ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

HCVAP 2009/024

BETWEEN:

GASTON BROWNE

Appellant

and

[1] THE ATTORNEY GENERAL OF ANTIGUA AND BARBUDA
[2] NATIONAL PARKS AUTHORITY

Respondents

Before:

The Hon. Mde. Janice George-Creque — Justice of Appeal
The Hon. Mr. Davidson Baptiste — Justice of Appeal
The Hon. Mr. Errol Thomas — Justice of Appeal [Ag.]

Appearances:

Mr. Anthony Astaphan, SC and Mr. Ralph Francis for the appellant
Mr. Justin Simon, QC, Attorney General for the respondent

2010: June 30;
August 13.

Civil appeal – National Parks Act – Whether breach of section 22(1) of the National Parks Act is a question of law or mixed law and fact – Civil Procedure Rules 2000 Rule 8.7 – Pleading material facts – Whether failure to consult with National Parks Authority renders land transfer void ab initio – Whether party can rely on its own failure to avoid or enforce a contract

The appellant ("Mr. Browne"), was a Government Minister of Antigua and Barbuda prior to the 2004 General Elections. Under the pre-2004 administration, a policy and practice existed for more than twenty-five years, whereby Crown lands were sold to parliamentarians at concessionary rates. Pursuant to this policy, Mr. Browne was sold three acres of Crown land at a price of $25,000.00 per acre. The land was situated in the Nelson's Dockyard National Park and was thus subject to the National Parks Act (the "Act"). Section 22(1) of the Act required that the Development Control Authority ("DCA") should receive prior written approval of the National Parks Authority ("NPA"), a statutory body established under the Act, before granting, *inter alia,* any permission or subdivision in relation to land situated within a National Park. However, this section or any facts in support thereof were not pleaded by the Crown or the NPA. Section 24(2) of the Act (pleaded by the Crown and the NPA) stipulated that no land in the Nelson's Dockyard

National Park shall be, *inter alia,* assigned or leased without consultation by the Crown, with the NPA.

Cabinet recorded its decision to sell Crown land to Mr. Browne on 18th February 2004. The Cabinet recorded that the Ministry of Agriculture and Lands should determine the site. However, Mr. Browne was advised by letter dated 11th February 2004 that the land ("Parcel 404") had been demarcated and allocated; he paid the $75,000.00 purchase price on 12th February 2004.

There is no written record that the NPA was consulted by the Crown about the sale of Parcel 404 to Mr. Browne. Additionally, evidence was presented that there had never been any formal written consultation and that other lands in the National Park were sold without any consultation.

After the 2004 General Elections, a new government was formed and Mr. Browne was no longer a Cabinet Minister. The Attorney General and the NPA commenced an action in 2005, in essence, seeking to undo the sale and transfer of Parcel 404 by the Crown to Mr. Browne.

The Learned Trial Judge made several orders including that the subdivision, transfer, registration, of Parcel 404 was null and void *ab initio* relying on sections 22(1) and 24(2) of the Act. Additionally, he ordered Mr. Browne to deliver up the land certificate for Parcel 404 so that it may be dealt with in accordance with the law.

Mr. Browne appealed, in essence, contending that the Trial Judge erred in setting aside his Certificate of Title for Parcel 404 even though there had never been any prior consultations for sale of land in the National Park, and even though the onus was on the Crown to consult with NPA as NPA was under the auspices of the Crown. Additionally, Mr. Browne argued that the Judge ignored the fact that there had been oral consultations and that the Board of NPA were aware of the sale of Parcel 404 to Mr. Browne. Finally, Mr. Browne renewed on appeal, his submission that the allegation of lack of written approval by the NPA, in accordance with Section 22(1), of the Act was not pleaded by the Attorney General and the NPA and therefore, they ought not to have been allowed to pursue that issue.

Held: allowing the appeal, and ordering the respondent to pay costs to the appellant in the sum of $9,380.00:

1. That the effect of the breach of section 22(1) of the Act is a matter of law, but the question whether or not there was a breach of the section is a question of fact. Given that the entities concerned with compliance were the DCA and the NPA, such matters of compliance would be within the knowledge of the Government through the DCA and the NPA and not necessarily within the knowledge of Mr. Browne. Such facts, given that the legal consequence is to render certain acts void or invalid, ought to have been pleaded. The claimants were under a duty to plead these facts under **Civil Procedure Rules 2000** Rule 8.7.

