In The Supreme Court of Bermuda

CIVIL JURISDICTION
2021: No. 29

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW AND IN THE MATTER OF THE COMMISIONS OF INQUIRY ACT 1935

BETWEEN:

(1) RAYMOND DAVIS

(2)MYRON ADWIN PIPER

Applicants

-and-

(1) THE PREMIER OF BERMUDA E. DAVID. G. BURT

(2) COMMISSION OF INQUIRY INTO HISTORIC LOSSES OF LAND IN BERMUDA

Respondents

Before: Assistant Justice David Hugh Southey QC

Appearances: Mr. Raymond Davis & Mr. Myron Piper Applicants in person
Ms. Lauren Sadler-Best for the First Respondent
Mr. Delroy Duncan QC for the Second Respondent

Date of Hearing: 11– 13 July 2022

Date of Judgment: 5 August 2022

Introduction

1. This application for judicial review raises issues about the scope of the Commission of Inquiry into Historic Land Losses in Bermuda ('the Commission of Inquiry'). The Commission of Inquiry had been appointed under the Commissions of Inquiry Act 1935 ('the 1935 Act'). Its terms of reference are set out below.

2. When hearing this case, it has been clear to me that land losses and the Commission of Inquiry are matters that significant numbers of Bermudans have strong views about. I hope that all who read this will understand that my role is a limited one. It is to determine the merits of arguments that are properly within the scope of this application for judicial review. As my concluding remarks should also make clear, it is not my role to express views regarding wider issues.

3. In *Bermuda Emissions Control Ltd v The Premier of Bermuda* [2016] SC (Bda) 82 Civ Kawaley CJ noted that:

> *I have attempted to balance the need for this Court to properly exercise its supervisory jurisdiction over the COI with the need to avoid the exercise of such supervisory jurisdiction being used to undermine the efficient and clearly lawful workings of the COI in their broadest canvass. The purpose of judicial review is to promote the interests of good public administration. The COI, within a narrower mandate, has a similar objective.* [5]

4. In delivering this judgment I have sought to perform the balancing exercise described by Kawaley CJ.

5. As the judgment below may demonstrate, the issues raised by this application for judicial review are technical and complex. Many lawyers would have struggled to engage with them. Even though I have not accepted every submission made by the Applicants, I have appreciated their efforts to assist the Court. They have sought to engage in a positive manner despite the complexities of the issues. I have also found the submissions of counsel for the Respondents of great assistance. They were cogent and comprehensive. I thank all of the parties.

6. At times the Applicants' submissions went beyond the evidence filed by the parties. I make no criticism as I understand they are not professional lawyers. I tried to ensure that submissions focused on the evidence. In drafting this judgment I have sought to focus on the evidence. In any event, I do not believe that anything turned on the submissions that were not supported by the evidence.

Factual background

The establishment and work of the Commission

7. The Commission of Inquiry was appointed on 31 October 2019.

8. According to the Commission of Inquiry's report as well as its terms of reference, the impetus for its appointment was a motion of the Honourable House of Assembly ('the HOA') on 4 July 2014 regarding land expropriation and the need to investigate it. On that date the late C. Walton D. Brown, JP, MP, a member of the Progressive Labour Party which was then the Official Opposition, introduced the motion. The ensuing parliamentary debate revealed that there were particular concerns regarding 2 well-known expropriations in Bermuda, Tucker's Town and St. David's Island. However, there were also concerns regarding widespread injustices in dealing with

losses of land in other areas across the island. For example, Mr Brown MP stated that:

> *We have an opportunity … to help correct some of the wrongs of the bad old days when justice was a fleeting illusion for many, and where the rich, the powerful and the connected acted with impunity. The theft of land, the dispossession of property, took place in this country on a wide scale and over a long period of time. The villains in these actions, Mr. Speaker, were oftentimes lawyers, real estate agents and politicians, but not exclusively so. The victims were at times the poor and the marginalised, but not always. What the victims shared though, Mr. Speaker, was an inability to secure a just outcome. …* (Hansard 2014 p. 2603).

9. Mr Brown MP clearly was of the opinion that one group that was connected was those with a political connection. He stated that:

> *The "politically connected," Mr. Speaker, refers to individuals with close ties to politicians but, perhaps more importantly, to people who have actually sat, served in this Honourable Chamber. A significant number of land grabs have their fingerprints and their signatures on paperwork marked for posterity.* (Hansard 2014 p. 2603).

10. I will consider below the approach that I believe I should adopt to this material. However, it is important to note that the First Respondent's counsel made it clear in answer to a question being asked by me that she referenced these passages to demonstrate that terms of reference of the Commission of Inquiry drafted with intent of being broad. It appears to me that it is correct that these passages of Hansard demonstrate that at least Mr Brown MP was keen that the terms of reference should be broad.

11. The motion approved by the HOA following the debate was as follows:

> *…to take note of historic losses in Bermuda of citizens' property through theft of property, dispossession of property and adverse possession claims; AND BE IT RESOLVED that this Honourable House calls on His Excellency the Governor to establish a Commission of Inquiry into <u>all</u> such known claims and to determine, where possible, the viability of any such claims and make recommendations for any victims of wrongful action to receive compensation and justice.* [Emphasis added]

12. The use of the word 'all' is significant as it suggests an intention that the Commission of Inquiry should be comprehensive.

13. There was then political debate about whether the motion should be acted upon. That debate appears to me to be irrelevant to what I need to determine. No party has relied upon it.

14. Following a failure to act on the 1st motion, in 2017 the motion was again passed. This time it was acted upon by the Premier. A Commission was issued under the 1935 Act. This named the Honourable (Retired) Justice Norma Wade-Miller as the Chairman. The terms of reference set by the Premier ('the terms of reference') were said to be derived from the HOA motion and were as follows:

> *1. Inquire into historic losses of citizens' property in Bermuda through theft of property, dispossession of property, adverse possession claims and/or such other unlawful or irregular means by which land was lost in Bermuda;*

2. Collect and collate any and all evidence and information available relating to the nature and extent of such historic losses of citizens' property;

3. Prepare a list of all land to which such historic losses relate;

4. Identify any persons, whether individuals or bodies corporate, responsible for such historic losses of citizens' property; and

5. To refer, as appropriate, matters to the Director of Public Prosecutions for such further action as may be determined necessary by that Office.

15. The Premier's commission also made it clear that findings should be submitted within 40 weeks or such longer period as the Premier might direct.

16. Mr Marc Telemaque, Secretary to the Cabinet, says in an affidavit that:

> *The Cabinet took the view that the establishment of a Commission was a matter of importance to the people of Bermuda, particularly those who considered themselves and their families to have suffered losses of land through theft of property, dispossession of property and adverse possession claims and through diverse other unlawful and irregular means over the past decades. The depth of feeling attached to these historic issues was evident in the protest of the then Governor's decision not to issue a commission of inquiry. <u>The Cabinet determined that it was important to give a voice to as many of these people as possible</u>. The breadth of cases suggested the need for an investigation that would be wide enough to allow such cases to be reported and heard.* [Emphasis added]

17. The emphasised words are obviously consistent with my conclusions about the significance of the word 'all' in the resolution of the HOA.

