



Trinity Term  
[2022] UKPC 25  
Privy Council Appeal No 0070 of 2021

## **JUDGMENT**

**Mackenzie Frank and another (Appellants) v Attorney  
General of Antigua and Barbuda (Respondent)  
(Antigua and Barbuda)**

**From the Court of Appeal of the Eastern Caribbean  
Supreme Court (Antigua and Barbuda)**

before

**Lord Reed  
Lord Sales  
Lord Hamblen  
Lord Burrows  
Lady Rose**

**JUDGMENT GIVEN ON  
13 June 2022**

**Heard on 3 May 2022**

*Appellants (Mackenzie Frank and Trevor Walker)*

Justin L Simon QC

Sylvester Carrott

Kwame L Simon

(Instructed by Royds Withy King (London))

*Respondent*

Anthony Astaphan SC

Carla Brookes-Harris

Dr David Dorsett

(Instructed by Axiom DWFM Ltd (London))

**LORD BURROWS AND LADY ROSE: (with whom Lord Reed, Lord Sales and Lord Hamblen agree)**

**1. Introduction**

1. This appeal concerns a claim brought by two Barbudans, Mackenzie Frank and Trevor Walker. Both have represented Barbuda in the Parliament of Antigua and Barbuda and have previously held Ministerial office. They and a number of fellow Barbudans are opposed to a major tourism development on Barbuda involving the building of a hotel resort. For the purposes of that development, 391 acres of land have been leased by the Government of Antigua and Barbuda to Paradise Found LLC for 99 years for a rental payment of US\$5.2m payable, on the signing of the lease, to the Government of Antigua and Barbuda. There is an option to renew the lease for a further 50 years, exercisable on completion of the resort, for a further rental payment of \$1m. That lease has been approved by the Paradise Found (Project) Act 2015.

2. The claimants allege, in an action commenced on 6 June 2016, that the grant of the lease infringes their rights under section 9(1) of the Antigua and Barbuda Constitution (1981) (“the Constitution”) protecting them from deprivation of property and that, therefore, the Paradise Found (Project) Act 2015 is void and/or they are entitled to payment of fair compensation (and vindictory damages). The defendant, the Attorney General of Antigua and Barbuda, representing the Government of Antigua and Barbuda, has sought to strike out the claim as disclosing no cause of action and/or as being an abuse of process.

3. It is helpful to set out straightaway section 9(1) of the Constitution:

**“9. Protection from deprivation of property**

(1) No property of any description shall be compulsorily taken possession of, and no interest in or right to or over property of any description shall be compulsorily acquired, except for public use and except in accordance with the provisions of a law applicable to that taking of possession or acquisition and for the payment of fair compensation within a reasonable time.”

4. The central issue on this appeal is whether the claimants have an “interest in or right to or over property” which is protected by section 9(1) in relation to the land on

Barbuda that has been leased to Paradise Found LLC. In the High Court of Justice of the Eastern Caribbean Supreme Court, in a judgment dated 19 February 2018, Wilkinson J dismissed the Attorney General’s application to strike out the claim. However, on appeal by the Attorney General, that decision was overturned and the claim was struck out by the Court of Appeal of the Eastern Caribbean Supreme Court in a judgment dated 26 June 2020. The lead judgment of the Court of Appeal was given by Bennett JA (Ag) with the concurrence of Thom JA and, while adding some reasons of his own, of Michel JA. The claimants now appeal to the Board.

5. The main submission of the claimants is that they have a proprietary interest or right protected under section 9(1) of the Constitution because they are Barbudans. They rely on the provisions of the Barbuda Land Act 2007, in particular on section 3 which states that all land in Barbuda “shall be owned in common by the people of Barbuda” and that title to all land in Barbuda shall vest in the Crown “on behalf of the people of Barbuda”. Section 3 has subsequently been repealed by the Crown Lands (Regulation) (Amendment) Act 2018 but was in force at the time the lease to Paradise Found LLC was granted.

## **2. The law on striking out a claim**

6. It is well-established that the strike-out jurisdiction extends to constitutional claims (see *Ingraham v Glington* [2006] UKPC 40; [2007] 1 WLR 1, para 11). Moreover, there is no dispute between the parties as to the relevant test for striking out a claim. That test is whether the claim has a realistic prospect of success. In this case the facts are straightforward and are not in dispute (and have been set out in para 1 above). The Board and the courts below have been presented with a pure question of law. In *Easyair Ltd (trading as Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch), Lewison J made clear at para 15(vii) that where a case raises a point of law and “the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the [claimant’s] case is bad in law, he will in truth have no real prospect of succeeding on his claim ...”. In order to determine whether the claim should be struck out the Board should therefore “grasp the nettle” and decide the point of law one way or the other.

