

EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV2016/0090

BETWEEN:

COVE HOTELS (ANTIGUA) LIMITED

Claimant

and

- [1] HON. GASTON BROWNE, PRIME MINISTER OF ANTIGUA AND BARBUDA
- [2] KONATA LEE, SECRETARY TO THE CABINET OF THE GOVERNMENT OF ANTIGUA AND BARBUDA
- [3] RYAN JOHNSON, EDITOR OF ANTIGUA AND BARBUDA OFFICIAL GAZETTE
- [4] RALPH GEORGE, ANTIGUA AND BARBUDA GOVERNMENT PRINTER
- [5] HON. STEADROY BENJAMIN, THE ATTORNEY GENERAL OF ANTIGUA AND BARBUDA

Defendants

Appearances:

Mr. John Carrington Q.C and with him Ms. Bellina Barrow for the Claimant
Mr. Anthony Astaphan S.C and with him Mrs. Carla Brookes-Harris for the Defendants.

2017: October 23rd
2018: October 22nd

JUDGMENT

- [1] WILKINSON J.: The Claimant on 18th February 2016, filed its application seeking leave to file a claim for judicial review. On 29th April 2016, an amended application was filed. By its application the Claimant also sought 3 interim injunctions (a) restraining the Defendants from making any further publication of the declaration for acquisition of 12 acres of Block 45 1696B Parcel 580 (**“the Acquisition Property”**) in the Official Gazette, (b) **restraining the vesting of the Acquisition Property** in the Crown and (c) restraining the authorised officer under The Land Acquisition Act Cap.233 and his agents, assistants and workmen from entering the Acquisition Property and taking possession of same in the name of the Crown, all pending the final determination of the suit.
- [2] On 7th March 2016, the Defendants gave the Court an undertaking that pending the final determination of the application for leave and interim injunctive relief filed on 18th February 2016, the Defendants and their servants and or agents shall not:
- i. Make a further publication of the declaration contained in Statutory Instrument No. 60 of 2015 in the Official Gazette or any other declaration relating to the compulsory acquisition of the Acquisition Property;
 - ii. Vest the Acquisition Property, identified in Statutory Instrument No. 60 of 2015, **forming part of the land described in Registration Section: Mc Kinnon’s, Block: 45-1696B Parcel 580** in the Crown;
 - iii. Take possession of the Acquisition Property identified in Statutory Instrument No. **60 of 2016 forming part of the land described as Registration Section: McKinnon’s Block: 45-1696B Parcel 580** or any part thereof in the name of the Crown.
- [3] On 9th June 2016, the Parties filed a consent order and therein it was provided amongst other matters that (a) leave was granted to the Claimant to file a claim for judicial review of the decision to acquire the Acquisition Property and (b) the undertaking given by the Defendants on 7th March 2016, was extended until determination of the claim for judicial review.
- [4] On 17th June 2016, the Claimant filed its claim for judicial review. Therein the Claimant claimed judicial review against: (i) the First Defendant, as Head of the Cabinet of the Government of Antigua and Barbuda, (ii) the Second Defendant as the Secretary to the Cabinet of the Government of Antigua and Barbuda; (iii) the Third Defendant as the editor of the Antigua and Barbuda Official Gazette; (iv) the Fourth Defendant is the Antigua and Barbuda Government Printer; (v) the Fifth Defendant as the Attorney General of Antigua and Barbuda. The relief sought:
1. A declaration that:
 - (a) The decision made by the Cabinet on 30th September 2015, that the Acquisition Property shall be compulsorily acquired for a public purpose is null and void and of no effect, notwithstanding its approval by Parliament;
 - (b) The declaration dated 15th December 2015, and made on even date by the Secretary to the Cabinet under section 3 of The Land Acquisition Act, Cap. 233 for the acquisition of the Acquisition Property and as published

as Statutory Instrument No. 60 of 2015 in the Official Gazette in Volume XXXV No. 79 and dated Thursday 31 December 2015, is in derogation of the provisions of section 3 of the Act and therefore null, void and of no effect;

- (c) **The Cabinet's decision to compulsorily acquire the Hotel (and actions taken in furtherance thereto)** derogates from the law, was procedurally improper, biased, irrational, unreasonable, based on material mistakes of fact, denies the Claimant its legitimate expectations to be entitled to the quiet enjoyment of the property for the duration of the Lease and is so unfair as to amount to an abuse of power.
- (d) The Cabinet notification dated 30th September 2015, commissioning a preliminary survey of the Hotel after obtaining approval in Parliament for the acquisition process is in derogation of the provisions of section 4 of The Land Acquisition Act and therefore null, void and of no effect;
- (e) The printed Statutory Instrument No. 60 of 2015 issued in February 2016 and published in the Official Gazette XXXV No. 79 with the material **declaration contains conflicting dates for the House of Representatives' and Senate's approval of the** Resolution to acquire the Acquisition Property to that which was contained in the online Statutory Instrument **No. 60 of 2015 published on the GoAB's website on 19th January 2016,** and is therefore null, void and of no effect;
- (f) The printed Statutory Instrument No. 60 of 2015 issued in February 2016 with the material declaration does not particularize the acreage for acquisition and the 14 year pending sub-division resulting in a 22.05 acreage of Parcel 580 as opposed to the acreage of 25 acres is null, void and of no effect as it is ultra vires section 3(2) (b) of The Land Acquisition Act;
- (g) The printed Statutory Instrument No. 60 of 2015 issued in February 2016 relative to the material declaration does not particularize the public purpose for which the land is being acquired and is therefore null, void, and of no effect as it is ultra vires section 3(2) (d) of The Land Acquisition Act;
- (h) The online posting of Statutory Instrument No. 60 of 2015 in Official Gazette Volume XXXV No. 12 dated 31 December 2015, with the material declaration is null, void and of no effect;
- (i) The online posting of Statutory Instrument No. 60 of 2015 in Official Gazette Volume XXXV No. 12 dated 25th February 2016 with only abbreviated reference to the material declaration is null, void and of no effect;

(j) The belated attempt by the GoAB, and or their servants and/or agents via letter to the Third Defendant dated 21st March 2016 and any other belated attempt to remedy the publication of Statutory Instrument No. 60 of 2015 issued in the Official Gazette Volume XXXV No. 79 or Volume XXXVI No. 12 is null, void and of no effect;

2. Orders for certiorari quashing :-

(a) The Cabinet decision made on 30th September 2015 to compulsorily acquire the Acquisition Property for a public purpose;

(b) The declaration of the approval given by the House of Representatives on 21st October, 2015; and that given by the Senate on 18th November 2015, for the **Government's compulsorily acquisition of the Acquisition Property which is** consequently of no effect;

(c) The declaration dated 15th December 2015, and made on even date by the Secretary to the Cabinet under section 3 of The Land Acquisition Act for the acquisition of the Acquisition Property and as published as Statutory Instrument No. 60 of 2015 in the Official Gazette Volume XXXV No. 79 and dated Thursday 31st December 2015 and the Official Gazette Volume XXXVI No. 12 dated 25th February 2016 referring to Statutory Instrument No. 60 of 2015 with only abbreviated reference to the material declaration;

(d) The Cabinet notification, dated 30th September 2015, commissioning a preliminary survey of the Hotel after obtaining approval in Parliament for the acquisition process.

3. Costs; and

4. Such further and/or other relief as the Court deems just.

[5] When the matter came on for trial there was no cross-examination of the witnesses.

[6] The Court inquired as to the state of the Hotel on the trial day and Counsel for the Claimant informed the Court that the Hotel was operational and pretty much fully booked.

Issue

1. Recognizing that The Land Acquisition Act grants the Government an absolute right to acquire land for a public purpose/s, the sole issue is whether such right was lost by the actions of the Defendants.

The Evidence

- [7] Mr. Richard Bryson gave evidence on behalf of the Claimant. He is the managing director of MRI Ltd. (“MRI”), a position he has held for 12 years. MRI manages the business of the Claimant and markets its Hotel by the trade name of Halcyon Cove Hotel by Rex Resorts. Previously he was the group accountant for MRI Ltd.
- [8] The Hon. Attorney General, Mr. Stedroy Benjamin and the Secretary to the Cabinet, Mr. Konata Lee gave evidence on behalf of the Defendants.
- [9] According to the Land Register, 25 acres of land identified as Registration Section: Mc Kinnons, Block and Parcel 45 1696B 580 (“the Leasehold Property”) is owned pursuant to instrument no. M.0334/89 dated 9th November 1989, by Antigua Isle Company Limited (AICL). According to AICL’s annual return filed on 18th June 2015, it was incorporated on 10th May 1976, with shareholders Mr. Hugh Marshall Snr – 1 share, Mr. Lloydstone Jacobs – 1 share, and Mr. Bernard Percival – 1 share, and directors Ms. Sherneall Govia, Mr. Hugh Marshall Snr. and Mr. Keith Hurst.
- [10] According to the plan disclosed while 3 sides of the Leasehold Property are bounded and adjoin with neighboring land, the fourth side is bounded and adjoins Dickenson Bay. Dickenson Bay is considered to be a premier beach at Antigua.
- [11] The Parties are agreed that during the year 1989, there was executed a lease for a term of 99 years between ACIL (Landlord), Sir Wilfred Ebenezer Jacobs (the Government) and the Claimant (Tenant) for the Leasehold Property (the Lease). The Lease provided that in regards to ACIL, the share capital was at the date of the Lease wholly owned by the Government, that Sir Wilfred Ebenezer Jacobs was acting for and on behalf of the Government. According to the Land Register, the Lease was registered on 15th November 1989 as instrument no. 5414/89.
- [12] **The Lease contains the usual landlord and tenant’s covenants. For the Claimant there were covenants for rent, outgoing, repair, maintenance, repair on notice, compliance with statutory requirements, insurance, entry by landlord, restrictions on alienations, registration of assignments, alterations, service installation, nuisance, use, notices, planning, easements and rubbish. For the Landlord there were covenants for quiet enjoyment, nuisance, restrictions of use of adjoining land, landlord’s title, forfeiture of the Lease and exclusion of section 53 of the Registered Land Act and arbitration.**
- [13] Upon the Leasehold Property is established the Hotel. The Hotel is not a new construction put up by the Claimant but was previously a hotel operated by another entity. According the Charterland Ltd hotel valuation prepared at 27th **October 2015, on the Government’s instructions, the general** description of the Hotel is that it is comprised of a central facility with an open sided lobby area and administration offices, a restaurant/conference room centre building, and guestroom accommodation provided in 12, 2 and 3 story blocks, generally located both parallel and at right angles to the beachfront. Other improvements include a pier, swimming pool, 4 tennis courts and service areas. A breakdown of the rooms were (a) executive/timeshare block of 40 rooms and 4 suites and (b) block of 77 guest rooms.
- [14] According to Mr. Bryson, since executing the Lease, the Claimant has over the course of 27 years invested approximately USD\$30-40 million in the Hotel. He also said that on the popular social

rating site TripAdvisor, the Hotel was rated 3 1/2 stars at 12th February 2016 based on 1650 reviews.

