IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

CAUSE NO. G 55 OF 2021 and
CAUSE NO. G 150 OF 2021

BETWEEN: CTMH HOLDINGS LIMITED

Applicant

AND THE GOVERNMENT OF THE CAYMAN ISLANDS

Respondent

(1) NARAYANA HRUDAYALAYA PRIVATE LIMITED
(2) ASTER CARIBBEAN HOLDINGS LIMITED

Interested Parties

Appearances: **Mr. Chris Buttler QC & Mr. Benjamin Tonner QC and Ms. Sally Bowler on behalf of McGrath Tonner for the Applicant**
Mr. Tom Hickman QC instructed by Mr. Jevon Alcock of the Attorney General's Chambers for the Respondent

Before: **Hon. Justice Richard Williams**

Hearing: **20-22 April 2022**

Draft Judgment Circulated: **12 August 2022**

Judgment: **19 August 2022**

HEADNOTE

Judicial review – Government contracts with private medical facilities containing undertakings granting long term customs duty and stamp duty waivers and work permit fee concessions – Declarations sought concerning the possible fettering effect of the contracts and the lawfulness of granting the waivers – Declaration sought as to whether the Respondent is obliged to publish a transparent statement of the criteria to be applied when determining applications for waivers of customs duty, work permit fees and stamp duty.

JUDGMENT

Background - The parties

1. The Applicant is CTMH Holdings Limited ("CTMH"). CTMH trades as the Doctors Hospital. That hospital was purchased by a syndicate of doctors and private investors in 2015/16. It is a majority Cayman owned private, for-profit hospital. The hospital provides a full range of health care services. The hospital employs around 130 persons. The Respondent is the Government of the Cayman Islands ("the Government").

2. Narayana Hrudayalaya Private Limited ("NHPL") is an interested party. NHPL is an Indian domiciled company which set up an integrated hospital in Grand Cayman primarily aimed at medical tourists, with an assisted living facility. That facility became operational in 2014 and is now known locally as "Health City". In terms of its resources, staffing levels and turnover profits, outputs, and investment levels, NHPL is larger than CTMH. In April 2010, NHPL entered into a contract with the Respondent[1] ("the 2010 Contract") to provide medical care facilities, and as a part of the agreement, it was agreed that it would benefit from tax and duty waivers.[2] This contract was not approved by Parliament or by any relevant committee. NHPL has not sought to take up the opportunity to actively participate in these proceedings.

3. Aster Caribbean Holdings Limited ("ACHL") is also an interested party. ACHL is a subsidiary of a member of a corporate group of which Aster DM Healthcare Limited ("Aster DM") is the ultimate parent. Aster DM is a company incorporated in India. ACHL agreed to set up a three phase project to develop new medical facilities to provide affordable healthcare to residents and further the growth of medical tourism, with an assisted living facility and medical university. In December 2020, ACHL entered into a contract with the Respondent[3] ("the 2020 Contract") to provide medical care facilities and, as a part of the agreement, it was agreed that it would benefit from tax and duty

[1] See paragraph 25 below.
[2] See paragraphs 30-35 below.
[3] See paragraph 38 below.

waivers.[4] This contract was not approved by Parliament or by any relevant committee. ACHL has not sought to take up the opportunity to actively participate in these proceedings.

Background - Application Cause No. G 55 of 2021

4. I am dealing with the substantive hearing of the Applicant's two applications for Judicial Review, brought pursuant to Grand Court Rules (1995 Revision) ("GCR") Order 53. The first application is brought in Cause No. G 55 of 2021. Following adherence by the Applicant to the procedural requirements of Practice Direction No. 4 of 2013 Judicial Review (GCR O.53) Pre-Action Protocol for Judicial Review[5], the Leave to Apply for Judicial Review application was filed on 19 March 2021. Leave to apply for Judicial Review was granted, *"administratively on the papers"* by Richards J on 15 April 2021. The Notice of Motion was filed on 22 April 2021.

5. In its pre-action letter to the Respondent dated 9 March 2021[6], the Applicant stated that it would bring Judicial Review proceedings if the Respondent failed to confirm (i) that the clauses in the 2010 Contract did not in any way fetter the Respondent's exercise of its statutory discretion to waive work permit fees, stamp duty and customs duty for NHPL; and (ii) that the Respondent will only consider granting the waivers in favour of the Interested Parties on a case by case basis. The Applicant did not receive that confirmation and, as a result, holds the view and submits that the Respondent considers itself as being bound to continually grant the waivers and has and continues to act in a manner consistent with that belief.

6. Therefore, the relief sought in the first application (Cause No. G 55 of 2021) is in respect to (i) *"The Respondent's ongoing grants of waivers of customs duty, work permit fees and stamp duty to (NHPL) and proposed grant of such waivers to (ACHL) in reliance on its view….that it is*

[4] **See paragraphs 42-44 below**.
[5] Paragraphs 8-11of the Practice Direction.
[6] At page 9 in the Letter.

contractually bound to grant such waivers"; and (ii) *"The Respondent's failure to publish a transparent statement of criteria by which it will grant or refuse waivers of customs duty, work permit fees and stamp duty"*.

7. In the Notice of Motion filed in Cause No. G 55 of 2021[7] the Applicant pleads its two grounds for judicial review as follows:

> *"11. First, the Respondent cannot lawfully contract out of or otherwise fetter the exercise of its statutory discretion to waive (or refuse to waive) customs duty, work permit fees and stamp duty. The Respondent's 2010 and 2020 Undertakings are expressly stated to be subject to the laws of the Cayman Islands and, accordingly, (on their true construction) do not fetter the Respondent's powers. Alternatively, if (on their true construction) the Respondent's Undertakings purport to bind the Respondent then they are ultra vires and of no legal effect. Either way, the Respondent is currently operating under a misapprehension of its statutory powers to waive customs duty, work permit fees and stamp duty in relation to Health City East End. For the same reasons, the Respondent's 2010 Undertaking will not bind the Respondent in relation to Health City Camana Bay. And, again, for the same reasons, the 2020 Undertaking cannot bind the Respondent to grant customs waivers to the Second Interested Party.*
>
> *12. Second, the rule of law requires the Respondent to publish a transparent statement of the criteria to be applied when determining applications for the waiver of work permit fees, stamp duty and customs duty, to ensure that such applications are determined in a consistent and non-arbitrary way. The Respondent's failure to publish such criteria is unlawful."*

8. In the Notice of Motion, the following relief is sought:

   (i) A Declaration that the Respondent's statutory powers to refuse to grant waivers of customs duty, work permit fees and stamp duty to the Interested Parties are unfettered;

[7] Paragraphs 11 and 12 in the Notice.

(ii) A Declaration that the Respondent is obliged to publish a transparent statement of the criteria it will apply when determining applications for waivers of customs duty, work permit fees and stamp duty;

(iii) A Declaration that the Respondent's decisions to grant waivers to NHPL and/or ACHL and/or refusal to grant waivers to the Applicant were unlawful and breached s.19 of the Constitution; and

(iv) An order for damages, to be assessed, against the Respondent, on the ground that the Respondent's grant of waivers to NHPL and/or ACHL and/or refusal of waivers to the Applicant, which were unlawful and in breach of s.19 of the Constitution, have caused financial loss to the Applicant in terms of the duty which the Applicant has paid and the competitive disadvantage caused by the difference in treatment.

9. There is evidence that the Respondent has on a number of occasions granted financial waivers to the Applicant. The evidence before me at this time does not ground an application for a declaration that the refusal to grant waivers to the Applicant was unlawful and in breach of s.19 of the Constitution. The Respondent was entitled to grant and refuse waivers depending on the circumstances of each application. In the oral and written submissions made, minimal time was spent on this part of the third declaration and accordingly, it would not be appropriate to make such a declaration in this judgment.

The parties' positions in relation to the remaining live issues in Cause No. G 55 of 2021

10. In relation to the first and third declarations sought, the Applicant's argument at this hearing is not whether waivers can in principle be granted and set out in an agreement, but it says that its claim is a challenge to the particular clauses in the two Agreements which result in a considerable deduction in the payments into the Government's revenues for many years to come. There is no dispute that public bodies can enter into contracts which include the grant of waivers, as long as it

is compatible with the proper exercise of their statutory powers. The Applicant contends that the Respondent has a statutory duty to collect taxes, albeit subject to a statutory power enabling it to grant waivers. It is argued that the Government cannot contract out of exercising the statutory functions given to it by the Legislature so as to not only to bind its own actions, but also to bind the actions of successor administrations for many years. However, unlike its position in relation to customs duty and stamps duty, the Applicant accepts that, due to Regulation 27 Immigration Regulations (2019 Revision), the Cabinet can give work permit waivers to persons or groups of persons on a general basis. That said, the Applicant argues that Cabinet must still be free to change its mind about any work permit waivers if its view about public interests changes, for instance if the need for foreign doctors reduces as there are a greater number of available Caymanian qualified doctors. The Applicant submits that the ongoing grants of waivers of customs duty, work permit fees and stamp duty to NHPL and the proposed grant of such waivers to ACHL in reliance on its view that it is contractually bound to grant such waivers due to the undertakings given in the contracts is unlawful. Therefore the Applicant's challenge is to the granting of tax waivers based on an error of law, namely the Respondent acting in a manner that indicates that it is continuing to treat itself as being bound to grant waivers under the contract. It is contended that the Respondent commits an error of law each time Health City imports medical supplies and the Respondent waives the customs duties on those supplies. The Applicant seeks a finding from the Court that the contractual clauses cannot lawfully fetter the Respondent's discretion.

11. If the Court finds that the Respondent has been acting unlawfully by granting the waivers on a mistaken premise that it is bound to do so, then it is submitted that the implication is that the past waivers given would be unlawful. However, these proceedings do not concern the unwinding of those waiver decisions[8], because the Applicant is not seeking a quashing order or a mandatory order

[8] Paragraph 14 affidavit sworn by Dr. Yaron Rado on 24 November 2021 where he states *"...The Doctor's Hospital does not seek an order that any previous unlawful financial concession granted to the First Interested Party should be clawed back."*

as a part of the relief being claimed. If that relief had been sought, the Respondent could have argued that to overturn any dated waivers granted was prejudicial to good administration and to third party interests.

12. The Respondent contends that it is entitled to enter contracts by which it undertakes to exercise powers of waiver under s.52 of the Customs and Border Control Act (2021 Revision) ("the Customs Act"), r.27 of the Immigration Regulations and under s.20 (6) of the Stamp Duty Act (2019 Revision) ("the Stamp Duty Act"). It is submitted that if this was not the case, then Government would not be able to effectively operate, which includes developing the Islands by attracting investors to the Islands. The Respondent submits that it has acted lawfully, as it properly exercised its powers when using duty waivers to *"support and incentivise inward investment"* for the economic development of the Islands.

