claimants had appealed from the decision of the Court of Appeal dismissing their application from the then Divisional Court which had refused the claim for declaratory relief. The claimants had sought a declaration that the Parliament Act 1949 was not an act of Parliament and consequently of no legal effect and accordingly the Hunting Act of 2004 was not an Act of Parliament and was of no legal effect.

[16] At issue was whether the 1911 Act, which had been relied upon to enact the 1948 Act, had been properly amended without the consent of the House of Lords.

[17] This case does not assist the applicants. The claim filed by the claimants was not one for pre-enactment intervention. The Claimants utilized the primary method for challenging statutory provisions by filing a claim for declaration after the Act was passed. Further the claim for declarations failed in all three courts.

[18] As in the Bahamas, the Constitution of Antigua and Barbuda is the supreme law of the land. If any other law is inconsistent with the Constitution, the Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void. Part 2 of the Constitution provides that "Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Antigua and Barbuda.

[19] Accordingly, the approach to be taken by this court is that expressed by the Privy Council in the cases cited above. This court can review the actions of Parliament however, pre-enactment relief will be granted only when, exceptionally, this is necessary to enable the courts to afford the protection intended to be provided by the Constitution. The applicants must show that there would be no effective remedy available to them once the legislative process is complete and that the resultant harm will be material and irreversible unless the court intervenes at an earlier stage. This is indeed a formidable burden.

Application of the Law to the Facts of this case

[20] This is an application for leave to make a claim for judicial review and for interim relief. The ordinary rule is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy[9].

[21] The applicants submit that they have presented an arguable case having a realistic prospect of success not only requiring leave but also interim relief. They advance that there is a statutory duty to consult with the Barbudan people pursuant to section 31 of the Barbuda Land Act 2007.

[9] Sharma v Brown-Antoine and others [2006] UKPC 57; [2007] 1 WLR 780

Additionally, the people of Barbuda have a legitimate expectation that they will be consulted pursuant to the 2007 Act when changes to the Act are proposed. No consultation has ever taken place. The 2017 Bill is therefore unlawful and is *ultra vires*.

[22] The applicants submit that they have met the test of exceptional circumstances and that material and irreversible harm will occur unless intervention is made at this stage. They say that without injunctive relief the Government will move swiftly to pass the Bill into law, thereby extinguishing their rights under the 2007 Act and breaching their constitutionally guaranteed rights pursuant to sections 3, 9 and 19 of the Constitution. Further, once the Bill is passed the Prime Minister will move to sell off the land. Counsel points the court to the evidence in the Ladoo affidavit. Ms Ladoo is a qualified stenographer by training who transcribed two recorded public radio interviews aired on 16th and 17th December 2017. The second interview is with the Prime Minister. Counsel refers to page 7 of the transcript. There the Prime Minister acknowledges that at least 400 families have been displaced by Hurricane Irma. He then states:

[23] " . . . we thought at the time that we would have had to create a mechanism in which they could have freehold title and that they can mortgage the land to get financing in order to rebuild.

Q. Uh- huh.

A. Now, if we do not help ourselves by putting mechanisms in place in which these Barbudans could rebuild, then there is no way they could return home because they have no home. The reality is they have lost their homes. They had no insurance so my Government recognize from the onset when they were arguing that we may a - - we made the offer too early for them to have the land for a token sum of $1 what they didn't recognize we were thinking ahead. We knew that the international - - even the regional institutions that they would not allow us to utilize their funds to go and give people free homes so it means that what the Government may have to do is to approach one of the banks, possibly Caribbean Union Bank, to borrow probably about US$20 million from the Caribbean Development Bank, which has to be repaid, and then to build these homes and the homes obviously the Barbudans will have to pay for them. They will be heavily subsidized but there has to be some mechanism for them to repay. And only how you can have an effective mortgage scheme is if the mortgagee has title to the land."

[24] Thereafter, the Prime Minister explained what he believed to be the land tenure operating in Barbuda.

[25] Counsel also submits that the Government has granted leases to various entities. Once the Act comes into force nothing stops the Government from converting these leases into freehold title. Therefore the court ought to preserve the presence status. Other than the stated belief, no evidence of imminent conversion of these leases has been submitted.

[26] The court sees nothing in the excerpt referred to by Counsel which evidences an arguable case of material and irreversible harm to the applicants if the court does not intervene at this pre-enactment stage. The plan referred to in the excerpt is for the Barbudans to be given freehold title and to arrange for mortgages for those who desire it. There is nothing to suggest that a post-enactment challenge could not provide relief.

[27] The court is of the view that the applicants have failed to present an arguable case for intervention at the pre-enactment stage. If the 2017 Bill is enacted, the court has the power to declare it void if it is shown to offend the Constitution. On the facts presented the applicants have failed to present an arguable case that there would be no effective remedy available to them once the legislative process is complete, or that material and irreversible loss will occur unless intervention is made at this stage.

[28] The primary and normal remedy in respect of statutory provisions whose content or legislative process, it is alleged, contravenes the Constitution therefore applies. The court can only reiterate the sentiments expressed by the Privy Counsel in the above cases that the courts should, as far as possible, avoid interfering with the pre-enactment legislative process.

[29] Accordingly, the application for leave to make a claim for judicial review and for interim relief is refused.

Clare Henry
High Court Judge

By the Court

Registrar