- [15] Around July 1992, there appears to have been a plan to mutate the Leasehold Property and a mutation survey map was prepared indicating that Parcel 580 was to be mutated into 2 parcels, Parcel 626 (22 acres) and Parcel 627 (0.05 acres). Since the Land Register for Block and Parcel 45 1696B 580 is still open and so exist, this indicates that the mutation was not registered.
- [16] On 24th June 2014, a meeting occurred between the Claimant's managing director Mr. Tom Correia (now deceased), the Hon. Prime Minister, Mr. Gaston Browne (the Prime Minister), the Minister of Tourism, Mr. Asot Michael (the Minister of Tourism) and Mr. Hugh Marshall Snr. Mr. Correia sought the meeting to congratulate the Hon. Prime Minister on his 2014 general elections **success. According to the Claimant's records, Mr. Correia's reception by the Minister of Tourism and Mr. Marshall Snr was hostile.** Both aggressively asserted that the Hotel was in a state of disrepair, the rooms were disgusting and the Hotel was dumping raw sewage into the sea. When Mr. Correia attempted to respond to the allegations, the Minister of Tourism and Mr. Marshall Snr. were uninterested and instead they demanded that Mr. Correia return the following day to sign a memorandum of agreement. The contents of the proposed memorandum of agreement were not disclosed to Mr. Correia at time of request.
- [17] On 25th June 2014, Mr. Correia returned to meet with the Hon. Prime Minister and Minister of Tourism. He was told that they were otherwise engaged in important meetings and so there was no meeting between them.
- [18] On 8th August 2014, Messrs. Marshall & Co., attorneys for AICL wrote to Messrs. Lewis Simon and Partners [LSP], a firm of engineering consultants, giving them instructions to inspect and **assess the condition of the Hotel and the Hotel's compliance with its obligations under the Lease.**
- [19] Approximately 2 months later, on 10th October 2014, Mr. Simon of LSP provided the first report on the state of the Hotel. He wrote to Mr. Marshall Jr as follows:

"October 10, 2014

Hugh C. Marshall

....

Dear Sir:

Re: Halcyon Cove Hotel

Subsequent to your correspondence of 8th August 2014, we visited the Halcyon Cove property on 11/09/2014 to determine the physical condition of the property.

At the time of our visit, preparations were in an advanced state of readiness for the proposed opening of the hotel on 19/09/2014.

We observed that:-

- a) The rooms had been refurbished.

- b) The external walls of most of the room blocks had been refurbished while those at the northern end of the property were being completed (plastered and painted).
- c) The swimming pool was being cleaned and prepared for the opening.
- d) The drains were being cleared.
- e) The plumbing and electrical systems were being checked out and repaired.
- f) The grounds were being manicured and the landscaping was in relatively good condition.
- g) The Warri Pier had been painted. Consideration, however, should be given to re-build this section.
- h) **No work had yet been scheduled for the “Clouds” Restaurant building.**

Our inspection was unable to determine the cost for the recent improvements since we did not visit the property at the commencement of the works.

In general, for a property which is approximately 40 years old, we were satisfied with the physical and engineering condition.

Sincerely yours,

(signed)
 Henderson St. C. Simon
LEWIS, SIMON & PARTNERS.”

[20] On 22nd September 2014, at an Antigua Hotel Partners meeting in London it was reported that the Minister of Tourism made several derogatory allegations against the Hotel and which included **amongst them, describing the hotel as a “dirty and run-down hotel full of cockroaches” and which was being “run into the ground”**. He further described Mr. Correia as an 89 year old man **“who does this on each island Antigua, Barbados, Saint Lucia....”** There was also at the time, a threat that the Government would **“take back the lease”**.

[21] On 26th September 2014, Mr. Justin Simon Q.C on behalf of the Claimant wrote to the Minister of Tourism taking issue with the derogatory allegations made against the Claimant and stated that the **Claimant was also aware of the Minister of Tourism’s press statement which indicated amongst other things that there were persons interested in the Hotel and that it was the Minister’s intention to have the Lease examined to determine whether there were any breaches of the Lease**. Mr. Simon Q.C also stated that the statements were published in the widely circulated press at Antigua and Barbuda and beyond and that the statements given their source were adverse and damaging **statements to Mr. Correia, the Claimant and Hotel’s reputations. The letter also inquired of the Minister what specific breaches the Claimant was guilty of, and what improvements the Government required the Claimant to carry out. Counsel further stated that the Claimant’s request was being made mindful of the provisions of section 56 of the Registered Land Act, Cap. 374**

which imposed certain obligations on a landlord before entitlement to exercise the right of forfeiture for the breach of any terms or conditions in a lease on the part of tenant.

[22] **During November 2014, the Claimant's Counsel, Mr. Tim Hardy** sought a meeting with a view to de-escalating the tension between the Parties and which was affecting the Hotel with the Minister of Tourism. At the meeting the Minister of Tourism delivered to the Claimant 3 options and it was asked to choose 1 thereof for moving forward. The 3 options were: (a) that the Claimant invest significantly to raise its standard- the Minister estimated this to be approximately USD\$30-40 million, (b) that the Government put the Claimant in touch with investors interested in purchasing the Lease, and (c) in the event that no decision was made by the Claimant, the Government would compulsorily acquire the Lease. In response Mr. Hardy stated that the Claimant would only be interested in investing significant sums in the Hotel if it were first able to acquire the freehold reversion because it made little commercial sense for the Claimant to invest further significant capital only to lose the benefit of those investments at the end of the Lease.

[23] On 17th November 2014, Counsel Mr. Hugh Marshall Jr wrote to Mr. Hardy:

"17th November 2014

CMS Cameron McKenna LLP

...

Attn: Mr. Tim Hardy

Dear Sir,

Re: Halcyon Cove Beach Resort and Casino

We confirm our representation of Antigua Isle (Company) Limited, the Landlord of your **Clients' in respect of the captioned Hotel. We also confirm our representation of the Ministry of Tourism** on this very same matter.

Please accept our sincere appreciation of the effort that your Clients made in sending you to meet with both representatives of the Government and ourselves. The discussions held during the week should help place in prospective the real issues of concern for our Clients.

As emphasized our Clients are of the position that your Clients' Hotel Plant occupies one of the premier beaches in Antigua. As such it is aptly place(d) to contribute significantly to the delivery of the Antigua and Barbuda Tourism Product. The current plant is significantly dated, and as a result it falls short of the current policy of the Ministry of Tourism. This is a **state of affairs the Ministry cannot allow to continue given the Country's need to increase** delivery of Tourism Services in an ever increasing competitive Market.

Accordingly, the Ministry wishes your Clients to elect to either invest significant sums to update the facility to a modern Plant reflective of its current Tourism Delivery Policy, or to elect to dispose of its interest in the Plant to a Government pre-approved Investor who themselves will make the necessary investment in a timely manner.

In both cases it is contemplated and desired that your Clients should be free to negotiate reasonable and acceptable terms that make both ethical and commercial sense.

It is however, imperative that your Clients make a decision in a timely manner. Failing such the matter will be referred to Cabinet with a view that Parliamentary Action will be taken in the economic interest of the Country as a whole.

In respect of the Lease, as pointed out in our discussion, Antigua Isle Company Limited is of the view there have been continuous and repeated breaches by your Clients. These include the repeated late payment of utilities, the failure to put in good repair and maintain **the "Cloud Restaurant" to name a few. Nonetheless, we accept that no Notice** has been issued or Demand made to date. This correspondence is not to be construed as a demand or a notice. We would appreciate no distraction to the consideration that your Clients must make, as to whether to invest or release the property.

Nonetheless, we would wish to be satisfied that the compromise arrangements arrived at in October last year and reflected in the Cabinet Decision of 13th October 2013 have been fulfilled.

Please therefore provide evidence of the following:

- (a) Payment of the USD\$50,000.00 paid to Antigua and Barbuda Television Company.
- (b) Payment of the USD\$75,000.00 for US Marketing of Antigua and Barbuda.
- (c) Payment of the USD\$26,500.00 for local scholarships for Primary Schools, Secondary Schools and Hospitality Training Center.

As expressed to you orally during our meetings, time is of the essence. We therefore require your Clients to respond to our request in their entirety within fourteen (14 days). We believe that such time would be more that sufficient for you to take full instructions.

Sincerely,

(signed)
Hugh C. Marshall

[24] 11 days later, on 28th November 2014, Mr. Hardy wrote to Mr. Marshall Jr as follows:

"Hugh Marshall

....

28 November 2014

Dear Hugh,

Halcyon Cove Beach Resort and Casino

I must begin by thanking you and the Minister, the Right Honourable Mr Asot Michael, for making the time available to meet with me and my colleague during our visit to Antigua earlier this month.

Secondly, I must thank you for your letter of 17 November 2014. I agree that our discussion helped us better understand the issues of concern to your clients. I confirm that, as I stressed in our meeting with the Minister and yourself, my client instructed me to meet with you both to make it clear that your concerns are understood, they are not being ignored and the issues you raised will be addressed. That is not to say that we accept the complaints that you had made but we do wish to establish a working dialogue to enable us to progress commercial discussions about the future of the hotel to our mutual benefit.

I was pleased that I was able to deliver the message to the Minister personally and I believe that we have put in place the foundation for a meaningful dialogue. Having established such a positive foundation, I am concerned to continue in the same vein and I am very conscious that you asked for an answer to a number of issues within 14 days. It is therefore with some reluctance I have to advise you that sadly I cannot give a complete answer to everything that you have asked at this stage. I am hopeful that once I have explained the reasons you will understand why more time is required. Although I did manage to have one conversation with Mr Correia after our meeting, Mr Correia was travelling at the time and before we were able to progress matters in **detail, Mrs Correia's** health deteriorated suddenly. I believe you know that she has not been well for some time but she is now most grievously ill and her family are gathered around her caring for her 24 hours a day. For a short while I must therefore **ask for the Minister's indulgence and** patience as it is not possible for them to attend to any of their business affairs at this difficult time.

In the brief conversation that I did have with Mr Correia he instructed me that his preferred option would be to purchase the freehold reversion held by Antigua Isle Company Limited but he did not yet have the agreement of the board and would need to call a board meeting to discuss the proposals and seek their agreement. In light of the substantial investment in the site which the Government is requesting, the value of the freehold title has a significant bearing on whether this option is viable. Therefore, in order to move things along, I should be most grateful if you could advise what consideration your clients have in mind. Alternatively, what suggestions your clients may have as to how to value the reversionary title. If you are able to provide that information, or some guidance as to what you have in mind, that would be most helpful to the assessment of what is feasible.

As to timing generally, I am also concerned to draw to your attention my instructions that significant long term contractual commitments to customers and third parties already exist and these will have to be taken into account when planning any future development of the property. I understand that these include a substantial number of bookings for the winter of 2014 and the summer of 2015.

Before I close, I do not wish to add any discordant note to our positive conversation but I do feel constrained to state for the record my instructions that the complaints that have been made about breaches of the lease and the poor condition of the hotel are not accepted. Further, I repeat my instructions that the evidence of the payment of the rent for 2013 and 2014 will be forwarded to you shortly.

Finally, returning to a more positive note, I would like to assure you that I am in regular **contact with my clients' business managers and I have asked that the board meeting be** arranged to review the current situation as soon as the family is able to attend to its business affairs. In the meantime, we hope you will agree that the economic interests of the Country as a whole remain firmly on the side of a continued dialogue around the commercial terms for the sale of the freehold and subsequent investment in the property.

I look forward to hearing from you and working to resolve this situation.

Yours sincerely

(signed)
Tim Hardy”

[25] 3 days later, on 1st December 2014, Mr. Marshall Jr. wrote to Mr. Hardy as follows:

“1st December, 2014

CMS Cameron McKenna LLP

...

Attn: Mr. Tim Hardy

Dear Sir:

Re: Halcyon Cove Beach Resort and Casino

Thank you for your letter of 28th November, 2014.

Please convey to the Correia's our sincere best wishes as they deal with the obvious personal challenges that their current circumstances must clearly present. I have shared your correspondence with the Minister and he also is sympathetic to the family at this time.

We trust that shortly an appropriate adjustment will be made to address the issue of the Hotel in the not too distant future.

On this view, we advise that the reversion of the Lease will either be sold at a marketing prevailing rate or a lesser sum. In any case a valuation of the property will have to be commissioned. However, before consideration can be given to a sale to your Clients, they must detail the propose investment specifying exactly what it is they will do to the site and in what time frame. It cannot be a simple sale. We ask that you be mindful at all times of **the Ministry's objective is to bring the plant (site) in line with its current policy on the**

delivery of the Tourism product of Antigua and Barbuda. Therefore, the Ministry must be satisfied that a sale to your Clients will meaningfully achieve this in an acceptable time frame.