13. I note that, at paragraph 1 in its Statement of Opposition[9] the Respondent denies that *"it has placed a fetter on the exercise of its statutory discretion to waive (or refuse to waive) customs duty, work permit and stamp duty"* and adds: *"The discretion of the Respondent remains intact and untrammeled. The Respondent did not fetter the exercise of its statutory discretion to waive (or refuse to waive) customs duty, work permit fees and stamp duty."* At paragraph 4 in its Statement of Opposition dated 13 December 2021, the Respondent denies the contention made[10] that it has wrongly fettered the exercise of its discretion, *"by determining on a blanket basis that the discretion will be exercised in a certain way in the future, regardless of the material considerations which may prevail at that time"*. In the same paragraph, the Respondent denies that it contracted out of or otherwise fettered the exercise of its statutory discretion to waive (or refuse to waive) the relevant duty and fees, because the 2010 Contract provides that its undertakings are *"subject to the*

[9] Dated 13 December 2021.
[10] At paragraph 2.2 in the Applicant's letter to the Respondent dated 9 March 2021.

laws of the Cayman Islands". At paragraph 3 in its Points of Objection[11] the Respondent denies that its *"statutory powers to refuse to grant waivers of customs duty, work permit fees and stamp duty has been fettered".*

14. These comments made by the Respondent seem to be consistent with the spirit of the first declaration which is sought by the Applicant and gives the impression that there is no disagreement between the parties about the 'non-fettering' effect of the undertakings. Despite that, the making of a declaration to clarify the position is opposed by the Respondent and a part of the reasons for that will be dealt with in more detail herein when I consider the threshold/gatekeeping issues raised by the Respondent.

15. The views of the Respondent set out in paragraph 13 above do not seem to be borne out by the evidence before the Court.[12] There is no evidence filed by the Respondent to show that it has considered or taken into account anything other than the granting waiver provisions in the Agreement or to show that that it has conducted any updated reevaluation in relation to the ongoing concessions.

16. The Respondent submits that the argument raised by the Applicant that the length of the concessions is relevant to its submission that there has been an illegal fettering of discretion is "*an irrelevant distraction",* as it says that the pleaded case is that the Government cannot agree in advance to exercise powers of waiver pursuant to the statutory provisions at all. However, that is not correct, as I note at paragraph 37 in the Notice of Motion the Applicant pleads that: *"The first issue in this claim is whether the powers of waiver can be contractually fettered, long in advance*[13] *of the liability for payment accruing."*

[11] Dated 5 November 2021.
[12] See paragraphs 52-53.
[13] My emphasis by underlining.

17. In relation to the second declaration sought, the Applicant highlights that there is no established criteria against which revenue waiver applications are assessed for approval and that there is an obligation for the Respondent to so do. The Respondent, on the other hand, contends that there is no duty on the Government and public bodies at common law to draft and have in place a policy to structure discretionary powers, and/or that the absence of a published criteria is not unlawful. It is submitted that the question as to whether to draft a policy and what a policy may contain is a political question concerning issues of good governance and is not a question of law. Absent any instruction from Parliament that criteria be devised or promulgated, it is submitted that it is a matter for Cabinet whether it chooses to devise policies and it is not for the Court to direct Cabinet to do so.

Background – Application Cause No. G 150 of 2021

18. The second application is brought in Cause No. G 150 of 2021. Following adherence by the Applicant to the procedural requirements of Practice Direction No. 4 of 2013 Judicial Review (GCR O.53) Pre-Action Protocol for Judicial Review[14], the Leave to Apply for Judicial Review application was filed on 16 July 2021. Leave to apply for Judicial Review was granted on a review of the papers by Richards J on 26 July 2021. The Notice of Originating Motion was filed on 6 August 2021.

19. The relief sought in the second application (Cause No. G 150 of 2021) is in respect to: *"The Respondent's ongoing failure to: (a) formulate criteria for designating an institution as a place at which institutionally registered practitioners may be employed; (b) formulate criteria for reviewing such designation: and (c) publish a transparent statement of those criteria."*

[14] Paragraphs 8-11in the Practice Direction.

20. The following relief is sought in Cause No. G 150 of 2021:

(i) A Declaration that the Respondent is obliged to formulate criteria for designating an institution as a place at which institutionally registered practitioners may be employed;

(ii) A Declaration that the Respondent is obliged to formulate criteria for periodically reviewing such designation; and

(iii) A Declaration that the Respondent is obliged to publish a transparent statement of those criteria.

21. All of the issues (save for costs) in relation to Cause No. G 150 of 2021 have now been resolved. Prior to the hearing the issues were narrowed because the Government produced the criteria sought in the proposed declaration above by means of written *"Guidelines for Designation as an Institutionally Registered facility to employ practitioners on the Institutional Registration List"*. Towards the close of the second day of the hearing, Mr. Hickman QC addressed the second declaration sought by the Applicant, namely that the Government should put in place *"some sort"* of criteria for reviewing a designation. Mr. Hickman QC stated: *"I accept my instructions that there should be and must be and will be a review of designated instructions against the designation criteria at reasonable intervals."* He added that this did not amount to a concession that the Government was under a duty to formulate and publish these criteria or that the Court had the power to order it to do so. He indicated that the review *"concession"* was being made because, following the formulation and distribution of the designation criteria, it was necessary for a mechanism for review to also be set out. This concession is one that is understandably made by the Government, and it is clearly in the medical profession's and patients' interests that such reviews be required and take place.

22. Before moving away from Cause No. G 150 of 2021, I note both parties' observations about the Health Practice Act (2021 Revision) ("the HPA") and the Health Practice Regulations (2021 Revision) ("the HPR"). They made specific reference to Regulation 5 and Regulation 5A of the

HPR which deal with the educational qualifications for full registration and the educational qualifications for institutional registration. Although the requirements set out at Regulation 5(2)-5(4) HPR are not replicated at Regulation 5A HPR, the parties both agree that the Regulations should be interpreted to read that Regulation 5(2)-5(4) HPR should also apply to an applicant applying for institutional registration. I agree with the parties that such an interpretation is most desirable and is to be commended, as it deals with the safety of patients and would ensure that all doctors have the appropriate level of experience. I see there being great merit in the Legislature considering whether there is a need to clarify/amend the wording in Regulation 5 and Regulation 5A HPR to remove any potential uncertainty in this important area of patient safety.

Background – Directions

23. On 13 September 2012, Carter J conducted a directions hearing at which she approved the draft order which the parties had submitted to her.[15] The two sets of judicial review proceedings were consolidated and the matter was to be listed for a 3-day final hearing on the first available date after 13 December 2021. Directions were given requiring the Respondent and the Interested Parties to file and serve detailed grounds in opposition to or in support of the claim.[16&17] In addition, wider directions were given about the filing of affidavit evidence, skeleton arguments and bundles. On 14 February 2022, a Notice of Hearing was issued by the Listing Officer fixing the substantive hearing of the Judicial Review proceedings for 20-22 April 2022.

The Hearing

24. At the Judicial Review hearing held in open court on 20-22 April 2022, I received oral submissions from Queens Counsel for each party. At the end of the hearing, I adjourned the matter in order to

[15] Counsel for the Applicant and Respondent were in attendance, the Interested Parties were not in attendance.
[16] Paragraph 4 of the Order provided that an Interested Party which has not filed and served detailed grounds of opposition to or in support for the claim in Cause No. G 55 may not participate at the final hearing.
[17] The deadline, with the consent of the parties, was extended to 4:00 p.m. on 5 November 2021and then further extended to 4:00 p.m. on 8 November 2021.

prepare and then deliver this reserved written judgment. When determining the issues dealt with in this Judgment, I have considered the written and oral submissions filed on behalf of the Applicant and the Respondent, the content in the core bundle, the bundles of authorities and the additional documentation filed during the hearing.

Factual Background

The 2010 Contract between the Government and NHPL

25. On 7 April 2010, the then Premier[18] and Mr. Mark Scotland[19], on behalf of the Respondent and Dr. Devi Shetty[20] on behalf of NHPL executed the 2010 Contract concerning the provision of new state-of-the-art health care facilities to cater for medical tourists and residents of the Cayman Islands.[21] The 2010 Contract provides that this followed the Cabinet resolving, with the express consent of the Governor, that the Respondent enter into the agreement.

26. The policy objective was to bring in medical tourist revenue and provide employment opportunities. Recital B in the 2010 Contract provided that there would be three phases to the agreed project. The first phase was the creation of a two hundred bed hospital to provide state of the art health care facilities in areas of tertiary care that were not available at that time in the Cayman Islands. The second phase was the creation of an educational institution, training academy and dental, nursing and medical college.[22] At the end of the three phases there would be further expansion of the hospital to the extent that it would offer 2,000 beds, with the facility being spread over 500 acres of land. The third phase included the creation of assisted living homes for seniors who could afford the cost of living in the Cayman Islands.[23]

[18] Mr. McKeeva Bush who was also Minister of Finance, Tourism and Development.
[19] Minister of Health, Environment, Youth, Sports and Culture.
[20] Chairman and Director of NHPL.
[21] Recital B of the NHPL Contract.
[22] This phase was anticipated to start one year after the hospital became operational (i.e. 2015) but it has not commenced yet.
[23] This phase was anticipated to start five years after the hospital became operational (i.e. 2019) but it has not commenced yet.

27. Recital C of the 2010 Contract contains the Government's commitment to the development of new medical facilities to enhance the existing health care system and to encourage the growth and development of medical tourism. In Recital C the parties agreed to provide certain undertakings *"for the implementation and completion of the Project subject to the terms and conditions of this Agreement"*.

28. Clause 1 in the 2010 Contract contains NHPL's undertakings for a project it estimates will take over ten years to execute at a cost of over US$2 billion. For instance, Clause 1.2(d) provides that NHPL undertakes to construct and operate the Hospital and that it will (i) endeavour to use local contractors and local services when that is possible and (ii) give preference to employing or engaging suitably qualified Caymanians as employees. Clause 1.2(g) provides that NHPL undertakes to offer a 20% discount on all surgical operations at the Hospital to every Caymanian patient referred from the Cayman Islands Health Services Authority for tertiary, specialty care, *"which obligation continues for so long as the Company is in receipt of any revenue exemptions or concessions from the Government under clauses 2.8 to 2.10 inclusive…"*.

29. Clause 1.3 of the 2010 Contract makes clear that NHPL's obligations/undertakings set out in Clause 1.2 (c) to (j) were subject to a number of condition precedents being satisfied within 12 months of the Effective Date, and if they were not, then NHPL was entitled to terminate the agreement in writing to the Government.