2. Merely stating an issue in the pre-trial memorandum is not sufficient and does not cure failure to plead. The issues which may properly be stated for determination can only be based on a party's pleaded case. Accordingly, the Crown and NPA could not rely on failure to comply with section 22(1) of the Act as the main basis for the granting of declarations of invalidity of the land transfer, its registration, and the setting aside of the land certificate, as this was not pleaded.

3. A settled practice which contravenes a statutory provision does not take precedence over or impliedly repeal the clear provision of an Act of Parliament.

4. A party to a contract may not pray in aid his own wrong or breach for either avoiding or enforcing his obligations or rights. Section 24(2) of the Act, if breached, was breached, not by Mr. Browne, but rather by the Crown. Thus, the Crown cannot take the benefit of its own failure to consult with the NPA to set aside the Crown's already concluded sale and transfer to Mr. Browne. In any event, section 24(2) of the Act does not provide that a failure to consult renders a transfer of the land invalid or the act of so doing null and void.

   Caribbean Development (Antigua) Limited v Electronic Technology International (Antigua) Limited (Civil Appeal No. 13/2005 – unreported), followed.

5. The issue of consultation ought not to have been open to the Crown and the NPA because the Cabinet and the Attorney General are continuous; there is no separate or separation of personality or authority. Additionally, Cabinet and/or the Attorney General as representative of the Crown, allowed a practice of sales within the National Park to many persons without any consultation, prior to and after the 2004 general elections and accordingly the Trial Judge ought not to have ruled against Mr. Browne on an alleged failure by the Crown to consult the NPA.

6. That the Trial Judge, as a matter of law as well as fairness, in light of the prevailing practice, and in the absence of any wrongdoing of any kind on the part of Mr. Browne, ought to have refused relief to the Crown or the NPA and treat the sale and transfer as having been properly done since the power and obligation to do so laid squarely upon the Crown.

JUDGMENT

[1] **GEORGE-CREQUE, J.A.:** This appeal arises from the decision of the Learned Trial Judge wherein he granted relief to the Honourable Attorney General (suing in

that capacity and representing and seeking to protect the public interest[1]) and to the National Parks Authority ('the NPA"), a statutory body established pursuant to the National Parks Act,[2] ("the Act"). The relief granted to them resulted in the appellant's Land Certificate in respect of a parcel of land described on the Land Register of Antigua and Barbuda as Parcel 404 Block 35 2580A in Registration Section English Harbour, being 'delivered up to the Registrar to be dealt with in accordance with the law'. This order was based on a finding by the Trial Judge that the NPA was not consulted by the Crown pursuant to section 24 of the Act, when the Crown agreed and sold to the appellant Parcel 404. Parcel 404, though owned by the Crown, is located within the area of land designated by the Act as Nelson's Dockyard National Park. The order was also based on the finding by the Trial Judge that the Development Control Authority ('the DCA"), another statutory body of the Crown, had not obtained the prior written approval of the NPA pursuant to s. 22 of the Act, when it effected a combination and subdivision from which Parcel 404 was created and subsequently transferred by the Crown to the appellant by way of sale and in respect of which the appellant became registered as owner with absolute title in March 2004.

The Background

[2] The following is gleaned from facts which are not in dispute:

(1) The appellant ("Mr. Browne"), prior to the 2004 General Elections was a Minister of the Government of Antigua and Barbuda.

(2) Under the pre-2004 administration there existed for upwards of twenty-five years, a policy and practice whereby Crown lands were sold to parliamentarians at concessionary rates.

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[1] See: para. 1 of Statement of Claim

[2] Cap. 290 of the Laws of Antigua and Barbuda.

(3) Notwithstanding that the area known as Nelson's Dockyard at English Harbour was designated under the Act as a National Park in 1984 the land remained vested in the Crown.

(4) Pursuant to this land policy, an agreement was reached whereby Mr. Browne was to be sold by the Crown an area of land comprising three acres at the concessionary price of $25,000.00 per acre.

(5) The land identified by the then Chairman of the NPA for sale to Mr. Browne fell within the Nelson's Dockyard National Park and as such was subject to the provisions of the Act.

(6) Cabinet recorded its decision to sell Crown lands to Mr. Browne evidenced by Cabinet Decision dated 18th February 2004. That Cabinet decision recorded that the Ministry of Agriculture and Lands should determine the site.

