In The Supreme Court of Bermuda

CIVIL JURISDICTION
2015: No. 127

IN THE MATTER OF THE BERMUDA CONSTITUTION ORDER 1968

AND IN THE MATTER OF THE MUNICIPALITIES AMENDMENT ACT 2013

AND IN THE MATTER OF THE MUNICIPALITIES AMENDMENT ACT 2014

BETWEEN:

(1) THE ALLIED TRUST

(2) ALLIED DEVELOPMENT PARTNERS LIMITED

Applicants

-v-

(1) THE ATTORNEY-GENERAL OF BERMUDA

(2) THE MINISTER FOR HOME AFFAIRS

Respondents

RULING ON STRIKE OUT APPLICATION

(in Chambers)

Date of hearing: July 20-21, 2015

Date of Ruling: August 24, 2015

Sir Jeffrey Jowell QC of counsel and Mr. Eugene Johnston, J2 Chambers, for the Applicants

Ms. Monica Carss-Frisk QC of counsel, Mr. Alan Dunch of, MJM Limited and Mr. Gregory Howard of the Attorney-General's Chambers, for the Respondents

Introductory

1. The 1st Applicant ("the Trust") and the 2nd Applicant ("ADPL") entered into various agreements with the Corporation of Hamilton ("the Corporation") in late 2012 in relation to the development of the Hamilton Waterfront. Under a Cooperation Agreement dated October 31, 2012, ADPL became exclusive development partner. A Development Agreement dated December 21, 2012 between the Corporation, ADPL and the Trust contemplated the grant of a lease. On December 21, 2012, the Corporation granted a 262 year lease to the Trust under an agreement in which ADPL joined as the developer ("the Lease").

2. The Municipalities Amendment Act 2013 ("the 2013 Act") took effect on or about October 15, 2013. Section 14 of the 2013 Act empowered the Legislature to reject any agreement entered into by the Corporation after January 1, 2012. On March 7, 2014, the Legislature rejected the said agreements entered into between the Corporation and the Applicants ("the Agreements"). With effect from March 24, 2014, the Municipalities Amendment Act 2014 ("the 2014 Act") introduced a new section 14(A) which provided that any rejected agreements were void.

3. Section 14 of the 2013 Act provided a mechanism for any person "interested in land" which is the subject of an agreement rejected under the statute, to apply for compensation. In or about March 2014 the Applicants made a claim for compensation to the 2nd Respondent ("the Minister"). On May 5, 2014, the Applicants made a formal demand for arbitration and commenced statutory arbitration proceedings ("the Arbitration"). Thereafter the Governor appointed an arbitration panel chaired by now Justice of Appeal Geoffrey Bell and including two London-based compensation specialists ("the Tribunal"). The Tribunal gave directions in August. On or about September 26, 2014, the Applicants served their 'Claimants' Statement of Case' in the Arbitration. On or about November 14, 2014 the Compensating Authority filed its Statement of Case. On or about December 5, 2014, the Claimants' Reply was served and on or about December 12, 2014 the Compensatory Authority filed its Reply to the Claimants' Reply.

4. Against this background, the Originating Summons herein was issued by the Applicants on February 11, 2015. The prayer sought the following relief:

> "*31.1 A declaration that on a proper construction of section 14 of the Municipalities Amendment Act 2013 (both in its original form and in the form amended by the Municipalities Amendment Act 2014) that Act did not have the effect in law of voiding the Agreements which were rejected by the Legislature on 7 March 2014.*

31.2 In the alternative, if the said voiding was the apparent legal consequence of the said rejection, a declaration that the voiding was of no legal effect because the voiding violated the Applicants' constitutional and common law rights to property.

31.3 In the further alternative, if there was a valid voiding, the Second Applicant claims compensation in the sum of at least US$ 90,000,000 pursuant to its rights under section 13(1)(c)(ii) of the Constitution.

31.4 In the further alternative, declarations as follows as to the correct legal approach to be adopted under the legislation in the calculation of compensation:

(a) That the Agreements, and/or the holders of the Agreements, should be treated as one.

(b) That the Trust is entitled to recover all consequential loss as a result of the voiding.

(c) That the Government of Bermuda's claimed hostile attitude towards the Waterfront Development is not to be taken into account in assessing compensation.

(d) *That matters connected with the rejection are not to be taken into account in assessing compensation.*"

5. The present application was commenced when the Respondents on March 12, 2015 filed a Strike out Summons which was issued on March 16, 2015. It sought to strike out all of the Originating Summons save for paragraphs 28(1) and 31.3 which sought relief on the hypothesis that the Agreements were, contrary to the Applicants' primary complaint, validly voided.

6. In essence, the Respondents contended that it was an abuse of process for the Applicants to seek to challenge the validity of the voiding of the Agreements, having accepted their validity in the context of the Arbitration for two related reasons. Firstly, they should be bound by their election and, secondly, the relief being sought was contrary to the public interest in that it cast doubt over the title to property which was an important national asset due to be used in October in the first event of the America's Cup.

Factual Findings: the case for and against abuse of process

The Respondents' Evidence

7. The First Affidavit of Michael Fahy, the 2nd Respondent ("the Minister"), firstly explains the background to the controversial voiding of the Agreements by the Legislature in March 2014. The Minister was appointed to the Senate and as Minister of Home Affairs on December 21, 2012 after the December 17, 2012 General Election. In the course of January, 2013, he met with the Mayor and other officers of the Corporation of Hamilton ("the Corporation") and requested to review the documentation relating to the Waterfront Redevelopment Project before the Corporation announced its plans in this regard.

8. The ultimate refusal of this request prompted the Government to propose amendments to the Municipalities Act 1923 to require approval of any leases with terms in excess of 21 years. The Government's concerns about the Project arose against the backdrop of the Ombudsman's Report published in 2013 which, the Minister deposed (at paragraph 19), "*in the course of finding extensive maladministration, made scathing remarks about the process followed in respect of the tendering*" for the Project.

9. By a letter dated "March 2014", exhibited to the Minister's First Affidavit, the Applicants through their then attorneys Wakefield Quin wrote to the Minister making "*a claim for the purposes of section 14(7) of the Municipalities Amendment Act, 2013*". The letter reserved the right to make additional claims under the Acquisition of Land Act 1970. Also exhibited is a March 19, 2014 letter from J2 Chambers on behalf of the Corporation to the Applicants indicating that the Corporation was considering challenging the constitutionality of the purported voiding of the Agreements and seeking clarification of what position the Applicants would take in relation to such a challenge.

10. The Minister further exhibits the pleadings in the Arbitration and letters written on behalf of the Applicants in May, 2014 to the Governor urging the expeditious constitution of the tribunal. In the course of argument, Ms Carss-Frisk QC placed particular reliance on the second of those letters (dated May 16, 2014) and the first two substantive paragraphs therein:

> "*Firstly it is not the case that the House of Assembly rejected the various agreements which are the subject of our clients' claims. Indeed, as provided for in the relevant legislation, the agreements were voided 'ab initio'.*
>
> *It is common ground between the parties that this matter should now be referred to arbitration as provided for.*"

11. As far as the Applicants' Statement of Case in the Arbitration is concerned, Ms Carss-Frisk QC placed reliance on the following averments:

    (a) paragraph 21 avers that the Agreements were rejected by the Legislature on March 28, 2014 (after being rejected earlier by the House of Assembly-March 7- and the Senate-March 21) and concludes with the following words: "*such rejection has the effect of retrospectively voiding the Agreements*";

    (b) paragraph 22 avers that section 14(10) of the 2013Act applied the provisions of the Acquisition of Land Act 1970 to "*compensation for the voiding of agreements under section 14*";

    (c) paragraph 83 concludes by asserting that if Government asserts that any of the Claimants' "*costs and losses*" were not recoverable in the Arbitration, the Claimants reserved their right to pursue "*other remedies…including a constitutional challenge.*"

12. The Respondents' counsel argued that this reservation of rights merely signified the right to pursue other remedies, including a constitutional challenge, in respect of the compensation claim being asserted in the Arbitration. The Applicants' counsel submitted it was intended to reserve the right to seek unlimited constitutional relief.

13. The Compensating Authority's Statement of Case effectively submitted that the Agreements had only nominal value so that only nominal compensation of $1 was due. Ms Carss-Frisk QC also relied on the concluding averments of the Claimant's Reply: "*For the avoidance of doubt, given the case pleaded by the Government of Bermuda, the Claimants reserve their rights to pursue other remedies against the Government, including a constitutional challenge.*" She contended that this did not say what Sir Jeffrey Jowell QC contended it said, namely that in light of the Government case a constitutional challenge is being pursued instead.

14. The Minister's Affidavit made the following averments under the heading "Delay":

    "*44. The 'Waterfront which is the subject of the Agreements comprises some of the most important real estate on Bermuda. It is a public asset of crucial significance to the City of Hamilton, and to the Islands more generally. As such, for there to be any uncertainty as to its control and ownership is highly undesirable so far as the good administration of Bermuda is concerned.*

    45. This lack of certainty to which the Applicants' Action has given rise-that is, uncertainty as to whether the Agreements have indeed been voided (so that all interests in the Waterfront revert to the Corporation), or whether they remain extant (so that the Applicants retain a controlling leasehold interest)-would be

unwelcome at any time. However, it is particularly worrying in circumstances where the Waterfront is about to play host to a global sporting event…

47. If administered properly, the America's Cup will provide an unparalleled stage on which to showcase the Islands at their very best, attracting tourism and investment. Indeed, the Government anticipates that the financial benefit to Bermuda could extend to some $250 million.