30. Clause 2 in the 2010 Contract contains the Government's undertakings which are given *"… for the advancement of the Project but only to the extent those undertakings are permissible by the laws of the Cayman Islands".*[24] Arguably this means that the contract itself cannot fetter the powers of

[24] My emphasis by underlining.

the Legislature. Therefore, the Applicant contends that, if the Court was to find that the Government's undertakings to waive taxes are unlawful, then the undertakings given by the Respondent in the contract will be of no legal effect and adds that: *"There is no question of the whole contract being ultra vires."* Clause 2.15 in the 2010 Contract makes clear that the Government's obligations/undertakings set out in Clause 2 were subject to a number of condition precedents being satisfied within 6 months of the Effective Date.

31. The Government's wide ranging undertakings in Clause 2 of the 2010 Contract relate to infrastructure, immigration, legal and exclusivity from competition undertaking provisions. Clause 2.8-2.10 relates to *"taxation, duties and fees"* concessions given to NHPL. Clause 2.9 provides:

> *"To ensure that a portion of work permit fees that would otherwise be payable for medical personnel employed or engaged at [the hospital] is waived by a percentage between 15% and 30%..."*

There appears to be no expiry date in relation to the percentage waiver provided in this undertaking and that arguably it could last for as long as Heath City remains operational and under successor administrations.

32. Clause 2.10 of the 2010 Contract contains undertaking provisions from the Government relating to exemptions and concessions provided to NHPL and provides

> *"To procure that, whilst [the hospital] is being built and/or operated by the Company, the Company receives the following exemptions and concessions from fees and duties:*
>
> *a. That the Company be exempted from liability to pay those classes of fees in relation to the establishment and operation of CNHU specified in Schedule 2[25];*
>
> *b. that the Company is exempted from liability to pay any customs or similar duty on the first US $800 million in value of all medical equipment and medical supplies brought to Grand Cayman for use in the operation of [the hospital]."*

[25] Schedule 2 a. specifies all stamp duties under the Stamp Duty Act payable in respect of the leasing of any land by the Company or an affiliate to another affiliate (and all business premises fees payable in lieu of such duties).

In relation to Clause 2.10(b) prior to the time when the level of the imports reaches US$800,000,000, there appears to be no expiry date in relation to the 100% duty exemptions provided in this undertaking. This concession could very well last for many years. In relation to Clause 2.1 a., it appears that the waiver of all stamp duty on land leased arguably commits Government for as long as Health City is operational.

33. Clauses 2.10(b)(i) and (ii) in the 2010 Contract go on to set out the Government's undertaking relating to duty exemptions and concessions that apply to NHPL for thirty years from the date when the imports have reached US$800,000,000, as follows :

> *"Thereafter:*
>
> > *(i) during the first 15 years immediately following the date on which the US $800 million exemption has been exhausted (which date the parties agree to confirm in writing), the Company's liability to pay customs or similar duty on medical equipment and medical supplies brought to Grand Cayman for use in the operation of [the hospital] will not exceed 5% of the value of the medical equipment and medical supplies; and*
> >
> > *(ii) during the next 15 years, the Company's liability to pay customs or similar duty on medical equipment and medical supplies brought to Grand Cayman for use in the operation of [the hospital] will not exceed 10% of the value of the medical equipment and medical supplies.*
>
> *Subject to paragraph c of this clause 2.10, at the expiration of the second 15-year, the Company acknowledges that it will be liable to pay customs or similar duty on medical equipment and medical supplies at the then prevailing rates.*

Again, these concessions will last for many years, at least 30 years after the US$800 million exemption point is reached and may result in many millions of dollars of waivers and lost revenue for future administrations.

34. Clause 2.10(c) in the 2010 Contract goes on to set out the Government's undertaking relating to a waiver *"from liability to pay any duty or other charges whatsoever"* for NHPL in relation to all

life-saving medical equipment and medical supplies for at least 50 years from the commencement of construction. This is a further very lengthy concession.

35. Clause 2.10(a) in the 2010 Contract provides that NHPL will be exempted from liability to pay those classes of fees in relation to the establishment and operation of the project specified in Schedule 2 of the Agreement. Schedule 2 paragraph 1 provides, that while the project is being built or operated, *"the Government will procure that the Company receives the following exemption from fees…all stamp duties under the Stamp Duty Law payable in respect of the leasing of any land by the Company to an affiliate or an affiliate to another affiliate…"*. There appears to be no specified expiry date for this stamp duty waiver exemption undertaking.

36. At Clause 2.16 in the 2010 Contract the parties acknowledge and agree that NHPL is not entitled to exemptions, concessions and other financial inducements which are not specified or set out in the Contract.

37. Clause 13 of the Contract, under the heading *"Powers of the Legislature"*, provides: *"Nothing contained in this agreement in any way fetters, or is to be taken as seeking in any way to fetter, the exercise of legislative power of the Legislature of the Cayman Islands…"*. The undertaking given by the Respondent at Clause 2.11 of the 2010 Contract under the heading *"legal"* refers to Clause 13 and provides:

> *"Subject to clause 13,*[26] *to move for and use its best endeavours to pass, amend or issue, as the case may be, all laws, regulations, directions or to take other measures as necessary to give effect to this agreement and the Government's undertakings under it, including (without limitation) in the following ways:*
>
> *a. …..*
> *b. To the extent necessary to support the issue of the undertaking referred to in clause 2.8 regarding exemption from future taxes*

[26] My emphasis by underlining.

c. To the extent necessary (i) to give effect to the undertaking in clause 2.9 regarding favourable work-permit fees for medical personnel employed or engaged at CHNU…..
d. To the extent necessary to give effect to the undertaking in Clause 2.10 regarding fees and duties;
e. …….”

As recurring tax concessions may require legislation, this clause shows that the parties recognised that it could only be best endeavours used in relation to future legislation, as it would be wrong to fetter or tie the hands of future governments. This is consistent with the first declaration sought by the Applicant

The 2020 Contract between the Government and ACHL

38. On 21 December 2020, the Respondent[27] and ACHL executed the 2020 Contract which related to a project for the provision of healthcare services over a full range of specialties primarily to medical tourists, but also to the residents of the Cayman Islands. The 2020 Contract provides that this followed the Cabinet resolving, with the express consent of the Governor, that the Respondent enter into the agreement.

39. Recital B in the 2020 Contract provided that there would be three phases to the project. The first phase, to be executed over *“some three years”,* involves the creation of a 150 bed hospital providing primary, secondary, tertiary and quaternary care. The second phase, to commence after the phase 1 hospital has been operational for 2 to 3 years, involves the creation of assisted living and independent living centres, each comprising of 100 units. The third phase, to commence after the hospital has been operational for a minimum of 5 to 7 years, involves the creation of a medical university integrated with the hospital and the expansion of (i) the hospital up to 500 beds; and (ii) the assisted living and independent centres up to 300 units each.

[27] Who was represented by Mr. Samuel Rose, Cabinet General Secretary.

40. At Recital D in the 2020 Contract, the parties *"agreed to provide certain undertakings for the implementation and completion of the Project subject to the terms and conditions of this Agreement"*.

41. Clause 1 in the 2020 Contract contains ACHL's warranty and undertakings for a project it estimates will take over 13 years to execute at a cost of over US$350 million. Clause 1.3 in the 2020 Contract makes clear that ACHL's obligations/undertakings set out in Clause 1.2(b) to (i) of the Recital were subject to a number of condition precedents being satisfied within 9 months of the Effective Date, and if they were not, then ACHL were entitled to terminate the agreement in writing to the Government. The condition precedents are set out at Clause 1.3 and I note that Clause 1.3 (d) refers to: *"The Government having done all such acts, matters and things as may be necessary or expedient and to the extent permissible by the laws of the Cayman Islands*[28]*, to fully perform each of its undertakings under each of the following clauses: clause 2.2(a), clause 2.3(a), clause 2.5, clause 2.6, clause 2.7, clause 2.8, clause 2.10, clause 2.11, clause 2.12 and clause 2.13."*

42. Clause 2.1 in the 2020 Contract provides that Government's undertakings are given *"… for the advancement of the Project but only to the extent those undertakings are permissible by the laws of the Cayman Islands"*.[29] With this in mind, the Applicant again contends that, if the Court was to find that the Government's undertakings to waive taxes are unlawful, then the undertakings given by the Respondent in the 2020 Contract will be of no legal effect.

43. The Government's wide ranging undertakings in Clause 2 of the 2020 Contract relate to infrastructure, immigration, legal and exclusivity from competition undertaking provisions. Clauses 2.7-2.8 and Schedule 2 in the 2020 Contract relate to *"taxation, duties and fees"* concessions given to ACHL. These concessions include that there will be no customs/import duties,

[28] My emphasis by underlining.
[29] My emphasis by underlining.

during the first 25 years after the commencement of the construction of phase 1, for life saving medical equipment/supplies and for other medical equipment/supplies. Although the concessions in the 2020 Contract are less generous than those given to NHPL in the 2010 contract, the Applicant again contends that the continuing granting of such concessions which bind future administrations and fetter their exercise of their statutory duties is unlawful.

44. Clause 10 of the Contract, under the heading *"Powers of the Legislature",* provides: *"Nothing contained in this Agreement in any way fetters, or is to be taken as seeking in any way to fetter, the exercise of legislative power of the Legislature of the Cayman Islands… ."* The undertaking given by the Respondent at Clause 2.11 of the 2020 Contract under the heading *"legal"* refers to Clause 10 and provides:

> *"Subject to clause 10,*[30] *the Government undertakes to move for and to use its best endeavours to pass, amend or issue, as the case may be, all laws, regulations, directions or to take other measures as necessary to give effect to this Agreement and the Government's undertakings under it, including (without limitation) in the following ways:*
>
> *a. …..*
> *b. To the extent necessary to support the issue of the undertaking referred to in clause 2.7 regarding exemption from future taxes;*
> *c. To the extent necessary to give effect to the undertaking in clause 2.8 (and Schedule 2) concerning the exemptions /concessions in relation fees, duties and imposts;*
> *d. To the extent necessary to give effect to the undertaking in Clause 2.9 (and Schedule 3) concerning incentives in relation to the issuing and processing of work permits;*
> *e. To the extent necessary to give effect to the undertaking in clause 2.10 regarding the Government's commitment as the manner in which Aster Cayman MedCity may conduct its day-to-day operations."*

As recurring the above concessions may require legislation, this clause shows that the contracting parties recognised that it could only be best endeavours used in relation to future legislation, as it would be wrong to fetter or tie the hands of future governments. This, again, is consistent with the first declaration sought by the Applicant.

[30] My emphasis by underlining.

Preliminary – gate-keeping issues/threshold questions

45. The Respondent contends that the Court need not and should not deal with the issue of the sought declaration that the Respondent's statutory powers to refuse to grant waivers of customs duty, work permit fees and stamp duty to the Interested Parties are unfettered. The Respondent also contends that the Court need not and should not deal with the issue of the sought declaration that the Respondent's decisions to grant waivers to the interested parties were unlawful. The contention that the challenge should not be entertained is based on a submission that (i) the issue is an academic one; (ii) the Applicant has no proper interest or standing; and (iii) the issue was not raised promptly. It appears that standing and delay are also being raised in relation to the second and third declarations sought in G 55 of 2021.