(7) Mr. Browne was advised by letter dated 11th February 2004 by the Lands Officer in the Ministry of Lands on behalf of the Permanent Secretary in that Ministry and the Minister with responsibility for lands, that the land had been demarcated and allocated. This was Parcel 404.

(8) Mr. Browne was asked to pay the purchase price of $75,000.00. He did so on 12th February 2004.

(9) Mr. George Duberry who at the relevant time was Chief Lands Officer, in his witness statement said that around May 2003 he was contacted by Mr. Fuller, the then Chairman of the NPA who had advised that the NPA had "agreed to sell 3 acres of land in the area of the Nelsons Dockyard National Park to' Mr. Browne and that Mr. Fuller identified the site to him. He said he was also aware of Government's land policy of issuing land to parliamentarians at

concessionary rates. He issued the approval to the Chief Surveyor for the approval of the survey plan which resulted in the creation of Parcel 404. He processed the sale agreement, he said, in keeping with governmental policy. The transaction took its usual course and in due course Mr. Browne was registered as owner of Parcel 404 and a Land Certificate number 1653 of 2004 was issued to him.

(10) Mr. Aldin Crump who at the relevant time served as the Town and Country Planner of the DCA and thus also served as a member of the Board of the NPA until 23rd March 2004, stated in his witness statement that Mr. Fuller had discussed with him the acquisition of the 3 acres of the land within the Park to be sold to Mr. Browne and he (Mr. Crump) had given his consent.

(11) Mr. Donald Edwards, who was Permanent Secretary in the Ministry responsible for lands, as from October 2005,[3] set out in his witness statement the procedure undertaken on a land sale from the Crown to a person and stated, in effect, that once the site and price had been determined, and the survey of the land had been completed and authenticated, 'an allocation letter' would be prepared and the purchaser would be advised to pay the purchase price of the land to the Ministry. He further stated that once payment is completed and the transfer instrument is prepared the file with the various minutes or notes of the steps taken or to be taken is eventually sent to the Ministry of Legal Affairs for vetting and further forwarding to the Governor General for his signature on the Instrument of Transfer.

(12) It is not disputed that the Instrument of Transfer to Mr. Browne was vetted by the Ministry of Legal Affairs and was eventually signed by the Governor General and Mr. Browne on 17th March 2004.

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[3] His predecessor in office at the relevant time was one Mr. W. Burleigh.

(13) It is not disputed that there is no written record of Cabinet or the NPA or the Ministry for Lands on behalf of the NPA being consulted by the Crown or any representative of the Crown.

(14) There is evidence that since 1984 there has been no formal written consultation or written request for permission to subdivide lands within the National Park; other lands in the National Park have been sold prior to 2004 and thereafter without any written record of consultation or consultation with the NPA.

(15) There is also evidence that Mr. Fuller, as Chairman of the NPA at the relevant time was fully cognisant of the transaction and that he told some or other members of the NPA of it some of whom confirmed this to be so. Mr. Browne also told some members of the NPA of it.

(16) There is evidence that there is no clearly established procedure for such consultation. Ms. Valerie Hodge, the new Chairman of the NPA gave evidence to the effect that consultation could be oral by 'talking.'

(17) The General Elections held in Antigua and Barbuda on 23rd March 2004 saw a 'changing of the guards'. A new administration took over. Cabinet now comprised a new slate of Ministers. Successful former Ministers then became members of Her Majesty's Loyal Opposition.

(18) Changes also followed in some civil service positions[4]. The Board of the NPA also underwent change. Ms. Valerie Hodge replaced Mr. Fuller as Chairman of the NPA by July 2004.[5] The former

[4] The Permanent Secretary in Lands, Mr. Burleigh was replaced by Mr. Edwards, Mr. Duberry is no longer Chief Lands Officer, and Mr. Crump is no longer Town and Country Planner and as such no longer sits on the board of the NPA. The Cabinet Secretary Mr. Lounel Stevens was replaced.

[5] Mr. John Meade ceased being a member of the board of NPA.

Chairman Mr. Fuller was described in the joint reply of the Attorney General and the NPA as "a high-ranking member of the Antigua Labour Party". The office holder of the Attorney General also changed to the current Attorney General who brought this action.

(19) The new Chairman of the NPA said the NPA became aware of Mr. Browne's purchase and ownership of Parcel 404 only when he wrote later in December 2004 seeking permission to develop Parcel 404.