## **3. The Constitution and the Barbuda Council**

7. In 1980, the Antigua Constitutional Conference was held at Lancaster House in London to discuss independence from the United Kingdom. On 1 November 1981, as

embodied in the Constitution, Antigua and Barbuda obtained independence as the sovereign unitary state of Antigua and Barbuda.

8. Section 9(1) of the Constitution, which has been set out in para 3 above, falls within Chapter II of the Constitution which sets out, in sections 3 to 17, the fundamental rights and freedoms of every person in Antigua and Barbuda. Section 18, which is invoked in this case, provides that, if any person alleges that any of the provisions of sections 3 to 17 has been or is being or is likely to be contravened in relation to him, that person may apply to the High Court for redress. The High Court has jurisdiction to hear and determine any such application and to make such declarations and orders as appropriate for the purpose of enforcing those rights.

9. The Constitution also contains, amongst other things, detailed provision for the main organs of state: the Governor General as Her Majesty's representative, a Senate with 17 appointed members, a President who is a Senator elected by the Senate, a directly elected House of Representatives, and a Prime Minister and Cabinet (which is in practice the Executive/Government of the state of Antigua and Barbuda).

10. Section 123 of the Constitution provides that "There shall be a Council of Barbuda which shall be the principal organ of local government in that island". The Barbuda Council ("the Council") "shall have such membership and functions as Parliament may prescribe". In fact, the Council predates the Constitution having been set up in 1976 by the Barbuda Local Government Act ("the BLG Act"). This established the Council as a body corporate, provided for its membership, and conferred on it the functions, duties and powers referred to in the subsequently enacted section 123 of the Constitution. One must therefore look to the BLG Act to see how the Council operates.

11. The powers of the Council prescribed in the BLG Act include the power, under section 3 of that Act, "to purchase, acquire, hold, mortgage and dispose of land and other property". Council members must have a strong connection by birth with Barbuda and be ordinarily resident on the island: section 6(1). By section 12, the members of the Council are elected by an electorate comprising those people who are entitled to vote for the member of the House of Representatives who represents the constituency of Barbuda in the Parliament of Antigua and Barbuda. Sections 18-21 provide for the responsibilities and duties of the Council which cover a wide range of public functions including to administer agriculture, public health and utilities services, to construct and maintain roads, and to raise revenue. Section 18(4) provides that it is the duty of the Council to promote hotel and tourism development in accordance with, and subject to, any law relating to the alienation of land, foreign investment or tax incentives. The BLG Act provides for the Cabinet to be involved in the exercise by the

Council of its functions, with a power conferred on the Cabinet to give general or special directions as to the policy the Council should follow in respect of some, though not all, of its duties, and with the approval of the Cabinet being required for certain decisions. For example, section 21 provides that the Council may, with the sanction of the Cabinet, acquire by lease or purchase lands and buildings “for any purpose of public utility” (section 21(1)).

#### **4. The ownership and use of land on Barbuda prior to the Barbuda Land Act 2007**

12. The Board is here grateful to rely on the historical summaries set out in the judgment of Sir Dennis Byron CJ (with whom Satrohan Singh and Redhead JJA agreed) in *Attorney General v Barbuda Council* (2002) 65 WIR 93, paras 15-20; and in the judgment of Bennett JA (Ag) at paras 2-11 in this case.

13. Starting in 1632, the islands of Antigua and Barbuda were colonised by the English. In 1685, Barbuda was leased to brothers John and Christopher Codrington and was subsequently and continuously leased to members of their family for over 200 years. The inhabitants of the island are the descendants of slaves that the Codringtons brought to Barbuda by force and who remained in Barbuda as slaves until slavery was abolished in 1834. The Codrington family surrendered their leasehold interest in the island in 1870 and the land reverted to the Crown. After 1870, the Crown granted a succession of leases to private interests (Messrs Hopkins and Cowley and finally to the Barbuda Island Company). After 1898, no further leases were granted by the Crown. In addition to dwelling in the village, the inhabitants used land all over the island to cultivate gardens, rear livestock and otherwise to work the land with little interference from the Crown.