46. The Applicant states that the three gate-keeping issues were not raised by the Respondent in the correspondence following the protocol letter sent to them, nor in the directed[31] later filed Points of Objection and Statement of Opposition. The Applicant submits that the first time they were raised was in the Respondent's Written Submissions dated 6 April 2022.

47. However, I note the following at paragraphs 5 and 6 of the Respondent's Statement of Opposition dated 13 December 2021:

> *"5. The Respondent objects to judicial review being used as a platform to impugn the legality of the agreement, in circumstances where the Applicant, did not instigate proceedings (directly) challenging the agreement. The proceedings are an erudite and skilful adroit to attack the granting of waivers to the First Interested Party (and future "competitors") through the prism of judicial review. The Applicant accepts that the Interested Parties "stand to be directly affected by the declaratory relief sought against the Respondent." This is an implicit acceptance that the proceedings constitute an indirect attack on the First and Second Interested Parties.*

[31] Orders made on 15 and 30 September 2021.

6. The Respondent opposes any examination of the agreement in these consolidated proceedings on the grounds that any such exercise:

(i) constitutes an intrusion in to an agreement which the Applicant does not directly challenge and which the Applicant lacks grounds/cause of action to so (directly) challenge;
(ii) …"

48. Although the language used by the Respondent in its Statement of Opposition did not include clear wording referring to the academic issue and standing, the content did touch on points relevant to those issues. I will consider the questions raised, despite the Applicant's contention that they are made "*too late."* Therefore, to ensure fairness, I granted leave for the Applicant[32] to file a Supplementary Skeleton Argument to enable the points raised to be addressed prior to the judicial review hearing commencing. In that Skeleton Argument the Applicant contended that the three issues raised by the Respondent were misconceived.

49. In relation to the academic submission, it is contended by the Respondent that it is not about whether the contract is lawful but, if properly analysed, it is an *"abstract question"* about the meaning and the enforceability of the clauses in the two contracts. It is argued that there is no practical need for the Court to resolve the issue raised by the Applicant concerning the contracts as (i) the Applicant does not highlight how it will benefit in any way if the declaration is granted and (ii) there is no dispute between the parties to the contract as to the meaning and effect of their agreement. The Respondent does not seek a declaration as to whether, if it wished to do so, it could refuse to grant waivers to the Interested Parties and the Interested Parties are not asking for a declaration that the Respondent is bound to grant waivers because the Respondent is threatening not to comply. It is submitted that, because it is common ground that the contracts are lawful, the issue does not go to the *vires* of the contracts.

[32] Unopposed by the Respondent.

50. The Respondent relies upon Munby J's observations at *paragraph 140* in ***R (Howard League for Penal Reform) v Secretary of State for the Home Department*** [2003] 1 FLR 484*:*

> *"…the fact remains that the courts – including the Administrative Court – exist to resolve real problems and not disputes of merely academic significance. Judges do not sit as umpires on controversies in the Academy. Nor is it the task of a judge when sitting judicially – even in the Administrative Court – to set out to write a textbook or practice manual or to give advisory opinions."*

51. The Respondent also relied upon Munby J's following observations made at paragraph 21[33] in ***R (John Smeaton on behalf of Society for the Protection of Unborn Child) v The Secretary of State for Health v Schering Health Care Limited, Family Planning Association*** [2002] EWHC 886 (Admin):

> *"Now I recognise of course, as well-established learning on the principles of locus standi in public law cases demonstrates, that the nature of the disputes which can properly and appropriately be ventilated in the Administrative Court in judicial review proceedings is much less confined than those disputes which properly form the subject of private law proceedings elsewhere. But making every allowance for this, the fact remains that the courts – including the Administrative Court – exist to resolve real problems and not disputes of merely academic significance. Judges do not sit as umpires on controversies in the Academy, however intellectually interesting or jurisprudentially important the problem and however fierce the debate which may be raging in the ivory towers or amongst the dreaming spires."*

52. The Applicant does not accept that the claim made is purely academic, claiming that it raises an important question about whether a government can contract out of exercising the statutory functions given to it by the Legislature to raise taxes so as to not only bind its own actions but to also bind the actions of future governments for many years to come or in perpetuity. The Applicant contends that, despite what is stated in the Statement of Opposition and Points of Objection [34], the

[33] In some versions of the report it appears at paragraph 22.
[34] See paragraph 13 above.

Respondent's approach has been and remains one consistent with being bound by the two agreements and that it is granting the waivers on that premise, thereby effecting ongoing government actions. In support of this contention the Applicant highlights paragraph 17 in the affidavit of Kenneth Jefferson, the Financial Secretary and Chief Officer at the Ministry of Finance and Economic Development, sworn on 5 November 2021 where Mr. Jefferson states: *"The First Interested party receives the exemptions from liability to pay any customs or similar duty on the first US$800 million in value of all medical equipment and medical supplies, on the terms set out in clauses 2.10 of the Agreement."* He does not outline any further factors that are taken into account or provide any details of an ongoing review or reevaluation before the ongoing waivers are processed. The Applicant also highlights an article in the Cayman Compass dated 19 February which reported that the then Premier said that the concession and duty waivers already in place for Health City would apply to the new facility.

53. The Applicant also relies upon its correspondence with the Respondent. The Applicant wrote to the Respondent on 6 January 2022 again asking whether the Respondent felt itself bound to comply with the waiver clauses in the 2010 Contract, and if not bound on what basis. If the Respondent felt bound, then clarity was sought as to the basis upon which the Respondent contended that compliance with those clauses did not amount to a fettering of its discretion to refuse to waive the duties. It also asked the Respondent to state whether it contended that the question of whether it was unlawfully treating its statutory powers to collect the duties as fettered by the contract was non justiciable/immune from judicial review and, if so, why. The Respondent, in its reply dated 27 January 2022, refused to address the questions as it deemed them to be in reality interrogatories and stated that the points set out in its Statement of Opposition did not require evidential clarification. The Respondent added that there did not *"appear to be any disputable facts between the parties"* and that *"the questions seemed designed to elicit legal arguments which could enable the Applicant to characterise the Respondent's position in the Applicant's own skeleton*

arguments". The Applicant replied on 15 February 2022, indicating that, having read the Points of Objection, the Statement of Opposition and the above-mentioned affidavit of Mr. Jefferson, it would proceed on the basis that the Respondent felt that it was bound to comply with the waiver clauses in the Agreement and that it has granted the waivers to NHPL and treated NHPL as exempt from the duties in accordance with the waiver clauses. The Applicant stated that the content in Mr. Jefferson's affidavit was consistent with such a view and commented in the letter that if the affidavit was inaccurate or gave a misleading impression it was "*incumbent*" on the Respondent to correct that. No clarification was forthcoming in correspondence from the Respondent.

54. Therefore, it is argued that the Respondent is, on the evidence, operating under a material error in law. There is no dispute that the Respondent has been continually granting waivers to Health City, and it is submitted that such governmental actions are amenable to judicial review. The Applicant accepts that the granting of the waivers is not unlawful, but contends that the decision to grant waivers on the premise that the Government is bound as a matter of law to do so when the contractual undertakings given are as a matter of law not so binding is unlawful. It is the continuing granting of waivers based on the Respondent's alleged view that it is constrained by the contract to grant those waivers which is challenged and which is contended to be amenable to judicial review. The Applicant argues that if the Respondent has misunderstood the legal effect of the contracts in this way, then the revenue waivers are unlawful and to the detriment to the citizens of the Cayman Islands. The waivers are said to be detrimental, as those considerable potential financial resources to fund public spending over a very long period of time are lost.

55. I find that the questions about the possible fettering of the Government's statutory powers to refuse to grant waivers to the Interested Parties to be not a purely academic one and is one of general importance to the public because it relates to the potential consequences of financial entrenchment on future elected governments. It is a genuine concern and the wider implications may affect the

lives of residents who, on one hand, wish the Government to promote the provision of health care systems and tourism in the Cayman Island and who, on the other hand, benefit from the public services, funded by revenue derived from all potential taxation resources, that Government could be providing.

56. The next threshold question, namely the standing of the Applicant, has some overlap with the academic issue. The Respondent contends that the Applicant has no proper interest in the meaning of the contract between the Respondent and NHPL and refers to the case of ***R (European Surgeries Ltd) v Cambridgeshire Primary Care Trust*** [2007] EWHC 2758 (Admin) at paragraphs 21, 56 and 58. The case concerned a contract between an individual and a health trust and the Trust's refusal to reimburse the individual for the costs of a medical procedure carried out by a German ophthalmology surgeon. A medical services company, which was not a party to the contract, brought judicial review proceedings seeking a mandatory order for the reimbursement to be made to the individual and a declaration that the Trust was obliged to reimburse patients under its care for treatment by EU providers on terms set out by the European Court of Justice. The individual did not seek to challenge the refusal and did not assign the right to demand the payment to the third party. The Administrative Court found that the third party had no justiciable claim and that in the circumstances of the case the order sought was *"truly academic"*. The ***Cambridgeshire Primary Care Trust*** case is rightly distinguished by the Applicant, as there was no public interest in the reimbursement. In the matter before me, due to the tax duty waivers in the contracts, the public are also affected, because the considerable lost tax revenue could have been used for public services. The Auditor General of the Cayman Islands observed in his report, *"Collecting Government Revenues"* (September 2015) ("the September 2015 Report"): *"A government relies on its ability to collect revenues in order to deliver services to the public"* and that the collection of customs duty accounts for 25% of total government revenue and that the collection of stamp duty accounts for more than 20% of total government revenue. The Applicant with some force also contends that,

if such substantial tax waivers are being given to the Interested Parties, and as the cost of public services still have to be met, then there will likely be less opportunity to grant tax waivers to other companies, including to itself. The Applicant, who conducts business in the same field as the two interested parties, has, at the very least, the same interest as other tax payers in the Government lawfully collecting taxes.

57. The Applicant is not a *"meddlesome busybody"*[35], nor is an entity that *"truly has no interest in the matter and is a busy-body, or a crank, or a mischief maker, or motivated by ill-will or some improper motive*[36]*"*. The challenge raised in relation to (i) whether the Government can bind future governments exercising its statutory duty to raise taxes by entering a contract granting tax exemptions and (ii) whether the contract entered into has fettered the government and its successors to refuse to grant waivers to the Interested Parties is a matter of general public importance and there appears to be no case precedent on the issue in the Cayman Islands. In such cases, even if an Applicant does not have a private interest in the outcome of the case, it may be properly motivated to seek a review on behalf of the wider community, which includes those running businesses in the private health sector. This is illustrated by the guidance given in the below cases. In such circumstances one can understand why Richards J granted leave to the Applicant without seeking further elaboration on the issue of standing at the permission stage.