(20) This action commenced on 20th July 2005 in which, in essence, the Attorney General and the NPA sought to undo the sale and transfer of Parcel 404 by the Crown to Mr. Browne effected under the previous administration.

The relief sought

[3] In the claim, the Attorney General and the NPA sought the following:

(1) a declaration that Mr. Browne was guilty of misfeasance in public office and breach of trust in relation to the sale and purchase of Parcel 404.

(2) a declaration that the sale of Parcel 404 was effected without consultation with the NPA contrary to section 24(2) of the Act;

(3) a declaration that the decision of Cabinet of 18th February 2004 did not validate or ratify the sale/purchase agreement made on 12th February 2004 between the then Minister of Lands and Mr. Browne; Rescission of the sale/purchase agreement;

(4) An order for delivery up of the Land Certificate in respect of Parcel 404 to the Registrar of Lands to be cancelled; and

(5) Damages for the tort of misfeasance.

The Trial Judge's conclusions

[4] The Learned Trial Judge found that the tort of misfeasance in public office had not been made out and dismissed that claim [para. 99 of judgment]. He also dismissed the claim for rescission of the sale/purchase agreement in respect of Parcel 404, having found that the contract had already been performed [para. 108 of judgment]. In relation to sale and purchase of Parcel 404 he made these findings:

(1) that Cabinet knew of the location and presumably other details of the land being sold; that there would not have been a specific reference to the sale to Mr. Browne of 3 acres of land in the 2004 Cabinet decision and minute unless Cabinet knew that Mr. Browne was purchasing the specific subject 3 acre parcel of land; that the sale/purchase of the land was hardly a clandestine affair; at least three of the members of the NPA being aware of Mr. Browne's desire to purchase. Personnel in the DCA and the Ministry of Agriculture, including the Minister, were also aware [para. 103];

(2) the contract for sale of land was between the Cabinet (Government of Antigua and Barbuda) and Mr. Browne, and the contract has already been performed in its entirety; with the Government of Antigua and Barbuda perfecting the sale of the subject parcel of land by preparing and vetting the land transfer document (also his Excellency the Governor General, signing the instrument) and registering Mr. Browne as the proprietor of the subject parcel [para. 107];

(3) there was no pleaded claim for rectification of the Land Register for 'Mistake' pursuant to section 140 of the Land Registration Act [para. 109];

(4) that breach of the Act does not affect the Government's agreement to sell the Land to Mr. Browne; No consultation or prior written approval by or for anyone, is required for the Crown to enter into an agreement for sell Crown lands. After (if not before) entering into such agreement however, compliance with the Parks Act is required to take the transaction to the next level. "The Cabinet agreement to sell remains intact but the other transactions requiring prior written approval, – such as the subsequent subdivision and any approvals thereto – are vitiated and further still, the actual sale, transfer and registration is rendered unlawful." [para. 110].

[5] The Trial Judge then made various orders. Among them he ordered as follows:

"(ix) The sale, subdivision, transfer and registration of the land, to wit, Parcel 404 Block 35 2580A, Registration Section, English Harbour, to the first named Defendant, Gaston Browne was effected without the prior written approval or consultation with the 2nd named Claimant, National Parks Authority, contrary to section 20(sic)(1) and 24(2) respectively of the National Parks Act. Cap 290 of the Laws of Antigua and Barbuda; and therefore:

(x) The transfer of the parcel of land is null and void ab initio

(xi) The registration of the said parcel in the name of the 1st Defendant is null and void ab initio.

(xii) The subdivision of the said parcel of land is null and void ab initio

(xiii) As a result of the above declarations and findings, the 1st Claimant (sic) deliver up the land certificate in respect of the said parcel of land to be dealt with in accordance with the law.

(xiv) The Cabinet decision and the Government's agreement for the sale of the said parcel of land to the 1st Defendant is valid and still subsists, subject to the National Parks Act and Law;

(xv) That the 1st named Defendant be at liberty to cause compliance with the National Parks Act. The court expresses no opinion on the process or its outcome;"

The Appeal

[6] Mr. Browne has appealed those parts of the Judge's findings, conclusions and orders, that set aside the land transfer, registration of the land transfer, and the Land Certificate issued to Mr. Browne in respect of Parcel 404. There is no cross-appeal by the Attorney General or the NPA. Mr. Astaphan, SC on behalf of Mr. Browne, states the issues arising on appeal as the following:

(1) whether the Judge erred or misdirected himself when he set aside Mr. Browne's certificate of Title;