18. On the first day of the Commission of Inquiry's open hearings, Mr Ivan Whitehall QC, senior counsel for the Commission stated that:

> *… once you take the context of the current order in counsel – particularly the context in which the words I've found – the word historic signifies both the temporary inquiry and as well as looking for a systemic injury and, therefore, the Commission should determine through the lens of the cases that have been filed before the Commission and based on the evidence it is about to hear, whether the evidence taken as a whole demonstrates a historical structural problem or systemic failure in identifying the lands where lands were historically lost by reason of theft, unlawful or irregular dispossession, unlawful or irregular adverse possession, or other unlawful or irregular means.*

19. Senior Counsel's written submissions also stated that:

> *Given the context in which the words are found historic signifies both a temporal inquiry as well as a systemic inquiry and I would submit that this Commission should determine through the lens of the cases filed before the Commission and based on the evidence it is about to hear whether the evidence taken as a whole demonstrates a historical structural problem or systemic failure and identify the lands where lands were historically lost by reason of theft, unlawful or irregular dispossession, unlawful or irregular adverse possession or other unlawful or irregular means whereby property was lost in Bermuda.*

20. Counsel's written submissions also stated that:

> *I suggest that systemic issues arise if it can be demonstrated that the cause of the loss transcends the individual case and demonstrates a legal, political or ethical culture that allows the named wrongs to have occurred.*

21. It should be noted that the 1st affidavit of Honourable Mr Wayne Perinchief, the Deputy Chair of the Inquiry, which was filed on behalf of the Commission of Inquiry:

> *… the interpretation of [the terms of reference] and scope of inquiry set out by Mr. Whitehall Q.C. in Counsel's Oral Submission and Counsel's Written Submission was discussed and debated in detail by the Commissioners prior to the opening day and accurately reflect the Commissioners' interpretation of [the terms of reference] and the scope of inquiry.*

22. Consistent with the oral and written statements of Mr Whitehall, the 1st affidavit of Mr Perinchief states that the Commissioners concluded that the term 'historic' was:

> *… intended to refer to all land losses that came about as a result of a systemic and conspiratorial regime, where the powerful deprived those with less or little power of their property.*

23. The affidavit continues that:

> *The Commissioners considered the requirement for losses to be systemic to be critical to the [Commission of Inquiry]. The*

Commissioners did not consider the purpose of the [Commission of Inquiry] to be of assistance to individuals with a commercial dispute where the individual believed there was injustice or irregularity.

24. The Commission of Inquiry submitted its report to the Premier on 31 July 2021. That covering letter was signed by the Commissioners including, Norma Wade-Miller J, as Chairman. That report was presented to the HOA on 10 December 2021. The report noted that:

> *The first Term of Reference is the cornerstone of the COI's mandate, setting the parameters of the Inquiry itself.*

25. The Commission of Inquiry's report sets out much of the background to the decision of the Premier to establish the Commission. It was said to be necessary to consider this because, according to it:

> *One of the primary challenges faced by the [Commission of Inquiry] was to determine its own scope of inquiry, <u>given the breadth of the Terms of Reference</u>.* [Emphasis added]

26. Later the report states:

> *One of the primary challenges faced by the COI was to determine its own scope of inquiry, given the breadth of the Terms of Reference. Because the first Term of Reference does not make specific reference to the expropriations at Tucker's Town and St. David's Island, the two expropriations with which Bermudians are most familiar, the COI determined that these events should be included generically along with any other matters that fall within the ambit of historic losses of property.*

27. The Commission of Inquiry's report noted that it needed:

> *... to formulate a working definition of the term "historic" as the qualifier for inquiring into losses of property by various means known to conventional law. This Term of Reference also presented the need to qualify the word "irregular" for the practical purposes of undertaking the mandate.*

28. The Commission of Inquiry's report noted examples of historic examples of land dispossession. It then commented that it commenced its work:

> *... recognizing early on the gravity and potentially extremely wide scope of its mandate ...*

29. The Commission of Inquiry's report noted that:

> *Before the COI could devise a comprehensive approach to its mandate and Terms of Reference, careful consideration had to be given to the context in which the COI was established. Its instrument of appointment authorized it to deal with alleged expropriations in Tucker's Town and St. David's Island, together with alleged injustices which might have occurred in relation to other land matters throughout the Island. <u>However, in considering such matters, the COI quickly recognized the limitations of the time, financial and manpower resources provided to it to research matters that had, in some cases, occurred over a century before</u>.* [Emphasis added]

30. The report of the Commission of Inquiry continues that:

> *... the COI decided that it should call for and examine evidence and then determine whether such evidence, taken as a whole, demonstrated a structural problem which was either historic in nature and/or which demonstrated systemic failure.* [emphasis added]

31. Although the passage of the report above suggests a focus on 'systemic' issues, the report of the Commission of Inquiry also states that:

> *Each case filed before the COI was examined with the COI then determining whether the particular case represented an instance of a historic loss of land by a citizen of Bermuda through "theft or dispossession of property, adverse possession claims or other unlawful or irregular means by which land was lost in Bermuda".*

32. The report also noted that:

> *The Commissioners determined that any case that had been, could be or was currently being litigated should not be before the COI, except for the purpose of demonstrating a systemic problem.*

33. The passages of the report set out in the paragraph above suggest that the Commission of Inquiry took account of its budget. It expressly referenced 'the limitations of the time, financial and manpower resources provided to it to research matters'. However, the 2nd affidavit of Mr Perinchief filed on behalf of the Commission of Inquiry states that:

> *The Commissioners did not allow the budget to impact whether or not claims fell with the [terms of reference] or the extent of the inquiry into these claims. The [Commission of Inquiry] in fact went over budget and the cost was in excess BMD $1 million.*

34. It might be said that there is an apparent inconsistency between the evidence of Mr Perinchief and the report of the Inquiry. The report the Commission's financial limitations. However, it appears to me the apparent inconsistency may be explained by the fact that the report and the evidence of Mr Perinchief are referencing different things. The report is referencing the interpretation of the terms of reference while the evidence is referencing the approach to cases that fall within the terms of reference.

35. Mr Davis points to the fact that the Commission of Inquiry found that the Tucker's Town land transfers were lawful but irregular. The basis for this finding of irregularity appears to have been findings that:

> *... agrees that the integrity of the entire process for compulsory purchase of property in Tucker's Town in the 1920s is called into question as being unequal, inequitable, prejudicial and carried out in an ad hoc manner.*

Mr Davis's involvement with the Commission

36. Mr Davis's affidavit states that:

> *I sent a submission to the Commission which included two claims: (1) irregular lending practices in a General Improvement Area (GIA) combined with retaliation based on my political affiliation by officers of the Bermuda Housing Corporation (BHC), resulting in a significant loss of property; and (2) the targeting of myself and other black businessmen who were merely innocent clients of the Bank of Bermuda during a criminal investigation conducted by Scotland Yard, no less, of an alleged fraud ring involving former bank manager Arnold Todd, resulting in an enormous loss*

of real property and the financial ruin of many black Bermudian men and, by extension, their families, including myself.

37. I have read both claims. These are lengthy documents that do not appear to have been drafted by a legal professional. They are also not expressly focused on demonstrating that the terms of reference of the Commission of Inquiry are engaged. However, it appears to me that the summary above is broadly fair. I know that the Second Respondent does not necessarily accept that. However, it appeared to me that the Commission failed to identify any basis for arguing that the summary is not fair. More importantly, the Commission asked me to consider the terms of the full application made by Mr Davis. I have done that. I simply rely on the paragraph above as a helpful summary for the purposes of this judgment.

38. The Commission of Inquiry ultimately concluded that Mr Davis's cases did not fall within its terms of reference. That decision was initially communicated in a letter dated 11 May 2020. In relation to the first complaint, the letter stated that:

> *The Commission is of the view that this is a commercial dispute between you and the Bermuda Housing Corporation and does not fall within the mandate of the Commission. Without commenting on: the merits of your case, the Commission is of the view that your dispute is best handled by the courts and you should seek legal advice regarding what remedies, if any, are available to you at this time.*

39. In relation to the second complaint, the letter stated that:

> *As in the case with your complaint relating to the Bermuda Housing Corporation, this is a commercial dispute between*

you and the Banks and the Pension Fund and, as such, is not within the jurisdiction of the Commission.

