

SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

HCVAP 2007/021

BETWEEN:

[1] CHATHAM BAY CLUB LIMITED
[2] CHATHAM BAY DEVELOPMENT CORPORATION LIMITED
Appellants

and

JUDITH JONES-MORGAN
(Attorney General for the State of Saint Vincent and the Grenadines)
Respondent

Before:

The Hon. Mde. Ola-Mae Edwards	Justice of Appeal
The Hon. Mde. Janice George-Creque	Justice of Appeal
The Hon. Mr. Frederick Bruce-Lyle	Justice of Appeal [Ag.]

Appearances:

Mr. James Guthrie, QC, Mr. Parnell Campbell, QC and Ms. Ramona Frederick
for the appellant
Mr. Anthony Astaphan, SC, Mr. Greame Bollers and Ms. Ruth Ann Richards
for the respondent

2010: January 27;
August 13.

Civil appeal – Aliens (Land Holding Regulation) Act – Aliens Land Holding Licence – whether the Crown was estopped or waived right to forfeit – whether inequitable to forfeit – Delay, Laches, Acquiescence Section 6 of the Constitution – compulsory acquisition/ Deprivation of property without compensation

The Aliens (Land Holding Regulation) Act (the “Act”) prohibits the holding of land in Saint Vincent and the Grenadines by non-nationals (“aliens”), unless licenced by the Crown to do so. The Act allows for the attachment of conditions on the grant of a licence. Section 5(2) of the Act stipulates that failure to follow the conditions may result in the land being forfeited to the Crown.

The appellants (“Chatham Bay”) were non-nationals, in accordance with the Act, and applied for an Aliens Land Holding Licence to hold land situate at Chatham Bay on Union

Island in the Grenadines. After a series of negotiations, the Licence was granted to Chatham Bay on 5th March 1987. The Licence stated that Chatham Bay was licenced as the absolute owner of the land. It also stated that Chatham Bay was to develop a resort which included two restaurants and 55 guestrooms. Chatham Bay also pledged to spend at least EC\$15 million within three years of the grant of the licence to develop the property. The licence included condition 4(d) which stated that failure to perform would result in land being vested in the Crown.

By the end of three years, viz 6th March 1990, Chatham Bay had not developed the land or at anytime subsequently. Chatham Bay attempted to get other investors for the development, including a cruise line. These attempts were unsuccessful. Chatham Bay requested an extension of time for carrying out the development from the Government. In November 1991, Government wrote to say that consideration of the grant of an extension of time had been deferred pending submission by Chatham Bay of new proposals. Chatham Bay put forward no new proposals to develop the land. Another fourteen years went by, without any steps being taken by the Government to forfeit the Land. During that period Chatham Bay kept the land clean and secured.

On 25th January 2006, the Government issued its forfeiture claim against Chatham Bay. No letter before action or any notice of intended proceedings was given to Chatham Bay.

Chatham Bay denied that they were in breach of conditions 4 and 5 of the Licence. Alternatively, they contended that if they were in breach, the breaches had been waived by the Government and/or that Government was estopped from relying on such breaches. They also relied on the equitable doctrines of delay, laches, and acquiescence. Additionally, Chatham Bay counterclaimed that Government was in breach of its agreement to the effect that no proceedings for forfeiture would be brought without reasonable notice to Chatham Bay and further that they were being deprived of their property without compensation in breach of section 6(1) of the Constitution of Saint Vincent and the Grenadines ("the Constitution").

The trial judge rejected Chatham Bay's defences and declared a forfeiture of the Land. Chatham Bay appealed, in essence, contending that the trial judge was wrong to dismiss the defences and declare forfeiture and in rejecting the counterclaim for compensation based on section 6 of the Constitution.

Held: dismissing the appeal and ordering the appellant to pay costs to the respondent in the sum of \$13,400.00:

1. That words or conduct relied on as waiver must be clear and unequivocal. The Prime Minister's letter of 28th May to Mr. Terman stating that "if you are impatient by lack of progress in securing investors, perhaps you can offer the Land to Government" is not clear and unequivocal language from which to conclude that Government had waived its legal rights to forfeit the Land. The verbal assurance was at best a suspension of its rights for a three year period which would have ended in July/August 1994.

W.J. Alan & Co. v El Nasr Export (C.A.) [1972] 2 QB 189, 213, applied.

2. That the verbal assurance coming from the Prime Minister in July of 1991 that the Government would not bring proceedings for forfeiture of the Land for a period of at least three years, assuming that the Prime Minister was authorised to give this assurance was limited. This was not an assurance that no forfeiture proceedings would be taken at all.
3. That this is not a case where the parties had embarked upon a course of negotiations and discussions such as to arrive at a new agreement. Furthermore, given Chatham Bay's established inability even now to comply with the development conditions, the service of notice would not have brought about any change in its ability to take remedial action. Thus, the Crown need not give Chatham Bay reasonable notice before commencing forfeiture proceedings.

Hughes v Metropolitan Railway [1877] HL (E) 439, distinguished.

4. That the expenses incurred by Chatham Bay on cleaning and securing the Land were not undertaken in reliance upon Government's assurance or representation that the right to forfeit would not be exercised, as such acts were wholly consistent with normal acts of a land owner (which Chatham Bay was) until forfeiture occurred. In any event, the cleaning and securing of the Land is insignificant compared to the development that Chatham Bay was to undertake and thus even if they were done in reliance of an assurance, these acts would not make it inequitable for the Crown to forfeit.
5. Delay is not sufficient to ground a defence of laches. The delay must be coupled with some conduct which affects the balance of justice as between the parties. The cleaning and securing of the Land compared to the development that Chatham Bay should have undertaken on the Land does not weigh the equity in Chatham Bay's favour. Thus, the defence of laches fails.

Lindsay Petroleum Company v Hurd [1874] LR 221, applied.

6. The wording of section 6 of the Constitution envisages the possibility of property being compulsorily taken possession of or acquired for a purpose which is not a public purpose, hence the use of the words "except for". The trial judge erred in interpreting section 6 of the Constitution as addressing cases relating only to the compulsory acquisition of land analogous to the acquisition of land under land acquisition legislation.
7. Even though a statutory framework is in place by which an alien may hold an interest in land the conditions which may be imposed are not statutorily imposed and can only come about on the basis of agreement between the Crown and the alien. Thus, even though the Licence is governed by a

statutory framework, and the breach of any conditions stated therein carries a statutory consequence, the conditions of the Licence are contractual.

8. That the taking of possession by the Crown of the land from Chatham Bay was an incident of the contract. Thus, it would be caught by the exception in section 6(6)(a)(iii) of the Constitution and there would be no requirement for adequate compensation as forfeiture for breach of a condition in the Licence granted under the Act is expressly stated by section 6(6) of the Constitution as not being inconsistent or in contravention of section 6(1).
9. That an alien holding land as a freehold or fee simple owner under a conditional licence granted pursuant to the Act would, if in breach of the terms and conditions of the licence, continue, to hold the land until the land is forfeited to the Crown by a declaration of forfeiture. Thus, there was no detrimental reliance, inequity or prejudice caused to Chatham Bay because it continued to hold the land as freehold owners until the declaration of forfeiture.
 - a. **Ho Young v Bess** [1995] 1 WLR 350, and **Village Cay Marina Ltd v Acland** (1996) 52 WIR 238, followed.
10. The exercise of the power of forfeiture is not subject to any time limitations. Whenever the declaration of forfeiture is obtained, it relates back to the time when the liability for forfeiture arose.

