Privy Council Appeal No 18 of 2006

HMB Holdings Ltd *Appellant*

v.

Cabinet of Antigua and Barbuda *Respondent*

FROM

THE COURT OF APPEAL OF
ANTIGUA AND BARBUDA

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Delivered the 5th June 2007

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Present at the hearing:-

Lord Hoffmann
Lord Hope of Craighead
Lord Scott of Foscote
Lord Walker of Gestingthorpe
Lord Neuberger of Abbotsbury

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*[Delivered by **Lord Hope of Craighead**]*

1. The appellant, HMB Holdings Limited ("HMB"), is the owner of property at Half Moon Bay in Antigua. This is one of the most beautiful bays in the island. Its white sand, crescent shaped beach has been described as one of the best beaches in the world. The shape of the bay and its secluded environment on the south-eastern corner of the island provide an unusual degree of privacy. For many years there has been a hotel there, known as the Half Moon Bay Hotel. HMB purchased the property in 1971. The quality of the amenities, which were enhanced under its management, made the resort particularly attractive to wealthy visitors from Europe and North America. It was described as a flagship

of the Antiguan tourist industry. It made a significant contribution to the local economy.

2. In September 1995 Hurricane Luis struck Antigua and Barbuda, causing great damage to property. The Half Moon Bay Hotel was among the properties that were damaged by the hurricane. The damage was so severe that the hotel had to be closed and members of staff were sent home. For reasons which it will be necessary to describe later in more detail, the hotel has not re-opened since 1995. The Cabinet took the view that this was affecting the economy of the islands. In 1999 it decided that it was in the public interest that it should acquire the hotel compulsorily so that the hotel business there could be regenerated. HMB objected, and discussions took place between it and members of the government with a view to enabling HMB to attract the investment that it needed to carry out this process itself. But there were further delays, and in about November 2001 the Cabinet resolved that it should proceed with the acquisition.

3. On 12 February 2002 the House of Representatives approved a resolution that the Secretary of the Cabinet should cause a declaration to be made for the acquisition of HMB's lands for a public purpose

> "namely, to create a fresh environment for investment in the defunct hotel business at Half Moon Bay with a view to facilitate the revival of the tourist industry and to provide jobs for the inhabitants of the Half Moon Bay and the surrounding villages."

The resolution was approved by the Senate on 21 February 2002. It was published in the *Gazette* on 7 and 14 March 2002.

4. HMB applied for judicial review of the Cabinet's decision to acquire its property and the approval of its decision by the legislature. On 16 March 2002 Mitchell J gave leave and ordered that a hearing be fixed for 7 May 2002. On 5 April 2002 HMB made a further application for constitutional relief. It asked that this application be heard at the same time as its application for judicial review. On 30 April 2002 the respondents applied for HMB's statement of claim to be struck out on the ground that it failed to disclose any reasonable grounds for the reliefs sought. The respondents' application for a strike out was heard on 8 July 2002. On 29 July 2002 Mitchell J dismissed this application. On 28 January 2003 the Court of Appeal of the Eastern Caribbean (Sir Dennis Byron CJ, Satrohan Singh and Albert Redhead JJA) allowed the respondents' appeal against the decision of Mitchell J, set it aside and struck out HMB's application. On 16 September 2003 the Court of Appeal gave final leave to appeal to their Lordships' Board.

5. The grounds on which HMB sought relief by way of judicial review were, in summary, that the Cabinet's decision was in violation of a legitimate expectation which HMB had formed that its land would not be acquired compulsorily, provided it embarked on a programme to refurbish the hotel in accordance with plans disclosed and approved at a meeting on 22 January 2001 with the Minister of Tourism and the Attorney General, that it was irrational and that the process adopted by the Cabinet was infected by bias and hostility to its principal officer Mrs Natalia Querard, amounting to an abuse of power. It sought constitutional relief on the ground that the declaration by the Cabinet and its approval by Parliament were in violation of its constitutional rights as protected by sections 3, 14, 18 and 19 of the Constitution of Antigua and Barbuda.

The legislation

6. Before describing the facts in more detail, their Lordships must first set out the statutory background. This is to be found in the Land Acquisition Act, cap 233, of 29 November 1958, a consolidating statute which confers powers of compulsory acquisition of land on the Cabinet with the approval of the Legislature, and in the Constitution of Antigua and Barbuda which contains the protective provisions on which HMB relies but makes an exception in the case of any law relating to deprivation of property that was in force immediately before 27 February 1967 when Antigua and Barbuda became a self-governing state within the Commonwealth.

7. Section 3(1) of the Land Acquisition Act provides:

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

Section 3(2) provides that every such declaration shall be published in two ordinary issues of the *Gazette*, and that in the declaration there shall be specified particulars relating to the land which is to be acquired including the public purpose for which the land is required. Section 3(3) provides that upon the second publication of the declaration in the *Gazette* the land shall vest absolutely in the Crown and that the authorized officer (defined by section 2 as meaning any person who may

from time to time by appointed as such for the purposes of the Act by the Cabinet) and his agents, assistants and workmen may enter and take possession of the land accordingly.