(2) whether the Judge erred or misdirected himself when he relied on an alleged failure on the part of the Crown to consult an Authority under its control;

(3) whether the Judge erred or misdirected himself when, notwithstanding the complete absence of any consultation or practice of consultation for over twenty (20) years, he held that the sale to Mr. Browne ought to be set aside because the Cabinet or Crown failed to consult with the authority under its control;

(4) whether the Judge erred or misdirected himself when he failed to consider the undisputed evidence that there was no prior consultation of any kind for over twenty years and/or sought to penalise Mr. Browne for an alleged failure for which he was in no way responsible;

(5) whether the Judge erred or misdirected himself when he failed to consider the evidence of oral consultation which took place/ and or the evidence that the board of the NPA were well aware of the intended sale to the appellant;

(6) whether the Judge erred or misdirected himself when he failed to exercise his discretion and refuse to grant any relief to the Respondents;

(7) whether the Judge was wrong on the issue of consultation.

Non-contested contentions

[7] It is accepted that:

(1) the duty to consult under s. 24 of the Act was on the Crown and not on Mr. Browne and accordingly any failure to consult, and thus any breach of s. 24, amounted to a breach by the Crown and not Mr. Browne.

(2) Assuming that reliance may be placed on s. 22(1) of the Act, the obligation to obtain prior written approval of the NPA was that of the DCA and not Mr. Browne, and accordingly any failure to do so would amount to a breach of this section by the DCA and not Mr. Browne.

(3) That the DCA as well as the NPA are both statutory bodies of the Crown[6]. Indeed the Attorney General posits that there is no 'disconnect' between NPA and the Executive of Government.

(4) It is not being asserted that Mr. Browne is guilty of misconduct or acted improperly in obtaining title to Parcel 404 from the Crown. Indeed it is not asserted that in so doing he acted fraudulently or under some mistake which would bring into play section 140 of the **Registered Land Act**.

The Pleading Point

[8] Mr. Browne has raised on appeal, an issue which was raised below in his submissions. Counsel for Mr. Browne contends that the allegation of lack of written approval by the NPA to the DCA for the subdivision creating Parcel 404

[6] Under the Act the Minister who gives policy direction to the NPA is the Minister with responsibility for Economic Development and Tourism; under the Land Development and Control Act Cap 235, the DCA operates under the auspices of the Minister of Cabinet responsible for land development and control.

was not pleaded by the Attorney General and the NPA and therefore, they ought not to have been allowed to pursue that issue. Mr. Simon conceded that this was not pleaded but says that there was an acceptance of this as an issue by virtue of the Pre-Trial Memorandum[7] and that the trial proceeded on this basis and the point only taken in Mr. Browne's closing submissions.

[9] I think it worthwhile to set out in part paragraph 89 and also paragraphs 91, 92 and 98 of the judgment of the Trial Judge as these, in my view, form the basis of his decision for declaring the transfer and registration of Parcel 404 as being null and void ab initio notwithstanding that the claimants had sought (a) no declarations or other relief in respect of section 22(1) of the Act on their claim:

> "[89] …. I accept the submission of Senior Counsel for the claimants that notwithstanding the claimant not pleading reliance on section 22 of the Act, the Court is required to apply the law to the facts of this matter. A party is not required to plead law except in limited circumstances such as for instance, when a defendant is relying on a limitation period. In any event this section is not required to be pleaded.
>
> [90] …..
>
> [91] The uncontroverted evidence is that no such prior written approval was obtained by DCA or anybody purporting to act with delegated authority from any such body. Neither the Crown nor the DCA can dictate to the Authority to grant the written approval. ….
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> [92] The effect of this is that the subdivision that created the parcel 404 and any permission, approval, authority, that may have been granted in relation to that land and subdivision, is null and void ab initio; as if it never took place.
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> [98] The tandem effect of the breach of s 22 and s24 of the Act, is to now put the 1st Defendant in the position he would have been in after the Cabinet decision to sell the subject land to him (the agreement for sale), but prior to the prohibited subdivision and transfer to the 1st Defendant. It leaves in tact the Cabinet's agreement to sell to the 1st Defendant the subject land, but subject to section 22(1) and 24(2) of the Act or other lawful consideration being satisfied."