JUDGMENT

- [1] **GEORGE-CREQUE, J.A.:** The State of Saint Vincent and the Grenadines, like many of its Eastern Caribbean counterparts, has legislation which prohibits the holding of land in such states or territories by non-nationals (“aliens”) unless licenced by the state or Crown to do so. In Saint Vincent and the Grenadines this legislation is the **Aliens (Land Holding Regulation) Act**.¹ (“the Act”). The Act allows for and contemplates the attachment of conditions on the grant of a licence. Invariably, the conditions set out the obligations undertaken by the alien for the development of the land in a certain manner; within a specified time frame. Such conditions may also set out the minimum expenditure to be laid out in carrying out the development.

¹ Cap 235 1991 Revised Laws of Saint Vincent and the Grenadines

[2] The Act also stipulates the consequence for breach or failure to perform in accordance with the conditions. That consequence is forfeiture of the alien's interest in the land to the Crown. This is contained in section 5(2) which says as follows:

"On breach of any condition in a licence to hold land as owner ... the estate and interest of the alien in the land ... held under the authority thereof shall thereupon be forfeited to the Crown"

Forfeiture is not automatic and must be declared by the court². However, on obtaining a declaration of forfeiture the Crown's title to the land which was the subject of the licence, then relates back to and commences as at the time when the liability for forfeiture arose³.

[3] On 29th June 2007 the Crown through the Attorney General obtained a declaratory judgment of forfeiture in respect of lands held by the appellants under a licence from the Crown. From this order they have appealed. A background summary is necessary before considering the grounds of appeal, so as to place the matter and the challenges made to the trial judge's findings and conclusions within proper context. In the body of this judgment the words "Government" and "Crown" are used interchangeably.

The Background

[4] The appellants ("Chatham Bay") are alien companies. On 2nd November 1985, they applied for an Aliens Land Holding Licence to hold land situate at Chatham Bay on Union Island, one of the Grenadines ("the Land"). The Land comprised upwards of 93 acres and is described in two deeds of conveyance both dated 27th November 1987 and bearing registrations numbers 3074 of 1987 and 3075 of 1987 respectively. In their application for a licence to hold the Land, Chatham Bay detailed their plans to develop the Land into a resort complex which would include a dock for vessels, restaurants, shops and guest rooms. On 3rd February 1986,

² See; section 7(1) - Aliens (Land-Holding Regulation) Act

³ See; sections 4, 5 and 7 of the Aliens (Land-Holding Regulation) Act, see also, Ho Young v Bess (Privy Council) [1995] 1WLR 350 at pg. 355

the then Prime Minister of the State responded to Chatham Bay's solicitors in the following terms:

"The proposals on Chatham Bay Development have already been agreed in principle with Mr. Richardson and other investors. The licence will be granted with performance clauses. Government's particular concern will be that the hotel and marine facilities will be in place before land is put on the market for homesites. The performance clauses will be as stipulated by your clients".

[5] On 2nd June 1986, the Permanent Secretary in the Office of the Prime Minister wrote to Chatham Bay's solicitors stating, in essence, that the price stated in the draft Alien's Land Holding Licence as the purchase price for the Land was unacceptable and returned the draft licence to Chatham Bay. Chatham Bay responded by letter dated 10th June 1986 pointing, out among other things, that the price was one freely agreed to as between Chatham Bay and the owner of the Land.

[6] On 29th December 1986, the Permanent Secretary wrote to Chatham Bay's solicitors informing them of Cabinet's approval of the grant of a licence to Chatham Bay to hold the Land. That letter also stated as follows:

"I am to further advise that such approval was granted, however, on condition that the licence be further amended to include the following new provision under condition 4, namely: -

(d) failure to perform would result in land being vested in the Crown."

The draft licence was yet again returned for the inclusion by Chatham Bay of this condition. Chatham Bay was quick to point out by their solicitor's letter of 7th January 1987 that this requested condition was "superfluous" since section 4(1) of the Act in effect stated that on breach of any condition in the Licence the estate and interest of the alien in the land shall be forfeited to the Crown. Government however prevailed in its request and Chatham Bay agreed to have this term expressly stated as a condition in the Licence.

[7] After further correspondence, a further draft licence was submitted by Chatham Bay under cover of a letter dated 28th January 1987. On 5th March 1987, the Permanent Secretary again wrote to Chatham Bay and informed that Cabinet had approved the grant of a licence (“the Licence”) to Chatham Bay to hold the Land and that the Licence had been signed and sent to the Registrar of the High Court for delivery to Chatham Bay upon their compliance with the Act.

[8] The Licence dated 6th March 1987 stated among other things that Chatham Bay was licensed to hold the Land as absolute owner. It also set out the various conditions as finally agreed between the parties to which the Licence was subject. The relevant conditions for the purposes of this appeal are those set out in clauses 4 and 5 of the Licence which are now reproduced:

“4. Chatham Bay Club Limited will construct a luxury class resort at Chatham Bay including:

(a) a large pavilion which will enclose two restaurants, seating 90 patrons and 50 patrons respectively;

(b) a minimum of 55 guest rooms;

(c) other facilities;

(d) failure to perform would result in land being vested in the Crown.

5. A minimum expenditure on the cost of construction of EC\$15 million within 3 years of the grant of this Licence.”

It is accepted, though the language of the Licence may have been inelegantly drafted, that Chatham Bay was to carry out a resort development on the Land within a three year period, expending at minimum on such development, EC\$15 million; and that failure to perform would result in the Land being vested in the Crown as per condition 4(d) in the Licence or forfeited to the Crown pursuant to the provisions of the Act.

[9] Chatham Bay experienced some delays in payment of the Licence fees and the registration of the Licence and sought extensions from the Crown. These were

granted. Of particular note is that on granting the extension for the registration of the Licence the Permanent Secretary on 30th September 1987 also wrote as follows:

"I am to inform you further that Cabinet wishes to underscore the provisions of Clause five (5) of the Licence with particular reference to the date on which that clause becomes operational, and to reiterate its position in that regard"

Government was accordingly making it clear that the time line for the development commitment began to run as from the date of the Licence namely, 6th March 1987, despite the extensions granted for payment of the Licence fees and registration of the Licence.

[10] By the end of the three year period, namely 6th March 1990, the development of the Land had not materialised. Mr. Guthrie, Learned Queen's Counsel for Chatham Bay, accepts and submits that as at 6th March 1990, conditions 4 and 5 of the Licence had not been fulfilled. In essence, they had been breached. It is common ground that up to the time of the declaration of the forfeiture by the court, no development as envisaged, had materialised. Further, it is not being suggested that Chatham Bay is in a position to carry out the development even now.

[11] Efforts were made to attract other investors to the development. In late 1990, negotiations took place with one Royal Caribbean Management Inc, (a cruise ship concern) with a view to the Land being transferred to them and their taking over the development. Approaches were made to Government towards this end. However, on 28th May 1991 the then Prime Minister wrote to one Mr. Terman⁴, a principal of Chatham Bay to this effect:

"The Government will not consider an Alien Land Holding Licence for a Cruise Ship operation with such a substantial area of land. If you are impatient with the lack of progress in securing investors, perhaps you can offer the land to Government."

⁴ Mr. Terman had died (1999) by the time the action was instituted.

I will return to this letter later in this judgment as it is one of the bits of correspondence on which Chatham Bay relies for their contention that Government waived and/or was estopped from relying on breaches of conditions 4 and 5 of the Licence.

[12] In July 1991, negotiations were undertaken by Chatham Bay with another entity called Tricor Resources Limited. Mr. Richardson, on behalf of Chatham Bay testified that at a meeting in July/August 1991, the Prime Minister gave him the verbal assurance that the Government would not bring proceedings for forfeiture of the Land for a period of at least three years. Assuming this to be the case, this would have operated to extend the timeline for performing the conditions to July/August 1994. Mr. Richardson also testified that, sometime around the mid 1990s, the Prime Minister put him in touch with one Dr. Rolla as a possible investor for the Land and the development and at that time assured him with words to the effect: "you don't have to make a big worry about this..."