8. Section 6(1) of the Act provides that as soon as any declaration has been published in accordance with the provisions of section 3, the authorized officer shall without delay enter into negotiations with its owner for the purchase of the land to which the declaration relates upon reasonable terms and conditions and by voluntary agreement. The Act provides for all questions and claims relating to the payment of compensation to be submitted to a Board of Assessment, for an appeal against a decision of the Board of Assessment to the Court of Appeal and for all amounts which have been awarded by way of compensation to be paid out of the Treasury. But it makes no provision for any appeal against, or for any other form of review of, the declaration by the Cabinet that the land is required for a public purpose. These are facts as to which the declaration itself is to be, as section 3(1) provides, conclusive evidence.

9. The Constitution of Antigua and Barbuda is set out in Schedule 1 to the Antigua and Barbuda Constitution Order 1981 (SI 1981/1106). Article 3 of the 1981 Order provides:

> "The Constitution of Antigua and Barbuda set out in Schedule 1 to this order shall come into effect in Antigua and Barbuda on 1 November 1981 subject to the transitional provisions set out in Schedule 2 to this Order."

Section 2 of the Constitution provides:

> "This Constitution is the supreme law of Antigua and Barbuda and, subject to the provisions of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."

10. Chapter II of the Constitution provides for the protection of fundamental rights and freedoms of the individual. Section 3 guarantees to every person in Antigua and Barbuda, among other rights, protection of his property and from deprivation of property without fair compensation. The protections which then follow include, in section 9, protection from the compulsory taking or acquisition of property except for public use and except in accordance with the provisions of a law applicable to the taking of possession or acquisition and for the payment of fair compensation within a reasonable time and, in section 14, protection from discrimination on grounds of race, place of origin,

political opinions or affiliations, colour, creed or sex. Section 18 provides that any person who alleges that any of the provisions of sections 3 to 17 has been contravened in relation to him may apply to the High Court for redress. Section 19 provides:

> "Except as otherwise expressly provided in this Constitution, no law may abrogate, abridge or infringe or authorise the abrogation or infringement of any of the fundamental rights and freedoms of the individual hereinbefore recognised and declared."

11. The Land Acquisition Act is an existing law relating to the right of the Crown to acquire land in Antigua and Barbuda. It must be read subject to paragraph 9 of Schedule 2 to the 1981 Order, which provides:

> "Nothing in section 9 of the Constitution shall affect the operation of any law in force immediately before 27 February 1967, or any law made on or after that date that alters a law in force immediately before that date and does not –
>
> (a) add to the kinds or property that may be taken possession of or the rights over and interests in property that may be acquired;
>
> (b) make the conditions governing entitlement to compensation or the amount thereof less favourable to any person owing or having an interest in the property; or
>
> (c) deprive any person of such right as is mentioned in subsection (2) of that section.

The facts: background

12. Experience elsewhere in the islands suggests that, devastating though the effects of the hurricane were, it ought to have been possible for a hotel on such a valuable site to be renovated and the business brought back into operation without too much delay. But the circumstances at Half Moon Bay, and of HMB in particular, were exceptional. They form an important part of the background to the events that immediately preceded the Cabinet's decision to acquire the property compulsorily. So it is necessary to set the scene generally, drawing for this purpose upon facts that are agreed or not disputed, before those events are described in more detail.

13. The Half Moon Bay Hotel was one of the first hotels built on the island. In 1971 Michael C Kluge, Joseph P Kelly, Jr and several other individuals formed HMB, a company incorporated under the Companies

Act of Antigua and Barbuda. The company then purchased the property, refurbished it and operated the resort. In 1973 the resort was expanded and various facilities were added, including a 9 hole private golf course, to increase its attractiveness to visitors. In 1993 HMB entered into a management agreement with Caribbean Hotel Management Services ("CHMS"). This was not a success. CHMS mismanaged the property and failed to insure it properly. As a result its management agreement was terminated. Renovation of the property after the hurricane was inhibited by the lack of adequate insurance. Matters were further complicated by the actions of Joseph P Kelly, Jr, who held 44% of the shares in the company. He engaged in a bitter dispute with the other shareholders, and in October 1994 he began proceedings to wind up HMB. When his petition was dismissed in 1997 he started fresh proceedings, which further prolonged the uncertainty over HMB's future. Mr Kelly died on 4 September 1998. But it was not until the further proceedings, which had been continued after his death by his personal representatives, were finally terminated in July 2000 that the way was clear for HMB to assure investors that it would be able to re-develop and re-open the resort.