48. However, conversely, in the event that Bermuda 'mishandles' the event the ramifications could be extremely severe. The damage which the adverse publicity would do to the Islands' profile would potentially be disastrous, both in the short and longer term. International confidence in the competence of Bermuda would necessarily be shaken."

15. The Minister then deposes (under the heading "*The Applicants' Conduct*") that launching the constitutional challenge in February 2015 is particularly problematic because the first event in the America's Cup (the World Series) is due to take place in October (paragraph 49). As result it is asserted that:

"*51….For the Applicants to have elected not to take legal action to challenge the voiding of the Agreements when it was open to them to do so [and] only subsequently to pursue such action at a time when it threatens the national interest of Bermuda …amounts to an abuse of the process of the Court…*

52. I consider that having declined to challenge the legality of the voiding of the Agreements and having instead expressly asserted and relied upon the their having been voided over a period of many months, it should not be open to the Applicants to bring such a challenge now, when to do so is liable to cause very serious harm to the public interest."

The Applicants' evidence

16. The First Affirmation of Michael MacLean was affirmed on February 9, 2015 in support of the Originating Summons herein. He explains that he is the settlor and main beneficiary of the Trust, which was settled on December 10, 2012 and owns the shares in ADPL. He exhibits, *inter alia*, the Agreements, the Official Hansard Reports in relation to the amendments to the Municipalities Act 1923 in 2013 and 2014 and the rejection of the Agreements, together with Appraisal and Valuation Reports.

17. The Second Affirmation of Mr. MacLean was affirmed on July 2, 2015 in response to the present strike out application. In paragraph 2, he affirms that in addition to further supporting the Applicants' claims in the present constitutional proceedings, his Second Affirmation is made for two other reasons:

"*The first is in opposition to the GoB's current application to strike out these proceedings on abuse of process grounds; and the second is to support the joint application of Allied and ADPL for an injunction*…"

18. The Second Affirmation firstly proceeds to put before the Court matters which the affiant previously choose not to disclose because "*I believe the court must be told of these further factual matters to put in proper context the legislation under challenge and the political exercise of discretion these proceedings are concerned with*" (paragraph 5). Those matters, in a nutshell, are allegations to the effect that from shortly after the General Election in December 2012, members of the Government promised to support the Project in return for bribes. This part of his evidence is supported by the First Affidavit of Llewellyn Peniston.

19. At the beginning of the hearing of the present application, I expressed the provisional view that these allegations had no relevance to the strike out issue. Both counsel agreed that the allegations did not bear on the merits of the strike out issue. However, because the Second Affirmation had before the hearing been published on the internet, the Respondents' counsel was keen to deny the truth of the allegations in question. These references to the Second Affirmation and the Respondents' Affidavits in reply prompted Bermuda Press Ltd. to apply to the Court for copies of the evidence in its entirety, an application which was granted on appeal from the Registrar's initial refusal based on a longstanding view of the Supreme Court (Records) Act 1955[1]. Following an in camera hearing on July 24, 2015 to deal with redactions at which local counsel for the parties to the present application were present, I advised counsel in response to a query as follows.

20. That it was a matter of record that a Search Praecipe had been filed by a local attorney not on the record in this matter (and not entitled to obtain copies of the court file as of right) the day after the Second Affirmation had been filed in Court requesting a copy of the Second Affirmation. It was unclear whether or not that attorney had obtained a copy and Court administrative staff members were investigating the matter. After the conclusion of the hearing of this related matter, I instructed the Registrar not to communicate with me further on the matter of whether or not the "leaked" version of the Second Affirmation might have emanated from the Court until I had delivered my judgment on the present application. This instruction was to avoid any risk that my decision in the present matter was influenced by extraneous matters not forming part of the application.

21. However it is clear that Mr. MacLean at most wanted to rely on the allegations at this stage not for their truth as such, but because the Respondents' insistence on pursuing the Arbitration took place against a background of "*circumstances where the*

[1] *Bermuda Press Ltd.-v- Registrar of Supreme Court* [2015] SC (Bda) 49 Civ (24 July 2015).

behaviour of government officials has been less than appropriate" and was "*merely an attempt to avoid the resolution of those* [important constitutional questions], *and to prevent the conduct of the GoB being put under sufficient scrutiny*" (paragraph 60). I will consider the relevance of this narrow argument, which if valid potentially points towards not striking out, below.

22. At the hearing of the present strike out application, attention properly focussed on the explanations advanced by Mr. MacLean for initially pursuing and then abandoning the Arbitration. In summary, it is frankly admitted that a conscious choice to pursue the compensation route was made. But it is contended that this choice was made on the assumption that the Government would not take an uncompromising stance in the Arbitration. Sir Jeffrey Jowell QC, implicitly conceding that such a stance made little sense from a lawyer's perspective, invited the Court to accept this explanation as the genuine perspective of his lay client. However, one aspect of the response was legally supportable. That was that if ADPL could obtain no compensation through the Arbitration because it never acquired an "interest in land", it might need to seek alternative relief in any event. This argument nevertheless also appeared to be anchored firmly to a compensatory constitutional claim.

23. The most significant averments made in the Second MacLean Affirmation for present purposes are the following:

    (a) on February 22, 2014, after being told by then Premier Cannonier that the Government was going to void the Agreements, he met the Minister to begin settlement discussions. It was agreed to have a firm known as HVS do a valuation on behalf of all parties (paragraph 45);

    (b) he subsequently had discussions with a business associate of the then Premier, a Mr. DeCosta, who offered to advance him monies to pay for the valuation. As a result, he believed the Government "*was, indeed, seeking an early resolution*" (paragraph 46);

    (c) on an unspecified date he gave HVS' appraisal to the Minister in his office. The Minister looked at it and said: "*It's not my money. Whatever it's worth government will pay it quickly*" (paragraph 47);

    (d) in a paragraph upon which the Respondents' counsel relied as an admission that a commercial decision was made which the Applicants should be bound by, Mr. MacLean next deposed as follows:

        "*48. That is the prevailing circumstance when the 42-day time-limit for Allied-and at the time, I thought ADPL as well-to agree compensation with the GoB expired. The Municipalities Amendment Act 2013 required the Minister of Home Affairs to refer*

the matter of compensation to arbitration. At that point, I am aware two options were open to Allied and/or ADPL: they could have seen whether arbitration would produce a quick, and adequate, compensation payment; or they could commence constitutional proceedings. Because I had been in receipt of various assurances from Fahy (and, by extension, the GoB) with respect to the payment of compensation, I believed going to arbitration was the best commercial decision in the circumstances";

(e) a different decision might have been made if the deponent had realised Government would assert that ADPL was not entitled to any compensation in the Arbitration (paragraph 49);

(f) unless the Court determines that the voiding was effective, the parties cannot know whether or not the Arbitration is a lawful one. It makes sense to stay the Arbitration until the position is clarified. Further, pursuing the arbitration proceedings until their end will not eliminate the need for a separate constitutional challenge (paragraphs 50-51); and

(g) the Applicants had no knowledge about Government's plans to use the Waterfront for the America's Cup when they commenced the Arbitration and these plans cannot properly be viewed as superseding the Applicants constitutional rights (paragraph 52).

24. Perhaps the most potent point made in Second Affirmation of MR. MacLean related to the parallel Corporation of Hamilton challenge to the constitutionality of the voiding of the Agreements: "*If the CoH follow through with their constitutional challenge, it could be that the arbitration proceedings Allied and ADPL engage in may be nullified*" (paragraph 53). The Corporation's elected officials became hopelessly deadlocked early this year resulting in the Minister exercising his stewardship powers and obtaining a stay of the constitutional proceedings. I granted the stay on March 19, 2015 in the hope that the municipal elections scheduled for early May 2015 might break the deadlock and enable the Corporation itself to reassume conduct of the constitutional proceedings[2]. Those elections returned a new municipal administration. The Court was shown a July 17, 2015 letter from the Corporation which signified unambiguously that there was no prospect of any application to discharge the stay of the constitutional proceedings commenced by the Corporation in December 2014.

Factual Findings

25. It is essentially common ground that the Applicants elected to pursue compensation rather than to challenge the voiding of the Agreements in the first quarter of 2014.

[2] *Corporation of Hamilton-v-the Attorney –General et al* [2015] SC (Bda) 22 Civ (19 March 2015).

The assertions by the Minister that the timing of the present challenge will create uncertainties about the 'Waterfront' which are inconsistent with the public interest are not directly challenged. Nor, to any convincing extent, is the delay in electing to challenge the validity of the voiding coherently explained. What is in dispute (whether the present proceedings are, so far as is material, an abuse of process in light of these largely agreed facts) can only be resolved in light of the applicable legal principles and following a consideration of the statutory background against which the Arbitration proceedings commenced.