[13] However, it may reasonably be inferred that sometime around the same time as the verbal assurance said to be given in 1991, Chatham Bay had requested from the Government an extension of time for carrying out the Development. This may be inferred from the Permanent Secretary's letter of 18th November 1991, to Chatham Bay in these terms:

"I am directed to inform you that Cabinet deferred consideration of the grant of an extension of the Aliens Land Holding Licence requested by Chatham Bay Association, to await the submission of new proposals by the company for the development of the area."

This letter was headed with the following notation: "ALIENS LAND HOLDING LICENCE CHATHAM BAY ASSOCIATES – REQUEST FOR EXTENSION OF TIME FOR DEVELOPMENT". Reliance is also placed on this letter and the verbal assurances to ground Chatham Bay's waiver and/or estoppel argument.

[14] After the letter of 18th November 1991 referred to above, there is no other correspondence indicating any other or further decisions of Cabinet in respect of Chatham Bay and its development commitment. Further, there is no evidence that

Chatham Bay put forward to Government any other or new proposals for development of the Land. Another fourteen years went by, without any steps being taken by the Government in respect of forfeiture of the Land. Similarly, there is no evidence to suggest that Chatham Bay, during those fourteen years, did anything which may be said to have been towards fulfilment of conditions 4 and 5 of the Licence in any form or fashion. From their inception the Chatham Bay companies as far as records are concerned went into a state of dormancy. They apparently held no meetings, and filed no corporate returns of any kind until the forfeiture proceedings were commenced. Chatham Bay says however, that during that period they kept the Land in reasonable order by keeping it cleared and secured and did this in reliance, in essence, on Government's assurance(s) that the Land would not be forfeited. Chatham Bay accordingly, also relies on these acts in support of their estoppel, delay, laches and acquiescence contention.

[15] On 25th January 2006, the Government issued its forfeiture claim against Chatham Bay. It is accepted that no letter before action or any notice of intended proceedings was given to Chatham Bay. In defending the claim, Chatham Bay denied that they were in breach of conditions 4 and 5 of the Licence. In the alternative, they contended that if they were in breach, the breaches had been waived by the Government and/or that Government was estopped from relying on such breaches. They also relied on the equitable doctrine of delay, laches, and acquiescence. In addition, Chatham Bay counterclaimed that Government was in breach of its agreement to the effect that no proceedings for forfeiture would be brought without reasonable notice to Chatham Bay and further that they were being deprived of their property without compensation in breach of section 6(1) of the **Constitution of Saint Vincent and the Grenadines** ("the Constitution"). Section 6 of the Constitution guarantees protection against deprivation of property by the State without payment of adequate compensation.

[16] The trial judge declared a forfeiture of the Land and in so doing rejected Chatham Bay's equitable defences as well as their Constitutional claim.

The grounds of appeal

[17] The appellants enumerated in their Notice of Appeal some seventeen grounds of appeal. In my view, the grounds may be combined under six main heads as follows:

- (1) whether the breaches of the conditions were waived by the Crown;
- (2) whether the Crown was estopped from enforcing the conditions or relying on them in seeking forfeiture of the Land;
- (3) whether the Crown was guilty of delay, laches and acquiescence thus making it inequitable to enforce its right of forfeiture;
- (4) whether it was open to the Crown to bring forfeiture proceedings without first giving reasonable notice to Chatham Bay of their intention of so doing;
- (5) the nature of Chatham Bay's title in respect of the Land;
- (6) whether the Land could be forfeited to the Crown without the corresponding right to compensation under section 6 of the Constitution irrespective of breaches of the conditions in the Licence.

I propose to deal with the challenges to the trial judge's findings under these main heads.

Waiver of the breaches/estoppel

[18] At paragraphs 20 to 42, of his judgment, the learned trial judge summarised the evidence led at the trial by the Attorney General on behalf of the Crown and by Mr. Richardson on behalf of Chatham Bay. Then, at paragraphs 54 to 57, he

addressed the issue of waiver. After referring to Mr. Richardson's evidence in respect of the verbal assurance said to be given by the then Prime Minister, he opined thus at paragraph 55:

"The pleading suggests to me that the assurance was limited and could not mean as learned Queen's Counsel submitted, that it was open ended"

[19] At paragraph 56, the learned judge then dealt with the letter of 18th November 1991 from the Permanent Secretary also relied on to prove waiver. After reciting the material portion of the letter⁵ he opined at paragraph 57 as follows:

"The evidence revealed that the Defendants made one proposal to the Claimant that involved a cruise line purchasing the land. The Government rejected that completely."

He then quoted from the Prime Minister's letter to Mr. Terman of 28th May 1991, and concluded as follows:

"One should notice that this new proposal was one allowing somebody else to take over the obligations of the Defendants, not they themselves, doing anything new"

[20] As to the Government's delay or inaction the learned trial judge at paragraphs 59, 60 and 61 had this to say in part:

"[59] It seems to me that if the Defendants continued to find investors this was nothing different from what they were doing from the beginning and it was done to help them to effect the project which they had initiated. And it cannot be stated with any degree of conviction that the Defendants spent any money on the property between 1987 and the present time. They produced no account.

[60] ... As learned counsel for the Claimant has shown the Defendants are shell companies. They did not have regular board meetings or kept minutes, and only on 29th March 2007 did they file corporate returns from the time of their incorporation to the present. ... To spend to secure or clean your own property cannot be an expense for which the Claimant can be liable. If the Defendants allowed bush to grow to such a height that it became unhealthy or unsightly they could be liable to the health authorities."

⁵ Already reproduced at para. 11 above

[61] It seems to me that the Defendants are admitting that their land could have been forfeited earlier, a year or two after 1990, but if the Government is gracious and patient even to the point of assisting them to get additional investors, then forfeiture is out of the question. I cannot agree. In the letter of 28th May 1991, referred to above the Prime Minister also said: "If you are impatient with the lack of progress in securing investors, perhaps you can offer the land to Government."

The Claimant wanted to give the Defendants every opportunity to fulfil their dreams."

[21] Chatham Bay contends that the learned trial judge wrongly rejected Mr. Richardson's evidence which was not contradicted by any evidence of the Claimant to the effect that:

(1) Government soon after the conveyance of the Land had accepted that the Land could not be developed in accordance with the original conditions 4 and 5 of the Licence because third party investors could not then be achieved but none the less accepted Chatham Bay's continued ownership of the Land;

(2) This acceptance was confirmed by, among other things, the Prime Minister's letter of 28th May 1991, in which he proposed for Chatham Bay's consideration that they "offer the Land to Government"; his verbal assurances to Mr. Richardson in or about July/August 1991; his suggestion or introduction of Dr. Rolla as an investor around said time, the Permanent Secretary's letter of 28th November 1991⁶.

(3) Chatham Bay had incurred expenditure on the Land during the period in reliance on Government's acceptance of that fact.

[22] Mr. Guthrie concludes and contends that, based on the letter of 28th May 1991, the Prime Minister accepted Chatham Bay's ownership of the Land; the reality of the lack of investors; he did not mention forfeiture of the Land; and he anticipated that

⁶ The relevant portion of this letter is reproduced at para. 13 above

the Government would have to pay something for it. He also contends that Government's continued inaction and/or lack of complaint for over 16 years before bringing the forfeiture proceedings confirmed Government's acceptance and implied agreement to Chatham Bay's continued ownership of the Land.