40. Following that letter, the Commission of Inquiry met on 17 June 2020. The minutes record that:

> *The members agreed that the applicant had 'no claim' as both were commercial disputes.*

41. Mr Davis challenged the decision of the Commission of Inquiry in an e-mail dated 6 July 2020.

42. On 1 October 2020 the Commission of Inquiry wrote to Mr Davis. It stated that:

> *As a result of several cases filed with it, the Commission has decided to investigate historical lending practices in Bermuda that may have led to a loss of land. Your allegations appear to raise issues that may be relevant to this matter. Thus the Commission is prepared to hear the evidence you have to offer relating to this matter as part of background information relating to banking practices on the Island, but in its final report it will not comment or make recommendations regarding your specific case.*

43. On 9 October 2020 the Commission of Inquiry e-mailed Mr Davis. It stated that:

> *To be clear, the Commission is not a court of law. Rather, it investigates historical systemic issues relating to land grabs in Bermuda. It does not and cannot grant remedies to any claimant. If it decides that systemic issues need to be*

addressed, it may make a recommendation to the Government of Bermuda as may be required to resolve such systemic problems.

44. Mr Perinchief's affidavit records further detail of the history set out above. It is should be noted that the affidavit states that:

> *… the Commissioners never granted Mr. Davis standing in the sense of accepting that the BHC Claim or the Bank of Bermuda Claim fell within the [terms of reference] or scope of inquiry. The Commissioners always considered Mr. Davis's claims as not being systemic and being commercial disputes. While the Commissioners wanted to do all they could for Mr. Davis …, ultimately it was decided that the investigation should not be pursued because it was neither systemic nor demonstrative of unlawful or irregular means by which land was lost. The claims were simply outside the [terms of reference] and so the [the Commission] did not have jurisdiction to hear or investigate them. …*
>
> *Mr. Christopher Swan, a property lawyer, gave evidence … [counsel to the inquiry] put to Mr. Christopher Swan that in the perception of some borrowers, a recalled mortgage was "a land grab", it was the stealing or unlawfully taking. Mr. Christopher Swan responded "The bank owns the property until you pay off the debt and if you don't pay off the debt, it's not illegal for the bank to retrieve those monies that have been borrowed."*
>
> *In the absence of any evidence that the "retrieval" by the bank of monies borrowed by Mr. Davis was both an irregular means by which his land was lost and was systemic in the sense*

> *described above, the Commissioners took the view that the BHC Claim and the Bank of Bermuda Claim were not appropriate cases for the [Commission of Inquiry] and that any investigation into those cases should not proceed.*

45. Mr Perinchief concludes his review of the Commission of Inquiry's approach to Mr Davis's case by stating that:

> *The Commissioners were prepared to investigate Mr. Davis's claims provided they met the criteria that his loss was the result of systemic practices that his loss of land was caused by irregular means. However, the Commissioners were ultimately of the view that there was no evidence upon which it could conclude that it was systemic or that the conduct of the lending institutions was unlawful or irregular.* [Emphasis added]

46. I have set the material above at length because there was debate about the approach that the Commission of Inquiry adopted to Mr Davis's case. Ultimately, the Commission argued that it had concluded that the loss of land in Mr Davis's case was commercial and therefore his land was not lost by 'such other unlawful or irregular means'. In addition, it argued that it found that the loss of land was not systemic 'which was a concept that underpinned the COI' (per note submitted by counsel for 2nd Respondent dated 13 July 2022). I accept that the Commission relied upon findings regarding the commercial nature of the transaction as well as a finding that the case was not systemic as the basis for concluding that Mr Davis's cases were outside the scope of the terms of reference. I will consider later whether that was a lawful approach.

Mr Piper's involvement with the Commission

47. Mr Davis's 1st affidavit accepts that Mr Piper's complaint was 'partially investigated'.

48. Mr Perinchief's affidavit states that:

> *The fact is, however narrowly the Commissioners interpreted the ToR, Mr. Piper was granted standing before his application for judicial review was filed and so he cannot now complain that he has been adversely impacted by the Commissioners' interpretation and application of the ToR.*

49. In oral submissions, Mr Piper essentially sought to argue that the Commission of Inquiry had failed to act fairly towards him. I have not set out the detail of the arguments because it appears to me that they are irrelevant. I have set out the grounds in support of the application for judicial review below. The important point to note is that they do not include a procedural challenge. They are focused on the Commission of Inquiry's terms of reference. Those terms of reference did not prejudice Mr Piper as his matter was found to be within scope.

Grounds

50. The Form 86A filed by the Applicants identified the first 2 grounds as being:

> *The Commission is ultra vires the Commissions of Inquiry Act 1935 ("the Act") for the following reasons:*
>
> *(a) The Commission is ultra vires Section 1(1) of the Act due to the too broad wording of the Terms of Reference set by the Premier of Bermuda to establish the Commission. By way of the lack of specificity of the time-span of the Commission's*

remit (no definition of "historic"); the lack of specificity of what the terms "other unlawful or irregular means" constitute; the lack of specificity on which "individuals" and "corporate bodies" are covered by the Commission's remit - the Commission is, in effect, exercising an absolute discretion with regards to the Terms of Reference. This has led to a lack of consistency exhibited by erratic, arbitrary and constantly changing decisions as to what matters actually fall within its jurisdiction. and/or

(b) The Commission is ultra vires Section 6 of the Act. If the Premier deliberately intended the Terms of Reference to be broad, then the Commissioners are unlawfully restricting the remit by excluding certain individuals and/or corporate bodies from exposure and examination, and thereby not making a "full, faithful and impartial inquiry into the matter specified in their commission."

As a result of the above, the Commission is not properly operating under the Act and, in the process, is harming the public welfare contrary to the stated intentions of the Premier's appointment in the Official Gazette.

2) It is unreasonable and irrational that the appointing authority (the Premier of Bermuda) would not have given more detail and specificity as to the parameters (timeframe) and persons (whether individuals or corporate bodies) covered by the Terms of Reference as a matter of public interest - to

> *avoid the confusion that has pursued the Commission's erratic decisions, which are themselves unreasonable and irrational.*

51. It appeared to me that, although the grounds set out above are not entirely clear, they essentially argue that the terms of reference were unlawfully vague or broad. Alternatively, if the grounds were broad, the Commission had breached section 6 of the 1935 Act. I granted permission in relation to this ground on 3 March 2022.

52. I granted leave for the grounds to be amended to add a further ground in replacement for ground 3 as initially drafted. In particular, on the basis of the oral and written submissions of the Applicants it appeared to me that a further question arose. That question is closely linked to the grounds that have leave. That question also appeared to me to be what the Applicants understood the initial draft of ground 3 to mean. That was whether the terms of reference were misunderstood/misapplied by the Commission of Inquiry if they were not excessively broad. As a consequence, the additional ground in relation to which I granted leave states that:

> *To the extent that the Terms of Reference are lawful, the Commission of Inquiry failed to apply their true breadth.*

53. This ground overlaps with ground 1(b) but not dependent upon section 6 of the 1935 Act.

Procedural history

54. As noted above, I granted leave to apply for judicial review on 3 March 2022. It should be noted that I refused leave in relation to a fourth ground. That was relied upon by the Applicants to argue that the Commission of

Inquiry was neither independent nor impartial. In summary, I refused leave in relation to that ground on the basis that:

a. The statements of Walton Brown in the HOA could not found a legitimate expectation as to who should be appointed to the Commission of Inquiry. The statement was not made by the appointing authority.

b. There was no evidence that suggested a lack of independence or impartiality. Instead, the recusal of Wade-Miller J in the case of Mr Piper demonstrated a sensitivity to possible issues of unconscious bias.

55. Nothing that I have heard during the course of hearing the substantive judicial review application causes me to question the conclusions I reached at the leave hearing.

56. On 3 March 2022 I also made a number of directions for case management.

57. On 23 May 2022 I heard argument regarding an application for a summons issued by the first Respondent. I also considered case management. At the end of that hearing I issued a number of directions including directions governing any application by the Applicants for further disclosure and/or oral evidence.