26. The key issues in dispute appeared to me to be the following :

    (a) most narrowly, did the Applicants effectively reserve the right to challenge the voiding of the Agreements in their Arbitration pleadings?

    (b) most broadly, do the ordinary principles of election and abuse of process apply at all to any relevant extent to constitutional proceedings and, if so, subject to what (if any) modifications?

    (c) to what extent, if at all, can the public interest trump a litigant's right to pursue constitutional claims which are not positively asserted to be unmeritorious?

27. A brief review of the relevant constitutional and statutory provisions must be undertaken before these questions can be answered.

Overview: key constitutional and statutory provisions

<u>Constitutional provisions</u>

28. The key constitutional provisions which the Applicants' case is based on are the following:

> "***Protection from deprivation of property***
> *13 (1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied, that is to say—*
>
> > *(a) the taking of possession or acquisition is necessary or expedient in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilisation of any property in such manner as to promote the public benefit or the economic well-being of the community; and*

(b) there is reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property; and

(c) provision is made by a law applicable to that taking of possession or acquisition—

(i) for the prompt payment of adequate compensation; and

(ii) securing to any person having an interest in or right over the property a right of access to the Supreme Court, whether direct or on appeal from any other authority, for the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled, and for the purpose of obtaining prompt payment of that compensation; and

(d) *giving to any party to proceedings in the Supreme Court relating to such a claim the same rights of appeal as are accorded generally to parties to civil proceedings in that Court sitting as a court of original jurisdiction.*"

29. The scheme of section 13 is to:

(a) prohibit the State from compulsorily acquiring any property;

(b) permit compulsory acquisitions in certain identified public interests; provided that

(c) there is reasonable justification for causing hardship to the person affected; and

(d) machinery is put in place to achieve prompt compensation and afford the property owner affected with a right of access to the Supreme Court to challenge both:

(i) the legality of the acquisition, and

(ii) the adequacy of the compensation obtained.

30. Section 15(2) of the Constitution provides as follows:

"*(2) The Supreme Court shall have original jurisdiction—*

(a) to hear and determine any application made by any person in pursuance of subsection (1) of this section; and

(b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) of this section,

and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the foregoing provisions of this Chapter to the protection of which the person concerned is entitled:

Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law." [emphasis added]

31. The proviso to section 15(2) is generally regarded as a filter mechanism to ensure that constitutional redress is only sought as a last resort. It is relevant to the abuse of process ground upon which the strike out application is primarily based. The proviso to section 15 may also be very broadly viewed as a domestic law counterpart to the practically distinguishable public international law principle embodied in Article 35 of the European Convention on Human Rights ("ECHR"), which provides:

> "*1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law…*"

32. The Respondents did not elaborate upon precisely how they relied on the proviso in the present case. However, in paragraph 70 of their Skeleton Argument, it was submitted that this constitutional provision recognised the possibility that judicial review was an alternate remedy for public law declaratory relief.

Statutory provisions

33. Section 14 of the 2013 Act provides as follows:

> **Approval of Cabinet and Leglislature required to validate certain agreements or dispositions**
>
> "*(1)Any agreement, entered into by a Corporation on or after 1 January 2012 and before the coming into operation of this section, for—*
>
> *(a) the sale of land which is the property of the Corporation; or*
>
> *(b) a lease, conveyance or other disposition of any interest in land which is the property of the Corporation, being a lease, disposition or conveyance expressed to be for a term exceeding twenty-one years or for terms renewable exceeding in the aggregate twenty-one years,*
>
> *and any related agreement entered into by the Corporation on or after 1 January 2012 and before the coming into operation of this section,*

must be submitted to the Minister by the Corporation within 14 days after the coming into operation of this section.

(2) The Minister shall, as soon as practicable after receiving an agreement submitted to him by a Corporation under subsection (1), publish notice thereof in the Gazette—

(a) giving such details as the Minister is satisfied identifies the property and

(b) the parties to the agreement; and

(c) advising that if there are any other such agreements as are referred to in subsection (1) they must be submitted to him within 14 days after the publication of the notice, failing which the agreement shall be void ab initio.

(3) Any agreement referred to in subsection (1) that has not been submitted to the Minister before the expiration of the 14 days after the publication of the notice under subsection (2) shall, after the expiration of the 14 days referred to in subsection (2)(b), be void ab initio.

(4) The Minister shall lay any agreement submitted to him under this section as soon as practicable after it is submitted to him before the Legislature for its consideration, and the Legislature shall either approve or reject it.

(4A)Any agreement that is rejected by the Legislature under subsection (4) shall be void ab initio[3].

(5) The approval or rejection of the Legislature shall be expressed by way of resolution passed by both Houses of the Legislature approving or rejecting the agreement, and communicated to the Governor by message.

(6) The Minister shall, within seven days of approval or rejection of the agreement by both Houses of the Legislature, publish notice thereof in the Gazette.

[3] Introduced by way of amendment of the 2013 Act by section 4 of the Municipalities Act 2014.

(7) Any person interested in land which is the subject of an agreement who is aggrieved by the voiding of the agreement under this section shall notify the Minister in writing, within 21 days after such voiding, of the person's estate and interest in the land and of the claim made by the person in respect of the land.

(8) If a person, within the 21 day period referred to in subsection (7), notifies the Minister of the person's estate or interest in the land which is the subject of the agreement and of the claim made by the person in respect of the land, the person may, before the expiration of 42 days after the voiding under this section, agree with the Minister upon the amount of compensation to be paid by the Government for the estate or interest belonging to him, or which he has power to sell, or for any damage which may be sustained by him by reason of the execution of any works.

(9) If any person who notifies the Minister in accordance with subsection (8) fails to agree with the Minister, before the expiration of 42 days after the voiding under this section, upon the amount of compensation to be paid by the Government for the estate orinterest belonging to him, or which he has power to sell, or for any damage which may be sustained by him by reason of the execution of any works, the question of compensation shall be referred by the Minister to arbitration.

(10) Sections 10, 11, 12, 13, 14 and 15 of the Acquisition of Land Act 1970 shall apply to any question referred to arbitration, and the reference in section 14(4)(c) of that Act to "the notice to treat under section 5" shall be construed as a reference to the voiding of the agreement under this section.

(11) The Minister or any person making a claim under this section who is aggrieved by an award of the arbitrators under section 15 of the Acquisition of Land Act 1970 may, within 21 days of the date of the award, appeal to the Supreme Court on the ground that the amount of compensation awarded has been wrongly determined.

(12) Any person interested in the land which is the subject of the agreement, within 42 days after the voiding of the agreement under this section, appeal to the Supreme Court on the grounds that—

(a) the extent of the estate, interest or right in the land to be acquired has been wrongly determined; or

(b) the taking of possession or acquisition of the property, estate, interest or right in the land is not in accordance with this Act or is otherwise unlawful.

(13) In this section "person interested" or "interested in the agreement" in relation to any land, means any person having an estate, interest, right or easement in or over that land.

(14) For the avoidance of doubt, notices under this section are not statutory instruments."

34. It is admitted that these provisions were introduced with the Agreements in mind. In the wake of the Corporation in January 2013 initially declining to submit a major transaction to an informal 'voluntary' review by the Minister, the 2013 Act made the following key provisions:

(a) any agreement entered into by a municipality for the sale or lease for a term in excess of 21 years entered into after January 1, 2012 and before the entry into force on October 15, 2013 (which included the Agreements) must be submitted to the Minister within 14 days of the latter date (section 14(1));

(b) any agreement not submitted in compliance with the section would be void *ab initio* (section 14(3)). Any agreement which was submitted was to be placed before the Legislature by the Minister for either approval or rejection (section 14(4));

(c) any agreement which was rejected by the Legislature under section 14(4) would be void *ab initio* (section 14(4A));

(d) within 21 days of any voiding, any person interested who is aggrieved is required to notify the Minister of a claim. Within 42 days of such a voiding, the claimant may agree compensation with the Minister (section 14(7)-(8)). In the absence of any agreement on compensation, the Minister is required to refer the compensation dispute to arbitration (section 14(9)) and sections 10-15 of the Acquisition of Land Act 1970 apply to the arbitration (section 14(10));

(e) an appeal lies to the Supreme Court from the arbitration award (section 14(11);

(f) an appeal lies to the Supreme Court within 42 days after the voiding on the part of any person interested in the relevant land on the grounds that

the relevant acquisition was in breach of the Act "*or otherwise unlawful*" (section 14(12)).

35. In summary, it is clear that the statutory scheme (1) makes time of the essence for any response by an aggrieved person, and (2) provides two distinct gateways for accessing relief, one route for seeking compensation, and another route for challenging the acquisition itself. The prescribed timetable requires an election to be made within 42 days of the voiding at the most.

36. It is arguable that it ought to be possible, perhaps by agreement or with a reservation of rights, to seek compensation by way of agreement within the first 41 days under subsection (8), and then opt out on day 42 in favour of a subsection (12) challenge in the absence of a speedy financial resolution. However, a straightforward reading of the section as a whole suggests that the alternative routes are intended, in terms of 'standard operating procedure' at least, to be mutually exclusive.

