**THE EASTERN CARIBBEAN SUPREME COURT**
**IN THE COURT OF APPEAL**
**ANTIGUA AND BARBUDA**

**ANUHCVAP2018/0040**

**BETWEEN:**

**COVE HOTELS (ANTIGUA) LIMITED**

Appellant

**and**

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

Respondents

**Before:**

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|---|---|
| The Hon. Mr. Davidson Kelvin Baptiste | Justice of Appeal |
| The Hon. Mde. Gertel Thom | Justice of Appeal |
| The Hon. Mr. Paul Webster | Justice of Appeal [Ag.] |

**Appearances:**

Mr. John Carrington QC with Mr. Jomokie Phillips and Mr. Kemar Roberts for the Appellant
Mr. Anthony Astaphan SC with Ms. Carla Brooks-Harris for the Respondents

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2019: June 18;
October 31.

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*Civil appeal – Judicial Review – Legitimate expectation – Compulsory land acquisition – Land Acquisition Act – Whether there was a legitimate expectation that the government would not compulsorily acquire land while negotiations were ongoing – Whether there was*

*a legitimate expectation that the Government would observe the terms of a lease – Bias – Whether learned judge failed to give effect to finding that the decision was tainted with bias – Judicial discretion – Irrationality – Procedural irregularities – Costs – CPR 56.13(6)*

In November 1981, the appellant, Cove Hotels (Antigua) Limited ("Cove"), acquired a 99-year lease over 25 acres of land located at Dickinson Bay Antigua registered as parcel 580 from Antigua Isle Company Limited ("AICL"), a company beneficially owned by the Government of Antigua,. Cove developed parcel 580 and carried on the business of the Halcyon Cove Beach Resort and Casino (the "Hotel").

In 2014, the Government of Antigua and Barbuda ("the Government"), consistent with a newly instituted tourism policy, entered into discussions with Cove's representatives to discuss its concerns about the condition of the Hotel and raising its standards. Cove alleged that during discussions, on two separate occasions, Government officials made derogatory statements about the condition of the Hotel. In November 2014, the Minister of Tourism gave Cove the option to either invest significantly to raise the standard of the Hotel, or allow the Government to put representatives of Cove in touch with investors interested in purchasing the lease. The Government indicated that, in the event that no decision was made by Cove in a timely manner, it would acquire 12 acres of parcel 580 compulsorily ("the Property"). On 17th November 2014, AICL's representative wrote to Cove reiterating the options available to it, and stated that the parties were free to negotiate, subject to a decision being made in a timely manner, failing which, the matter would be referred to Cabinet for parliamentary action. Cove never presented an investment plan to the Government and did nothing further for the next three months.

Cove's representative met with the Attorney General in March 2015. Cove alleges that the Attorney General agreed that the parties would commence negotiations for the sale of the freehold or leasehold in relation to the property and that he gave an assurance not to acquire the Property compulsorily while negotiations were ongoing. The Government's position was that there had been considerable delay by Cove in taking up one of the options contained in the November 2014 letter and that while they were prepared to continue the negotiations, but if the negotiations failed they would acquire the property compulsorily , and they were taking steps in the event that it was necessary to proceed with the acquisition.

Negotiations continued but were inconclusive. By instrument dated 15th December 2015 made under section 3 of the **Land Acquisition Act**, Cabinet declared that the Property 'shall be acquired for a public purpose, namely the development and expansion of the Halcyon Hotel into a five-star Hotel'. .

On 18th February 2016, Cove sought and obtained leave to apply for judicial review. The learned judge dismissed the claim with costs to the respondents.

Cove appealed on the following grounds: (i) the judge failed to find that Cove's legitimate expectations were breached; (ii) the judge erred in not finding that the decision to compulsorily acquire the Property ("the Decision") was irrational, (iii) the judge failed to give effect to her finding of bias by setting aside the Decision on that ground, (iv) having

found that there were procedural irregularities in the acquisition process the judge erred in not setting aside the Decision on that ground; and (v) the judge erred when she awarded costs against Cove. The respondents counter-appealed challenging the judge's findings of bias and procedural irregularities in the decision-making process.

**Held:** Allowing the appeal only to the extent of setting aside the order that appellant should pay the costs of the respondents, and in all other respects dismissing the appeal; dismissing the counter notice of appeal; and ordering that the parties file written submissions on the issue of the costs of the appeal and the counter appeal by no later than the 15th November 2019, that:

1. For a promise by a public official to amount to a legitimate expectation, the promise must be clear, unambiguous and devoid of relevant qualification. Once this is proven, the onus shifts to the public authority to justify the frustration of the legitimate expectation. The evidence does not disclose an unequivocal promise that the Government had abandoned its stated intention of acquiring the Property if Cove did not produce an acceptable proposal. Accordingly, Cove did not get past the first stage of the test and therefore the respondents did not need to justify the frustration of a non-existent legitimate expectation.

   **Francis Paponette and others v The Attorney General of Trinidad and Tobago** [2010] UKPC 32 applied; **HMB Holdings Ltd v Cabinet of Antigua and Barbuda** [2007] UKPC 37 followed.

2. A purchaser of land agrees to the normal risks associated with the ownership of land including the risk of interference with the landowner's rights by the Crown. Therefore, an express covenant or promise contained in a lease must, by necessary implication, be read to exclude those measures taken by the Crown for the public good and cannot exclude the Crown's right to acquire the lease compulsorily for a public purpose, as enshrined in the provisions of the Land Acquisition Act and the Constitution. There was no legitimate expectation arising out of either the covenant for quiet enjoyment or the right of pre-emption.

   **Clunies-Ross v Commonwealth of Australia and others** [1985] LRC [Const.] 292 considered; **Commissioners of Crown Lands v Page** [1960] QB 274 considered; **The King v Dominion of Canada Postage Stamp Vending Co Limited** [1921] 3 KB 500 distinguished; **Rederiaktiebolaget Amphitrite v The King** [1921] 3 KB 500 considered; **The Grenadian Hotel Limited v Beryl Isaac, Cabinet Secretary of Grenada and others** GDAHCVAP2016/0066 (delivered 3rd August 2016, unreported) distinguished; **H.M.B. Holdings Limited v The Cabinet of Antigua and Barbuda and another** ANUHCVAP2002/0016 (delivered 28th January 2003, unreported) applied; **E. Johnson & Co. (Barbados) Limited v N.S.R. Limited** [1997] A.C 400 applied.

3. The decision of a public body is irrational where it is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question to be decided, could have arrived at it. The judge's

approach to the issue of irrationality cannot be faulted as she carefully considered the evidence and found that the Decision was not irrational owing to the fact that Cove failed to act in a timely manner and, in its conduct, shifted the goal post. She also rejected the claim for legitimate expectation and accepted the evidence that throughout negotiations, the Government reserved the right to acquire the property. Further, there is no evidence that the Decision was a sham or was politically driven.

**Council of Civil Service Unions and others v Minister for the Civil Service** [1985] AC 374 applied.

4. The law requires strict adherence to the procedures in the Land Acquisition Act and the landowner's rights under the Constitution. Even though there were procedural irregularities in the process to compulsorily acquire the Property, the Government had corrected the errors and the process of acquisition remains incomplete. The judge rightly refrained from making a declaration of procedural impropriety at this stage.