The Ministry remains ready to entertain other investors who have already detailed their interest in the property, and demonstrated their readiness to invest appropriately within acceptable time frame. This is not to say that the Ministry will not treat your Clients fairly. They most certainly are eager so to do. However, we still await a demonstration of a serious commitment from your Clients. Though our Clients are patient, such cannot be indefinite.

Accordingly, and being mindful of the Correia's current personal circumstances, we would ask you to now give a time frame that your Clients' would present a clear plan of investment for the plant for our Clients' consideration.

In the meantime, I ask that your forward a direct contact for Mr. Correia as the Minister wishes to speak to him directly and convey his concerns.

Sincerely

(signed)

Hugh C. Marshall Jr

[26] 4 days later, on 5th December 2014, Mr. Hardy wrote to Mr. Marshall Jr as follows:

"Hugh Marshall

....

5 December 2014

Dear Mr Marshall

Halcyon Cove Beach Resort and Casino

Thank you for your letter of 1 December 2014.

I have passed on the best wishes of yourself and the Honourable Minister to the family. I am sorry to say that I have not received any response as yet but understand that they are not replying to any messages at all at this time.

I have duly noted the comments in your letter concerning how to take forward discussions concerning Halcyon Cove and I will get back to you on this as soon as I have any further instructions. However, in light of the extenuating circumstances detailed above I should be most grateful if you would explain the situation to the Honourable Minister and ask him to extend his patience for a short while longer.

Yours sincerely

(signed)

Tim Hardy"

- [27] **18 days later, and now approximately 5 weeks after Mr. Marshall Jr's letter of 17th November 2014**, on 23rd December 2014, Mr. Hardy wrote a further letter to Mr. Marshall Jr as follows:

"Hugh Marshall

...

23 December 2014

Dear Mr Marshall

Halcyon Cove Beach Resort and Casino

Further to our letter dated 5 December 2014, I have been informed that Mrs Correia has sadly passed away. As I am sure the Minister, the Right Honourable Mr Asot Michael, will understand, the Correia family are currently preoccupied with family matters. We therefore **do not have any further instructions in relation to the Government's proposals and we do not anticipate that we will have any contact with our clients until the New Year.**

I must again thank the Minister for his patience and indulgence at this very difficult time. I will, of course, contact you as soon as we have further instructions from our clients.

Yours sincerely

(signed)
Tim Hardy"

- [28] A few days short of 3 months from Mr. **Hardy's last letter to Mr. Marshall Jr, on 19th March 2015**, a meeting occurred between Mr. Hardy on behalf of the Claimant and the Fifth Defendant. The Parties contradict each other in some respects as to what was said and agreed to at that meeting.

- [29] According to Mr. Hardy, the meeting was to resume negotiations between the Parties. During the meeting the Fifth Defendant assured him that (a) no further public statements would be made by Government representatives criticizing the Hotel or the Claimant, (b) he assured Mr. Hardy that the Government would not expropriate the Hotel. Further, the Parties agreed that each would obtain a **valuation of the Hotel's freehold reversion and leasehold interest and then enter into negotiations** regarding a possible purchase of the freehold and subsequent redevelopment of the Hotel by the Claimant or the sale of the leasehold interest to the Government.

- [30] **The Fifth Defendant's version of events as deposed to in his affidavit filed 24th March 2016**, were:

"5. I hereby categorically state that I did not assure the Applicants that the Government will not under any circumstance compulsorily acquire the Hotel. I could not and would not have given such a broad and unqualified assurance.

6. To the best of my recollection the Applicant was advised that based on the report the Government received from the Chief Health Inspector within the Ministry of Health with regard to the general environs of the hotel which concerned rats and mosquitoes infestation, and the general condition of the hotel plant, it appears to the Government that the Applicant was unable or not interested in making the requisite investments to upkeep the standards and condition of the hotel plant. I further intimated that this state of affairs at **the hotel was not in keeping with the Government's policy to ensure sustainable growth of the economy through tourism.**

7. I informed the Applicant that the Government was not prepared to continue to allow **what should be one of Antigua's prime hotels on a prime beach to remain in its present condition or fall further into disrepair.**

8. I further informed the Applicant's representatives that if the Applicant was not willing to make a substantial investment into the hotel so as to upgrade it to a five-star hotel then the Government would have no other choice but to compulsorily acquire the hotel for a public purpose. However, if in fact the Applicant agreed to invest as requested there would be no need for the Government to acquire the lands. It is in this context only that I said that the Government would not acquire.

9. As I recall **the Applicant's representative spoke of acquiring the freehold. As I recall, the Applicant was not prepared to invest the required sums to upgrade the hotel to a five-star hotel under its lease."**

[31] **The sole Chief Health Inspector's (CHI) report before the Court was** indeed prepared approximately 1 month after the meeting between the Fifth Defendant and Mr. Hardy and so it appears that the Fifth Defendant was mistaken as to his source of information about the general environs of the Hotel.

[32] The CHI inspected the Hotel on 20th and 21st April 2015 and prepared and signed off his Report on 28th April 2015. The CHI stated that he inspected the Hotel 21st April 2015. At clause (II) he describes the type of inspection as:

"(II) The Inspection, in general:

The inspection was of the type normally carried out by this Office, the purpose of which is to establish the general quality of maintenance, infrastructure upkeep, level of sanitation, and those features related to the environmental and public quality of the facility. In this particular inspection attention was directed to both the issues claimed in the initial **anonymous 'report' as well as the issues normally checked in a routine** inspection. In addition to its primary purpose, an Inspection Report is normally found to be beneficial to **the property Owner."**

[34] The CHI after recording his observations, he made certain recommendations pertaining to the: (i) kitchen, (ii) handwashing facilities, (iii) reverse osmosis plant area/room/facility services, (iv) Block C, (v) waste water treatment plant, and (vi) pest/vector control. His conclusion stated:

“The Inspection results, as set forth herein, indicate that certain ‘house-keeping’ remedial needs to be taken at this facility in order to maintain the public health standards expected by Government and the tourism industry.”

- [35] During June 2015, there followed a number of public statements by the First Defendant and the Minister of Tourism and wherein the Hotel was criticized, and it was stated that the Lease would be terminated and the Hotel sold to the Sandals Group.
- [36] On 24th June 2015, Mr. Hardy wrote to the Fifth Defendant recording the Parties’ agreement to negotiate on 19th March 2015, and again seeking assurances that no further damaging statements would be made.
- [37] On 25th June 2015, the Claimant released a press statement stating that (a) the sale of the Hotel was a surprise since the Claimant had a Lease, and (b) the actions of the Government were having an adverse financial impact on the Hotel by way of creating uncertainty about the Claimant and so this was affecting its bookings.
- [38] There were 2 Cabinet Conclusions made. The first was made on 29th July 2015, this being **approximately 8 months after Mr. Marshall’s letter of 17th November 2014**, setting out the 3 options between the Parties. The second Cabinet Conclusion was made on 30th September 2015.
- [39] On 29th July 2015, the Cabinet Conclusion to acquire the Hotel was recorded as follows:

“Declaration Pursuant to Section 3 of the Land Acquisition Act (Cap. 233)

169. Cabinet considered and resolved that a portion of the parcel of land (currently owned by ANTIGUA ISLE COMPANY LTD which is subject to a Leasehold interest granted to COVE HOTELS (ANTIGUA) LTD, (which land is hereinafter described) upon which certain buildings are located, including particularly those of the Halcyon Hotel) is required for a **‘public purpose’ under the provisions of the Land Acquisition Act (Cap.233 of the Laws of Antigua and Barbuda)**. The public purpose for which the land is required is for the provision of tourist amenities, including the provision of a new luxury hotel so as to contribute in a meaningful manner to the sustainable growth of the Economy of Antigua and Barbuda as well as to improve delivery of the country’s tourism product.

Parish: St. John’s

| Registration Section | Block no. | Parcel No. | Acreage |
|----------------------|-----------|------------|-------------------|
| Mc Kinnons | 45 1696B | 626 | 25” (My emphasis) |

- [40] The Court observes at this juncture that while the Cabinet Conclusion speaks of a portion of the parcel of land, the entire Leasehold Property is described and there is no reference to the lesser amount of the Acquisition Property.
- [41] The Claimant became aware of the Cabinet Conclusion in or about 29th July 2015.

[42] Approximately 11/2 months after the Cabinet Conclusion of 29th July 2015, on 11th September 2015, **Mr. Hugh Marshall Jr wrote to the Claimant's Counsel, Mr. Simon Q.C and therein he stated amongst other matters:**

"... We have made it clear in previous correspondence that we represent the Government of Antigua and Barbuda via the Ministry of Tourism and Energy....

It is hoped and anticipated that we shall reach a voluntary settlement around the table. We do intend to exchange valuations, and are happy so to do in an effort to reach that voluntary settlement. However, in the event that despite our good intentions and greatest efforts we fail in this respect, we will be compelled to proceed under the Land Acquisition Act. In this regard we would not wish to have to repeat the efforts of Mr. Watson and his team. Therefore, the assessment he does now must also be geared towards a Board of Assessment eventuality.

On this basis he will require as part of his assessment process, access to your Client's financial statements and relevant contracts so as to assess your Client's expected losses for inclusion in his report. The exact items he will require we think he will be best able to state upon his arrival.... Our client's objective is to ensure that your Clients are fairly compensated as to any losses occasioned by their actions. In this regard they will require full disclosure.

....

Yours sincerely

(signed)

Hugh C. Marshall Jr."

[43] 6 days later, on 17th September 2015, Mr. Marshall Jr. wrote to Mr. Simon Q.C setting out the items of disclosure that Mr. Watson required. They included (i) summary of financial statements for a minimum of 3 years, (ii) copies of any leases, tenancy agreements, licences or operating agreements in relation to any other businesses operating on the Leasehold Property, (iii) copies of any agreements with tour companies and airlines, (iv) current insurance policies, (v) details of floor areas and/or floor plans where available, (vi) copies of Land Registers and survey plans, and (vii) any other valuation or other reports previously prepared with respect to the subject Leasehold Property. Mr. Marshall Jr also indicated that Mr. Watson had stated that the list was not definitive **and was at that juncture only a 'wish list'**.

[44] 4 days later, on 21st September 2015, Mr. Simon Q.C wrote to Mr. Marshall Jr and advised that items (i), (ii) (iv), (v) and survey plans would be provided to Mr. Watson, that the Land Registers could be obtained from the Land Registry, and that item (iii) was confidential business documents **which would not be disclosed at this stage for the reason that the Claimant's competitors might get hold of the information.**

[45] According to Mr. Bryson, the Claimant acceded to the request for its information in reliance on the Parties agreement to negotiate.

[46] 9 days after Mr. Simon Q.C's letter, on 30th September 2015, there was a Cabinet notification issued commissioning a preliminary survey of the Hotel. It read as follows:

"30th September, 2015

Notification Pursuant to Section 4 of the Land Acquisition Act (Cap.233)

94. Cabinet hereby gives NOTICE that a preliminary survey is required in order to demarcate the portion of land (currently owned by ANTIGUA ISLE COMPANY LTD which is subject to a Leasehold interest granted to COVE HOTELS (ANTIGUA) LTD, (which land is hereinafter described) upon which certain buildings are located, including particularly **those of the Halcyon Hotel) that is required for a "public purpose" under the provisions of the Land Acquisition Act (Cap. 233 of the Laws of Antigua and Barbuda). The public purpose for which the land is required is for the provision of tourist amenities, including the provision of a new luxury Hotel so as to contribute in a meaningful manner to the sustainable growth of the Economy of Antigua and Barbuda as well as to improve the delivery of the country's tourism product.** Accordingly, authorized officers, agents, assistants and workmen of the Government of Antigua and Barbuda may lawfully do and perform all things and acts authorized by Section 4(a) to (g) and the Proviso thereto of the Land Acquisition Act (Cap. 233 of the Laws of Antigua and Barbuda)

Parish: St. John's

| Registration Section | Block No. | Parcel No. | Acreage |
|----------------------|-----------|------------|-------------------|
| McKinnons | 45 1696B | 580 | 25" (My emphasis) |

[47] The Cabinet notification for demarcation of the land was never published in the Official Gazette pursuant to section 4 of the Act.

