

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **CIVIL DIVISION**

3 **CAUSE NO: G 163 of 2019**

4 **BETWEEN:**

5 (1) **CROSBY COLLYMORE EBANKS**
6 (2) **WILSON JONATHAN MENDOZA**
7 (3) **MARIO ALBERTO GOMEZ**

8
9 **PETITIONERS**

10 **AND:**

11 (1) **THE GOVERNOR OF THE CAYMAN ISLANDS**
12 (2) **THE NATIONAL ROADS AUTHORITY**
13 (3) **THE ATTORNEY GENERAL OF THE CAYMAN ISLANDS**

14
15 **RESPONDENTS**

16

17

18 **Appearances:** **Mr. Rupert Wheeler of KSG Attorneys for the Petitioners**
19 **Mr. Michael Smith of the Attorney General's Chambers for the Respondents**

20

21

22 **Before:** **The Hon. Justice Cheryll Richards Q.C.**

23

24 **Heard:** **10th March 2021**

25

26 **Draft Judgment:** **19th August 2021**

27

28 **HEADNOTE**

29 *The Cayman Islands Constitution 2009, Claim under s. 26 (1), alleged breaches of s. 7 and s. 15.*
30 *Compatibility with the Roads Act (2005 Revision)*

31

32 **JUDGMENT**





1 INTRODUCTION

2 1. These are proceedings brought by the Petitioners pursuant to s.26 (1) of the *Cayman Islands*
3 *Constitution* 2009 (“the Constitution”). Pursuant to this section any person may apply to the
4 Grand Court on the basis that government has breached or threatened his or her rights and
5 freedoms under Part 1 of the *Constitution, the Bill of Rights, Freedoms and Responsibilities*
6 (“the *BoR*”).

7
8 2. By their Petition filed on the 27th September 2019, as amended on the 9th December 2019, the
9 Petitioners aver that their rights and freedoms under s.15 (1) and s7 (1) of the Constitution have
10 been breached by the Government of the Cayman Islands. The specific averments are that the
11 *Roads Act* does not provide a direct or indirect right of appeal to the Grand Court against the
12 legality of the interference with, taking of possession and acquisition of their land, and
13 secondly, that they have been denied a right to a fair hearing as to the decision of the Governor
14 in Cabinet under the *Roads Act* (2005 Revision) to make a declaration to acquire certain lands
15 owned by them for the purpose of road building.

16
17 3. The Petitioners claim:

- 18 i. A declaration that the *Roads Act* does not conform with the Petitioners’ rights and
19 freedoms under the *BoR* because it does not secure for the Petitioners a right of access
20 to the Grand Court, whether direct or on appeal from any other authority, for the
21 determination of the legality of the taking of their land;
- 22
23 ii. A declaration that, pursuant to s.5 (1) of the *Cayman Islands Constitution Order* , the
24 *Roads Act* shall be read and construed as providing a right of access to the Grand Court,
25 whether direct or on appeal from any other authority for the determination of the
26 legality of the taking of their land so as to bring the said Act into conformity with the
27 Petitioners’ rights and freedoms under the *BoR*;
- 28
29 iii. Alternatively a declaration of incompatibility under s.23 (1) of the *BoR* to the extent
30 that the *Roads Act* does not conform with the Petitioners’ rights and freedoms under
31 the *BoR* as described above.

32

1 iv. An injunction preventing the Roads Authority from entering upon the Petitioners’
2 lands for the purpose of laying a road.

3
4 v. Damages

5
6 vi. Costs



7
8
9 4. Pursuant to the GCR O.77A r.4 (2) the Respondents to the Petition are the Attorney General
10 and other relevant public officials. Public officials are defined in s.28 of the Constitution as
11 including any statutory body or company in which the Cayman Islands Government has an
12 interest and any person carrying out a public function or duty including the Governor except
13 where the nature of their act is private.

14
15 5. The First Respondent is the Governor of the Cayman Islands. Part II of the Constitution
16 provides for the Office of Governor and for the functions and exercise of the functions of the
17 Governor. By s.31, the functions of the Office are to be exercised in accordance with the
18 Constitution and any other Act and subject thereto in accordance with any such instruction as
19 may be addressed to the Governor by or on behalf of Her Majesty.

20
21 6. The Second Respondent is the National Roads Authority (“the NRA”). The NRA is a statutory
22 Authority established under s.3 of the *National Roads Authority Act*. By s.5 of the Act, its
23 responsibilities, functions and duties include:

24
25 (i) The administration, management, control, development and maintenance of the
26 public roads and related facilities;

27 ii) To plan, design, construct, develop, maintain, protect and administer public roads
28 and related road works.

29 7. The Third Respondent is the Attorney General in his capacity as the principal legal advisor to
30 the Government of the Cayman Islands.



1 **THE FACTUAL BACKGROUND**

2 8. The Petition is verified by the First Affidavit of the Second Petitioner, Wilson Jonathan
3 Mendoza dated 27th September 2019. He attests to the truth of the contents of the Petition and
4 produces various documents which are said to be relevant to the Petition.

5
6 9. The three Petitioners are the registered proprietors of three parcels of land in the North West
7 Block of the district of West Bay. The First Petitioner, Crosby Collymore Ebanks is the
8 proprietor of Block 4B Parcel 9. The Second Petitioner, Mr. Mendoza is a joint proprietor of
9 Block 4B, Parcel 3. The Third Petitioner, Mario Alberto Gomez is the Proprietor of Block 4B
10 Parcel 8.

11
12 10. On the 23rd August 2019, a Road Notice was published in the Cayman Islands Gazette by the
13 Clerk of the Cabinet on behalf of the Cabinet of the Cayman Islands¹. The Notice published
14 was a Declaration under s. 3 of the **Roads Act**. It stated that in exercise of the powers conferred
15 on the Governor in Cabinet by that section and acting upon the recommendation of the NRA,
16 it is declared that it is the intention of the NRA to gazette a new public road at West Bay North
17 West, Block 4B, Boundary Plan 626. The Notice listed the portions of land required for
18 construction of the road including three portions owned by the Petitioners and stated that the
19 Plan was available for inspection at the offices of the NRA or at the Lands and Survey
20 Department or on a web portal.

21
22 11. Thereafter the three Petitioners each received similar letters from the Lands and Survey
23 Department which were stated to have been written on behalf of the Governor. The letters
24 advised of the Declaration made, the publication of the Notice and of their right to claim
25 compensation. A copy of the Notice and of Boundary Plan 626 was enclosed, together with a
26 compensation Claim Form.

27
28 12. The letters² stated in part:

29 *“Section 9 of the Law details provisions by which persons affected may serve*
30 *notice of intent to claim for compensation (Form A) to His Excellency the*

¹ Page 1 of Exhibit WJM-1 to the Affidavit of Mr. Wilson Mendoza

² Page 2 of Exhibit WJM-1 to the Affidavit of Mr. Wilson Mendoza



1 Governor not later than 22nd November 2019, being ninety (90) days after the
2 declared day.

3 For further information on the procedures please refer to the notes on the rear of
4 the enclosed Form and/or the attached Guide to compensation.”

5
6 The declared day is the day of publication of the Notice in the Gazette.

7
8 13. On the 11th September 2019, another Road Notice was published in the Cayman Islands Gazette
9 by the Clerk of the Cabinet on behalf of the Cabinet of the Cayman Islands³. This was entitled
10 s.6 Authorisation to Enter Lands under the said Act and stated in part that “In exercise of the
11 powers conferred on the Governor in Cabinet by s.6 of the Roads Law (2005 Revision), and
12 acting upon the recommendation by the National Roads Authority, it is hereby declared that it
13 is in the public interest to widen the road along the highway” in West Bay North West, Block
14 4B, (“the road works”). The Notice further stated that the NRA and its agents are authorised
15 within 15 days of the Gazette publication to enter upon the seven parcels of lands as listed in a
16 schedule for the purpose of carrying out the road works as publicly declared in the earlier notice
17 under s.3 of the Act. Three of the seven parcels are the parcels belonging to the Petitioners as
18 identified above.

19
20 14. As a result of the proposed road works the anticipated area to be lost by the Petitioners in acres
21 are 0.09, 0.11 and 0.10 respectively. Notice was also provided that the anticipated boundaries
22 of the road works are as shown edged in green on Boundary Plan 626 which Plan could be
23 inspected at the said locations stated above.

24
25 15. On the 2nd October 2019, the Petitioners filed an Ex Parte Summons in the Grand Court seeking
26 orders that the NRA vacate their lands and cease all road construction works taking place
27 thereon and be restrained from entering on their lands for the purpose of laying or constructing
28 a road.

29
30 16. The application was supported by the Second Affidavit of Mr. Mendoza dated 2nd October
31 2019. He stated therein that he was authorised to make the Affidavit on behalf of all three

³ Page 4 of Exhibit WJM-1 to the Affidavit of Mr. Wilson Mendoza

1 Petitioners. He gives the sequence of events as being that on the 27th September 2019, following
2 the publication of the Notice, a NRA construction crew arrived in the area of the lands of the
3 Petitioners and commenced work. The Petitioners filed the Petition on the said day and by letter
4 requested confirmation from the Attorney General that the NRA would cease all construction
5 work, pending the hearing of the Petition. A response was received on the 1st October 2019
6 which advised that instructions were being sought on the matter. In the interim NRA
7 construction crews returned to the site on the 28th and 30th September 2019 and again on the 1st
8 and 2nd October 2019.

9
10 17. On the 3rd October 2019, the Grand Court granted the application of the Petitioners for an
11 Injunction and made an Order in the terms sought. The Injunction continues in effect.

12
13 18. There was a Directions hearing on the 6th December 2019 at which Orders were made by
14 consent. These included the grant of leave to the Petitioners to amend the Petition, directions
15 as to a date for the filing of Points of Reply to the Petition by the Respondents and the
16 adjournment of the question of damages until after the judgment on the Petitioner's Claims for
17 Declaratory Relief. Additionally by paragraph 6 of the said Order the Respondent was given
18 the option to serve any affidavit evidence in response.

19
20 19. No evidence has been filed by the Respondent for the purpose of this hearing.

21 THE CAYMAN ISLANDS CONSTITUTION ORDER 2009

22 20. The Cayman Islands Constitution Order 2009 ("the Order"), came into force in the Cayman
23 Islands on the 6th November 2009, (the appointed day) with the exception of Part 1 of the
24 Constitution, the **BoR**. By s.4 (2) of the Order, the **BoR**, came into force three years after that
25 appointed day, on the 6th November 2012, with s. 6 (2) and (3) thereof having effect four years
26 after that day. The Order provides in s.2 that the Constitution means the Constitution set out
27 in Schedule 2 and that s.124 thereof shall apply for the purposes of interpreting s.1 to 9 of the
28 Order and otherwise in relation to them and to the Constitution. Section 5 of the Order deals
29 with laws in force before the appointed day. Such laws are to have effect as if they had been
30 made pursuant to the Constitution and are to be read and construed with such modifications as
31 may be necessary for them to be in conformity with the Constitution. It provides:





1 “5.— (1) Subject to this section, the existing laws shall have effect on and
2 after the appointed day as if they had been made in pursuance of
3 the Constitution and shall be read and construed with such
4 modifications, adaptations, qualifications and exceptions as may
5 be necessary to bring them into conformity with the Constitution.

6 (2) The Legislature may by law make such amendments to any
7 existing law as appear to it to be necessary or expedient for
8 bringing that law into conformity with the Constitution or
9 otherwise for giving effect to the Constitution; and any existing
10 law shall have effect accordingly from such day, not being earlier
11 than the appointed day, as may be specified in the law made by
12 the Legislature.

13 (3) In this section “existing laws” means laws and instruments (other
14 than Acts of Parliament of the United Kingdom and instruments
15 made under them) having effect as part of the law of the Cayman
16 Islands immediately before the appointed day.”

17 21. The **BoR** in Part 1 of the Constitution begins with a declaration that it is a cornerstone of
18 democracy in the Cayman Islands. It states that this part of the Constitution confirms or creates
19 certain responsibilities of the government to include public officials as defined in s.28 and
20 corresponding rights of every person against the government. Section 7(1) is under the heading
21 Fair trial and states:

22 “7. (1) Everyone has the right to a fair and public hearing in the determination of
23 his or her legal rights and obligations by an independent and impartial court
24 within a reasonable time.”

25
26 22. Section 15 is under the heading Property and states as follows:

27 “15. (1) Government shall not interfere in the peaceful enjoyment of any person’s
28 property and shall not compulsorily take possession of any person’s property, or
29 compulsorily acquire an interest in or right over any person’s property of any
30 description, except in accordance with law and where—

31 (a) the interference, taking of possession or acquisition is necessary or
32 expedient in the interests of defence, public safety, public order, public
33 morality, public health, town and country planning or the development
34 or utilisation of any property in such manner as to promote the public
35 benefit or the economic well-being of the community; and

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

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

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



6 (ii) securing to any person having an interest in or right over the
7 property a right of access to the Grand Court, whether direct or
8 on appeal from any other authority, for the determination of his
9 or her interest or right, the legality of the interference with,
10 taking of possession or acquisition of the property, interest or
11 right, and the amount of any compensation to which he or she is
12 entitled, and for the purpose of obtaining prompt payment of that
13 compensation; and

14 (iii) giving to any party to proceedings in the Grand Court relating
15 to such a claim the same rights of appeal as are accorded
16 generally to parties to civil proceedings in that Court sitting as a
17 court of original jurisdiction.” (Emphasis added.)

18 23. Section 19 of the Constitution is under the heading Lawful administrative action. It provides
19 that:-

20 “19. (1) All decisions and acts of public officials must be lawful, rational,
21 proportionate and procedurally fair.

22 (2) Every person whose interests have been adversely affected by such a
23 decision or act has the right to request and be given written reasons for
24 that decision or act.”

25 24. By s.23 of the Constitution, the Court may make declarations of incompatibility where primary
26 legislation is found to be incompatible with part 1 of the Constitution. It provides:

27 “23. (1) If in any legal proceedings primary legislation is found to be
28 incompatible with this Part, the court must make a declaration
29 recording that the legislation is incompatible with the relevant
30 section or sections of the Bill of Rights and the nature of that
31 incompatibility.

32 (2) A declaration of incompatibility made under subsection (1) shall
33 not constitute repugnancy to this Order and shall not affect the
34 continuation in force and operation of the legislation or section
35 or sections in question.