[7] See: Pre-Trial Memorandum – pg. 122 –ROA –para. 3

[10] Mr. Astaphan contends that this was not a mere matter of law but a material fact. I agree. This is borne out by paragraph 91 of the Learned Judge's judgment. The effect of the breach of section 22(1) of the Act is a matter of law, but the question whether or not there was a breach of the section is a question of fact. The Crown, in their submissions, accepts it is one of mixed fact and law. Given that the entities concerned with compliance were the DCA and the NPA, such matters of compliance would be within the knowledge of the Government through the DCA and the NPA and not necessarily within the knowledge of Mr. Browne. In my view, such facts, bearing in mind that the legal consequence is to render certain acts void or invalid, ought to have been pleaded. That is the claimants' duty under CPR 8.7. Mr. Browne was entitled to know, based on the matters pleaded, the case he had to meet, and that reliance was being placed on this section for vitiation of his land transfer and his registration as proprietor of Parcel 404 and for cancellation of his land certificate.

[11] There was no reference whatsoever to any matter which raised the issue as to whether written approval was necessary or whether such written approval had been obtained by the DCA from the NPA in keeping with s. 22 of the Act in the Crown's and NPA's pleading. Indeed, there was no relief sought in reliance upon breach of this section. s. 22 of the Act appears to have been introduced through a side wind in the nature of a witness statement of the new chairman of the NPA, but this was not, in my view, sufficient since this was not foreshadowed in their pleaded case. Similarly, I do not consider that merely stating it as an issue in the pre-trial memorandum is sufficient or cures the failure to so plead. No authority has been cited for holding that where a statement of case is devoid of pleading a specific matter, the consequence of which is invalidity, such a gap can be filled by stating it as an issue in the pre-trial memorandum. The issues which may properly be stated for determination can only be based on a party's pleaded case.

[12] I have always understood the purpose of the pre-trial memorandum as a document enabling the Trial Judge to assess the readiness of the parties for trial and to give any further directions for this purpose, based on the parties' respective

pleaded case. The gravamen of the claimants' case under the Act was grounded in the lack of consultation under s. 24(2). There is no averment whatsoever in the Crown's or NPA's pleading to the effect that Parcel 404 had been improperly combined or subdivided and as a result was invalid as well as all transfers, and registrations bearing reference to that parcel. Accordingly, I do not consider that it was appropriate for the Crown and NPA to pursue and rely on this issue and more so to be used as the main basis for the granting of declarations of invalidity of the land transfer, its registration, and the setting aside of the Land Certificate.

[13] Having so concluded, this alone ought to be sufficient to dispose of this appeal by setting aside those orders made in reliance upon a breach of s. 22 of the Act. For completeness however, I propose to consider the question whether in the circumstances the Crown, based on its accepted failure to consult with the NPA, ought to have been granted the relief as given by the Trial Judge.

Consultation

[14] s. 24(2) of the Act states as follows:

> "Subject to the provisions of section 21, all lands, buildings, structures, rights or easements which at the date when this Act comes into operation are situate within or, as the case may be, appertain to the Nelson's Dockyard National Park and which at that date are vested in the Crown shall remain so vested and shall not, without consultation with the Authority, be assigned, sublet, leased, mortgaged or dealt with in any other manner either by the Crown or by any person deriving title from the Crown."

It is accepted that this section imposes on the Crown a duty to consult with the NPA where it is intended to assign, or deal in any manner with lands forming the Nelson's Dockyard National Park.

[15] Mr. Simon contends that there was no consultation between the Crown and the NPA as required by s. 24(2); that even though some members of the NPA were told or made aware of the transaction there is no minute of the NPA or record showing that the matter was ever discussed at a meeting of NPA. I think it is safe to say that Mr. Bird the then Minister for Lands, was not aware of the statutory

requirement to consult with the NPA. He believed that Mr. Browne had consulted with the then chairman of the NPA, Mr, Fuller, the Secretary and the whole board of the NPA. Mr. Fuller, the former chairman of the NPA, did not give evidence in the trial.

[16] There is evidence however from Mr. Crump and Mr. Duberry that they had been made aware of the proposed sale of the land in the park to Mr. Browne. Mr. Crump as Town & Country Planner was also a member of the board of NPA. He gave his consent. He stated that he did not recall the sale of Parcel 404 being discussed at any board meeting and that he was not aware of any formal procedure for consultation Mr. Duberry acted for the Permanent Secretary in the Ministry of Lands. He said that Mr. Fuller, the then Chairman of NPA, had spoken with him; he regarded Mr. Fuller as having the authority of the NPA and he proceeded to identify, and have the land surveyed and subdivided and issued the allocation letter. The Legal Department of the Crown prepared the land transfer. He said that at no time during the transaction did any officer of the Legal Department indicate to him that something was irregular with the procedure; that had he known of anything wrong he would not have requested his Minister, Mr. Bird, to give his approval. Mr. Meade, another board member, also stated that he was made aware and approved of it.