[48] On 30th September 2015, the second Cabinet Conclusion to acquire the Hotel was recorded as follows:

"30th September, 2015

Declaration Pursuant to Section 3 of the Land Acquisition Act (CAP.233).

95. Cabinet considered and resolved that a portion of the parcel of land (currently owned by ANTIGUA ISLE LTD which is subject to a Leasehold interest comprising of 12.0 acres or 530717.4 square feet granted to COVE HOTELS (ANTIGUA) LTD, (which land is hereinafter described) upon which certain buildings are located, including particularly those **of the Halcyon Hotel) is required for a 'public purpose' under the provisions of the Land Acquisition Act (Cap. 233 of the Laws of Antigua and Barbuda). The public purpose for which the land is required is for the provision of tourist amenities, including the provision of a new luxury hotel so as to contribute in a meaningful manner to the sustainable growth of the Economy of Antigua and Barbuda as well as to improve the delivery of the country's tourism product.**

Parish: St. John's

Description of the Property”

| Registration Section | Block No. | Parcel No. | Acreage |
|----------------------|-----------|------------|-------------------|
| McKinnons | 45 1696B | 580 | 25” (My emphasis) |

- [49] This later Cabinet Conclusion is distinguished from the earlier Cabinet Conclusion as it set out the amount of the Acquisition Property.
- [50] On 6th October 2015, Mr. Watson inspected the Leasehold Property and was given confidential **documents requested per Mr. Simon Q.C’s letter of 21st September 2015.**
- [51] On 16th October 2015, being 2 weeks after it was made, the Claimant became aware of the second Cabinet Conclusion.
- [52] On 21st October 2015, a resolution setting out the Cabinet Conclusion was put before the House of Representatives and Approval was given on said date by the House of Representatives. During the debate, the **Hotel was described as “rat infested”.**
- [53] The Court observes that the public purpose was different to that of the Cabinet Conclusion in that it **read: “...public purpose namely the development and expansion of the Halcyon Cove by Rex Resorts into a five Star hotel.”** (My emphasis)
- [54] On 22nd October 2015, Mr. Hardy wrote to Mr. Hugh Marshall Jr **(i) emphasizing the Claimant’s dismay at the Government’s actions, (ii) referring to the assurance of the Fifth Defendant, (iii) stating that the Government had undermined the negotiations as the purpose of obtaining valuations was to enter into negotiations regarding a possible purchase of the freehold or the sale of the Claimant’s leasehold interest to the Government and (iv) asking the Government to confirm in writing that it would suspend the taking of effect of the resolution pending conclusion of negotiations.**
- [55] **The Government’s valuator, Mr. Watson prepared two (2) reports. The first of the two (2) reports was titled “Hotel Valuation: Halcyon Cove, Antigua” and dated 27th October 2015, and the second was titled “Assessment of Compensation Re: Halcyon Cove, Antigua” and dated 2nd November 2015.**
- [56] The Hotel Valuation report included a cover letter issued by Mr. Watson dated 2nd November 2015, and addressed to the Permanent Secretary of the Ministry of Tourism. Therein he stated his **instructions were to prepare a report on the ‘market value’ of the Property for the purpose of a proposed acquisition of the property.** In his valuation summary, he stated that the market value of the freehold was US\$16,600,000.00, and the market value of the leasehold with 73 years unexpired was US\$14,100,000.00.
- [57] The Assessment of Compensation report included a cover letter dated 2nd November 2015 addressed to the Permanent Secretary in the Ministry of Tourism and therein Mr. Watson stated that further to his instructions to prepare a report on the Compensation for Disturbance in the event of a proposed acquisition of the Hotel under the powers of the Land Acquisition Act, he now had the pleasure of providing his valuation report. The valuation summary stated the subject of the

valuation was the Hotel, the interest to be valued was “Compensation for Disturbance under the Powers of The Land Acquisition Act”, the purpose of the valuation was “Proposed Acquisition of Property under the Powers of The Land Acquisition Act”, basis of valuation was “Market Value in accordance with named professional standards, the date of the valuation was 9th October 2015, and compensation for disturbance was to be “Nil”. At paragraph 8 – Conclusion, it was stated:

“In preparing our conclusion to our assessment of Compensation for Disturbance we note that we have been instructed by the Client’s legal advisers that under Clause 25 of the Land Acquisition Act (Cap. 233) no compensation will be payable to the Lessee for the loss of land taken. Whilst this may not necessarily represent our opinion, we are not experts in the local laws in Antigua & Barbuda and so must defer to this legal advice.

....

Similarly, we have considered other legitimate heads of claim under the basis of compensation for disturbance, such as loss of goodwill; other trade and business loss; removal expenses etc. and considered that, based on current information available, any claims for compensation under these headings are likely to be negligible, although we reserve the right to amend this opinion should the current business decide to relocate to other premise(s) in Antigua following service of notice under.

In this case, having considered relevant case law and valuation practice in assessment of compensation, based on the fact that the business has consistently made an annual loss, and due to the value of the leasehold interest being base on development value, we are of the opinion that any compensation for disturbance is **currently nil.**”

[58] **As the Court understands, Mr. Watson’s 2 valuations, while the market value of the freehold was US\$16,600,000.00, the market value of the leasehold was US\$14,100,000.00 and the compensation for disturbance of the Hotel’s business would be Nil.**

[59] On 29th October 2015, the Claimant issued a further press release criticizing what it described as the abusive behavior of the Government and highlighting the false allegations made against the Hotel and the Claimant.

[60] On 30th October 2015. Mr. Simon Q.C sent a letter of even date to the Hon. Prime Minister. The letter read as follows:

“30th October, 2015.

Hon. Gaston Browne
Prime Minister

....

Dear Hon. Prime Minister:

Re: Resolution pursuant to the Land Acquisition Act, Cap. 233.

We continue to act for Cove Hotels (Antigua) Limited, which holds a Lease of Parcel 580 of Block 45 1696B in Registration Section: Mc Kinnons comprising 25 acres, and on which

stands Halcyon Cove Hotel. The Lease which is dated November 14, 1989 is for a term of 99 years, and was granted jointly by Antigua Isle Company Limited, an incorporated company **“which company is at the date of this Lease wholly owned by the Government” and the Governor General “acting herein for and on behalf of the Government of Antigua and Barbuda”**.

It is instructive that by letter dated January 28, 2015 from Marshall & Co – Attorneys-at-law (who confirmed their representation of Antigua Isle Company Ltd.), our client was advised **“that all rental payments until further notice should be paid to the Accountant General of Antigua and Barbuda”**, but were later advised by letter dated May 14, 2015 from the Attorneys-at-law that the rental cheque for the second quarter of 2015 **“should be re-issued payable to Antigua Isle Company Limited”**. All subsequent rent cheques were issued accordingly.

During the month of June 2015 there were many reports in the local press of **Government’s intention to terminate our client’s lease of the property**, following upon the Hon. Minister of Tourism’s comments made at the annual Antigua Hotel Partners Meeting held in September 2014, that the hotel was a **“dirty and run-down hotel full of cockroaches”** which our client was deliberately running **“into the ground”**. Back in November 2014, our client’s UK Solicitor, Tim Hardy, had met with the Hon. Minister of Tourism and Hugh Marshall Esq. and held discussions on the government’s issues of concerns over the hotel, and the option of our client purchasing the freehold to allow for the expansion of the hotel. At a further meeting between Mr. Hardy and the Hon. Attorney General in March 2015, it was eventually agreed that both parties would obtain an independent valuation of the freehold and leasehold interest, following which the parties would enter into commercial negotiations aimed at arriving at a mutually agreeable position. The valuations are yet to be exchanged.

On the basis of this agreement, Mr. Marshall Jr. requested in his letter dated 31 August 2015 that the Government’s valuer, Mr. Simon Watson, be granted access to the property and in his letter dated 17 September 2015 that my clients provide Mr. Watson with various confidential and sensitive documents relating to the hotel and its business. Our client granted these requests, permitting Mr. Watson to enter Halcyon Cove on 6 October 2015 and providing him with the agreed documents. The Government had requested in these letters that our client give **an undertaking that, in the event the parties’ do not reach a voluntary settlement, Mr. Watson’s valuation may be submitted by the Government to a Board of Assessment**. However, this undertaking was not given by our client.

Against that background, our client wishes to record their concerns over the Resolution under section 3 of the Land Acquisition Act, Cap. 233 which was recently tabled in the House of Representatives and debated and passed on Wednesday October 21, 2015. In **light of the parties’ clear agreement to enter into commercial negotiations, our client was understandably shocked by the Government’s escalation of the matter towards a compulsory acquisition**.

The Resolution states that a portion of Parcel 580, that is 12 out of the 25 acres, is being **“acquired for a public purpose, namely the development and expansion of the Halcyon Cove by Rex Resorts into a five star hotel”**. **We urgently seek clarification on the following:**

1. It seems clear that what is being acquired is the freehold title rather than our **client’s leasehold interest**. **Why then would Government seek to acquire property** from a company in which it holds a 100% beneficial interest?
2. **And, is our client’s Lease to remain an Incumbrance on the title to be “acquired” by Government?**
3. **Is it the Government’s intention to sell the freehold in the 12 acres acquired to our client to allow for the realization of the stated public purpose?**
4. The 12 acres being acquired consists of the hotel buildings, but excludes the Clouds Restaurant, the tennis courts, and some vacant land – all of which are **included in our client’s Lease**. **How are the remaining 13 acres to be treated in respect of our client’s leasehold interest?**
5. **Our client’s 99 years lease of Halcyon Cove was granted jointly by Antigua Isle Company Limited and the Governor General acting on behalf of the Government**. In doing so, the Government conferred upon our client a legitimate expectation **that it would honor the terms of the lease, including our client’s right to “enjoy the Property peaceably” pursuant to clause 5.1 of the lease**. **There are currently 73 years of this legitimate expectation to its detriment by paying approximately US\$11 million to enter into the lease, followed by annual rent payments and an investment of over US\$30 million in the leased property**. In the absence of any breach by our client of any of its obligations under the Lease, how does the **Government justify its compulsory acquisition given our client’s legitimate expectations under the Lease and the investment made in good faith?**

We would be obliged for your clarification of these concerns before the Senate debates the Resolution, as our client is conscious of the parameters established by the Privy Council in its judgment in *HMB Holdings Ltd. v Cabinet of Antigua and Barbuda* [2007], for the compulsory acquisition of property.

Kindly be advised that our client reserves the right to raise additional issues and/or concerns with the Government and to challenge the proposed compulsory acquisition, should they consider this necessary to enforce their legal rights as Lessee.

Yours respectfully,

(signed)
JUSTIN L. SIMON QC.”

[61] **One (1) week short of the one (1) year anniversary of Mr. Marshall’s letter of 17th November 2014, on 10th November 2015, Mr. Marshall Jr wrote to Mr. Hardy as follows:**

“10th November, 2015

CMS Cameron McKenna LLP

....

Attn: Mr. Tim Hardy

Dear Sir:

Re: Cove Hotel (Antigua) Ltd

Your letter of 22nd October, 2015 is acknowledged.

We are compelled to place the position of our Clients, The Government of Antigua and Barbuda acting through the Ministry of Tourism on record.