58. On 6 June 2022 I rejected the Applicants' application for further disclosure and/or oral evidence. I applied well-known authority (*Tweed v Parades Commission* [2007] 1 AC 650 and *R (Jedwell) v Denbighshire County Council and others* [2016] PTSR 715) to conclude that fairness did not require further disclosure or cross-examination. In essence, that was because the extra evidence sought and the cross-examination sought did not appear to me to be relevant to what was in issue in this case. For example, Mr Davis

made reference to the motives of the Commission of Inquiry. However, it appeared to me that motive was irrelevant. Either the Commission of Inquiry directed itself lawfully regarding its terms of reference or it did not. I have kept the issues of disclosure and oral evidence under review as I heard this case. Nothing that I have seen or heard calls me to doubt my conclusion that fairness did not require further disclosure and oral evidence.

59. Subsequently, 2 further applications for leave to apply for judicial review were lodged in the matters of Robert Moulder and LeYoni Junos. All parties sought an adjournment of this judicial review application to enable leave to be determined in the new claims first. I heard oral argument regarding this application on 1 July 2022. Further, although I was far from certain that Mr Moulder and Ms Junos had standing to seek an adjournment of this application, I heard from them regarding adjournment on 5 July 2022. The arguments presented by the parties were not identical. However, they included that the Court would potentially be better informed if all matters were considered together and that costs would potentially be saved. Applying the overriding objective set out in order 1A of the Rules of the Supreme Court (GN 470/1985), I refused the application to adjourn for the following reasons:

    a. An adjournment at this late stage would cause a significant waste of court resources. Although some of the scheduled hearing could be used to determine leave in the new matters, several days of court time would be wasted.

    b. I had already carefully reviewed whether the Court had the material it needed to determine this application. I had concluded that it did. Nothing I had seen demonstrated that the new applications would cause material to be available that was relevant. There was very little overlap between new grounds raised by the new applications and the grounds already before the Court. If any party to this application

believed that the new applications had identified relevant evidence, they could apply to admit it.

c. Listing the new leave applications to follow this substantive application might result in there being a single hearing if leave was refused. That would be the only circumstances in which a single hearing could take place and my intention was to facilitate that. The course proposed by the parties would inevitably cause 2 hearings. Further, if leave was to be granted in the new matters, there was likely to be little time saved by linking the new matters and the existing matters because of the limited overlap between the issues.

d. It was in the public interest to resolve these applications as soon as possible.

60. I am of the opinion that nothing subsequently has called into question my approach. I remain satisfied that this matter can be tried without leave being determined in the matter of Mr Moulder and Ms Junos. It should be noted that I have now heard those leave applications so have a good understanding of the issues raised. I will deliver my judgment in that matter at the same time as this judgment is delivered.

62. Unfortunately, an application for leave to appeal against my judgment regarding disclosure and oral evidence was listed on 5 July 2022 but overlooked. In part that was because no party alerted the Court to the matter. In any event it was listed at the start of the substantive hearing on 11 July 2022. I determined that there was no merit in an appeal and refused leave to appeal. That was because my judgment regarding discovery and oral evidence involved the application of well-established principles. I do not believe that any prejudice was caused by the failure to determine leave on 5 July 2022.

63. At the start of the hearing, an originating motion was issued arguing that I had denied the Applicants (and Mr Moulder and Ms Junos) a fair hearing. I initially proposed a way forward to the parties. In light of the fact that the parties were uncertain about my proposal, I decided that the originating motion should be case managed by another Justice of the Supreme Court. I have made arrangements for this and will say nothing more about the originating motion.

Legal framework

65. Section 1 of the 1935 Act provides that:

> *(1) The Governor may, whenever he considers it advisable, issue a commission appointing one or more commissioners and authorizing them, or any quorum of them therein mentioned, to inquire into the conduct of any civil servant, the conduct or management of any department of the public service or into any matter in which an inquiry would in the opinion of the Governor be for the public welfare.*
>
> (2) *Each such commission shall specify the subject of inquiry, and may, in the discretion of the Governor, if there is more than one commissioner, direct which commissioner shall be chairman, and direct where and when such inquiry shall be made, and the report thereof rendered, and prescribe how such commission shall be executed, and may direct whether the inquiry shall or shall not be held in public*. [Emphasis added]

66. Section 1A of the 1935 Act provides that:

> *(1) The Premier shall, in addition to the Governor, have the authority to issue commissions of inquiry under this Act.*
> *(2) When the Premier acts under subsection (1), sections 1 to 6 and 11, and the First and Second Schedules, shall be read with "Premier" in place of "Governor", and the rest of those provisions shall be construed accordingly.*

67. This makes it clear that the Premier can exercise the powers of the Governor identified in section 1 (as well as other powers set out in the 1935 Act). Obviously, in this case it was the Premier who established the Commission of Inquiry. Given either the Governor or the Premier can appoint a Commission, I will refer later in this judgment to decision makers exercising powers under section 1 of the 1935 Act as the Appointing Authority.

68. Section 6 of the 1935 Act provides that:

> *The commissioners shall, after taking the oath, make a full faithful and impartial inquiry into the matter specified in their commission, and shall conduct such inquiry in accordance with the direction (if any) in the commission, and shall, in due course, report to the Governor, in writing, the result of such inquiry; and the commissioners shall also, when required, furnish to the Governor a full statement of the proceedings of the commission, and of the reasons leading to the conclusions arrived at or reported.*

69. I have set out section 6 at this stage because it appears to me to be clear that sections 1 and 6 should be read together. In summary, section 1 makes it clear that it is the Appointing Authority who determines what a commission of inquiry shall investigate. Section 6 then imposes duties on the commissioners to investigate whatever is specified in the terms of reference. It should be noted, in particular, that the obligation is to conduct a 'full'

investigation. There is no discretion to investigate only some matters that are within the scope of the terms of reference.

70. In light of the matters above, the requirement in section 1 of the 1935 Act to 'specify the subject of inquiry' is clearly of importance. It is section 1 that provides the Appointing Authority with power and duty to specify what a commission of inquiry must investigate. In *Re Royal Commission on Licensing* [1945] NZLR 665, the New Zealand Court of Appeal held that a commission of inquiry:

> *… is not a roving Commission of a general character authorizing investigation into any matter that the members of the Commission may think fit to inquire into…the ambit of the inquiry is limited by the terms of the instrument of appointment of the Commission.*

71. The need for restrictions on the scope of a Commission of Inquiry mean that it is important that the terms of reference clearly 'specify the subject of inquiry'. Unless the terms of reference are clear, there is a risk that the Commission of Inquiry will become 'roving'.

73. In *Ratnagopal v Attorney v General* [1970] AC 974 the Privy Council considered a warrant that:

> *… empowered a commissioner to inquire into and report whether during the period in question any abuses occurred in relation to such tenders and such contracts as the commissioner should in his absolute discretion deem to be, by reason of their implications, financial or otherwise, on the Government, of sufficient importance in the public welfare to warrant an inquiry and report.* [Headnote of the law report]

74. The Privy Council held that was unlawful as the commissioner was entrusted with deciding what tenders and what contracts required to be inquired into so that the scope of the inquiry was left entirely to the commissioner's discretion. The Privy Council held that the power to commission a Commission of Inquiry had to be construed ‘quite strictly’ in light of the need for witnesses to understand the limits of the Commission to question them.