[17] Ms. Anne-Marie Martin, Parks Commissioner, said in her evidence that she checked the NPA's records and minutes covering the relevant period and could find no written record of any consultation with the NPA on the proposed sale of Parcel 404. She stated under cross examination that she had inquired of two other board members of the NPA, after the fact, as to their knowledge of the transaction, and that there is nothing … on how consultations are to be held. She also stated that one Dr. Singh had acquired land in the National Parks area and that there were consultations with Dr. Singh after NPA found out of his purchase. NPA did not however sue Dr. Singh.

[18] Mr. Donald Edwards said that the 3 acre area of land of Mr. Browne within the park is between Slipway (a marina) and Galleon Beach Club; that the Crown had sold lands in the park since 2004 and that it was not an unusual event to sell land within the park. He was not aware of a Parks plan; that in relation to the transfer of land within the Park to Mr. Singh he did not receive any documents or have any consultations with NPA about it; that there is nothing unusual not to have any consultations with respect to the transfer to Mr. Browne; and that all processes, meaning the preparation of the cabinet minute, preparation of the survey plan and receipts from the accounts department are all done by professional technicians of the Government.

[19] Valerie Hodge, the current chairman of the NPA said that it is a fact that Government has been selling land in the Nelson's Dockyard National Park; that there are no minutes of the NPA with respect to consultation for the purchase by Dr. Singh. She said consultation can take the form of 'talking' among other things".

[20] Mr. Browne, in his witness statement said that he had a number of discussions with Mr. Fuller concerning his desire to purchase the land. It may be reasonably inferred that Mr. Fuller acquired his knowledge, from Mr. Browne.

[21] What becomes apparent from the evidence taken in its totality is that:

(1) lands in the Nelson's Dockyard National Park have been sold by the Crown prior to and after the sale to Mr. Browne;

(2) there was a practice of lack of consultation by the Crown with the NPA as if the Crown or its agent was wholly unaware of this requirement;

(3) there was no established procedure for consultation with the NPA;

(4) the then chairman Mr. Fuller, the then Town and Country Planner and member of NPA, and a number of other members of the NPA were fully aware of the intended sale, to Mr. Browne notwithstanding that there is no board minute or written record of it;

(5) notwithstanding this knowledge no member raised an objection to the proposed sale in fact the then chairman and some other members supported it.

[22] Mr. Simon, QC says that the fundamental question which arises is whether, in the absence of a settled practice of consultation, or prescribed procedure of consultation or no established practice of any consultation of any kind, the court can and should ignore the clear provisions of the Act and exercise its discretion in favour of Mr. Browne. In other words, does a settled practice which contravenes statutory provision take precedence over or impliedly repeals the clear provision of the Act. Couched in this way the answer must surely be 'no'. To my mind however, the more fundamental question to be answered in the circumstances of this case is this: Can it be right and just for the Crown, acting by a new administration and a re-constituted NPA, to take the benefit of the Crown's own failure (for which no fault is and can be attributed to Mr. Browne) and set aside the Crown's already concluded sale and transfer to Mr. Browne?

[24] It bears note that the Act does not specify a consequence for failure by the Crown to consult. Specifically, it does not say that where there is a failure on the part of the Crown to consult that any assignment or other dealings with Crown lands in the Park is vitiated thereby. Ordinarily, the general principle is that where an enactment permits a party to take certain actions but only in accordance with a specified procedure and the party fails to act, in accordance with that procedure the act may be rendered void or may become voidable. In the instant case however, the obligation was on the Crown and it is the Crown that holds title to the land in question, not the NPA. The Legal Department of the Crown vetted the transaction, and the transfer of the land was perfected by the Crown. In the absence of any clearly established procedure for consultation it would be difficult to conclude that there was no consultation. As the Learned Trial judge found, the Cabinet knew of the transaction. This would include the Minister with responsibility for the NPA. The then Chair of the NPA and apparently most if not all its then board members knew of the transaction. Can it then be open to challenge by a

new NPA board and a new Cabinet representing the Crown? I think not. It is perhaps worthwhile to be reminded that whereas, changes in governmental administrations occur from time to time, the Crown, in a monarchial system, as is the case of Antigua and Barbuda, remains constant and indivisible. To my mind, even were it to be accepted that the Crown acted contrary to section 24(2) it would be a stretch to conclude that the Crown's assignment or dealings with its lands are rendered invalid by such failure on its part. No doubt there may be good reasons for the Crown not fettering its rights and powers in this manner.