58. In ***R v Somerset County Council, ex p Dixon*** [1998] 75 P. & C.R. 175 (1997) at page 9, Sedley J commented:

> *"Public law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs -- that is to say misuses of public power; and the courts have always been alive to the fact that a person or organisation with no particular stake in the issue or the outcome may, without in any sense being a mere meddler, wish*

[35] Per Lord Donaldson, M.R. in ***R v Monopolies and Mergers Commission, Ex p. Argyll Group plc*** [1986] 1 W.L.R. 763 at 773. ("**the Argyll Group case**").
[36] Lewis QC, Judicial Remedies in Public Law, 4th Edition, (Sweet & Maxwell 2009) at paragraph 10.007.

and be well placed to call the attention of the court to an apparent misuse of public power. If an arguable case of such misuse can be made out on an application for leave, the court`s only concern is to ensure that it is not being done for an ill motive. It is if, on a substantive hearing, the abuse of power is made out that everything relevant to the applicant`s standing will be weighed up, whether with regard to the grant or simply to the form of relief."

59. At page 5 in ***ex parte Dixon***, Sedley J reviewed the practical test on a leave application set out by Lord Donaldson MR in the ***Argyll Group case***, and commented that if the leave is granted then the test of interest or standing could be reapplied as a matter of discretion on the hearing of the substantive application and that at *"this second stage, the strength of the applicant`s interest is one of the factors to be weighed in the balance"*.

He added that:

"At the substantive hearing "the strength of the applicant`s interest is one of the factors to be weighed in the balance"; that is to say that there may well be other factors which properly affect the evaluation of whether the application in the end has a "sufficient interest" to maintain the challenge and -- what may be a distinct question -- to secure relief in one form rather than another."

He went on to say that he did not dissent from the proposition that not every member of the public can complain of every breach of statutory duty by a person empowered to come to a decision adding that.

"This, however, is by no means the same as asserting that no member of the public can complain of any breach of statutory duty unless he or she objectively has an interest greater than that of the rest of the public.

In the majority of cases, no doubt, such a distinction will be necessary in order to demonstrate that the applicant is not a mere busybody. But there will be, in public life, a certain number of cases of apparent abuse of power in which any individual, simply as a citizen, has a sufficient interest to bring the matter before the court."

60. In ***R v Her Majesty's Treasury, Ex Parte Smedley*** [1985] Q.B. 657 (1984) the Court of Appeal had to consider a preliminary question about whether Mr. Smedley had sufficient interest to entitle

him to apply for judicial review. Mr. Smedley sought to challenge the Treasury's decision to pay money out of the consolidated fund to the European Community without consulting Parliament, but under an Order in Council. He was applying in his own interest and that of all taxpayers and voters. Although his challenge failed on its merits, the Court of Appeal held that he had standing. Slade LJ remarked:

> *"There has been what Lord Roskill described (in Reg v. Inland Revenue Commissioners, Ex parte National Federation of Self- Employed and Small Business Ltd [1982] A.C. 617) as a "change in legal policy," which has in recent years greatly relaxed the rules as to locus standi. Lord Diplock referred to a "virtual abandonment" of the former restrictive rules as to the locus standi of persons seeking prerogative orders against authorities exercising governmental powers. If the court had taken the view that (the) application was of a frivolous nature, the wide discretion given to it by R.S.C., Ord. 53 would have enabled it to dispose of it appropriately… I do not feel much doubt that Mr. Smedley, if only in his capacity as a taxpayer, has sufficient locus standi to raise this question by way of an application for judicial review; on the present state of the authorities, I cannot think that any such right of challenge belongs to the Attorney General alone."*

61. As already mentioned above, when considering the overlapping academic issue, the Applicant has, at the very least, the same interest as other tax payers in the Government lawfully collecting taxes. This is not a frivolous application or one made by a meddling busy body. Having reviewed the guidance given in the above cases, I am satisfied that the Applicant has sufficient interest to seek the Court's consideration of issues raised relating to each declaration sought by way of the judicial review application No. G 55/2021.

62. In relation to the **delay question** raised by the Respondent, it submits that the claim was not brought promptly. The Respondent highlights that the 2010 Contract was executed on 7 April 2010 and that the claim was issued almost ten years later on 19 March 2021. However, it is clear that the Applicant's challenge is to an alleged continuing course of conduct, namely the Respondent's continuing grant of waivers on the premise that the Respondent believes that it is bound to do so

pursuant to the contract. It is not disputed that waivers occurred during the three months prior to the proceedings being issued. In such circumstances, I am satisfied that it is appropriate for the claim to proceed.

Statutory Framework for Taxation in the Cayman Islands and the Power to Grant waivers/concessions

(i) Legislation revenue collection

63. In the Cayman Islands a significant part of the Government's revenue is derived from customs duty and stamp duty. As stated by the then Auditor General in the September 2015 Report:

> *"A government relies on its ability to collect revenues in order to deliver services to the public. There is an expectation that government will have in place the management framework needed to ensure that it collects and manages revenues efficiently and effectively, in accordance with established legislation and regulations."*[37]
>
> *...*
>
> *20. It is important that Government identify potential sources of revenue while ensuring that it collects all revenues prescribed in law to meet budget commitments. It is also important that Government charges fees in a consistent manner in order to demonstrate to the public that it is charging fees fairly and doing everything it can to collect them. The responsibilities for collecting revenue are defined in law and are supported by the Government's ability to impose penalties and potentially exercise enforcement to ensure that revenues are collected."*[38]

It is, therefore, necessary to consider the legislation relating to the obligation to collect such revenue.

64. In the Cayman Islands, for the purpose of this matter, the relevant governing taxation legislation relevant is the Customs Act, the Customs Tariff Act (2017 Revision), the Stamp Duty Act and, for completeness sake, the Immigration (Transition) Act (2021 Revision).

[37] Page 1 of the September 2015 Report.
[38] Page 9 of the September 2015 Report.

65. The following provisions in the Customs Act mean that the Respondent is under a statutory duty to collect any applicable customs duty and that ordinarily the Interested Parties would be under an obligation to pay that duty.

66. Section 42(1) of the Customs Act is a general provision and it relates to the requirement to charge and collect customs duty and provides:

> "**Charge of Duty**
>
> *42 (1) There shall be charged, collected and paid through Customs and Border Control to the Treasury upon all goods imported into the Islands and enumerated in Schedule 1 to the Customs Tariff Act (2017 Revision)[39] the several duties therein set forth.*
> *(2) ...."*

67. Section 43 of the Customs Act (2021 Revision) provides:

> "**Liability for Duty**
>
> *43. (1) A person shall not deliver or remove any imported goods until the importer of the goods has paid to the Customs and Border Control any duty chargeable on the imported goods, and that duty shall, in the case of goods of which entry for home use is made, be paid on making the entry.*
> *(2) The rates of duty chargeable on imported goods shall be -*
> *(a) if entry is made of the goods, except where the entry is for warehousing, those in force in respect of such goods at the time of presentation of the entry to Customs and Border Control;*
> *(b) if entry is made of the goods for warehousing, the rates in force at the time of the removal of the goods from the warehouse for home use; or*
> *(c) if no entry is made of the goods, those in force in respect of such goods at the time of their importation."*

Under this provision the payment of duty is to be made at the time when the declaration of the goods is made to Customs.

68. *S*ection 44 of the Customs Act concerns the rate of duty to be charged and provides:

> "**Basis of Valuation**
>
> *44. Unless otherwise provided in this Act or in the Customs Tariff Act (2017 Revision), all imported goods subject to duty shall be charged to such duty at an ad valorem rate*

[39] Schedule 1 to the Customs Tariff Act sets out in detail the rates of duty applicable to imported goods.

expressed as a percentage of the value of such goods as ascertained in accordance with the method of calculation provided in section 45."

69. Section 45 of the Customs Act provides that the value of imported goods shall be taken to be the normal open market price and outlines how one determines what the normal price is. It also sets out wider provision as to the calculation of value.

70. The following provisions in the Stamp Duty Act mean that the Respondent is under a statutory duty to collect any applicable stamp duty and that ordinarily the Interested Parties would be under an obligation to pay that duty.

71. Section 3(1) of the Stamp Duty Act is a general provision and it provides that stamp duty is payable on instruments listed in the schedule to the Act. Section 4 Stamp Duty Act provides that the Minister of Finance is the *ex officio* Commissioner for the collection of stamp duty. Section 20 of the Stamp Duty Act specifies the time limit for the stamping of instruments, which runs from the date of their execution.

(ii) Legislation – revenue waivers/concessions

72. The parties agree that Government may use the grant of duty waivers or concessions as a means to encourage economic development and investment. As stated by the then Auditor General in the September 2015 Report:

"6. ....individuals and business can make an application for a revenue waiver, or concession, for a portion or full amount of fees (e.g. customs duty, stamp duties, tourist accommodation taxes, etc.) for various reasons. The Government may grant such requests as a strategy to provide economic stimulus to various businesses or industries.

7. Formal applications for revenue waivers are submitted to the Ministry of Finance and Economic Development (F&ED). These are reviewed by the Corporate Unit within the Ministry and forwarded to the Minister. Authority for the approval of revenue waivers with

a value of less than $25,000 rests with the Minister of F&ED, who has delegated that authority to the Financial Secretary. Revenue waivers valued at more than $25,000 must be approved by Cabinet."

73. The use of waivers by governments was helpfully highlighted in the ACS Working Paper produced by the African Studies Centre[40]:

"The charging and waiving of customs duty is an integral part of the tax system in any country which governments routinely use in the attempt to influence economic and industrial development with the aim of furthering its national objectives.
In several developing countries, for instance, governments provide tax incentives, which include duty waivers, to encourage capital formation in selected industries."

74. One should recognise that the necessity for the Government and the methods used to encourage investment into the Cayman Islands may be different to that in the larger and more established jurisdiction like the United Kingdom and Nigeria. The Cayman Islands Government may have to judge, based on the public interest and having regard to local circumstances, whether economic stimulus in a particular sector is more important than raising revenue needed to fund public services.

75. Therefore, with the above in mind and having considered the governing legislation for the collection of duties, it is now necessary to review the legislation which enables the reduction or the removal of those prescribed fees/duties and s.52 of the Customs Act provides:

"**Cabinet may waive or order refund**
52. The Cabinet may, in any particular case, waive or order refund of any duty, package tax or part of any duty or package tax which would otherwise be payable or would not be liable to refund under this Act, subject to such conditions as the Cabinet may think fit to impose".

[40] The (ab)use of import duty waivers in Nigeria by Nwanneka Modebe, Okoro Okoro, Chinwe Okoyeuzu & Chibuike Uche.