75. In *Bethel v Douglas* [1995] 1 WLR 794 Lord Jauncey held that:

> *… the Governor-General must specify the matters to be inquired into and is not entitled to leave it to the commission to determine what those matters are to be.* (802F-G)

76. In *Bermuda Emissions Control Ltd* this Court cited *Ratnagopal*. It noted that this authority establishes that:

> *A commission which is so broadly framed as to purportedly empower the appointed body to determine the scope of its own jurisdiction will be unlawful and struck down by the courts.* [12]

77. This Court noted that as a consequence:

> *… it is for the appointing authority to determine the ambit of inquiry, not the appointed body itself.* [13]

78. This Court also stated that:

> *A basic rule of evidence is that witnesses are only required to answer relevant questions. It must be possible to easily*

> *determine what is or is not relevant by reference to well-defined terms of reference.* [16]

79. This judgment was appealed to the Court of Appeal (16/2016, unreported, 20 December 2016). The Court of Appeal distinguished *Ratnagopal* on the basis that:

> *… the Commission is given a discretion to limit rather than expand the inquiry. It is, sensibly, not required to look into insignificant violations.* [17]

80. The Court of Appeal held that it was open to the Commission of Inquiry to determine what was significant. That was apparently because such a determination was part of the management of its process [20].

81. In *Robinson and Been v Auld and Attorney General*, Turks and Caicos Islands Supreme Court, CL 83/08, unreported, 28 July 2008 it was held that the terms of reference:

> *… must be sufficiently clear to allow any person who is under inquiry or summoned before it to know the matters about which he is to be examined. What is sufficient in any particular case is a matter of degree and, however precisely the terms are specified, there will inevitably be some aspects which, in practice, have to be left to the sense and experience of the Commission to determine.*

82. There is an obvious similarity between the approach adopted in *Bermuda Emissions Control Ltd* and that in *Robinson and Been*. In both cases there is a focus on the need for those summoned before a commission of inquiry to have clarity about what they can be questioned about. That seems to me to reflect the approach in *Ratnagopal.* It also reflects the language of sections

1 and 6 of the 1935 Act. That language makes it clear that the terms of reference need to be sufficiently clear because ultimately, they determine what a commission has a duty to investigate. Obviously a commission can only determine a person in accordance with their duty.

83. The use of the phrase 'sufficiently clear' in *Robinson* suggests that perfection is not required. That is because absolute certainty is likely to be almost impossible to achieve. I agree with the approach in *Haughey v Moriarty* [1999] 3 IR 1 in which Geoghegan J held that:

> *I do not take the view that a resolution not in perfect form must necessarily fail.*

84. The reference to a resolution is essentially to what in this context is a commission establishing a commission of inquiry.

85. In *Re Royal Commission on Licensing* the terms of reference in issue included a provision that stated:

> *And generally to inquire into and report upon such other matters arising out of the premises as may come to your notice in the course of your inquiries and which you consider should be investigated in connection therewith, and upon any matters affecting the premises which you consider should be bought to the attention of the Government.*

86. There was no direct challenge to this provision. It was said that:

> *The paragraph is what might be called an "omnibus" paragraph intended generally to gather up previously unspecified matters arising out of or affecting the premises.*

87. I was at first concerned by the apparently broad terms of reference. However, it appears to me that little can be derived from the terms of reference in *Re Royal Commission on Licensing*. In addition, it is clear that the broad provision cited above was clearly narrowed as it was essentially parasitic on earlier provisions.

89. In *Bermuda Emissions Control Ltd* this Court adopted the following approach to the interpretation of the terms of reference of a commission of inquiry:

> *… linguistic contortions can never be justified when the natural and ordinary meaning of the words of an instrument, in their proper context, conform entirely to rationality and common sense and do not result in a manifestly absurd or unworkable result.* [24]

90. 2 reasons were given for this approach:

> *(a) the commission being construed is an official Government instrument, which is entitled to the benefit of the presumption of validity in relation to official acts (omnia praesumuntur rite esse acta); and*
> *(b) there is general legal policy interpretation leaning in favour of upholding the validity rather than the invalidity of statutory and other legal instruments (ut res magis valeat quam pereat).* [24]

91. It appears to me that these principles may also require a departure from the natural language of a commission where that natural language may produce irrationality or other public law error.

92. In *Re Royal Commission on Licencing* an argument that a particular interpretation should be adopted was rejected on the basis that:

> *A construction of the instrument that would confer such powers upon the Commission, assuming such interpretation to be possible (which, in my opinion, it is not), would, in my view, be so unreasonable as that, if the document is capable of a more reasonable construction not involving such consequences (as, in my opinion, it is), the more reasonable construction should be adopted.* (p683)

93. That is obviously consistent with the 2 principles identified in *Bermuda Emissions Control Ltd*.

94. In the context of statutory construction, the courts have warned against the dangers of seeking to define a broad term (e.g. *South Yorkshire Transport Ltd v Monopolies and Mergers Commission* [1993] 1 All ER 289 at 295). One reason for that is that:

> *... a provision needs to deal with a broad range of circumstances and it is not possible to anticipate them all in advance* (*Bennion, Bailey and Norbury on Statutory Interpretation*, 8th Edition, at [22.2])

95. In *Bermuda Emissions Control Ltd* the Court of Appeal appeared to conclude, in obiter remarks, that it would have been possible to imply a limitation into the terms of reference of a commission of inquiry so that it was not required to look into insignificant matters. That limitation could have been implied in light of the timeframe given for the commission to report [17].

96. In *Haughey v Moriarty* [1999] 3 IR 1 Geoghegan J held that it was not permissible to reference parliamentary materials when interpreting the terms of reference of a public inquiry established by the executive.

97. Although I understand the approach of Geoghegan J and believe that it may be applicable in some cases, it appears to me that it is very difficult to ignore the debate in the HoA in this case. The terms of reference make express reference to the motion passed by the HoA following parliamentary debate. The debate, the motion, the evidence of Mr Telemaque and the terms of reference all appear to be broadly consistent. It has been recognised that parliamentary debate can provide an indication of the objectives of legislation (*Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816 at [63]). I can see no reason why the same approach should not be applied to the interpretation of terms of reference such as those in issue. However, it is important to be cautious applying this principle. As was noted in *Wilson*:

> *Different members may well have different reasons, not expressed in debates, for approving particular statutory provisions.* [67]

98. Some care also needs to be applied to reasons provided during the course of litigation such as this application for judicial review. The case law regarding this topic was reviewed by Chamberlain J in *Inclusion Housing Community Interest Company v Regulator of Social Housing* [2020] EWHC 346 (Admin) who held that:

> *So far as ex post facto reasons are concerned, the authorities draw a distinction between evidence elucidating those originally given and evidence contradicting the reasons originally given or providing wholly new reasons: ... Evidence of the former kind may be admissible; evidence of the latter kind is generally not. Furthermore, reasons proffered after the*

> *commencement of proceedings must be treated especially carefully, because there is a natural tendency to seek to defend and bolster a decision that is under challenge* [78].

100. In *Public Inquiries*, Jason Beer QC, Oxford University Press, it is stated that:

> *It has long been recognized that a public inquiry ought to interpret and then publicly explain its own interpretation of its terms of reference.* [2.109]

101. The approach to the interpretation of policy is clear. It is for the courts interpret policy (e.g. *R (O) v Secretary of State for the Home Department* [2016] 1 WLR 1717 at [28]). If it is decided that policy has been interpreted correctly, the application of the policy can then only be challenged on the basis that the application was irrational (*Gladman Developments Ltd v Canterbury City Council* [2019] EWCA Civ 669 at [22]).

102. Section 8 of the 1935 Act provides that:

> *The commissioners acting under this Act may make such rules for their own guidance and the conduct and management of proceedings before them, and the hours and times and places for their sittings, not inconsistent with their commission, as they may from time to time think fit, and may from time to time adjourn for such time and to such place as they may think fit, subject only to the terms of their commission.*

103. Section 8 makes it clear that it is for the Commission to determine its own procedure. As a consequence, a distinction is drawn between procedure

which is governed by the Commission applying section 8 and substance which is governed by the Appointing Authority applying sections 1 and 6.

Arguments of the parties

104. I have read the skeleton arguments filed on behalf of all parties. I have also listened carefully to the oral arguments of the parties. I will merely summarise the contents of the skeleton arguments and the oral argument. Any failure to repeat a matter identified in the skeleton arguments or in oral argument does not mean that I have not considered it.