14. The colonial authorities promulgated a series of enactments to regulate and control that permissive use by the inhabitants while preserving the position that title to all the land in Barbuda was vested in the Crown. These culminated in the Barbuda Act of 1904 (“the 1904 Act”). Section 4 of that Act provided that all lands within Barbuda were vested in the Governor General on behalf of the Crown and were to be dealt with in accordance with the provisions of that Act. Section 13 of that Act (which, following later amendment, subsequently became section 5 of the 1904 Act) stated that the inhabitants of Barbuda were “tenants of the Crown”. In 1982 and 1983 amendments were made to the 1904 Act, including the insertion of new subsections into what had become section 5. The amended provisions of section 5 still provided that all inhabitants of Barbuda were declared to be tenants of the Crown but added that that did not preclude the grant by the Crown of any interest in or over any piece of land within Barbuda to any person, whether or not that person was an inhabitant of Barbuda. This power was subject to a right to compensation on the part of any

Barbudan who could show that such a grant had caused him any material loss in respect of any use that he had been making of the land.

15. Disputes subsequently arose as to the respective powers of the Crown and of the Council in respect to the granting of leases of land in Barbuda. For example, in 1985, in *Thomas Hilbourne Frank v Attorney General* (Civil Appeal No 1 of 1990), a Senator of the Antigua and Barbuda Parliament and Chair of the Council, Thomas Hilbourne Frank, filed a notice of motion asserting various “customs and rights” of the system of land tenure on the island. Mr Frank sought a declaration that amendments to the 1904 Act purporting to confer a power on the Crown to grant interests over land to non-Barbudans were unconstitutional and void being in violation of section 9 because it was not restricted to grants for public use. That motion was denied on the grounds that the claimant had no locus standi in the absence of an infringement or threatened infringement of his rights. In his judgment in that case, Sir Vincent Floissac CJ (with whom Nicholas Liverpool and Satrohan Singh JJA agreed) stated, in the penultimate paragraph of his judgment, that the proprietary rights and interests claimed by Mr Frank on behalf of the inhabitants had not yet been legally established and it was not part of the function of the court “to grant relief which amounts to legislation in regard to those rights and interests ... The court can only declare and protect legally established rights and interests”.

16. Then in *Attorney General v Barbuda Council* (2002) 65 WIR 93, the question arose as to whether the Crown, as opposed to the Council, had the power to grant a lease of land in Barbuda to a company called Unicorn Development Ltd for a hotel development. In holding that the Crown did have that power, Sir Dennis Byron CJ, giving the leading judgment of the Court of Appeal, described the BLG Act as “an important step towards self-determination” (para 61) establishing the Barbuda Council on democratic principles. However, he summarised his conclusions at para 81 as follows:

“I would now summarise my answers to the issues raised on this appeal. The law is that the Crown as the owner of land has the power to grant, including the power to lease, lands on the island of Barbuda. The laws in my view are equally clear that the Barbuda Council has no role in the transfer of title. There is no requirement in the Barbuda Act, nor in the Local Government Act nor in any other Act requiring the Crown to first obtain the consent or approval of the Barbuda Council before exercising its powers to grant any land. The Council had no legal or other interest in the land contained in the grant of the lease to Unicorn. Nor did the Council have

any legal or constitutional status in the process of granting an interest in land to anyone. The legislation as I have shown does not preclude the Crown from behaving as a universal and absolute owner and in that capacity granting an interest in land. The evidence indicates that the proper processes required by law were observed and the lease was properly issued by the Governor General. In my view the granting of the lease was not unlawful.”

17. It was in the light of that judgment that the Barbuda Land Act 2007 was enacted.

## **5. The Barbuda Land Act 2007**

18. The Preamble to the Barbuda Land Act 2007 (“the 2007 Act”) states that it is

“An Act to confirm that all land in Barbuda is owned in common by the people of Barbuda, to provide for the administration and development control of land in Barbuda, to provide for the confirmation or otherwise of certain leases of land in Barbuda, and for incidental and connected purposes.”

19. Part I of the Act is headed “Preliminary” and contains sections 1-2. Section 2 is the “Interpretation” section. The term “Barbudan” is defined in section 2 as follows:

“(a) a person born in Barbuda of whose grandparents at least one was born in Barbuda; or

(b) the child, wherever born, of parents at least one of whom is a Barbudan within the meaning of paragraph (a).”

The claimants in this case are both Barbudan within that definition. The term “land” is defined in section 2 as including “an interest in land”; and the term “major development” means

“(a) a development which will cost in excess of five million four hundred thousand dollars; or



(b) a development which in the view of the Council or of the Cabinet will have a significant impact on the economy, environment or infrastructure of Barbuda.”

20. Part II of the 2007 Act (containing sections 3-6) is entitled “The Ownership of Land in Barbuda”. Section 3 provides:

**“3. Barbuda land is owned in common by Barbudans**

(1) All land in Barbuda shall be owned in common by the people of Barbuda.

(2) Subject to sections 4 [land held for public purposes] and 20 [existing leases], the title to all land in Barbuda shall vest in the Crown on behalf of the people of Barbuda.”