This provision provides that Cabinet may approve the waiver in *"any particular case."* The Applicant contends that this is not a blanket waiving, as the liability to pay duty only arises in relation to a particular importation. However, the language in the provision is wide and the words *"any particular case"* can be read to mean that there may be a contractual agreement that a waiver applies to a particular individual or to a particular business and that the wording *"any duty"* does not require there to be a consideration on entry about whether to grant a waiver for each and every item. Of course, the processing of the item upon landing by the Customs official will require that official to check if that the business and the item are subject to a granted waiver and if they are, it can be cleared as a no waiver item in the documentation. However, this provision is not intended to and should not be treated as enabling the Cabinet to fetter the Government's ability to collect that duty or tax over an extended period of time or that it should not follow the requirements in the good governance framework for government expenditure when granting tax concessions. If there was an appropriate policy put in place to govern and inform about the process that was being taken for granting these waivers, then there would hopefully be less risk of falling foul of the no fettering principle and ensure good governance. The Auditor General's reports highlight his view that the process used for the decision to grant these waivers for extended periods of time in the Contracts was improper and unlawful and understandably he forcefully advocated that a policy should be put in place.[41]

76. In relation to the waiver of stamp duty payments, the relevant part of s.20(6) of the Stamp Duty Act provides that:

"The Commissioner[42] may, <u>at any time</u>[43] -

(a) waive, refund or abate the whole or part of the duty payable;…
(b) …"

[41] See paragraphs 81-84 and 96-99 below.
[42] Section 4 Stamp Duty Act provides that the Minister of Finance shall be the *ex officio* Commissioner.
[43] My emphasis by underlining.

77. The Applicant contends that s.20 of the Stamp Duty Act provides that duty is only payable upon the execution of the relevant instrument. It is argued by the Applicant that s.20(6) does not give a general waiver to a particular person or business or to a general area of business. In support of this contention, the Applicant compares s.20(6) with s.32 of the Stamp Duty Act, as the latter enables the Governor *"from time to time"* to waive or reduce any or all of the fees set out in a Schedule *"in relation to any person or group of persons"* in Cayman Brac or Little Cayman. It is submitted that s.32 allows a general waiver from the Governor in the specific circumstances set out and that, as the Legislature did not provide similar wording in s.20(6), it was not intended that the Commissioner be able to give general waivers and that he could only give a waiver at the time of execution of a particular instrument. It is contended that this requires the Commissioner at each execution to form his own view about the grant of the waiver when considering the balance between the loss of revenue and the benefits. On this issue I prefer the Respondents' submission that the words *"at any time"* means that you can only waive at the moment the duty becomes payable.

78. I do not set out in detail the provisions relating to work permit fees because, at the hearing, the Applicant stated that: *"Unlike customs duty and unlike stamp duty we accept work permit fees waivers can be given to a person or group of persons on a general basis."* The Applicant added that s.27 of the Immigration Regulations stated that the power to waive the fees may be used by Cabinet *"from time to time"* and that Cabinet must still be free to stop granting waivers of those fees as its view as to what is in the public interest may change. For instance, when there are enough local qualified doctors in the Cayman Islands with the requisite expertise, then foreign doctors would not be required.

79. It is clear from the above provisions that the Respondent is entitled to grant waivers for customs duty and stamp duty. The purpose and thinking behind the granting of waivers are succinctly stated

in the above extract from the Auditor General's September 2015 report[44] and in the above quoted extract from the Nigerian ACS Working Paper.[45] With those provisions, the above background details and my above observations in mind I now turn to the declarations sought and the parties' respective positions in more detail.

Issue - The first and third declarations sought in the Notice of Motion

80. The Applicant agrees that contracts can be entered into, *"so long as this is compatible with the due exercise of their statutory powers"*. The real 'bone of contention' for the Applicant is found in its submission that the restricted manner in which Government has acted and continues to act, which has governed its approach to the undertakings given in the 2010 Contract and in the 2020 Contract, cannot be regarded as being compatible, because that is binding and fettering the Government and future administrations with some waivers/concessions being granted in perpetuity and some others for very lengthy periods of time. The core challenge by the Applicant is not about whether the Respondent can make a commitment in a contract to grant duty waivers for a reasonable period of time, but it is a challenge to the commitments given in particular clauses in the 2010 Contract and in the 2020 Contract and its view that the Government continues to act in a manner that shows that it views its statutory powers to refuse to grant waivers of customs duties and stamp duty as being fettered. It states that the Court should make a finding that the contractual clauses cannot lawfully fetter the Respondent's discretion.

81. The concerns expressed by the Applicant echo some of those set out by the former Auditor General[46] in his June 2015 Report entitled "National Land Development and Government Real Property" ("the 2015 Report"). The 2015 Report included an assessment of the 'Health City' Agreement to determine whether the Government had complied with legal requirements governing

[44] See paragraph 72 above.
[45] See paragraph 68 above.
[46] Mr. Alistair Swarbrick.

expenditure and whether the principles of good management applicable for major projects had been applied.

82. The Auditor General stated that: *"Government officials should ensure effective development in the Cayman Islands whilst ensuring compliance with legislation."* He explained that the governance model is set out in the Public Management and Finance Law (2013 Revision) ("the PMFL") and in the Constitution Order of 2009, because the Laws established a management model based on a clear segregation of roles. He described the segregation of roles as follows:

> *"Ministers are to set policy, propose outcome objectives and forecast expenditure and a three-year Strategic Plan;*
> *Ministers are to "influence specific outcomes" though recommending outputs, transfer payments, investments and changes to these or through legislative measures;*
> *Chief Officers are to determine and acquire the "inputs" (resources) needed to produce the output specified in the annual budget statement: and*
> *The Legislative Assembly is to approve all expenditure by passing appropriation laws."*

He added at paragraphs 79-81 in the 2015 Report:

> *"79. While not specifically stated, written into the PMFL are management principles which all government expenditure is to follow including: effective medium-term planning, value for money, management of risk and accountability for the use of public resources. The PMFL sets out clear requirements for achieving value for money in government expenditure. There must be an appraisal and business case "for all projects whether funded from recurrent surpluses, conventional borrowing or all alternative finance mechanisms . . . before the procurement stage to ensure value for money". The Government is required to retain independent accounting, legal, financial, economic, environmental and other technical advice "to ensure robust investment appraisals are produced.*
>
> *80. (Public Private Partnerships) PPPs (Public Private Partnerships) or any other form of alternative financing will only be considered:*
>
> *a. where there is a sound appraisal underpinning the proposed project before the financing means has been determined;*
> *b. where a financial appraisal demonstrates improved value for money against a conventionally financed alternative;*

c. where the long term affordability case has been assessed and agreed by the appropriate technical experts retained by the Cayman Islands Government; and
d. where an independent opinion has been received from a qualified accountant of good standing on the correct accounting treatment in the Cayman Islands Government's accounts. -PMFL (2013 revision).

81. The PMFL has had effect since 2004. The FFR (The Framework for Fiscal Responsibility), which was signed in November 2011, was incorporated in the PMFL in November 2012. The requirements of the FFR therefore pre-date the Health City agreement ..... An appraisal, business case or cost-benefit analysis is nevertheless a basic good practice for any significant undertaking and ought to have been performed whether or not required by law."

83. Having set out the appropriate procedures to be followed, the Auditor General found that

"... The Health City Agreement (was) negotiated outside the normal planning process secret by Ministers with no public disclosure until after the Government had committed to them and that the governance framework for the Cayman Islands has not been respected in the approval and management of major developments."

At page 3 of his report, He stated that:

"In the case of Health City, the agreement was negotiated by Ministers. It was presented to Cabinet together with input from the Ministry commenting on the terms of the agreement. Although there was input from the civil service, Ministers acted outside the legal roles by becoming involved in the selection of means. Again, no approval from the Legislative Assembly, was sought, even though the agreement committed government to hundreds of millions of dollars in tax, duty and the concessions and contained obligations for infrastructure upgrading and expenditure. I conclude that...the Government acted unlawfully and without proper authority in signing these agreements. The government did not conduct adequate value for money analysis for...the Health City Agreement."

84. He concluded that the Government had acted *"unlawfully and without proper authority"* in signing the agreement and elaborated on that at paragraph 89 as follows:

"...The governance framework for government expenditure requires that Ministers set objectives and policy, but not become involved in selection of means, or in operational

implementation. Moreover, all expenditure must be improved by the Legislative Assembly. ....neither of these legal requirements was (sic.) were met."

The Auditor General went on to find that there were *"serious deviations from the process in place to protect the people of the Cayman Islands from possible corruption by public officials".*

85. The Applicant submits that the Government and its successors are not bound to waive customs duties for the Interested Parties or the extended periods of time set out in the contract and that it is also not bound to waive stamp duties of the First Interested Party in perpetuity. It submits that it is wrong for a government to fetter future administrations. These contentions are based on the principle stated in ***Birkdale District Electric Supply NHP Ltd v Corporation of Southport*** [1926] AC 355 ("The Birkdale Principle"[47]). In ***Birkdale*** the supply company had authority to '*make such charges for the supply of electricity as may be agreed'*, subject to maxima and restrictions against undue preference. The company had made an agreement tying their charges to those made by the Corporation of Southport, an agreement which they then alleged was *ultra vires* on the grounds that it interfered with the exercise of their statutory power to fix charges. This argument was rejected both in the Court of Appeal and House of Lords, both holding that the agreement was not incompatible with the public duties of the supply company. As highlighted by the Respondent in its submissions, it was held that the statutory corporation which was providing electricity was entitled to enter into binding agreements governing its charges.