**Land Acquisition Act** Cap. 233, Revised Laws of Antigua and Barbuda 1992 considered; **Constitution of Antigua and Barbuda** Cap.23, Revised Laws of Antigua and Barbuda considered.

5. The discretion to refuse relief in judicial review proceedings where the claimant has made out a ground for relief is narrow. Where relief is refused, the reason for so doing should be stated. The learned judge made a finding of fact that the statements made by various Government officials pointed to bias or prejudice and there is no proper basis to interfere with this finding. The judge was entitled to rely on her assessment of the evidence to refuse relief, notwithstanding her finding of bias, and she provided good and adequate reasons for refusing to grant relief.

6. **Beacon Insurance Co Ltd v Maharaj Bookstore Ltd.** [2014] UKPC 21 applied; **R (on the application of Bibi) v London Borough of Newham** 2001] EWCA Civ 607 applied; **R (on the application of Edwards) and another v Environmental Agency and others** [2008] UKHL 22 considered; **Nichol v Gateshead Metropolitan Borough Council** (1988) 87 LGR 435 considered; **The Judicial Review Handbook** Michael Fordham QC, Judicial Review Handbook (6th edn, Hart Publishing 2008) pg. 271 at para 24.3 considered, **Dufour v Helenair Corporation Limited** (1996) 52 WIR applied.

7. An award of costs against an unsuccessful applicant for judicial review may only be made where the court is satisfied that the applicant acted unreasonably in bringing the claim or in the conduct of the application. The judge did not make a finding that Cove acted unreasonably in bringing the claim or in the conduct of the application so as to justify departing from the general rule in 56.13(6). Accordingly, the judge's cost order must be set aside.

Rule 56.13(6) of the **Civil Procedure Rules 2000** applied.

## JUDGMENT

[1] **WEBSTER JA [AG.]**: This is an appeal against the judgment of the learned judge delivered on 22nd October 2018, dismissing the appellant's claim for judicial review to quash the decision of the Cabinet of Antigua and Barbuda made on 30th September 2015 to compulsorily acquire the leasehold property belonging to the appellant, Cove Hotels (Antigua) Limited, located at Dickinson Bay, Antigua, known as Halcyon Cove Beach Resort and Casino. The central issue in the appeal is whether the Government of Antigua and Barbuda ("the Government") lost its right to acquire the property by the conduct of the respondents.

[2] In this judgment, I will refer to the appellant as "Cove", the 12 acres being acquired as "the Property", the buildings comprising the resort as "the Hotel', and the entire 25 acres on which the Hotel stands (which includes the Property) as "Parcel 580".

### Background

[3] Parcel 580 is beachfront property that has been described as one of the finest beaches in Antigua. The registered owner of Parcel 580 is Antigua Isle Company Limited ("AICL"), a company that is beneficially owned by the Government. In November 1989, AICL granted a 99-year lease of Parcel 580 to Cove (the "Lease"). The Government is a signatory to the Lease. Cove developed Parcel 580 and has carried on the business of the Hotel on the parcel.

[4] In 2014, the Government became concerned about the state of the tourism product in Antigua and Barbuda and instituted a policy to raise the standards of hotels and increase the number of rooms as a means of attracting new investments and stimulating revenue growth and jobs in the country.[1] One aspect of the Government's concern was the condition of the Hotel which, by then, had been in operation for over 40 years. Consistent with its policy of raising the standard of hotels in the country, the Government entered into discussions

[1] Record of appeal Vol. 2, p. 116, at para. 23 of the affidavit of Konata Lee filed 24th March 2016.

with representatives of Cove to address the concerns about the condition of the Hotel and raising its standards.

[5] On 24th June 2014, Cove's managing director, Mr. Tom Correia, attended a meeting with the Prime Minister, Mr. Gaston Browne, the Minister of Tourism, Mr. Asot Michael, and Mr. Hugh Marshall Sr. (representing AICL). Cove's evidence of the meeting is to the effect that the Minister of Tourism and Mr. Marshall Sr. 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.

[6] On 8th August 2014, the attorney for AICL and the Government, Mr. Hugh Marshall Jr. of the firm Marshall & Co, instructed the engineering firm of Lewis Simon and Partners to inspect the Hotel and assess its condition. The engineers carried out the inspection and on 10th October 2014 delivered a report of their inspection to Mr. Marshall Jr. The report was in generally favourable terms regarding the condition of the Hotel. The concluding sentence of the cover page of the report is that '[i]n general, for a property which is approximately 40 years old, we were satisfied with the physical and engineering condition.'[2]

[7] On 22nd September 2014, at an Antigua Hotel Partners meeting in London it was reported that the Minister of Tourism made several derogatory statements about the Hotel which included describing it as a 'dirty and run-down hotel full of cockroaches' which was being 'run into the ground'. The Minister is also said to have described Mr. Correia as an 89 year-old man who does this on each island – Antigua, Barbados and Saint Lucia. This evidence was not disputed by the respondents and appears to have been accepted by the learned trial judge ("the judge"). On 26th September 2014, Cove's attorney, Mr. Justin Simon QC, wrote to the Minister of Tourism complaining about the derogatory statements made about the Hotel and enquired of the Minister into what specific breaches of the

[2] Record of appeal Vol. 2, pp.167 to 176 at p. 167.

Lease that Cove was guilty of and what improvements the Government required Cove to carry out.

[8] During November 2014, Cove's London-based solicitor, Mr. Tim Hardy, met with representatives of the Government with a view to de-escalating tensions between the parties. At the meeting, the Minister of Tourism gave Mr. Hardy three options for moving forward: (1) invest significantly to raise the standard of the Hotel; or (2) allow the Government to put representatives of Cove in touch with investors interested in purchasing the lease; and (3) in the event that no decision is made by Cove in a timely manner the Government would compulsorily acquire the Property. In response, Mr. Hardy stated that Cove would only be interested in investing significant sums in the Hotel if it were able to acquire the freehold reversion. Following the meeting, Mr. Marshall Jr. wrote to Mr. Hardy on 17th November 2014 – this letter plays a central role in this appeal. Mr. Marshall Jr. emphasised that the Hotel occupies one of the premier breaches in Antigua and is well placed to contribute significantly to the country's tourism product. Further, the current plant is significantly dated and falls short of the current policy of the Ministry of Tourism, and that:

> "Accordingly, the Ministry wishes your Clients to elect either to 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.
>
> …
>
> 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 (sic)

entirety within fourteen (14 days). We believe that such time will be more than sufficient for you to take full instructions."[3]

[9] Mr. Hardy promptly replied by letter dated 20th November 2014, stating among other things, that Cove's preferred option was to buy the freehold of Parcel 580 but, he needed to get the approval of Cove's board of directors. There is no evidence that Cove's board ever met or decided to buy the freehold. Mr. Marshall Jr. responded on 1st December 2014 to the effect that the Government had to be satisfied of Cove's intent and ability to develop the Property as requested by the Government. He said:

> "… however, before consideration can be given to a sale to your Clients, they must detail the proposed 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 the 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.
> …
> However, we still await a demonstration of a serious commitment from your Clients. Though our Clients are patient, such cannot be indefinite.
>
> Accordingly, …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."[4]

[10] Cove did not present an investment plan to the Government and nothing further was done by the Cove for the next three months. This was apparently due to the untimely passing of Mr. Correia.