21. Section 5(1) provides that no land in Barbuda shall be sold and, by section 5(2), “No person shall acquire the ownership of any land by prescription or otherwise”.

22. Section 6 makes provision for leases of land for major developments. We discuss this below when considering Part VI of the 2007 Act which gives more detail of the procedure to be followed in order for such a lease to be granted.

23. Part III of the 2007 Act (containing sections 7-10), headed “The Rights of the People of Barbuda”, then sets out a bespoke regime by which Barbudans over the age of 18 years can acquire limited rights over land designated for the purpose for which the applicant wishes to use it. According to section 7, the primary right which can be granted, “subject to availability”, is an exclusive right of occupation of land for a dwelling, or for cultivation or for commercial purposes other than major developments. Barbudans may also be granted a non-exclusive right to graze animals over the land.

24. The application process to be followed by a Barbudan applying for the grant of exclusive rights of occupation under section 7 is set out in the Barbuda Land Regulations 2010 (SI 2010/17) (“the 2010 Regulations”) and includes the payment of a fee, the submission of documents proving his or her status as a Barbudan and evidence of the purpose for which the land will be used. Where a person has been granted an exclusive right of occupation, the Council may, on the person’s application, grant a

lease to that person for the purposes for which the exclusive right has been granted, for a maximum term of ten years, renewable for additional periods of ten years: section 8.

25. Part IV of the 2007 Act (containing sections 11-14) deals with the powers and duties of the Council. As well as the duty to designate land for specific uses under section 12, the Council must grant an exclusive right of occupation to a Barbudan “who wishes to exercise his or her rights under section 7”: section 11(2).

26. Part V contains just one section, section 15, and deals with residential land. The claimants rely on section 15(4) and (5) in support of their claim. These subsections provide:

“(4) On the death of a Barbudan, the exclusive rights of occupation of residential land which have been granted to him or her shall pass by operation of law, or by will, to his or her next of kin or heirs.

(5) If a Barbudan has died intestate without leaving next of kin, any exclusive rights of occupation granted to him or her shall immediately expire and the land shall be vested unencumbered in the Crown on behalf of the people of Barbuda.”

27. Part VI of the 2007 Act, headed “Future Development of Land in Barbuda”, contains sections 16-19 and, together with the earlier section 6, provides for major developments in Barbuda. Section 6 reads as follows:

**“6. Leases of land for major developments**

(1) The Council, with the approval and on the advice of Cabinet and having obtained the consent of a majority of the people of Barbuda, may grant leases of land for major developments in accordance with this section and Part VI.

(2) A person proposing to develop land in Barbuda shall apply to the Council in accordance with the regulations and pay the application fee set out in the regulations.

(3) Before the Council grants a lease under subsection (1) it shall obtain the consent of a majority of the people of Barbuda.

(4) The Council may grant a lease of land in Barbuda for a major development for a maximum period of 50 years, or any longer period that the Council may, by regulation fix in accordance with this Act.

...”

28. Section 17 reiterates that major developments shall not take place without the agreement of the Cabinet and the Council and the consent of the people of Barbuda in accordance with Part VI. The procedure to be followed to obtain the necessary consents is set out in section 17(2)(a)-(d). First, the Council must obtain the consent of the people of Barbuda to the principle of the proposal; then the proposal is to be considered and approved in detail by the Council; if so approved, it is then considered by the Cabinet; finally, if the Cabinet agrees, the Council must obtain the consent of the people of Barbuda.

29. As to how the consent of the people of Barbuda is to be obtained, section 18 places on the Council the responsibility of consulting the people and obtaining their consent either by a meeting or a vote. The 2010 Regulations provide, in regulation 10, for the convening of meetings to discuss and vote on whether to consent to a major development. They provide that such a meeting must have a quorum of 50 and that, broadly, only Barbudans who are present at the meeting are entitled to vote.

30. According to section 19 of the 2007 Act, a lease granted for the development of land in Barbuda must specify a time within which the tenant must begin to develop the land and complete the development. If the tenant fails to do so then, if the Council refuses to grant further time, the lease determines and the land “shall revert to the Crown unencumbered to hold on behalf of the people of Barbuda”.

31. Under Part IX (“Miscellaneous”), section 28 repeals certain provisions of the 1904 Act including section 5; and section 30 provides that “This Act shall bind the Crown”.