1 (3) *In the event of a declaration of incompatibility made under*
2 *subsection (1), the Legislature shall decide how to remedy the*
3 *incompatibility.”*

4 25. Primary legislation is defined in s.28 of the **BoR** as meaning “a Law enacted by the legislature.”

5
6 26. Section 24 is under the heading Duty of public officials. It states:

7 “24. *It is unlawful for a public official to make a decision or to act in a way that*
8 *is incompatible with the Bill of Rights unless the public official is required*
9 *or authorised to do so by primary legislation, in which case the legislation*
10 *shall be declared incompatible with the Bill of Rights and the nature of*
11 *that incompatibility shall be specified.”*

12 27. Section 25 imposes an interpretive obligation where the compatibility of primary or subordinate
13 legislation with the **BoR** is unclear or unambiguous. It states:

14 “25. *In any case where the compatibility of primary or subordinate legislation*
15 *with the Bill of Rights is unclear or ambiguous, such legislation must, so*
16 *far as it is possible to do so, be read and given effect in a way which is*
17 *compatible with the rights set out in this Part.”*
18

19 THE APPROACH TO CONSTITUTIONAL INTERPRETATION

20 28. The classic exposition of the approach to be taken with regard to the interpretation of a
21 constitution is to be found in the Privy Council case of **Minister of Home Affairs v. Fisher**.⁴

22 The Board stated:

23 “Here, however, we are concerned with a Constitution, brought into force certainly by Act
24 of Parliament, the Bermuda Constitution Act 1967 United Kingdom, but established by a
25 self-contained document set out in Schedule 2 to the Bermuda Constitution Order 1968
26 (United Kingdom S.I. 1968 No. 182) . It can be seen that this instrument has certain special
27 characteristics. 1. It is, particularly in Chapter I, drafted in a broad and ample style which
28 lays down principles of width and generality. 2. Chapter I is headed “Protection of

29 *Fundamental Rights and Freedoms of the Individual.” It is known that this chapter; as*
30 *similar portions of other constitutional instruments drafted in the post-colonial period,*
31 *starting with the Constitution of Nigeria , and including the Constitutions of most*
32 *Caribbean territories, was greatly influenced by the European Convention for the*
33 *Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969). That*
34 *Convention was signed and ratified by the United Kingdom and applied to dependent*

⁴ 1980 A.C. 319

1 territories including Bermuda. It was in turn influenced by the United Nations' Universal
2 Declaration of Human Rights of 1948. These antecedents, and the form of Chapter I itself,
3 call for a generous interpretation avoiding what has been called "the austerity of tabulated
4 legalism," suitable to give to individuals the full measure of the fundamental rights and
5 freedoms referred to. 3. Section 11 of the Constitution forms part of Chapter I. It is thus to
6 "have effect for the purpose of affording protection to the aforesaid rights and freedoms"
7 subject only to such limitations contained in it "being limitations designed to ensure that
8 the enjoyment of the said rights and freedoms by any individual does not prejudice... the
9 public interest."

10 29. In the Privy Council case of *Matadeen v. Pointu*⁵ Lord Hoffman in his judgment emphasized
11 that the question is one of construction of the language. In summary the learned Judge stated
12 that while constitutions are not construed in the same manner as commercial documents
13 because of the different contexts, the interpretation of these documents have in common that
14 "in each case the court is concerned with the meaning of the language which has been used."

15
16 30. In the recent case of *Day & Bush v. Governor of the Cayman Islands and Others*⁶, the Grand
17 Court referenced the above cases and the case of *Reyes v. R*⁷. and concluded:

18 "Seen in the light of this venerable and authoritative body of judicial dicta the Court's
19 duty when construing a constitutional Bill of Rights, is unmistakable. The court must
20 begin with a careful consideration of the language used and while being faithful to
21 the meaning of the words, (abjuring its own predilections and moral values), must
22 always be mindful of the fact that they are the words, not of a private document, but
23 of a Bill of Rights which enshrines fundamental constitutional rights and freedoms for
24 everyone in society. The court must therefore ascribe a meaning which while
25 consonant with the language, is also suitable for ensuring the contemporary
26 protection of "the full measure of the fundamental rights and freedoms" to which
27 individuals are entitled, in keeping with "the evolving standards of decency of a
28 maturing society" as well as in keeping with any expressed limitations which apply
29 as being "reasonably justifiable in a democratic society" (or in the modern language
30 of the formulation of limitations".

31 31. In its judgment on the appeal in the said case, the Cayman Islands Court of Appeal ("CICA")
32 reviewed with approval the case of *Minister of Home Affairs v. Fisher* and a number of other
33 authorities before concluding that:



⁵ 1999 A.C. 98

⁶ Grand Court Judgment, Civ 111, 184 of 2018, 29th March 2019

⁷ 2002 2 A.C. 335

1 *“It is clear from the authorities cited that the court must approach constitutional*
2 *provisions such as those in the BoR in a broad and purposive manner, not narrowly*
3 *and technically.”*

4 32. The Court stated that the decisions make plain that a court must interpret the Constitutional
5 Law of the Cayman Islands and that part of it which deals with citizens’ rights in a broad and
6 purposive way. However the Court cautioned in the context of considering societal norms and
7 changes over time that in interpreting the Constitution, it is not for the Court to ignore the clear
8 meaning and effect of a Constitutional provision. The Court also stated that when construing a
9 provision in a constitution, that provision must be considered in the context of the constitution
10 as a whole and not only individually.

11
12 33. The Appellate Court did not consider it necessary to review the approach taken by the Grand
13 Court with respect to s.5 of the Order and the interpretative obligation under s.25 of the **BoR**.

14
15 34. In the Grand Court the Respondent had submitted that the Court should first consider its
16 obligation under s.5 of the **BoR** to read or construe the Marriage Act into conformity with the
17 **BoR**. The Grand Court was of the view that there were two obstacles to this approach. Firstly
18 that where s.25 refers to primary legislation, this is defined in s.28 of the said Bill as meaning
19 a law enacted by the Legislature and that the Legislature therein referred to the Legislature
20 established by the 2009 Order itself and not to the Legislature established under the former
21 Constitution. The Court said that a measure passed by the former Legislature is an “existing
22 law” and the Court had no jurisdiction to make a declaration under s.23 with respect to an
23 existing law.

24
25 35. The second obstacle identified was that a finding in that case did not arise merely because the
26 law in question was unclear or ambiguous but because of what the Court found to be the
27 discriminatory intent of the law in the context of that case. The Court concluded that while it
28 could make a declaration of incompatibility, this would not be one for the purpose of s.23 and
29 that s.23 and 25 remedies do not apply where an existing law is found to be in contravention
30 of the **BoR**⁸.



⁸ Ibid, para 361

1 36. The Court’s view was that the matter fell to be dealt with under s.5 of the Order.

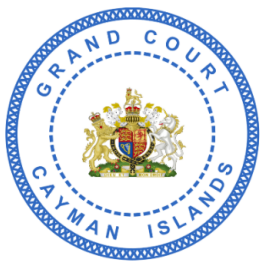
2 **THE ROADS ACT**

3 37. The **Roads Act** (2005 Revision) sets out the legislative frame work for proposed road works
4 involving compulsory acquisition of private land. It was originally enacted on the 15th October
5 1974, as Law 18 of 1974. It was last consolidated and revised in 2005. It predated the 2009
6 Constitution and it is agreed by the parties that it is deemed to be an existing law under it.

7
8 38. Section 3 of the Act requires that there is publication of proposals to compulsorily acquire land
9 for road building purposes. Declarations to this effect must be published in the Gazette and in
10 local newspapers and notices must also be sent to registered land owners. The section also
11 provides for the details to be included in the declaration and for a plan of the proposed new
12 road to be prepared and exhibited to any person who may wish to examine it.

13
14 It states:

15 “3. (1) *Whenever it appears to the Governor, upon recommendation by the Roads*
16 *Authority, that any particular portion of land is needed for the layout of a new*
17 *public road or the widening or diverting of an existing public road, a declaration*
18 *to that effect*
19 *shall be —*



- 20 (a) *gazetted;*
21 (b) *sent by registered post to the registered proprietor of the land at*
22 *his address on the register; and*
23 (c) *published twice per week for three consecutive weeks in a daily*
24 *newspaper published and circulating in the Islands.*

25 (2) *The declaration shall state —*

- 26 (a) *the intention of the Roads Authority to construct a road or portion*
27 *of road over the portion of land; (b) the locality in which the*
28 *portion of land is situated, specifying particulars of block and*
29 *parcel numbers on the Register and, so far as feasible, any name*
30 *or other information which may be helpful in identifying the land;*
31 (c) *the line and anticipated boundaries of the road or proposed road;*



1 (d) the approximate area of the portion of land; and

2 (e) the place where a plan can be inspected.

3 (3) The Governor shall cause a detached plan of the proposed new road, or of the part
4 of the road intended to be widened or diverted, and the lands through which it is to pass,
5 to be transmitted to the Registrar and the Roads Authority to be exhibited to any person
6 who may require to examine it.

7 (4) The plan produced for the purposes of this section shall be such as to allow
8 correlation of particulars thereon with particulars on the composite map.”

9 39. Section 6 of the Act provides the power to act in the public interest by taking land for road
10 building purposes, after 15 days of a declaration having been published under s.3. This states:

11 “6. In any case where a declaration has been published under section 3(1), and where
12 the Governor, upon recommendation by the Roads Authority, is satisfied that it is in
13 the public interest to lay out, widen or divert a road over the portion of land to which
14 the declaration relates, then, notwithstanding anything contained in any other law,
15 and subject to the provisions of this Law which relate to the payment of compensation,
16 the Governor may, on the expiration of fifteen days from the publication of the
17 declaration, authorise the Roads Authority to enter upon the said portion of land and
18 cause the said road or portion of road to be commenced or proceeded with without
19 further notification.”

20 40. By s.7 of the Act an Assessment Committee is established for the purpose of assessing and
21 making awards of compensation under the Act. Any person having an interest in a portion of
22 land in respect of which a declaration has been made under s.3 and who has suffered a net loss
23 by reason of such declaration may serve notice of intent to make a claim for compensation
24 within 90 days of the declared day. This is then to be followed by a claim within one year after
25 the proposed road is scheduled as a public road. The Act also contains various provisions for
26 the giving of notice of intent and claims and for the negotiation and assessment of a claim.

27
28 41. The Second Schedule to the Act provides for the practical working of the Assessment
29 Committee, its powers, for the taking of evidence of witnesses, how the assessment is to be
30 made and other such general matters. Following the making of an award by the Committee, the
31 Roads Authority or any person having an interest in the land who is aggrieved by the award
32 made, may appeal to the Grand Court. The specific grounds of appeal are that:

- 1 (a) The extent of the interest or right in the portion of land has been wrongly
2 determined.
3 (b) The Committee has erred in a matter of law.

4 **THE ISSUES**

5 42. It is agreed by the parties in this case that the process for assessment of compensation and
6 appeals from the decision of the Assessment Committee satisfies the requirements of s. 15 (1)
7 (a) of the Constitution.

8
9 43. It is not disputed that there are no provisions for an appeal from the decision to make a
10 declaration in the first place and that there is no statutory process under the *Roads Act* for
11 affected persons to make representations *before* the making of a declaration. This is the crux
12 of this case.

13
14 44. The Petitioners say that this is an omission and that they wished to appeal the Declaration made
15 but that the *Roads Act* contains no right of appeal to a statutory tribunal or other person and no
16 right of access to the Grand Court to appeal the Declaration. It also makes no provision for
17 affected persons to make representations as to the proposed Declaration nor for the provision
18 of reasons for the decisions made.

19
20 45. The four issues for determination as identified by the Petitioners in written submissions⁹ and
21 agreed to by the Respondents are thus as follows:



22
23 i) “Is the Roads Law incompatible with the right of the Petitioners to
24 peaceful enjoyment of property as provided for by s.15 of the *BoR* in that
25 it fails to provide a right of access to the Grand Court whether direct or on
26 appeal from any other authority for the determination of the legality of the
27 taking of possession of the Petitioner’s lands?

28
29 ii) Has the right of the Petitioners to a fair trial as provided for by s.7 of the
30 *BoR* been infringed by failing to permit them a right of access to the Grand
31 Court whether direct or on appeal from any other authority for the

⁹ Paragraph 3 of submissions dated 27th February 2020



1 determination of the legality of the taking of possession of the Petitioner's
2 lands?

3
4 iii) If the Court finds either an incompatibility or an infringement, how does
5 the Court read and construe the **Roads Act** so as to bring it into conformity
6 with the BoR in accordance with s.15 (1) of the Constitution?
7

8 iv) If the Court does not believe that it has the power to read or construe the
9 **Roads Act** under s.5 (1), should it make a declaration of incompatibility
10 and what if any other relief should it grant?"

11 SUMMARY OF POSITIONS

12 46. The Petitioners' position is that their constitutional rights have been breached by the absence
13 of specific legislation giving a right of access to the Grand Court and by the absence of a
14 detailed consultation process prior to the making of the Declarations to effect the road works.
15

16 47. In support of this position, the Petitioners make two broad submissions. Firstly that in respect
17 of s.15 (1) of the **BoR**, that when the Court properly applies the principles of interpretation that
18 relate to constitutional instruments in particular and to other legislation, it is clear that the
19 legislature intended for there to be a statutory right of access to the Grand Court and for that
20 statutory right of access to be contained within a law applicable to the concept of land
21 acquisition by the State. The obvious law which would be applicable say the Petitioners is the
22 **Roads Act**. However this makes no provisions for assessing or determining whether the land
23 should have been taken in the first place. This is a breach of s.15 (1) because there is no
24 provision made through a law applicable to the interference for the determination of that right.
25

26 48. It is further submitted that the **Roads Act** cannot be read and construed so as to be in conformity
27 with s.15 (1) of the Constitution. Any such reading or construction would require the Court to
28 undertake a lengthy drafting exercise which is impermissible. Thus there has to be a declaration
29 of incompatibility.
30

31 49. In relation to s.7 (1) of the **BoR**, it is submitted that the summary procedure for granting a
32 declaration under s.3 and s.6 of the **Roads Act**, both of which contain no right to make



1 representations and no procedural safeguards is insufficient to satisfy the rights under the
2 Constitution. Additionally that because of the inadequacy of the safeguards provided by the
3 **Roads Act**, the availability of judicial review alone as a remedy is not sufficient to satisfy s.7
4 (1).