Findings: did the Applicants elect to pursue compensation alone and is it an abuse of process on that ground for them to pursue an inconsistent remedy in the form of constitutional relief?

Election, waiver and abuse of process: application of general principles to the constitutional context

37. The respective submissions on the correct legal approach had little common ground and passed each other like ships in the night. Ms. Carss-Frisk QC's central thesis was, in effect, that the usual principles of abuse of process applied undiluted in the constitutional context: *Durity-v-Attorney-General of Trinidad & Tobago* [2003] 1 AC 405. The high point of Sir Jeffrey Jowell QC's submissions was the proposition that constitutional rights can never be waived: *Tellis & Others-v- Bombay Municipal Corp & Others* (1987) LRC (Const) 351 (Supreme Court of India), cited by Odoki CJ in *Sharon et al-v- Makerere University*, Supreme Court of Uganda, Judgment dated September 24, 2003 at page 34[4]. His repeated mantra-like references to the importance of upholding the rule of law, only weeks after the 800th anniversary year of Magna Carta had been celebrated in England and elsewhere in the common law world, had an almost hypnotic effect.

38. The correct legal position, in my judgment, lies between these two extremes. The doctrine of abuse of process applies to constitutional proceedings, but due account must be given to the importance of constitutional rights. A fuller extract from the judgment of Lord Brown on behalf of the Privy Council in *Durity* a narrower extract from which the Respondents relied upon supports the need for this qualification:

[4] This was a freedom of religion case and the Ugandan Supreme Court was merely referring to a case cited in argument without necessarily approving it. On the facts the Court held no waiver had occurred.

"*30. Clearly, the inherent jurisdiction of the High Court to prevent abuse of its process applies as much to constitutional proceedings as it does to other proceedings. And the grant or refusal of a remedy in constitutional proceedings is a matter in respect of which the court has a judicial discretion. These limitations on a citizen's right to pursue constitutional proceedings and obtain a remedy from the court are inherent in the High Court's jurisdiction in respect of alleged contraventions of constitutional rights and freedoms. <u>But the Constitution itself contains no express limitation period for the commencement of constitutional proceedings. The court should therefore be very slow indeed to hold that by a side wind the initiation of constitutional proceedings is subject to a rigid and short time bar. The very clearest language is needed before a court could properly so conclude.</u>*"[5] [emphasis added]

39. A clearer articulation of the distinctive principles which apply to abuse of process in the context of constitutional proceedings and a failure to pursue alternative remedies may be found in *dicta* upon which the Applicants' counsel relied. Lord Nicholls, delivering the advice of the Privy Council[6] in *Attorney-General of Trinidad & Tobago-v-Ramanoop* [2006] 1 AC 328 at 337B-F, opined as follows:

"24.*In Harrikissoon the Board gave guidance on how this discretion should be exercised where a parallel remedy at common law or under statute is available to an applicant. Speaking in the context of judicial review as a parallel remedy, Lord Diplock warned against applications for constitutional relief being used as a general substitute for the normal procedures for invoking judicial control of administrative action. Permitting such use of applications for constitutional redress would diminish the value of the safeguard such applications are intended to have. Lord Diplock observed that an allegation of contravention of a human right or fundamental freedom does not of itself entitle an applicant to invoke the section 14 procedure if it is apparent this allegation is an abuse of process because it is made "solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right": [1981] AC 265, 268 (emphasis added).*

25. In other words, where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which

[5] In *Ingraham-v-Clinton* [2007] 1 WLR 1 at pages 5H-6A, Lord Brown stated: "*…of course, courts should look with particular care at constitutional claims, constitutional right emanating from a higher order of law. But constitutional claims cannot be impervious to the strike-out jurisdiction and it would be most unfortunate if they were*…."

[6] The other concurring panel members were Lord Hoffman, Lord Scott, Baroness Hale and Lord Brown.

complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the court's process. A typical, but by no means exclusive, example of a special feature would be a case where there has been an arbitrary use of state power.

26. That said, their Lordships hasten to add that the need for the courts to be vigilant in preventing abuse of constitutional proceedings is not intended to deter citizens from seeking constitutional redress where, acting in good faith, they believe the circumstances of their case contain a feature which renders it appropriate for them to seek such redress rather than rely simply on alternative remedies available to them. Frivolous, vexatious or contrived invocations of the facility of constitutional redress are to be repelled. But "bona fide resort to rights under the Constitution ought not to be discouraged": Lord Steyn in Ahnee -v- Director of Public Prosecutions [1999] 2 AC 294, 307, and see Lord Cooke of Thorndon in Observer Publications Ltd v Matthew (2001) 58 WIR 188, 206. "

40. I find that while the usual abuse of process principles apply with equal force in the constitutional context, the "plain and obvious" bar may have to be set marginally higher than in the ordinary civil litigation context. The Court should, where all other things are equal, lean in favour of allowing a *bona fide* constitutional complaint to be heard on its merits. This approach is required because the character of fundamental rights is such as to warrant enhanced levels of protection than corresponding 'ordinary' public or private law rights. However, as ever, each case will turn on its particular legal and factual matrix, and the task of the Court faced with a strike out application in constitutional proceedings should ordinarily be to adopt a cautious and healthily sceptical approach to an attempt by the State to seek to avoid having an arguable constitutional complaint fully aired. On the other hand, as Lord Brown opined on behalf of the Privy Council in a Bahamian appeal, *Ingraham-v-Clinton* [2007] 1 WLR 1 at page 6A:

> "*It cannot be right that anyone issuing proceedings under…the Constitution is guaranteed a full hearing of his claim irrespective of how ill-founded, hopeless, abusive or vexatious it may be.*"

41. One of the important legal features of any constitutional complaint, as far as election and/or waiver is concerned, is the particular fundamental right engaged by the application. How the facts fall to be analysed will usually be significantly influenced by the nature of the right it is contended the constitutional applicant has elected not to, or waived the right to, pursue. Ms Carss-Frisk QC referred the Court in this regard to

the following observations of Lord Hope in *McGowan-v-B* [2011] 1 WLR 3121 (at 3130 F-H, 3131E:

> "*15…It has, of course, to be borne in mind when looking at this jurisprudence that the rights which are said to have been waived may vary in importance according to the circumstances of each case. The right which we are dealing with in this case is the right of the detainee to have access to legal advice prior to and during his interview by the police while in police custody. And the test of whether the waiver is effective may vary in intensity according to whether it was express or is said to have been implied from the actings of the applicant. This is a case where the waiver that is in question was an express waiver, not one that is said to have arisen by implication.*
>
> *16. So care needs to be taken when looking at cases where the right said to have been waived was a different right, such as the right to an independent and impartial tribunal, and where the right to legal assistance was not declined expressly as it was in this case – and in Scotland it always will be, if the practice of offering it which has been adopted in the light of* Cadder *and the requirements of section 15A of the 1995 Act is properly carried out. The factual background has always been important to the approach that the Strasbourg court has taken to implied rights. Dicta in a case with one set of facts may not be a safe guide to what it would make of a case with facts that were materially different, and the domestic court too should be aware of these differences.*"

42. I infer from these admittedly general remarks, together with my own general apprehension of how the scheme of Chapter 1 of the Bermuda Constitution works in practice, the following propositions: Where the constitutional claim is based on an alleged interference with property rights, and the claimant is a commercial enterprise represented by experienced counsel, the case for applying the usual civil law principles of abuse of process, election and waiver will in many cases be stronger than in other constitutional contexts. The difference between constitutional property rights and private law property rights will perhaps be potentially greatest where the applicant is seeking to preserve a home, a historic business enterprise or some cherished chattel or other asset. The difference will likely be least where the property rights in question have no distinctive characteristics and the deprivation can fairly easily be compensated for in monetary terms. Where it is really "all about money", the Court ought also logically to be more inclined to infer that a free choice to pursue a private remedy was made by a well-resourced commercial entity than if an under-resourced homeowner, in the agony of the moment and without proper advice, reluctantly waived a constitutional remedy, and then realised he had made an ill-informed choice.

43. Having regard to the proviso to section 15(2) of the Constitution, an important consideration invariably will be the adequacy of the alternative remedy it is contended the constitutional applicant either ought to be left to pursue or ought to have pursued.

In what is essentially a commercial case such as the present one, affecting two related entities, the adequacy of the alternative remedy must be looked at in primarily commercial terms. The more rarefied considerations which might arise in right to life cases, right to liberty, fair trial, freedom of expression or freedom of conscience cases, just by way of example, will be unlikely to occupy centre stage in most deprivation of property cases. It must also be remembered that section 13 according to its terms serves two dual functions. Its primary function is clearly to protect private property rights for the benefit of the citizen; however, its ancillary function is to permit the Crown to acquire private property in the public interest on conditions which both:

(a) facilitate such acquisitions; and

(b) require legislative safeguards to enable the private property owners affected to be able to challenge the legality of the taking or obtain prompt and adequate compensation.

