IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CICA No 7 of 2014

Cause No 62 of 2013

BETWEEN: **(1) ALICE MAE COE**

(2) ANNIE MULTON

(3) EZMIE SMITH

(4) BETTY EBANKS **Plaintiffs/ Appellants**

AND:

(1) THE GOVERNOR OF THE CAYMAN ISLANDS
(2) **THE ATTORNEY GENERAL OF THE CAYMAN ISLANDS**
(3) **MINISTER FOR FINANCE, DISTRICT ADMINISTRATION, WORKS, LANDS & AGRICULTURE**
(4) **NATIONAL ROADS AUTHORITY (NRA)**
(5) **DART REALTY (CAYMAN) LTD**

Defendants/ Respondents

Appearances: **Mr Anthony Akiwumi of Stuarts Walker Hersant, instructed by Mr Irvin Banks, Attorney-at-Law for the Appellants**

Mr Richard Keen QC, instructed by Ms Reshma Sharma & Ms Jenny Catran of the Attorney General's Chambers for the 1st to 4th Respondents

Mr Mac Imrie & Mr Adam Huckle of Maples and Calder for the 5th Respondent

Before: **The Rt Hon Justice Sir John Chadwick, President**

The Hon Elliott Mottley, Justice of Appeal

The Rt Hon Sir Bernard Rix, Justice of Appeal

Heard: **5 November 2014**

Delivered: **21 November 2014**

JUDGMENT

The Rt Hon Justice Sir Bernard Rix

1. In this appeal, Alice Coe, Annie Multon, Ezmie Smith and Betty Ebanks (the "appellants") appeal from the judgment of Hon Justice Henderson dated 17 February 2014 who dismissed their claim by way of writ pursuant to the Constitution of the Cayman Islands to challenge the government decision to close a portion of the West Bay Road (the "Road") where it runs along Seven Mile Beach. The judge called the portion of the Road concerned the "Affected Road", and it is convenient to adopt his soubriquet.

2. The appellants are Caymanians, members of a civic action group known as the Concerned Citizens Group ("CCG"), of which Ms Coe is the chairwoman. The first to fourth respondents are various branches of government which are said to be involved in one way or another with the impugned decision. The fifth respondent, Dart Realty (Cayman) Ltd ("Dart" or "DRCL"), is a private sector developer which is concerned in developing and constructing a new hotel in the area of the Affected Road. Dart was not originally made a defendant in these proceedings but applied to be joined of its own motion.

3. Henderson J held, in essence, that the appellants' claim had been brought out of time, and therefore had to be dismissed as a matter of limitation. As such, his decision was not concerned with the merits of the Appellants' challenge to the decision; and neither is this appeal.

4. It was a matter of dispute before Henderson J, and it remains a matter of dispute in this court, whether the appellants' challenge had to be brought as a

matter of judicial review, pursuant to Order 53, or could be brought pursuant to Order 77A as a claim for breach of the Bill of Rights set out in Part I of the Schedule to The Cayman Islands Constitution Order 2009 (the "2009 Order"). The respondents submit that the challenge is a classic matter of judicial review governed by Order 53 with its three month time limit. They submit (by way of a respondents' notice) that it is an abuse of process to seek to bring by way of writ a typical judicial review challenge which ought to be brought under a different procedure with its own, tighter, time limit. The judge did not have to reach a conclusion on that submission because he was content to decide the litigation before him on the assumption that the longer, one year, time limit set by section 26(4) of the Bill of Rights applied. Even so, the appellants were out of time, he said, because the decision about which they were to be understood to be complaining was the decision to close the Affected Road contained in a contract, known as the "NRA Agreement" (or herein simply the "Agreement"), executed on 15 December 2011, whereas their writ had been issued more than a year later, on 25 February 2013. It was on this ground that he dismissed the appellants' claim.

5. On this appeal Mr Anthony Akiwumi, on behalf of the appellants, submits that the judge erred in finding that the decision about which the appellants complain was that contained in the NRA Agreement. In his grounds of appeal he had contended, first, that the correct date "for the commencement of the Appellants' constitutional challenge to the closure of the Affected Road" was 13 March 2013, not 15 December 2011. 13 March 2013 was the date when the Affected Road was gazetted for closure by the NRA pursuant to section 14 of the Roads Law (2005 revision). It was the date for which he had contended before the judge below. The second ground of appeal was a complaint that the judge had erred in failing to deal with an issue whether the road closure constituted by such gazetting "complied with due process or [was] compatible with the principles of lawful administration stipulated by section 19 of the Bill of Rights". The third ground raised the issue whether the judge had failed to interpret section 14(3) of the Roads Law (which provided that a road or portion of a road which had been gazetted for closure pursuant to section 14(1) shall cease from the date of such gazetting to be a public road and shall vest in the Crown) in a manner consistent with sections 15, 16 and 19 of the Bill of Rights. And the fourth and final ground stated that the judge had failed to consider the submissions made on behalf of the Appellants "adequately or at all".

6. In developing his grounds of appeal in his oral submissions at the hearing of this appeal, Mr Akiwumi quite properly concentrated on his first and fundamental ground of appeal. He acknowledged that his second and third

grounds of appeal dealt with the merits of the appellants' claim, which would only become relevant upon a remission to the Grand Court if they succeeded on this appeal in demonstrating that that their claim was not time barred. His fourth ground added nothing to the essence of his first ground, nor to the current irrelevance of his second and third grounds. It had been struck out by order of this court, by consent, earlier this year.

7. In developing his oral submissions as to his first ground of appeal, Mr Akiwumi vacillated between two dates as being the correct date which started time running. The first was 13 March 2013, the date for which he had contended before the judge, the date of the section 14 gazetting of the Affected Road. The second was 14 February 2013, the date which he contended was likely to be the date of the decision to gazette the closure of the Affected Road, as was, he submitted to be inferred from the fact that on the next day, 15 February 2013, the Cabinet had issued a press briefing that it had decided to allow the first portion of the Affected Road to be closed. Mr Akiwumi submitted that the appellants' proceedings of 25 February 2013 had been issued within a year of either of those dates and were therefore within time. Indeed, the date of gazetting, 13 March 2013, had not yet occurred when the appellants' writ was issued. 13 March 2013 was the date of closure of the first 1600 feet of the Affected Road ("Phase 1 closure"). Phase 2 closure, the remaining 2300 feet, had not yet occurred at the time of the hearing below, but has since occurred.

8. The reason why Mr Akiwumi relied on the date of 13 March 2013 was because this was the date for which he had contended before the learned judge and also the date which the first of his grounds of appeal regarded as the relevant date of the decision or act on which the claim was founded. The reason why Mr Akiwumi relied on 14 February 2013 was because he was conscious of the judge's criticism that the appellants' statement of claim (or even amended statement of claim) had not mentioned the date of 13 March 2013 as being relevant to their claim. Of course, that date had not occurred when the original statement of claim had been indorsed on the appellants' writ. Mr Akiwumi was therefore anxious to found his appeal on a date which had at least been mentioned in the statement of claim (at para 58):

> "58. According to a press briefing on 14 February 2013, *the former* Cabinet ha*d* decided to allow the first portion of the Road to be closed, but *were* determined not to release the *Independent* Report to the public or the Legislature until the first stretch of road closure ha*d* taken place, a *fait accompli*." [The words in italics were added to the amended

statement of claim, other than the words *fait accompli* which were in italics already in the original statement of claim's para 26.]

9. In making this submission, Mr Akiwumi had perhaps overlooked that para 48 of at any rate the amended statement of claim had already added a reference to 13 March 2013 as a new last sentence of that paragraph (para 24 of the original statement of claim), as follows (again, additional wording of the amended statement of claim is inserted in italics below):

> "48. *Against this background, a*ccording to a press briefing by the *former* Cabinet Minister (not the Third Defendant responsible for roads and for submitting policy decisions to the Fourth Defendant) the Minister claim*ed* the Report show*ed* good value for money for the Government, and that there *was* now no barrier to the closing of the Road which the Minister state*d was due* to take place sometime before the end of February 2013. *The closure of this stretch of the road was actually accomplished on 13th March 2013 by Extraordinary Gazette No. 22/2013*."

10. It was in these circumstances that Mr Akiwumi, during his submissions before the court, adopted first one date and then the other as his primary case. Ultimately he sought to rely on both dates in the alternative. It has to be said that there was no mention of the date of 14 February 2013 or of a decision on that date in his Written Submissions on Appeal dated as recently as 13 October 2014. It also has to be observed that the references to both dates in the amended statement of claim are of a purely incidental nature, as part of a narrative, and are in no way highlighted as the basis of the claim contained in the appellants' pleadings.