## 6. The Paradise Found (Project) Act 2015

32. The preamble to the Paradise Found (Project) Act 2015 (“the Paradise Found Act”) states that the Act provides “for the approval of specified terms of an Agreement dated 3 November 2014 between the Government of Antigua and Barbuda and Paradise Found LLC for a tourism development Project in Barbuda”. It defines the “Leased Land” as the parcels of land situate in Barbuda leased to Paradise Found LLC or its subsidiaries or affiliates as described in Schedule 1 to the Act together with all lands that may be leased in future for the purposes of the Project. The “Project” is the tourism and real estate development on Barbuda by Paradise Found LLC on lands of the former “K Club” resort together with the additional lands leased by the Government to Paradise Found LLC on 3 November 2014. The K Club referred to was established in 1989 under a lease of 251 acres of beach front land. It is common ground that the Paradise Found Project is a “major development” within the meaning of the 2007 Act.

33. Section 3 of the Paradise Found Act provides:

“(1) Notwithstanding the provisions of the Barbuda Land Act 2007, or any other law to the contrary, the Government leases to Paradise Found the Leased Land on the terms set out in Schedule 2.

...

(3) The provisions of the Barbuda Land Act 2007 [do] not apply to the lease of the Leased Land pursuant to this Act.”

34. Sections 4, 5 and 6 then expressly disapply sections 6, 17 and 19 of the 2007 Act, making it clear that (i) the need for the advice of the Cabinet or the consent of a majority of the people of Barbuda required under section 6 of the 2007 Act does not apply, (ii) the procedure for obtaining Cabinet and Council approval specified in section 17 is not applicable, and (iii) the time limits on development in section 19 shall not apply.

## **7. The claim and the judgments of the lower courts**

35. The claim form issued by Mackenzie Frank and Trevor Walker seeks declarations and relief pursuant to section 18 of the Constitution:

(i) A declaration that the Government has compulsorily acquired and taken possession of the property specified in Schedule 1 to the Paradise Found Act by securing the enactment of that Act; that the property was not acquired for public use; that section 3 of the Act violates section 9 of the Constitution and is therefore void and of no effect;

(ii) An order striking down the Paradise Found Act;

(iii) In the alternative, if the court finds that the land has been acquired for the public good, a determination of the amount of compensation to which the people of Barbuda are entitled, payment of that compensation and vindicatory damages.

36. A schedule to the originating motion lodged by the claimants contained the signatures of about 100 Barbudans who supported the application.

37. In her judgment handed down on 19 February 2018, Wilkinson J decided that the claim should not be struck out. She said that, in interpreting the meaning of the term in the 2007 Act, “[land] owned in common” by the people of Barbuda, she was guided by the definition of the same term in the Registered Land Act 1975, section 102. This is set out at para 50 below and provides that, where any land is owned in common, each proprietor is entitled to an undivided share in the whole. Wilkinson J considered that it would lead to uncertainty for the same term to be given two different meanings in the two different statutes. She therefore held, at para 40 of her judgment, that the claimants owned an undivided share in the land in Barbuda and that this was protected under the Constitution.

38. Wilkinson J also referred to section 3(2) of the 2007 Act which, as set out in para 20 above, provides that title in the land in Barbuda vests in the Crown “on behalf of the people of Barbuda”. She said, at para 31, that this was the simplest way of stating that while the land is vested in the Crown “it is not for the Crown’s use or benefit, but rather that the Crown is holding it on behalf of the people of Barbuda and so it could only be used for the benefit of the people of Barbuda”. This was, she held, on all fours

with the classic establishment of a trust so that the Crown could be said to be in the position of trustee.

39. On appeal, the Court of Appeal disagreed with the judge as to the relevance of the term “owned in common” in the Registered Land Act. That Act did not apply to land in Barbuda. The phrase used in the 2007 Act was referring to a different concept, given that section 5 of the 2007 Act expressly precluded the ownership by a person of land in Barbuda and the provisions of the 2007 Act created only very limited kinds of entitlements which could be conferred on Barbudans. Bennett JA concluded that the reference to ownership in common in the 2007 Act did not amount to ownership of undivided shares in the land by members of the defined class.

40. He then turned to the question whether these limited rights enjoyed by Barbudans by virtue of their status as Barbudans amounted to an interest in or right to or over property protected by the Constitution. He recognised that the term “property” in section 9 must be read in a wide sense. But he held, at para 76, that a right to apply for the grant of an interest in land was not in itself an interest in property which if taken away entitles one to compensation: “however generously the concept of ‘an interest in or right over property’ is construed, the benefit or privilege so described must at least be exercisable immediately and as of right”. Since the claimants did not assert that they were entitled to any immediate right to use or occupy the land, they lacked the necessary standing to pursue a claim for relief.