86. The Respondent contends that reliance cannot be placed by the Applicant on the decision in ***Birkdale*** to support a contention that the Government cannot contract as to how it will exercise its statutory powers to grant waivers or concessions in advance. However, it is a fundamental obligation of the Government to preserve its freedom to exercise its discretion as it sees fit at the

[47] See paragraph 86 below.

appropriate time. This includes its "statutory birthright" and its duty to bring in revenue which is then used to fund public services, for example from customs and stamp duties. As stated by the author of Judicial Review Handbook, Michael Fordham (6th Ed.) a person or a public body *"cannot enter into any contract or take any action incompatible with the due exercise of their powers or the discharge of their duties"*. That said, the Government is also free to enter into contracts, for example to encourage overseas investment into the country. The difficulty arises when it is asked to contract, or even to give an assurance, as to how it will exercise any discretionary power in the future, especially for lengthy periods of time. The principle that a public body to whom a discretionary power has been entrusted cannot bind itself as to the manner of exercising that discretion in the future (or to put it another way the principle that a governmental authority must always retain the power to act for its own preservation despite an agreement that it has made) was viewed by Lord Birkenhead in ***Birkdale*** to be a well-established principle of law. In that case he set it out in the following words:

> *"If a person or public body is entrusted by the legislature with certain powers and duties expressly or implicitly for public purposes, then those persons or bodies cannot divest themselves of those powers and duties. They cannot enter into any contract or take any action incompatible with the due exercise of their powers or the discharge of their duties."*

87. However, the principle stated by Lord Birkenhead must be kept within reasonable bounds, and is not an authority to say that the Government, especially if it follows the proper procedure and to the extent it is empowered to act by the statutory provisions, is never competent to limit its discretion by entering into a contract in which reasonable revenue waivers or concessions are given. The difficulties of too wide an application of the principle were emphasised by Sargant L.J. in the Court of Appeal[48] when he stated: *"In my judgment it would be an extraordinary extension of this doctrine of ultra vires or repugnancy to say that in such a case as this a commercial undertaking was*

[48] ***Southport Corporation v Birkdale District Supply Company*** [1925] 1 Ch. 794 at 824.

deprived of its ordinary discretion as to fixing the price at which the services rendered or the commodities supplied should be rendered or supplied." It has long been accepted that the legislation enables the Government to grant waivers if the Government feels that it is in the public interest to do so. In this regard it has been accepted that the commercially beneficial reason for using waivers to bring in inward investment and development of the Islands may be in the public interest. Lord Sumner stated at page 364 in ***Birkdale*** that the incompatibility if it was to vitiate the contract must amount to a 'renunciation of a part of their statutory birthright', or be contrary to the fundamental objects of the corporation. There is therefore, no general proposition that any agreement fettering a discretion is bad; but that the authorities show that, provided a power is given to enter into the contract in question, it will not be invalidated by the fact that it will in the future hamper a public authority in exercising its discretionary powers, unless the effect is to prevent the authority carrying out some fundamental public purpose for which it has been created.

88. It is the effect of any limitation on the discretion and this can include the length of time that limit is to be in place and whether the contract sets out any proviso to the limitation. As the Applicant rightly states: *"Whether a particular contract is found to fetter the government's statutory powers will be a matter of fact and degree."* The Applicant states that its challenge has arisen to the longevity of the waivers. With that in mind, reference is made to the case of ***York Corporation v Henry Leetham & Sons*** [1924] 1 Ch 557, which was a case reviewed and approved by Lord Birkenhead in ***Birkdale.*** The facts were that York Corporation was by statute entrusted with the control and management of the Rivers Ouse and Foss in Yorkshire. It could charge tolls, within limits, as it deemed necessary to carry on the two navigations in which the public had an indubitable interest. In 1888, the Corporation entered into two agreements with the firm of Henry Leetham & Sons. These allowed the firm and its successors and assignees to transport cargo on the River Ouse for a monthly fee in place of authorised dues and charges, with an agreement for a refund to the firm of the difference between the annual fee and the ordinary charges. The River Foss agreement

was one by which the firm covenanted to pay the corporation £200 per annum for 20 years as a composition for the ordinary tolls, in exchange for free use of that waterway. York Corporation sued for a declaration that the two agreements were illegal and invalid being ultra vires. The Chancery Court held for the Corporation with Russell J stating that no body charged with statutory powers for public purposes may divest itself of such powers or fetter itself in the use of such powers and he said:

> *"As I have already indicated, the plaintiffs are invested with statutory powers of charging such tolls, within limits, as they may deem necessary for the purpose of carrying on these two undertakings in which the public are interested. The effect of these two agreements is that they bind themselves for a period, the duration of which depends upon the volition of the defendants, not to exercise those powers as against them. No matter what emergency may arise during the currency of the agreements the Corporation have deprived themselves of the power to charge the defendants such increased tolls as might enable them to cope with the emergency. They have for so long a time as the defendants desire to that extent wiped out or fettered their statutory power. If that be, as I think it is, the effect of these agreements, they are, in my opinion, agreements which are ultra vires the Corporation."* [49]

89. The Respondent contends that ***York Corporation*** is not applicable in the circumstances that exist in the matter before me because the Corporation, by agreeing not to levy them, had purported to divest itself of its power given to it by Parliament to levy tolls. It is contended that the Government has not agreed in contract to not exercise its powers to waive fees and duties and that it continues. However, the Respondent applies the waiver/concession undertakings given in the contracts without any further review or deliberation and gives the impression that it feels bound by them and as a consequence it will not exercise its powers to levy considerable duties from the Interested Parties.

[49] My emphasis by underlining.

90. The Applicant also highlights the following helpful remarks of Prof Davis in "Ultra Vires problems in government contracts" (2006) 122 LQR 98:

> *"The only clear limitation on the government's contracting powers is that they cannot be used to fetter the government's discretion*" and "*it is important that the 'no-fettering' rule be maintained in some form. It reflects the special nature of public power. The government is democratically accountable to the electorate. It needs the ability to change its policies in order to reflect the will of the people (particularly after a change of government) or to reflect new circumstances (such as evidence of a new risk to public health).*"

91. Although, the Respondent should not readily act in a manner inconsistent with any undertaking given if the performance of that undertaking is compatible with a duty imposed upon it, there appears to be no dispute between the parties that, due the wider provisions set out in the contracts which have been highlighted by me above, the statutory powers to refuse to grant waivers of customs duty, work permit fees and stamp duty to the interested parties are unfettered. Accordingly, I make a declaration in the form of that sought in paragraph a. of the Notice of Motion.

92. If the correct process is adopted as commended by the Auditor General, Cabinet may approve customs duties and stamp duties may be waived by the Commissioner. Work permit concessions may be given. It is lawful to do that in order to attract investment for the purpose of development in the Islands. This applies in the present and for a reasonable period of time in the future, even though the latter may impinge on the actions of a following administration. Especially in the absence of an established policy concerning the grants of waivers and concessions, it is important that one considers the facts and degree of the same. Some of the provisions in the contracts which grant release from the payment of revenue for very long periods of time of time and some without any cut-off date, are arguably incompatible with this and future Government's ongoing ability to exercise its powers and discharge their revenue collecting duties. Despite the concession made in relation to the content of the first declaration sought, it is evident that the Respondent continues to act in a manner consistent with a belief that it is bound by the undertaking and that it should keep

on granting the waivers without any review of the prevailing circumstances despite a passage of time, for example since entering the 2010 Contract. Such an approach is an improper fetter of an administration's discretion and use of its powers to bring in revenue which may be required for it to govern and to meet the public's needs at that time. If there is an intention to enter in to a contract that fetters a democratically elected government to change its policies or raise revenue then that should be properly done following consideration by Parliament. If Parliament deems it appropriate to grant such long ranging concession then that could be put into effect in specific legislation. That said, in a democracy, governments should not be allowed to bind future governments. Ordinary legislation cannot be made unrepealable, and future governments are free to revisit the policy choices of their predecessors. This is partly to ensure that each government can be democratically responsive to its own electorate and is not bound by the preferences of the past as well as being able to meet the needs of the community as they might be at that time. As highlighted by the Auditor General in the 2015 Report when commenting on the segregation of roles and his view that: *"The essential principle is that government must have specific authority from the Legislative Assembly to undertake any new initiative."*

93. Despite these concerns, I am not satisfied it is would be appropriate to make the widely worded declaration as set out in paragraph c. of the Notice of Motion. Decisions by Government to grant tax concessions to the interested parties to stimulate development were not in themselves unlawful. For example, the Government may enter into a public-private partnership which could bind a future government to the terms of a contract or enter into long term procurement contracts or development agreements. Similarly, as in the matter before me, a Government may offer tax breaks to induce development which can limit future income. It is a matter of degree, having regard to the quantum of concessions and their duration. Therefore, the issue is not the granting of individual waivers or concessions, especially if they are for a reasonable period of time. The issue arises due to the insular process Cabinet adopted to reach that decision, as the granting of such concessions over an extended

period of time and then acting in a manner that is consistent with a belief that the Government (and successive administrations) are bound by the Contracts to continue to give the waivers without further review, an exercise of discretion which is inconsistent with the fettering principle. Although I do not deem it appropriate to grant the wide declaration sought in the Notice of Motion, I do find that the Government acted inappropriately in awarding waivers and concessions for the extremely lengthy periods that they did without any meaningful reference to Parliament.

Issue - The second declaration sought in the Notice of Motion

94. The Applicant contends that there is an obligation on Cabinet to publish criteria for the determination of applications for tax waivers under the statutory discretion. The Respondent historically agrees that there would be merit in that happening, but argues at this hearing that there is no duty on the Government to do that. The Respondent highlights that Parliament has not imposed a requirement on Cabinet to publish criteria and submits that the question about whether or not to draft a policy and what it should be are political questions and not ones of law. The Respondent submits that for the Court to impose such a duty *"would be to cross the Rubicon between law and policy and breach the separation of powers"*.

95. The authors of the ACS Working Paper produced by the African Studies Centre[50] stated, in the context of granting waivers and financial concessions to attract investment for the development of a country, that:

> *"In order to help achieve the above objective, such incentives must meet the characteristics of a good tax system which include fairness, transparency and even handed application. Investors for instance, will naturally have more confidence in tax incentive systems that have the above characteristics than in systems where there is little or no transparency and no guarantee of even handedness in the award and adjudication of tax incentives. This is because policy inconsistencies distort markets. Efficient tax systems therefore determine*

[50] See paragraph 73 above.

rules upfront and ensure uniform application of tax incentives aimed at aiding specified sectors of the economy. This explains why the usual legal mechanism for establishing tax incentives like waivers is through legislation and public pronouncements."

This is sound reasoning for stating that criteria or a policy should be drafted and published to give more transparency, certainty, consistency and to minimise the possibility of corruption.