11. Even when Mr Akiwumi came to rely on the 13 March 2013 gazetting in his submissions before the judge, which began on 9 December 2013, there was no application to amend (ie to reamend the appellants' statement of claim at that or at any subsequent time). As for the date of 14 February 2013, that has not been identified as the basis of any relevant decision or act for the purposes of this action until the submissions in this court itself, which took place on 5 November 2014.

12. It was in these circumstances that the respondents submitted that the judge was right to have focussed on the only pleaded basis of the appellants' claim, which was the NRA Agreement itself. Further, they submitted that it was an

abuse of process to bring a claim for what was in substance a judicial review challenge to an administrative decision by way of a claim under section 26(1) of the Bill of Rights, which was only concerned with a breach or threatened breach of "his or her rights and freedoms under the Bill of Rights".

The legal framework

13. What the parties and I have called the Bill of Rights is more accurately called "Bill of Rights, Freedoms and Responsibilities" which is the title given to Part I of "The Constitution of the Cayman Islands", scheduled to the 2009 Order.

14. Sections 2 to 15 of Part I deal with fundamental rights and freedoms which are familiar in constitutional documents throughout the world and in particular in the seminal European Convention of Fundamental Rights and Freedoms (the "ECHR"). Such rights and freedoms are indicated by the titles to those sections: Life, Torture and inhuman treatment, Slavery or forced or compulsory labour, Personal Liberty, Treatment of prisoners, Fair trial, No punishment without law, Private and family life, Conscience and religion, Expression, Assembly and association, Movement, Marriage, and Property. Section 16, rather like article 14 of the ECHR, headed "Non-discrimination", requires that such rights are to be enjoyed without discrimination.

15. Sections 17, 18, 19, on the other hand, are drafted in a different manner and deal with the responsibilities of government. Thus section 17 states that "the Legislature shall enact laws to provide every child and young person under the age of eighteen…with such facilities as would aid their growth and development…". And section 18 states that "Government shall, in all its decisions, have due regard to the need to foster and protect an environment that is not harmful to the health or well-being of present or future generations…To this end government should adopt reasonable legislative and other measures to protect the heritage and wildlife and the land and sea biodiversity of the Cayman Islands".

16. Section 19 is of particular importance to this litigation for it is at the forefront of the appellants' claim, and I set it out below:

> "**Lawful administrative action**
>
> **19.** – (1) All decisions and acts of public officials must be lawful, rational, proportionate and procedurally fair.

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

17. Sections 21 and 22 then deal with the exceptional case of public emergencies. Section 23 deals with declarations of incompatibility: if primary legislation is found to be incompatible with Part I, the court must declare it to be so, *but* any such declaration "shall not affect the continuation in force and operation of the legislation or section or sections in question". Section 24 is concerned with the duty of public officials, and section 25 is concerned with the interpretative obligation to construe legislation so far as it is possible to do so in a way which is compatible with the rights protected by Part I.

18. Section 26 is concerned with "The enforcement of rights and freedoms", and since it is also fundamental to the appellants' claim, I shall set out subsections (1) and (4) of it:

"(1) Any person may apply to the Grand Court to claim that government has breached or threatened to breach his or her rights and freedoms under the Bill of Rights and the Grand Court shall determine such an application fairly and within a reasonable time…

(4) Proceedings under subsection (1) shall be commenced within one year of the decision or act that is claimed to breach the Bill of Rights, or from the date on which such decision or act could reasonably have been known to the complainant; but the Grand Court shall extend time on application by the complainant where such an extension would in the opinion of the Court be in the interests of justice."

19. In the present appeal, the appellants complain that the first four respondents have breached section 19(1) of the Bill of Rights; and that the "decision or act" that is claimed to breach "their rights or freedoms" was the gazetting of the closure of the Affected Road on 13 March 2013, or alternatively the decision of 14 February 2013 to gazette such closure, but not the execution of the NRA Agreement. There is no ground of appeal to the effect that, if the judge was right nevertheless to say that the decision or act relied on as allegedly breaching the appellants' rights or freedoms was the execution of the NRA Agreement, the appellants nevertheless could not reasonably have known of that decision or act until a date within one year of the commencement of their proceedings.

20. The respondents submit that the alleged breach of section 19(1) is not a breach of a "right or freedom", but of a responsibility of government; that section 19(1) re-enacts the law of judicial review and that the proper procedure if complaint is made of the failure of government to live up to its section 19(1) responsibilities is to apply for judicial review pursuant to Order 53; that there was no claim based on a request for reasons under section 19(2) and that in such circumstances it is an abuse of procedure to bring a claim under section 26(1) pursuant to Order 77A. In any event the judge was right to say that the decision or act identified in the appellants' proceedings was the NRA Agreement whose execution on 15 December 2011 took place more than one year before the commencement of proceedings.

21. Order 53, headed "Applications for Judicial Review", relates to any application for an order of mandamus, prohibition or certiorari or an injunction restraining a person from acting in any substantive office of a public nature. O 53, r 3 provides that no application for judicial review shall be made save with the leave of the Court. Such applications have to be made in the form of a notice in prescribed terms. The Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates. O 53, r 4 is concerned with "Delay in applying for relief". Rule 4 states:

> "(1) An application for leave to apply for judicial review shall be made promptly and in any event within 3 months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made…
>
> (3) The preceding paragraphs are without prejudice to any statutory provision which has the effect of limiting the time within which an application for judicial review may be made."

Rule 7 permits a claim for damages to be included in an application for judicial review, on certain conditions.

22. Order 77A was introduced on 6 November 2012 to give procedural effect to "Proceedings under sections 23 and 26 of the Constitution". It will be recalled that section 23 deals with declarations of incompatibility and section 26 deals with the "Enforcement of rights and freedoms". Rule 2 states that proceedings under section 23 or 26(1) "shall be begun by petition or writ"; a writ has to be indorsed with a statement of claim if it is to be issued. Rule 4 provides as follows:

"4.(1) A petition, or a writ, or any pleading alleging that the government has breached or threatened the applicant's rights and freedoms under the Bill of Rights shall include full particulars of –

(a) the circumstances in which the government's liability is alleged to have arisen, and the circumstances of the conduct of any public official or officials in respect of which the applicant complains;
(b) the decision or decision[s] or the act or acts that is or are alleged to breach the Bill of Rights, and the date or dates of each such decision or act;
(c) to the extent that such decision or act as referred to in rule 4(1)(b) of this Order is alleged to have taken place more than one year prior to the issuing of the writ, the presentation of the petition, or filing of the pleading, the date or dates on which such decision or act was alleged to be known or alleged could reasonably have been known to the applicant."

23. It may be observed that when Order 77A was introduced in December 2012, no amendment was made to Order 53 dealing with judicial review. Mr Akiwumi submitted, nevertheless, that the effect of the Bill of Rights was to abolish the procedure of judicial review and to replace it with a new constitutional claim pursuant to section 26(1) and, when it emerged, Order 77A. That seems to me to be a difficult submission, but I will refer below to the basis on which it was made.

The background facts

24. The parties have very sensibly avoided any substantial dispute about facts by entering into a Statement of Agreed Facts dated 5 December 2013. This is a substantial document running to 26 closely typed pages. The effect of it is well summarised by the judge, and I gratefully make use of that summary. There is no suggestion on this appeal that the judge's summary is unfair or inaccurate.

25. The Government of the Cayman Islands and Dart have entered into a broad agreement known as the FCIA (the ForCayman Investment Alliance) which is intended to stimulate the economy and create employment and development opportunities in the Cayman Islands. The Heads of Terms which formed the basis of the FCIA were signed by the Government and Dart on 12 April 2011.

Among the wide-ranging objectives of the FCIA are the construction of a new hotel and the mutual transfer of lands between the Government and Dart. The economic effect of the Heads of Terms was intended to involve a capital outlay by Dart of more than US$100 million together with direct investment in the Cayman Islands of $415 million over a five year period. A formal press conference was convened on 15 June 2011in the foyer of the hurricane damaged Courtyard Marriott Hotel, and became the subject of press comment on numerous occasions thereafter.