[11] The next activity was on 19th March 2015 when representatives of Cove met with the Attorney General. A note of the meeting was prepared by Cove's representatives. The tenor of the note, which reflects Cove's position in this matter, was that the Attorney General, representing the Government, had given

[3] Record of appeal Vol. 1, pp. 8 to 9.
[4] Record of appeal Vol. 3, p. 112.

an assurance not to compulsorily acquire the Property and that the parties would obtain and exchange valuations with a view to negotiating the sale of the freehold or leasehold. Cove described this as a new agreement with the Government that superseded and replaced the agreement in Mr. Marshall's letter of the 17th November 2014.

[12] In his affidavit filed on 24th March 2016, the Attorney General disputed that any such assurance had been given. He said: '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 have given such a broad and unqualified assurance.'[5] The Attorney General continued at paragraphs 7 to 9 of his affidavit:

> "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 choice but to compulsorily acquire the hotel for a public purpose. However, if 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. I recall the Applicant's representatives 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."

[13] The evidence shows that there was a sharp disagreement between the parties as to the way forward, after the meeting with the Attorney General. Cove's position was that there was a new agreement, as outlined above, which meant that the Government would not acquire the Property while negotiations were continuing, which by extension meant that the Government would not take any steps towards acquisition. The Government's position was that there had been considerable

[5] Record of appeal Vol. 2, p. 107, para 5.

delay by Cove in taking up one of the options in the November 2014 letter and that while they were prepared to continue the negotiations which were not open-ended, they intended to acquire the Property compulsorily if the negotiations failed, and that they were taking steps in the meantime to proceed with the acquisition, if necessary. This was apparent from several letters written by Mr. Marshall on behalf of Government and AICL both before and after the meeting with the Attorney General in March 2015.

[14] On 30th September 2015, Cabinet resolved to compulsorily acquire a portion of Parcel 580 for a public purpose (the "Decision"). The stated public purpose was '…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'. The resolution was debated and approved by the House of Representatives.

[15] Also, on 30th September 2015, the Cabinet issued a notification under section 4 of the **Land Acquisition Act**[6] (also herein referred to as "the Act") that it intended to enter Parcel 580 to conduct preliminary surveys and investigations.

[16] Upon becoming aware of the Decision, Mr. Hardy complained that the Decision breached the March 2015 agreement not to take any steps to acquire the Property compulsorily while negotiations were ongoing. He set out Cove's position in detail in a letter to Mr. Marshall dated 22nd October 2015.[7] The alleged new agreement continued to be heavily disputed by the respondents and on 10th November 2015, Mr. Marshall Jr. replied to Mr. Hardy '…to place the position of his clients …on record'.[8] He referred to his letter of 17th November 2014 and stated that a year had passed and Cove had not responded to the

[6] Cap. 233, Revised Laws of Antigua and Barbuda 1992.
[7] Record of appeal Vol. 3, pp. 233 to 236.
[8] Record of appeal Vol. 3, p. 242.

options of either re-investing in the Hotel or divesting its interest. He stated further that Cove could not reasonably be contemplating a purchase of the freehold because it had not produced any proposals for re-investing as requested by the Government. He confirmed that there was a new agreement to exchange valuations with a view to a voluntary settlement on the level of compensation to be paid to Cove. Importantly, he repeated the Government's position that if the commercial negotiations failed, his clients would rely on their valuation before the Board of Assessment. In short, Mr. Marshall reiterated the Government's intention to acquire the property if the negotiations failed and that they were taking steps in that direction in the meantime. The reference to a Board of Assessment (on page 244 of the record of appeal) can only be to the compensation procedure under the **Land Acquisition Act**.

[17] Mr. Hardy's response on 16th November 2015 repeated his client's position that there was an agreement not to acquire the Hotel while negotiations were continuing, and that the Government had breached that agreement.

[18] The Government commissioned two valuations of the Hotel by Mr. Simon J. Watson, FRICS of Charterland Ltd. The first, dated 27th October 2015, assessed the market value of the freehold of the property as US $16,600,000.00 and the unexpired term of the leasehold as US $14,100,000.00. The second report dated 2nd November 2015, concluded that no compensation was payable for loss of profits and disturbance having regard to the Hotel's poor financial performance.[9] The latter report also contained a statement by the valuer that based on instructions from the Government's legal advisers no compensation will be payable for the loss of the land taken.[10] Notwithstanding this statement, the Government's position both before and after the report was produced was that Cove would be compensated for the Property in accordance with the provisions of the **Land Acquisition Act**. This was stated twice in Mr. Marshall's letter of

[9] Record of appeal Vol. 3, pp. 197 to 232.
[10] Ibid p. 215.

10th November 2015[11] (before the report was delivered) and repeated in his letter dated 5th January 2016[12] (after the report was delivered).

[19] By way of S.I. 60 of 2015, dated 15th December 2015, made under section 3 of the **Land Acquisition Act**, Cabinet declared that 12 acres of Parcel 580 'shall be acquired for a public purpose, namely the development and expansion of the Halcyon Hotel into a five star Hotel'.[13] The declaration was published in the Official Gazette on 31st December 2015. The declaration was not published a second time as required by section 3 of the **Land Acquisition Act** and therefore the process of the acquisition remains incomplete.

[20] The valuation reports prepared by Mr. Watson were sent, by Mr. Marshall Jr. by email, to Mr. Hardy on 28th December 2015 with an undertaking by Mr. Marshall Jr. that his clients '…will not move to take actual possession of the property until the end of Easter 2016', and continuing 'we would however wish your client's undertaking that [it] will operate the Hotel until such time'. The email concluded with a request for the appellant's valuation 'as soon as possible'.[14]

[21] By letter dated 5th January 2016, Mr. Hardy protested the publication of the declaration as being in breach of an oral undertaking given by Mr. Marshall on 14th December 2015 and referred to the fact that the second Watson report stated that no compensation will be payable for the Property. Mr. Marshall replied the same day confirming that compensation would be payable and that the further steps taken by the Government were not in breach of his undertaking which was set out in his email on 28th December 2015.[15] He requested Mr. Hardy's confirmation that he would attend compensation meetings on settlement

[11] Record of appeal Vol, 3, pp. 242 to 243.
[12] Record of appeal Vol. 3, p. 252.
[13] Record of appeal Vol. 3, p. 44.
[14] Record of appeal Vol. 3, p. 248.
[15] Mr. Marshall's undertaking is set out in para 20 above.

in January. Thereafter, Cove refused to provide its valuation or to attend the meetings.

**The claim**

[22] On 18th February 2016, Cove filed an application in the High Court for leave to apply for judicial review of the Decision to acquire the property. Cove was granted leave to proceed with the application. It filed an application to set aside the Decision on five grounds, namely:

(i) the Decision was in breach of the appellant's legitimate expectations;

(ii) the Decision was tainted with bias;

(iii) the Decision was irrational;

(iv) the Decision was procedurally improper; and

(v) the Government acted illegally and in breach of Cove's rights under the **Land Acquisition Act**.