#### **8. Do the claimants have a relevant “interest in or right to or over property” under section 9(1) of the Constitution?**

41. The central submission of Justin Simon QC, counsel for the claimants, is that Mackenzie Frank and Trevor Walker have a proprietary interest protected by section 9(1) of the Constitution in relation to the land on Barbuda that has been leased to Paradise Found LLC. This is because they are Barbudans and, by section 3 of the 2007 Act, all land in Barbuda is “owned in common by the people of Barbuda” and title to land in Barbuda is vested in the Crown “on behalf of the people of Barbuda”. That reference to the Crown holding the land on behalf of the people is confirmed, Mr Simon submits, by the use of the same words in sections 15(5) and 19 which state that, where land reverts to the Crown on an intestacy or if the time limit on a major development expires, the land is also held by the Crown “on behalf of the people of Barbuda”.

42. More specifically the claimants argue that the 2007 Act has created a form of trust whereby the Crown holds the legal title to all the land in Barbuda as trustee for

the people of Barbuda who are all beneficiaries with equitable title. Deprivation by compulsory acquisition of a person's equitable title to land is therefore deprivation of an "interest in or right to or over property" under section 9(1) of the Constitution. That submission is consistent with the view accepted at first instance by Wilkinson J that "owned in common" in the 2007 Act means the same as that provided for in section 102 of the Registered Land Act which may be said to embody similar characteristics to the traditional English law concept of tenants in common co-owning undivided shares.

43. The Board rejects those submissions for the following reasons.

44. First, if those submissions were correct (and assuming the grant was not for public purposes), every grant of a lease of land for development purposes and every exclusive right of occupation or lease granted to a Barbudan pursuant to sections 7 and 8 of the 2007 Act would diminish the equitable co-ownership rights of (other) Barbudans. The grant would therefore entitle them to compensation under the Constitution. That would be an absurd consequence which would undermine the purpose of the 2007 Act. Moreover, once one departs from the idea of the Crown holding the land on trust for the people as equitable co-owners, the language in section 3(2) of the 2007 Act of all land in Barbuda being vested in the Crown (subject to land held for public purposes and land already leased at the date of the coming into force of the Act) can be straightforwardly read as meaning that the Crown has legal and beneficial (ie equitable) title to the land. Similarly, that a Barbudan does not have any relevant proprietary rights, merely because of his or her status as a Barbudan, may be said to be supported by section 5(2) which lays down that no person shall acquire the ownership of any land (whether by prescription or otherwise).

45. Secondly, it is clear from sections 7 and 8 of the 2007 Act that the right that a Barbudan has under the Act is not an *existing* proprietary right. Rather it is the right to apply to the Council for a grant, subject to availability, of exclusive occupation of land (for dwelling, cultivation, or commercial purposes other than major developments) or, without exclusive occupation, for grazing animals. If a Barbudan is granted exclusive occupation of land, there is the further right to apply to the Council for a grant of a ten-year lease which the Council may grant.

46. Thirdly, had the claimants, under sections 7 and 8, been granted exclusive occupation, or a lease, of any of the land that has been leased as part of the Paradise Found project, the Board would accept (as Bennett JA accepted as a general proposition at para 74 of his judgment in the Court of Appeal) that the claimants would have an "interest in or right to or over property" protected by section 9(1) of the Constitution. But, as Mr Simon conceded, the claimants are not alleging that they have been granted any exclusive right of occupation or lease of the relevant land; and, in

any event, there is no evidence that could be put forward to support such an allegation.

47. Fourthly, the scheme of the 2007 Act is that areas of land on Barbuda will be designated by the Council for particular purposes. As set out in section 12(1), those purposes include designation for residential use, agricultural use, public purposes, commercial use, tourism development and other development projects. The rights in section 7 and section 8, referred to above, relate to the areas of land so designated (ie the rights granted under sections 7 and 8 go “hand in glove” with the relevant designations). It seems clear that at least part of the land that has been leased for the Paradise Found project, namely the 251 acres of K Club land, was used for a number of years as a tourist resort and there is no evidence that that land or any of the newly leased land has been used, or designated, for any purpose other than for a major development within the meaning of the 2007 Act.

48. Fifthly, looking at the words, purpose and context of the provisions, the correct interpretation of the land being held “on behalf of the people of Barbuda” and being “owned in common by the people of Barbuda” is not a reference to any proprietary rights of Barbudans. Rather this is a reflection of the fact that only Barbudans within the meaning of the 2007 Act are entitled to apply for section 7 and section 8 rights; that the people of Barbuda are represented through the Council which considers and grants such applications and more generally administers the land; and that only Barbudans (rather than all the inhabitants of the unitary state of Antigua and Barbuda) are entitled to vote when consent is sought for major developments as set out in the procedures in Part VI of the 2007 Act and the 2010 Regulations. If, for example, the proper procedures to obtain the consent of the Barbudan people (in section 6 of the 2007 Act) were not complied with (and were not validly disapplied) prior to the lease being granted to the Paradise Found LLC, that might prompt a judicial review application challenging the validity of what was done (see para 60 below). However, that would be a separate matter from the constitutional claim under section 9(1) of the Constitution with which the Board is concerned.