[25] There is no doubt that if section 24(2) was breached, it was not by Mr. Browne, but rather by the Crown. Yet, based on the Trial Judge's order it is the Crown calling in aid its own breach so as to set aside a concluded sale to the prejudice or detriment of Mr. Browne. In the law of contract there is the well known principle that a party to a contract may not pray in aid his own wrong or breach for either avoiding or enforcing his obligations or rights thereunder.[8]

[26] Mr. Astaphan contends that the issue of consultation ought not to have been open to the Crown and the NPA because, he says, the Cabinet and the Attorney General are continuous; there is no separate or separation of personality or authority and the undeniable evidence is that the Cabinet and/or the Attorney General as representative of the Crown, allowed a practice of sales within English Harbour to many persons without any consultation, prior to and after the 2004 General Elections and accordingly the Trial Judge ought not to have ruled against Mr. Browne on an alleged failure by the Crown to consult the NPA. I am inclined to agree. In so agreeing this does not in any way, in my opinion, diminish the efficacy of s. 24(2) but merely recognizes the broader principle in the circumstances of this case, that a wrongdoer ought not to be permitted to take advantage of his own wrong to frustrate or avoid obligations owed to the blameless party.

[8] Caribbean Development (Antigua) Limited v Electronic Technology International (Antigua) Limited (Civil Appeal No. 13/ 2005 – unreported)

[27] The very framing of the Trial Judge's orders set out above, [para. 5] bespeaks the conundrum in which he found himself having concluded, in my view rightly, that:

(1) fraud, misconduct, mistake, or breach of any law on the part of Mr. Browne; or

(2) the remedy of rescission, did not avail the Crown. For example, he ordered delivery up of "the land certificate in respect of the said parcel of land "to be dealt with in accordance with the law." It is not clear what this means. His intent can only be gleaned from the prior orders declaring the transfer and its registration 'void ab initio.' He also ordered that "the 1st named Defendant be at liberty to cause compliance with the National Parks Act. The court expresses no opinion on the process or its outcome." This appears to suggest that Mr. Browne may compel the Crown to comply with its obligations thus clearly seeking to give effect to the agreement for sale of the land which the Learned Judge found to be valid and binding and which agreement, I may add, he also found to have been performed.

[28] This then raises the question, in the absence of fraud, mistake, or similar misconduct on the part of Mr. Browne, as to the basis for the invalidation of the registration of the transfer, instrument of transfer, and presumably the cancellation of the land certificate in favour of Mr. Browne thereby depriving him of his registered title to Parcel 404. As I said above, section 24(2) of the Act does not afford a basis for so doing. Given all the circumstances of this case, it is my view that the Trial Judge, as a matter of law as well as fairness, in light of the prevailing practice, and in the absence of any wrongdoing of any kind on the part of Mr. Browne, ought to have refused or declined to grant relief to the Crown or the NPA and treat the sale and transfer as having been properly done since the power and obligation to do so laid squarely upon the Crown. As Mr. Simon reminded the court, there is no 'disconnect' between the Executive and the NPA.

Conclusion

[29] For the foregoing reasons, I would allow this appeal and set aside the orders numbered (ix) to (xiii) and (xv) made by the Trial Judge.

Costs

[30] The Trial Judge made no order as to costs below. At the hearing of this appeal the parties were directed to file written submissions on costs and the basis of quantification within ten days. None have been filed. This matter attracts the prescribed costs regime under CPR 65.5. The claim was not valued and is not for a monetary sum. Accordingly, CPR 65.5(2)(b)(iii) applies and the claim is valued in the sum of $50,000.00. Based on this, the costs below would amount to $14,000.00. Thus, pursuant to CPR 65.13, the appellant shall therefore have his costs on this appeal fixed at two-thirds of that sum.

Janice George-Creque
Justice of Appeal

I concur.

Davidson Baptiste
Justice of Appeal

I concur.

Errol Thomas
Justice of Appeal [Ag.]