[23] The judge heard the application on written and oral submissions by the parties. The deponents were not cross-examined. The judge found that the allegation of bias was made out and that there were breaches of the procedural requirements in the **Land Acquisition Act**. However, Cove's legitimate expectations were not breached, and the Decision was not irrational or illegal. The judge concluded that Cove had not made out a case for the relief sought and dismissed the claim with costs to the respondents.

**The Appeal and Issues**

[24] Cove appealed on five major grounds which also represent the issues in the appeal:

(i) the judge failed to find that Cove's legitimate expectations were breached;

(ii) the judge erred in not finding that the Decision was irrational;

(iii) the judge failed to give effect to her finding that the Decision was tainted with bias by setting aside the Decision on that ground;

(iv) having found that there were procedural irregularities in the acquisition process the judge erred in not setting aside the Decision on that ground; and

(v) the judge erred when she awarded costs against Cove.

[25] The respondents counter-appealed challenging the judge's findings of bias and procedural irregularities in the decision-making process. These challenges will be addressed when dealing with the grounds of appeal.

**Legitimate expectations**

[26] Cove claimed that the Decision breached its legitimate expectations in two respects, namely: (a) its legitimate expectation that the Government would abide by its promise not to compulsorily acquire the Property while negotiations towards a voluntary settlement were ongoing; and (b) its legitimate expectation that the Government would abide by the express terms of the Lease relating to Cove's quiet enjoyment of the leased property and its right of pre-emption.

**Legitimate expectation – the promise**

[27] It is common ground between the parties that for a promise by a public official to amount to a legitimate expectation the promise must be clear, unambiguous and devoid of relevant qualification. The details of how a promise can amount to a legitimate expectation are summarised by Lord Dyson SCJ in **Francis Paponette and others v The Attorney General of Trinidad and Tobago** as follows:

> "The initial burden lies on applicant to prove the legitimacy of his expectation. This means that in a claim based on a promise, the applicant must prove the promise and that it was clear and unambiguous and void of relevant qualification. If he wishes to reinforce his case by saying that he relied on the promise to his detriment, then obviously he must prove that too. Once these elements have been proved by the applicant, however, the onus shifts to the authority to justify the frustration of the

> legitimate expectation. It is for the authority to identify any overriding interest on which it relies to justify the frustration of the expectation. It will then be a matter for the court to weigh the requirements of fairness against that interest."[16]

[28] Leading counsel for Cove, Mr. John Carrington QC, submitted that Cove's case is that the Attorney General gave an undertaking at the March 2015 meeting that the Government would not acquire the Property compulsorily and that the parties would obtain valuations of the Property with a view to negotiating a sale thereof to Cove. Mr. Carrington QC, submitted that this was an unambiguous and unqualified promise that the Government breached by taking steps to acquire the Property starting in September 2015, while negotiations were on-going. Further, that the learned judge erred by taking into consideration the 17th November 2014 letter from Mr. Marshall Jr. to Mr. Hardy. In effect, Cove's position was that the Government's position as outlined in the November 2014 letter, was overtaken by the Attorney General's promise in March 2015 not to acquire the Property.

[29] Leading counsel for the respondents, Mr. Anthony Astaphan SC, denied that any such promise had been given by the Attorney General. He referred to the evidence of the Attorney General himself and to several letters written by Mr. Marshall Jr. that not only denied the alleged promise not to acquire the Property, but also set out and repeated the Government's position that Cove's failure to produce an acceptable plan for renovating and developing the Hotel would result in the compulsory acquisition of the Property by the Government.

[30] It is helpful to review the findings of the judge on this important issue. At paragraphs 120 and 121 she found:

> "[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,

[16] [2010] UKPC 32, at para 37.

(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) <u>failing the exercise of the option in a timely manner, then the government was going to acquire.</u>

[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." [Underling supplied].

The judge continued at paragraphs 127 and 128:

"[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 be no acquisition.

[128] The Claimant therefore fails on the ground of legitimate expectation."

[31] This is a clear finding by the judge that she preferred the respondents' version of the facts starting with the letter of 17th November 2014. It is difficult to see why the judge should not have considered this letter in assessing the parties' respective positions on the evidence, as suggested by Mr. Carrington QC. The letter set out in clear terms the Government's concerns about the state of the Hotel, referred to the policy of the Ministry of Tourism of upgrading the standard of the tourism product, and set out the options available to Cove for either re-investing in or divesting the Hotel. It may have been different if there was evidence of an unequivocal act or correspondence showing that the Government had abandoned its stated intention of acquiring the property if Cove did not produce an acceptable development proposal, or later a valuation. But the Government never retracted or abandoned its position. The evidence and correspondence following the March 2014 meeting is to the contrary. The Government continued negotiating with the representatives of Cove while maintaining its position regarding the compulsory acquisition of the Property if the negotiations failed.

[32] The judge also took into consideration that in the November 2014 letter, Mr. Marshall Jr. requested Cove to act in a 'timely manner', that 'time is of the essence' and that in the subsequent months Cove was the party who 'shifted the goal post'. Further, Cove's delay in obtaining its own valuation of the Property was long past what was reasonable.

[33] The judge was correct in considering the November 2014 letter as a part of the background to the claim, and finding, in effect, that the Government did not make a promise not to acquire the Property, far less one that was clear, unambiguous and devoid of relevant qualification. This means that Cove did not get past the first stage of the test in the **Paponette** case,[17] and therefore the respondents did not need to justify the frustration of a non-existent legitimate expectation.

[34] This finding is sufficient to dispose of the claim for breach of legitimate expectation based on a promise but I feel compelled to refer to the case **HMB Holdings Ltd v Cabinet of Antigua and Barbuda**,[18] a decision of the Privy Council on appeal from this Court sitting in Antigua and Barbuda, which bears a striking resemblance to the instant appeal.

[35] HMB was the owner of a resort at Half Moon Bay in Antigua, on beachfront property. The resort was severely damaged by Hurricane Luis in 1995. Several years passed without HMB rebuilding the resort. The Cabinet of Antigua and Barbuda took the view that the closure of the resort was affecting the economy of the country. It decided that it was in the public interest to acquire the resort compulsorily so that its business could be regenerated. HMB objected to the acquisition. Discussions followed to enable HMB to attract the investment that it needed to restore the resort. There were further delays and in November 2001, Cabinet resolved that it should proceed with the acquisition and took steps to do so. HMB applied for judicial review of the decision to acquire the resort.

[17] Ibid n. 16.
[18] [2007] UKPC 37.

Notwithstanding the resolution to acquire the resort and the ongoing litigation, the Cabinet granted an extension of six months from 1st February 2001 'to allow the owner to perform in respect of the development of the resort…' and the Attorney General gave the Court of Appeal an undertaking to the same effect. Cabinet also approved incentives and concessions for the proposed development. The six-month extension expired on 31st July 2001 without any steps being taken to commence the project.

[36] In delivering the advice of the Board, Lord Hope found that the undertaking not to acquire the resort expired at the end of the six-month extension and no steps had been taken to implement the redevelopment of the resort. Lord Hope went further to say that even if the undertaking was open-ended the lack of progress on the ground would have defeated any expectation that HMB might reasonably have entertained that the Government would not have acquired the resort, or that any such expectation had been breached when the Cabinet proceeded to acquire the resort in November 2001. The claim for breach of legitimate expectation was rejected by the Board.