14. Meantime the Government of Antigua and Barbuda had begun to investigate the reasons for the continued closure of the hotel. On 29 January 1997 the Minister of Tourism wrote to Mrs Natalia Querard, the daughter of Michael Kluge and Managing Director of HMB, inviting her to meet him to discuss what could be done to make the hotel operational again. In December 1998 a resolution was passed by the legislature authorising government intervention with a view to a restructuring of HMB and the granting of a package of economic incentives to the company. On 19 January 1999, in response to this initiative, Mrs Querard wrote to the Minister of Finance stating that the company was in negotiations with a lender, Regent Street Property Group Ltd, which had established various pre-conditions for its involvement. She asked the Cabinet to grant various concessions to the company, including waiver of stamp duty on transfers of property and shares to be made in connection with the reorganisation of its business interests. On 28 January 1999, having been told that her request had been misdirected, she sent a copy of her letter to the Minister of Tourism. On 12 February 1999 she wrote directly on this subject to the Prime Minister, stressing the risk that inability to demonstrate government support would result in the loss of the lender and lead to further delay. On 15 February 1999 she provided the Prime Minister's parliamentary secretary with reassurance that the proposed reorganisation of ~~the~~ HMB would not diminish the company's indebtedness to its workers or to the Government. On 18 March 1999 she wrote further on this subject to the Hon Molwyn Joseph, who had just been appointed Minister of Tourism following a general election. 14

May 1999 she was informed that the Cabinet had decided on 20 January 1999 not to grant the concessions and incentives that she had requested. Negotiations with Regent were terminated.

15. On 2 June 1999 the Cabinet resolved to acquire the hotel compulsorily for the public purpose of tourism and issued instructions to the Ministers of Tourism and Legal Affairs to take steps to that effect. But in August 1999 the *Antigua Sun* newspaper published a statement by Mrs Querard's son Constantine on behalf of HMB that the hotel was to re-open for business in November 1999. In September 1999 the Minister of Tourism, Mr Joseph, wrote to Mrs Querard asking for confirmation that this was so, and he received a letter from her to that effect. At the request of the Prime Minister HMB then entered into discussions with Tradewinds Investment Holdings Corporation about the way forward. Mrs Querard informed Tradewinds that the property was not for sale but that HMB was willing to explore a joint venture for renovation of the hotel. Terms of agreement were negotiated, and on 15 February 2000 Mr Ortt, Tradewinds' Chief Executive, wrote to the Prime Minister requesting various concessions that were needed to put the joint venture into effect. He wrote to the Minister of Tourism to the same effect on 27 March 2000, stressing that a decision was needed very quickly as time was beginning to run out for a summer 2001 opening. Some of the concessions that had been requested were approved by the Cabinet on 28 April 2000. The crucial concession, which was the waiver of stamp duty for which no provision was made in the Fiscal Incentives Act, was not approved by the Cabinet until 26 May 2000. It was made on condition that work on the hotel commenced within six months of that decision and that the property was opened for guests by 1 July 2001. But Tradewinds had lost the support of its financial backer, the Commonwealth Development Corporation, and it withdrew from the joint venture.

Negotiations following the withdrawal of Tradewinds

16. HMB avers that following the collapse of the Tradewinds initiative, which it blames on the Government's procrastination and bureaucratic delay, the Government engaged in a campaign of blame against HMB which was directed against Mrs Querard personally. In her affidavit Mrs Querard states that the Prime Minister told the nation in June 2000 by radio and television that she despised the people of Antigua and that she stood in the way of progress. She responded in an open letter to the Prime Minister dated 13 June 2000 in which she assured him of her love and respect for the island and its people and of the financial commitment which she and her family had already made with a view to re-opening the hotel. HMB then entered into negotiations with Ian Moncrief-Scott, a

financial consultant based in the Isle of Man. In November 2000 he entered into arrangements with National Westminster Bank for a loan on terms which required the Government to grant a non-citizen land holding licence to enable a charge to be taken by the Bank as security for the loan over the property.

17. In December 2000 the Cabinet decided once again to acquire the hotel compulsorily for public purposes. A report of the Cabinet's decision appeared in the *Antigua Sun* on 7 December 2000. HMB's attorney, Ms Joyce Kentish, met the Minister of Tourism the same day and outlined what she maintained would be the disastrous impact of the impending announcement of this decision on the loan arrangements which HMB had just entered into. She wrote to him later that day repeating this point, giving details of the arrangements that had been put in place and urging the Government not to proceed with its proposal. On 8 December 2000 HMB obtained an ex parte injunction against the Attorney General, the Cabinet secretary and all members of the Cabinet not to proceed with the compulsory acquisition. On 12 January 2001 at a contested hearing the injunction was set aside. On 16 January 2001 HMB appealed against that order to the Court of Appeal. On 19 January 2001 the Minister of Tourism wrote to Ms Kentish in these terms:

> "Following our several discussions in connection with the Half Moon Bay Hotel, I am pleased to advise that notwithstanding the decision of the Courts in favour of the Government's decision to acquire the Half Moon Bay Hotel, the Cabinet has authorized an extension of a six (6) months time frame, with effect 1 February 2001. This is to allow the owner to perform in respect of the development of the resort at Half Moon Bay, in light of the owner's claim that it has full capacity to do so immediately.
>
> The Government however wishes to advise that the following conditions must be agreed to by the owner in order for this extension of time to take effect
>
> (1) Documented proof of the owners' financial ability to undertake and complete the project to be approved by Government.
>
> (2) The owners of the hotel to develop and present to the Government the plans and proposals for the construction and operation of a Four Star to Five Star Resort Hotel with at least 200 rooms and an 18 hole PGA rated golf course plus other amenities normally associated with this standard of facility.