Firstly we wish to emphasize that as early as our meeting in November 2014 and confirmed in our letter to you of the 17th November 2014 we advised that time was of the essence for your Clients to elect to either re-invest in the property or to divest their interest in it. This was then an invitation for your Clients to give a firm commitment to bring the property in line **with the Government's current policy on the delivery of the Nation's** Tourism product. (A copy of that letter is attached for ease of reference). Despite your **Client's assurances they have yet to either** elect to divest or to present a definitive plan for re-investment. In all fairness there can be no confusion that our Clients have moved on from that position in the exact manner expressed in that letter.

We refer to your suggestion that “Government has given no notice to (your) Clients of its escalation of matter towards expropriation”. In our said letter of 17th November, 2014 we stated:

“It is however, imperative that your Clients make a decision in a timely manner. Failing such, the matter will be referred to Cabinet with a view that Parliamentary Action will be taken in the economic interest of the Country as a whole”

Having regards to this we are ourselves surprised that your Clients had no indication that our Clients would take the very steps they said they would take. A year has passed and your Clients have not yet decided whether to re-invest in the property, or to agree the divestment of their interest. Despite repeated communications from your Offices and indeed those of your **Clients' local Attorney, nothing meaningful has been advanced by** your Clients over the year. We truly appreciate that both Mr. and Mrs. Correia have passed; your Clients are a corporation with perpetual succession. Its business continues as does the business and the affairs of the State of Antigua and Barbuda.

We acknowledge and confirm the Agreement to exchange valuations. This Agreement **remains on the table. We await our Mr. Watson's Report as you await the Report from your** chosen Valuer. Once we have this we are ready to exchange Reports as agreed we will seek to settle voluntarily the level of compensation due to your Clients.

In our view there remains no other issue on the table at this time. We are not aware of any other purpose for the exchange of valuations. Your Clients cannot be reasonably contemplating a purchase of the absolute proprietorship of the property having elected not to furnish any proposals for re-investment as requested in our letter of 1st December 2014 (again copy enclosed for ease of reference).

Our Client is not in the business of compulsory acquiring private proprietries. However, in fulfillment of its obligation to the general public this is something though reluctant to do; it cannot shy away from, particularly where operators of the Hotel will not bring the plant in line with Government policy. This they do whilst the plant continues in the Government's view to have a negative impact on the industry as a whole, it is imperative for the Government in such circumstances to act.

We note with interest that this is the first time you have raised an issue that the Attorney General gave an undertaking not to compulsory acquire your Clients property. We are confident that this is not an accurate reflection of the commitments given by the Honourable Attorney-General which by our letter of the 5th August 2015 has led to the Agreement to exchange valuations.

With respect to your understanding of the process and your request for confirmation as to **why the Government is acquiring the property from "its own wholly owned subsidiary" we respectfully decline to advise on these matters at this time.**

We note your comments on legitimate expectation and irrationality. These we consider together with paid advert of your Clients appearing in the printed media appropriate not for us to comment upon at this time. We do however confirm that our Clients are acting lawfully and within the interest of the General Public of Antigua and Barbuda.

So far as you stated that the Resolution undermines the commercial negotiations, we confirm once again that there is no intention on the part of ourselves or our Clients to undermine the negotiations. Our Clients are determined to bring a resolution and is committed to arriving at a voluntary one. In this respect no effort is being spared.

At all times we made our position clear that should commercial negotiations fail we would be relying upon our valuation before a Board of Assessment. We refer to ours of 31st August, 2015 addressed to Justin Simon, QC (copy enclosed). Truly your Clients did refused to give an undertaking, be that as it is it remains the option of our Clients to rely upon the same valuation before such a Board for Assessment should a voluntary Agreement not be reached.

We now refer to the time table. Time remains of the essence in this matter. We would be grateful for you to indicate how soon your valuation will be ready for exchange. As indicated to you previously by phone a Compulsory Acquisition does not take effect until several specified events under the relevant legislation have taken place. In these circumstances we see no need for any undertaking that the Government will suspend any aspect of this process which is preliminary to the acquisition.

Please therefore let us have your knowledge of when your valuation will be available so that we can mutually agree a time table within the week.

There remain two issues that require brief mention. Firstly your Clients refused to supply certain confidential documentation, then they failed to supply to Mr. Watson documents they agreed to supply. Documents supplied by them were generic in nature having to do **with occupiers' liability insurance. The other matter is that both your offices and those** of your Antigua counterpart, Justin Simon, QC have been aware that our offices are instructed in this matter. May we humbly suggest that all future communications be addressed to us on this matter so that they may receive the appropriate and timely response.

Sincerely

(signed)
Hugh C. Marshall Jr"

[62] On the one (1) year anniversary of Mr. Marshall Jr's letter of 17th November 2014, on 16th November 2015, Mr. Hardy responded to Mr. Marshall Jr's letter. He wrote:

"Hugh Marshall

....

16 November 2015

Dear Mr Marshall Jr

Halcyon Cove Hotel (the "Hotel")

I refer to your letter dated 10 November 2015, in which you defend the Government's decision to ignore its agreement to negotiate with our client as to the future of the Hotel and instead proceed with a Resolution to expropriate the Hotel.

Your letter advises that the Government will proceed with the expropriation and only **negotiate the compensation to be paid for expropriating our client's interest. Your** letter asserts that the escalation of matters towards expropriation is a direct consequence of our **client failing to "elect to either divest" its leasehold interest "or present a definitive plan for re-investment" and refers to your letter dated 17 November 2014, which stated that it was "imperative that your Clients make a decision in a timely manner." You conclude that, in** light of this request, our client should not be surprised that the Government is proceeding to expropriate the Hotel.

However, your letter completely overlooks the considerable further discussions and **subsequent agreement that the parties would obtain valuations of the Hotel's leasehold** and freehold reversion, following which they would negotiate either the acquisition of the freehold reversion and subsequent redevelopment of the Hotel by our client or the sale of its leasehold interest. In reliance on this agreement, our client reasonably expected that it

would be given the opportunity to negotiate the future of the Hotel before any Resolution to expropriate would be tabled in Parliament. Further, your letter advises that the Government will now only negotiate the compensation to be paid for expropriating our **client's interest, disregarding the parties' agreement to negotiate both the value of the leasehold and freehold reversion of the Hotel.**

There is an agreement to negotiate the future of the Hotel

As I explained in my letter dated 28 November 2014, our client's preference is to redevelop the Hotel if it first acquires the Hotel's freehold reversion. Before our client could confirm those plans or submit a "definitive plan for re-investment" it needed to know the value of the freehold reversion and what the Government would accept for it. To that end, my letter stated:

"In light of the substantial investment in the site which the Government is requesting, the value of the freehold title has a significant bearing on whether this option is viable. Therefore, in order to move things along, I should be most grateful if you could advise what consideration your clients have in mind or, alternatively, what suggestions your clients may have as to how to value the reversionary title."

You responded on 1 December 2014 stating that:

"...we advise that the reversion of the Lease will either be sold at a market prevailing rate or a lesser sum. In any case a valuation of the property will have to be commissioned. However, before consideration can be given to a sale to your Clients, they must detail the propose investment specifying exactly what it is they will do to the site and in what time frame [sic]."

However, as I explained to the Attorney General, the Hon. Steadroy Benjamin, when we met in Antigua in March 2015, it is clearly not feasible to submit a definitive investment plan without reference to the value of the freehold reversion. Accordingly, we agreed with **the Attorney General that the parties would both obtain valuations of the Hotel's freehold reversion and leasehold, following which the parties would negotiate the future of the Hotel.** This agreement was confirmed in my letter to the Attorney General dated 24 June 2015, which stated:

"...you proposed that in order to progress matters both the Government and my clients should instruct surveyors to value the freehold and the leasehold interests of the Hotel. I confirmed that my clients agreed with this approach and have selected the surveyors they will be using" (emphasis is added).

At this meeting the Attorney General also gave assurances that the Government would not expropriate the Hotel. The Attorney General stated that the Government had learnt its lesson from Half Moon Bay and that there would be no reoccurrence.

However, on 30 June 2015, you wrote to Justin Simon QC disregarding this agreement, asserting that any negotiations would be in respect of the compensation payable to our client for the loss of its interests, stating:

“It is observed that your Clients are now expressing a willingness and preparedness to sit and negotiate with the intention to arrive at a position beneficial to all. In this regard we must advise that our Client stands ready to purchase the remainder of the Lease NOW. Already the process of obtaining valuations has been commenced and we expect them to be completed shortly. Our Client welcomes a meeting to arrive at a process for a settlement of any claim for loss your client may have, including any perceived loss of business.”

On 10 July 2015, Mr Simon QC responded, confirming our client’s preference to acquire the freehold reversion and the parties’ agreement to obtain the valuations of both the Hotel’s freehold reversion and the leasehold for the purposes of negotiating the future of the Hotel. Mr Simon QC confirmed that at my meeting with the Attorney General:

“...Mr. Hardy again expressed my client’s preference to purchase the freehold of the property and confirmed that my client would consider selling its leasehold interest but only for the right price. To that end, Mr. Hardy and the Hon. Attorney General agreed that both the Government and my client would obtain valuations of both the hotel’s leasehold and freehold, following which both parties would hold further negotiations”.

Accordingly, in light of this history, our client was rightly shocked to discover that on 21 October 2015 the Government had tabled a Resolution to expropriate the Hotel in the House of Representatives without attempting to negotiate as previously agreed and at a time when it still has not obtained its own valuation of the property.

The Government’s refusal to suspend the Resolution to expropriate

Our client’s ability to negotiate a fair resolution will be seriously undermined by the Resolution. Our client is therefore dismayed by the Government’s refusal to suspend its Resolution to expropriate the Hotel and refusal to discuss alternatives for the future of the hotel. Our client understands the Resolution will now be debated by the Senate on Tuesday, 17 November 2015 and we would ask that a sensible period for negotiation is agreed before any first publication of the Resolution in the Gazette.

The reasons for the decision to expropriate

I note your avoidance of the issues I raised concerning the irrationality of the proposed decision to **expropriate the Hotel and our client’s legitimate expectations. We reserve all of our client’s rights in respect of all of these matters**

Additional documents

With regard to your assertion that our client failed to disclose documents which it had agreed to provide to Mr Watson, our client is unaware of any such failure. In my letter

dated 22 October 2015, I requested clarification as to exactly which documents our client failed to provide. However, your letter fails to provide this clarification and simply refers to **the documents provided as being “generic in nature having to do with occupiers’ liability insurance.”** If you wish to pursue this please provide details of the documents you were referring to as being withheld.

Conclusion

Notwithstanding the very difficult position in which you have placed our client, it considers that it has little choice but to attempt to negotiate a resolution of the situation with you. To this end, we anticipate being able to exchange valuations next week. Accordingly, please **confirm when the Government’s valuation will also be completed.** Please also confirm **when the Government will be ready to meet to discuss the parties’ valuations.**

Yours sincerely

(signed)
Tim Hardy”

[63] 28 days following the resolution on the Cabinet Conclusion being approved by the House of Representatives, on 18th November 2015, the Senate approved the resolution. There was no amendment to the public purpose.

[64] According to Mr. Hardy, on 14th December 2015, he telephoned Mr. Marshall Jr and spoke with him and within their conversation, Mr. Marshall Jr assured him that the Government would take no further steps to acquire the Hotel before Easter 2016, on the condition that the Claimant continued to keep the Hotel open.

[65] On 15th December 2015, Statutory Instrument No. 60 of 2015: **Cabinet’s Declaration** was published on-line (exhibit RB1). It stated that the declaration the Acquisition Property was pursuant to section 3 of the Land Acquisition Act and it declared:

“IT IS HEREBY DECLARED that the Cabinet considers that the parcel of land described in the Schedule hereto shall be acquired for a public purpose, namely the development and expansion of the Halcyon Hotel into a five star Hotel.”