[37] The Board's decision on legitimate expectation is not binding on this Court because the case was decided on its facts. But the reasoning of their Lordships is a good example of how courts will deal with promises that could amount to a legitimate expectation but are not followed up by the required prompt conduct. In HMB there was a promise not to acquire but the promise was limited in time to six months. In Cove's case, there was no promise not to acquire the Property, but even if there was a promise coming out of the March 2015 meeting with the Attorney General, there was no meaningful follow up by Cove up to 30th September 2015 when the Decision to acquire the Property was made, and further by 15th December 2015 when the declaration for the Acquisition was issued.

[38] Based on the foregoing analysis of the facts of the instant appeal, and supported by the decision of the Privy Council in the **HMB** case, I am satisfied that there is no basis for this Court to interfere with the judge's finding that there was no legitimate expectation (based on a promise) and that the appeal fails on this issue.

**Legitimate expectation – the Lease**

[39] The Lease contained a covenant for quiet enjoyment in the following terms:

> "5. THE LANDLORD COVENANTS WITH THE TENANT as follows:-
>
> 5.1 Quiet enjoyment
> That as long as the Tenant pays the rents and complies with the terms of this Lease the Tenant may enjoy the Property peaceably during the term in accordance with those terms without any interruption by the Landlord or any person lawfully claiming through under or in trust for the Landlord or by title paramount."

Mr. Carrington QC argued that this covenant gave Cove an express right to enjoy the use of the Property during the term of the Lease and precluded the Government from acquiring the Property compulsorily. He did not dispute that the decided cases are to the effect that an implied term not to acquire a property was not sufficient, but submitted that the cases left open the possibility that an express term not to acquire, such as clause 5.1 of the Lease, could be sufficient to preclude any attempt by the Government to acquire the Property by compulsory acquisition.

[40] This Court does not have the benefit of the judge's consideration and finding on this issue but fortunately it is a matter of law based entirely on the wording of the Lease and is independent of the evidence given by the parties. This Court, therefore, is in as good a position as the judge to deal with the issue.

[41] Mr. Carrington QC referred the court firstly to the case of **Clunies-Ross v Commonwealth of Australia and others**,[19] where the plaintiff conveyed part of his lands by deed to the Commonwealth of Australia, reserving certain covenants over the conveyed property for the enjoyment of the retained land on which he lived. The Commonwealth decided to acquire the retained land compulsorily for a public purpose under the provisions of the Land Acquisition Act. The claimant disputed the decision to acquire on the grounds that the reason for the acquisition was not a public purpose and that the acquisition would constitute a breach of an implied term in the contract contained in the deed with the Commonwealth. On the issue of breach of contract, the majority of the High Court found that:

> "[T]here is nothing in the deed which had the effect of contractually binding the Commonwealth to make or apply the law in a manner that would leave unaffected the plaintiff's rights of ownership or occupation of that land. It is unnecessary to consider whether, if the Commonwealth Executive had purported to covenant to that effect, the covenant would have been valid or enforceable."

Mr. Carrington QC submitted that the highest court in Australia left open the possibility that an express covenant not to derogate from the terms of a lease contract could be effective against the right given to the Government to acquire land compulsorily under the provisions of the **Land Acquisition Act** of Antigua and Barbuda.

[42] Mr. Carrington QC also referred to the case of **Commissioners of Crown Lands v Page**,[20] a decision of the English Court of Appeal. The case involved the requisition of leasehold premises in 1945 by the Minister of Works acting on powers conferred by the Defence (General) Regulations, 1939. The lease did not contain a provision for quiet enjoyment. The issue on appeal was whether the requisition breached the tenant's implied covenant of quiet enjoyment. At page 287 Lord Evershed said:

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[19] [1985] LRC [Const] 292.
[20] [1960] QB 274.

> "I am not, however, satisfied that in a demise by the Crown the covenant implicit in the demise would extend to prevent future exercise by the Crown of powers and duties imposed upon its executive capacity by statute. Whatever might be the position if the demise had contained an express covenant unqualified in terms (upon which I prefer to express no opinion), I think that any implied covenant should be treated as qualified to the extent indicated."

Mr. Carrington QC submitted that Lord Evershed also left open the possibility that the Crown cannot resile from an express covenant for quiet enjoyment in a lease. He also referred to the case of **The King v Dominion of Canada Postage Stamp Vending Co Limited**[21] and **Rederiaktiebolaget Amphitrite v The King**,[22] but I do not think that these cases take his submission any further. Neither case deals with the compulsory acquisition of land in the face of a covenant for quiet enjoyment, which is the issue that this Court is dealing with.

[43] The only case that the court was referred to where a covenant for quiet enjoyment in a lease was given the meaning contended for by counsel, was the decision of the High Court of Grenada in **The Grenadian Hotel Limited v Beryl Isaac, Cabinet Secretary of Grenada and others**.[23] The claimant had a 99-year Crown lease that contained an express covenant for quiet enjoyment. The lease was compulsorily acquired by the Government of Grenada. The claimant brought judicial review proceedings to quash the acquisition. The learned judge decided that claimant had procedural and substantive legitimate expectations arising under the lease, that it would continue to enjoy the benefits of the lease throughout the 99-year term, and that the Government could not resile from the lease in the absence of evidence of an overriding public interest to counterbalance the claimant's legitimate expectations. The learned judge set aside the acquisition of the lease on this and other grounds. I do not share the learned judge's reasoning and conclusion on the issue of legitimate expectation. Once the lease was acquired by the Government under the **Land Acquisition Act**, the claimant's

[21] [1930] SRC 500.
[22] [1921] 3 KB 500.
[23] GDAHCAPV2016/0066 (delivered 3rd August 2016, unreported).

rights were limited to challenging the acquisition for non-compliance with the provisions of the Act, and the **Constitution** if applicable. The issue of rights arising under the lease was overtaken by the acquisition under the Act. The decision of this Court in **H.M.B. Holdings Limited v The Cabinet of Antigua and Barbuda and another** [24] supports this conclusion.

[44] Mr. Carrington QC invited the court to take up the challenge to fill the gap left open by the majority in **Clunies-Ross v Commonwealth of Australia and others**[25] and Lord Evershed in **Commissioners of Crown Lands v Page**[26] and find that clause 5 of the Lease in this case is an express covenant for quiet enjoyment from which the Government cannot resile, notwithstanding its undoubted power under the **Land Acquisition Act** to acquire land compulsorily for a public purpose. Mr. Astaphan SC responded by submitting that there are at least two very important reasons why the Crown's right to acquire land compulsorily cannot be fettered by the terms on which the landowner holds his property.

[45] Firstly, a landowner, whether freeholder or leaseholder, takes title to his or her property subject to the risk that it can be acquired by the Crown for a public purpose under the relevant legislation. Only two pre-conditions need to be satisfied: (1) the land must be required for a public purpose; and (2) the landowner must be paid full and prompt compensation for the value of his land. Once these two conditions are satisfied, the Crown's right of eminent domain (compulsory acquisition) cannot be thwarted by the private interests of a leaseholder.