26. The NRA Agreement, executed by the Government, Dart and the NRA on 15 December 2011, was the mechanism by which certain of the objectives of the FCIA were to be achieved. The projects which the Agreement was designed to facilitate include the development of a new hotel on Seven Mile Beach, the extension of the Esterley Tibbetts Highway to West Bay, and other related matters. One aspect of the Agreement required the closure of a section of West Bay Road, 3900 feet long, which runs along a portion of Seven Mile Beach, a section which I have already named the Affected Road. Most of the parcels of land adjacent to the Affected Road were owned by Dart. The Agreement provides for the land underneath the Affected Road to be added to the adjacent parcels and thus for it to cease to be a public road and to be closed. The NRA itself reviewed and commented on the Agreement before it was signed.

27. The appellants, as members of the public, have been using the Affected Road for over 50 years. For generations the public has had access to Seven Mile Beach from various places on the Affected Road. The beach has been used for fishing, bathing and recreation. Drivers along the Affected Road could enjoy a view of the sea. Dart's current design includes a network of bicycle paths and pedestrian walkways following the approximate route of the Affected Road and crossing two beach access points. As part of the construction of the new hotel, a public beach promenade will run parallel across the entire beachfront of the new hotel. The appellants believe, however, that the network of bicycle paths and pedestrian walkways will not compensate for what they expect will be a loss of the sort of access to the beach area which they previously enjoyed. There has been a traffic impact assessment report, and consultation between Dart and the Department of the Environment, but the Agreed Facts do not refer to any formal overall environmental impact study.

28. The Agreement, although not publicly released until 10 May 2013, after these proceedings were commenced, had nevertheless before then been the subject matter of a great deal of media coverage, public comment and consultation, which included the appellants and their CCG in particular. The

Statement of Agreed Facts goes into great detail about the nature of public knowledge and discussion about the FCIA and the Agreement and its contents so far as the closure of the Affected Road is concerned. For instance, section 5 of the Statement is headed "Transparency and Public Consultation/Awareness" and includes sub-sections headed "Media coverage of the NRA Agreement, publicly available information and visible construction work", "Media appearance by the Plaintiffs in relation to the Road Closure", "Public Meetings in relation to the NRA Agreement", CIG consultation with the CCG and the Plaintiffs", "Meetings between [Dart] and the Plaintiffs in April 2011", "Visible Construction Work", and "Consultation between [Dart] and affected groups". The judge summed up these detailed agreed facts as follows:

> "5. The NRA Agreement has been publicized in the media in over 200 pages of press articles. CIG representatives and employees of [Dart] have made themselves available to the media for interviews on the subject. A variety of documents relating to the FCIA initiative, including documents about the closure of the Affected Road, have been available on the FCIA website since January 10, 2012. The first and second plaintiffs appeared as guests on a television show on June 27, 2011 and expressed their opposition to the closure of the Affected Road. It is clear from what was said during the interview that they were well informed on the proposal. Public meetings for the discussion of the NRA Agreement were held on August 4 and 30, 2011. The plaintiffs, CIG officials, and [Dart] representatives attended.
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> 6. The plaintiffs and the Concerned Citizens Group communicated their opposition to the closure of the Affected Road to the Governor, to the Premier, and to others during 2011 and 2012. On August 30, 2011 the First Plaintiff advised the Governor that a petition was being prepared, to be signed by persons objecting to the road closure. It was provided to the Governor on December 12, 2011. There were over 4,000 signatures on the petition. The First Plaintiff engaged in correspondence on the subject with the Premier and with the United Kingdom Minister for the Overseas Territories. Members of the Concerned Citizens Group also met with [Dart] representatives in 2011 to express their opposition to the development….
>
> 8. Since the execution of the NRA Agreement, construction work has been continuing. The planned extension to the Esterley Tibbetts Highway has been completed; it facilitates travel between West Bay and George Town, a route which used to require travel on the Affected Road. Some

> of the rush hour traffic congestion previously experienced in West Bay has been alleviated by the new highway…
>
> 14. [Dart] has now done an extensive amount of construction work in pursuit of its entitlements and in fulfilment of its obligations under the NRA Agreement. A very significant amount of money has been expended by [Dart] on the assumption that the CIG was permitted by law to enter into the NRA Agreement."

29. The judge might also have mentioned, as Agreed Facts, such matters as these. Phase 1 demolition of the old Courtyard Marriott Hotel had commenced as early as 14 July 2011. The ground-breaking ceremony of the extension to the Esterley Tibbetts Highway was held on 6 September 2011. A formal press conference to announce the signing of the NRA Agreement was held on 15 December 2011, and signing statements, referring to the closure of the Affected Road, were posted on various websites and disseminated to the media. At the appearance of the first and second appellants on television on 27 June 2011 they held up a copy of a map released by Dart entitled "18 Months from Commencement – Legal Closure of West Bay Road": the map depicted, in colour, the Affected Road and the development plans for the area on either side of it. The second appellant, Ms Multon, said: "You can see what is going to happen here…this here is the portion of the road that becomes legally Dart property and gazetted as such."

30. In the light of such undisputed facts, the judge went on to say this:

> "30. The plaintiffs have not asked for any extension of time under section 26(4) of the Constitution. I am satisfied that this is for good reason: any such request would fail. The plaintiffs have always been well informed about the proposed road closure and can be taken to have possessed all the information necessary to advance the present claim a few days after December 15, 2011 at the latest. There is nothing before me which justifies or even explains the 14-month delay before this action was started."

31. On this appeal, none of these findings were disputed, if indeed they could be. Mr Akiwumi's attack was founded on his submission that the relevant impeached decisions or acts were either the gazetting and closure of (Phase 1 of) the Affected Road on 13 March 2013, or the decision to proceed to that gazetting and closure on 14 February 2013. There has never been any

application to extend time, if such extension was necessary. Nor has there been any submission that, if the impugned decision or act was an earlier one, as the judge found it was, nevertheless "the date on which such decision or act could reasonably be known to the complainant" (to quote the words in section 26(4)) was sufficiently later than the decision or act itself as to bring the appellants within a period of one year prior to the commencement of their action and thus within the relevant limitation period.

32. In the circumstances, it would seem that for the purposes of the limitation issue which is the sole subject matter of this appeal there is no relevant dispute of fact. The dispute has rather centred on how the appellants' statement of claim should be regarded and on how the movement from FCIA to closure of the Affected Road, via the execution of the NRA Agreement, should be categorised.

The statement of claim

33. The appellants' statement and amended statement of claim are discursive documents. Mr Akiwumi has pointed out that they were not drafted by him. The original statement of claim ran to 79 paragraphs, and the amended statement of claim (dated 9 August 2013) runs to 126 paragraphs. Ultimately, it seems to me that it is the prayer, which has remained unchanged, which will help to define the complaint which is made in these proceedings. On the way to the prayer, however, the following may be observed.

34. (i)At para 7 the "rights and freedoms said to be breached…are legally recognised rights of way and or passage over the West Bay Road, a public road, and legally recognised beach access…". This appears to put the appellants' claim as one based on rights of property. There is no statement at this point as to the sections of the Bill of Rights on which this claim to breach of rights and freedoms is premised. (ii) However, immediately thereafter, at para 8, under the heading "Introduction and overview" and the sub-heading (added by amendment) of "The Agreement", the NRA Agreement is introduced. In its setting it is hard to doubt that this is the foundation of the appellants' claim. It is emphasised that, by contrast with the FCIA, the Agreement is a "standalone" agreement "meaning that it does not require other aspects of the partnership with government to take place, before it is activated" (at para 10). Thus, as is rightly said, by the Agreement "Government has committed itself" to the closure and dispossession of the Affected Road and public beach front (at para 8). (iii**)** The next section is headed, by amendment, "The Issues" (paras 11-24).

There is nothing there about any decision or act subsequent to the Agreement. It is rather concerned with allegations about property rights. (iv) The next heading, "Bill of Rights", is part of the amended pleading, and identifies sections 18 and 19 as being relevant to the claim: it is claimed that section 18 protects the appellants' property rights and that section 19 requires lawful administrative action (at paras 24-27). (v) Paras 28-39 are headed "Lack of Transparency". The complaint here is again that it is the Agreement that breaches the appellants' rights: thus "The Plaintiffs bring these proceedings on the basis that the Agreement *which removes their rights of way/passage and beach access,* and the way it is being implemented is unconstitutional…" (at para 29); and "The Plaintiffs claim therefore that the Agreement is in breach of the Constitution under Sections *18*, 19 and 24 in that *all decisions must be lawful, rational, proportionate and procedurally fair,...*" (at para 34: amendments are, as before, put in italics, both here and below).