5
6 50. The Respondents' position is that there has been no breach of the rights under either s.15 (1)
7 or s.7 of the **BoR**, and that there is no incompatibility with the **Roads Act** because while the
8 Act does not contain a mechanism by which declarations made thereunder may be appealed
9 the Petitioners have access to the Grand Court in relation to the interference with their lands by
10 way of judicial review and by the bringing of a petition under the Constitution itself. It is said
11 further that while a statutory right of access would be one way of achieving the intention of the
12 Legislature and might perhaps even have been the best way, judicial review or a Constitutional
13 petition is good enough to provide the s.15 (1)(c)(2) right of access. It is an appropriate and
14 acceptable route for challenging the interference itself but would not be for challenging the
15 amount of compensation for which there is the statutory right of appeal as provided by s.8 of
16 the Second Schedule to the Act.

17
18 51. The Respondents describe the Petition as a collateral attack on the specific decision by the
19 Governor in Cabinet to make Lissa Lane in West Bay a public road which is "dressed up" as a
20 wider public spirited effort to ensure the compatibility of the **Roads Act** with the **BoR**. The
21 Respondents say that the Petitioners had the option of proceeding by way of judicial review
22 and deliberately chose not to do so.

23
24 52. The Respondents' primary submission in support of its position is that the words in s.15 (1),
25 "a law applicable" should be given a broad interpretation and that the plain and grammatical
26 meaning is for a route of access by "a law". The word law is not defined in the Constitution as
27 being limited to primary legislation. It includes secondary legislation and by reference to
28 certain case authorities it may also include rules and conventions. It thus also includes the
29 common law.

30
31 53. With respect to s.7 (1), the Respondents submit that s.15 (1) is the *lex specialis* for interference
32 with property rights. Secondly it is argued by reference to the case of **R(Alconbury**
33 **Developments Ltd. & Ors. v. Secretary of State for the Environment, Transport & the**



1 *Regions*¹⁰ that there has been compliance with the requirements for a broad scheme which
2 combined with the availability of judicial review meets the requirements of s.7 (1).

3
4 **SUBMISSIONS ON INTERPRETATION OF CONSTITUTIONAL PROVISIONS**

5 54. The Petitioners submit that in so far as the *BoR* refers to the duties of government taking lawful
6 administrative action and providing a route for redress, it is not creating any new rights, it is
7 confirmatory of rights which have existed for some time. It is submitted that the Constitution
8 has elevated property rights to the *BoR* and has specifically provided therein by s.15 (1) that
9 citizens who are adversely affected should have direct access to the Grand Court where there
10 is interference by the government with these rights. It is said that the correct interpretation of
11 the Constitution requires that the right of access should be contained in the law applicable to
12 the interference or a similar law and that on the plain reading of the section the ‘*intention was*
13 *not simply to codify what was already generally available*’. The legislature intended thereby to
14 create another statutory scheme to be included in the *Roads Act* or in another enactment on the
15 statute books. This was to be a specific and effective route to the Grand Court for a remedy to
16 challenge the legality of the taking of land and to allow for affected persons such as the
17 Petitioners to appeal to the Grand Court.

18
19 55. It is also submitted that the purpose of s.15 was to ensure that the right of access to the Grand
20 Court was in similar terms as it is for compensation, and that the legislature intended for that
21 written right of access to be probably governed by GCR O.55. This Order applies to appeals to
22 the Grand Court from the Governor in Council, Registrar of Lands, Tribunals or persons
23 general. Rule 1 states:-

24
25 (1) *Subject to paragraphs 2 and 3, this Order shall apply to every appeal*
26 *which by or under any enactment lies to the Court from the Governor-in-*
27 *Council, the Registrar of Lands, any tribunal or person.*
28

29 56. Counsel drew a contrast between the *Roads Act* and a number of other statutory schemes which
30 provide rights of appeal. These included five enactments, the *Registered Land Act*, in particular
31 s.18 (2), s.41 (3), s.129, s.134 and s.147 thereof, the *National Conservation Act*, s.36 and 39,

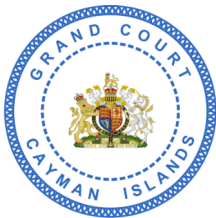
¹⁰ 2001 2 WLR 1389, 2001 UKHL 23

1 the *Development and Planning Act* s.4, the *Land Acquisition Act* s.17 and the *Land*
2 *Adjudication Act* s.23.

3
4 57. The *Registered Land Act* (2018 Revision) provides for rights to be heard at the stage of various
5 decisions being made by the Registrar. By s.18 (2), the Registrar may give notice to fix
6 boundaries of land and give aggrieved persons a right to be heard. By s.41 (3), the Registrar
7 may refuse registration of an instrument or application until he has heard and determined the
8 rights of interested parties, s. 129 is the withdrawal and removal of cautions by the Registrar
9 who is to give a person an opportunity to be heard, and s.134 is the removal and variation of
10 restrictions. Section 147 which was highlighted by the Petitioners is the provision for an appeal
11 to the Court against any decision of the Registrar. It states:

12 *“The Governor or any person aggrieved by a decision, direction, order,*
13 *determination or award of the Registrar may within thirty days of the decision,*
14 *direction, order, determination or award, give notice to the Registrar in the*
15 *prescribed form of his intention to appeal to the court against the decision.”*

16 58. Similarly the *National Conservation Act* at s.39, provides for the right of access to the Grand
17 Court:-



18
19 “39. (1) *A person aggrieved by a decision of the Council-*
20 *(a) refusing an application for a permit or a licence;*
21 *(b) ...;*
22 *(c) ...;*
23 *(d) ...; or*
24 *(e) ... ,*
25 *may, within twenty-one days of the date on which notice of the decision is*
26 *received, appeal against it to the Cabinet*

27 (2)

28 (3) *Any person aggrieved by a decision of the Cabinet ... may,appeal to*
29 *the court against the decision.*

30 (4)”

31 59. The *Development and Planning Act* at s.48, provides for a right of access to a tribunal, and by
32 s.48 (4), a right of appeal to the Court against the decision of the tribunal.

1 64. Counsel also drew the Court’s attention to the reference in the text to the case of *Minister of*
2 *Transport v Noort*¹⁵ in which in respect of the New Zealand Bill of Rights it was said by that
3 Court that:

4 *“The Bill of Rights should be given such fair, large and liberal construction and*
5 *interpretation as will best ensure the attainment of its object according to its true*
6 *intent, meaning and spirit.”*

7 65. In relation to the method of interpretation of the Canadian Charter of Rights, it was said that it
8 should be a:

9 *‘Generous rather than a legalistic one, aimed at fulfilling the purpose of the*
10 *guarantee and securing for individuals the full benefit of the Charter’s*
11 *protection’.*” *R v Big M Drug Mart Ltd [1985] 1 SCR 295, ...”*

12 66. It was further submitted by Counsel that when interpreting a constitutional document, the Court
13 needs to have regard to the general objects and purposes of a democratic society which includes
14 access to the courts. Counsel referred to the said text and in particular the following statement:

15 *‘When interpreting the HRA 1998, courts should have regard to the general objects*
16 *and purposes of the Convention, which is an instrument designed to maintain and*
17 *promote the ideals and values of a democratic society. Particularly important*
18 *features of a ‘democratic society’ are ‘pluralism, tolerance and broadmindedness’*
19 *‘the rule of law’ with ‘access to the courts’ ...”*¹⁶

20 67. Counsel submitted that against the background of these principles, the interpretation of the
21 Respondents of s.15 is a “strained and miserly interpretation” as opposed to a generous one and
22 is wrong because it would deny the Petitioners the full measure of fundamental rights and
23 freedoms referred to therein and it would not provide an adequate safeguard against the
24 potential abuse that the **BoR** was intended to provide, Additionally it is said that such an
25 interpretation would not accord with the approach of good sense and realism as it would not
26 allow for the pre-eminence of substance and reality over a technicality. On the interpretation
27 proposed by the Respondents, access to the Courts would be limited to seeking leave to bring
28 judicial review despite the Constitutional provisions. This would be inconsistent with the



¹⁵ [1992] 3 NZLR 260, NZCA.

¹⁶ Paragraph 3.07



1 proposition that the Constitution seeks to grant access to the Courts in as generous a way as
2 possible. Judicial review would be a very limited way of challenging the decision.

3 **GRAMMATICAL MEANING**

4 68. Counsel for the Petitioners argued that the grammatical meaning favours the interpretation of
5 the Petitioners and that the grammatical and plain meaning of the phrase “*a law applicable*” is
6 to an enactment and not to the common law.

7
8 69. Counsel placed reliance on the case of *BDO Cayman Ltd. v. Governor in Cabinet*¹⁷ for the
9 submission that the general approach to statutory interpretation does not assist the Respondents.
10 It is said that the words in s.15(1) are capable of only one grammatical meaning and that on an
11 informed interpretation, the interpretative criteria raises no real doubt that the grammatical
12 meaning ascribed is the one intended by the legislator.

13
14 70. In the case of *BDO Cayman Ltd and Four Others v. Governor in Cabinet* the Applicants
15 sought judicial review of the decision of the Governor in Cabinet. This was following dismissal
16 of their appeals as to decisions on the applicable fees to be paid by firms of accountants. The
17 factual question was whether a fee per person in addition to one for the firm as a whole was
18 required. The legal issue turned on the proper approach to statutory interpretation and under
19 what circumstances internal and external aids to construction could be considered.

20
21 71. The Grand Court held that the correct approach to statutory construction was to consider both
22 internal and external aids to construction irrespective of whether there are any ambiguities in
23 the grammatical or literal meaning of an enactment.

24
25 72. The Court said that the paramount criterion is the intention of the legislature and that while the
26 grammatical and literal meaning is a starting point, the enactment is to be construed in the
27 wider context in order to determine the intention of the legislature:

28 “125 *It is only if the enactment is grammatically capable of one meaning only, and on*
29 *an informed interpretation of that enactment the interpretative criteria raise no*
30 *real doubt as to whether that grammatical meaning is the one intended by the*
31 *legislator, will the legal meaning have the same meaning as the grammatical*

¹⁷ 2018 (1) CILR 457



1 meaning (the “plain meaning” rule—see *Bennion*, s.195, at 507). If, on the other
2 hand, on an informed interpretation the wider context does raise a doubt as to
3 whether that meaning is the one intended by the legislator—when it may be said
4 the provision is ambiguous or leads to an absurdity—then the court will need to
5 weigh the competing considerations, including any relevant statutory
6 presumptions, in determining the legal meaning. But it is not necessary for an
7 “ambiguity” to be identified before that wider context is considered. See *Bennion*,
8 s.193 at 504.

9 126 On an “informed interpretation” the court considers the wider context including
10 internal aids, such as other provisions in the same statute, and it may include
11 external aids, such as the legislative history and other materials in *pari*
12 *materia* which may provide guidance as to the underlying legislative intention. It is
13 in my view not necessary (as the applicants contend) for there to be some
14 “ambiguity” before those aids to construction may be considered. Thus, the court
15 can consider these aids to construction even where the grammatical or legal
16 meaning of a provision is clear.

17 127 However, I appreciate that the clearer the meaning, the slower the court should be
18 in adopting another meaning on the basis of an external aid. In *R. (Spath Holme*
19 *Ltd.) v. Environment Secy. (16)*, Lord Nicholls explained ([2001] 2 A.C. at 398):

20 “Judges frequently turn to external aids for confirmation of views reached without
21 their assistance. That is unobjectionable. But the constitutional implications point to
22 a need for courts to be slow to permit external aids to displace meanings which are
23 otherwise clear and unambiguous and not productive of absurdity. Sometimes
24 external aids may properly operate in this way. In other cases, the requirement of
25 legal certainty might be undermined to an unacceptable extent if the court were to
26 adopt, as the intention to be imputed to Parliament in using the words in question,
27 the meaning suggested by an external aid. Thus, when interpreting statutory
28 language courts have to strike a balance between conflicting considerations.”

29
30 73. Counsel for the Respondents submits that the grammatical meaning favours the Respondents
31 because of the use of the word “a” rather than “the”. Further that it was open to the drafters to
32 use the term “primary legislation” rather than law and the fact that they chose not to do so
33 indicates that *a law applicable* is not limited to primary legislation.

34
35 74. In response to this submission, the Petitioners contend that the Respondents have put too much
36 emphasis on the three words, “*a law applicable*” and have not focused on the entire phrase, “*a*
37 *law applicable to the interference*.” It is said that the Respondents’ interpretation would render
38 the words that follow ‘applicable’ redundant, that is, the words “*to that interference taking of*
39 *possession or acquisition*’ given that it is always possible to seek leave to claim judicial review

1 against any action of the State. It is submitted by Counsel that laws applicable to the
2 interference would include laws such as the *Registered Land Act* and the *Land Acquisition*
3 *Act* and that common law is not applicable to the interference ‘except in the very loosest of
4 ways’.

5
6 75. The second argument of the Respondents is that the term “a law applicable” should be given a
7 broad interpretation. Counsel relies on the case of *Wall v. Mutuelle de Poitiers Assurances*¹⁸
8 per Jackson LJ. for the submission that “law” ought not to be confined to black letter rules and
9 is comprised of both rules and principles. Counsel submitted that the reference in that case to
10 the term is generally applicable and is not confined to Article 15(1) of Parliament and Council
11 Regulation EC No 864/2007 (“Rome II”).

12
13
14 76. In response, Counsel for the Petitioners submits that the reliance on the case of *Wall v Mutuelle*
15 *de Poitiers Assurances* is misplaced in that this case was specifically looking at the meaning
16 of the phrase, ‘a law applicable to a non-contractual obligation’ arising out of a tort. This was
17 in the context of Article 15, ‘Scope of the law applicable’, where there was an issue of conflict
18 of law between English law and French law and the approach to be taken as to the procedure
19 for calling expert evidence in respect of the assessment of damages. The Court was considering
20 the law applicable in terms of these regulations.

21
22 77. I have reviewed the case in some detail. The claimant therein who was English brought a claim
23 in the United Kingdom in relation to injuries which he had sustained whilst in France. The
24 preliminary issue before the Court was which law governed the procedures in relation to expert
25 witnesses and the manner for assessment of damages and thus which law was applicable in the
26 context of Article 15 (1) of Rome II.