[46] Mr. Astaphan SC relied on several cases in support of his position. I will mention just one of them. **E. Johnson & Co. (Barbados) Limited v N.S.R. Limited**[27] is a decision of the Privy Council on appeal from the Court of Appeal of Barbados. It

[24] Antigua and Barbuda Civil Appeal No. 16 of 2002 (delivered 28th January 2003, unreported), at para 24, per Redhead JA.
[25] Supra n.19.
[26] Supra n. 20.
[27] [1997] A.C. 400.

stands for the general proposition that a purchaser of land agrees to the normal risks associated with the ownership of land including the risk of interference with landowner's rights by the Crown. As Lord Jauncey of Tullichettle said:

> "The risk of interference with land-owning rights by the Crown or statutory authorities is always present. The land may be needed for the construction of a road or an airport, wayleaves for power lines or for gas or oil pipes may be required, restrictions may be imposed on the use of the land by planning legislation or the peace and quiet which the owner had hoped to enjoy may be shattered by a noisy local development. These are some of the examples of the ways in which landowner is at risk of having his rights and enjoyment removed or curtailed."[28]

Applying this principle, Mr. Astaphan SC submitted that when Cove took title to the Lease, it did so with the inherent risk that the leased property could be acquired by the Government for a public purpose. I observe that if Cove's lease was acquired, its rights would not be lost. They would be converted into an entitlement to payment of fair compensation for the acquired interest within a reasonable time. This is the stage that the parties have reached in this case and the Government's position is that Cove is entitled to compensation for the acquisition of the Property.

[47] Mr. Astaphan's SC second point regarding the terms of the Lease is a corollary of the first. It is that it was not within the competence of the executive branch of the Government to make a contract, in this case the Lease, that has the effect of limiting or fettering the executive power of the Cabinet to act in the future in the public interest. In **Rederiaktiebolaget Amphitrite v The King**[29] the British Government, during the First World War, gave an undertaking to the owners of the cargo ship Amphitrite, that the ship would not be detained if it was sent to a British port with cargo of a specified kind. The Government subsequently withdrew the undertaking. The shipowners sued. Rowlatt J held that the undertaking not to detain the ship was unenforceable as it was not within the competence of the

[28] Ibid at pages 406-407.
[29] Supra n. 22.

Crown to make a contract that would have the effect of limiting its power of executive action in the future. The learned judge opined at page 503 that:

> "My main reason for so thinking is that it is not competent for the Government to fetter its future executive action, which must necessarily be determined by the needs of the community when the question arises. It cannot by contract hamper its freedom of action in matters which concern the welfare of the State."

This statement by Rowlatt J, despite its antiquity, encapsulates the principle that the executive of the Government cannot, as a general rule, make a contract that has the effect of limiting or fettering the executive power of the Cabinet to act in the future in the public interest. Mr. Carrington QC submitted that this case was decided in wartime (actually 1921) and that it should not be followed today having regard to the developments in administrative law and the principle of legitimate expectation. This argument has merit and it would be interesting to see how a case with similar facts to the **Amphitrite** case would be decided today. However, this Court has not been directed to any case that has overruled the case or questioned the principle for which it stands. In fact, the cases of **Clunies-Ross v Commonwealth of Australia and others**[30] and **Commissioners of Crown Lands v Page**[31] (referred to above) seem to support the principle. In the latter case, where Lord Evershed left the issue open in relation to an express covenant for quiet enjoyment,[32] Lord Devlin had no such reticence. At page 292 he said:

> "Even if, therefore, there was an express covenant for quiet enjoyment, or an express promise by the Crown that it would not do any act which might hinder the other party to the contract in the performance of his obligations, the covenant or promise must by necessary implication be read to exclude those measures affecting the nation as a whole which the Crown takes for the public good."

This statement is a complete answer to counsel's submissions in the context of a Crown lease with a covenant for quiet enjoyment where the acquisition is 'for the public good'.

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[30] Supra n. 19.
[31] Supra n. 20.
[32] See para 42 above.

[48] The cases of **William Cory and Son Limited v London Corporation**,[33] **Cudgen Rutile (No 2) Pty and another Ltd v Gordon William Wesley Chalk and others**,[34] and **West Lakes Limited v The State of South Australia**,[35] all of which are cited in the respondents' written submissions, also apply the principle that the executive cannot bind itself; but, I will not deal with these cases in detail because they are not concerned with the compulsory acquisition of land.

[49] Returning to the invitation by Mr. Carrington QC, for this Court to find that an express covenant for quiet enjoyment in a Crown lease should be interpreted as excluding the Crown's right to later acquire the lease compulsorily, I am, with all due deference to his very able submissions, unable to agree with him for the following reasons:

(i) The right of the Crown to acquire property compulsorily is enshrined in the provisions of the **Land Acquisition Act** and the rights of the landowner are recognised and protected by the provisions of the Act as well as section 9 of the **Constitution**. Cove is deemed to have acquired the Lease with knowledge of these rights (see paragraphs 46 and 47 above).

(ii) Compulsory acquisition of property is vital to the functioning of Government. There are situations, examples of which are listed in the judgment of Lord Jauncey of Tullichettle in the **E. Johnson & Co. (Barbados) Limited v NSR Limited** (see paragraph 46 above), where is it essential that the Crown should have the power to acquire property for the benefit of the community as a whole, or as Lord Devlin said in the **Page** case 'for the public good'.

[33] [1951] 2 KB 476.
[34] [1975] AC 520.
[35] [1980] 25 SASR 389.

(iii) The cases cited above support the continuance of the right of compulsory acquisition, provided it is being exercised for a public purpose.

(iv) On the facts of this case, there is no suggestion that the acquisition is a sham or is motivated by a political agenda. The acquisition was in furtherance of the Government's tourism policy and that policy was not disputed

(v) Also, on the facts of this case, the Government is not the landlord and did not covenant with Cove that it would have quiet enjoyment of the Property during the currency of the Lease. The Government signed the Lease and had certain obligations under it relating to guaranteeing AICL's title to the Property (clause 5.4), not disposing of a part only of the shares of AICL (clause 7.1) and approving certain transactions by AICL (clauses 6.2.3 and 6.2.4). This is very different from saying that the Government covenanted with Cove that it would have quiet enjoyment of the Property. I note also that there is no evidence that any Government official is a director of AICL.

(vi) As a corollary of the preceding sub-paragraph, in executing the Lease in 1989 the executive of Government did not bind itself not to acquire the Property for a public purpose in the future.

(vii) Cove is entitled to fair compensation for its interest in the Property.

**The pre-emption clause**

[50] I also note that the Lease contains a provision in clause 7 that gives Cove a right of pre-emption in the event that AICL decided to sell the freehold of the Property or the Government decided to sell the issued capital of AICL. This right will be lost

when the acquisition is completed. But the same considerations that apply to the covenant for quiet enjoyment apply to the right of pre-emption. Cove did not have a legitimate expectation that the right of pre-emption would not be lost by compulsory acquisition. I would expect, that the loss of the right of pre-emption will be considered in the compensation process.

[51] In the circumstances, I find that there was no legitimate expectation arising out of either the covenant for quiet enjoyment or the right of pre-emption in the Lease and the appeal fails on this ground.