35. (vi) The next heading is "Fiscal Responsibility and Good Governance" (paras 40-51). The appellants now introduce the subject matter of the Independent Report which the NRA Agreement calls to be undertaken by Price Waterhouse Cooper ("PwC"). No claim is made under this heading, but an issue is indirectly floated as to whether the Agreement is good value for money. It is under this heading that para 48 now states, as quoted above, that the Phase 1 closure was accomplished on 13 March 2013. (vii) The next heading, entitled "Independent Report", continues with this obscure theme (paras 52-61). It is said that, because the Independent Report was only published in May 2013, this had occurred after the fait accompli of the Phase 1 closure (para 58, where, as observed above, there is an incidental reference to the decision announced at a press briefing on 14 February 2013 to proceed to the Phase 1 closure). This section ends with the statement: "The Plaintiffs claim that the lack of transparency surrounding the Agreement *was* unconstitutional…". I will need to revert to the matter of the Independent Report, for it was a subject about which Mr Akiwumi made submissions on the hearing of this appeal.

36. (viii) A short passage headed "Other Issues" (at paras 62-65) again concludes with a complaint about the Agreement: "The Plaintiffs believe that under the Agreement to close the Road, the people of the Cayman Islands stand to lose culturally, environmentally and economically…" (at para 65). (ix) The next section (at paras 66-85), called somewhat mysteriously "Legal clarifications of existing laws and procedures by the First, Third and Fourth Defendants" ends with a claim, thereafter particularised, that "the lack of transparency throughout is unconstitutional and under Section 19 *and 24* of the Constitution, the First…and the Third and Fourth Defendants have not acted

lawfully…". The particulars appear to complain that by the Agreement the government has waived procedural safeguards under the Governor (Vesting of Lands) Law (2005 revision), as it is accepted that it is entitled to do, but as it is asserted that it should not have done. This obscure claim has not been explained in the appeal. Some light may perhaps be thrown on it by the judge's remark in para 17 of his judgment where he says that Mr Akiwumi made reference to the Governor (Vesting of Lands) Law as an example of Cayman legislation "which provides a framework for the alienation of Crown land which is consistent with the Constitution": as distinct from Mr Akiwumi's complaint before the judge that the Roads Law is incompatible with the Constitution (para 16 of the judge's judgment). The difficulty with that view of matters, however, is that the Roads Law is only mentioned in the statement of claim in a sentence added by amendment at the end of para 121 whereby it is baldly stated that its section "has to be revised for its incompatibility with other laws i.e. the Crown Lands Law".

37. (x) The next section is headed "The Plaintiffs Constitutional and Common Law Claims" (paras 86-121). It is there stated that "the Plaintiffs proceed under section 26 of the Constitution, and specifically sections 18, 19 and 31…". A sub-heading "Common Law *and Statute*" (paras 88-94) appears to assert again property claims ("right of way and right of passage"), "lack of an Independent Review" and problems under the Crown Lands Law. A further sub-heading "Constitution" appears to revert to earlier allegations, but perhaps can best be visited by reference to the next main section, which is helpfully headed "The Constitutional Claims".

38. (xi) "The Constitutional Claims" are thus summarised at paras 122-126, the final numbered paragraphs of the pleading. Para 122 begins: "The Plaintiffs claim therefore that the Agreement as it currently stands…cannot possibly promote good governance in its present lack of transparency…". Para 123 states: "In conclusion therefore, the Plaintiffs claim *inter alia* that under section 19 of the Constitution, the First…Third…and Fourth Defendant have not acted lawfully, have acted irrationally, and have not been procedurally fair in agreeing to and actioning the Road closure and disposition requirements of the Agreement with [Dart], and have abdicated their statutory and constitutional duties in doing so…The Plaintiffs seek declarations from the Court to this effect, and a declaration that the Agreement itself as a standalone contract is flawed and *ultra vires* for all the reasons given above."

39. Finally, I come to the appellants' prayer. This was set out in extenso by the judge in para 21 of his judgment, and I will not do the same here. I will

summarise. The prayer begins in paras (a) and (b) with claims for declarations as to property rights in the appellants in the nature of a "common law prescriptive right of way and right of passage over the Road and its beach access points…and/or by the doctrine of Lost Modern Grant", or in the nature of a "prescriptive easement…" by virtue of the Prescription Law (1997 Revision), or in the nature of an "unregistered equitable easement" under the Registered Land Law (2004 revision). As to such claims, however, the judge remarked that there is no evidence that the appellants enjoy any private law interest in property, as none of the appellants is alleged to be the owner of an interest in land adjacent to the Affected Road or even near to it. There has been no attempt in this appeal to argue otherwise. The appellants' claim is merely an attempt to say that they enjoy the same public law rights to a public road as anyone else in the Cayman Islands – hence the expression "the Plaintiffs with" [or "and"] "the people of the Cayman Islands enjoy" used in these paras (a) and (b).

40. The rest of the paragraphs of the prayer are plainly invoking public law issues, but repeatedly do so by reference to "the Agreement". Thus para (c) prays for "A declaration that the Agreement…which calls for the closure and Disposition of the Road to [Dart] is *ultra vires* and void under sections 19 and 24 of the Constitution…". Para (d) similarly prays for "A declaration that the government defendants have acted in breach of sections 18, 19 or 31 of the Constitution "as defined above in the body of the claim". I have already sought to demonstrate that "the body of the claim" is repeatedly and fundamentally premised on the Agreement. Para (f) prays for "A declaration that any disposition of Crown Land to [Dart] under the Agreement…is void" unless requirements of section 10 of the Governor (Vesting of Lands) Law are met. Para (g) prays for a declaration that the Attorney General "reaffirm publicly his support for the legality of the Independent Report and by extension, the Agreement…as soon as possible". Para (e) prays for a declaration, not tied in to any allegation of breach, that provisions of the Governor (Vesting of Lands) Law and the Roads Law are incompatible with sections 23 and 25 of the Constitution. And para (h) prays for an inhibition on the Land Registry restricting any transfer of the Affected Road until further order.

What is the "decision or act" of which the appellants complain?

41. It is the respondents' submission in this appeal, made principally by Mr Richard Keen QC on behalf of the first to fourth respondents but with the

support of Mr Mac Imrie on behalf of Dart, that, quite apart from any other defects of the appellants' statement of claim, the "decision or act" which is identified in it as founding their claim for relief under section 26(1) of the Bill of Rights is the NRA Agreement – and not the gazetting or closure of Phase 1 of the Road on 13 March 2013, nor the decision to do so of 14 February 2013, as the appellants would submit. I have considered this submission of the respondents carefully, and have sought in the passages of this judgment above to have provided a detailed analysis of the pleading by which the appellants' claim must stand or fall.

42. I have concluded that the above analysis indicates that the respondents' submission is correct. From beginning to end of the (amended) statement of claim, it is the Agreement of which complaint is made, and which is said to breach the appellants' constitutional rights and freedoms. There is no separate or alternative claim that the gazetting and closure has done so, nor that the 14 February 2014 decision to gazette and close Phase 1 of the Road has done so. If there had been, it would be inevitable that those decisions or acts would have been clearly identified as the burden, or at least alternative burden, of the appellants' complaints and it would also be inevitable that those decisions or acts would have been specified in the pleading's final prayer. As it is, those matters which Mr Akiwumi lately relies on were mentioned in the statement of claim only fleetingly and in passing and not as the burden or gravamen of the claim.

43. This conclusion is, in my judgment, supported and underlined by the provisions of Order 77A which, as quoted above, requires, for entirely understandable reasons, that the writ shall include "full particulars" of inter alia the decision or decisions or act or acts which are alleged to breach the Bill of Rights and, to the extent that such decisions or acts are alleged to have taken place more than one year prior to the issuing of the writ, the date or dates on which such decision or act was alleged to be known or alleged could reasonably have been known to the applicant. To the extent that the appellants can be said to have complied with these requirements, only the NRA Agreement stands out as the subject matter of their complaint. That Agreement was executed more than one year before the issue of the writ in these proceedings, and there is no allegation that the appellants could only reasonably have known about it less than one year before the date of the writ. There is no application to extend time, and, as the judge remarked, there could not be: "There is nothing before me which justifies or even begins to explain the 14-month delay before this action was started" (at para 30). It follows that the appellants' writ is time barred and must be struck out.

44. In these circumstances, this is a sufficient ground upon which to dismiss the appellants' appeal.

Is the NRA Agreement the only properly relevant decision?