27
28 78. The Court held that the “applicable law” with respect to evidence and procedure was the law
29 of England, the jurisdiction in which the claim was being brought. With respect to assessment
30 of damages Article 15 of Rome II provided:

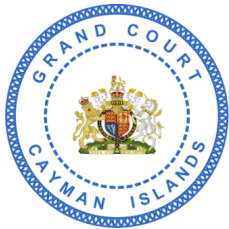


¹⁸ 2014 EWCA Civ. 138

1 “The law applicable to non-contractual obligations under this Regulation shall govern in
2 particular ... (c) ... the assessment of damage or ... remedy claimed.”¹⁹

3 79. The claimant contended for a narrow construction of the word “law” as being limited to fixed
4 legal rules. The defendant urged a broad construction so as to include practices, conventions
5 and guidelines regularly used by judges under French law.
6

7 80. The Court accepted the contention of the defendant as correct and stated that in the context of
8 a Regulation or convention which is intended to have an international element, a narrow view
9 of “law” is not appropriate. In this context applicable law could be understood in a broad sense
10 to include judicial conventions and practices. The Court said:



11 “In my view the defendant's contention is correct. As Professor Dworkin has
12 eloquently demonstrated, the law comprises both rules and principles. Principles do
13 not dictate results, but they exert influence. The judge arrives at the result in any given
14 case by applying the appropriate rules and taking into account those principles which
15 bear on the problem: see Dworkin, *Taking Rights Seriously* (1978) (passim) and
16 Dworkin, *Law's Empire* (1986), chapter 7, “Integrity in Law”. Whether one is talking
17 about civil law or common law, it is unduly restrictive to confine the notion of “law”
18 to black letter rules.”

19 81. The Court considered that the practical effect of the claimant’s contention would produce
20 unusual results as it would depend on whether or not there were formal rules of law as distinct
21 from rules of practice.
22

23 82. In my view the Petitioner’s contention is correct that where the Court stated the meaning of
24 “law applicable”, this was a reference to which law was applicable French or English in the
25 context of Rome II. It is not a finding that where the words “a law applicable” appear, they
26 must mean rules of convention and practice or that taken in any another context a broad
27 interpretation of law is required.
28

29 83. Counsel for the Respondents also referred to an extract from the book *Words and Phrases*
30 *Legally Defined* as another broad interpretation of the term law applicable. The definition of
31 law therein is taken from the case of *R v Darlington Local Board of Health*²⁰, a case appearing
32 to deal with an interference by the state with property rights. Law is taken in its wider sense

¹⁹ Ibid paragraph 34

²⁰ 1865 6 B & S 562

1 as meaning “all proceedings for protecting civil rights, equitable as well as legal”. The
2 Petitioners point to the age of this case and the absence of detail as to the context in which the
3 reference was being made.

4 **THE NATURAL AND ORDINARY MEANING**

5 84. It is further argued by the Petitioners that the natural and ordinary meaning of the words “by a
6 law applicable” in the context of the *BoR* is an enacted law. Reference was made to the case
7 of *R (The Good Law Project) v. Electoral Commission*.²¹ In that case, the issue before the
8 High Court was the proper interpretation of certain legislation dealing with “referendum
9 expenses” specifically what was the meaning of “expenses incurred by or on behalf of an
10 individual or body”.

11
12 85. The Court identified the basic principle of statutory interpretation as being that the words of
13 the statute are interpreted in the sense which best reflects their ordinary and natural meaning
14 and is in accord with the purposes of the legislation. The Court said further that:

15 *“It is generally reasonable to assume that language has been used consistently by the*
16 *legislature so that the same phrase when used in different places in a statute will bear the*
17 *same meaning on each occasion all the more so where the phrase has been expressly*
18 *defined.”*

19 86. The Court agreed that it is always necessary to consider not just the ordinary meaning of the
20 words used in a statute but the context in which the words appear and the underlying policy of
21 the legislation.²²

22 **INFORMED INTERPRETATION - INTERNAL AIDS**

23 87. Against the background of the cited case of *BDO v. Governor of the Cayman Islands*, the
24 Petitioners argue that regard can be had to a number of internal aids. By reference to the canon
25 of construction, “same words, same meaning” the Petitioners point to other parts of the
26 Constitution where the word “law” refers to laws on the statute book. In particular to s.5 (3)
27 which refers to existing “laws” as meaning laws and instruments other than UK Acts of

²¹ 2018 EWHC 2414

²² Ibid Para 74



1 Parliament. It is said that this is a clear reference to enactments and that the context of this does
2 not include common law.



3 **DEFINITION IN THE CONSTITUTION**

4 88. The second point relied on by the Petitioners is the definition in the Constitution. The word
5 “law” is defined in s.124 as including “*any instrument having the force of law made in exercise*
6 *of a power conferred by law*”. The Petitioners say that there is no reference to common law in
7 this definition and that if “law” included common law, it would not have been necessary for
8 the drafters of the Constitution to provide this definition.

9
10 89. In summary the argument is that instruments having the force of law are all black letter laws
11 and are of the same class as legislation, enactments and statutes while common law principles
12 are of a different class. They are not written down in the same way. The essence of Counsel’s
13 submission is that the inclusion of instruments in the definition of law evidences the restrictive
14 nature of it. Had it been intended to have a wider ambit, it would have been unnecessary to
15 expand the definition in such a very limited way, which was done to make it clear that statutory
16 instruments are also included.

17
18 90. Additionally, Counsel submitted that as a matter of ordinary language, the word “law” is
19 usually understood to mean a written law and not a common law principle. There is an obvious
20 distinction between the two, which informs the argument being made. I thought this argument
21 a less forceful one which perhaps does not take into account the context in which the term is
22 being used.

23
24 91. In response to the Respondents’ argument that if the drafters had wished to exclude the common
25 law, they would have used the term primary legislation rather than law in s.15, it is submitted
26 that the term was used so as to include instruments. Thus as used in section 15, it includes both
27 primary legislation as well as statutory instruments and other written law.

28
29 92. The Respondents argue that the definitions relied on by the Petitioners, both use the word
30 “includes” and that in each case they amount to a non-exhaustive list of concepts falling within
31 the definition. Counsel said that the *Expressio Unius* principle is only a starting point and that
32 the reason for express inclusion is not to limit the definition of laws to those instruments. The

1 express inclusion was to avoid confusion as to whether they qualified as laws. Counsel made
2 reference to the case of *Appleby (Cayman) Ltd. v. Chief Immigration Officer*²³ in which the
3 Grand Court stated that the use of the word “includes” evidenced the non- exhaustive nature of
4 the listed items. The Court also stated that where the language of the statute is clear the words
5 are to be given their natural meaning.
6

7 93. The Respondents also point out that the definition in the Interpretation Act which is referenced
8 by the Petitioner is “*Law includes any Order in Council*”. This has a capital L and not law with
9 a lower case. Counsel for the Petitioners agreed that there was a lack of clarity as to whether
10 there was a distinction between the two.



11 **EXTERNAL AIDS**

12 94. The Petitioners submit that external aids assist in interpreting s.15 by reference to other
13 material. Counsel points to examples of statutory schemes under other laws which provide for
14 rights of appeal as detailed above and also that GCR O.55 which applies to all of those appeals
15 does not refer to the common law but relates to routes of appeal to the Grand Court which are
16 made by way of enactment.
17

18 95. Finally in terms of external aids, Counsel submitted that on both grammatical and informed
19 interpretation the legislature intended for a new law or section to be created to provide access
20 to the Court. Counsel said that when contrasted with all the other land related laws which have
21 a statutory right of access it would be questionable for judicial review to have been what was
22 intended in respect of such a serious interference with rights to property.
23

24 96. I did not consider that this argument stands up to scrutiny. It is correct to say that each of the
25 other laws relate to entirely different circumstances. For example the functions being
26 performed by the Registrar of Lands under the *Registered Land Act* in determining the precise
27 position of a boundary, priority interests, or the application or removal of a caution or
28 restriction, all have the potential to raise extensive factual issues for determination and are
29 visibly different in context. As are the circumstances of persons seeking a permit or a license
30 under the *National Conservation Act* or planning permission under the *Development and*

²³ Cause No: G.0046/2016

1 *Planning Act*. The *Land Adjudication Act* provides the power to determine interests in land
2 upon claims being made. The *Land Acquisition Act* is perhaps the closest in context but refers
3 to land being acquired for unspecified public use and the reference to the Court by s.17 thereof
4 is in relation to the level of compensation which is similar to that in the *Roads Act*.

5 **PRINCIPLES OF STATUTORY INTERPRETATION**

6 97. The Petitioners also submit that if the Court is doubtful as to the grammatical and ordinary
7 meanings, the Court can consider a number of other principles of statutory interpretation to
8 assist in coming to a decision. The principles relied on are:

- 9 i. Principle of effectiveness
- 10 ii. Principle against absurdity
- 11 iii. Purposive interpretation
- 12 iv. Construction against evasion
- 13 v. Common sense interpretation



14
15 98. The summary submission is that the rights under the *BoR* are meant to be practical, effective,
16 and to have purpose, such as to achieve the intention of the legislator which is to provide a
17 remedy, which is an effective right of access to the Grand Court. It is argued that an argument
18 as to the applicability of judicial review or a petition not only amounts to straining the meaning
19 of the language but is also against commonsense and is not consistent with the generous
20 interpretive approach that the Court must have when assessing the meaning of the *BoR*.

21 **PRINCIPLE OF EFFECTIVENESS**

22 99. The Petitioners refer to the principle of effectiveness as a principle of general statutory
23 interpretation in *Bennion, Bailey and Norbury on Statutory Interpretation*:

24 “An enactment must be construed so as to implement, rather than defeat, the
25 legislative purpose.”²⁴

26 100. The legislative purpose in the instant case is said to be to ensure a clear and defined path to the
27 Grand Court with respect to the interference with land. The Petitioners say further that the

²⁴ Section 11.8



1 contentions of the Respondent, were it to stand, would defeat such a purpose because at best
2 judicial review provides a qualified right of access. It is not as effective as the statutory rights
3 in the various laws referred to and in the *Roads Act* in relation to compensation. Counsel gave
4 four reasons for it being a less effective remedy.

5
6 101. Firstly, that there is a leave stage that is not present in the other laws. One has to satisfy a Judge
7 that there is an arguable case. It is said that this is fatal to the Respondents' arguments as to
8 effectiveness as it is inconsistent with the Constitutional provision which says a right of access.

9
10 102. Secondly, the remedy on a claim for judicial review is a discretionary one. A claimant can
11 establish that they have suffered a public law wrong and can still be denied a remedy by the
12 Court.

13
14 103. Thirdly, in response to the Respondents' point that judicial review is more effective or provides
15 better access to the Court because it has a three month time limit rather than fourteen or twenty-
16 one days as in other laws, it is submitted that the test for whether one is in time to make a claim
17 for judicial review, is whether the application was made promptly. A claimant can be denied
18 judicial review on the basis that he did not act promptly even if he acted within three months.

19
20 104. Counsel's fourth point which is said to be the most important is that the jurisdiction of the
21 Court in a judicial review claim does not include the establishing of new factual findings. It is
22 not a fact finding exercise or a re-hearing of the evidence. It is a review of the decision made
23 below on the basis of public law grounds. Whilst there may on very rare occasions be the
24 possibility for calling evidence, it is not an adversarial trial in the same way that a first instance
25 decision would normally be or a statutory appeal to the Grand Court can be.

26
27 105. With respect to the effectiveness of filing of a petition, the second contention of the
28 Respondents, the Petitioners argue that a petition provides no opportunity to revisit or challenge
29 any of the factual findings made at the hearing of the petition. The purpose of the petition under
30 the *BoR*, is to determine whether rights have been breached. It is not to determine whether it
31 was legal to interfere with the land.

32
33 106. The Respondents argue in response that judicial review and petitions are clear and defined
34 paths to the Grand Court and are more effective than most or all statutory appeals. They are

1 wider in scope in that they are not limited to appeals on points of law as are most statutory
2 rights of appeal. Counsel submits that it is wrong to state that the construction sought by the
3 Respondents would permit the government to defeat the legislative purpose. The section would
4 continue to be effective even more so than on the construction sought by the Petitioners. The
5 fact that judicial review is essentially where no other right of appeal exists or other rights have
6 been exhausted does not render it ineffective, as a right of access to the Grand Court.

7
8 107. As to the argument that the requirement to obtain leave to bring a claim for judicial review
9 renders this route less effective, Counsel submitted that the granting of leave is done by the
10 Grand Court itself and that it is not clear how the presence of the leave stage undermines the
11 right of access any more than the twenty eight day timelines under GCR Order 55, r.4 (2).
12 Furthermore all that an applicant has to show at the leave stage is that they have an arguable
13 case and sufficient interest in the matter,²⁵ which is a very low bar.

14
15 108. Counsel submitted further that the fact that judicial review remedies are discretionary is not a
16 measure which reduces its effectiveness. The application of discretion is also the case in the
17 Petitioner's route for statutory appeals, GCR O.55 r.7 (7), provides:

18 *"The court shall not be bound to allow the appeal on the ground merely of*
19 *misdirection, or of the improper admission or rejection of evidence, unless in the*
20 *opinion of the Court substantial wrong or miscarriage has been thereby*
21 *occasioned."*

22 109. As to time lines Counsel for the Respondents submitted that the time frames for filing a claim
23 for judicial review and a petition are three months and one year respectively, both of which
24 time frames are considerably longer than the period for statutory appeals which is twenty eight
25 days as per GCR O.55 r.4 (2). Counsel also noted that the maximum time allowed for the first
26 named is also longer than the thirty days allowed under s.23 (1) of the **Land Adjudication Act**,
27 the same period of thirty days under s.147 (1) of the **Registered Land Act**, the six weeks, under
28 s.17 (2) of the **Land Acquisition Act**, fourteen days under s.48 (4) of the **Development and**
29 **Planning Act**, and the twenty-one days permitted under s.39 (3) of **The National Conservation**
30 **Act**.



²⁵ GCR Order 53, r.3(7),

1 110. While it is conceded that judicial review applications should be filed promptly, it is said to be
2 rare indeed that such claims are dismissed as being out of time, when they are filed within the
3 three month limit.

4
5 111. In response to the Petitioners' contention that judicial review cannot consider all the grounds,
6 the Respondents say that statutory appeals to the Grand Court are also limited often to certain
7 grounds and that includes the aforementioned s.48 (4) of the *Development and Planning Act*
8 and s.23 (1) of the *Land Adjudication Act*. Under those enactments there is also a limited
9 opportunity to call and test evidence.