44. Section 13 is therefore unique amongst all other fundamental rights provisions in actually prescribing conditions subject to which property may permissibly be compulsorily acquired, conditions which actually require any compulsory acquisition legal regime to both provide an effective compensatory remedy and a right of access to this Court, either directly or by way of appeal, with a view to challenging not just the adequacy of the compensation awarded but also the legality of the taking. Where property is acquired by the Crown under a law which purports to provide the right to access to this Court mandated by section 13(1) in relation to complaints about, *inter alia*, the legality of the taking, the scope for complaints under section 15 will in most cases be limited to complaints about the extent to which the statutory acquisition regime falls short of the constitutional standard. Section 13 contemplates that the statute under which the acquisition is made will itself provide a tailor-made remedy for non-compliance with section 13 itself. By necessary implication, where such statutory remedy exists, the scheme of section 13 of the Constitution may be said to envisage that, save for good cause, this remedial route will be pursued before a section 15 application is made. This is made explicit as regards the uniquely constitutional right to "*prompt payment of adequate compensation*" and is only implicit as regards other section 13(1) rights in section 13(1)(c):

> "*(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied, that is to say—*
>
> *(a)* [justifying grounds]*; and*
>
> *(b)* [reasonableness requirement]*; and*

(c) provision is made by a law applicable to that taking of possession or acquisition—

(i) for the prompt payment of adequate compensation; and

(ii) securing to any person having an interest in or right over the property a right of access to the Supreme Court, whether direct or on appeal from any other authority, for the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled, and for the purpose of obtaining prompt payment of that compensation; ...

(d) [appeal rights]" [emphasis added]

45. These distinctive characteristics of section 13 of the Constitution must properly be taken into account, both in assessing the merits of the election and waiver arguments, and the alternative delay-related strike out grounds. Both counsel appeared to be more comfortable deploying arguments based on persuasive authorities rather than engaging in a detailed analysis of this central constitutional provision, admittedly a provision which has not in these respects seemingly received the benefit of prior judicial consideration[7]. The Respondents in their Skeleton Argument were reluctant to concede the obvious, that what occurred was clearly a taking of property thus engaging section 13(1)[8]. As a result, perhaps, they were also reluctant to positively rely on the fact that section 14 of the 2013 Act was obviously made with a view to complying with the requirements of section 13(1) of the Constitution and, to this extent, affording a form of 'constitutional' relief.

46. At the end of the day, however, my own more section 13-centred analysis is best viewed as a question of framing rather than an entirely new point which counsel should be afforded an opportunity to meet. It is simply a somewhat more elaborate way of re-formulating an important submission made by the Respondents, both orally and in their Skeleton Argument, an argument which I accept and to which the Applicants had no or no convincing response. The argument advanced with admirable brevity, clarity and simplicity was the following:

"*66. The Respondents submit that it would have been open to the Applicants to make use of the appeal procedure provided for in section 14 (12) of the MAA 2013 to argue that the purported voiding of the Agreements was not in accordance with the MAA 2013 or unlawful on the grounds they now seek to advance in the action.*"

[7] The Applicants cited the leading Bermudian case dealing with whether or not a deprivation of property had occurred where the question of constitutionally-mandated remedies did not arise: *Grape Bay Ltd.-v-Attorney-General* [2000] 1 WLR 574 (PC). Nor did the question of a purportedly constitutionally compliant legislative remedies scheme arise in another deprivation of property case, *Paponette-v-A-G of Trinidad and Tobago* [2012] 1 AC 1 (PC).

[8] Paragraph 66, footnote 1.

Election, waiver and abuse of process: the general principles

47. Ms Carss-Frisk QC referred the Court to various passages on election and estoppel. I found the following judicial guidance to be of assistance. Firstly, Arden LJ in *Thomas Koshy-v-DEG-Deutsche Investitions-undEntwicklungsgesellschaft mbH, Gwembe valley Development Co. Ltd. (In Receivership)* [2008] EWCA Civ 27 opined as follows:

> *"37.I should first clarify what is meant by election in this appeal. It is not said that there was a waiver on which DEG relied. It is said that having gone down the appeal route Mr Koshy had chosen one of two inconsistent remedies and in addition it is thus too late for him now to pursue another. The judge doubted whether this was an election in law. If there had been an election in law, it would have been unnecessary to consider the additional point whether it is now too late for him to pursue another route: that question would not arise because that alternative route would have been lost by election.*
>
> *38.The making of an election in law requires more than mere words of choice: it also requires the choice to be between inconsistent courses of action and that one of those routes is abandoned by words or conduct (see the doctrine of election as authoritatively explained by Lord Goff in the Kanchenjunga case at 397 to 399)..."*

48. In that case it was further explained that election in a non-technical sense could also occur when a litigant expressly in the face of the court waived the right to pursue a particular claim. Secondly, Lord Goff's much-quoted observations in *Motor Oil Hellas (Corinth) Refineries SA-v-Shipping Corporation of India (the "Kanchenjunga")* [1990] 1 Lloyd's Rep 391 at 398:

> "*Election itself is a concept which may be relevant in more than one context. In the present case, we are concerned with an election which may arise in the context of a binding contract, when a state of affairs comes into existence in which one party becomes entitled, either under the terms of the contract or by the general law, to exercise a right, and he has to decide whether or not to do so. His decision, being a matter of choice for him, is called in law an election.*"

49. This passage was cited with approval by Sir John Chadwick, delivering the judgment of the Privy Council in *Lancashire Holdings Ltd.-v-MS Frontier Reinsurance Ltd* [2012] UKPC 42, a Bermudian appeal, at paragraph 26. I made reference to the fact that this case considered the election issue, in the course of the hearing. Sir John

Chadwick went on to cite the following expanded extract from the same passage in Lord Goff's judgment, which merely adds a further gloss to the analysis:

> "…*where with knowledge of the relevant facts a party has acted in a manner which is consistent only with his having chosen one of the two alternative and inconsistent courses of action then open to him – for example, to determine a contract or alternatively to affirm it – he is held to have made his election accordingly, . . . But of course an election need not be made in this way. It can be communicated to the other party by words or conduct; though, perhaps because a party who elects not to exercise a right which has become available to him is abandoning that right, he will only be held to have done so if he has so communicated his election to the other party in clear and unequivocal terms (see Scarf-v-Jardine, (1882) 7 App CAs 345 at p 361, per Lord Blackburn and China National Foreign Trade Transportation Corporation –v- Evlogia Shipping Co SA of Panama (The Mihalios Xilas) [1979] 2 Lloyd's Rep 303 at p 307; [1979] 1 WLR 1018 at p 1024, per Lord Diplock).*"

50. The above principles apply to determine whether or not Applicants are bound by an election in the present case. That they reflect the general law was not disputed. Rather, Sir Jeffrey Jowell QC relied on the following general public law principle described in Wade & Forsyth, '*Administrative Law*', 11th edition (2014) at pages 198-199:

> "*Waiver and consent are in their effects closely akin to estoppel, and not always clearly distinguishable from it. But no rigid distinction need be made, since for present purposes the law is similar. The primary rule is that no waiver of rights and no consent or private bargain can give a public authority more power than it legitimately possesses. Once again, the principle of ultra vires must prevail when it comes into conflict with the ordinary rules of law*
>
> *In one case a tenant had applied to a rent tribunal and obtained an order substantially reducing his rent, but later discovered that the house had been let at a date which put it outside the tribunal's jurisdiction. The High Court granted mandamus to compel the county court to decide the case, despite the fact that both parties had previously acquiesced in the rent tribunal's order. The issue was one of jurisdictional fact and the court before which it was raised was obliged to determine it. For the same reasons an agreement with the landlord that the tenancy is furnished, when in fact it is not, cannot estop the*

tenant from later claiming an unfurnished tenancy. In a planning case concerning a caravan site, the Court of Appeal head that the site-owner could apply for a declaration that the planning authority's enforcement notice was bad in law, even though he had pleaded guilty to the contravention of the notice in previous criminal proceedings. If the notice was in reality bad, no previous acquiescence could preclude him from contesting it. Exactly the same point determined an earlier enforcement notice case in which the landowners on whom the notice had been served applied for planning permission on the footing that the notice was valid. They were held entitled, nevertheless, to dispute its validity subsequently. The House of Lords confirmed this principle in a case where a party had acquiesced in proceedings before the Lands Tribunal which were later held to be outside that tribunal's jurisdiction. Lord Reid said: 'in my judgment, it is a fundamental principle that no consent can confer on a court or tribunal with limited statutory jurisdiction any power to act beyond that jurisdiction, or can estop the consenting party from subsequently maintaining that such court or tribunal has acted without jurisdiction.'

It follows that resort to a statutory remedy cannot be a waiver of the right to seek judicial review later."

51. In my judgment this principle cannot sensibly be viewed as excluding altogether the operation of the doctrine of election in the public law context. This would turn the entire field of public law into an unruly horse. It is simply a statement of the well-known rule that general jurisdiction cannot be conferred by consent. The Respondents' present strike out application does not seek to undermine that principle at all. Rather, it asserts the argument that in the present legal and factual context, the Applicants have lost the right to challenge the voiding of the Agreements and to assert that, as a result of that challenge, the Arbitration panel may be found to have no jurisdiction to do anything at all. The Respondents' counsel rightly submitted that this general principle, which is supported by the House of Lords decision in *Essex Incorporated Congregational Union-v-Essex County Council* [1963] AC 808, had no application to the present factual and legal context.