45. This is a slightly different question to the one which I have considered above, and the judge's answer to it represents the basis on which he reached his decision about the limitation issue in his judgment.

46. The judge reasoned the matter as follows:

> "29. The action was commenced on February 25, 2013. Even assuming that it is properly brought as a constitutional action under section 26(1) rather than in the form of judicial review, the Court is permitted to consider only governmental decisions made on or after February 26, 2012. While the publication of the notice in the Official Gazette on March 13, 2013 may constitute in law and in fact the closure of the road, *that is not the date on which the decision to close it was taken*. I agree with Mr Akiwumi's argument that the taking of this decision was to some extent a continuous process which commenced around the time the heads of terms were executed in April 2011 and continued through various discussions, public consultations, and studies throughout the latter part of 2011. I cannot accept his contention that the decision was made only when the notice in the Gazette was published. At the very latest, the impugned decision had been taken by the time the NRA Agreement was executed on December 15, 2011. It is clear from the agreed facts that the plaintiffs would have known that the decision had been made within hours of the NRA Agreement being signed. *The NRA Agreement contains a commitment by government to close the Affected Road*. Publication of the notice in the Official Gazette is notice to the world of the road closure. Had the intention to close the road been kept secret until March 13, 2013 the publication in the Gazette would be of considerable significance as it would provide the starting point for the limitation period calculation. Given the widespread publicity about the intended road closure throughout 2011, the Gazette notice in this case amounts to nothing more than complicance with a necessary legal formality (publication is required by section 14(1) of the Roads Law (2005 Revision)). I am satisfied that the decision to close the road and thus the

> real gravamen of this case occurred at the latest on December 15, 2011. The decision may have been taken earlier." [*Emphasis added*]

47. On this appeal, Mr Akiwumi has attacked this reasoning. He has done so primarily by reference to a submission that the NRA Agreement was only conditional, being dependent, he says, upon a satisfactory Independent Report on the matter of value for money. In other words, he attacked the judge's statement that the Agreement committed the government to close the Affected Road and therefore amounted to the definitive decision to do so.

48. It would seem from the structure of the judge's judgement that it had not been in dispute before him that the Agreement did commit the government to the closure of the Affected Road. This is understandable in the light of the statement of claim's assertion in its para 8 that "Government has committed itself" by the Agreement to the closure of the Affected Road. I can refer also to the judge's statement early on in his judgment (at para 3) that "One aspect of the NRA Agreement requires the closure of a section of the West Bay Road which runs along a portion of Seven Miles Beach ("the Affected Road")"). Be that as it may, Mr Akiwumi's submission requires some consideration of the Agreement itself, what it says about the Independent Report, and the events which transpired pursuant to the Agreement.

The NRA Agreement and the Independent Report

49. The NRA Agreement opens with a background passage and recitals referring to the FCIA and its objectives, but then immediately proceeds in its substantive provisions with a section headed "West Bay Road and ETH". Clauses 1-4 are concerned with the construction at Dart's sole cost and expense of the ETH Extension. The Agreement then proceeds as follows:

> "5. To the extent possible, immediately following the date of this Agreement, but in any event immediately following the date of the Review Period, Government and the NRA shall commence all steps required to complete the West Bay Road Legal Closure and the Raleigh Quay Legal Closure, and review and approve the design and layout of the new or altered roads as shown on the West Bay Road Plan and ETH Extension Plan.

6. Without limiting the generality of the foregoing, the steps referred to herein as required to be taken by Government shall include provision of all necessary written directions by the relevant Minister to the NRA as permitted under the NRA Law, and making all necessary declarations in respect of the Legal Closure of existing public roads and gazetting new public roads under the Roads Law."

50. "Legal Closure" is part of a definition to be found in the "Dictionary" set out at the end of the Agreement, as follows:

"Legally Close, Legal Closing, Legal Closure

Means, in relation to a public road, or portion of a public road, the discontinuance and closing thereof in accordance with section 14 of the Roads Law, and to publish or the publishing of a declaration in the Cayman Islands Gazette that such road is to be discontinued pursuant to which such road shall cease to be a public road and all public rights of way over it shall cease (on the date specified in the declaration) and, in accordance with section 14 of the Roads Law, the addition of the land over which the former public road or portion of road passed in such land parcels as provided under the terms of this Agreement."

51. A section of the Agreement headed "Road Legal Closures" begins as follows:

"27. Where Government agrees or undertakes anywhere in this Agreement to Legally Close any existing public road, or a portion of a public road, it shall, without limiting the generality of the foregoing:

27.1 Subject to consultation with the Board, the Minister shall endorse, and direct the NRA to follow, a policy consistent with the Legal Closure of any existing public road, or a portion of such road, provided under this Agreement and otherwise consistent with the terms of this Agreement

27.2 Having considered the benefits of the West Bay Road and ETH Extension Plan and other terms of this Agreement, the NRA hereby recommend and endorse the West Bay Road Legal Closure and the Raleigh Quay Legal Closure;

27.3 Within thirty (30) days of the date of the expiry of the Review Period, publish in the Cayman Islands Gazette a declaration in respect of the West Bay Road Legal Closure and the Raleigh Quay Legal Closure specifying:

27.3.1 the road or portion of road proposed to be discontinued;

27.3.2 that the road or portion of road shall cease to be a road immediately upon the completion of Phase 1 and commencement of Phase 2 in accordance with the West Bay Road and ETH Extension Construction Schedule; and

27.3.3 the place where a plan of such road or a portion of road may be inspected…"

52. The provisions concerning the Independent Review are set out in a section headed "Independent Review" to be found at clause 127 and following of the Agreement.

53. Clause 127.1 stated that the purposes of the Independent Review were "to ensure Government's compliance with its Framework for Fiscal Responsibility" and "to provide Government with adequate information to assess the value of the Agreement to the Cayman Islands". Clause 127.3 set out initial terms of reference for the Independent Review to consider. Clause 127.5 provided that such terms of reference were to be finalised within 3 weeks of the date of the Agreement. Clause 127.6 allowed that if either Government or Dart were not satisfied with the final terms of reference, it "shall be entitled to terminate this Agreement". However upon agreement of the terms of reference, the Independent Review "shall be conducted strictly in accordance" therewith.

54. Clauses 128 and 129 then made provision for difficulties with respect to the Independent Review. Thus under clause 128, government would be entitled, upon receipt of the independent reviewer's written report, up to the end of the Review Period, to propose revised terms to the Agreement, and failing agreement of those terms by Dart, would be entitled to terminate the Agreement. Clause 129 then made provision for an unsatisfactory outcome to the Independent Review:

"129. In the event that either DRCL or Government:

129.1 is not satisfied with the written report of the observations and conclusions of the entity which has carried out the independent review, or

129.2 is of the view that the entity which has carried out the independent review has not conducted its review in accordance with the terms of reference provided to it

either Government or DRCL shall be entitled at any time during the Review Period to terminate this Agreement by notice in writing delivered to the other, failing which this Agreement shall, without any further action required by the Parties, be deemed to be in full force and effect and thereby ratified and confirmed by the Parties."

55. In the event of a termination notice under clauses 128 or 129 delivered by Government to Dart, however, Dart would be entitled to a full indemnity for all costs and expenses incurred, inter alia with respect to works already carried out, pursuant to or in contemplation of the Agreement (clause 130). Government and the NRA were also entitled to terminate the Agreement for standard matters such as the insolvency of Dart (clause 132). Dart was entitled to terminate the Agreement if Government or NRA were still in breach of the terms of the Agreement following a 60 day warning notice (clause 133). In the event of termination by Dart for breach of the Agreement by Government, Dart would be fully indemnified (clause 139).

56.These provisions have been summarised under the Statement of Agreed Facts.

57. In clause 189, Government and NRA represented and warranted inter alia that:

"189.4 Government is acting within the Constitution of the Cayman islands in entering into and discharging its obligations under this Agreement.

189.5 The execution, delivery and performance by Government and the NRA of this Agreement, does not and will not conflict with or result in a breach of any of the terms, conditions or provisions of any order, judgment, decree, or ruling of any court, arbitrator or Governmental Authority applicable to or binding on Government or the NRA or violate any provision of any statute or other rule or regulation of any Authority of or applicable to the Government.

189.6. The NRA enters into this Agreement with the Board having properly considered its duties and powers under the National Roads Authority Law (2006 Revision) as amended."