[23] In *W.J. Alan & Co. v El Nasr Export (C.A.)*⁷ Lord Denning M.R. stated the principle of waiver in these terms:

"If one party, by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict legal rights when it would be inequitable for him to do so. There may be **no** consideration moving from him who benefits by the waiver. There may be no detriment to him by acting on it. There may be nothing in writing. Nevertheless, the one who waives his strict rights cannot afterwards insist on them. His strict rights are at any rate suspended so long as the waiver lasts. He may on occasion be able to revert to his strict legal rights for the future by giving reasonable notice in that behalf, or otherwise making it plain by his conduct that he will thereafter insist upon them"

[24] It is well recognized and accepted that words or conduct relied on as waiver must be clear and unequivocal. The Prime Minister's letter of 28th May to Mr. Terman, assuming that he was so authorised by Cabinet, rejected the cruise ship proposal made by Chatham Bay. The fact that the letter ended by saying: "if you are impatient by lack of progress in securing investors, perhaps you can offer the Land to Government" is not in my view clear and unequivocal language from which the only conclusion to be drawn was that Government had either waived its legal rights to forfeit the Land, or, Mr. Guthrie contends, that Government accepted that it would not take ownership of the Land without paying compensation. The fact that the Prime Minister did not make reference to the Crown's right to forfeit the Land does not convert the omission into a positive assurance to this effect. In my view, the Prime Minister's statement could equally be interpreted as an invitation to Chatham Bay to relinquish, of their own volition, ownership of the Land and vest it in the Crown without the necessity for bringing forfeiture proceedings.

⁷ [1972] 2 QB 189, 213.

- [25] The verbal assurance coming from the Prime Minister sometime around July/August 1991 to Mr. Richardson, (a director of Chatham Bay) to the effect that the Government would not bring proceedings for forfeiture of the Land for a period of at last three years, again assuming he was so authorised was, as the learned trial judge found, limited and not open ended. At its highest, this would have merely deferred the time for bringing forfeiture proceedings to July/August 1994. Such an assurance could not in my view be stretched to such an extent as to be taken as an assurance not to take forfeiture proceedings at all. Indeed this would have meant that Chatham Bay, by such assurance, had been released for all time from their obligations to fulfil conditions 4 and 5 of the Licence. Indeed, during the course of the hearing, this is precisely what Mr. Guthrie argued. In my view however, were this the case then Mr. Guthrie's further contention that Chatham Bay was entitled to reasonable notice before the taking of forfeiture proceedings would be totally at odds with this position since it would mean that the Land having been forever released from the conditions, the Crown could not at any time in the future revert to its strict legal rights, notice or no notice.
- [26] I do not accept this to be the position. More importantly, the position being advanced is also at odds with Chatham Bay's conduct which strongly suggests that they did not understand their position to be that conditions 4 and 5 had been released. The evidence shows that Chatham Bay were in dialogue with Government with a view to extending the timeline for performing the Licence conditions, or at best for varying the terms and conditions of the Licence. Had Chatham Bay considered their breaches to be waived by Government and the Land released from the conditions, surely there would be no need for extension requests of any kind. Indeed, Chatham Bay would have been free to do with the Land as they wished including sitting back and doing nothing. They recognised that this was not the case, and that an extension was needed. They applied for an extension of the time for performance of the conditions. The sole purpose of Chatham Bay's request was to be granted more time by the Crown before the Crown invoked its forfeiture rights.

[27] Government's letter of 18th November 1991 to Chatham Bay bearing on this issue worthy of recital. This letter bears this heading: "ALIENS LAND HOLDING LICENCE CHATHAM BAY ASSOCIATES – REQUEST FOR EXTENSION OF TIME FOR DEVELOPMENT". It goes on to state as set out above that Cabinet had "deferred consideration of the grant of the extension (my emphasis) of the Aliens Land Holding Licence requested by Chatham Bay Association, to await the submission of new proposals by the company for the development of the area." This letter does not mention breach of the conditions by Chatham Bay, nor does it mention the Crown's right to forfeit the Land. Mr. Guthrie says that this letter seeking new proposals for development as well as the Prime Minister's letter, confirm that the original conditions of the Licence were gone and all that remained and continued in existence was the Licence - in essence a bare licence freed of all conditions. The omissions to mention breach of the conditions or the right to forfeiture, in my view, are of no moment. More to the point is that there is nothing in this letter which may be taken as a clear and unequivocal assurance or representation to Chatham Bay (as required by **Woodhouse AC Israel Coco Ltd SA v Nigerian Produce Marketing Co. Ltd**)⁸ that the Crown was not insisting on its legal rights to forfeit based on the Act or as contained in the Licence.

[28] The position, in all probability, would have been decidedly different had Chatham Bay submitted new proposals as contemplated by the November letter and Government had embarked on a consideration of those new proposals; but this is not the case. No new proposals were submitted by Chatham Bay. Accordingly, even were it arguable that Government, by that letter led Chatham Bay to believe that its strict rights arising under the contractual obligations contained in the Licence were not being insisted upon, intending that Chatham Bay should act on that belief, the fact is Chatham Bay did not so act. The result is that the grant of an extension of time for compliance was simply not considered by Government. Chatham Bay would have been well aware, that having done nothing further, as contemplated in the letter, their request for an extension of time had been

⁸ [1972] AC 741 (H.L.)

unsuccessful. This scenario certainly does not fit within the classical operation of the principle of waiver as set out by Denning M.R. in the case of **Alan**.

[29] Mr. Guthrie also refers to the further verbal assurance that the Prime Minister is said to have given to Mr. Richardson some time in the Mid 1990s with some words to the effect: "you don't have to make a big worry about this" He submits that Mr. Richardson is to be believed and there is no finding by the trial judge that he is not to be believed. Accepting what Mr. Richardson stated, this does not, in my view, afford any clarity in terms of what representations were in fact made by the Prime Minister purportedly on behalf of Government such as to consider it a waiver of the Crown's right to forfeit.

[30] Learned Queen's Counsel submitted that the Prime Minister has the ostensible authority to bind the State. No authority was cited for this proposition. What is clear in this case however is that in all instances where Cabinet made a decision, this decision was conveyed in writing under the hand of the Permanent Secretary. Where the Prime Minister himself wrote letters to Mr. Terman such as the letter of 28th May 1991 or gave verbal assurances to Mr. Richardson in 1991 and again sometime in 1994/1995, it is worthwhile to note that there is no reference to any Cabinet decision, nor is there any mention that he had done so or was speaking on behalf of Cabinet.

[31] Given Learned Queen's Counsel's statement, I feel compelled to make this observation: It would be nothing short of remarkable that a Prime Minister of any state can, without more, give written or verbal assurances which are elevated to being a Cabinet decision binding on the State or the Crown. It would seem to me to be a rather dangerous method of decision-making by any Cabinet in exercising its decision-making authority on behalf of a state and by extension its subjects. In this regard, I consider the Privy Council decision in **Stanford International Bank Ltd v Austin Lapps**⁹ to be quite apt. In that case, Cabinet granted Stanford

⁹ *Stanford International Ltd v Austin Lapps*: [2006] UKPC 50, Privy Council Appeal No. 19 Of 2005 delivered 20/11/06. (on appeal from the Eastern Caribbean Court of Appeal – Antigua)

International Bank Ltd. a 99 year lease of Crown land near the airport known as parcel 384, on the 6th December 1995. This parcel included 0.6 acre of land that Mr. Lapps was occupying from 1970. Mr. Lapps in or around 1976 had approached Mr. V.C. Bird, the then Prime Minister, and asked to be allowed to purchase or lease the 0.6 acre. He was told that the Government had not yet decided what to do with the land. In 1984 Mr. Bird assured him that steps would be taken to regularise his occupation of the land. At paragraph 34 the Privy Council said of the Prime Minister's assurance: "The evidence of the Cabinet Secretary makes it tolerably clear that there was never any affirmative consent by the Cabinet to Mr. Lapps taking possession of the 0.6 of an acre. He went into and remained in occupation of the land to the knowledge and with the encouragement of the Prime Minister but nothing has been shown to their Lordships to indicate that the Prime Minister had any authority to create a tenancy at will over this small piece of Crown land."