105. Mr Davis argues that:

a. The Commission of Inquiry's statement that it needed to determine the parameters of its inquiry demonstrate the terms of reference were too vague. He points to the absence of any definition of terms such as 'historic' or 'irregular'.

b. The Commission of Inquiry had no authority to reduce the scope of its remit.

c. The Commission of Inquiry misunderstood the scope of its terms of reference.

106. Mr Davis has raised issues in his skeleton argument that are not covered by the grant of leave. For example, he has argued that the Commission of Inquiry discriminated in its approach to its terms of reference. That is not covered by the grant of leave and there has been no application to amend the grant of leave. Similarly, orally Mr Davis sought to emphasise the approach to the Darrell family case. However, it appears to me that any specific issues arising from the Darrell family case cannot before me. The

Darrell family case was not raised by the Applicants until after the grant of leave (and in response to Respondent evidence).

107. Mr Davis filed further written submissions on 21 July 2022. These were apparently submitted after the deadline I set. However, I have considered them. It appears to me that they take arguments no further.

108. Mr Piper adopted the arguments of Mr Davis.

109. Mr Piper also seeks to raise issues in his skeleton argument that are not covered by the grant of leave. For example, he has argued that the Commission of Inquiry has failed to ensure procedural fairness.

110. The Premier argues, among other matters, that:

a. Any commission of inquiry is entitled to interpret its own terms of reference.

b. As already indicated, the objectives of the Commission of Inquiry were broad. However, the Commission had an implied power to narrow its terms. The factors that the Commission would need to consider when narrowing its terms would be for the Commission to determine.

112. The Commission of Inquiry argues, among other matters, that:

a. The dominant provision when interpreting the provisions of the terms of reference is paragraph 1. This defines the scope of matters to be investigated applying paragraphs 2 onwards.

b. In light of the context to the establishment of the Commission of Inquiry, it is clear that historic within the terms of reference does import some consideration of whether issues are systemic.

c. The term 'irregular' must be coloured by the earlier words of paragraph 1. Those words shed light on the sort of irregularity that the Commission of Inquiry was required to address.

d. The focus on whether Mr Davis's transactions were commercial is a reference to the requirement for the transactions to be irregular.

e. Part of the context that needs to be considered is the need for the Commission to conclude its work within a reasonable period of time.

f. The only evidence relied upon by Mr Davis relates to his case and there is no evidence that any misdirection is material in any other case. In Mr Davis's case the evidence does not demonstrate that any error is material.

Analysis

113. It appears to me that the first issue that I need to consider is whether I am required to accept the Commission of Inquiry's interpretation of its terms of reference (providing that that interpretation is not for some reason a breach of public law). Although I accept that the Commission of Inquiry was entitled to consider and interpret the meaning of its terms of reference at an early stage (indeed it was probably required to consider this issue (*Public Inquiries*, Jason Beer QC)), this cannot mean that the Commission had the power to determine its own terms of reference. It must correctly interpret the terms of reference set for it. Consistent with this, in cases such as *Re Royal Commission on Licensing* and *Bermuda Emissions Control Ltd* courts have sought to interpret the terms of reference of public inquiries. That is hardly surprising. If it were for the Commission to determine the

meaning of its own terms of reference, that would undermine the division of responsibilities identified above. As already set out above, it is clear that it is for the Appointing Authority to determine what the Commission must investigate. The Appointing Authority sets terms of reference that must have a single legally correct meaning that the Commission must then comply with. Were that not the case, the Commission would be determining its own terms of reference contrary to the principle in *Ratnagopal*.

114. I should add that my conclusions in the paragraph above is supported by the approach adopted to the interpretation of policy. This makes it clear that there is a distinction drawn between the meaning of policy (which defines the rules to be applied by a decision maker) and the application of policy (*O* and *Gladman Developments Ltd*). If the interpretation of policy (as well as statutory rules) are a matter for the Court, it appears to me that there is no reason why the Commission should be given greater latitude regarding the meaning of terms of reference. The approach is applied because of the need for legal certainty when a legal instrument determines rights. A commission establishing a commission of inquiry does that. For example, it determines what witnesses can be questioned about.

115. In light of my conclusion in the two paragraphs above that there is a single legally correct meaning of the terms of reference set by the Premier in this case, it appears to me that the next issue I need to consider is what that meaning is. That is relevant both to determine whether the terms of reference violate the rule identified in *Ratnagopal* that the scope of the inquiry should not be left entirely to the commissioner's discretion and to determine whether the Commission of Inquiry misapplied its terms of reference.

116. In considering the interpretation of the policy, I will apply the principles identified above. In summary:

a. The starting point is the language of the terms of reference (*Bermuda Emissions Control Ltd*). In general the language should be applied if it consistent with rationality and common sense (*Bermuda Emissions Control Ltd*).

b. I should construe the terms of reference in a manner that favours upholding their validity (*Bermuda Emissions Control Ltd*). Consistent with this, I should avoid an interpretation that produces an unreasonable construction (*Re Royal Commission on Licensing*).

c. I can consider the context of the terms of reference (including the parliamentary debate) (*Wilson*).

d. I need to be cautious about seeking a precise meaning for a broad term that has been used to reflect the fact that it is intended to cover a wide range of circumstances (*Bennion*).

118. Applying the approach summarised above, I have reached the following conclusions regarding the terms of reference:

a. The terms of reference are drafted in a manner that is far from perfect. As noted below, it appears that the natural meaning of the terms of reference would go far wider than intended and would be unworkable. That, however, does not necessarily mean that they are flawed.

b. It is clear that paragraph 1 is the central provision that defines what matters the Commission of Inquiry. That is demonstrated by, among other matters, the use of the word 'such' in paragraphs 2 to 4. The use of the word 'such' demonstrates that it is paragraph 1 that defines the obligations in paragraphs 2 to 4. That, however, does not mean that paragraphs 2 to 4 are irrelevant to the interpretation of paragraph 1 as I will seek to explain below.

c. Paragraph 1 has at least 2 terms that are potentially uncertain: 'historic' and 'irregular'. The starting point when seeking to understand those terms is their natural meaning. The first definition of the word 'historic' in the Oxford English Dictionary, Online Edition is 'concerned with past events'. That meaning of the word 'historic' suggests that the terms of reference are concerned with anything that happened in the past. Applying that definition, there is no temporal limit on what past matters can be considered. For example, the terms of reference are not limited so that the Commission is only required to consider matters within the last 100 years. The word 'irregular' must mean something other than unlawful because otherwise it would be otiose. The Commission of Inquiry appears to have applied this approach in relation to Tucker's Town. The first definition of word 'irregular' in the Oxford English Dictionary, Online Edition is '[n]ot in conformity with rule or principle; contrary to rule; disorderly in action or conduct; not in accordance with what is usual or normal; anomalous, abnormal'.

d. I accept the submission of the 2nd Respondent that the approach to the terms of reference suggested by the analysis of the language in the sub-paragraph above would be likely to be unreasonable. It would allow anyone disgruntled by a land transaction in the past where they lost land to complain to the Commission of the Inquiry and seek a review. A powerful person could potentially allege illegality despite the fact that the Commission was clearly intended to be focused on the powerful. That would potentially impose an unreasonable burden on the Commission. It should be noted that the Commission was required to report within 40 weeks. Although that period could be extended, the presence of a short time limit within the terms of reference suggest that the Commission was not intended to be faced with an unrealistic burden. This implies I should consider

whether there is some alternative more reasonable interpretation of the terms of reference.