**Irrationality**

[52] The test for deciding that a decision by a public body is irrational is a high one. It is that the decision must be so outrageous in its defiance of logic or of accepted moral standards that no sensible person, who had applied his mind to the question to be decided, could have arrived at it.[36]

[53] The judge's approach to the issue of irrationality cannot be faulted. She outlined the test set out in the preceding paragraph and then stated correctly that it was not for the court to make statements about the Government's policy. That is the responsibility of the Minister. She did not, as suggested by the appellant in its written submissions, find that the statements made by the Government officials could not be relied on to find irrationality. What she did was to focus on the Government's tourism policy as articulated in the correspondence starting with Mr. Marshall's letter in November 2014, and Cove's failure to act in a timely manner in response to the Government's demands. The judge then referred to her rejection of Cove's claim that its legitimate expectations were breached. She set, out in copious detail, the correspondence and conduct between the parties regarding Cove's 'shifting of the goal post' and the Government's unwavering position that it reserved the right to acquire the Property if Cove did not come up with an

[36] Council of Civil Service Unions and others v Minister for the Civil Service [1985] AC 374, at page 410, per Lord Diplock.

acceptable re-investment and development plan. I also note that there was no evidence or pleading, that the Decision was a sham or was politically driven. It is not surprising that the judge found that the Decision was not caught by the test of irrationality in the **Council of Civil Service Unions** case,[37] or otherwise.

[54] I have taken note of Cove's position on the issue of irrationality to the effect that it has invested significant amounts of money in the Hotel over the years and Cove's general contribution to the economy of the country; that the judge should have found that the disparaging statements made by the Government officials regarding the state of the Hotel not only showed bias but also irrationality; and that the absence of any evidence that the tourism product of the State needed or would necessarily benefit from a five-star hotel.

[55] In my opinion, these submissions do not detract from the judge's reasoning and finding, outlined above, that the Decision was not irrational and I would affirm her finding.

**The procedural irregularities**

[56] It is not disputed that there were procedural irregularities in the decision-making process to compulsorily acquire the Property, and that the law requires strict adherence to the procedures in the **Land Acquisition Act** and the landowner's rights under **The Antigua and Barbuda Constitution Order**[38] for the compulsory acquisition of land.[39] The irregularities or discrepancies relate to the legal description of the Property, the amount of land being acquired, and the public purpose for the acquisition. The errors in the first publication of the declaration of the acquisition were corrected by the Government during the process of

[37] Ibid.
[38] Cap. 23, Revised Laws of Antigua and Barbuda.
[39] See Noreen De Gale v The Attorney General GDAHCV2012/0373 (delivered 12th December 2013, unreported).

acquisition, which is still incomplete. The judge was therefore correct in not making a declaration of procedural impropriety at this stage.[40]

**Bias**

[57] The allegation of bias is contained in statements made by the various Government officials, including the Minister of Tourism, regarding the condition of the Hotel. The statements were made in June and September 2014 when the Government became concerned about the condition of the Hotel, and again in June 2015 before the decision to acquire was made in September 2015. The criticisms appear to be at two levels. At the lower level, the Hotel is old and in a state of disrepair and needs to be upgraded. At the higher level, the Hotel was dumping sewage into the sea, the rooms were in disrepair and disgusting, and the Hotel was run down and full of cockroaches. With one exception, the statements were directed to the condition and use of the Hotel and were not about the owners of the Hotel. The learned judge found that:

> "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 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."[41]

[58] The respondents counter-appealed against this finding by the judge. They argued that, contrary to the judge's finding, there was evidence to support the statements made, even though the statements were expressed in strong terms. Further, the judge did not have any or any sufficient regard to the evidence regarding the condition of the Hotel that supported the statements such as the report of the Chief Health Inspector. It is clear from the judge's finding at paragraph 107 that she did have regard to the reports commissioned by the Government, but she found that at

[40] See para. 138 of the judgment.
[41] See para. 107 of the judgment.

least some parts of the statements were not supported by the evidence. For example, there is no evidence of cockroaches or dumping of sewerage into the sea. Based on her assessment of the evidence, she was satisfied that the statements pointed to bias or prejudice against Cove. This, is a finding of fact by the judge that has an evidentiary basis and, following the well-known principles about how this Court approaches appeals against findings of fact, even when the evidence is not tested by cross-examination, there is no proper basis to interfere with the finding of bias by the judge.[42]

[59] That said, I note that there was evidence from the Government's valuer, Mr. Watson, that his general impression was that the Hotel was outdated and tired, there were defects and wants of repair, and the best use of the property was demolition of many of the buildings and redevelopment as a modern hotel.[43] It appears that the judge obviously had these statements in mind because her finding was that only the statements about dumping of sewerage in the sea, cockroaches and the Hotel being run down were not supported by the evidence. Mr. Watson's evidence about the condition of the Hotel, is consistent with a hotel that is more than forty years old and there is no evidence of major renovations over the years. I note also that despite the derogatory language used by the Government officials, there is no evidence that they hindered Cove in its attempts to comply with the Government's request to re-invest or divest as set out in Mr. Marshall's November 2014 letter, and his subsequent letters, and that the negotiations continued from November 2014 to January 2016. This evidence, taken as a whole, does not suggest bias in the decision-making process and will be considered when I come to consider how the judge exercised her discretion.

[60] The respondents also complained in their written and oral submissions that the allegation of bias is a serious one and it must be specifically pleaded and proved.

[42] See for example the opinion of Lord Hodge in Beacon Insurance Co Ltd v Maharaj Bookstore Ltd. [2014] UKPC 21.
[43] Record of appeal Vol 3. p. 141.

However, I find that bias was pleaded in the fixed date claim form and particularised in the supporting affidavit of Mr. Richard Bryson filed on 18th February 2016. I do not accept this complaint.

[61] Mr. Astaphan SC also referred to and relied on the Privy Council decision in the **HMB** case[44] in support of his submissions on bias. A brief summary of the facts of this case is set out in paragraphs 36 to 38 above under the heading 'Legitimate expectation – the promise'. The relevant facts on the issue of bias are that in June 2000 (before the grant of the six-month extension by the Cabinet) there was 'a campaign of blame' against HMB that was directed against its principal, Mrs. Natalia Querard, personally. The Prime Minister told the nation, by radio and television, that Mrs. Querard despised the people of Antigua and that she stood in the way of progress. There was no finding by either the High Court or the Court of Appeal that the statement by the Prime Minister showed bias against Mrs. Querard or in the decision-making process, and it appears from the material available to this Court that the issue was raised for the first time in the Privy Council. Therefore, their Lordships were not dealing with a finding of bias by the lower court as in the Cove appeal. They were dealing with the issue for the first time. Despite the Prime Minister's vitriol and the manner of its publication, their Lordships decided that the decision to acquire the resort was made without any indication of bias against HMB and there was nothing to suggest that the Government was not genuine in their desire to see progress in restoring the resort. In the circumstances, their Lordships did not see that anything would be gained by sending the issue of bias to trial and dismissed HMB's appeal.