49. Sixthly, although both parties placed some reliance on the Preamble to the 2007 Act, the Board has derived no real help from it in interpreting the Act. If anything, the words “to confirm that all land in Barbuda is owned in common by the people of Barbuda” may be thought to indicate that no radical change was being made from the previous law; and it was previously accepted (for example, under the 1904 Act) that the land on Barbuda vested in the Crown. Moreover, as has been referred to in para 16 above, the important case of *Attorney General v Barbuda Council* (2002) 65 WIR 93, which preceded the passing of the 2007 Act, was concerned with the proprietary rights



and powers of the Council as against the Crown and did not directly deal with the proprietary rights of individual Barbudans.

50. It follows from our reasoning that we reject Wilkinson J's reliance on section 102 of the Registered Land Act. Section 102 reads as follows:

**“102. Characteristics of proprietorship in common**

(1) Where any land, lease or charge is owned in common, each proprietor shall be entitled to an undivided share in the whole, and on the death of a proprietor his share shall be administered as part of his estate.

(2) No proprietor in common shall deal with his undivided share in favour of any person other than another proprietor in common of the same land, except with the consent in writing of the remaining proprietor or proprietors of the land, but such consent shall not be unreasonably withheld.”

51. By amendments made in the Second Schedule of the 2007 Act, the Registered Land Act (and hence section 102) does not apply to land in Barbuda (as opposed to Antigua), except as provided for by the 2007 Act. The Board is prepared to accept, however, that that in itself does not fatally undermine Wilkinson J's reasoning because one may wish to apply a consistent meaning to the same terms used in different statutes dealing with land in Antigua and/or Barbuda. But, as the Board has explained, ownership in common under the 2007 Act is not referring to the proprietary interests or rights of co-owners. The different statutes have different purposes and are concerned with different matters. Contrary to Wilkinson J, there is therefore no good reason to treat the same terms in the 2007 Act and the Registered Land Act as having the same meaning.

52. It also follows from our reasoning that the Board agrees with the reasons given by Bennett JA for striking out the claim as disclosing no cause of action. Given the quality of his exposition, it is helpful now to set out several key paragraphs of his judgment which the Board endorses.

53. The Board agrees with his description of the meaning of the phrase “owned in common” in the 2007 Act:

“66. Essentially, ‘ownership in common’ as envisaged by the Act encompasses the collective right of the people of Barbuda as a community, exercised through the Barbuda Council, to control of the administration, development and use of land on the island, inclusive of the collective right to be consulted and to have the final say on major developments of land on the island.

67. It also encompasses the individual entitlement of every Barbudan who had attained the age of 18 years to vote on proposals for the carrying out of major developments on the island; to enjoy, upon application to the Council and subject to availability, the exclusive right to occupy specific plots of land in specially designated locations in Barbuda for purposes of residence, cultivation or commercial ventures and to seek, and subject to availability to obtain permission to graze animals and to carry out such other activities as the Council may have permitted on lands designated for those purposes. In this connection, the Land Act empowered the Council to convert rights of occupancy into leases renewable for successive terms of ten years in each instance.

68. In summary, ‘ownership in common’ as defined by the Land Act connotes a kind of communal control of a usufruct, notionally shared by the people of Barbuda as a defined class, whereby, subject to certain powers granted to the Barbuda Council to manage the same on their behalf as a common resource, members of that community over the age of 18 years had the right to apply for, and subject to availability, to obtain grants of leasehold or lesser interests in the land and/or to occupy or use designated portions of the same for approved purposes. This, to my mind, is a lesser interest than that which is enjoyed by an owner in common under the Registered Land Act or at common law. It does not amount to the ownership of undivided shares in the land by members of the defined class.”

54. The Board agrees, further, with Bennett JA’s reasoning as to why the rights, being of the nature he describes in those paragraphs, do not attract the protection of section 9 of the Constitution:

“78. I conclude that even if section 9 of the Constitution is given a generous and purposive construction, the rights accorded to individual Barbudans solely on account of their status as Barbudans within the meaning of the Land Act do not constitute an interest in or right over property: such persons have no immediate entitlement to use or possess, or to deal with their interests in such property without permission. Rather the statute confers eligibility upon such persons to obtain such an interest upon application and subject to availability. ... The benefit of an exclusive right to occupy a specific plot of land for residential, agricultural or commercial purposes is ‘an interest or right over property’ but such an interest or right does not come into existence until it is granted by allotment of the relevant plot. Section 9 of the Constitution can only be properly invoked in cases where: (a) property rights already exist; and (b) such rights have been compulsorily taken possession of or compulsorily acquired.