[32] Based on the foregoing, I am of the view, even accepting Mr. Richardson's evidence, that the learned trial judge was right in rejecting Chatham Bay's defence of waiver. Waiver has simply not been made out on the facts of this case.

[33] The argument put forward by Chatham Bay that the conditions of the Licence had been varied also fails for the same reasons.

Estoppel

[34] Chatham Bay also says that in reliance on the various assurances given, as set out above, they incurred expenditure in keeping the Land clear and secure, and in negotiations with Royal Caribbean Cruise Line. This, they say, gave rise to an equity in their favour against the Crown's right to forfeiture. They contend that the learned trial judge was wrong to reject Chatham Bay's arguments based on **Hughes v Metropolitan Railway**¹⁰ in which Lord Cairns LC at page 448 stated the principle thus:

¹⁰ [1877] HL (E) 439.

"... it is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results ... afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties."

[35] The doctrines of waiver and estoppel are of the same genre rooted in the equitable notion of fairness. In **Theresa Henry and Marie Ann Mitchell v Calixtus Henry**¹¹ a decision of the Privy Council on an appeal from this court, Sir Jonathon Parker, in delivering the opinion of the Board at para 38 quoted a passage from the judgment of Dunn LJ in the case of *Watts v. Storey*¹² in which Dunn LJ explained the dictum of Denning MR in *Greasley v. Cooke*¹³ thus:

"... As the judge said, it matters not whether one talks in terms of detriment or whether one talks in terms of it being unjust or inequitable for the party giving the assurance to go back on it. It is difficult to envisage circumstances in which it would be inequitable for the party giving an assurance alleged to give rise to a proprietary estoppel, i.e. an estoppel concerned with the positive acquisition of rights and interests in the land of another, unless the person to whom the assurance was given had suffered some prejudice or detriment."

Sir Jonathan Parker then had this to say:

The overwhelming weight of authority shows that detriment is required. But the authorities also show that it is not a narrow or technical concept. The detriment need not consist of the expenditure of money or other quantifiable financial detriment, so long as it is something substantial. The requirement must be approached as part of a broad inquiry as to whether repudiation of an assurance is or is not unconscionable in all the circumstances.Whether the detriment is sufficiently substantial is to be tested by whether it would be unjust or inequitable to allow the assurance to be disregarded – that is, again, the essential test of unconscionability. The detriment alleged must be pleaded and proved."

¹¹ [2010] UKPC 3 Privy Council Appeal No 2009 of 0024 – on appeal from ECSC (St. Lucia)

¹² [1983] CAT 319.

¹³ 1980 1 WLR 1306

- [36] The critical question here then is what may be said to be the course of conduct or negotiations between Chatham Bay and the Government which led Chatham Bay to believe or suppose that Government's 'strict rights arising under the Licence (contract) would not be enforced, or would be kept in suspense, or held in abeyance.'
- [37] As I stated earlier, the Prime Minister's letter of 28th May 1991 refusing the Royal Caribbean cruise line proposal and his invitation to Chatham Bay to 'offer' the Land to Government could not, in my view, lead Chatham Bay to suppose that the Crown was either foregoing, or, putting in suspense, its strict rights of forfeiture.
- [38] The verbal assurance said to be given by the Prime Minister in July/August of the same year, on the evidence of Chatham Bay, was at best a suspension of its rights for a three year period which would have ended in July/August 1994. The Crown's forfeiture claim in 2006 was some twelve years after.

Entitlement to reasonable notice

- [39] In addition to my observations at paragraphs 25 to 27 and 38 above, I should mention as it relates to the argument that Chatham Bay was entitled to reasonable notice before the forfeiture proceedings took place, that the extension said to be given by the verbal assurance was for a finite term. This, in my view, distinguishes it from the circumstances of the case of **Hughes** and similar cases where the parties embarked upon a course of negotiations and discussions and therefore begs the question, assuming waiver or, more to the point, a variation by the Crown based on the verbal assurance, whether notice was necessary in the circumstances at all. In my view it was not. Furthermore, given Chatham Bay's established inability even now to comply with the development conditions, the service of notice would not have brought about any change in its ability to take remedial action. As learned Senior Counsel Mr. Astaphan, on behalf of the Attorney General contends, Chatham Bay cannot complain of their right to be heard being restricted or taken away in measure by failure of notice before action. They participated fully in the proceedings.

- [40] It is difficult to reconcile Chatham Bay's assertion of their belief that time under the Licence had been extended with its own conduct in and around the same period whereby they were seeking an extension of time to comply with the Licence conditions. Implicit in this request was the recognition by Chatham Bay of Government's strict rights to forfeit the Land for non performance of the conditions of the Licence for why else would an extension of time be sought? Any such belief which Chatham Bay may have had (which based on their own conduct is doubtful) would have been dispelled by Cabinet's decision conveyed by letter of the Permanent Secretary in November 1991 in which it was clearly stated that consideration of an extension of time had been deferred pending submissions of "new proposals" by Chatham Bay. Since Chatham Bay failed to put forward any new proposals, then a course of conduct or the entering into negotiations from which it may have been possible to rely as showing a change of position, did not materialize.
- [41] The trial judge found that expenses incurred on cleaning and securing one's own property could not be Government's liability. Learned Queen's Counsel for Chatham Bay criticized this statement by the Learned Judge and contends that it reveals a misunderstanding of Chatham Bay's case. I do not consider that criticism to be well founded. In the context of the entire judgment I understand the Learned Judge to be saying that this act of cleaning and securing the Land by Chatham Bay was not undertaken in any reliance upon Government's assurance or representation that the right to forfeit would not be exercised, such acts being wholly consistent with normal acts of a land owner (which Chatham Bay was) until forfeiture occurred.
- [42] The cleaning and securing of the Land in my view pales in comparison to the development commitments which Chatham Bay were to undertake, did not and apparently, cannot undertake. Accordingly, even assuming the cleaning and securing of the Land were done in reliance of an assurance, these acts would not, on an overall view of the matter, make it inequitable for the Crown to forfeit. Chatham Bay has been unable to point to any acts which may be considered to be

substantial giving rise to an equity in their favour from which it would be unconscionable to allow the Crown to resile. The estoppel argument accordingly fails.

Delay, Laches and Acquiescence

[43] The doctrines of delay, laches and acquiescence are also equitable defences rooted in the concept of fairness and good conscience. Chatham Bay says that the learned trial judge was wrong in rejecting the defences of laches acquiescence and delay as he failed to take into account:

- (1) the length of the delay since March 1990 when, on the Crown's case, the performance conditions would have been breached;
- (2) Government's acceptance of Chatham Bay's continued ownership and occupation of the Land;
- (3) Chatham Bay's expenditure on the Land; and
- (4) the fact that Chatham Bay had been prejudiced by the delay, for e.g. the death of Mr. Terman who was principally concerned on behalf of Chatham Bay in negotiations with Government so that Chatham Bay lost the ability to support its case with further documents.

[44] The short point that I understand Mr. Guthrie to be making on this aspect of the matter is that, as soon as the breach occurred then Government was obliged to act by way of forfeiture. Counsel contends that mere delay in this case involving land which was purchased as freehold for some \$477,000.00, would, unlike the leasehold/forfeiture cases, make it inequitable to enforce forfeiture rights. Yet, in my view, like the lessee, who would be aware that breach of certain covenants in the lease may lead to forfeiture, similarly, Chatham Bay was quite aware that their freehold title to the Land was conditional upon the performance of conditions the non-fulfillment of which may lead to forfeiture of the Land. Similarly, leasehold interests may also be substantial interests viewed in money terms or in duration. I

do not accept this as a good reason for applying the principles governing delay differently.