58. Under the Dictionary definition of the Review Period, that period terminated at 5 pm on 16 March 2012. The Statement of Agreed Facts at its para 13.9 provides:

"The "Review Period" was initially set to last until 5pm on 16 March 2012, pursuant to clause 127 of the NRA Agreement. An extension to 13 April 2012 was requested by CIG and granted by [Dart] on 31 January 2012…This was subsequently extended to 16 April 2012 and was recorded in the fourth recital to the First Amendment…An additional extension to 25 May 2012 was recorded in the terms of the First Amendment."

59. The Agreed Facts continue with a section on the Independent Review. These state as follows:

"13.19 PwC issued a first draft of their independent report to the Ministry on 4 May 2012 and then to CIG, the NRA and [Dart] in June 2012…

13.20 The Draft First Independent Report concluded that the terms of the NRA Agreement were in line with the FFR [the Framework for Fiscal Responsibility] and provided CIG with value for money generally, but suggested certain recommendations to CIG.

13.21. CIG raised these recommendations with [Dart] and the NRA, which negotiations led to the signing of the Second Amendment to the NRA Agreement on 25 July 2012. PwC subsequently issued a revised independent report simultaneously to CIG, NRA and [Dart] on 5 October 2012 to take into account those amendments (the "Second Independent Report")…

13.22 The Second Independent Report concludes that the terms of the NRA Agreement are in line with the FFR and provide CIG with value for money generally…

13.25 Mr Simon Conway from PwC also gave a presentation to Cabinet in April 2013. He stated that at first PwC had been concerned by some of the incentives that had been offered, and had recommended they be

tightened and capped. He then explained that this had since been done. Mr Conway also stated that if asked to give an opinion as to whether CIG should agree to the deal with the incentives included, PwC would advise in the affirmative…

13.27 The Second Independent Report was publicly released in May 2013.

13.28 The Plaintiffs have not, since the publication of the second Independent Report, communicated to any of the Defendants that they have not understood either the Independent Report or the Terms of Reference for the Independent Report."

60. In my judgment, it is clear that the judge was correct to state that government was committed by the Agreement to the closure of the Affected Road. Of course, as in any contract, matters may occur, pursuant to or in breach of contract, which may upset contractual commitments and due performance. However, there is nothing in the provisions of the Agreement referred to above which undermines the judge's view that it was the execution of the Agreement which, at latest, constituted the government respondents' decision to close the Affected Road, even if, in certain events, such as, for instance, the failure finally to agree on terms of reference for the Independent Review, or an unsatisfactory Independent Review concluded within the Review Period, the Agreement might come to an end, if the government elected to terminate it, under its own terms. Even so, once the parties were committed to finally agreed terms of reference for the Independent Review, any termination or breach by government would lead to the payment of an indemnity and/or damages to Dart, and any possibility of government terminating the Agreement under clauses 128 or 129 ended with the expiry of the Review Period on 28 May 2012.

Is the NRA Agreement the only possible relevant decision (revisited)?

61. I can therefore find nothing in these matters to affect the judge's conclusion that the decision to close the Affected Road occurred at latest with the execution of the NRA Agreement on 15 December 2011; and that the actual gazetting and closure of part of the Affected Road on 13 March 2013 merely constituted the working out of that decision. The same would apply to Mr Akiwumi's new

candidate of the 14 February 2013 decision to proceed at that time with that gazetting and closure.

62. At the hearing of this appeal Mr Akiwumi cited no authority in support of his submissions. However, in his written submissions for this appeal Mr Akiwumi cited and relied on two authorities. The first was *Shrewsbury & Atcham Borough Council v. Secretary of State for Communities & Local Government* [2008] EWCA Civ 148. That case concerned proposals of the Secretary of State to replace two-tier local government in some parts of England with unitary authorities. The claimant Boroughs brought judicial review proceedings to challenge the process and decisions made by the Secretary of State in the course of that process. Since that challenge had started, a new statute (the "2007 Act") had been passed and brought into effect and the Secretary of State had made decisions under that statute to proceed with the proposals. The Boroughs applied for and were granted permission by the Court of Appeal to amend their applications to cover these later events. Lord Justice Carnwath was to say, at para 31 of his judgment, that that amendment "was in my view essential to ensure that the relevant decisions were within the scope of the proceedings". He then proceeded as follows, in a passage cited by Mr Akiwumi:

> "32. Judicial review, generally, is concerned with actions or other events which have, or will have, substantive legal consequences: for example, by conferring new legal rights or powers, or by restricting legal rights or interests. Typically there is a process of initiation, consultation, and review, culminating in the formal action or event ("the substantive event") which creates the new legal right or restriction. For example, the substantive event may be the grant of a planning permission, following a formal process of application, consultation and resolution by the determining authority. Although each step in the process may be subject to specific legal requirements, it is only at the stage of the formal grant of planning permission that a new legal right is created.
>
> 33. Judicial review proceedings may come after the substantive event, with a view to having it set aside or "quashed"; or in advance, when it is threatened or in preparation, with a view to having it stayed or "prohibited". In the latter case, the immediate challenge may be directed at decisions or actions which are no more than steps on the way to the substantive event. In the planning example, judicial review may be directed at the local authority resolution to grant permission while it is still conditional on, say, the completion of a highways agreement, even

though the resolution can have no legal effect until the issue of the formal permission.

34. In the present case, the substantive event, if it occurs, will be the taking effect of the necessary orders under the 2007 Act, bringing about the creation of the new authorities and the abolition of the old. Decisions or actions taken in advance of that event, whether before or after the Act, were no more than preparatory steps to that end. There is the difference, however, that steps taken after the Act were on their face formal steps in a statutorily defined procedure, whereas those taken before the Act were not. It was of course open to the Boroughs to commence proceedings at the earlier stage, and to use the March and July decisions as the focus of that challenge. But that challenge had no purpose in itself, except as a means of pre-empting the possibility of formal steps leading to a substantive order under the act in due course.

35. Once the Act has been passed and formal decisions have been taken, the focus of the challenge inevitably shifts. To put it another way, there would be no purpose in the court "setting aside" the pre-Act decisions, while leaving the post-Act decisions in place, since it is only the latter which provide the direct legal foundation for the making of the Parliamentary orders. At best, such an order by the court would create great uncertainty as to its practical consequences. In my view, therefore, it would have been wrong in principle to allow the challenge to proceed in the form proposed by Mr Arden. Had he refused to amend, I would have been inclined to treat that in itself as sufficient reason to deny a remedy.

36. It follows that the only issue which ultimately matters is the legal effect of the December decisions, and the steps taken pursuant to them. This issue must be considered in the context of the statute under which they were purportedly made…"

63. In the event the appeal in that case failed, despite the amendment which was crucial to its survival. The court concluded that Parliament had, if only retrospectively, given its stamp of approval to the procedure adopted, and there was no evidence that the Boroughs had been prejudiced in presenting their opposition (at paras 70, 76, 78).

64. However, it seems to me that there is no parallel between that case and this. We are not concerned with mere proposals, as in the case of the pre 2007 Act

proposals, but with a binding Agreement for the closure of the Affected Road which took into account all the matters which the NRA would have to take into account for the purposes of the Roads Law. In the present case, therefore, the "substantive event" is clearly the NRA Agreement. To the extent that Carnwath LJ in that passage is looking for the relevant decisions or acts, in the present case that search plainly points towards the Agreement. Thus Mr Akiwumi's invocation of the "substantive event" test seems to me to lead him in the wrong direction, back to the Agreement. And in the present case, there has in any event been no amendment.

65. Mr Akiwumi's second authority, *R (The Garden and Leisure Group Ltd) v. North Somerset Council* [2003] EWHC 1605 (Admin), was cited to invoke the "useful purpose" test. It concerned an attempt by one garden centre to thwart the decision in principle by the Council to grant an extension of the range of goods which could be sold by a competitor garden centre. The challenge succeeded and the decision was quashed, for it was flawed in the light of the governing statute. In the course of the argument, the defendant Council submitted that the decision was not a decision under the statute at all, it was a mere approval subject to referral to a Planning and Regulatory Committee. The argument failed, because, although there was no final decision, it was open to a claimant to anticipate the final decision "if the court in its discretion considers that a useful purpose would be served by such a challenge" (at para 35).

66. It seems to me, however, that that does not assist the appellants either. It demonstrates that, if, having complained about the NRA Agreement, the appellants had been met by an argument (not advanced in the present case) that reliance on that Agreement for launching a challenge had been premature, the argument would have failed. That tells one nothing, however, about the legitimacy of complaining about the NRA Agreement more than a year after its execution, to the knowledge of the appellants; nor does it tell one anything about the legitimacy of Mr Akiwumi's attempt to use the administrative outcome of the process committed to under the Agreement in his attempt to evade the limitation time bar applicable to the appellants' pleaded case.