10
11 112. While I note in considering these submissions that GCR O.55 r.3 provides that appeals to which
12 that Order applies shall be by way of re-hearing and by r.7 the Court has power to receive
13 evidence on questions of fact, the arguments of the Respondents appear to be strong ones. The
14 time frames are longer than for statutory appeals. There is no marked distinction with respect
15 to limitations on grounds and in the ability to call or test evidence in certain circumstances. The
16 discretionary test also applies. Considering the nature of the subject matter in the instant case,
17 any restrictions on the fact finding scope in one in contrast to the other does not appear as likely
18 to have significant implications for effectiveness. In summary, application of this principle
19 would not assist in coming to a decision in favour of the interpretation of the Petitioners.
20

21 **PRESUMPTION AGAINST ABSURDITY**

22 113. Under this heading, Counsel for the Petitioners referenced the general principle from *Bennion,*
23 *Bailey and Norbury on Statutory Interpretation:*

24 *“The court seeks to avoid a construction that produces an absurd result, since this is*
25 *unlikely to have been intended. Here, the courts give a very wide meaning to the concept*
26 *of ‘absurdity’, using it to include virtually any result which is impossible, unworkable or*
27 *impracticable, inconvenient, anomalous.”²⁶*

28 114. The submission is that if the Respondents are correct then the words ‘applicable to the
29 interference’ are rendered pointless. Counsel said that this would be an absurd result which
30 would have a corresponding effect for bespoke rights of access to the Grand Court under other

²⁶ Chapter 13.1



1 laws, were it to be said that judicial review alone is a sufficient right of access in the instant
2 case.

3
4 115. The Respondents submit that the assertion that the construction would lead to an absurd result
5 as the government would then have the ability to repeal various laws which permit direct access
6 to the Grand Court is wrong. Reference is made to the case of *R (on the application of Edison*
7 *First Power Ltd.) v. Central Valuation Officer*²⁷ in which the Court stated that the strength of
8 the presumption depends on the degree to which a particular construction produces an
9 unreasonable result. The more unreasonable the result the less likely it is that Parliament
10 intended it. The rule against absurdity comes into play when the consequences or result of the
11 enactment are futile or pointless which is not the case here.

12
13 116. It is also said that the Respondents' interpretation likely gives affected persons greater rights
14 of access to the Grand Court and would not produce a result which is so objectionable,
15 unreasonable or unfair that it cannot have been the intent of the legislation. Thus in this case
16 the rule against absurdity does not outweigh the ordinary grammatical meaning.

17
18 **PURPOSIVE INTERPRETATION**

19 117. Counsel for the Petitioners' argument under this heading is that the application of the purposive
20 approach would involve the recognition that the purpose or object of Parliament is usually to
21 provide an appropriate remedy for a mischief with which the Act deals. Additionally that the
22 Court should aim for a construction which furthers the aim of the legislator to provide a remedy
23 rather than one which attempts to circumvent it.

24
25 118. The Respondents argue that this rule does not advance the case for the Petitioners as the primary
26 and most reliable source of the legislative intention is the grammatical interpretation.



²⁷ 2003 4 All ER 209

1 119. The Respondents also say that their argument is not “making a ‘fortress of the dictionary’ as
2 the Petitioners appear to be doing by insisting that only a statutory right of an appeal could
3 meet the requirements of s.15(1)(c).”

4 **PRESUMPTION AGAINST EVASION**

5 120. The referenced principle as to the presumption against evasion is:

6 “A construction which advances the legislative aim of providing the remedy for the
7 mischief against which the enactment is directed is to be preferred to a
8 construction that attempts to find some way of circumventing it.”²⁸

9 121. The argument is that the aim of s.15 (1) is to provide a remedy for a mischief against which the
10 enactment is directed, namely, the taking of the land illegally. The remedy is the right of access
11 to the Court. It is said that the Respondents construction is an attempt to find a way of
12 circumventing or evading the purpose of the statute. The Court’s attention was drawn to the
13 words of Lord Steyn, in the case of **R v J**²⁹:-

14 “Parliament does not intend the plain meaning of its legislation to be evaded. And
15 it is the duty of the courts not to facilitate the circumvention of the parliamentary
16 intent.”

17 122. The Respondents argue that their interpretation would not enable the government to evade
18 challenges to declarations under the **Roads Act** because challenges may still be made by the
19 identified routes. The further argument of the Respondents is that the Petitioners appear to have
20 misconstrued the Rule of Construction against Evasion and that this particular rule of
21 construction is not relevant. It is submitted that the mischief that the first part of s.15 (c) (ii)
22 deals with is an unlawful interference by the State with property rights and the enactment would
23 seek to remedy this by allowing that interference to be questioned in the Grand Court. The
24 proposed construction therefore allows for the mischief to be remedied.

25

26



²⁸ Bennion, Bailey and Norbury on Statutory Interpretation Paragraph 12.10

²⁹ 2004 UKHL 42



1 COMMON SENSE INTERPRETATION

2 123. The Petitioner’s final argument under this heading is that on a common sense interpretation of
3 the constitutional provision, recourse to a remedy of judicial review is not in keeping with the
4 intention of the drafters. An application for judicial review would require:

- 5
- 6 i. Citizens to meet the *Wednesbury* unreasonableness test for all appeals.
- 7 ii. The possible costs and delay associated with such a procedure where there
8 is no prior right to a reconsideration or quasi-judicial appeal.
- 9 iii. Such applications would have to be made without information as to the
10 merits of any such applications - the leave test.
- 11 iv. The absence of quasi-judicial proceedings would lead to significant delays
12 with the progress of applications and the NRA’s road building programme.
- 13

14 124. The Respondents made submissions on the common sense interpretation which are summarised
15 below:

- 16
- 17 i. There is no requirement that judicial review must be undertaken on
18 unreasonableness grounds, other grounds such as procedural unfairness
19 are available.
- 20 ii. The pre-action protocol for judicial review provides for a review of legal
21 and evidential arguments and disclosure of relevant documentation prior
22 to the commencement of proceedings.
- 23 iii. Requests for relevant documentation can be made under the *Freedom of*
24 *Information Act* and the *Data Protection Act*.
- 25 iv. Setting up a tribunal or other body to determine such matters would have
26 resource implications for the government and would be undemocratic
27 (Reference to judgment in the case of *Alconbury v. Secretary of State for*
28 *the Environment*).
- 29 v. Delay would apply irrespective of the forum for determining disputes.
- 30

1 125. It is also submitted by the Respondents that the CICA in the case of *Chief Immigration Officer*
2 *of the Cayman Islands v. Ian Fernando Ellington*³⁰, has said that judicial review provides an
3 adequate review process as is required by s.13 (3)(c) of the *Immigration Act*. It is argued that
4 as s.15 (1) expressly provides that access to the Grand Court can be direct or on appeal from
5 another body, it does not require that a specialist tribunal be set up to adjudicate on challenges
6 under the *Roads Act*. This means it is said that there is no barrier to the application of the
7 reasoning of the CICA to the present circumstances.

8 DISCUSSION

9 126. It is accepted that constitutional provisions are to be given a generous interpretation. Such
10 interpretation which while faithful to the language used, must be one that ensures that citizens
11 have the full measure of rights and freedoms to which they are entitled. In the cited case of
12 *Day & Bush v. Governor of the Cayman Islands*, the Appellate Court cautioned against
13 ignoring the clear meaning and effect of a constitutional provision. Similarly in the case of
14 *BDO v. Governor of the Cayman Islands*, the Grand Court said that the clearer the meaning
15 the slower the Court should be in adopting another meaning on the basis of an external aid.

16
17 127. Any application of interpretative principles must first begin with the grammatical meaning or
18 linguistic meaning of the words used. In this case the word ‘law’ is grammatically capable of
19 more than one meaning. As the cited cases suggest, it may or may not include the broader
20 concept of law which includes rules and principles. Ambiguity in the grammatical meaning is
21 informed by the application of interpretative factors including, the nature of words used before
22 and after, and the context in which the word is used. That context includes the context of the
23 provisions and of the wider document and any applicable definitions.

24
25 128. One example of the context in which the word is used is in s.7 (2):

26
27 *“Everyone charged with a criminal offence has the following minimum rights – (a) to be*
28 *presumed innocent until proved guilty according to law.”*



³⁰ CICA 15/2020

- 1 129. In this context the word “law” plainly means not only statute law but applicable rules, principles
2 and procedures. In the context in which it is used in s.15 (1)(c) it is preceded by the word ‘a’.
3
- 4 130. Multiple sections within the **BoR** refer to “provision by a law” or to “nothing in any law or
5 done under its authority”. Both the words preceding and after it and the context in which it is
6 used in s.15 (1)(c) suggest that, used in this sense, it refers to an enactment. By the definition
7 given, ‘law’ is not limited to primary legislation, but also includes any instrument having the
8 force of law which is made in exercise of a power conferred by law. It therefore includes
9 regulations, rules or codes which are made pursuant to a power conferred by law. One example
10 of the latter mentioned is the Road Code made pursuant to the **Traffic Act**.
11
- 12 131. Additionally it appears to be correct, as the Respondents submitted, that the legislature could
13 have used the words “*primary legislation*” which is defined in s.28 of the **BoR** as meaning “a
14 Law enacted by the legislature”. Significantly in this definition the word “Law” is capitalized,
15 and in s.15 it is not. It is accepted that the use of the word “law” rather than “primary
16 legislation” which is defined in the same part of the **BoR** must mean that “law” is wider in
17 scope and is not limited to primary legislation.
18
- 19 132. Considering the legislative intention and purpose attendant upon the words, it must be that
20 provision is made for a right of appeal by way of an enactment, whether of primary or
21 secondary legislation which may apply to the interference with property rights. The
22 Respondents’ argument as to non-specificity appears to be correct. There is a distinct difference
23 between “a law” and “the law”. Indeed the Petitioners accept that the right of appeal as to the
24 legality of the interference need not specifically be in the **Roads Act**.
25
- 26 133. While it would be optimum for this to have been included in the **Roads Act** or other such
27 legislation, I accept the argument of the Respondents that there is the general right to bring a
28 petition under the Constitution itself, which would be applicable to any interference with
29 property rights.
30
- 31 134. There is, moreover, the remedy of judicial review. While this is a common law remedy and not
32 a statutory one, it continues to operate by virtue of GCR O.53. These are rules made pursuant
33 to s.19 of the **Grand Court Act**. By s.18 of the **Grand Court Act**, the jurisdiction of the Grand



1 Court is to be exercised in accordance with rules made under that Act or in accordance with
2 other Acts.

3
4 135. Practice Direction No. 4 of 2013³¹ has been issued by the learned Chief Justice pursuant to that
5 Order. It is entitled Pre-action Protocol for Judicial Review and begins by stating:

6
7 1. “Judicial review allows people with a sufficient interest in a decision of action by a
8 public body to ask a judge to review the lawfulness of:

9
10 1.1 rules and regulations, or other subordinate legislation ; or

11 1.2 a decision, action or failure to act in relation to the exercise of a public function.

12
13 2. Judicial review may be used where there is no right of appeal or where all avenues of
14 appeal have been exhausted.”

15
16 136. Is judicial review an effective route to the Grand Court which would afford an affected person
17 the full measure of rights and protections to which he is entitled by virtue of s.15? I have
18 considered all the submissions on this. In my view the first fact of significance is the underlying
19 subject matter. This involves specific acts and decisions made by government officials in the
20 exercise of public functions. Much has been said about the development of judicial review
21 principles over many years and its efficacy in dealing with such matters. Lord Hoffman in the
22 case of *R (Alconbury Developments Ltd. & Ors.) v. Secretary of State for the Environment,*
23 *Transport & the Regions* noted that a relevant principle which must exist in a democratic
24 society is the rule of law and that the principles of judicial review (while having some
25 limitations) give effect to this rule by ensuring that administrative decisions are taken in
26 accordance therewith. The learned Judge stated:

27 “When ministers or officials make decisions affecting the rights of individuals, they must
28 do so in accordance with the law. The legality of what they do must be subject to review by
29 independent and impartial tribunals. This is reflected in the requirement in article 1 of the
30 First Protocol that a taking of property must be “subject to the conditions provided for by
31 law”.



³¹ Dated 12th December 2013



1 *The principles of judicial review give effect to the rule of law. They ensure that*
2 *administrative decisions will be taken rationally, in accordance with a fair procedure and*
3 *within the powers conferred by Parliament.”*

4
5
6 137. Secondly, I thought it also noteworthy that while the Petitioners refer to the rules for inquiry
7 made under the **Highways Act** and other Acts dealing with compulsory acquisition in the
8 United Kingdom as evidencing the detailed nature of the consultation process which obtains,
9 those statutes provide for judicial review of the decision of the Secretary of State rather than
10 for an appeal on the facts. Lord Slynn of Hadley in his judgment stated:

11
12 *“When exercising his powers under the Highways Act, the Secretary of State is given*
13 *power to acquire land compulsorily. The Acquisition of Land Act 1981 and the*
14 *Compulsory Purchase by Ministers (Inquiries Procedure) Rules 1994 (SI 1994/3264)*
15 *provide for a public local inquiry to be held if an objection is received. The inspector*
16 *makes his conclusions and recommendations to the Secretary of State. If the latter*
17 *disagrees he is required once again to follow a procedure similar to that in rule 17(5)*
18 *of the Town and Country Planning (Inquiries Procedure) (England) Rules 2000.*

19
20 *The various statutes provide for judicial review rather than for an appeal on the facts*
21 *or the merits of the decision. Thus in section 288 of the Town and Country Planning*
22 *Act 1990:*

23 *“Proceedings for questioning the validity of other orders, decisions and directions*
24 *288(1) If any person—(a) is aggrieved by any order to which this section applies and*
25 *wishes to question the validity of that order on the grounds —(i) that the order is not*
26 *within the powers of this Act, or (ii) that any of the relevant requirements have not*
27 *been complied with in relation to that order; or (b) is aggrieved by any action on the*
28 *part of the Secretary of State to which this section applies and wishes to question the*
29 *validity of that action on the grounds—(i) that the action is not within the powers of*
30 *this Act, or (ii) that any of the relevant requirements have not been complied with in*
31 *relation to that action, he may make an application to the High Court under this*
32 *section.”*

33
34 138. The point I take from this is that while given the force of statute under those enactments, the
35 scope of judicial review was considered appropriate to the circumstances.

36
37 139. Thirdly, I have considered the concern of the Petitioners as to the inability to establish or find
38 facts as reducing the effectiveness of this route. In this regard the Respondents have drawn my
39 attention to the Pre-Action protocol referenced above by which means an interested party may
40 seek information to include a request for a fuller explanation of the reasons for decisions and
41 for any details of any documents considered relevant and necessary.

1 140. I also note that under s.19(2) of the **BoR**, persons adversely affected by a decision of a public
2 official have the right to request and be given written reasons for that decision or act.