Election, waiver and abuse of process: findings

52. Whether or not the Applicants should be held to be bound by an election in the present case depends on an analysis of the facts in the unique statutory context in which the voiding of the Agreements occurred. When the voiding occurred in March 2014, the legislative scheme afforded two distinct legal pathways for relief:

    (a) a negotiated compensatory settlement with the Minister within 42 days (failing which referral to arbitration); or

    (b) an appeal against the voiding itself within 42 days.

53. There is no suggestion in the present case that these timelines were too tight and that the Applicants had insufficient time to make an informed choice. Such time limits are generally viewed by the courts as not invalidating any proceedings which follow a failure to strictly comply with them[9]. Mr. MacLean freely admits to making what appeared to him at the time to be the best commercial choice. There is no credible support in the evidence for any finding that the Minister or any other person with apparent authority to bind the Government positively represented anything about the position which the Government would take in the Arbitration. The Applicants could only fairly complain about being misled if a written commitment to agree that the loss of the Trust and ADPL should be aggregated had been resiled from. But even if that had occurred, such a representation would have no plausible bearing on a decision to go down the compensation pathway under section 14(8)&(9) rather than to challenge the voiding by way of appeal under section 14(12)(b) of the 2013 Act. Challenging the voiding would, quite clearly, entail asserting continued entitlement to the contractual rights purportedly taken away as opposed to accepting the validity of the acquisition, and seeking compensation therefor. It is difficult to imagine more inconsistent remedies.

54. In addition to the statutory appeal remedy, which appears broad enough to encompass the pursuit of constitutional arguments, the Applicants could within six months of the voiding applied for judicial review pursuant to Order 53 of the Rules of the Supreme Court. This Court has in recent years been receptive to entertaining constitutional complaints by way of alternative relief within judicial review proceedings when such points are closely connected with more traditional public law claims[10].

55. There is also evidence that the Applicants had an opportunity to consciously consider a constitutional challenge to the validity of the voiding of the Agreements at an early stage. By letter dated March 19, 2014, the Corporation's then attorneys J2 Chambers asked ADPL to consider the following question:

> "*If the CoH commences proceedings alleging that s. 14 of the 2013 Act is unconstitutional (for various reasons), would ADP Ltd. assume a neutral stance, or would it be minded to make substantive arguments one way or the other? Is ADP Ltd.'s position that s. 14 of 2013 Act is lawful, or not?*"

56. In a transcript exhibited to the Second Affirmation of Mr. MacLean purportedly recording his own subsequent discussions (at page 4) with the Minister in April, Mr. McLean indicates that in the absence of a quick settlement he is leaning towards "*taking my chances in arbitration*". However, remarkably, in an earlier transcript purportedly recording his discussions with Mr. DeCosta on September 24, 2013 when the 2013 Act was about to be passed (at 66-70), Mr. MacLean in apparently

[9] *Roberts-v-DPP* [2008] Bda LR 37 (Court of Appeal for Bermuda), applying *R v Soneji* [2005] 4 All ER 321.
[10] See e.g. Fahy-v-*The Governor*[2008] Bda LR 66.

discussing a draft of section 14 is focussed solely on the compensation remedial option: "*But how much I'm willing to settle for is the question.*" This supports the other more formal evidential record in demonstrating that for the Applicants the loss of their rights under the Agreements is "all about money", and has never seriously been about seeking to reverse the voiding process.

57. That the Applicants were not vulnerable poorly resourced litigants likely to have difficulty in accessing adequate legal advice can be discerned from two undisputed facts. Firstly, they retained an established local firm of attorneys in connection with the commencement of the Arbitration. Secondly, their final Arbitration pleading was on its face settled by overseas leading counsel. This is unsurprising bearing in mind that the Lease was valued at $45 million. These matters cannot be ignored when one proceeds to consider the following questions:

    (a) did the Applicants clearly and unambiguously represent to Government that they were electing to pursue compensation instead of challenging the voiding of the Agreements? Or

    (b) did the Applicants expressly reserve the right to challenge the voiding?

58. I find that the Applicants did clearly and unambiguously communicate to the Government their intention of pursuing compensation rather than challenging the validity of the voiding of the Agreements. Not only did they positively assert that the Agreements had been voided in their carefully drafted Statement of Case. Their initial pleading actually contained an express reservation of the right to seek constitutional relief, which was clearly limited to challenging the adequacy of the compensation recovered in the Arbitration:

> "*53. If and to the extent that the Government asserts that any of the Claimants' <u>costs and losses</u> are not recoverable in these proceedings, the claimants reserve their rights to pursue other remedies against the Government, including a constitutional challenge.*" [emphasis added]

59. This meaning is consistent not just with common sense: why would any rational disputants proceed with a $45 million claim grounded on the premise that contractual rights have been validly acquired, on terms that the claimant is reserving the right to challenge the validity of the acquisition itself for the purposes of retaining (or re-establishing) ownership of the property in question; a challenge to be launched at some uncertain future date unilaterally chosen by the claimant? It is also consistent with the fact that the Applicants were well aware that ADPL was unlikely in its own right to be able to claim compensation as it had no interest in land. The Claimants' Statement of Case accordingly asserted as follows:

> "*23. AT is a person interested in land which is the subject of voided agreements…and is entitled to compensation under section 14 of the MAA 2013. As explained above, if and to the extent that ADPL is not also entitled to claim compensation in this arbitration, AT is also entitled to recover compensation for any losses incurred by ADPL.*"

60. The implicit suggestion made in the Second Affirmation of Mr. MacLean that the Arbitration was commenced in the expectation of only token resistance is contradicted by the full and careful way in which the Statement of Case was pleaded, including its averments in relation to the ADPL losses issue. It was explicitly contended in the Second Affirmation of Mr. MacLean that the Arbitration was abandoned because of the vigour with which the Government defended the Applicant's claim. The vigorous response came in the Compensating Authority's Statement of Case dated November 14, 2014, a 64 page document settled by overseas leading counsel. The first issue dealt with was entitlement of ADPL to compensation, which was unequivocally denied. The most significant (and perhaps dramatic) plea was that the Agreements were worth only $1. It was accepted that the Trust was entitled to consequential loss.

61. What was the Applicants' pleaded response to this full-blooded and robust Government response to the $45 million claim? The Claimant's Reply, settled by leading counsel, concluded as follows:

> "*74. The Claimants maintain the position set out in their Statement of Case dated 26 September 2014. For the avoidance of doubt, given the case pleaded by the Government of Bermuda, the Claimants reserve their rights to pursue other remedies against the Government, including constitutional challenges.*"

62. This plea clearly signified that the Applicants were (a) standing by their initial claim for compensation for the voiding of the Agreements, and (b) in light of the Government's plea that ADPL was not entitled to obtain any compensation at all and that the Trust was only entitled to recover consequential loss, the right to pursue other compensatory challenges was being expressly reserved. This reservation (like its counterpart in the Statement of Case) comes nowhere close to being a reservation of the right to pursue an entirely inconsistent remedy. Nor does it support to any material extent the assertion that the decision to change course and challenge validity of the voiding was wholly or substantially because of the vigorous manner in which the Government responded to the Arbitration claim. If this was the motivation, it provoked a delayed reaction and it does not amount to the sort of compelling new discovery which could potentially constitute legitimate grounds for departing from the position previously elected.

63. For these reasons I find that the Applicants are bound by their election to pursue compensation for the voiding of the Agreements and have, as a result, abandoned

(rather than waived) the right to challenge the validity of the voiding process. It follows that it is an abuse of process for them to pursue any relief designed to regain control of the voided Agreements. To this extent, in the exercise of my discretion, I find that the offending portions of the Originating Summons should be struck out.

64. The estoppel analysis does not in my judgment fit the facts of the present case. If it was not open to me to find that an election had taken place in a technical sense, I would alternatively reach the same finding that pursuit of the inconsistent remedy is abusive on the grounds that an election in the non-technical sense was made.

Findings: is the Applicants' attempt to set aside the voiding of the Agreements an abuse of process because of their delay and failure to pursue more appropriate remedies?

Delay, alternative remedies and abuse of process: general principles

65. The alternative strike-out argument based on delay relied heavily on the Minister's public interest assertions set out in his First Affidavit, fortified by reliance on the fact that the Applicants had failed to pursue the tailor-made statutory remedy in section 14(12) or judicial review. The central theme which ran through these arguments was the notion that the Court was bound to take into account the public interest in expedition, as expressed in the short time-limits created by the legislative scheme pursuant to which the Agreements were voided, in considering the extent to which the present proceedings were abusive by reason of the delay.

66. The Court is most familiar with the application of strike out principles in the context of ordinary civil litigation. In that context, it is routine to have regard to public interest considerations, typically considerations relating to the administration of justice and protecting the integrity of the Court's processes, when considering:

    (a) whether the impugned proceedings have been conducted in a way which represents a misuse of the machinery of the Court; and/or

    (b) whether the discretion to strike out, which must be exercised sparingly, ought to be exercised in all the circumstances of the relevant case.