There was a schedule which described the Registration Section as McKinnons’s, Block and Parcel as 45-1696 580 acreage as 12 acres. There was a plan inserted and it was stated that there was a Cadastral Registry Map which could be inspected at stated times at the offices of the Land Registry. (My emphasis)

[66] **The Court observes at this juncture that the description of the ‘public purpose’ is different to the description in both Cabinet Conclusions and the section 4 Notification and so too the acreage to be acquired.**

[67] On 22nd December 2015, Mr. Hardy wrote to Mr. Marshall Jr. as follows:

“Dear Mr. Marshall Jr.

Halcyon Cove Hotel (the “Hotel”)

I refer to our call on 14 December and our email dated 21 December 2015.

I confirm that our valuation is now finalized. We have called your office several times since Friday to confirm when the Government will be ready to exchange valuations but, unfortunately, we have been unable to get through to you. We are conscious that, given that the proposed negotiations are due to take place on 5 and 6 January 2016, we will need to exchange valuations by tomorrow so that we have sufficient time to review the **Government’s valuation and to take advice from our own valuer. Further, we need to** finalize our travel plans before Christmas

If the Government’s valuation will not be ready by tomorrow, we suggest that the negotiations are rescheduled to 12 and 13 January 2016. If those dates are not suitable, we will not be available until the week commencing 14 March 2016. Our availability for any of those dates is subject to flight availability.

Finally, thank you for your assurance that the Government will not take any further steps to acquire the Hotel before Easter 2016 provided that our client keeps the Hotel open. As I stated on our call, the Hotel has a large number of bookings over the next few months and our client will not close the Hotel prior to Easter.

Yours sincerely

(signed)
Tim Hardy”

[68] On 28th December 2015, Mr. Hugh Marshall Jr emailed Mr. Hardy stating:

“Good day

Mr. Hardy

I trust that you had a good Christmas and that this email meets you in good health.

I am attaching our copies of the valuations that we shall be relying upon.

I am also giving you our undertaking that our clients will not move to take actual **possession of the property until the end of Easter 2016. We however wish your client’s** undertaking that it will operate the Hotel until such time.

I also appreciate that the delivery of these items are later than you expected and that this may affect your schedule. Please let me know as soon as possible.

Let me have your valuation as soon as possible also.

Regards
Hugh Marshall”

[69] 2 days later, on 30th December 2015, Mr. Marshall Jr wrote to the directors of the Claimant as follows:

“Dear Sirs

Re: Notice Pursuant to Clause 6.1.1

We Messrs. Marshall & Co. as Attorneys-at-Law for and on behalf of your landlord, Antigua Isle Company Ltd. do hereby give you Notice pursuant to Clause 6.1.1 and clause 4.3.1. of the Lease between yourselves.

Accordingly we advise that as follows:

1. Outgoings

Pursuant to Clause 4.2 of the lease and clause 6.2 you have not paid utilities as and when due. Further you have failed to comply with section 15 and 16 of the Public Utilities Act whereby you are under a statutory obligation to pay for the utilities used by you on the premises. As at October 1st 2015 the amount of \$368,539.00 is owing as an outgoing on electricity. Our Client requires this amount to be paid in full either direct to APUA with production of the relevant receipt or alternatively that the amount be paid into our chambers. This amount must be paid within thirty (30) days failure so to do may result in **forfeiture of the lease thirty (30) days from today’s date.**

2. Pursuant to clause 4.5 of the Lease our Client advises of the breach of clause 4.3.1.in that you have failed to keep in good repair and well decorated the Clouds Restaurant. If **you fail to correct this breach within two (2) months from today’s date Our Client may forfeit** the Lease.

Yours sincerely,

(signed)
Hugh C. Marshall Jr.”

[70] In the Antigua and Barbuda Official Gazette Vol.XXXV dated Thursday 31st December 2015, No. 79, under Notices there was published:

“No. 60 of 2015, “Declaration dated 15th December, 2015 for the Acquisition of Parcel of Land described as Registration Section Mc Kinnons, Block No. 45-169B; Parcel No. 580.”

[71] The Court observes that there was an error in the Block description. It reads 45-169B and should read 45-1696B.

[72] 2 versions of SRO 60 of 2015. SRO 60 of 2015, were stated to have been published in the Official Gazette Vol XXXV No. 79 dated 31st December 2015 (exhibit RB1A), was titled:

“DECLARATION DATED 15TH DECEMBER, 2015 FOR THE ACQUISITION OF THE PARCEL OF LAND DESCRIBED AS REGISTRATION SECTION MC KINNONS BLOCK NO.:45 169B, PARCEL NO.:580”

It therein provided:

“DECLARATION dated the 15th of DECEMBER 2015, made by the SECRETARY TO THE CABINET UNDER SECTION 3 OF THE LAND ACQUISITION ACT CAP. 233 FOR THE ACQUISITION OF THE PARCEL OF LAND DESCRIBED IN THE SCHEDULE FOR A PUBLIC PURPOSE.

WHEREAS...

WHEREAS on the 30th September 2015, the Cabinet considered the acquisition of land described in the Schedule hereto for a public purpose; and

WHEREAS the House of Representatives and the Senate, by a Resolution dated 26th October, 2015 and 15th November, 2015 respectively, approve the acquisition of the land described in the Schedule for a public purpose.

NOW, THEREFORE, It is hereby DECLARED that the land described in the Schedule hereto shall be acquired for a public purpose.

SCHEDULE

| Registration Section | Block No. | Parcel No. |
|----------------------|-----------|------------|
| Mc Kinnons | 45-1696B | 580 |

(A plan was disclosed) (My emphasis)

[73] The Court makes a number of observations on this publication. First, it is observed that the in title of the declaration that the Block is described as Block 45-169B instead of Block 45-1696B. Second, the Court observes that it appears that all of Parcel No. 580 was to be acquired whereas the evidence was that it was only the Acquisition Property measuring 12 acres. Third, the dates of the resolutions before both the House of Representatives and the Senate is incorrect. The resolution of the House of Representatives was approved on 18th November 2015, and not the 15th as recorded. And the resolution was approved by the Senate on 21st November 2015, and not 26th as recorded. Fourth, the public purpose is not stated.

[74] A further version of the SRO 60 of 2015 (exhibit RB2), the Court was informed was the on-line version stated:

“DECLARATION dated 15th December, 2015 made by the Secretary to the Cabinet under section 3 of the Land Acquisition Act, Cap, 233 for the Acquisition of land described in the survey map with the Land Registry particulars show in the Schedule to this Declaration.

IT IS HEREBY DECLARED that the Cabinet considers that the parcel of land described in the Schedule hereto shall be acquired for a public purpose, namely the development and expansion of the Halcyon Hotel into a five star Hotel.

SCHEDULE (Disclosed a map with particulars)

....

Dated the 15th day of December 2011 - Konata Lee Secretary to the Cabinet

Approved by the House of Representatives this 21st day of the October 2015 – Ramona Small

Clerk to the House of Representatives

Approved by the Senate this 18th day of November 2015 - Ramona Small Clerk to **the Senate**” (My emphasis)

- [75] The Court observes that while the Registration Section, Block No. and Parcel No. remained as prior and there was headed Acreage and thereunder was set out 12, the public purpose was added (so it read like RB1), however, it was different to the Cabinet Conclusions.
- [76] On 5th January 2016, Mr. Hardy wrote to Mr. Marshall: (a) acknowledging receipt of Mr. Marshall's email with the valuations. He referred to his letter of 22nd December 2015, which proposed **negotiation dates and stated that having reviewed the Government's valuation reports** it was unclear what the purpose of the proposed negotiations would be in light of the fact that the Government apparently considered that the Claimant was not entitled to any compensation in the event that the Hotel was expropriated. He cited page 19 (cited by the Court above) of the **Government's valuation on compensation and noted that the Valuer had been instructed by the Government** that there would be no compensation in the event the hotel was expropriated. He further stated that it **seemed that the fundamental issue of the Claimant's compensation should be resolved** before the Claimant provided its valuation and spent significant resources sending persons to Antigua. He referred to his call of 14th December 2015, and wherein he was assured that the Government would take no further steps to acquire the Hotel until after Easter 2016 provided the Claimant kept it open. In his letter of 22nd December 2015, he had confirmed the Hotel would not be closed prior to Easter. He referred to **the Claimant's Counsel at Antigua** informing the Claimant that there were instructions issued by letter of 16th December 2015, to publish the resolution to expropriate the Hotel in the Gazette for the first time. This he said undermined genuine commercial negotiations with the Government. He observed that the latest Gazette had yet to be published. He stated that the Claimant now requested that the Government fulfilled its previous assurance not to take any steps to acquire the Hotel until after Easter 2016 by taking the necessary steps to **withdraw the publication of the Government's Resolution from the** Gazette. He asked for confirmation of the withdrawal of the publication.
- [77] On 5th January 2016, Mr. Marshall Jr wrote to Mr. Hardy stating: (a) **the Government's position** had not changed in that it would not take possession of the Hotel until after Easter 2016 provided the Claimant kept the Hotel open, (b) the Government was prepared to enter into negotiations to arrive at a settlement in terms of an appropriate sum for compensation, (c) the date of March 2016 for negotiations was too far as the matter needed to be resolved soonest, (d) the Government did not consider the publication in the Gazette an act of possession and did not consider that it broke the undertaking which was conditional on the Claimant keeping the Hotel opened until Easter, nor did the Government consider that the publication undermines the negotiation process. He then sought confirmation that the Claimant would attend meetings on compensation in January 2016, provide copies of its valuations, and give the undertaking to keep the Hotel open until Easter.

[78] On 7th January 2016, Mr. Hardy wrote to Mr. Marshall Jr referring to his letter of 30th December 2015, - Notice Pursuant to Clause 6.1.1. He advised that payment of the electricity charges was eminent and that the Claimant did not consider the failure to pay the said charges a ground for forfeiture. In regards to the Clouds Restaurant he stated that the Claimant denied that it failed to keep the restaurant in good repair and decorated. Further, repeated requests for the LSP report following their inspection on 11th September 2014, had been ignored. In addition, the Government had accepted rent from the Claimant and consequently any right to forfeit was waived pursuant to section 55(3) of the Registered Land Act. He also said that the Claimant was unaware of any disrepair.

[79] On 8th January 2016, Mr. Hardy wrote a further letter to Mr. Marshall. It stated:

“Hugh Marshall Jr

....

8 January 2016

Dear Mr Marshall Jr

Halcyon Cove Hotel (the “Hotel”)

I refer to your dated 5 January 2016, which we received on 7 January. The letter asked, amongst other things, whether we intend to meet next week.

Negotiations in Antigua – **As I pointed out in my letter of 5 January, the Government’s valuer’s report states that, as a matter of law, our client is not entitled to any** compensation. In light of this, there is no point in meeting to discuss the relative merits of valuations if you are going to maintain that position. The position is based on your interpretation of Antiguan law, more precisely the Antiguan Land Acquisition Act. As I explained in my letter of 5 January it seems to us that that fundamental issue should be resolved before our client provides its valuation and/or spends significant resources sending us to Antigua. Accordingly, while you maintain this position we see no point in travelling to Antigua.

Disclosing our client’s valuer’s report – Similarly, while the Government maintains that as a matter of law our client is not entitled to any compensation, there is no point in sharing that with you.

Section 25 of the Land Acquisition Act – **The Government’s valuer’s report includes a** statement that:

“[W]e note that we have been instructed by Client’s legal advisers that under Clause 25 of the Land Acquisition Act (CAP 233) no compensation will be payable to the Lessee for the loss of the land taken. Whilst this may not necessarily represent our own opinion, we are not experts in the local law of Antigua & Barbuda and so must defer to this legal advice.”