> (3) Immediate settlement of all outstanding monies owing to the staff and workers that were previously employed at the hotel.
>
> (4) Construction should commence within six (6) months and completion should be by November 2002, the beginning of the 2002/2003 Tourist Season.
>
> (5) The above proposal is made without prejudice. Further, and in demonstration of good faith, the Government would wish your client's assurance that should the project not proceed within the mutually agreed time frame, your client would thereafter not oppose an acquisition of the property for a public purpose, namely tourism development."

18. Ms Kentish replied to the Minister of Tourism by letter dated 23 January 2001, a copy of which she sent to the Attorney General. This letter followed a meeting the previous day, 22 January 2001, when Mrs Querard and Ms Kentish met the Minister of Tourism and the Attorney General at the Minister's office to review relations between HMB and the government and to chart an amicable way forward. Documents illustrating HMB's plans for re-development were exhibited, and the conditions in the letter of 19 January 2001 were discussed. Basing herself on what had been discussed, Ms Kentish set out in her letter of 23 January 2001 HMB's replies to each of the five conditions which the letter of 21 January 2001 had set out. With regard to the second condition she said that HMB expected to commence construction well before the six months that had been suggested, that the projected opening date of November 2002 was eminently achievable and that it hoped to be open before then. With regard to the fourth condition she said:

> "The Company envisages that with the grant of the Non-Citizen Land Holding Licence to Mr Ian Moncrief-Scott, construction will commence well within the six month period and completion set to occur in time for the opening of the 2002/2003 tourist season. To accomplish this, the Company must be confident that it will remain the beneficiary of the concessions and waivers already granted by the Cabinet."

She enclosed a copy of an email dated 21 January 2001 from Mr Moncrief-Scott in which he confirmed that the loan was still available to the company but that it must be taken up no later than 9 February 2001. She pointed out that time was of the essence in respect of all governmental approval and licences required to carry forward the transaction. On 5 February 2001 Mrs Querard wrote to the Minister of Tourism asking for confirmation that the incentives and concessions

which the Cabinet granted to Tradewinds when it was planning to participate with HMB in returning the hotel to service were still available to HMB.

On 12 February 2001 HMB's appeal against the order of 12 January 2001 came before the Court of Appeal. The Attorney General gave an undertaking in these terms:

> "The Honourable Attorney General doth hereby give an UNDERTAKING to this Honourable Court that the Respondents shall not proceed any further with proceedings to acquire the Half Moon Bay Hotel, the property of the Appellant/Applicant, for a period of 6 months commencing from the 1st day of February 2001."

HMB accepted this undertaking and did not proceed with the appeal. On the same day Mrs Querard wrote by fax to the Minister of Tourism at Ms Kentish's request with an excerpt from a letter by Mr Moncrief-Scott in which he said that the lenders had requested a letter of comfort from the Antiguan authorities confirming that there were no planning or other outstanding issues which would inhibit the completion of the project and repayment of the loan obligations from their perspective. She said that this was the only remaining document required to complete the transaction. On 19 February 2001 HMB's solicitors wrote to the Minister of Tourism stating that they were urgently awaiting the letter of comfort as the final requirement to close the loan transaction, adding that they were fearful that the delay in its production might be misconstrued by the lender as a sign that HMB did not have the support of the Government. On the same day the Minister of Tourism wrote to Mr Moncrief-Scott, care of Ms Kentish's chambers, confirming that the Government and Mrs Querard and her solicitors had concluded discussions culminating in an understanding that was mutually satisfactory to both parties and adding:

> "Specifically, Government has approved all incentives normally granted for developments of this nature, and in addition, approved all licenses and other permits required to ensure a smooth implementation of this development.
>
> Essentially, there are no issues pending that should impact negatively on the realization of this project.
>
> The understanding reached by both parties is based on the undertaking by HMB Holdings Ltd that it will initiate full implementation of this project within the six-month period

> effective February 1, 2001. Implementation entails meeting all performance requirements agreed to by both parties."

19. On 14 March 2001 the Permanent Secretary in the Ministry of Tourism wrote to Ms Kentish confirming that on 7 February 2001 the Cabinet had agreed to the request that the incentives and concessions granted to Tradewinds and HMB be transferred to HMB. On 14 May 2001 he wrote again to Ms Kentish advising her that on 28 April 2001 the Cabinet had revisited its decision and made a number of amendments to their terms. He added that these concessions and incentives were granted provided that the project commenced within the six month period time frame that had been granted by the Ministry of Tourism. In May 2001 National Westminster Bank, which was to provide most of the loan for the project, withdrew from the arrangement, expressing a lack of confidence in the Government's support for HMB. Mr Moncrief-Scott undertook to find another lender. On 4 July 2001 Mrs Querard advised the Minister of Tourism, who had come to visit Half Moon Bay, of National Westminster Bank's withdrawal. His response was that HMB did not now have a lender. On 5 July she wrote to the Minister of Tourism insisting that this was not so and saying that she wished to dispel any misunderstanding on the subject. She added:

> "Mr Moncrief-Scott was and is at the apex of a syndication, in which one of the players, and only one, has withdrawn due to the delays and difficulties we have experienced. He/we are in the process of replacing this single entity and should be able to do so shortly, provided there are no more man-made earthquakes or volcanic eruptions to raise the level of risk associated with investing or lending to an Antiguan company. We trust that you will be able to prevent any of these from occurring. Without any finger-pointing, we are – all of us – doing the best we can under the circumstances. Let us continue to do so, in full knowledge of the process, and in recognition that the successful repositioning of the Half Moon Bay Resort as a luxury five-star destination is in everybody's best interest and possible only through perseverance and cooperation. We have shown perseverance and sincerely look to the Government for cooperation."

20. The period of six months referred to in the Minister of Tourism's letter of 19 January 2001, the Attorney General's undertaking to the Court of Appeal of 12 February 2001, the comfort letter of 19 February 2001 and the Permanent Secretary's letter of 14 May 2001 expired on 31

July 2001 without any steps having been taken to commence the project. No application was made for an extension of the six month period.

Events after expiry of the six month period

21. On 2 November 2001 an article appeared in the *Antigua Sun* indicating that the Government intended to proceed with the compulsory acquisition of the Half Moon Bay Hotel. Further articles about the proposed acquisition appeared in the *Antigua Sun* in December 2001 and January 2002. HMB were not notified either formally or informally during this period that a decision had been taken to this effect. On 25 January 2002 the Government moved a resolution in the Senate authorising the Cabinet Secretary to cause a declaration to be made for the acquisition of HMB's land for a public purpose. An opposition request that the debate on the resolution be postponed was refused and the opposition members left the Chamber. A short time later Senator Asot Michael, the Leader of Government Business in the Senate, entered the opposition room and reprimanded Mr Wilmoth Daniel, the Deputy Leader of the Opposition, for supporting white people to take over what he said rightfully belonged to black people of the country. He accused Mrs Querard, whom he described as "that white woman", of being a fraud, an enemy of the state and of laughing at the government and the country.

22. The resolution which was passed on 25 January 2002 was not proceeded with because the parcels of land had been misidentified. It was re-introduced and passed in the House of Representatives on 12 February 2002 and in the Senate on 21 February 2002. The material parts of the resolution were in these terms:

> "WHEREAS by section 3 of the Land Acquisition Act, Cap 233, it is provided that if Cabinet considers that any land should be acquired for a public purpose they may, with the approval of the Legislature, cause a declaration to that effect to be made by the Secretary to the Cabinet in the manner provided under section 3 of the said Act, and
>
> WHEREAS the Cabinet considers that the parcels of land described in the Schedule hereto be acquired for a public purpose, namely to create a fresh environment for investment in the defunct hotel business at Half-Moon Bay with a view to facilitate the revival of the tourist industry and provide jobs for the inhabitants of the Half-Moon Bay and the surrounding villages;

> NOW THEREFORE, BE IT RESOLVED by this Honourable House that the Secretary to the Cabinet be authorized to cause a declaration to be made in the manner provided under section 3 of the Land Authorisation Act Cap. 233 to the effect that the parcels of land described in the Schedule hereto are required for a public purpose."

The proceedings

23. The grounds on which relief was sought by HMB by way of judicial review were, in summary, that HMB had formed a legitimate expectation that its lands would not be acquired provided it took steps to implement the agreement that was made at the meeting on 22 January 2001 in reliance on which it expended large sums of money and suspended the prosecution of its suits against the government, that the process which was adopted by the Cabinet and Parliament was flawed by the lack of a proper assessment and infected by bias and hostility to HMB and its principal officer, Mrs Querard, and that the Government's failure to give advance notice of their reliance on the effluxion of time as their reason for determining the agreement was so unfair as to amount to an abuse of power and a breach of natural justice. Constitutional relief was sought on the grounds that the decisions of the Cabinet and their approval by Parliament were discriminatory, arbitrary, irrational, unreasonable, capricious and infected by bias and in breach of HMB's constitutional right to the protection of the law.

24. In the High Court Mitchell J said that HMB's case for judicial review was essentially that the Government gave an undertaking and entered into a consent order in the Court of Appeal to hold off the acquisition for a period of six months to permit HMB to take certain steps, that HMB relying on that undertaking took steps and spent large sums of money and was entitled to consider that it was performing as it had agreed to, that a legitimate expectation was thereby created, that the respondents were under an obligation to give HMB notice of their reliance on the effluxion of time and that their failure to give such notice was so unfair as to amount to an abuse of power and a breach of natural justice. He rejected the respondents' argument that relief was not available in land acquisition matters and that if relief were to be granted the court would necessarily be substituting its judgment for that of the Cabinet. He said that the claim passed the test that was needed to avoid a strike out, which he described as "a scintilla of a cause of action." As for the claim for constitutional relief, he said that it might be a difficult task

for HMB to prove that the Cabinet acted in a manner that was discriminatory and affected by bias but that here too the test was passed, as it was in regard to what he understood to be an alternative claim of misfeasance in public office.