67. A starting assumption must be that abuse of process focusses on the misuse of the processes of the Court and the public interest in ensuring that litigation is conducted fairly. Where the wider public interest is relevant to this analysis, it may clearly be taken into account. It is not immediately obvious that a claim which causes harm to the wider public interest (e.g. the economy) can be said to constitute an abuse of process on such grounds alone, wholly detached from any misuse of the litigation process.

68. Ms. Carss-Frisk QC submitted that the Court should have regard to the tight timelines imposed by section 14 of the 2013 Act as reflective of a public interest in the expeditious resolution of voiding-related claims. It is impossible to sensibly reject this argument. She supported by reference to the Privy Council decision in *The Bahamas Telecommunications Company Ltd.-v-Public Utilities Commission* [2008] UKPC 10. This was factually a quite similar case to the present one where:

    (a) the claim was not brought within the time-limits prescribed by the statutory scheme;

    (b) the claim was not brought within the longer three months' time-limit for judicial review; and

    (c) the claim was brought 8 months after the latest date when the claimant ought to have known that it had a claim by ordinary civil action, with no satisfactory explanation.

69. The Privy Council held that the way in which the proceedings were being brought, in terms of delay, were so inconsistent with the policy underpinning the legislative scheme out of which the claim arose and the related public interests that they should be struck out on abuse of process grounds. Lord Hope opined as follows:

> "27. *These proceedings are not subject to any time limit, unlike proceedings by way of an appeal under section 7 or judicial review. The contrast with those alternatives, both of which were available as a means of bringing the central issue of law before the court, is stark. If they were to be allowed to continue a prolonged litigation would be likely to ensue. This would be wholly incompatible with what was contemplated when the regulatory system that the 1999 Act lays down was enacted. The technology in the field of modern telecommunications is complex and fast moving. Investment is the key to success. But this in turn depends on winning the confidence of the investor that the benefits of his investment will be realised. Dr Barnett submitted that it was open to the court to excuse an irregularity in the choice of procedure. But the situation that is disclosed by this case goes far beyond a mere irregularity. It is not one which the Board, having regard to the general public interest, can excuse.* "

70. This approach and its supporting reasoning cannot be dismissed as inapplicable because in the present case a constitutional claim is being asserted. It is quite apposite because the (offending) constitutional claim which is being asserted is said to be precisely the same type of claim which could and should have been brought within the compressed time-limits of the special statutory procedure designed specifically for this species of claim. To the extent that the Applicants have also bypassed the further

alternative remedy for challenging the voiding through judicial review, it is permissible to take into account the public interest in that general area of the law in bringing on public law challenges quickly. Although this legal policy is partly based on the notion that judicial review is a discretionary remedy, it is more substantively based on the notion that the interests of good administration will often be undermined if important public activities are unduly delayed. The Applicant's counsel relied upon the following observations of Lord Woolf. Whilst they were made in the judicial review delay context, to my mind the principle stated is capable of wider application:

> "37…*if what is being claimed could affect the public generally the approach of the court will be stricter than if the proceedings only affect the immediate parties*…"[11]

71. The idea that the right of an individual to assert a public law claim by way of judicial review may be restricted in the wider public interest perhaps has greater force (or wider recognition) in the administrative law domain than in the sphere of fundamental rights and freedoms. However, even in the present legal sphere and most particularly as regards the right to property, fundamental rights are not expressed in absolute terms. Such rights can only be enjoyed subject to such limitations as may be required in the wider public interest. It is accordingly entirely consistent with the scheme of section 13 of the Constitution that whenever there is a conflict between the individual rights of the constitutional claimant and the wider interests of the public to take those wider interests into account. The question of delay in bringing constitutional proceedings, and the failure to pursue remedies, which have been made available by legislative provisions designed to afford relief mandated by section 13 itself, necessarily requires any pertinent public interest considerations to be taken into account.

72. In any event, it is clear as a matter of legal principle and high authority that these principles relating to the abusive nature of delay entailing a circumvention of alternative available remedies apply in relation to constitutional claims. In *Durity-v-Attorney-General of Trinidad & Tobago* [2003] 1 AC 405, Lord Brown opined as follows:

> "35…*When a court is exercising its jurisdiction under section 14 of the Constitution and has to consider whether there has been delay such as would render the proceedings an abuse or would disentitle the claimant to relief, it will usually be important to consider whether the impugned decision or conduct was susceptible of adequate redress by a timely application to the court under its ordinary, non-constitutional jurisdiction. If it was, and if such an application was not made and would now be out of time, then, failing a cogent explanation the court may readily conclude that the claimant's*

[11] *Clarke-v-University of Lincolnshire and Humberside* [2000] 1WLR 1988 at 1997H-1998A.

constitutional motion is a misuse of the court's constitutional jurisdiction. This principle is well established. On this it is sufficient to refer to the much repeated cautionary words of Lord Diplock in Harrikissoon –v- Attorney General of Trinidad and Tobago [1980] AC 265, 268. An application made under section 14 solely for the purpose of avoiding the need to apply in the normal way for the appropriate judicial remedy for unlawful administrative action is an abuse of process."

73. In the 'overriding objective' era, I consider that the terminology of Lord Brown suggesting a more flexible discretion are more reflective of the modern legal position than the phraseology of Lord Diplock, whose judgment in *Harrikissoon* was delivered in January 1979, suggesting that only a constitutional claim brought "solely" to avoid applying for the alternative remedy would be an abuse of process. This conclusion finds additional general support in a Seychellois authority not referred to in the course of argument, *Hackl -v- Financial Intelligence Unit and Another* [2010] SCCC 1; [2011] LRC 59 (Seychelles Constitutional Court). In that case a petition for constitutional relief for deprivation of property was dismissed because the petitioner had not availed himself of alternative remedies under the Proceeds of Crime (Civil Confiscation) Act.

Delay, alternative remedies and abuse of process: findings

74. It is plain and obvious that the delay in bringing the present proceedings to challenge the voiding of the Agreements is an abuse of process in the sense that it violates the public policy underpinning the 42 day time-limit for appealing the voiding under section 14 (12) of the 2013 Act without any satisfactory explanation or excuse. These time-limits are obviously the manifestation of Parliament's view that it is in the public interest that both claims for compensation and challenges to the validity of acquisitions be quickly adjudicated. It is self-evident that such expedition serves public policy objectives, both of which are embedded in section 13(1) of the Constitution itself:

    (a) the need to ensure prompt as well as adequate compensation for the claimant whose property has been acquired in satisfaction of the claimant's express rights in this regard under section 13(1)(c) of the Constitution;

    (b) the need to ensure prompt and unimpeded access by the State to the acquired property which has been taken in the public interest, pursuant to its implied rights under section 13 (1)(a) of the Constitution.

75. It is also clear that a section 14(12)(b) appeal on the grounds that "*the taking of possession or acquisition of the property, estate, interest or right in the land is not in accordance with this Act or is otherwise unlawful*" would have afforded the Applicants an opportunity to challenge the voiding on constitutional grounds. As the Respondents' counsel pointed out, the "Construction Issue" in Part II of the Originating Summons is an ordinary public law or statutory interpretation point, coupled with a reliance on common law protection of property rights. These complaints could have been advanced in the context of a judicial review application for declaratory relief under Order 53 of this Court's Rules.

76. Part III contains a full-blooded attack on the constitutionality of the legislative scheme contained in paragraph 14. Both grounds are asserted in part in support of the attempt to unwind the voiding of the Agreements. Bearing in mind that the right of appeal in subsection (12) is expressed in terms designed to embrace grounds of appeal based on legal considerations other than within section 14 itself, these constitutional arguments could clearly have been raised either:

    (a) within such an appeal as initially constituted; or

    (b) by way of amendment to such appeal proceedings to seek consolidated relief under section 15 as well assuming (which in my judgment would not have been justified) doubt existed as to the ability to raise constitutional points under section 14(12).

77. I accept the Minister's unchallenged assessment that the 'Waterfront' is a public asset of crucial significance which is intended to be used in connection with the America's Cup and an Event Village scheduled for October 15-18 this year. I also accept that if the Government's ability to utilise this crucial asset were to be impaired and/or rendered subject to doubt due to the belated prosecution of a challenge to the voiding of the Agreements, that international confidence in the ability of Bermuda to effectively host events such as the America's Cup would be undermined. The direct and indirect economic benefit of the America's Cup to the community as a whole is in my judgment a notorious fact of which I could take judicial notice in any event.

78. Although the America's Cup may not have been in view when section 12 of the 2013 Act was enacted, the time limits enacted for challenging voided agreements were clearly designed to prevent precisely the sort of collision between private and public interests which the present proceedings have brought about. In circumstances where there is no satisfactory explanation for the delay and the Applicants have forsaken the appropriate statutory remedies for obtaining equivalent relief, the attempt to set aside the voiding of the Agreements in the present proceedings constitutes a gross misuse of the constitutional processes of the Court.