- [45] In grounding their case for laches, delay and acquiescence, Chatham Bay relied on a passage from **Lindsay Petroleum Company v Hurd**¹⁴ in the judgment of Sir Barnes Peacock at pages 239- 240 as follows:

“Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval which might affect either party and cause a balance of justice or injustice in taking one course or the other, so far as relates to the remedy.”

Government’s delay, he says was in the region of some sixteen years during which time Chatham Bay held the Land and was accepted as owner, and kept the Land secured and clean.

- [46] Mr. Astaphan, on behalf of the Attorney General, also relies on the same passage from **Lindsay Petroleum**. He contends, on the authority of this passage, that mere delay cannot be a bar to the Crown’s right to forfeiture and does not give rise to laches or acquiescence; that delay must, in essence, be coupled with some conduct making it inequitable for the Crown to forfeit; that on the facts of the case there is no conduct which make it inequitable for the Crown to forfeit.

- [47] The learned trial judge at paragraph 59 had this to say:

“It seems to me that if the Defendants continued to find investors this was nothing different from what they were doing from the beginning and it was done to help them to effect the project which they had initiated. And it

¹⁴ [1874] LR 221.

cannot be stated with any degree of conviction that the Defendants spent any money on the property between 1987 and the present time. They produced no account"

Later, after quoting the very passage from **Lindsay Petroleum**, the learned trial judge at paragraph 65 stated as follows:

"In my judgment though the delay in taking proceedings was lengthy it was undertaken all along for the benefit of the Defendants in allowing them more time than the licence allowed to undertake and complete the project. And in my judgment there were not any acts done in the interval at all material to the equity between the parties. The defences of laches, acquiescence and delay, like the defences of waiver and estoppel, fail."

[48] I do not consider that mere delay is enough. The delay must be coupled with some conduct which affects the balance of justice as between the parties. As I stated earlier, the cleaning and securing of the Land as compared to the development to have been undertaken on the Land cannot be considered as material to the equity as between the Crown and Chatham Bay. Chatham Bay carried out no development of the Land as contemplated or indeed any development at all. The acts relied on are comparably insignificant. The learned Trial Judge was quite right in so finding and accordingly in rejecting the defences of delay, laches and acquiescence.

The nature of Chatham Bay's title

[49] It is not disputed, nor could it be, that an alien holding land as a freehold or fee simple owner under a conditional licence granted pursuant to the Act would, if in breach of the terms and conditions of the licence, continue, to so hold the land until the land is forfeited to the Crown by a declaration of forfeiture. No doubt it is for this reason that the forfeiture is expressed by section 7(1) of the Act to relate back to the date when the forfeiture took place. The liability for forfeiture arises at the time of the breach of the condition. Section 5(2) of the Act states as follows:

"On breach of any condition in a licence to hold land as owner ... the estate and interest of the alien in the land... held under the authority thereof shall thereupon be forfeited to the Crown"

These provisions ensure that there is no break in title between the alien land owner and the time when the alien is in breach pending a declaration of forfeiture by the court.

[50] These considerations were addressed in **Ho Young v Bess**¹⁵ a decision of the Privy Council on appeal from this court arising in a claim out of Saint Vincent and the Grenadines. Mr. Guthrie, who now appears on this appeal for Chatham Bay, appeared for the Defendants before the Board. The Board held “that since by section 5 of the **Aliens (Land Holding Regulation) Act** land did not vest in the Crown until a judgment had been obtained declaring forfeiture and by section 16 of the Act, the Attorney General was only empowered and not obliged to apply for such a declaration, the legislature had intended forfeiture under section 3 of the Act and similarly under section 4(2) in respect of breaches of conditions imposed on an alien licensed to hold land to be a discretionary power vested in the Crown; that it followed that persons who had acquired land in Saint Vincent and the Grenadines as unlicensed aliens, or who had breached a condition of a licence, did not automatically forfeit the land but held a voidable title until such time as the Crown might obtain a judgment declaring forfeiture; ...”

[51] I think it worthwhile to recite a passage from the opinion of the Board as delivered by Lord Jauncey of Tullichettle, since much was made in this appeal as to the status of Chatham Bay's title and the fact that they held the fee simple interest in the Land throughout. After considering the bizarre consequences which could flow from construing the provisions in the Act regarding forfeiture to mean ‘automatic’ forfeiture, Lord Jauncey had this to say at page 355 [E] - :

“... Starting with the general proposition that the law abhors a vacuum and that title to land must always be in someone, whether the Crown or a subject, it is clear from section 5(1) that it cannot be in the Crown until a declaratory judgment has been obtained. The only other person in whom it can possibly be is the alien who had acquired the land, since section 3 does not nullify the conveyance. The use of the word “may” in section 16 (now section 19) demonstrates that the Attorney General has a discretion whether or not to apply for a declaratory judgment.... Construing section

¹⁵ [1995] 1 WLR 350.

3 (now section 4) in the context of sections 5 (now 7) and 16 (now 19) it is apparent that the legislature did not intend forfeiture to be automatic but rather that prohibition on land holding by an unlicensed alien could be enforced by a discretionary power of forfeiture vested in the Crown. The position in relation to section 4 (now section 5) is similar. It follows that the words "shall be forfeited" in sections 3 and 4(2) must be construed as "shall be liable to be forfeited" and "the time when the forfeiture took place" in section 5(1) is the time when the liability for forfeiture arose. ... This construction means that the title remains with the alien until the Crown has obtained judgment under sections 5(1) and 16 when it vests in Her Majesty as from the time above referred to. There is no vacuum. The result is that the aliens' title is voidable until the Crown obtains judgment and a bona fide purchaser from him would be protected..."

- [52] It is therefore quite in keeping with the Act that paragraph 3 of the Order entered following the judgment provided, in essence, that the Land was thereby "vested in the Crown as from 7th June 1987 under the provisions of section 7(1)" of the Act. However, the date stated must be taken to be in error as the time for compliance under conditions 4 and 5 of the Licence would have ended on 6th March 1990.
- [53] The case of **Village Cay Marina Ltd v Acland**¹⁶ is another Privy Council decision, this time emanating from the Virgin Islands, in which reference was made to **Ho Young**. The same principles were therein restated and applied. In that case the Board made clear that the **Non-Belongers Land Holding Regulation Act**¹⁷ is not an invalidating Act; that such an Act merely renders such titles or offices voidable at the discretion of the Crown¹⁸.
- [54] Accordingly, whilst it is accepted that Chatham Bay are freehold or fee simple owner of the Land, based on the above authorities relied on by both sides, it is settled that their fee simple title, being subject as it is to the conditions contained in the Licence is nonetheless voidable at the discretion of the Crown. I accordingly find no force in the argument that because Chatham Bay continued to hold the Land as freehold owners until the declaration of forfeiture this was an act amounting to detrimental reliance or one causing prejudice or inequity by delay in

¹⁶ (1996) 52 WIR 238.