25. In the Court of Appeal Redhead JA, in a judgment with which the other members of the Court concurred, said that the judge was wrong to consider the misfeasance of public office unless it could be proved that members of the Cabinet were motivated by fraud in acquiring HMB's land and that there was not one scintilla of evidence to support this: para 16. As for legitimate expectation, he said that this was predicated on the Attorney General's undertaking that was the basis for the consent order in the Court of Appeal. But no promise had been held out that HMB would be consulted by the Cabinet before the government embarked on the acquisition process. The undertaking was simply a bare promise that the government would not acquire the property within six months: para 22. As for the Land Acquisition Act, he said that once it had been established that the provisions of section 3 were complied with and that the acquisition was for a public purpose, the land vested in the Crown and that any constitutional matter could only arise after the acquisition of the property: paras 28-30. Mitchell J's decision was set aside.

26. Mr Millar QC for HMB said, in opening the appeal before their Lordships, that no point was being taken on the ground of misfeasance in public office or fraud or that the decision had been taken in bad faith. He directed his argument to four grounds: legitimate expectation, bias, irrationality and, in support of the claim for constitutional relief, discrimination. He invited the Board to examine the whole history of events as disclosed by HMB's statement of claim and the affidavits that had been lodged in support of it. He said that, contrary to what the Court of Appeal appeared to have thought, the claim for judicial review was not based only on legitimate expectation. He pointed out that the Court of Appeal had based its decision on this point solely on the undertaking which had led to the consent order and had not dealt at all with the argument based on the agreement of 22 January 2001 that it was unfair not to give HMB more time when the six month period expired on 31 July 2001, nor had it examined HMB's allegations of bias and of irrationality. He explained that his point on irrationality was that there had been no assessment of the relative merits of resorting to acquisition to achieve the public purpose and leaving to HMB to do this or of why HMB was failing to make progress and the costs that acquisition of the property by the government would lead to. The question of bias was linked to the lack of a rational explanation for the decision to acquire the property. The lack of a rational explanation was also linked to the claim for constitutional relief. A strike out could only succeed if this was a

decision that did not call for an explanation. The issue was not whether the declared purpose was a public purpose, which was not disputed, but whether there was a rational explanation for it.

27. The Attorney General submitted that, once it was settled that the land was required for a public purpose, the decision to make the declaration could not be challenged unless it was manifestly without foundation. The history, when it was examined, did not support the argument that the decision was sufficiently unreasonable to meet this test. As for the history, he pointed out that although the six months period expired on 31 July 2001 it was not until February 2002 that the decision to acquire the property was placed before the legislature, and that there was no suggestion that even by that date HMB had been able to commence the development. What else, he said, was the government to do? As for the allegations of bias and discrimination, Senator Michael's outburst in the emotional atmosphere which affected the proceedings in January 2002 did not support the allegation that the decision itself was affected by bias or was discriminatory. The history showed that the government had been bending over to help HMB in its endeavours to obtain funding for the development. Yet nothing concrete had emerged by the end of the six month period. The decision to acquire the property in these circumstances, bearing in mind its obvious potential for development, could not be said to be irrational.

Discussion: jurisdiction

28. In cases such as this, where permission has already been given for judicial review, it will almost always be preferable for the judge to let the review take its course so that the facts can be established rather than entertain an application for it to be struck out. But the position in this case was complicated by the further application for constitutional relief which HMB wished to have considered at the same time. The proceedings below were conducted on the basis that both applications should be struck out if they appeared to disclose no reasonable grounds for the reliefs sought. The argument before the Board was conducted on the same basis. The respondents' contention is that, assuming all the facts relied on by HMB to be true, the proceedings would be bound to fail. If this is so, to continue with them would not result in any possible benefit to HMB.

29. The first question is whether the Cabinet's decision is open to review at all, having regard to the terms of section 3(1) of the Land Acquisition Act. That subsection provides that, if the Cabinet considers that any land should be acquired for a public purpose, a declaration which

is made to that effect under the procedure that it prescribes shall be conclusive evidence that the land to which it relates is required for a public purpose. As Lewis J observed in *Vanterpool v Crown Attorney* (1961) 3 WIR 351, 355, if it is proposed to acquire any land under the subsection by compulsory process there are two questions that must be considered. The first is whether the land is to be acquired for a purpose which is "a public purpose". The second is whether the land should in fact be acquired – that is, as the subsection puts it, whether it is "required" for that purpose. The effect of the subsection is that the declaration is conclusive evidence that both these requirements are satisfied, namely that the purpose for which the land is required is a "public purpose" and that the land is "required" for that purpose. The Act contains no provision which enables either of these two issues to be subjected to an appeal or any other form of judicial scrutiny. The Cabinet's decision as to what is a public purpose and that the land is required for that purpose is not justiciable: *Spencer v Attorney General* [1999] 3 LRC 1, per Byron CJ (Ag) at pp 18-19.