67. Although Mr Akiwumi did not rely on *Regina (Burkett) v. Hammersmith and Fulham London Borough Council* [2002] UKHL 23, [2002] 1 WLR 1593, nevertheless the court raised it with the parties. That case concerned the issue whether an application for judicial review of the grant of outline planning permission had been made within three months. The outline planning permission had been granted on 15 September 1999 but was subject to various conditions and created no legal rights (at paras 37-39). The formal grant of

planning permission had been granted on 12 May 2000. The challenge had been made to the earlier resolution: but an amendment was made and granted directed to the later grant of formal permission. The House of Lords held that in the planning context it is the formal permission which founds the challenge. As Lord Steyn said: "In public law the emphasis should be on substance rather than form" (at para 31). Therefore, the judicial review challenge was not out of time.

68. In the present case, however, we are not concerned with planning permission: but if one asks whether the NRA Agreement is analogous to a mere outline planning permission which grants no legal rights, or to a formal planning permission which does, the answer must surely be that the analogy is to the latter and not to the former. The Agreement, being a binding contract between its parties which committed government to the closure of the Affected Road and committed Dart in its turn to various obligations of construction and expenditure, certainly created legal rights.

69. In *Regina (Nash) v. Barnet London Borough Council* [2013] EWCA Civ 1004, [2013] PTSR 1457 the *Burkett* case was distinguished. There again there had been earlier decisions (in 2010/11) and later decisions (in 2012), the claimant was out of time with respect to the earlier ones, but had based his challenge on the later ones. It was held, however, that the claimant's essential complaint related to the earlier decisions and he was refused permission to extend time so as to amend to impugn the earlier ones. The context was not planning but procurement. Lord Justice Davis gave the leading judgment with which Lady Justice Gloster and Lord Dyson MR agreed. In the course of his judgment, Davis LJ considered the *Burkett* case carefully, and continued:

> "65. That simply is not the situation here. Here, the council was not provisionally resolving to enter any outsourcing contract at all…What, as the context and the terms of the relevant decisions in November 2010 and March 2011 show, the council was doing was actually deciding to enter into a procurement process by way of competitive dialogue. That process then, and in accordance with the 2006 Regulations, proceeded in stages. Thus, in contrast with the initial resolution in *Burkett's* case, work here was lawfully and foreseeably done and money was expended precisely because of such decisions. The decisions thus had and were intended to have legal effect: not, of course, in terms of sanctioning a binding contract but in terms of authorising and causing the initiation of the procurement process, with attendant inevitable heavy expenditure and significant use of time and resources. Without such decisions, those things could not and would not have been done. Those decisions are thus,

indeed, in my view properly to be regarded as substantive or, if you like, "final" (using Mr Giffin's word) for that purpose. They are not to be regarded as contingent or provisional, even though there was no guarantee at all that any outsourcing contract or contracts might ultimately result. Mr Giffin did suggest that so to conclude would be tantamount to resurrecting "the real basis of complaint" approach put forward in the *Greenpeace* case but which was disapproved in *Burkett's* case. In my view, however, it does no such thing: rather, as I have sought to say earlier in this judgment, it identifies the actual decision by reference to which the grounds of challenge first arose."

70. Davis LJ also said this:

"72. Mr Giffin did also – with respect, rather vaguely – talk about the point when there was a final decision to act in a way which would impact on the claimant's "rights". I am not sure it is very helpful, in a context such as the present, to talk of "rights". Certainly there were here no property rights of the kind held by the claimants in *Burkett's* case [2002] 1 WLR 1593 which stood to be affected. That the claimant, given the obligations in section 3 of the 1999 Act and given that she is a resident of Barnet, had a sufficient interest entitling her to bring the proceedings is not in dispute. But to talk further about her "rights" adds nothing to the points identified above and cannot detract from focusing on the time when it was open to her to challenge the council for breach of its duty to consult: and that was in 2010/11.

73. There was also nothing in terms of fairness or certainty here such as to justify the claimant not issuing proceedings until after the decision of 6 December 2012. The prior decisions had been made at public meetings, had been published and (as found by the judge) were widely known…In truth considerations of fairness and certainty in this respect weigh strongly in favour of the council. It is inconceivable that the council (or the potential tenderers) would have gone down the very costly and time-consuming process of procurement and competitive consultation had it been envisaged that a challenge on the grounds of lack of consultation on the whole strategy of outsourcing might at the very end of the day be made. That is quite different from the inherent and understood risk that the procurement process might not ultimately result in any concluded procurement contract."

71. Nearly all of that applies, but a fortiori, to the present case, which, of course, involves the making of a binding contract as at December 2011.

72. In sum, I agree with the judge that the relevant, and indeed only relevant, decision for the purposes of section 26(4) of the Bill of Rights is indeed the one decision which in any event has been the focus of the appellants' pleading.

73. It follows that on this ground also the appellants' writ is out of time, and must be dismissed.

Abuse of process

74. There remains the respondents' argument that in any event the whole basis of the appellants' proceedings is misconceived, and that their challenge ought to have been brought as a typical case of judicial review, pursuant to Order 53, rather than pursuant to section 26(1) of the Bill of Rights and Order 77A.

75. The judge considered this submission carefully, but concluded that it was unnecessary for him to decide it. He reasoned as follows:

> "24…The First to Fourth Defendants have argued that the claim should be struck out for just this reason…They point out that…the so-called "exclusivity principle" set out in *O'Reilly v Mackman [1983] 2 AC 237* and confirmed in subsequent decisions supports their contention. In essence, the principle of exclusivity requires that challenges to governmental acts and decisions be advanced by way of judicial review; to pursue such a claim in a writ action is tantamount to an abuse of process. For further elaboration of this principle, see *Trim v North Dorset District Council [2010] EWCA Civ 446; Clark v University of Lincolnshire [2000] 1 WLR 1988; Bahamas Telecommunications Company Ltd. v Public Utilities Commission [2008] UKPC 10;* and *Stancliffe Stone Co. Ltd. v Peak District National Park Authority [2005] EWCA Civ 747 (CA).*
>
> 25. I am satisfied that the principle of exclusivity is part of the legal system in the Cayman Islands. It is open to this Court to view a writ action which challenges the validity of a governmental act or decision and does not assert any private law right, or in which the assertion of a private law right is a transparent fiction for the sole purpose of avoiding

the judicial review process, as an abuse of the process of the Court. However, the force of the exclusivity principle has been somewhat eroded by the adoption of our new Constitution and the catalogue of rights found within it. Section 26(1) of the Constitution enlarges the jurisdiction of this Court as it permits applications to the Grand Court where it is claimed that a governmental act or decision has breached a personal right or freedom.

26. Where the act or decision complained of is capable of grounding a claim (including an application for judicial review) under the law of the Cayman Islands as it was before the *Bill of Rights* took effect, the claim should ordinarily be advanced in the traditional manner. Nevertheless, there has now been some relaxation of the exclusivity principle (as is illustrated by the authorities mentioned below) and the fact that a writ action invokes constitutional protections and seeks to challenge a governmental act or decision will not necessarily or automatically mean that the action must be brought by judicial review. The law is in an undeveloped state at present. It is clear that some constitutional claims can be brought by a writ action in the ordinary way but this should not be permitted to become a "general substitute for the normal procedures of administrative action": *Harrikissoon v Attorney General of Trinidad and Tobago [1980] AC 265 (PC);* also see *D et al. v Home Office [2005] EWCA Civ 38 (CA)*. Just where the line should be drawn is unclear; some guidance has been provided in *Attorney General of Trinidad and Tobago v Ramanoop [2005] UKPC 15* where the Privy Council said (at 25):

> "*…where there is a parallel remedy, constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature which, at least arguably, indicates that the means of legal redress otherwise would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the court's process. A typical, but by no means exclusive, example of a special feature would be a case where there has been an arbitrary use of state power."*

76. On this appeal, these matters were not further investigated, and the jurisprudence listed by the judge was not referred to. In the circumstances, I am reluctant to decide this issue, seeing that it is unnecessary to do so.