¹⁷ In many respects similar to the Aliens (Land Holding Regulation) Act of Saint Vincent and the Grenadines

¹⁸ At page 248.

taking steps to forfeit. Without a declaration of forfeiture it was not open to the Crown to treat or accept Chatham Bay other than as the fee simple owner of the Land. The fact that the Land was liable to forfeiture from the time breach of the conditions occurred does not nullify the conveyances by which Chatham Bay acquired title in 1987. As said in **Ho Young**, the power of forfeiture is a discretionary power. Many reasons may abound for the Crown delaying the exercise of the power or not exercising it at all. Some examples were given by Lord Jauncey in **Ho Young**. The trial judge expressed various views to the effect that Government wanted to give Chatham Bay “every opportunity to fulfill their dreams” or was being gracious and patient [para. 61] or that the lengthy delay in taking proceedings was ‘for the benefit of the Defendants in allowing them more time than the Licence allowed to undertake and complete the project. In my view, whatever the reasons for the long delay in bringing forfeiture proceedings which are discretionary, unless the delay is coupled with conduct which makes it inequitable for the Crown to forfeit, it really matters not if the Crown merely sat by and did nothing. At the end of the day, at whatever point in time the declaration of forfeiture is obtained, it relates back to the time when the liability for forfeiture arose. The perceived vacuum is statutorily filled. The exercise of the power by the Attorney General is not subject to any time limitation.

Forfeiture without compensation – the Constitution point

- [55] Chatham Bay argues, in essence, that forfeiture of the Land amounted to a breach or threatened breach of their right under section 6(1) of the Constitution not to be deprived of their property without adequate compensation and that the trial judge was wrong to treat the case as one analogous to compulsory acquisition of Land for a public purpose by reference to the **Land Acquisition Act** and in this regard misunderstood Chatham Bay’s case which was that Chatham Bay had been deprived of its property, namely the Land, by the State and as such the State was required to make adequate compensation.

[56] The learned judge from paragraphs 73-84 of his judgment considered what he termed the Defendants' constitutional defence. He made reference to Land being acquired for a public purpose and the background to land acquisition pursuant to the law allowing for acquisition even before constitutions were brought into force in many Caribbean States. He then made reference to a number of cases where land was the subject of acquisition pursuant to land acquisition legislation in the various states and in respect of which persons had sought refuge under the constitutional provision guaranteeing the right not to be deprived of property. He then concluded at paragraph 80 thus:

"I mention these to say that acquisition of land as mentioned in the Constitutions and as practiced in the region has a specific significance"

After considering section 6 of the **Constitution of Saint Vincent and the Grenadines**, he concluded that the phrase "compulsorily acquired" meant or referred to property taken for a public purpose. At paragraph 83 he went on to state this:

"Learned Senior Counsel for the Claimant in his submissions stated: 'My Lord we contend simply that forfeiture is not a compulsory acquisition and therefore is not caught by section 6 of the Constitution for two reasons' Later he stated: 'We respectfully submit that forfeiture under the Aliens Land licence is not a compulsory acquisition entitling the Defendants to compensation.' I agree"

At paragraph 84 the learned trial judge had this to say in part:

"I hold there has been no acquisition to trigger section 6 of the Constitution and shall proceed no further along that route."

[57] Mr. Guthrie contends that these were irrelevant considerations and as such the trial judge was in error. He argues that section 6 of the Constitution applies to any deprivation of property by the State. Section 6 of the Constitution states:

"No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except for a public purpose and except where provision is made by a law applicable to that taking of possession or acquisition for the payment, within a reasonable time of adequate compensation."

[58] Mr. Guthrie submits that the plain wording of section 6 envisages the possibility of property being compulsorily taken possession of or acquired for a purpose which is not a public purpose, hence the use of the words “except for”. I agree. Section 6 of the Constitution guarantees against deprivation of any type of property; be it real or personal, irrespective of the purpose. This guarantee is of course subject to the exceptions contained in the said section to which I will return. The restricted interpretation of section 6 of the Constitution by the trial judge as addressing cases relating only to the compulsory acquisition of land, analogous to the acquisition of land under land acquisition legislation, was in error. This error in turn, led to the extraneous consideration of lands acquired under land acquisition legislation for a public purpose and cases dealing with claims arising under such legislation and his finding that there had been no acquisition to trigger section 6 of the Constitution.

[59] That said, in my view, two questions must be addressed on Chatham Bay's constitutional point which I understand to be a novel one. They are:

(1) whether land forfeited to the Crown for breach of a condition contained in a Licence under the Act amounts to a compulsory taking under section 6 of the Constitution;

(2) If the answer to (1) is yes, whether, compensation is payable in respect thereof.

I address these in turn.

Forfeiture amounting to a compulsory taking

[60] Mr. Guthrie submits that because the trial judge unjustifiably imposed two fetters on his discretion, namely (1) by equating the Constitution to the **Land Acquisition Act**; and (2) by thinking that to give rise to a claim for redress under the Constitution the relevant acquisition must have already occurred, led him wrongly to reject Chatham Bay's arguments which were:

- (1) protection from deprivation of property without adequate compensation was a guaranteed fundamental right under the Constitution and threatened breaches of fundamental rights were also protected under section 16 of the Constitution;
- (2) that forfeiture of the Land would necessarily amount to deprivation of the Land which had been conveyed to Chatham Bay in fee simple in 1987;
- (3) that the effect of forfeiture of the Land and its vesting in the Crown necessarily amounted to compulsory acquisition of the land for the purposes of section 6(1) of the Constitution;
- (4) that the Act, in so far as it might (in 1922) have provided for forfeiture of land without compensation, must now be considered subject to the terms of the (1979) Constitution which require adequate compensation for the deprivation of property;
- (5) That as a result the Defendants were entitled to compensation for loss of the Land. (As to this counsel submits that the trial judge erred in his comparison with the law of contract, para. 86 of judgment), which he says was not relevant to Chatham Bay's constitutional claim);
- (6) That in the circumstances, if the Attorney General succeeded in her claim for forfeiture then provision should be made for an assessment of adequate compensation.

[61] Mr. Astaphan maintains that forfeiture of the Land for breach of the Licence condition is not a compulsory acquisition and that section 6 of the Constitution does not apply to land under the Act. He posited that one must first start with the fact that an alien can only hold land subject to conditions agreed to by the Crown and that therefore it is an incident of the contract between the Crown and the alien who has accepted the risk of forfeiture. He contends that the result of Chatham

Bay's argument of entitlement to compensation notwithstanding an admitted breach of the condition in the Licence would be tantamount to saying that a defaulting alien can benefit from his own default. This is the context in which I understand the learned trial judge to have cited and relied on a passage from the judgment of Gordon JA at para. 20 in **Caribbean Development (Antigua) Limited v Electronic Technology International (Antigua) Limited**¹⁹ where he stated thus:

"If one were to come to the opposite conclusion, then a horse and cart could be driven through the ordinary law of contract. A contracting party would then be able to rely on its own breach to force restitution from the other innocent party"

[62] The Learned trial judge referred to the dictionary meaning²⁰ of the word "forfeiture" [para. 85] which stated the word, to mean the divestiture of property without compensation; the loss of a right, or property because of a crime, or breach of obligation. In my view, however the focus ought not to be placed on the meaning of forfeiture, but rather on whether the effect of the forfeiture amounts to a compulsory taking of property for the purposes of section 6 of the Constitution. The answer to my mind depends on whether conditions in a licence are considered to be contractual, or whether the matter is to be considered merely in the context of the fact that Chatham Bay held the fee simple and is averse to their title to the Land being vested in the Crown. In the latter context, it can no doubt be considered that, to the extent Chatham Bay is not voluntarily divesting themselves of title to the Land in favour of the Crown but rather that title is being taken by the Crown, in essence as a penalty for breach, this amounts to a compulsory taking of the Land by the Crown. If viewed in the former context however, (i.e. in terms of a contract) then in my view, the forfeiture would simply be an accepted, or in this case, an agreed consequence flowing from the breach of agreed terms and could not be considered as amounting to a compulsory taking. At this juncture it must be remembered that not only was forfeiture the stipulated consequence under the

¹⁹ Civil Appeal No. 13/2005 (Antigua – unreported)

²⁰ He referred to Blacks' Law Dictionary 2004 8th Ed. pg 677 and Jowitt's Dictionary of English law

Act but was also an expressly stated consequence under the terms of the Licence itself.