30. But this does not mean that the decision is immune from judicial review. The Attorney General conceded that the door was not closed entirely. He accepted that the decision could be challenged on the ground that it was manifestly without foundation. He was right to do so, but the principle extends further than that: *Vanterpool v Crown Attorney* (1961) 3 WIR 351, per Lewis J at pp 366-367. As Lord Wilberforce explained in *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147, 207D-F, however widely the field in which a decision-maker operates is defined by statute, there are always certain fundamental assumptions which necessarily underlie the remission, or delegation, of a power to decide such as the requirement that a decision must be made in good faith. An examination of its proper area is not precluded by a clause which confers finality on its decisions. Clauses of that kind can only relate to decisions which have been given within the field of operation that has been entrusted to the decision-maker. This means that all three grounds for judicial review which Lord Diplock identified in *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1AC 374, may be invoked – illegality, irrationality and procedural impropriety.

31. Their Lordships therefore reject the respondents' argument that judicial review of the Cabinet's decision is not available. It is open to HMB to challenge the decision on the ground that it was irrational. The test of irrationality will be satisfied if it can be shown that it was one which no sensible person who had applied his mind to the question to be decided could have arrived at. Then there is legitimate expectation as an additional ground of review. As Lord Fraser of Tullybelton explained in *Attorney General for Hong Kong v Ng Yuen Shin* [1983] 2 AC 629, 636E-

F, the concept of legitimate expectation is capable of including expectations created by something that falls short of an enforceable legal rights, provided they have some reasonable basis. But if the public body has done nothing or said nothing which can legitimately have generated the expectation that is contended for, the case must end there: *R (Bibi) v Newham London Borough Council* [2002] 1 WLR 237, para 21. The action complained of cannot be said to have been contrary to what the public body could reasonably have been expected to do in the circumstances.

32. The respondents also challenge the court's jurisdiction to grant constitutional relief. But the fact the Land Acquisition Act is saved from constitutional challenge by paragraph 9 of Schedule 2 to the 1981 Order does not mean that decisions taken under it cannot be challenged on constitutional grounds. The Court of Appeal thought that, once it was established that the acquisition was in conformity with section 3 of the Land Acquisition Act, the only constitutional matters that might arise were those relating to the assessment and payment of compensation. This is not so. The law itself cannot be challenged. But decisions taken under it are as open to challenge on constitutional grounds as any other decisions which affect the fundamental rights and freedoms of the individual. Section 14(1) of the Constitution states that no person shall be treated in a discriminatory manner by any person acting by virtue of any law or in the performance of the functions of any public office or any public authority. That protection extends as much to acts taken under a law which is itself immune from challenge as it does to any other law in force in the islands.

Legitimate expectation

33. HMB's case does not rest solely on legitimate expectation, as Mr Millar in his very able argument was at pains to emphasise. But as the other arguments are really subsidiary to this point it is convenient to start with it.

34. The argument as set out in HMB's amended claim form, which was served on 15 April 2002, divides the events relied on into two parts. The first part relates to the period prior to 22 January 2001. The contention is that during this period the respondents represented to HMB that they were ready and willing to provide all necessary state assistance to ensure the success of the joint venture with Tradewinds, and that in reliance on those representations HMB expended considerable sums to effect the joint venture which was frustrated by the respondents' failure or refusal to fulfil its promises timeously. The second part relates to the period on and

after 22 January 2001, when the meeting took place that preceded Ms Kentish's letter of 23 January 2001. The contention is that the negotiations at that meeting resulted in an agreement under which the government gave an undertaking not to acquire HMB's property provided HMB embarked on its programme to refurbish the hotel in accordance with the plans disclosed and approved at that meeting. It is said that by reason of that agreement HMB formed a legitimate expectation that its lands would not be acquired provided it took steps to implement the agreement.

35. Mr Millar did not suggest that the events referred to in the first period could form a self-standing ground, based on a legitimate expectation, for saying that the Cabinet's decision in November 2001 to proceed to acquire the property was unfair. This part of the history does not do more than provide part of the background to the events which followed on and after 22 January 2001. There is a dispute as to why the joint venture with Tradewinds collapsed. But it is not necessary to resolve this dispute in order to assess whether the contention that the respondents generated the reasonable expectation that is relied on in regard to the second period is bound to fail.

36. As for the second period, the essence of the point that HMB seeks to make is that it had a legitimate expectation, based on the discussions at the meeting on 22 January 2001, that the government had given an open-ended commitment not to acquire the property provided HMB took steps to proceed with the redevelopment. But it is impossible to see how this argument can be sustained in view of the government's repeated insistence that redevelopment had to commence within six months of 1 February 2001. This was one of the conditions set out in the Minister of Tourism's letter of 19 January 2001. That the condition was not departed from at the meeting on 22 January 2001 is indicated by that fact that Ms Kentish stated in two separate places in her letter of 23 January 2001 that HMB expected to commence construction well before the six months period and by the absence of any protest in her letter that this condition was not acceptable. The condition was emphasised again in the undertaking which the Attorney General gave to the Court of Appeal and which was consented to by HMB. The government's undertaking not to proceed further to acquire the property was, of consent, limited in its operation to a period of six months from 1 February 2001. The condition was stated again in the comfort letter of 19 February 2001, in which the Minister of Tourism said that the understanding reached by both parties was based on HMB's undertaking to initiate full implementation of the project within six months of 1 February 2001. It was stated yet again at the end of the Permanent Secretary's letter to Ms Kentish of 14 May 2001.