79. It follows that I reject entirely the suggestion made in the Second Affirmation of Mr. MacLean (paragraph 60) that the Respondents' true reasons for seeking to strike out the present proceedings are to prevent the allegations of misconduct identified in that Second Affirmation and the First Affirmation of Peniston from being subjected to "*sufficient scrutiny*". This suggestion on its face makes no sense bearing in mind that:

    (a) the alleged misconduct was only first raised by the Applicants in their evidence in response to the strike out application despite being admittedly within their knowledge before the voiding even took place in March 2014;

    (b) the alleged misconduct was, at the hearing, admitted to have no bearing on the merits of the strike out application;

    (c) it is difficult to see what relevance the alleged misconduct has to the merits of the constitutional application as a whole. Because despite filing detailed pleadings in the Arbitration and a fully particularised Originating Summons filed in the present proceedings, no assertion has ever been made which expressly or impliedly suggests a ground of complaint which impugns in a similar or connected manner the integrity of the Government actors involved in the enactment of the impugned provisions of the 2013 Act.

80. While in other places mere allegations may be considered to be of great import, such is not the approach of the courts. In civil litigation where most evidence is initially filed in written form, findings will not usually be made based on the contents of seriously contested portions affidavits or witness statements without oral evidence and cross-examination. And even then, findings will only be made on matters which are relevant to the issues in dispute, not on tangential issues, no matter how colourful those issues may be.

81. I also am bound to take into account a further public interest consideration. That is that the Ombudsman's December 2013 Report found that the way in which the Agreements had been entered to by the Corporation constituted maladministration. The mere fact that those findings were made constituted very significant independent support for the *bona fides* of the decision of the Government to void the Agreements in March 2014. In stating this, I express no view on either (a) the merits of the Report's findings and how (if at all) the Report impacted the commercial value of the Agreements, which are matters in controversy in the Arbitration, nor (b) on whether the constitutional requirements for voiding the Agreements were met.

82. Against this background, however, it is all the more abusive for the Applicants to fail to pursue their challenge promptly and by the most appropriate procedure, and to only

seek to do so belatedly, in circumstances where there is no solid reason why their individual rights should trump the countervailing public interest.

83. What was ultimately in dispute in the strike out application was not whether the parties can seek to establish that, notwithstanding whatever compensation they obtain through the Arbitration, such compensation falls short of the constitutional standard. Nor was it in dispute, after Mr. Johnston's brief but compelling submissions on this topic, that if the Applicants are to be able to seek additional constitutional compensation, they must necessarily be entitled to establish that a substantive breach of the Constitution occurred. In seeking to establish that, in my judgment, they are at least arguably entitled to rely on a breach of the non-compensatory requirements of section 13(1) as well.

84. All that the Court is deciding, in acceding to the strike out application on delay and/or election grounds at this stage, is that it is too late for the Applicants to pursue one particular form of relief, namely an unwinding of the voiding of the Agreements. The right to seek appropriate constitutional relief at the appropriate time is not being denied. For these alternative reasons those portions of the Originating Summons which seek to set aside the voiding of the Agreements must, in the exercise of my discretion, be struck out.

85. It follows that the surviving portions of the Originating Summons only concern complaints and related relief which cannot actively be sought until the Arbitration (and possibly any related appeal as well) have been concluded. In practical terms, the Applicants are only left to seek constitutional relief on the grounds that not only have their constitutional rights been infringed by the effects of the voiding process, but also that one or both of them have not received adequate compensation in section 13 terms.

Findings: section 15(2) proviso of the Bermuda Constitution

86. For the avoidance of doubt I would, if required to formally address the proviso to section 15(2) of the Constitution have found that I was satisfied, on the above grounds, that the relevant limbs of constitutional relief sought should not be granted because adequate means of redress have been available to the Applicants under another law.

87. On balance, this provision is (as appears to have been assumed by the Respondents' counsel) simply a gateway through which the Court's inherent jurisdiction to restrain abuses of its process can be accessed in the constitutional context. It is also a reminder that a freestanding application for constitutional relief should be the last port of call rather than the first when adequate means of redress are available under the general law.

The status of the Originating Summons

88. It remains to consider precisely what portions of the Originating Summons should be struck out. I have found that it is an abuse of process for the Applicants to pursue in the present proceedings grounds of complaint designed to establish that the Agreements were never validly voided. Such complaints could have been pursued under section 14(12) of the 2013 Act and/or by way of judicial review.

89. Part III of the Originating Summons contains the following central averment: "*20. In the premises, the MAA 2014 did not have the effect of achieving a legislative voiding of the Agreements*…" This is a point of statutory interpretation which is linked to the following prayer for relief:

> "*31.1 A declaration that on a proper construction of section 14 of the Municipalities Act 2013 (both in its original form and in the form amended by the Municipalities Amendment Act 2014) that Act did not have the effect in law of voiding the Agreements which were rejected by the Legislature on 7 March 2014.*"

90. Paragraph 31.2 of the Originating Summons also seeks a declaration that the voiding was of no legal effect on alternative grounds:

> "*31.2 In the alternative, if the said voiding was the apparent legal consequence of the said rejection, a declaration that the voiding was of no legal effect because the voiding violated the Applicants' constitutional and common law rights to property.*"

91. Part III of the Originating Summons and paragraphs 31.1 and 31.2 of the prayer of the Originating Summons are struck out on the abuse of process grounds explained above.

92. The following prayer for relief is also struck out on the grounds that it is plain and obvious that the relief sought ought not be granted by way of 'freestanding' constitutional relief:

> "*31.4 In the further alternative, declarations as follows as to the correct legal approach to be adopted under the legislation in the calculation of compensation:*
>
> *(a) That the Agreements, and/or the holders of the Agreements, should be treated as one.*

(b) That the Trust is entitled to recover all consequential losses as a result of the voiding.

(c) *That the Government of Bermuda's claimed hostile attitude to the Waterfront Development is not to be taken into account in assessing* compensation.*"*

(d) *That matters connected with the rejection are not to be taken into account in assessing compensation.*"

93. What the correct approach is under the 2013 Act is a matter to be determined within the Arbitration. Section 14 makes the following provisions relating to arbitration proceedings under the 2013 Act:

> "*(10)Sections 10, 11, 12, 13, 14 and 15 of the Acquisition of Land Act 1970 shall apply to any question referred to arbitration, and the reference in section 14(4)(c) of that Act to "the notice to treat under section 5" shall be construed as a reference to the voiding of the agreement under this section.*
>
> *(11)The Minister or any person making a claim under this section who is aggrieved by an award of the arbitrators under section 15 of the Acquisition of Land Act 1970 may, within 21 days of the date of the award, appeal to the Supreme Court on the ground that the amount of compensation awarded has been wrongly determined.*"

94. The relief sought in paragraph 31.4 of the Originating Summons is relief to be sought in the first instance from the Arbitration Tribunal which the Applicants have referred their compensation dispute to. The issues in question have been addressed in the Applicants' own Arbitration pleadings (e.g. Claimants' Statement of Case, paragraphs 3-5, 75-79, and Claimants' Reply paragraphs 35-49). If they are dissatisfied with the way those issues are determined by the Tribunal, they have a right of appeal to this Court under section 14(11) of the 2013 Act. That is the exclusive procedure prescribed by the applicable legislation (and also contemplated by section 13 of the Constitution itself) which the Applicants have themselves invoked for compensatory relief. It is an abuse of process to seek that relief by way of an Originating Summons under section 15 of the Constitution as this is a remedy designed to afford wholly different forms of relief.

95. I decline to strike out Part III of the Originating Summons to the extent that:

(a) it seeks to contend that the voiding (assumed for these purposes to be valid) interfered with the Applicants' section 13(1) rights because the various conditions prescribed by the Constitution were not met; and

(b) it seeks (via the prayer for relief in paragraph 31.3) to receive adequate compensation pursuant to section 13(1)(c)(ii) of the Constitution.

96. However, for the same reasons the prayer for relief under paragraph 31.4 of the Originating Summons is an abuse, so are the corresponding averments in paragraph 24.6 and 28, which invite this Court to both prejudge an assessment not yet made by the Tribunal, and further to grant pre-hearing relief which would usurp the exclusive jurisdiction of the Arbitration Tribunal to make primary assessment determinations.

97. It follows from the reasoning underpinning the above conclusions that it would equally be an abuse of process for the Applicants to seek to pursue the surviving parts of their Originating Summons before they have exhausted their remedies under the Arbitration. This conclusion does not in any way seek to prejudge any future case management decisions about whether any appeal from the award of the Tribunal should be heard first or could be listed for hearing at the same time as the present constitutional application.

Conclusion

98. The Respondents' strike out application is allowed to the extent set out in paragraphs 88 to 97 above. The Applicants can no longer seek to challenge the validity of the voiding of the Agreements and may only seek constitutional relief with a view to obtaining adequate compensation. Such relief can only be pursued on the basis that, having exhausted their statutory remedies in the Arbitration under the 2013 Act, the relief obtained falls short of the constitutional standard or they are for other reasons entitled to additional constitutional compensatory relief.

99. I will hear counsel as to costs and consequential matters arising from the present Ruling, such as the terms of the final Order, if required.

Dated this 24th day of August, 2015 _____

IAN RC KAWALEY CJ