e. The context of the terms of reference is clear from the debate in the HOA, the HOA motion and the evidence of Mr Telemaque. It appears to me that all these sources point in one direction. It appears to me that it is clear that there was concern that land had unjustly been lost as a consequence of the actions of 'the rich, the powerful and the connected' (per Mr Brown MP). Further, the concern was to ensure that as many as such cases as possible were considered. For example, the motion referred to the need to review 'all such known claims'. Further, Mr Telemaque's evidence refers to the need 'to give a voice to as many of these people as possible'. In considering the statements of Mr Brown, I have taken account of the fact that he is a single member of the HOA (albeit one who appears to have paid a key role in the process that led to the Commission of Inquiry). I have also taken account of the fact that there is no contemporaneous material that supports Mr Telemaque's evidence about the reasoning of the Cabinet. However, as already noted, all of this material is consistent with the terms of reference and so it appears to me that I can legitimately consider it.

f. I have considered whether the terms of reference are restricted to land expropriations or grabs. The citation of the evidence of Mr Swan by Mr Perinchief in his affidavit suggests that may have been the case. However, it appears to me that such an approach is inconsistent with the debate in the HOA, the HOA motion and the evidence of Mr Telemaque. All of this material suggests that the focus is on power imbalance rather than particular mechanisms used to deprive people of property.

g. The key consequence of my conclusion in paragraph e. above is that it appears to me that 'irregular' can and should be given a technical meaning in this context. It appears to me that 'irregular' can be understood to mean cases where there is a power imbalance as described by Mr Brown MP. I was initially minded to conclude that 'irregular' should also be interpreted applying a ejusdem generis construction (i.e. a construction that would define 'irregular' by reference to the earlier categories of case identified in paragraph 1). It appeared to me that the use of the word 'such' in paragraph 1 might imply such an approach. However, having considered the matter further it appears to me that that approach is wrong. It appears to me read as a whole, that the use of the word 'irregular' in paragraph 1 is intended to ensure that the Commission was not limited by technical arguments about legality and nature of the mechanism used to deprive a person of their land. As a consequence, it was intended to be wider than the preceding words in paragraph 1. It appears to me that the use of the word 'such' was simply intended to make it clear that any irregularity must have resulted in land loss.

h. I have considered whether my approach in the sub-paragraph above violates the principle that courts should seek to avoid defining broad terms (*Bennion*). It can be argued that 'irregular' is a broad term intended to reflect the fact that the Commission of Inquiry is required to consider a wide range of cases where there is no illegality. The problem with that argument is that it does potentially impose an impossible burden on the Commission. It would require the Commission to consider cases that are unrelated to the concerns that caused the Commission of Inquiry to be established. That would potentially cause very substantial delay. As a consequence, what I have sought to do is identify a broad approach that is not unworkable.

i. The other matter that arises from the material summarised in sub-paragraph e is relevant to an issue that has not straightforward. That is whether there is an implied power to exclude cases that would otherwise come within paragraph 1 on some basis such as a finding that an irregularity is not significant. In *Bermuda Emissions Control Ltd* it was suggested in obiter remarks (i.e. remarks that do not bind me) that such a power might be implied where it was necessary to avoid a commission inquiry being faced with an impossible burden. I have reached the conclusion that there is no implied power. Firstly, it appears to me that it would be very difficult to determine objectively the scope of such a power. That implies the existence of such a power might violate the principle in *Ratnagopal* by permitting the Commission of Inquiry to determine its own terms of reference. I recognise that in *Bermuda Emissions Control Ltd* it was held that it can be legitimate for a commission to be 'given a discretion to limit rather than expand [an] inquiry'. However, that was in the context of an express provision providing such a discretion. Here the absence of any clear discretion would require the Commission to determine how it would exercise its discretion. That would mean that it would have to determine its terms of reference. Secondly, the evidence of Mr Telemaque suggests that the Commission of Inquiry's work was intended to be comprehensive. That is consistent with the terms of reference that suggest the need for a comprehensive investigation. For example, paragraph 3 requires a list of 'all land' lost to be prepared. A discretion would cause some cases not to be considered. Thirdly, it would have been easy for the terms of reference to make express reference to a discretion as they did in *Bermuda Emissions Control Ltd*. Finally, the existence of a discretion does not fit easily with section 6 of the 1935 Act, which requires a 'full' investigation.

j. In light of the matters above, it appears to me that the terms of reference require an investigation of any case where it is alleged that there was an imbalance of power in the past that caused a loss of land. I will review that conclusion below when I come to the approach of the Commission of Inquiry.

119. If my interpretation of the terms of reference is correct, it appears to me that there is no failure to comply with the principle in *Ratnagopal* (as explained in subsequent judgments such as *Bermuda Emissions Control Ltd*). The Court cannot expect the terms of reference to be perfect (*Haughey*). The terms of reference need to be 'sufficiently clear' (*Robinson*). Here the terms of reference are 'sufficiently clear'. Properly interpreted there is clarity about what the Commission must investigate. It has very little discretion. I accept that the Commission's report includes statements that suggested it needed to determine its own terms of reference. However, it appears to me that what the Commission needed to do and did was interpret its terms of reference. The key issue is whether it misinterpreted its terms of reference.

120. It appears to me that the evidence demonstrates several features of the Commission of Inquiry's approach to its terms of reference:

a. Most importantly, it appears to me that the Commission of Inquiry appears to have concluded that it had an implied power to determine which cases it would consider. That is reflected in both the statement in the Commission's report about the need to 'determine its own scope of inquiry' and its analysis of the details of specific within the terms of reference (as set out below).

b. The Commission of Inquiry appears to have focused on whether cases demonstrated 'systemic failure'. There is some confusion in the reasoning of the Commission as to whether a complaint needed

to relate to systemic failure or whether systemic failure was treated as an alternative to historic failure. The report of the Commission referred to the need consider whether evidence demonstrated 'a structural problem which was either historic in nature and/or which demonstrated systemic failure' [emphasis added]. However, the directions of Mr Whitehall QC (which appear to have been adopted by the Commission) appear to make it clear that 'systemic injury' was treated as a necessary aspect of the requirement for a complaint to be 'historic'. Similarly, Mr Perinchief's evidence was that 'the requirement for losses to be systemic to be critical'. The written advice of Mr Whitehall demonstrates that the word 'systemic' was used to indicate that the cause was required to be something that 'transcends the individual case'.

c. To some extent the approach of the Commission of Inquiry in seeking 'systemic injury' appears to have been the basis of the approach in Mr Davis's case. For example, the evidence of Mr Perinchief highlights the need for systemic loss before stating that the Commission of Inquiry did not consider its purpose 'to be of assistance to individuals with a commercial dispute where the individual believed there was … irregularity'. That distinction between systemic issues and commercial disputes is then reflected in the reasoning in Mr Davis's case. For example, the evidence of Mr Perinchief states that the Commission was prepared to investigate Mr Davis's claims 'provided they met the criteria that his loss was the result of systemic practices'. That appears to me to be consistent with the contemporaneous documents. For example, the e-mail to Mr Davis dated 9 October 2020 states that the Commission 'investigates historical systemic issues relating to land grabs in Bermuda'.

d. The contemporaneous reasoning in the case of Mr Davis appears to me support the analysis above. The initial decision dated 11 May 2020 appeared to conclude that Mr Davis's 2 cases were outside the scope of the terms of reference because they were a 'commercial dispute'. That reasoning is also reflected in the minutes of the meeting on 17 June 2020. It should be noted that contemporaneous reasoning is important (*Inclusion Housing Community Interest Company*).

e. I have noted above that the report of the Commission of Inquiry refers to financial and other limitations imposed on it. The report appears to imply that the Commission adopted a narrow approach to its terms of reference as a consequence. However, it appears to me that ultimately the key question is whether the Commission misinterpreted its terms of reference. Its reasons for that are irrelevant.