77. I would merely record the following. Mr Akiwumi went so far as to submit that the introduction of the Constitution and the inclusion in it of section 19(1) meant that the process of judicial review had been abolished and replaced by a constitutional claim, under section 26(1), for breach of section 19(1). In this connection he referred to transcripts of "Formal Negotiations on a New Cayman Islands Constitution" held in 2008/9 involving Sir Jeffrey Jowell, the draftsman of the Constitution. These negotiations are, I suppose, a form of *travaux préparatoires*. Referring to what was then numbered section 18(1), Sir Jeffrey said, on 2 October 2008, that –

> "Eighteen is an increasingly accepted right, a constitutional right. It is something, particularly 18(1), that we have already because it simply is the law about judicial review of the action of public officials…This is already in the law, but to make it a constitutional right just elevates its status and applies it to all public officials and allows people reading the Constitution to see that this country observes good administrative practice, and if there is not good administrative practice it can be enforced in the courts…This provision was first introduced in South Africa, it is now part of the European Union Charter…"

78. On 13 January 2009 Sir Jeffrey said:

> "…19(1) reflects the drafting first from the South African constitution, and it's a formulation that has been accepted in a number of other countries since…"

79. On 5 February 2009, at Lancaster House, Sir Jeffrey said this:

> "In addition, and we must look at the bill of rights as a whole, there are additional rights here that don't even appear in the UK Human Rights Act and in the constitutions of a number of countries such as the right to lawful administration, constitutionalising the right to fairness, rationality, proportionality and so on in judicial review…"

80. Mr Akiwumi also referred us to the South African example, of which Sir Jeffrey had spoken. Thus, by reference to *The Pharmaceutical Manufacturers Association of South Africa Case, In re Ex Parte President of the Republic of South Africa* (2000) (2) SA 674 (CC) he submitted that in the context of a written constitution the common law "supplements…but derives its force from"

that constitution (at para [49]), and that "constitutional law and common law are intertwined and there can be no difference between them" (at para [50]). Similarly, Mr Akiwumi cited from the judgment of O'Regan J at para [22] in *Bato Star Fishing (Pty) Ltd v. The Minister of Environmental Affairs and Tourism* (12 March 2004, CC) to the effect that –

> "There are not two systems of law regulating administrative action – the common law and the Constitution – but only one system of law grounded in the Constitution. The courts' power to review administrative action no longer flows directly from the common law but from PAJA and the Constitution itself."

81. However, if one reads further into *Bato Star* it becomes clear that the South African constitutional example is not necessarily a good model for an understanding of the Cayman Islands' Constitution. This is because section 33 of the South African Constitution provides (see *Bato Star* at para [23]) not only by section 33(1) that "Everyone has the right to administrative action that is lawful, reasonable and procedurally fair" (which it might be said expresses the section 19(1) governmental responsibility of the Cayman Islands' Bill of Rights directly in terms of everyone's "right"), but goes on by section 33(3) to state that –

> "(3) National legislation must be enacted to give effect to these rights, and must –
>
> (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
> (b) impose a duty on the state to give effect to the rights in subsections (1) and (2), and
> (c) promote an efficient administration."

Transitional provisions of the South African Constitution provided that the legislation referred to in section 33(3) be passed within three years. The result was PAJA (the Promotion of Administrative Justice Act), referred to in para [22] of O'Regan J's judgment. The full provisions of PAJA are not available to this court, but O'Regan's judgment cites sufficiently from it to make it clear that PAJA itself provides a definition of "administrative action" and that the statute appears to legislate for a comprehensive regime of judicial review pursuant to section 33 of the Constitution: see para [25].

82. In the Cayman Islands there are no similar provisions and it seems reasonably clear to me that, however much judicial review may have been

adopted as the means by which the constitutional responsibility of section 19(1) is to be vindicated, it has not been abolished, *pace* Mr Akiwumi's submission, but continues to operate pursuant to Order 53, which has plainly survived the enactment of Order 77A. Mr Akiwumi submits that the concept of proportionality referred to in section 19(1) is an advancement on the common law of judicial review. I doubt that, for the common law is itself always developing: but if it is an advancement, so be it, but that still leaves open the strong likelihood that the process of judicial review is the means by which the section 19(1) responsibility is to be vindicated. I would be most reluctant to agree that judicial review has been abolished by the Bill of Rights.

83. That conclusion may leave open for consideration how one differentiates between matters for which the Bill of Rights provides a remedy under section 26(1) and matters for which judicial review is to provide a remedy. That question has not been seriously canvassed on this appeal. I would therefore be reluctant to attempt a definitive conclusion, and, as I have already remarked, it is not necessary to do so. The judge cited para 25 of Lord Nicholls' advice in the Privy Council in *Ramanoop* (see above). That case considered whether exemplary damages could be awarded to a claimant who had brought proceedings under section 14 of the constitution of Trinidad and Tobago which provided for redress by way of originating motion for breach of "any of the provisions of this chapter…contravened in relation to him". Mr Ramanoop's claim arose out of false imprisonment and assault by a police officer. The attorney general argued that only compensatory damages were available, but the Privy Council held that exemplary damages could be awarded. In the circumstances, the case did not directly concern the question raised by the respondents' notice on this appeal. Nevertheless, the Privy Council considered the question whether it made any difference that Mr Ramanoop's claim could have been brought by a common law action for damages.

84. It was in these circumstances that Lord Nicholls spoke as he did at para 25 of his advice. However, perhaps even more relevant to the present case is his previous paragraph 24, where he said this:

> "In *Harrikissoons's* case the Board gave guidance on how this discretion should be exercised where a parallel remedy at common law or under statute is available to an applicant. Speaking in the context of judicial review as a parallel remedy, Lord Diplock warned against applications for constitutional relief being used as a general substitute for the normal procedures for invoking judicial control of administrative action. Permitting such use of applications for constitutional redress would

> diminish the value of the safeguard such applications are intended to have. Lord Diplock observed that an allegation of contravention of a human right or fundamental freedom does not of itself entitle an applicant to invoke the section 14 procedure if it is apparent this allegation is an abuse of process because it is made "*solely* for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right": [1981] AC 265, 268 (emphasis added)."

85. In my judgment, these remarks are apposite to this case. I have referred above to the distinction which appears to be made in the Cayman Islands Bill of Rights between personal "rights and freedoms" and governmental "responsibilities". Mr Akiwumi accepted that section 19(1) is concerned with a responsibility of government. It is true that section 1(b) speaks of "responsibilities of the government and corresponding rights of every person against the government"; that Sir Jeffrey Jowell similarly spoke in terms of section 19 as concerning "rights"; and that the section 19(2) "right to request and be given written reasons" must often arise in connection with a typical judicial review challenge. Even so, and taking account of these matters, it seems to be possible to distinguish between on the one hand the fundamental personal human rights and freedoms which are set out in the Bill of Rights and which are familiarly found in constitutional documents such as the ECHR, and on the other hand the responsibilities of government which are concerned with lawful administration and the furtherance of constitutionally important objectives such as the environment and education. Such a distinction would not only fit within Lord Diplock's and Lord Nicholls' comments about the proper way to regard and canalise the possibilities of parallel remedies, but might well be regarded as a reflection of the need to support, indeed even to enhance by constitutional protection, the normal procedures of judicial review for the control of administrative action.

86. In such circumstances, and where the appellants cannot claim to be the victim of an infringement of their personal rights and freedoms, I see force in the respondents' submission that it is an abuse of process to use the constitutional remedy under section 26(1) in preference to the constitutionally protected remedy of judicial review under Order 53, with its appropriately more limited, but familiar, time limitation provisions. It is understandable that a victim claimant alleging breach of a fundamental right or freedom should have a

year, subject to the right to ask for an extension, within which to bring his or her claim. It is equally understandable that a person having nothing more than sufficient standing to bring a judicial review claim complaining of unlawful administration should do so within the shorter period prescribed by Order 53: even if the right to request reasons (under section 19(2)) might well provide a sound basis, in an appropriate case, to claim an extension of that period where reasons have not been provided and that right to request them has been ignored. It may be noted that in the present case, the appellants have never sought to amend to focus their complaint upon either the February or March 2013 dates for which they have contended on this appeal, nor have they complained that they have requested reasons which they have been denied.

Conclusion

87. In sum, I would dismiss this appeal both for the reason given by the judge, and because the appellants' statement of claim, even in its amended form, has always been focussed on the NRA Agreement itself, for understandable reasons, and not on the later workings out of the commitments which it contained.

Hon Justice Elliott Motley

88. I agree.

The Rt Hon Justice Sir John Chadwick, President

89. I also agree.