79. Mr Frank and Mr Walker do not claim to have been entitled to any immediate right to use or occupy any portion of the lands which are the subject matter of their claim. For that reason, it is clear to me that their statement of case does not disclose their personal entitlement to an interest in or right to or over property which has been compulsorily acquired without compensation.”

55. However, the Board does not think it is helpful to refer, as Bennett JA did in a sentence in para 78 that has been omitted in the quote above, to an analogy with beneficiaries under a discretionary trust. The rights set out in the 2007 Act are a particular regime established to balance the interests of Barbudans with the interests of the Crown and with the interests of the wider population of the unitary state and should be construed as such in their particular context.

## **9. Two other matters**

### **(1) Disapplication of provisions of the 2007 Act by the Paradise Found Act**

56. Section 31(1) of the 2007 Act states that it is the Government’s intention to amend section 123 of the Constitution to provide that the 2007 Act is entrenched to

the same extent as that section entrenches most of the BLG Act, so that in effect it could not be amended without the consent of the Barbuda Council. Section 31(2) provides that until section 123 of the Constitution is so amended, the 2007 Act cannot be amended “without the consent given by the Council and the people of Barbuda”.

57. Although the Government has not followed through the stated intention in section 31(1) of the 2007 Act, there was some discussion in the lower courts as to the effect, if any, of section 31(2) on the validity of certain sections of the Paradise Found Act which purport to disapply provisions of the 2007 Act. So, for example, section 3(3) of the Paradise Found Act purports to disapply generally the 2007 Act: “The provisions of the Barbuda Act 2007 [do] not apply to the lease of the Leased Land pursuant to this Act.” More specifically sections 4, 5 and 6 of the Paradise Found Act purport to disapply, respectively, sections 6, 17 and 19 of the 2007 Act.

58. In the light of the Board’s reasoning above, it is unnecessary for the Board to say anything about the effect of section 31(2) of the 2007 Act on the validity of that purported disapplication by the Paradise Found Act. Nevertheless, it is clear that, subject to any constitutional impediment, the principle of parliamentary sovereignty applies whereby any later Act can expressly or impliedly repeal an earlier Act. It would appear to follow that, unless and until the Government acts on its intention to entrench the provisions of the 2007 Act by amending section 123 of the Constitution, the provisions in the Paradise Found Act can, and do, disapply the provisions of the 2007 Act; and that, furthermore, the subsequent repeal of the 2007 Act by section 6 of the Crown Lands (Regulation) (Amendment) Act 2018 is valid.

59. However, that disapplication or repeal would not have undermined the claimants’ rights under section 9(1) of the Constitution if the claimants, contrary to what the Board has decided, had an “interest in or right to or over property” within the meaning of section 9(1) because, under section 3, the provisions of the Constitution prevail over all other law. That explains why the validity or invalidity of the disapplication of the 2007 Act has been irrelevant to what the Board has had to decide.

## **(2) Mackenzie Frank’s application for leave to bring judicial review proceedings against the Attorney General and the Council**

60. The Board notes for completeness that, in a separate action, Mackenzie Frank sought leave to bring proceedings for judicial review against the Attorney General and the Council in respect of the procedures adopted in relation to the approval of the granting of the lease to Paradise Found LLC. As set out in paras 27-30 above, the procedures for leases of land for major developments are laid down in section 6 and

Part VI of the 2007 Act and the 2010 Regulations. In a judgment dated 30 March 2015, Cottle J refused leave. Permission to appeal against that judgment has been granted but the appeal has been stayed pending the outcome of this appeal before the Board. It would be inappropriate for the Board to comment on the implications for that appeal of this decision. However, and conversely, the Board sees no direct relevance of that decision of Cottle J to the claim under section 9(1) of the Constitution with which the Board has been concerned. In particular, if the claimants had established, contrary to what the Board has decided, that they had a relevant “interest in or right to or over property” it would appear that they would have been entitled to fair compensation for compulsory acquisition of their property whether or not proper procedures under the 2007 Act had been complied with.

## **10. Conclusion**

61. For the reasons the Board has given, the claimants have no realistic prospect of succeeding in their claim under section 9(1) of the Constitution so that the Court of Appeal was correct to strike out that claim. The Board will therefore humbly advise Her Majesty that the appeal should be dismissed.