121. It seems to me that the approach described in the paragraph above, represents a misdirection. I have reached that conclusion for the following reasons:

a. I have already concluded that on a proper interpretation, the Commission of Inquiry had no discretion to determine whether to investigate cases that came within the scope of its terms of reference. The terms of reference gave it no discretion. The financial and other pressures on the Commission do not change that. However, the erroneous conclusion that there was a discretion would not be material if the Commission considered all claims that it was required to consider by reason of the terms of reference. That means that it is necessary to consider whether the Commission's approach to its terms of reference was sufficiently broad.

b. The terms of reference used the word ‘historic’ and not ‘systemic’. That is hardly surprising. The parliamentary debate makes it clear that the Commission of Inquiry was intended to investigate cases where there was a power imbalance. There was no suggestion that there needed to be some additional systemic issue. The focus on ‘systemic failure’ appears to me to be potentially inconsistent with the terms of reference. The matter that has troubled me is whether the use of the word ‘systemic’ can be explained by the need for there to be a power imbalance for a case to come within the terms of reference. It might be said that the background to the establishment of the Commission demonstrates a concern that there was a systemic issue in the form of power imbalance. Ultimately I have concluded that the word ‘systemic’ was used by the Commission in a different sense. The advice of Mr Whitehall QC demonstrates that ‘systemic’ was used to rule out one off cases. That diverted the focus of the Commission from consideration of whether there was a power imbalance. That analysis is supported by the approach to Mr Davis’s case (see below).

c. It also appears to me that the Commission of Inquiry erred by apparently concluding that Mr Davis’s cases were outside the scope of the terms of reference on the basis that they amounted to a ‘commercial dispute’. It appears to me that there is no reason in principle why a commercial dispute cannot relate to a power imbalance. In particular, there is no reason why commercial lenders cannot be particularly powerful. Mr Davis argued that it was relevant that paragraph 4 of the terms of reference referred to ‘bodies corporate’ as an indication that commercial transactions are not excluded. That appears to me to be correct.

122. The misdirection may well have been a breach of section 6 of the 1935 Act if it caused any cases to be disregarded. I will address the issue of whether

it had that effect in the cases of Mr Davis and Mr Piper below. However, it appears to me that it is unnecessary to determine whether section 6 was breached as any finding of a breach of section 6 would be dependent upon a finding of an unlawful misdirection. In other words, section 6 would add nothing. Illegality would have been established.

Materiality

123. It appears to me that the analysis above demonstrates that the misdirection was applied in Mr Davis's case. In particular, findings that Mr Davis's claims were not systemic and were historic influenced the decision that his case was outside scope. The more difficult question is whether the misdirection is immaterial because the Commission of Inquiry would have concluded that Mr Davis's case was outside the scope of the terms of reference had there been no misdirection.

124. In considering the issue of materiality, I have applied the approach in *Sadovska v Secretary of State* [2017] 1 WLR 2926 and sought to determine whether the outcome of Mr Davis's case would 'inevitably have been the same' [33]. It appears to me that approach reflects the scheme of the 1935 Act, which makes it clear that it is for the Commission of Inquiry to determine matters that fall within the scope of its terms of reference. It also appears to me that it reflects the fact that the Commission is better equipped that I am to apply to apply a legally correct interpretation of the terms of reference to the facts. It has a better understanding of power imbalances.

125. Applying the approach set out in the paragraph above, it appears to me that I cannot conclude that the outcome would 'inevitably have been the same' had there been no error of law. In reaching that conclusion I have considered both the oral submissions of the 2nd Respondent and its written submissions dated 13 July 2022. I have also considered Mr Davis's submissions (including his most recent submissions). I understand that

there may be strong arguments that Mr Davis's case does not come within the terms of reference. However, it does not appear to me that that conclusion is inevitable. I have reached that conclusion for the following reasons:

a. The witness statement of Mr Davis regarding the 1st claim states that he believes that the Bermuda Housing Corporation refused to manage properties owned by him to punish him for political activities. This caused Mr Davis to sell his property and suffer a financial loss. The claimed forced sale of property can arguably be said to be a historic loss of property. On Mr Davis's account that would appear to be arguably 'irregular' as it resulted from improper political motives. The claim made by Mr Davis to the Commission of Inquiry makes no express reference to power imbalance. However, the statements of Mr Brown MP makes it clear that political power was seen as one of the potential sources of power imbalance.

b. The witness statement of Mr Davis regarding the 2nd claim alleges that the banks sought to deny credit to 87 black businessmen. This was said to be intended to punish people who were believed to be part of an unlawful scheme. He alleged that any illegality should have been addressed by the courts. He also claimed to have lost property as a result. It appears to me that again it might be said that there was a power imbalance because the banks were more powerful.

c. It appears to me to be significant that the Commission recognised that lending practices might come within its terms of reference and that Mr Davis's case might be relevant. That implies that it was concluded that there was no reason in principle why lending was outside scope of the terms of reference. It also implies that it was acknowledged that lending practices can be 'irregular'.

d. I should emphasise that I have made no findings as to whether the claims of Mr Davis are correct. I have no basis for carrying out such an assessment. I have simply concluded that it may be open to the Commission to conclude that Mr Davis's claims are in scope.

126. It appears to me that mis-directions are immaterial in the case of Mr Piper. The Commission was willing to consider his case. The dispute that followed was about procedure. It was not about the terms of reference.

Relief

127. It appears to me that the potentially relevant relief identified in the form 86A in support of the judicial review application is:

> ***Relief#2:*** *A Declaration that the Commission is ultra vires Section 1(1) of the Act by way of the exercise of an absolute discretion due to a lack of proper specificity in the appointed Terms of Reference set by the Premier; and/or that the Commission is ultra vires Section 6 of the Act by way of their decision to restrict the ambit of the Premier's Terms of Reference*
>
> ***Relief #3:*** *Alternatively, a Declaration on the meaning of the term "other ... irregular means"; and what "individuals" and "corporate bodies" are meant to be covered in the Commission's Terms of Reference. …*
>
> ***Relief #5:*** *An Order reimbursing Mr. Raymond Davis for the costs of his wasted travel to and stay in Bermuda for the past 3 months.* [Emphasis in the original]

128. It appears to me that there is no basis for making any declaration that Commission of Inquiry is ultra vires because of 'a lack of proper specificity in the appointed Terms of Reference'. As already noted, I have concluded that the terms of reference can be and should be interpreted in a manner that means that they are lawful. What is more difficult is what relief should follow from my findings regarding the approach of the Commission. Ideally I would hope that the parties agree an order that specifies the relief. Should that prove impossible, I am conscious that I have heard limited argument regarding relief. I am reluctant to impose an order without further argument. Mr Davis is unrepresented. It was probably difficult for him to predict likely outcomes as there were a number of possible outcomes. I indicated earlier that I would hear argument regarding relief. I will merely make the following remarks in an attempt to prompt settlement:

    a. On the basis of the argument I have heard so far, it appears to me that I have no basis for concluding that any misdirection is material in any case other than that of Mr Davis. It is also unclear whether Mr Davis has standing in any other cases. As a consequence, it appears to me at present that any relief should be limited to Mr Davis. I am, however, willing to hear argument regarding this if agreement cannot be reached.

    b. I am also unclear what basis there could be for awarding damages. It is well-established law that public law error does not generate a claim for damages unless a tort can be demonstrated. However, again I have not heard argument regarding this.

Concluding remarks

129. In light of the matters above, it should be clear that I have concluded that the Commission of Inquiry misdirected itself regarding its terms of reference. That appears to have been material in the case of Mr Davis (but

not that of Mr Piper). If necessary, I will hear argument about the relief that should be granted.

130. I recognise that there may well be Bermudans who believe that the Commission of Inquiry has undertaken a difficult task well. There may well be others who hold contrary views. It is ultimately for the HoA to determine whether it is satisfied with the work of the Commission. It is not my role to determine a political debate of that nature. That is why I have sought to focus on whether the Commission has acted lawfully. In one specific respect I have found illegality.

Dated this 5th day of August 2022

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DAVID HUGH SOUTHEY
ASSISTANT JUSTICE