[62] Mr. Astaphan SC submitted that this Court should adopt a similar approach. We should review the history of how the Decision was made and note that it was made only after the Government's genuine attempts to settle the issue of the redevelopment of Hotel. This Court should find that the Decision was not affected

[44] Supra n. 18.

by the derogatory statements made by the officials. I will deal with this submission when I come to deal with how this Court should review the exercise of discretion by the judge.[45]

[63] In this case, there was a finding of bias by the judge and the issue for this Court is whether that finding meant that Her Ladyship was required to set aside the decision to acquire the Property, or whether she had a discretion in deciding whether to grant the relief sought. If she had a discretion, did she exercise it properly? The decided cases provide useful guidance.

[64] In the UK Court of Appeal decision of **R (on the application of Bibi) v London Borough of Newham**,[46] Schieman LJ described the role of the court in judicial review cases as having '…two functions – assessing the legality of the actions by the administrators and, if it finds unlawfulness on the administrators' part, deciding what relief it should give'. This statement does not rule out a decision not to grant relief, but it suggests that once illegality is found the court is likely to grant relief.

[65] The House of Lords decision in **R (on the application of Edwards and another) v Environment Agency and others**,[47] is more to the point. It is to the effect that the granting or withholding of relief is a matter within the discretion of the court. In this case, the High Court judge found that the respondent was guilty of a failure to disclose certain reports on an application for a permit to operate a cement factory, but the relevance of the reports had been overtaken by events. The learned judge exercised his discretion by refusing an order setting aside the permit that had been granted without the undisclosed information. The judge saw no purpose in setting aside the permit and remitting the application to be heard on the basis of the missing information which was now redundant. Both the Court of Appeal and the House of Lords affirmed the exercise of the judge's discretion not to quash the

[45] See para. 69 below.
[46] [2001] EWCA Civ 607 (Tab 1 Appellant's bundle of authorities).
[47] [2008] UKHL 22 (Tab 3 Appellant's bundle of authorities).

permit. The leading judgment of the House of Lords was given by Lord Hoffmann. In dealing with the court's discretion he said:

> "It is well settled that 'the grant or refusal of the remedy sought by way of judicial review is, in the ultimate analysis, discretionary' (Lord Roskill in Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617, 656.) But the discretion must be exercised judicially and in most cases in which a decision has been found to be flawed, it would not be a proper exercise of the discretion to refuse to quash it… Both the nature of the flaw in the decision and the ground for exercise of the discretion have to be considered."

[66] In **Nichol v Gateshead Metropolitan Borough Council**,[48] the trial judge set aside a decision of the respondent Borough Council on account of a flawed consultation procedure. The Court of Appeal allowed an appeal against the judge's decision finding that the procedure was not flawed. The majority of the court, O'Connor and Taylor LLJ, stated obiter that even if the decision was flawed, the court had a wide discretion to set aside it on the facts of the case. Taylor LJ described how the court should exercise any discretion it had to grant relief on an application for judicial review:

> "The court has an overall discretion as to whether to grant relief or not. In considering how that discretion should be exercised, the court is entitled to have regard to such matters as the following: (1) The nature and importance of the flaw in the challenged decision. (2) The conduct of the applicant. (3) The effect on administration of granting relief."[49]

This seems to me to be a useful approach to exercising a discretion to grant or refuse relief on a judicial review application.

[67] The court's discretion in granting or refusing relief in judicial review applications is further illustrated by **The Judicial Review Handbook** where the learned editors state:

> "It is a first principle of judicial review that remedies are discretionary. One specific basis on which a remedy can be refused in the Court's discretion

[48] (1988) 87 LGR 435.
[49] Ibid at page 24, per Taylor LJ.

> is where the claimant unduly delayed and granting a remedy would cause relevant prejudice and detriment. The Court will need to identify a good and principled reason to exercise its discretion by declining a practical and effective remedy to a claimant who has succeeded in showing a public wrong."[50]

[68] I am satisfied that the court has a discretion whether to grant or refuse relief on a judicial review application where the claimant has made out a ground for relief, in this case bias. However, the discretion to refuse relief is a narrow one and where relief is refused, the reason for so doing should be stated.

**Exercise of discretion**

[69] The manner in which the learned judge exercised her discretion is set out in paragraphs 139 and 140 of the judgment. She found:

> "[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 the 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." (Underlining added)

From this statement, it is apparent that the judge thought that this was an appropriate case to refuse relief even though the Decision was flawed by bias. She stated that the key operational statement of how the matter was to proceed was confirmed by Mr. Marshall's letter of 17th November 2014 which, also stated that time was of the essence. In other words, the key reason for the Government's decision to acquire the Property was Cove's failure to comply with the terms set by the Government in a timely manner. The judge also had regard to the failed claim for breach of legitimate expectations, and Cove's shifting of the goal post.

[50] Michael Fordham QC: Judicial Review Handbook (6th edn. Hart Publishing 2008) pg. 271 at para 24.3 (Tab 2 Appellant's bundle of authorities).

Inferentially, she decided that the bias was not the reason for the decision to acquire the property, but Cove's conduct.

[70] This assessment of the evidence was open to the judge and, in my opinion, is consistent with the contemporaneous correspondence and documents. It is also consistent with my assessment of the evidence under the heading 'Legitimate expectation – the promise' in paragraphs 27 to 38, and in paragraph 59 above. There was no evidence before the judge that in over a year of negotiations, the respondents hindered the representatives of Cove in their efforts to comply with the options in Mr. Marshall's November 2014 letter, or the March agreement to produce a valuation of the Property. The judge was entitled to rely on her assessment of the evidence to refuse relief, 'notwithstanding the bias demonstrated against the Claimant' and, in my opinion, she provided good and adequate reasons in paragraph 139 of her judgment, for exercising her discretion by declining to grant relief. I am satisfied that the judge did not err in principle and that her decision did not exceed the generous ambit within which reasonable disagreement is possible and may therefore be said to be plainly wrong.[51]

[71] I would affirm the judge's decision not to grant relief to Cove.

**Costs**

[72] The judge having dismissed the claim, ordered Cove to pay the costs of the respondents. Cove appealed against this order on the ground that this was an improper exercise of the judge's discretion. Rule 56.13(6) of the **Civil Procedure Rules 2000** provides that an award of costs against an unsuccessful applicant for judicial review may only be made where the court is satisfied that the applicant acted unreasonably in bringing the claim or in the conduct of the application. In ordering Cove to pay the respondents' costs, the judge did not make a finding that Cove acted unreasonably in bringing the claim or in the conduct of the application

[51] Dufour v Helenair Corporation Ltd (1996) 52 WIR 188, per Sir Vincent Floissac CJ.

so as to justify departing from the general rule in rule 56.13(6). Mr. Astaphan SC quite correctly, did not contest this ground of appeal. I would set aside the judge's costs order in the court below.

**Conclusion**

[73] I would make the following orders:

(i) The appeal is allowed only to the extent of setting aside the order that the appellant should pay the costs of the respondents. In all other respects, the appeal is dismissed.

(ii) The counter notice of appeal is dismissed.

(iii) The parties shall file written submissions on the issue of the costs of the appeal and the counter appeal by no later than the 15th November 2019.

[74] I gratefully acknowledge the invaluable assistance of counsel and those assisting them.

I concur.
**Davidson Kelvin Baptiste**
Justice of Appeal

I concur.
**Gertel Thom**
Justice of Appeal

**By the Court**

**Chief Registrar**