[63] The possible answers to the first question posed leads me to consider a further question: that is whether the Licence is in essence a contract between the Crown and Chatham Bay. Mr. Guthrie says that it is not. That it was a statutory obligation imposed. He relies on the case of **Spiricor of Saint Lucia Limited v The Attorney General of St. Lucia and Hess Oil St. Lucia Limited**²¹ for this proposition. He says further, in essence that contractual considerations are extraneous to Chatham Bay's constitutional claim. Mr. Astaphan contends that it is contractual in that the conditions contained in the Licence must be on terms agreed between the Crown and the alien, breach of which entitles the Crown to do certain things.

[64] The Learned trial judge at para. 51 stated:

"In the course of the submissions by both counsel, there was much said as to whether or not a licence is a contract. I did not find it necessary to express a view on that."

I am of the view that in considering the constitutional point raised by Chatham Bay, a resolution of this issue is relevant and necessary.

[65] I do not accept Mr. Guthrie's argument that the Licence was not a contract but simply a statutory obligation imposed. In **Spiricor**, Byron CJ [Ag.], at page 14 in relation to the facts of that case, in the course of his judgment, made this statement:

"the Appellants obligation to obtain an Aliens Land holding licence was not based on any contract. It was a statutory obligation imposed and regulated by the Aliens (Land holding Regulation) Act"

To my mind, **Spiricor** does not assist. Whilst it is authority for saying that an alien has a statutory obligation (which in my view may or may not also be a contractual one) to obtain a licence to hold land, it is not authority for the proposition that the conditions (if any) expressed in a licence are statutory obligations. Whilst the Act

²¹ Civil Appeal No. 3 of 1996.

seeks to prohibit the holding of an interest in land by an alien unless the alien is granted a licence under the Act, the Act does not mandate that a Licence must contain conditions. Section 5(1) of the Act makes this clear and states as follows:

"The Governor- General may, if he thinks fit, grant to any alien a licence to hold land as owner, tenant or mortgagee for any estate or interest, **either subject to any conditions or not**". (my emphasis).

[66] The correct position then, in my view, is that even though a statutory framework is in place by which an alien may hold an interest in land the conditions which may be imposed are not statutorily imposed and can only come about on the basis of agreement between the Crown and the alien. This is self evident from the facts of this very case where there was clearly much negotiation between the Government and Chatham Bay before mutually acceptable terms expressed as conditions in the Licence were arrived at. The rationale for not having statutorily imposed terms must be a recognition that if terms or conditions were to be attached to the Licence or not, then there must of necessity be some flexibility in allowing the parties (the Crown and the alien) to negotiate and arrive at mutually acceptable terms and conditions to which a licence may be subject. If the Crown proposes conditions for the grant of a licence which the alien considers unacceptable, the alien remains free to reject it. Accordingly, I am of the view that even though the Licence is governed by a statutory framework, and the breach of any conditions stated therein carries a statutory consequence, the conditions of the Licence are nevertheless contractual in nature. In this case, the consequence was not only statutory but was an agreed consequence expressed in the Licence.

[67] It is also worthwhile to recall that as early as September 1986, when the grant of a licence was being negotiated between the Government and Chatham Bay, the Government stated in their letter to Chatham Bay, thus: "The performance clauses will be as stipulated by your clients". This leaves no doubt in my mind that the performance conditions were contractual and were not statutory obligations.

[68] I would accordingly answer question (1) posed in paragraph 59 above in the negative. The forfeiture does not fall to be considered as a compulsory acquisition

under section 6(1) of the Constitution and therefore the requirement for adequate compensation does not arise.

[69] Having arrived at this conclusion, it is not necessary to consider question (2). However, for completeness and on the assumption that forfeiture is a compulsory acquisition for the purposes of section 6(1) of the Constitution then it falls to be considered whether the compulsory acquisition by way of forfeiture of the Land falls within any of the exceptions contained in section 6, and thus excepting it from the requirement for adequate compensation on such acquisition. Section 6(6) of the Constitution states as follows:

"Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) of this section-

- (a) to the extent that the law in question makes provision for the taking of possession or acquisition of any property, interest or right -
 - (i) in satisfaction of any tax ;
 - (ii) by way of penalty for breach of any law or forfeiture in consequence in breach of any law;
 - (iii) as an incident of a lease, tenancy, mortgage, charge, bill of sale, pledge or contract;
 - (iv) In the execution of judgments or orders of a court in proceedings for the determination of civil rights or obligations;
 - (iv) ;
 - (v) ;
 - (vi) ;

And except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

(b)"

- [70] Counsel for the parties were ad idem that breach of a condition of the Licence was not a breach of the Act or any law, and as such the exception contained in 6(6)(a)(ii) would have no application. I agree.
- [71] Mr. Astaphan sought to rely on section 6(6)(a) (iii) and (iv). In relation to 6(6)(a)(iii) he contends the taking of possession was an incident of the contract between the Crown and the alien who accepted the risk of forfeiture. Mr. Guthrie contends that it cannot be an incident of a contract in reliance on the case of **Spiricor**. For the reasons already given above I do not accept that contractual considerations are extraneous to the question of deprivation of property under section 6 of the Constitution. One is dealing here with a licence which was subject to certain conditions expressed therein. I would agree with Mr. Astaphan that the taking of possession in the circumstances would be an incident of the contract. As such, it would be caught by the exception in section 6(6)(a) (iii) and no requirement for adequate compensation would attach as forfeiture for breach of a condition in the Licence granted under the Act is expressly stated by section 6(6) of the Constitution as not being inconsistent or in contravention of section 6(1). Accordingly, on either view, the argument for the requirement of adequate compensation fails.
- [72] As to reliance on section 6(6)(a)(iv) Mr. Guthrie, in my view rightly, contends that that provision refers only to execution of a judgment. This exception would not avail the Attorney General.
- [73] Finally, Mr. Astaphan relies on the last provision contained in 6(6) and contends, in essence, that the forfeiture and the provision for forfeiture contained in the Act are reasonably justifiable in a democratic society of Saint Vincent and the Grenadines. Whilst he rejects, quite rightly, the view expressed by the learned trial judge to the effect that the purpose of the Act is 'to obviate any attempt towards recolonization' [para.43] he says, in essence that the position contended for by Chatham Bay would mean that an alien is in a better position than the ordinary citizen of Saint Vincent and the Grenadines who does not hold a voidable title. The intention

could not be to create a more beneficial regime for aliens vis a vis the Vincentian national having regard to the objective of the Act which is to regulate the holding of interests in land by aliens. Accordingly, he says that forfeiture without compensation was permissible and is also reasonably justifiable in a democratic society. Based on the conclusions to which I have arrived above I do not consider it necessary to express a view on this point.

Conclusion

[74] For the reasons given above I would dismiss this appeal and award costs of this appeal to the respondent. The learned trial judge ordered Chatham Bay to pay the Attorney General's costs in the sum of \$20,000.00. Neither side took issue with the quantum or addressed the question of quantum of costs in their submissions. Accordingly, applying CPR 65.13, I would award two thirds of that sum to be paid by Chatham Bay to the Attorney General as the costs of this appeal.

[75] Finally, I express my appreciation to counsel on both sides for their well articulated arguments which were of great assistance.

Janice George-Creque
Justice of Appeal

I concur.

Ola Mae Edwards
Justice of Appeal

I concur.

Frederick Bruce-Lyle
Justice of Appeal [Ag.]