We similarly are not experts in your local laws but on a plain reading of the English in these clauses and the rest of the Land Acquisition Act we cannot understand **how section 25 can be construed to take away our client's right to compensation.** To any mind **their only relevance to our client's entitlement to compensation is to** the extent that the compulsory acquisition does not apply to all of the land. In that case, these sections determine what should happen as regards the lease, rent and compensation relating to the remainder that is not compulsorily acquired. Can you please urgently explain the construction of these clauses on which you rely.

Assurances as to the future – I note that you now state that the Government is **prepared “not to take possession” of the Hotel until after Easter 2016 on condition** that our client continues to operate the Hotel until then. We had, in fact, already **recorded in our letter of 22 December 2015 our client's agreement to your earlier** proposition that they agree to keep the Hotel open until after Easter 2016 provided **that the Government does “not take any further steps to acquire the Hotel” until** after Easter 2016. However, since then we have learnt that in breach of that agreement the Government has arranged for the first publication of the Resolution to compulsorily acquire the Hotel to be published in the next edition of the Gazette. **In defence of the Government's action you state that “we do not consider this an act of possession.” That is true but misses the point. It is a “further step to acquire the Hotel” and as such it is contrary to our agreement. Further, it is a very significant step and is likely to fuel speculation and concern amongst the Hotel's** guests, lead to cancellations and deter bookings. This is wholly unsatisfactory. Please therefore confirm that your client will keep to the existing agreement and stop the publication of the Resolution in the Gazette progressing any further.

Future negotiations – As previously indicated I will not now be able to attend any meetings in Antigua until the week commencing 14 March 2016. However, before committing to any such meetings I will need to consider your responses to the issues **raised above. In the meantime, for the avoidance of doubt, all of our client's** rights are reserved.

Yours sincerely

(signed)
Tim Hardy”

- [80] On 19th January 2016, the Official Gazette dated 31st December 2015, was published on the **Government's website, it included the declaration. It stated that the House of Representatives** approval occurred on 21st October 2015 and Senate approval occurred on 18th November 2015.
- [81] 2 days after the publication, on 21st January 2016, Mr. Hardy wrote to Mr. Marshall Jr requesting a response to his letter of 8th January 2016.
- [82] On 18th February 2016, the Claimant filed its application for leave to apply for judicial review of the **Cabinet's decision to acquire the Acquisition Property and sought certain orders** therein. The

matter came on for hearing on 15th March 2016, before Lanns J. and the Court reserved its decision.

- [83] On 21st **March 2016, while the Court's decision was pending on whether or not to grant leave to file the judicial review claim, the Hon. Solicitor General, Mr. Lebrecht Hesse wrote to the Editor of the Official Gazette stating that it had been drawn to his attention that in the publication in the Official Gazette of 31st December 2015, and that on the Government's website were different, he noted the differences and he attached a version of the declaration as shown in an unnumbered statutory instrument, (presumably a draft document) and wherein "public purpose" was defined as "namely the development and expansion of the Halcyon Cove Hotel into a five star hotel".**
- [84] On 14th **March 2016, the Claimant noticed the posting on the Government's website of the Official Gazette Vol XXXVI referring to Statutory Instrument No. 60 of 2015.**

The Law

- [85] The Land Acquisition Act provides for acquisition of any land at Antigua a relatively straight forward procedure. For the purpose of this suit the relevant provisions are:

"2. In this Act-

"public purpose" means a purpose determined to be a public purpose in accordance with the provisions of section 3.

3. (1) If the Cabinet considers that any land should be acquired for a public purpose they may, with the approval of the Legislature, cause a declaration to that effect to be made by the Secretary to the Cabinet in the manner provided by this section and the declaration shall be conclusive evidence that the land to which it relates is required for a public purpose.

(2) Every declaration shall be published in two ordinary issues of the Gazette and copies thereof shall be posted on one of the buildings (if any) on the land or exhibited at suitable places in the locality in which the land is situate, and in the declaration shall be specified the following particulars relating to the land which is to be acquire –

(a) the parish or district in which the land is situate:

(b) a description of the land giving the approximate area and such other particulars as are necessary to identify the land;

(c) in cases where a plan has been prepared, the place where, and the time when, a plan of the land can be inspected;

(d) the public purpose for which the land is required.

(3) Upon the second publication of the declaration in the Gazette as aforesaid the land shall vest absolutely in the Crown, and the authorized officer and his agents, assistants and workmen may enter and take possession of the land accordingly.

(4) Nothing in this section shall be deemed to prevent the acquisition of lands for public purposes by private treaty.

4. If it appears to the Cabinet that any land is likely to be required for any purpose which in the opinion of the Cabinet, is a public purpose and it is necessary to make a preliminary survey or other investigation of the land, he may cause a notification to that effect to be published in the Gazette and at the same time in notices to be exhibited at suitable places in the locality in which the land is situate, and thereupon it shall be lawful for the authorized officer and his agents, assistants, and workmen, to do all or any of the following things –

(a) to enter upon and survey and take levels of any land in any locality to which the notification relates;

(b)...

5.

6. (1) As soon as any declaration has been published in accordance with the provisions of section 3, the authorized officer shall without delay, enter into negotiations (or further negotiation) for the purchase of the land to which the declaration relates upon reasonable terms and conditions, and by voluntary agreement with the owner of the land.

(2) It shall not be necessary for the authorized officer to await the publication of the declaration before he endeavours to ascertain from the owner the terms and conditions on which he is willing to sell his land, but no negotiations or agreement shall be deemed to be concluded unless and until the conditions of sale and acquisition have been approved in writing by the Minister.

....

11. (1) All questions and claims relating to the payment of compensation under this Act and to the apportionment of such compensation shall, save as is hereinafter provided, be submitted to a Board of Assessment to be appointed in each case in accordance with the provision of section 12.

(2) A Board of Assessment shall have full power to assess, award and apportion **compensation in such cases, in accordance with the provisions of this Act.** “

[86] While the Court applies the plain and literal meaning rule to interpretation of the Act, one principle on which the authorities are clear and it is that the procedures must be strictly complied with. In Noreen De Gale v. Attorney General¹ the Court ruled that the failure to post the notice of

¹ GDAHCV2012/0373

acquisition on the Snell Hall property pursuant to the provision in the Grenada Land Acquisition Act, was fatal to the acquisition.

- [87] In Bethel and Others v. Attorney General² for the Commonwealth of Bahamas the Privy Council stated that the provisions of Land Acquisition legislation must be strictly interpreted.
- [88] In the locus classicus Council of Civil Service Unions v Minister for Civil Service³ Lord Diplock identifies 3 grounds upon which a decision could be challenged. They being (a) illegality, (b) irrationality, and (c) procedural impropriety. At the same time he expressed the opinion that over the course of time there could evolve additional grounds.
- [89] **He defined "illegality" as "By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable."**
- [90] **"Irrationality" he defines as "By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness'It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no reasonable person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system.... 'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by judicial review.**
- [91] **On "procedural impropriety" he said "I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which it jurisdiction is conferred, even where such failure does not involve any denial of natural justice....**

As respects 'procedural propriety', I see no reason why it should not be a ground for judicial review of a decision made under powers of which the ultimate source is the prerogative.... Indeed, where the decision is one which does not alter rights or obligations enforceable in private law but only deprives a person of legitimate expectations, 'procedural impropriety' will normally provide the only ground on which the decision is open to judicial review. But in any event what procedure will satisfy the public law requirement of procedural propriety depends on the subject matter of the decision, the executive functions of the decision-maker (if the decision is not that of a administrative tribunal) and the particular circumstances in which the decision came to be made."

- [92] On the test of legitimate expectation, irrationality and bias, HMB Holdings Ltd v. Cabinet of Antigua and Barbuda⁴ is instructive. Here the case involved a resort at Half Moon Bay and which

² [2013] UKPC 31

³ [1984] 3ALL ER 935

⁴ [2007] UKPC 37

was set out on land measuring approximately 108 acres with extensive beachfront. The building structures were devastated by hurricane Luis in September 1995. Several years passed without the HMB Holdings Ltd rebuilding the resort. The Government resolved to compulsorily acquire and took possession of the property in July 2007. Citing paragraph [5] of the decision, the grounds on which HMB sought relief by way of judicial review were, in summary were: **(a) that the Cabinet's** decision was in violation of a legitimate expectation which HMB had formed that its land would not be acquired compulsorily, provided it embarked on a programme to refurbish the hotel in accordance with plans disclosed and approved at a meeting on 22nd January 2001, with the Minister of Tourism and the Attorney General, **(b) that it was irrational and that the process adopted by the Cabinet was infected with bias and hostility towards its principal officer, Mrs. Natalia Querard, amounting to an abuse of power, and (c) it also sought constitutional relief on the ground that the declaration by the Cabinet and its approval by Parliament were in violation of its constitutional rights as protected by sections 14, 18 and 19 of the Constitution of Antigua and Barbuda. At paragraph [31] et seq. it was stated:**

“[31] The tests of irrationality will be satisfied if it can be shown that it was one which no sensible person who applied his mind to the question to be decided could have arrived at. Then there is legitimate expectation as an additional ground of review. As Lord Fraser of Tullybelton explained in *Attorney General for Hong Kong v. Ng Yuen Shin* [1983]2 AC 629, 636 E-F ,..., **the concept of legitimate expectation is capable of including expectations** created by something that falls short of an enforceable legal rights, provided they have some reasonable basis. But if the public body has done nothing or said nothing which can legitimately have generated the expectation that is contended for, the case must end **there....**

BIAS AND IRRATIONALITY

[39] These two grounds for seeking review of the Cabinet's decision can be taken together, because they are inter-related. As Mr. Millar explained, the argument on bias is that the decision was motivated by hostility to Mrs. Querard. The argument on irrationality was based on the proposition that there was no evidence that the Cabinet made any assessment of what was to happen after they had acquired the property. He said that no rational person could conclude that the public interest would be better served by its **compulsory acquisition that it would by leaving property in HMB's hands.**

[40] There is no doubt that the Cabinet had a responsibility in the best interests of the island to try to resolve the problems which had been created by the continued closure of Half Moon Bay Hotel. Its view that redevelopment and re-opening of the hotel would be in the public interest is not, and cannot be, in dispute: *Spencer v. A-G* [1993] 3 LRC 1, 18... Acquisition for the purpose of transferring it to a private developer who would use it for his own profit is not inconsistent with its being for a public purpose: *Spencer*, p17. The absence of an explanation by the Cabinet as to what its plans are does not mean that its decision to acquire the property was irrational.

[41] The argument that the decision was biased is based on what is described the campaign of blame against HMB in June 2000 which was directed against Mrs. Querard personally when the Prime Minister told the nation by radio and television that she despised the people of Antigua and that she stood in the way of progress. This proposition would carry more weight if there were grounds for suspecting that the decision to acquire which was taken in November 2001, was irrational. As it is, the history of events show that, notwithstanding what was said in these broadcasts, the government responded to every request that HMB made for incentives and concessions to its lenders without any indication of bias. There were delays, but there is nothing to show that this was because **the government was trying to put obstacles in HMB's way because it had a bias against the company.** Nor is there anything to suggest that the setting of the six **months' time** limit was motivated by anything other than a genuine desire to see progress after several years **of consideration and debate.**"

[93] The Court also finds useful the illustration of a legitimate expectation in Behluli v. Secretary of State for the Home Department⁵ where Beldam LJ said:

"Although legitimate expectation may in the past have been categorized as a catchphrase not to be elevated into a principle, or as an easy cover for a general complaint about unfairness, it has nevertheless achieved an important place in developing the law of administrative fairness. It is an expectation which, although not amounting to an enforceable legal right, is founded on a reasonable assumption which is capable of being protected in public law. It enables a citizen to challenge a decision which deprives him of an expectation founded on a reasonable basis that his claim would be dealt with in a **particular way.**"(Emphasis mine)

Findings and Analysis

[94] Historically, the Court observes that up to 23rd June 2014, there was no evidence before it demonstrating that either Party had any issues with the Lease and carrying out the covenants therein. The Claimant did admit to an outstanding utility bill (electricity) and which it promised to deal with shortly after it was raised by Mr. Marshall.