37. The idea that HMB had a legitimate expectation, based on what was agreed on 22 January 2001, that the government would not insist on any time limit, or that its commitment was open-ended provided it took steps to proceed with the development, is entirely contradicted by the documentary evidence. There is nothing anywhere else in the documents that supports it. Ms Kentish says in her affidavit that the six month period referred to in the Attorney General's undertaking not to proceed with the acquisition was intended to operate as a benchmark and that it assumed that all incentives and approvals would be granted speedily. But the undertaking, which HMB accepted and was limited to a period of six months commencing on 1 February 2001, was not qualified in this way. Nor were the letters, in which the same condition was set out repeatedly in the clearest terms. The situation would have been different if HMB had produced some evidence of actual progress indicating that it had begun to proceed with the development before the expiry of the six month period. But that did not happen. The time limit was allowed to pass without any action by HMB that could give rise to a legitimate expectation on its part that it had achieved what was needed to fulfil the condition about commencement that the government had laid down. Even if the condition was open-ended, the lack of any actual progress on the ground defeats the argument that any expectation that HMB might reasonably have entertained was breached when the Cabinet decided in November 2001 to proceed to acquire the property.

38. For these reasons their Lordships have concluded that the argument based on legitimate expectation has no reasonable prospects of success. No advantage would be gained by allowing this part of the case to go to trial, as it would be bound to fail. The Court of Appeal was right to hold that it should be struck out.

Bias and irrationality

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

40. There is no doubt that the Cabinet had a responsibility in the best interests of the island to try to resolve the problems which had been created by the continued closure of Half Moon Bay Hotel. Its view that redevelopment and re-opening of the hotel would be in the public interest is not, and cannot be, in dispute: *Spencer v Attorney General* [1999] 3 LRC 1, 18. The government had first expressed an interest in promoting its redevelopment in 1997. Years had gone by without any actual progress on the ground. In the light of this background their Lordships reject the suggestion that it was irrational for the Cabinet to decide in November 2001 that the time had come for the compulsory acquisition to proceed. HMB had been unable even by then, more than three months after the expiry of the six month period, to commence redevelopment. As for the future, it has not produced, nor does it offer to produce, any evidence to show that there were sound reasons to doubt that redevelopment could not proceed if the property were to be in other hands. The absence of such evidence must be seen in context. The site is valuable, and there is no doubt that a developer who has access to funds can expect to make money from it. Acquisition for the purpose of transferring it to a private developer who would use it for his own profit is not inconsistent with its being for a public purpose: *Spencer*, p 17. The absence of an explanation by the Cabinet as to what its plans are does not mean that its decision to acquire the property was irrational.

41. The argument that the decision was biased is based on what is described the campaign of blame against HMB in June 2000 which was directed against Mrs Querard personally when the Prime Minister told the nation by radio and television that she despised the people of Antigua and that she stood in the way of progress. This proposition would carry more weight if there were grounds for suspecting that the decision to acquire which was taken in November 2001 was irrational. As it is, the history of events shows that, notwithstanding what was said in these broadcasts, the government responded to every request that HMB made for incentives and concessions to its lenders without any indication of bias. There were delays, but there is nothing to show that this was because the government was trying to put obstacles in HMB's way because it had a bias against the company. Nor is there anything to suggest that the setting of the six months time limit was motivated by anything other than a genuine desire to see progress after several years of consideration and debate. Their Lordships do not see that anything would be gained by sending this issue to trial, as it too would be bound to fail.

Discrimination

42. The essence of the constitutional challenge is that the decision, if not motivated by bias, was based on discrimination on grounds of race or colour contrary to section 14 of the Constitution of Antigua and Barbuda. The incident that is relied on is Senator Asot Michael's reprimand of Mr Wilmoth Daniel on 25 January 2002 for supporting white people to take over what he said rightfully belonged to black people of the country when he accused Mrs Querard, whom he described as "that white woman" of being a fraud, an enemy of the state and of laughing at the government and the country. But that event has to be seen its context. The decision to acquire had already been taken by the Cabinet the previous November, and the proposal had been in issue since June 1999, long before this outburst occurred. HMB do not offer to prove that remarks of this nature were made on any previous occasion by any member of the Cabinet. The process of extracting incentives and concessions from the government was punctuated by delay. But there is no evidence, nor is there any offer to produce any, that this was deliberate delay based on grounds which could be described as discriminatory. The argument that the Cabinet's decision in November 2001 was in breach of section 14 of the Constitution is so lacking in substance that it too must be struck out.

Conclusion

43. Their Lordships are satisfied, although for different reasons, that the Court of Appeal was right to hold that the applications for relief should be struck out. They will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the costs of the appeal to their Lordships' Board.