3
4 141. For the reasons set out above in paragraph 112, given the circumstances of this matter, and
5 considering the arguments as to effectiveness from both sides, accepting those of the
6 Respondents, there is nothing that would militate against this route as an effective right of
7 access to the Court.

8
9 142. Fourthly and most important to a conclusion on this aspect, I have considered the approach of
10 the Appellate Court in the cited case of *The Chief Immigration Officer of the Cayman Islands*
11 *v. Ian Fernando Ellington CICA*.³²

12
13 143. In that case the appellant appealed a decision declaring that s.82 of the *Immigration Act* (2015)
14 Revision and s.109 of the *Customs and Border Control Act* 2018 were incompatible with the
15 Cayman Islands **BoR**. Section 82 provided for an automatic designation of Prohibited
16 Immigrant where a person had been sentenced to a term of imprisonment in excess of 12
17 months. The Grand Court held that this automatic designation which afforded no opportunity
18 to consider the personal circumstances of the individual was incompatible with s.9 of the **BoR**,
19 the obligation imposed upon government to respect private and family life.

20
21 144. By s.13 (3)(c) of the **BoR** dealing with freedom of movement, a person in the position of the
22 Respondent was entitled to have his case reviewed by a competent authority prescribed by law.
23 No such provision for review had been made in the *Immigration Act* for persons designated as
24 Prohibited Immigrants to have their cases reviewed. This is the wording of that section:

25 “13. The requirements to be satisfied for the purposes of subsection (2)(d)(iii) are as
26 follows—

27 (a) the decision to expel that person is taken by an authority, in a manner and
28 on grounds prescribed by law;

29 (b) that person has the right to submit reasons against his or her expulsion to
30 a competent authority prescribed by law;



³² Civil Appeal No. 15 of 2020, 8th October 2010



1 (c) that person has the right, save where a court has recommended his or her
2 deportation, to have his or her case reviewed by a competent authority
3 prescribed by law; and

4 (d) that person has the right to be represented for the purposes of paragraphs
5 (b) and (c) before the competent authority or some other person or
6 authority designated by the competent authority;

7 but paragraphs (b), (c) and (d) shall not apply where the interests of defence, public safety
8 or public order so require.”

9 145. The Appellate Court considered whether despite the absence of such a provision in the
10 **Immigration Act** itself the option of judicial review was a satisfactory alternative. The Court
11 said that while judicial review would fall substantially short of the procedure followed by the
12 Immigration Board and or tribunal under s.14 and s.15 of the Act it would amount to a sufficient
13 independent review of a decision taken by the Chief Immigration Officer for the purposes of
14 s.13 (3)(c). The Court stated:

15 “It is clear that under section 13(3)(c) someone in Mr. Ellington’s position is entitled to
16 have his case reviewed by a competent authority prescribed by law. As Mr. David on
17 behalf of the Respondent rightly pointed out, any review by way of judicial review would
18 fall substantially short of the sort of procedure followed by the Immigration Board and or
19 the Immigration Appeal Tribunal under sections 14 and 15 of the Law. However, that
20 having been said, judicial review would amount to an independent review of any decision
21 taken by the Immigration Officer and be bound to have regard to the Immigration Officer’s
22 respect, or otherwise, of Mr. Ellington’s section 9 rights. In my judgment, that would
23 amount to a sufficient independent review by a competent authority as required by section
24 13(3)(c).”³³

25 146. Respectfully adopting the reasoning of the Appellate Court, to the instant case, although the
26 circumstances are different in some respects, by virtue of the **Grand Court Act** and Rules,
27 judicial review is available to the aggrieved persons and is applicable to the interference with
28 rights.

29
30 147. Counsel for the Petitioners accepted its applicability but questioned its generality. The
31 argument in summary is that they are guaranteed a right to a bespoke route and anything less
32 would be insufficient or ineffective in providing the full measure of rights. For my part I think

³³ Ibid, paragraph 74

1 that argument would be a stronger one if on a detailed examination the route of judicial review
2 could be seen as substantially ineffective which it is not.

3
4 148. Where the provision itself is non-specific and where there is a clear route available which
5 allows for affected persons to approach the very same Court which would be considering an
6 appeal, with likely similar issues to be addressed in both, to conclude that there is breach of a
7 right in such circumstances may unduly disregard the substance of the matter.

8
9 149. That is not to say that a bespoke route is not desirable and that there is not a need for the
10 legislature to give specific consideration to providing for same but to answer the question
11 whether there has been a breach by the absence of a bespoke route must require an examination
12 as to other routes that are available.

13
14 150. Consequently I would answer the first issue, in the negative, that the *Roads Act* is not
15 incompatible with the Constitution by reason of the absence of provision for a right of access
16 to the Grand Court. Provision is made by other means which is what is required by s.15. I would
17 decline to make a declaration of incompatibility.

18 FAIR TRIAL RIGHTS

19 151. Both parties agree with the description of fair trial rights as provided for in s. 7(1) of the
20 Constitution as rights which hold such a prominent place in a democratic society that they
21 should be given a broad and purposive rather than restrictive interpretation.³⁴

22
23 152. In argument on this aspect, both sides were concerned to describe the events leading up to the
24 making of the Declaration. There was some dispute as to what those events were. The
25 Respondent provided no affidavit evidence but sought to rely on a chronology of events which
26 was attached as a schedule to written submissions. This was in an effort to show that some
27 consultation had been undertaken prior to the Declaration being made. In response to a specific
28 inquiry from the Court as to whether the schedule was agreed, Counsel for the Petitioners
29 responded that, *“the precise chronology is not accepted. While it is not being said that it is*
30 *wrong, it is not clear that it is fully correct.”*



³⁴ Lester, Pannick & Herberg 3rd Edition Chapter 4.6.1; Delcourt v. Belgium [1970] 1 EHRR 355

1 153. Counsel said that in any event any such consultation process is not underpinned by any law and
2 that even on the chronology provided which shows letters having been sent inviting comments
3 on the proposal before the Declarations were made, the process is inadequate.

4 **THE PETITIONERS' ARGUMENT**

5 154. The Petitioners argue that the decisions made in this case relating as they do to the compulsory
6 acquisition of land by the State properly engage s.7 of the **BoR** and that s.7 supplements s.15
7 in that it provides important safeguards with respect to the right to a fair and public hearing.
8

9 155. Against that background, the primary submission is that there has been a breach of s.7 (1) in
10 that no fair and public hearing has taken place in this case with respect to the decision of the
11 Governor to make a Declaration. Thus it is said that the procedure under the **Roads Act** for the
12 compulsory acquisition of land from citizens where there has been no opportunity to be heard,
13 to present evidence or review the basis of the proposed Declaration, to challenge the findings
14 made and no written judgment even when taken with judicial review, does not satisfy the
15 requirements of s.7 (1).
16

17 156. It is submitted that s.7 (1) of the Constitution is in similar terms to Article 6 of the United
18 Kingdom's Human Rights Act and that a procedure whereby civil rights are determined without
19 hearing the submissions of the parties is incompatible with the Article and with the section.
20

21 157. The Petitioners rely on the dicta of the Court in the case of **R (on the application of Wright**
22 **and Others) v. Secretary of State for Health and another**³⁵ and argue that judicial review does
23 not provide a fair and public hearing in the instant case.
24

25 158. Counsel for the Petitioners highlights that in contrast to the detailed provisions for the
26 assessment of compensation, s.3 and s.6 of the **Roads Act** do not provide at the preliminary
27 stage for a procedure in the law that allows for challenge to the Governor's decision in terms
28 of making representations, calling evidence, and being represented by an attorney. Counsel
29 said that the judicial review procedure does not allow for a re-investigation of the factual

³⁵ 2009 (2) ALL ER 129; 2009 UKHL 3,



1 findings, or for witnesses to be called and evidence to be challenged. It simply allows for a
2 review of the decision under the normal judicial review public law headings.

3
4 159. Counsel referred to the case of *Alconbury v. Secretary of State for the Environment* upon
5 which reliance is placed by the Respondents and submitted that while judicial review was
6 therein said to be sufficient, much will turn on the process by which the first instance decision
7 was arrived at. It is said that the distinguishing feature from the instant case is the very detailed
8 procedure which obtained at first instance under the *Town and Planning Act* and the *Highways*
9 *Act* in England and Wales. This is a different system from that which obtains under the *Roads*
10 *Act*. It includes provision for preliminary information to be supplied by the local planning
11 authority, procedures for pre-inquiry meetings between the local planning authority and other
12 parties that are affected, receipt of statements of case and for appearances at the inquiry.
13 Judicial review was therefore adequate in those circumstances, on an examination of the quality
14 of the decision making process. It was in considering the full system which was operative that
15 the combination of judicial review and that system was held to be compliant with Article 6.

16
17 160. Counsel highlighted the statement of the Appellate Court that:

18 *“If there is a classic exercise of Administrative discretion, even though determinative of*
19 *civil rights and obligations and there are a number of safeguards to ensure that the*
20 *procedure is in fact both fair and impartial, then judicial review may be adequate to supply*
21 *the necessary access to the court even if there is no jurisdiction to examine the factual*
22 *merits of the case. The planning system is a classic example.”*

23 161. The submission is that in the case of the *Roads Act*, there are no safe guards. Counsel points to
24 the absence of evidence as to the consultation process as to what happens to the letter of
25 invitation to provide comments which is sent to affected persons, how it is considered as well
26 as the process for the analysis of those representations and the procedure to make oral
27 representations or to call evidence on behalf of the Petitioners or the other party. Counsel said
28 that whilst it might be right that there was an invitation for comments, there was nothing close
29 to the Rules in the United Kingdom. Counsel argued that the present circumstances are akin to
30 that in the case of *Wright*, where care workers were placed on a list without the opportunity to
31 make representations rather than the case of *Alconbury v. Secretary of State for the*
32 *Environment* where the first instance approach was with respect to a different statutory scheme
33 than the present.





1 **THE RESPONDENTS' ARGUMENT**

2 162. The Respondent's principal argument in reply is that s.7 (1) of the **BoR** is not engaged because
3 the *lex specialis* in respect of interference with property rights is s.15 of the **BoR**. (*Pretty v.*
4 *Solly*³⁶).

5
6 163. Counsel submitted that this was the approach taken by the CICA in the cited case of *Deputy*
7 *Registrar & AG of the Cayman Islands v. Chantelle Day & Vicki Boddan Bush*. In that case,
8 the Court considered the applicability of s.14 of the **BoR** and the general provisions in s.9 and
9 s.10 and concluded that s.14 was the applicable section.

10
11 164. The Respondents seek to distinguish the case of *Wright* by stating that it does not deal with
12 planning or compulsory acquisition matters but with matters of an entirely different nature than
13 the instant case.

14
15 165. The Respondents place significant reliance on the decision of the House of Lords in the case
16 of *R (Alconbury Developments Ltd. & Ors.) v. Secretary of State for the Environment,*
17 *Transport & the Regions* and drew the Court's attention to a multiplicity of statements therein.
18 That case considered Article 6 rights under the European Convention of Human Rights. The
19 Court concluded that the availability of judicial review was sufficient to meet the requirements
20 under that Article:

21
22 *"In the determination of his civil rights and obligations or of any criminal charge*
23 *against him, everyone is entitled to a fair and public hearing within a reasonable time*
24 *by an independent and impartial tribunal established by law.*

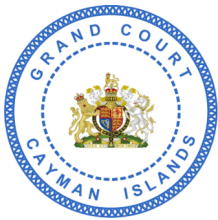
25
26 *Judgment shall be pronounced publicly but the press and public may be excluded from*
27 *all or part of the trial in the interests of morals, public order or national security in a*
28 *democratic society, where the interests of juveniles or the protection of the private life*
29 *of the parties so require, or to the extent strictly necessary in the opinion of the court in*
30 *special circumstances where publicity would prejudice the interests of justice."*

31
32
33 166. The submission of the Respondents is that decisions under the **Roads Act** are made by the
34 Governor in Cabinet and thus preserve the democratic principle in the manner required by the
35 Convention. The Governor is bound by s.19 of the **BoR** but does not have the constitutional

³⁶ 1859 26 Beav. 606

1 duties of a Court. The Cabinet is exercising a statutory function in a non-judicial manner.
2 Counsel stated that while the Petitioners seek to distinguish *R (Alconbury Developments Ltd.
3 & Ors.) v. Secretary of State for the Environment* on its facts, it was applied by the Privy
4 Council in the very factually different case of *Meerabux v. the Attorney General of Belize*³⁷
5 and was also cited in the case of *Wright*.

6
7 167. Counsel also said that it is of note that in *R (Alconbury Developments Ltd. & Ors.) v. Secretary
8 of State for the Environment* the Court considered three cases. One of these was the case of
9 *Legal and General Assurance Society Ltd.* which is a very similar case to the present
10 proceedings in that it deals with a compulsory purchase in respect of roads and appears to be
11 directly on point. The facts as set out on the judgment are:



*“Legal and General Assurance Society Ltd. These proceedings are brought by
the Secretary of State at the invitation of Legal and General Assurance Society
Ltd. The issue relates to an improvement scheme at junction 13 of the A34/M4
proposed by the Secretary of State through the Highways Agency. There are
complex details of a dual two-lane carriageway all-purpose road, 100 metres to
the west of the existing junction 13, together with connected slip and side
roads...”*³⁸

19 168. The Respondents argue that while in the cited case the Inquiry procedures were codified in
20 statutes, this need not necessarily be the case. Such could be set out by way of policies,
21 procedures, codes or other non-statutory instruments while still meeting the *R (Alconbury
22 Developments Ltd. & Ors.) v. Secretary of State for the Environment*, requirements when
23 considered alongside judicial review. There is no requirement that they must be set up in the
24 *Roads Act* itself. This is said to be particularly the case, where a broad definition of law is
25 adopted.

26
27 169. The concluding submission is that in the instant case the requirements for a broad scheme have
28 in fact been complied with for the following reasons:

- 29 i) A consultation process was undertaken by which the Petitioners were invited
30 to make submissions.
31 ii) A report was submitted following the consultation and it was considered by
32 the decision maker, the Governor in Cabinet.

³⁷ 2005 UKPC 12

³⁸ *Ibid*, paragraph 8



1 170. Thus it is said that the fair trial requirements were met, which combined with the availability
2 of judicial review meet the requirements of s.7 (1), of the **BoR** when the overall framework
3 available to an aggrieved party is considered. It is noted that no evidence was provided as to
4 this report.