[95] Applying the plain or literal meaning rule of interpretation, section 3 of The Land Acquisition Act prescribes an absolute right to acquire any land throughout the State of Antigua once the sole stated condition of acquisition being for a public purpose is satisfied. It is not to be doubted that the Hotel as a commercial venture connected to the tourism industry would qualify as a public purpose. The Court agrees with Counsel for the Defendants when he submitted that a contract or lease could not fetter the authority of the State in an acquisition.

⁵ [1998] Imm AR 405, 407

- [96] **The Court's first general observation is that by Mr. Marshall's letter of 17th November 2014, there is confirmation of the Minister's 3 options as between the Parties and stated to the Claimant earlier the same month. Of importance to the Court's mind, the said letter fixed the time for selection of an option (freehold purchase or sale/purchase of leasehold) to be advised at 14 days, and there is a statement that time is of the essence.**
- [97] **That timing of selection of option was of importance is repeated in Mr. Marshall's subsequent letter of 1st December 2014, where he states in the penultimate paragraph:**
- "Accordingly, and being mindful of the Correia's current personal circumstances, we would ask you to now give a time frame that your Clients would present a clear plan of investment for the plant for our Clients' consideration."**
- [98] **The phrase "time is of the essence' is a common law principle that in the absence of a contract indication, imports that time is an essential condition in the performance of a contract .**
- [99] Having set up that a decision was needed sooner rather than later, on reading the subsequent letters exchanged between the Parties and the contested evidence of the meeting between Mr. Hardy and the Fifth Defendant, it appears that the Government was trying to hold onto its position **in Mr. Marshall's letter, whereas** the Claimant was of the view that while the three (3) options were **on the table, the conditions of Mr. Marshall's 17th November 2014**, in particular as it related to the possible option of purchase of the freehold were shifting or evolving to more than what was stated in the said letter.
- [100] The Claimant holding the belief that there was a shifting away from the time line fixed and **conditions in Mr. Marshall Jr's 17th November 2014**, letter, was of the opinion that the Government had gone back on its various promises (a) to negotiate a price for freehold or leasehold, and (b) not to acquire the Leasehold.
- [101] The Claimant holding this belief has raised its complaints against the Defendants under the 4 classic heads of judicial review – bias, legitimate expectation, irrationality and procedural impropriety.

Bias

- [102] For the claim of bias, the Claimant states the bias against it was first demonstrated at the meeting of 24th June 2014, when disparaging remarks were made about the Hotel to Mr. Correia and without sight of its contents, he was asked to return the following day to sign a memorandum in connection with the Leasehold Property.
- [103] This act of bias was followed up when on 22nd September 2014, at London, at an Antigua Hotel Partners meeting, more disparaging remarks were made about not only the Hotel, but also about Mr. Correia.

- [104] There was then approximately nine (9) months later, at June 2015, public statements made, once again disparaging the Hotel and threatening to terminate the Lease.
- [105] This was followed by the two (2) Cabinet Conclusions and the Cabinet notification pursuant to section 4 of The Land Acquisition Act for a survey for the purpose of demarcating a portion of the Leasehold Property.
- [106] **And finally, the pointed statement in Mr. Watson's Hotel valuation report of 2nd November 2015**, that he had been instructed that there would be no compensation payable to the Claimant for the loss of land taken.
- [107] The Court on review of the incidents and statements complained of and save the Cabinet Conclusions and Cabinet notification, agrees that they point to a bias or prejudice against the Claimant especially since the statements of (a) dumping of raw sewerage into the sea, (b) state of disrepair of and disgusting rooms, (c) being dirty and run down, (d) full of cockroaches, and (e) being run into the ground, were not supported by any evidence and which included reports commissioned by the Government.
- [108] The Claimant therefore succeeds on this ground.

Legitimate Expectation

- [109] This brings the Court to examination of the actions upon which the Claimant says it relies to set up its claim of legitimate expectation and which point to the Defendants agreeing to **'hold their hand'** on the matter of exercising the 3rd option – acquisition.
- [110] The Claimant says that from its meeting with the Minister of Tourism when the three (3) options were put on the table, that it indicated that given the investment which the Government was calling upon it to make to upgrade the Hotel that it believed that it would more than likely exercise the option to purchase the freehold.
- [111] **Following Mr. Marshall's letter of 17th November 2014**, which fixed a deadline of 14 days for exercise of an option and stated that time was of the essence, the Claimant again at 28th November 2014, intimated that its preferred option would be to purchase the freehold but consideration had to be given to the price of the freehold in light of the significant sum the Government was asking it to make to upgrade the Hotel.
- [112] At 5th and 23rd December 2014, Mr. Hardy sought an extension of time for the Claimant to make its decision. Reason given was largely the death of both Mr. & Mrs. Correia. It appears that Mr. Correia died not too long thereafter.
- [113] There appears to have been a lag in time on **the Claimant's part in confirming what had been** intimated to the Minister of Tourism and Mr. Marshall.

- [114] The Claimant then says that at what appears to be approximately 3 months after its last communication to Mr. Marshall Jr that Mr. Hardy sought to resume negotiations between the Parties by attending a meeting with the Fifth Defendant on 19th March 2015. According to Mr. Hardy, key results of the meeting were that (a) the Claimant was given the assurance that the Government would not acquire the Hotel, and (b) that the Parties would each obtain a valuation for consideration on whether the Claimant would exercise the option to purchase the freehold or allow the acquisition of the remaining leasehold interest.
- [115] According to the Claimant, relying on the assurance of Fifth Defendant, both Parties moved forward with the preparation of valuations for discussion. No such matter was on the table prior.
- [116] **The Claimant also relies on Mr. Marshall's letter of 11th September 2015, to Mr. Justin Simon Q.C, wherein he speaks of a hoped for and anticipated voluntary settlement after the exchange of valuations.**
- [117] **The Claimant is also of the view that at the Government's behest it allowed entry into the Hotel and disclosed certain confidential information about the Hotel to the Government's valuation surveyor in reliance on their legitimate expectation of no acquisition before negotiations on the freehold and leasehold after the exchange of valuations.**
- [118] Notwithstanding the Cabinet Conclusions and the approval of the House of Representatives and **Senate of the acquisition, the Claimant also relied on Mr. Marshall's assurance in a telephone conversation of 14th December 2015, that the acquisition was off the table until after Easter 2016, once the Hotel was kept open.**
- [119] **For the Court on review of all the evidence, the question is whether the Claimant's expectation that there would be no acquisition, was a reasonable one for it to hold.**
- [120] It appears to the Court that as far back as 17th November 2014, and it remained the theme **through a number of Mr. Marshall's letters, that the Claimant was put on notice that in relation to the Leasehold Property that (a) a decision was needed in a "timely manner" and "time was of the essence" on whether purchase of freehold was the option being exercised, (b) the Government needed to know development plans and period within which they would occur, if the Claimant was interested in the freehold, and (c) failing the exercise of the option in a timely manner, then the Government was going to acquire.**
- [121] There was no evidence before the Court of a breakdown in negotiations between the Parties up to April 2015, and that being so, it appears to the Court that **Mr. Marshall's letter of 17th November 2014, was still applicable in its requirements of the Claimant. It is therefore unclear as to why the Claimant felt the need to "restart" negotiations by a meeting with the Fifth Defendant.**
- [122] It appears that what the Claimant wanted to do, was find out its potential exposure on a freehold purchase, and from there make the decision on whether to purchase the freehold and make the upgrading investment, or sell the remaining years on its Lease. This is **suggested in Mr. Hardy's letter of 28th November 2014.**

- [123] **On an aside, there was no evidence that anything other than “market value” principles would be used as the measure for the freehold and the leasehold. This is confirmed by Mr. Watson.**
- [124] The series of correspondence between the Parties ran for approximately 8 months. The Court **believes that this would have been long past what would reasonably be deemed per Mr. Marshall’s letter of 17th November 2014, “timely manner” and “time is of the essence”.**
- [125] At 22nd **December 2015, being just over 1 year after Mr. Marshall’s letter of 17th November 2014,** and just over 8 months from the meeting with the Fifth Defendant, the Claimant stated that its valuation was finalized.
- [126] On the matter of reliance on production of valuations, the Court giving the Claimant, the lesser count of 8 months within which to produce it valuation, observes that there is no excuse tendered by the Claimant as to why it took as long as 8 months for the preparation of a valuation of the Leasehold Property, a property of which it was in control off.
- [127] **Against the background of Mr. Marshall’s letters pressing for selection of option and the Claimant being the party shifting the ‘goal post’, the Court does not believe that it was a reasonable expectation to hold, that there would no acquisition.**
- [128] The Claimant therefore fails on the ground of legitimate expectation.

Irrational Decision

- [129] On the question of whether the decision to acquire the Acquisition Property was an irrational decision, the authorities say that the Court must find that **the decision was one which “is so outrageous in its defiance of logic or of accepted moral standards that no reasonable person who applied his mind to the question to be decided could have arrived at.”**
- [130] In the first instance, the Court does not believe that it can make statements on the tourism product policy that would be the responsibility of the responsible Minister.
- [131] Secondly, as the Court sees it, while there might have been public statements by Government **Ministers, Mr. Marshall’s letter of 17th November 2014,** was clear as to the approach and what the **outcome could possibly be on a failure of the Claimant to act in a “timely manner” and it made “time of the essence”.** This was a theme running through his letters. It was 8 months before the 1st Cabinet Conclusion.
- [132] Finally, the Court having found that there could be no legitimate expectation that the Leasehold Property or Acquisition Property would not be acquired, then following on, the Court holds that it **does not believe that the decision to acquire the Acquisition Property can be deemed to be “so outrageous” that it defies logic or accepted moral standards** of a reasonable man.
- [133] The Claimant therefore fails on the ground or irrationality.

Procedural Impropriety

- [134] There is no issue of a failure to observe basic natural justice pleaded and so the issue is strictly whether the acquisition procedure had been complied with.
- [135] It is a fact that the 2nd publication of the declaration in the Official Gazette has not occurred and so the Acquisition Property remains fully intact as part of the Leasehold Property. This being the case, the Court can only make observations on the irregularities noted in the procedure but cannot make any declaration in relation to the acquisition since there was none.
- [136] The Court has recorded already in the earlier paragraphs of this judgment the irregularities noted. Such matters were for example inconsistencies between the various documents on what was to be the public purpose and what was the amount of land being acquire, 25 acres or 12 acres?
- [137] According Bethel and Others the provisions of the Act must be strictly complied with. This would of **course include getting all descriptions of “public purpose” and acreage to be acquired correctly** stated in all the documents to lead to acquisition.
- [138] The most that the Court can say on the procedure is that it was flawed by the observed irregularities.
- [139] **Summarizing the Court’s findings, the Court is of the view that notwithstanding the bias demonstrated against the Claimant, that once the 3 options were stated by the Minister of Tourism and confirmed by Mr. Marshall’s letter of 17th November 2014, with the statement of time of the essence, that this was the key operational statement from which proceedings were going to flow and occur. The Court is not of the view that there could be a legitimate expectation as the seemingly shifting of the ‘goal post’ was always on the Claimant’s side.**
- [140] The Court concludes that the Claimant has not made out a case for the relief sought.
- [141] Court’s order:
1. The claim is dismissed.
 2. Prescribed costs are awarded to the Defendants.

Justice Rosalyn E. Wilkinson
High Court Judge

By the Court

Registrar