96. It is evident that the Auditor General shares the above views, at the very least having regard to the *"principles of good management for major projects"*. The Auditor General highlighted that the Health City Project:

> *"Underline(d) weaknesses in the Government's framework for the management of public private partnerships (PPP's)"* and that "*although the framework of fiscal responsibility provides a basic structure for PPP's, the Government lacks the detailed policies or procedures for its successful implementation."*[51]

The Auditor General concluded:

> *"Our audit shows that much remains to be done to create a framework for the management of Public Private Partnerships (PPP's). The increased use for such vehicles was anticipated when the Framework for Fiscal Responsibility was signed and indeed, it appears that future major development of infrastructure will not necessarily be government-led or completely government-financed. The FFR, which is now embedded in the PMFL, provided an outline of the principles that are used to manage PPP's, but detailed policies and procedures are still required to ensure that the Government receives value for money. Examples of such policies and procedures exist and have been used for a considerable period of time in other jurisdictions and it should not be difficult to adopt and customize the required framework for the Cayman Islands. A framework and transparent process would assist the Government in attracting high quality institutional investors as they are now diversifying into infrastructure PPP's."*[52]

[51] My emphasis by underlining the row.
[52] My emphasis by underlining

97. In the September 2015 Report, the Auditor General again raised his concerns about the lack of any policy. He stated at page 1:

> *"Fundamental to the effective management of revenues for the Government is adherence to the PFML— Public Management and Finance Law (2013 Revision) - and adherence to generally accepted business practices. While we found that coercive revenues are collected in compliance with legislation, we also found that in the absence of policies and procedures for processing revenue waivers (or concessions), they are not granted in a consistent and transparent manner. As a result, we were unable to assess how waivers are managed, processed, or tracked, nor were we able to assess the reasonableness of the dollar value of waivers granted."*[53]

98. The Auditor General concluded in the report that revenue waivers were managed poorly and shared the following concerns about the system in place and lack of a criteria[54]:

> *"24. Given that revenue waivers reduce or remove fees prescribed in legislation, we expected that a very clear, defined, and equitable revenue waiver process would be established to ensure that all applications for revenue waivers would be treated fairly, consistently and transparently.*
>
> *25. We found a process in place that defined roles, responsibilities and accountabilities for the approval of revenue waivers greater than or less than $25,000. However, we did not find a defined or documented process, including the roles, responsibilities and accountabilities, for assessing the applications prior to approval.*
>
> *26. ……*
>
> *27. We also found that there was no checklist with established criteria and requirements against which revenue waiver applications were assessed for approval or rejection. The use of such a checklist would help ensure that all applications are assessed fairly and consistently. Further, there was no reporting of revenue waivers as a basis to summarize the total amounts of revenue waivers granted over a given period of time.*

[53] My emphasis by underlining
[54] At page 13 in the September 2015 Report

28. Documentation of roles, responsibilities, and accountabilities would help to ensure that the processing of revenue waiver applications is transparent and consistent within the governance framework outlined in the PMFL."[55]

Importantly, with the above in mind, the Auditor General went on to understandably recommend that:

"The Government should formalize policies and procedures to provide documented and consistent roles, responsibilities and accountabilities for all parts of the revenue waiver process, including a set of decision criteria on which to assess revenue waiver applications and a formalized records management process."

99. There is little doubt that this recommendation, made by the Auditor General when he was considering good governance, has great merit and one would have expected the Government to have acted upon it. This is especially so when the Auditor General has stated that the lack of systems and documentation that his team found during the audit *"should be of great concern to Legislators, who would expect that decisions made are based on clearly documented criteria applied in a fair and consistent manner"*.

100. In the Recommendation Appendix in the September 2015 Report, it is recorded that Management agrees with the recommendation made and that the date of the planned implementation of it was by 31 December 2016, with responsibility being given to the Financial Secretary and Chief Officer. Regrettably, that deadline passed and despite the Auditor General's successor reiterating his concern, it has still not been done. The Court was informed that the Auditor General was told that the implementation date would be July 2017 and then told that the policy would have been finalised in 2019 and then that it would be in 2020. As the 2020 date also passed the Financial Secretary stated that a draft policy would be presented to the Legislature for approval by the end of February

[55] Section 14A of the PMFL imposes a duty on the Government to comply with the principles outlined in the FFR to ensure and provide *"improved accountability"*. The FFR provides that the Government's approach *"will continue to be open and transparent, consistent with the highest standards of governance and democracy"*.

2021. Alas, that date also passed and there is still no policy in place. It is reported that Mrs. Sue Winpsear, the present Auditor General, very fairly acknowledged that the process to create a concessions policy was not an easy one, but she reiterated the amount of time that had passed since the recommendation made in the September 2015 Report and the importance of the policy. It is reported that she felt that there was merit in even a provisional policy being produced to get on with, which could be fine-tuned as time progresses when stating that: *"All you want to see is clarity about what the concession is, how much is the value, what you expect in return for that concession, and then, most importantly, for accountability purposes, you follow up and there's a sort of reporting mechanism."*

101. It is submitted by the Applicant that the Government's open ended discretion to waive taxes under the above mentioned statutory provision affects individual's rights and therefore the rule of law requires the Executive to state, in a published criteria, the circumstances in which that discretion will be exercised.

102. The Applicant contends that a concessions policy is necessary to make it possible for businesses to predict whether a duty waiver will be granted in a particular instance and for the public to assess whether the Government is acting reasonably when it is not bringing in tax revenue in a particular instance and which would ordinarily have been received and the possibly be expended on funding public services. The submitted basis for the intended obligation is summarised in the Applicant's Supplementary Written Submissions where it is stated:

> *"This obligation follows, inter alia, from (i) the open-ended character of the powers, (ii) the impact of the exercise of the powers on fundamental rights (viz. the decision on whether to exercise a power of waiver determines whether an applicant will be deprived of property), (iii) the requirement in this area for transparency and accountability…, (iv) the need for taxpayers to be able to predict whether taxes will be payable so that they can plan their*

affairs[56]*, (v) risk of arbitrary and inconsistent decisions-making in this field, in particular given the absence of reasoned decisions, and (vi) to provide a benchmark against which to assess refusals to make payment."*

He also added, having regard to the Auditor General's remarks, that criteria is required to (i) enable the Auditor General to perform her constitutional task and (ii) to enable the Government to perform its duties under the PFML.

103. It is with the above historical background that, although opposing the Declaration sought in relation to the requirement for there to be a policy put in place, the Respondent concedes that in some contexts it might be useful and beneficial for policies to be adopted to regulate the exercise of discretionary powers. The Respondent accepts that the reasoning set out above may well support the desirability of there being a policy, but they do not demonstrate that it is illegal not to have a policy. There is little doubt that the implementation of such a policy is well overdue. The need for such a policy to be put in place is unquestionable, and that principle seems to have been accepted by previous Governments, but not actioned. What is at issue is whether it is appropriate for the Court to make the declaration that the Government is obliged to do that.

104. In support of its contention that there is an obligation to publish a criteria, reliance is placed by the Applicant on ***R (Lumba) v Secretary of State for the Home Department*** [2012] 1 AC 245 where the Supreme Court considered the legality of detaining foreign nationals who had completed prison sentences for criminal offences, pending their deportation. It was concluded that the detention was unlawful and the policy under which they had been detained had not been published and was inconsistent with published policy. At paragraph 34 in the Decision**,** Lord Dyson stated *obiter* that:

[56] Although, not something for me to determine at this hearing, the Applicant contends that its own applications for waivers have been determined in an arbitrary manner.

"The rule of law calls for a transparent statement by the executive of the circumstances in which the broad statutory criteria will be exercised."

105. ***Lumba*****,** unlike the present matter, is a case concerning unpublished policies and it is not one addressing whether there is an obligation to publish a policy in the first place where one does not exist. Lord Dyson had in mind that: *"What must,..., be published is that which a person who is affected by the operation of the policy needs to know in order to make informed and meaningful representations to the decision –maker before a decision is made."* [57] Also the *obiter* statement made by Lord Dyson was clearly one made in the very different context of coercive immigration detention powers. Rather than saying that there is a need for criteria to be drafted and published in all instances where there is an exercise of a discretionary power, Lord Dyson identified examples where they should, for example arrest and surveillance powers.[58]

106. The Applicant also refers to Sedley LJ's comments in ***B v Secretary of State for Work and Pensions*** [2005] 1 WLR 3796 where the Court of Appeal was dealing with the Secretary of State seeking recovery of overpayment of benefits from an adult with a mental capacity described as below borderline and who did not know that they had been overpaid. Sedley LJ stated at paragraph 43: *"It is axiomatic in modern government that a lawful policy is necessary if an executive discretion of the significance of the one now under consideration is to be exercised, as public law requires it to be exercised, consistently from case to case but adaptably to the facts of individual cases."* This case, similar to ***Lumba***, involved a serious interference with an individual's rights. In addition the Department of Works and Pensions, unlike in the present matter, already had a written policy but they had failed to publish or disclose it. I am not satisfied that ***Lumba*** or ***B v Secretary of State for Work and Pensions*** can be regarded as establishing a precedent that there is a duty to

[57] Paragraph 38.
[58] Paragraph 35.

draft and publish a criteria whenever a body is exercising a wide discretion conferred by a statute including when considering whether to grant tax/duty waivers and concessions.

107. The Applicant also places reliance upon ***R (Teleos PLC) v Customs and Excise Commissioners*** [2005] 1 WLR 3007. In ***Teleos*** the taxpayer sought to challenge in Europe the ruling by the respondents that the mobile phones they supplied did not meet the criteria to be zero-rated for value added tax ("VAT"). As a decision would be unlikely before 2006, they sought an interim payment. They sought judicial review now of the refusal of the Commissioners to make an interim payment. The Court of Appeal considered the fact that the Commissioners had a statutory discretion to make interim payments and in relation to that power, Dyson LJ stated *obiter* at paragraph 24:

> *"If there are criteria by which the Commissioners exercise this discretion, they were not disclosed to us. Indeed, at para 14 of his witness statement, Mr Holland said that it was his understanding that it was the Commissioners' policy not to make interim payments. It is clear from Ms. Farmer's statement that this understanding was not correct. But it is most unsatisfactory that taxpayers appear not to be aware of the true position. In my judgment, the Commissioners should make a clear statement of their policy and they should publish the criteria by which they exercise the discretion to make interim payments. This will enable taxpayers to know whether they may be entitled to an interim payment, and provide courts with a benchmark against which to assess refusals to make payment."*

This decision is not an authority that a body needs to have a policy when exercising a statutory discretion. This case, as with the two above, does highlight the benefits of their being a clear policy in such circumstances and the thinking illustrates, even involving the non- coercive powers which are the subject matter in the matter before me, why the long standing promises made to act upon the Auditor General's aged recommendations should now be executed and not delayed any further.

108. In light of my above observations and despite the clear merits of the clarity which would derive from a criteria put in place for the reasons espoused by both Auditor General, I am not satisfied that it is appropriate for the Court to make a declaration that the Respondent is obliged to publish

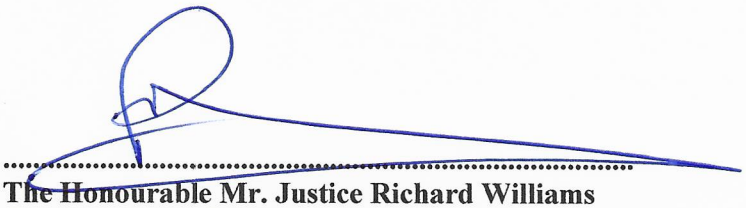
a transparent statement of the criteria that it will apply when considering concessions. Of course, the Respondent would be well advised and would be acting in a manner consistent with good governance if it did so, something that it seems to have recognised since publicly stating in 2015 that it would draft and publish a policy.

Costs

109. Neither party has been fully successful in this matter. My provisional view is to make no order for costs. However, if either party wishes be heard on costs they may apply by Summons for a costs hearing.

General Observations

110. I would like to thank Leading and Junior Counsel who appeared before the Court at different stages of the proceedings and, in particular for their masterful delivery at the Substantive hearing. I wish to apologise for the delay in the provision of this Judgment which has been caused by intervening unforeseen events and thank the parties for their patience.



The Honourable Mr. Justice Richard Williams
JUDGE OF THE GRAND COURT