5 **DISCUSSION AND REVIEW OF CASES**

6 171. Section 7 of the **BoR** as with Article 6 of the Convention deals in part with the process for the
7 determination of civil rights as between the individual and the State. As to claims on the
8 compulsory acquisition of land, the referenced text states:

9 *“The most significant of the rights so identified are the right to and associated with real*
10 *property (for example, claims concerning the expropriation of property and the application*
11 *of the planning laws have been held to be subject to the right to a fair hearing) and to*
12 *personal property (including decisions in relation to bankruptcy and patent rights).”³⁹*

13 172. The concern of Article 6 is that the process for determination of these rights must be
14 procedurally fair. A hallmark of procedural fairness is for affected persons to have the right to
15 be heard. By reference to a number of cases including the cited case of **R (Wright) v. Secretary**
16 **of State**, the text states:

17 *“A procedure where civil rights are determined without ever hearing the parties*
18 *is moreover, plainly incompatible with the article.”⁴⁰*

19 173. However the jurisprudence appears to make a distinction between administrative acts taken by
20 the executive and the process before courts of the “classic kind”. With respect to the former the
21 decisive factor even where there is a breach of certain Article 6 rights is whether there exists a
22 right to challenge the decision before a judicial body. The text states:-

23 *“Where a decision determinative of an individual’s civil rights and obligations is taken by*
24 *the executive, or by an adjudicatory body not complying with art 6(1), the article requires*
25 *(in accordance with the right of access to a court) that the state provide a right to challenge*
26 *the decision before a judicial body with full jurisdiction providing the guarantees of art*
27 *6(1). If such an appeal is provided, there will be no violation of the article. In contrast,*
28 *where ‘courts of the classic kind’ (rather than administrative tribunals) are concerned, art*

³⁹ Human Rights Law and Practice, Lester Pannick and Herberg 3rd Edition paragraph 4.6.10

⁴⁰ Ibid para 4.6.16



1 6 must be fully complied with at the trial stage (although an appeal court may sometimes
2 ‘make reparation’ for a breach of the article at trial)”⁴¹.

3 174. The term full jurisdiction has been interpreted in the case of **R (Alconbury Developments Ltd.**
4 **& Ors.) v. Secretary of State for the Environment**, as meaning “full jurisdiction to deal with
5 the case as the nature of the decision requires.”

6
7 175. Counsel for the Respondents drew the Court’s attention to **Meerabux v. AG of Belize**⁴². The
8 appellant in that case challenged the holding of proceedings in camera by the Belize Advisory
9 Council. He asserted that his constitutional rights under s.6 (8) of the Belize Constitution which
10 required every court or other authority to sit in public when determining the existence of any
11 civil right or obligation. The Board held that this requirement did not extend to the Council
12 which was not part of the judiciary. Counsel highlighted the following:

13 *“But the jurisprudence of the European court on this issue is based upon a narrow*
14 *interpretation of the term "civil rights and obligations" which is unfamiliar to an English*
15 *lawyer, as Lord Hoffmann explained in R (Alconbury Developments Ltd) v Secretary of*
16 *State for the Environment, Transport and the Regions [2003] 2 AC 295 , 327-328, paras*
17 *78 and 79. It excludes many rights which English law would treat as part of the civil rights*
18 *of the individual but which on the European continent are regarded as a matter for the*
19 *administrative courts. This interpretation is unsuited to a common law system such as that*
20 *of Belize. Their Lordships consider that the reason why section 6(8) has no application is*
21 *not because the appellant had no civil rights in respect of his office but because that*
22 *subsection applies only to courts and other authorities forming part of the judicial branch*
23 *of government. The BAC is not such an authority. The appellant has a right that it should*
24 *act fairly, but he does not have a right that it should comply with all the constitutional*
25 *duties of a court.*

26 *There remains then the common law rule that proceedings of the kind contemplated by*
27 *section 98(5) must be fair. In the context of the common law an oral hearing for the*
28 *resolution of disputes is not mandatory. Fairness does not always require such proceedings*
29 *to be held in public. The advantages of subjecting proceedings to public scrutiny are well*
30 *known. Where grave allegations are made, as was the case here, they ought, unless there*
31 *are compelling reasons to the contrary, be subjected to the test of public scrutiny. This*
32 *protects persons against whom allegations are made in secret from misunderstandings*
33 *based on suspicion and rumour. It makes the proceedings transparent by bringing them*
34 *out into the open for all to see. It reinforces the need for self-discipline in the conduct of*
35 *the proceedings by the decision maker and it contributes to public confidence. But the*
36 *common law does not go so far as to lay this down as a basic rule of procedural fairness.*
37 *As Professor Feldman (English Public Law , para 15.04) has explained, the common law*
38 *requirements of procedural fairness are essentially twofold: the person affected has the*

⁴¹ Ibid 4.6.23

⁴² 2005 2 AC 513



1 *right to prior notice and an effective opportunity to make representations before a decision*
2 *is made or implemented, and he has the right to an unbiased tribunal.*"⁴³

3
4 176. In *R (on the application of Wright and others) v. Secretary of State for Health and another*,
5 the English Courts were concerned with whether the manner in which the provisional
6 placement of care workers on a list of persons considered unsuitable to work with vulnerable
7 adults under a section of the *Care Standards Act* 2000 infringed their right to a fair hearing
8 under Article 6 of the Convention.

9
10 177. The House of Lords allowed the appeal of the care workers, restored the decision of the judge
11 at first instance holding that the procedure for provisional listing did not meet the requirements
12 of Article 6(1). It gave no opportunity for the workers to be heard prior to placement on the list
13 in circumstances where the detrimental effect of being listed was often irreversible and
14 incurable. The Court stated:

15 *"The difficult question is how the requirements of article 6 apply in cases such as this. It*
16 *is a well-known principle that decisions which determine civil rights and obligations may*
17 *be made by the administrative authorities, provided that there is then access to an*
18 *independent and impartial tribunal which exercises "full jurisdiction": Bryan v United*
19 *Kingdom (1995) 21 EHRR 342, applied domestically in R (Alconbury Developments Ltd)*
20 *v Secretary of State for the Environment, Transport and the Regions [2003] 2 AC 295 and*
21 *Runa Begum v Tower Hamlets London Borough Council (First Secretary of State*
22 *intervening) [2003] 2 AC 430. What amounts to "full jurisdiction" varies according to the*
23 *nature of the decision being made. It does not always require access to a court or tribunal*
24 *even for the determination of disputed issues of fact. Much depends upon the subject matter*
25 *of the decision and the quality of the initial decision-making process. If there is a "classic*
26 *exercise of administrative discretion", even though determinative of civil rights and*
27 *obligations, and there are a number of safeguards to ensure that the procedure is in fact*
28 *both fair and impartial, then judicial review may be adequate to supply the necessary*
29 *access to a court, even if there is no jurisdiction to examine the factual merits of the case.*
30 *The planning system is a classic example (Alconbury v. Secretary of State for the*
31 *Environment),⁴⁴"*

32 178. The cited case of *R (Alconbury v. Secretary of State for the Environment Ltd.)* concerned
33 three appeals. In each case, decisions had been made by the Secretary of State for the
34 Environment, Transport and the Regions dealing with planning permissions and or compulsory

⁴³ Ibid page 532, B to G.

⁴⁴ Ibid paragraph 23

1 acquisition of land. His decisions were challenged in each case on the basis that they were
2 incompatible with Article 6(1) of *the European Convention for the Protection of Human Rights*
3 *and Freedoms*. In particular that given the role of the Secretary with respect to policy, decisions
4 made by him were inconsistent with the right to have civil rights and obligations determined
5 by an independent and impartial tribunal.
6

7 179. The third of the three appeals involved a proposed scheme for improvement of a major road
8 junction which required the compulsory acquisition of land from a company, Legal and General
9 Assurance Society Ltd. The process with respect to compulsory acquisition of land under the
10 *Acquisition of Land Act 1981* and the *Compulsory Purchase by Ministers Inquiries*
11 *Procedure Rules 1994 (SI 1994/3264)* included provisions for the holding of a public local
12 inquiry if an objection is received. An inspector appointed to conduct the inquiry would provide
13 his conclusions and recommendations to the Secretary of State. The *Highways Act 1980* (as
14 did the *Transport and Works Act 1992* and the *Acquisition of Land Act 1981*) provided for
15 judicial review rather than for an appeal of the decision.
16

17
18 180. The Divisional Court at first instance held that the powers of the Secretary of State were
19 incompatible with the provisions of Article 6 (1).
20

21 181. The House of Lords held that all the disputes concerned civil rights within the meaning of
22 Article 6(1) and that although the Secretary of State was not an independent and impartial
23 tribunal, decisions taken by him were not incompatible with that Article provided that the
24 decisions were subject to review by an independent and impartial tribunal. The House held that
25 the power of the High Court to judicially review the legality of the decision and the procedures
26 followed was sufficient to ensure compatibility with Article 6(1).
27

28 182. In his judgment, Lord Slynn, having accepted that planning, compulsory purchase and other
29 such decisions affect civil rights, identified the first question as being whether the decision of
30 the Secretary of State which determined those rights constituted a fair and public hearing by an
31 impartial tribunal. It was noted that the Secretary of State had accepted before the House that
32 he both made and applied policy and that this prevented him from being an independent and
33 impartial tribunal. The learned Judge stated:



1 *"But the many decisions of the European Court of Human Rights make it plain that one*
2 *does not stop there. A choice was recognised as early as Albert and Le Compte v Belgium*
3 *5 EHRR 533, para 29 that:*

4 *"either the jurisdictional organs themselves comply with the requirements of article 6(1) ,*
5 *or they do not so comply but are subject to subsequent control by a judicial body that has*
6 *full jurisdiction and does provide the guarantees of article 6(1)." These judgments also*
7 *show that the test whether there is a sufficient jurisdictional control is not a mechanical*
8 *one. It depends on all the circumstances."*

9 183. The learned Judge also stated that the starting point was to have regard to the procedural
10 safeguards which existed in the decision making process. Of import was the fact of an inquiry
11 by an inspector which provided the opportunity for the applicant and objectors to be heard and
12 to call and cross-examine witnesses. The inspector then completed a report with his
13 recommendations to the Secretary of State.

14
15 184. Following a review of a number of decisions of the European Court, the learned Judge said that
16 sufficient judicial control to ensure a determination by an independent and impartial tribunal,
17 did not require that there be a full rehearing by a Court. What was required was a review of the
18 legality of the decision and the procedures which had been followed. The learned Judge
19 referred to grounds for judicial review:

20 *"49 ... The common law has developed specific grounds of review of*
21 *administrative acts and these have been reflected in the statutory provisions for*
22 *judicial review such as are provided for in the present cases. See as relatively*
23 *straightforward examples Ashbridge Investments Ltd v Minister of Housing and*
24 *Local Government [1965] 1 WLR 1320 and Stringer v Minister of Housing and*
25 *Local Government [1970] 1 WLR 1281.*

26 50. *It has long been established that if the Secretary of State misinterprets the*
27 *legislation under which he purports to act, or if he takes into account matters*
28 *irrelevant to his decision or refuses or fails to take account of matters relevant to*
29 *his decision, or reaches a perverse decision, the court may set his decision aside.*
30 *Even if he fails to follow necessary procedural steps—failing to give notice of a*
31 *hearing or to allow an opportunity for evidence to be called or cross- examined,*
32 *or for representations to be made or to take any step which fairness and natural*
33 *justice requires—the court may interfere. The legality of the decision and the*
34 *procedural steps must be subject to sufficient judicial control. But none of the*
35 *judgments before the European Court of Human Rights requires that the court*
36 *should have "full jurisdiction" to review policy or the overall merits of a planning*
37 *decision."*





1 185. It was concluded that:

2 *"...there is in principle no violation of article 6 of the European Convention on Human*
3 *Rights as set out in Part I of Schedule 1 to the Human Rights Act 1998. The scope of review*
4 *is sufficient to comply with the standards set by the European Court of Human Rights. That*
5 *is my view even if proportionality and the review of material errors of fact are left out of*
6 *that account: they do, however, make the case even stronger."*
7

8 186. In his judgment, Lord Nolan identified the central question as being whether given the statutory
9 rights of appeal and supervision of the procedures by way of judicial review the procedures
10 were compatible with Article 6(1). In response to the contention that those remedies failed to
11 meet the criterion of the Article because they do not allow for a review of decisions taken on
12 their merits The learned judge stated:

13 *"If this criticism is limited to the absence of a review of the decision on its planning merits*
14 *it is indisputable. But a review of the merits of the decision-making process is fundamental*
15 *to the courts' jurisdiction. The power of review may even extend to a decision on a question*
16 *of fact. As long ago as 1955 your Lordships' House, in Edwards v Bairstow [1956] AC 14,*
17 *a case in which an appeal (from general commissioners of income tax) could only be*
18 *brought on a question of law, upheld the right and duty of the appellate court to reverse a*
19 *finding of fact which had no justifiable basis."*

20 187. The learned Judge referred to the broad and generous interpretation with which the court's
21 powers have been interpreted for example as extending to the rationality of the decision and
22 the fairness of the decision making process.
23

24 188. Lord Hoffman reviewed Article 1 of the Protocol to the Convention:

25 *"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No*
26 *one shall be deprived of his possessions except in the public interest and subject to the*
27 *conditions provided for by law and by the general principles of international law. "The*
28 *preceding provisions shall not, however, in any way impair the right of a state to enforce*
29 *such laws as it deems necessary to control the use of property in accordance with the*
30 *general interest or to secure the payment of taxes or other contributions or penalties."*

31 189. The learned Judge stated that the question of what the public interest requires for the purpose
32 of that Article should, be "determined according to the democratic principle—by elected local
33 or central bodies or by ministers accountable to them," and that:

34 *"There is no principle of human rights which requires such decisions to be made by*
35 *independent and impartial tribunals. There is however another relevant principle which*
36 *must exist in a democratic society. That is the rule of law."*



1
2 190. The learned Judge reviewed a number of decisions in the European Court before concluding
3 with a review of the decision in the case of **Zumtobel v. Austria**⁴⁵. This dealt with an appeal
4 following the compulsory acquisition of land for the purpose of building a by-pass road. The
5 land owners appealed to the Commission and the European Court on the basis that the
6 administrative Court which had heard their appeal in the first instance “could not independently
7 assess the merits and facts of the case”, and thus that it did not have full jurisdiction within the
8
9 meaning of **Albert and Le Compte v. Belgium** 1983 5 EHR 533.” The conclusion of the
10 European Court was summarised as follows:

11 *“The European court said, at para 32, that its jurisdiction was sufficient in the*
12 *circumstances of the case, "Regard being had to the respect which must be accorded*
13 *to decisions taken by the administrative authorities on grounds of expediency and to*
14 *the nature of the complaints made by the Zumtobel partnership.”*

15 191. The learned Judge conducted a detailed review of enforcements proceedings in English law
16 and of European cases on the English Planning system. This included a review of the case of
17 **Bryan v. United Kingdom**⁴⁶ and as to whether or not there was a conclusion that the adequacy
18 of judicial review depended on the safeguards attendant upon the initial decision making
19 process. The learned Judge stated that contrary to the treatment of the case by the Divisional
20 Court this was not the conclusion where decisions had been taken in respect of matters of policy
21 or expediency. Safeguards are not relevant where the question is one of policy or expediency.
22 It was stated:

23 *“The Divisional Court treated it as holding that, whatever the issues, the "safeguards"*
24 *which the court enumerated in, para 46, as attaching to the functions of the inspectors*
25 *were necessary before the existence of an appeal on a point of law or judicial review*
26 *would satisfy article 6. But this is the very opposite of what the court was at pains to*
27 *emphasise. It said, in para 45, in language echoing that of Mr. Bratza's opinion:*

28 *"in assessing the sufficiency of the review available to Mr. Bryan on appeal to the*
29 *High Court, it is necessary to have regard to matters such as the subject matter of the*
30 *decision appealed against, the manner in which that decision was arrived at, and the*
31 *content of the dispute, including the desired and actual grounds of appeal."*

⁴⁵ [1993] 17 EHR 116

⁴⁶ (1995) 21 EHR 342



1 *If, therefore, the question is one of policy or expediency, the "safeguards" are*
2 *irrelevant. No one expects the inspector to be independent or impartial in applying*
3 *the Secretary of State's policy and this was the reason why the court said that he was*
4 *not for all purposes an independent or impartial tribunal. In this respect his position*
5 *is no different from that of the Secretary of State himself. The reason why judicial*
6 *review is sufficient in both cases to satisfy article 6 has nothing to do with the*
7 *"safeguards" but depends upon the Zumtobel principle of respect for the decision of*
8 *an administrative authority on questions of expediency. It is only when one comes to*
9 *findings of fact, or the evaluation of facts, such as arise on the question of whether*
10 *there has been a breach of planning control, that the safeguards are essential for the*
11 *acceptance of a limited review of fact by the appellate tribunal."*

12 192. The learned Judge concluded the review with the following statement:

13 *"As for decisions on questions of policy or expediency such as arise in these appeals,*
14 *whether made by an inspector or the Secretary of State, there has never been a single*
15 *voice in the Commission or the European court to suggest that our provisions for*
16 *judicial review are inadequate to satisfy article 6."*

17 193. With respect to the appeals before the Court the learned Judge stated his view that there was
18 no incompatibility with Convention rights;

19 *"Equally, the fact that the Department of Transport has promoted the road*
20 *improvement scheme in the Legal and General case does not mean that judicial*
21 *review cannot satisfy article 6 unless the court can itself decide whether the scheme*
22 *is a good idea. Nor do I think it makes any difference that in the Alconbury case the*
23 *Ministry of Defence, another emanation of the Crown, has a financial interest in the*
24 *proposed development. Once again, this is something which might be significant if*
25 *the Secretary of State was claiming to be an impartial tribunal. But, as he is not, the*
26 *remedy available by way of judicial review to quash a decision on the ground that the*
27 *Secretary of State has taken irrelevant matters into account is sufficient to satisfy*
28 *article 6."*

29 194. With respect to the argument that Article 6 does not apply to administrative acts such as those
30 by a Secretary of State or Minister, the learned judge considered that at some stage the matter
31 involved the determination of civil rights and obligations.

32
33 195. On a reading of these cases, there is guidance which may be summarised as follows.
34 Administrative decisions of the executive may involve a determination of civil rights and
35 obligations. In contrast to the factual circumstances of the cited case of *Meerabux*, compulsory
36 acquisition of land and planning rights issues will involve the determination of civil rights.

1 196. As I understand what is being said in the cases it is that one has to consider the nature of the
2 subject matter in issue to determine the adequacy or not of what is said to satisfy Article 6. The
3 answer may not be the same from case to case. In the instant case, the Road Notices published
4 on behalf of Cabinet evidence clear policy decisions said to have been taken in the public
5 interest. They involve the widening of a road for the benefit of the public. They therefore fall
6 into the ambit of decisions made on the basis of expediency. They are decisions made in a
7 democratic society for which the executive is answerable to the public on behalf of whom they
8 purport to be acting.

9
10 197. On the basis of the reasoning of Lord Hoffman, in contrast to other learned Judges, where such
11 administrative decisions of the executive were taken in respect of matters or policy or
12 expediency, the safeguards are irrelevant, the essential requirement to satisfy Article 6 is access
13 to a court, an independent and impartial tribunal. That access can be obtained by way of judicial
14 review which is adequate to satisfy Article 6. I bear in mind however that the import of what
15 was being said was in relation to the independence of the Inspector and the Secretary of State
16 and that even where safeguards were said to be immaterial, this was against the background of
17 a scheme which included a detailed fact finding process by way of inquiry which gave an
18 opportunity to be heard to affected persons.

19
20 198. While there is some resonance to the argument of the Respondents that s.15 is the *lex specialis*
21 when dealing with property rights, the issue of procedural fairness in dealing with those rights
22 also falls to be considered. In my view the making of a Declaration as to the acquisition of
23 private property for the purpose of road construction does engage Article 6 or s.7 rights and
24 before any such decision is made affected persons ought to be given an opportunity to be heard.

25
26 199. In the instant case, prior notice and information as to the precise boundary details were
27 published as is required by the **Roads Act**. There does not appear to be a formal consultation
28 scheme much less a detailed one as in the United Kingdom. However there appears to have
29 been a broad scheme which gives an opportunity to affected persons to be heard. The
30 Petitioners challenge the extent and limited nature of any consultation. I take guidance from
31 the case detailed above in particular the statement which is repeated below that:

32
33 *“Even if he fails to follow necessary procedural steps—failing to give notice of a*
34 *hearing or to allow an opportunity for evidence to be called or cross-examined, or*



1 *for representations to be made or to take any step which fairness and natural justice*
2 *requires—the court may interfere. The legality of the decision and the procedural*
3 *steps must be subject to sufficient judicial control.”(Emphasis added).*

4
5 200. In this case, these are not actions by a court of the “*classic kind.*” These are administrative
6 acts in respect of which there is a right of challenge before a judicial body. Importantly this
7 includes a right to challenge the adequacy of the process which process would therefore be
8 subject to judicial control. I am satisfied given the nature of the subject matter, the broad
9 scheme which appears to exist, that it would be subject to “sufficient judicial control” by way
10 of judicial review such as to ensure compatibility with s.7 of the **BoR**.

11
12 **REMEDIES - CONSTRUCTION OF THE ROADS ACT**

13 201. The Petitioners argue that the Court has broad powers under s.5 and s.27 of the Order and
14 Constitution to remedy any breaches identified and rely on ***Day and Bush v. Governor of the***
15 ***Cayman Islands and Others.*** The Court is invited to consider whether a modification of the
16 law is possible to provide a fair trial and a right of access to the Grand Court and if not what
17 other relief is appropriate.

18
19 202. The Petitioners submit that at minimum the Declaration should be quashed and an injunction
20 granted to prevent any further declarations being made until such time as the appropriate
21 safeguards are in place. The Respondents note with some force that in the Petition neither a
22 quashing order nor injunction on further declarations was sought and say that it is neither fair
23 nor in accordance with the overriding objective to seek same in the course of skeleton
24 arguments.

25
26 203. Counsel for the Respondents submits that the jurisprudence is to the effect that a Declaration
27 of Incompatibility should only be made as a measure of last resort and referred to the cited case
28 of ***Ellington*** which referred to the case of ***R. v. A.*** Counsel highlighted the following passage
29 in the judgment of the Court:

30 *“Mr. Smith submitted that where the issue of compatibility is unclear or ambiguous, then*
31 *the duty is a strong one, far stronger than the duty to avoid absurdity. In so submitting,*



1 Mr. Smith drew the Court's attention to the speech of Lord Steyn in *R v A* [2001] UKHL
2 25 at paragraph 4, in which he said:

3 "...In the progress of the Bill through Parliament the Lord Chancellor observed
4 that 'in 99 per cent of cases that will arise, there will be no need for judicial
5 declarations of incompatibility' and the Home Secretary said, 'We expect that, in
6 almost all cases, the courts will be able to interpret the legislation compatibility
7 with the Convention'.

8 ... The techniques to be used will not only involve the reading down of the express
9 language in a statute but also the implication of provisions. A declaration of
10 incompatibility is a measure of last resort. It must be avoided unless it is plainly
11 impossible to do so...."⁴⁷

12 204. Counsel's alternative submission is thus that if the Court is not satisfied as to the primary
13 arguments of the Respondents as to compatibility, there would at least be such uncertainty and
14 ambiguity that the strong interpretive duty under s.25 comes into effect. In support Counsel
15 highlighted the reference in the said judgment to the case of *Re Canute Nairne*, in which
16 Henderson J. stated:

17 "24. The obligation to attempt to read a challenged provision in a manner compatible
18 with the UK Human Rights Act has been described there as a "strong
19 'interpretative obligation'". I accept that the courts of the Cayman Islands must
20 approach the interpretative obligation with equal vigour, but the occasion is
21 unlikely to occur as often because the Human Rights Act provision is expressed in
22 broader language than s.25; the former (in s.3 (1)) sets down an obligation ("as
23 far as it is possible to do so") which is not limited to "unclear or ambiguous"
24 cases.)"⁴⁸

25 205. Counsel for the Respondent argued that if there is in fact some sort of consultation procedure,
26 it does bring the *Roads Act* itself into the realm of ambiguity and uncertainty and thus the
27 strong interpretative duty would apply and that by virtue of s. 25 of the *BoR*, this Court should
28 therefore read and give effect to the *Roads Act* in a way which is compatible with the *BoR*.

29
30 206. Counsel referred to s.20 (h) of the *Roads Act* which provides a power for the "*The Governor*
31 *in Cabinet upon recommendation by the Roads Authority, to make regulations generally for*
32 *the better implementation of this Law*". The submission is that the existence of this power
33 means that the *Roads Act*, is capable of being interpreted compatibly with both s.7 (1) and s.15

⁴⁷ Ibid para 61

⁴⁸ Ibid para 60



1 (1)(c)(2) of the **BoR**. This because it would be possible under s.20 (h), to introduce regulations
2 and codify prior procedures and full statutory appeal rights which meet all of the Petitioners'
3 requirements, all the Rules for inquiring into the facts, the right of access, the statutory appeal
4 to the Grand Court and further right of appeal to the Court of Appeal. This would mean said
5 Counsel, that the Act is not and cannot be incompatible with the **BoR**, notwithstanding that
6 those regulations are not yet in force. Consequently no declaration of incompatibility can or
7 should be made and that for those reasons, the Petitioner is not entitled to these claims or any
8 remedies and the Petition should be dismissed.
9

10 **PETITIONER'S REPLY TO S. 20 (H) POINT**

11 207. In response to the Respondents' submissions as to s.20 (h) and the power to make Regulations
12 under the **Roads Act**, Counsel for the Petitioners submitted that no regulations have been made.
13 Counsel argued that an entire system of rules cannot be added to the **Act** by way of reading
14 down. This would go far beyond what the Court is able to do in relation to construing the
15 compatibility of an Act with the **BoR**.

16
17 208. Counsel also pointed to the cautionary position expressed by the CICA in the case of cited case
18 **Ellington** in respect of legislation. Counsel said that while a declaration of incompatibility is
19 the last resort, this must be the case where the circumstances warrant and that whilst the Court
20 has to attempt to construe laws compatibly with the **BoR**, it serves the public purpose in making
21 a declaration of incompatibility to identify for the Legislature where issues arise which require
22 a remedy.



23
24 **CONCLUSION**

25 209. In my view the Respondents' arguments as to s.20 (h) would require the Court to effectively
26 legislate to add rules and regulations and is the very activity which the Appellate Court has
27 cautioned against. I do not consider that this would be appropriate. The Respondents argued
28 against the position taken by the Grand Court in the case of **Day and Bush v. Governor of the**
29 **Cayman Islands and Others** with respect to s.5 of the Order. This position in part relied on the

1 dicta in the case *Roodal v. The State*,⁴⁹ which was stated to be that the power of modification
2 “extends to making substantial amendment to laws, either by deleting parts of them or making
3 additions to them to substitute new provisions for old.” The Petitioners argued in written
4 submissions in favour of the use of the s.5 powers as discussed by the Grand Court⁵⁰ but
5 appeared to be less forceful on this in the course of oral arguments. The consensus which
6 emerged is that the interpretative obligation under s.25 applies, in circumstances where there
7 is lack of clarity or ambiguity.

8
9 210. I have considered the arguments in some detail particularly with respect to the s.7 issue
10 identified. I do consider that there is some ambiguity as the Respondents argued. If I am wrong
11 as to my conclusions with respect to the acceptability of a broad informal scheme, the
12 Petitioners have provided examples in the *Registered Land Act* (s.18 (2)) of the simple wording
13 which will suffice. I would have proposed that s.6 of the *Roads Act* be read and construed in
14 accordance with the Constitution so as to include after the word compensation, “and having
15 given all persons affected an opportunity of being heard.”

16
17 211. Having considered all the circumstances and the submissions made, I would answer the
18 questions raised by the issues in the negative as follows:

- 19
20 i) The *Roads Act* is not incompatible with the right of the Petitioners to
21 peaceful enjoyment of property as provided for by s.15 of the *BoR* in
22 that the right of access to the Grand Court is provided by other means.
23
24 ii) The right of the Petitioners to a fair trial as provided for by s.7 of the
25 *BoR* has not been infringed by failing to permit them a right of access
26 to the Grand Court whether direct or on appeal from any other
27 authority for the determination of the legality of the taking of
28 possession of the Petitioners’ lands.
29



⁴⁹ 2003 UKPC 78

⁵⁰ Paragraphs 53 to 59 of submissions dated 27th February 2020

1 212. The Petition is therefore dismissed. Any party seeking to be heard on costs may provide written
2 submissions in respect thereof within 14 days of receipt of the perfected judgment.

3 **Dated this the 4th day of October 2021**

4 

5 **Honourable Justice Cheryll Richards Q.C.**
6 **Judge of the Grand Court**