IN THE GRAND COURT OF THE CAYMAN ISLANDS

LEGAL AID NO: LACV: 0138/2017

CAUSE NO: 66 OF 2019

BETWEEN:	**ALICE MAE COE**	**1ST APPLICANT**
	ANNIE MULTON	**2ND APPLICANT**
	EZMIE SMITH	**3RD APPLICANT**
AND:	**GOVERNOR OF THE CAYMAN ISLANDS**	**1ST RESPONDENT**
	ATTORNEY GENERAL	**2NDRESPONDENT**
	REGISTRAR OF LANDS	**3RD RESPONDENT**

GRAND COURT CAYMAN ISLANDS GOVERNMENT 14/17

CLERK OF COURT MAY 01 2019 CAYMAN ISLANDS GOVERNMENT

APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW (O 53 r 3)

To the Clerk of the Court, Law Courts, George Town, Grand Cayman	
Name, Address and Description of Applicant(s)	1.1 Alice Mae Coe, Mt. Pleasant, West Bay, P. O. Box 524 Grand Cayman KY1-1107 – Caymanian, Retired 1.2 Annie Multon, Snug Harbour, West Bay Road, P. O. Box 616 Grand Cayman KY1-1107 – Caymanian, Retired 1.3 Ezmie Smith, Willie Farrington Drive, West Bay, P. O. Box 287 Grand Cayman KY1-1301 – Caymanian, Retired Civil Servant
Judgment, order, decision or other proceeding in respect of which relief is sought	**2. DECISIONS AND OMISSIONS IN RESPECT OF WHICH RELIEF IS SOUGHT:** **2.1** The failure of the 3rd Respondent to register the rights of way, a decision which the now Applicants appealed against, which appeal is **Exhibit AMC-4** to the Joint Affidavit of the Applicants. Those rights were proven by the approximately 500 affidavits that were filed with the 3rd Respondent and are

	referred to in paragraph 3 of the 1st Joint Affidavit of the 1st Applicant Alice Mae Coe, the 2nd Applicant Annie Multon and the 3rd Applicant Ezmie Smith (together "the Applicants"). **2.2** The decision by the Registrar of Lands as contained in the letter dated 17 January 2017, **Exhibit AMC-2** to the 1st Joint Affidavit of the Applicants by which the Registrar conveyed the decision to the general effect that the Registrar had no power to register the rights of way, and therefore refused to consider if the approximately 500 affidavits aforesaid had proved the rights of way. The decision was wrong in law and unreasonable. **2.3** The omission, by the 3rd Respondent, having received a formal appeal made by the Applicants under section 147 of the Registered Land Law, **Exhibit AMC-4** to the 1st Joint Affidavit of the Applicants failed to comply with that section by refusing to refer the matter to the Grand Court, this being upon the advice of the 2nd Respondent.
	2.4 The decision of the 2nd Respondent, given by way of legal advice, that the Registrar had not power to register the rights of way nor to refer the matter to the Grand Court.

Relief Sought

3. RELIEF SOUGHT:

3.1 An order of *certiorari* to quash the decision contained in the letter of the Registrar of Lands dated 17 January 2017 aforesaid by which she conveyed a decision to the effect by which the Registrar conveyed the decision to the general effect that the Registrar had no power to register the rights of way aforesaid, and to send the matter back to the 3rd Respondent to be reconsidered and decided in accordance with the findings of the Court;

3.2 An order of *certiorari* to quash the decision of the Attorney General contained in the letter of 27 March, 2017, **Exhibit AMC-5** to the 1st Joint Affidavit of the Applicants written to the Concerned Citizens Group to the effect that once an appeal is lodged with

	the Registrar under section 147 of the Registered Land Law, the appellants need to file an originating motion rather than the Registrar referring the matter to the Grand Court.
3.3	An order of *mandamus* directing the Registrar of Lands reconsider and decide the matter, in accordance with the findings of the Court, regarding the registration of the pertinent rights of way with respect to which affidavits were filed. .
3.4	Further and in the alternative, that the Registrar refer the matter to the Grand Court as required by section 147 of the Registered Land Law.
3.5	An order that the Respondents furnish the Applicants with reasons for the decision, as requested by the Applicants under section 19 of the Constitution of the Cayman Islands, and that such decisions be sufficient in law in terms of the details required as may be ordered by the Court;
3.6	A stay under Order 53 r 10(a) that no rights that are subject to the approximately 500 affidavits referred to herein be alienated until this matter is determined.
3.7	Costs, on the basis that the 2nd Respondent's position is an abuse of authority and is not arguable;
3.8	Such further, consequential, or other relief as the Grand Court deems just.
3.9	An oral hearing is requested as per Order 53 rule 3 (3), unless the court finds it unnecessary.

Name and address of applicant's attorneys, or, if no attorneys acting, the address for service of the applicant	H. Phillip Ebanks, Attorney-at-Law, 19 Walkers Road, P. O. 30422, Grand Cayman KY1-1202

Signed H Phillip Ebanks	H. Phillip Ebanks	Dated **29th April** 2019

GROUNDS ON WHICH RELIEF IS SOUGHT

(If there has been any delay, include reasons here)

Note - Grounds must be supported by an affidavit which verifies the facts relied on.

4. GROUNDS ON WHICH RELIEF SOUGHT:

4.1 ERRORS OF LAW:

4.1.1 The 2nd Respondent and the 3rd Respondent are wrong in law in holding that:

- The Registrar has no power to register rights of way even in cases where the prescriptive rights of way are proven.
- If the Registrar refuses to register the rights of way, she is not bound to refer the matter to the Grand Court and that it is rather the aggrieved applicant who should do so under Order 55 of the Grand Court Rules.

4.1.2 There are glaring errors of law in interpreting the statute in terms of substance. The following are the detailed arguments in that regard.

(a) Wrong general approach to the interpretation of the statute concerned

4.1.3 Statutes are not perfect and when a difficult problem arises, the courts must not immediately throw their arms up in the air and declare that there is nothing they can do. They must, within reason, do their best to do justice. In so doing, they must try to interpret the words used in the context in which they are used. This has been articulated by various authorities as follows.

4.1.4 In *Seaford Court Estates Ltd. V. Asher* (1949) 2 KB 481 at 498 Lord Denning said:

"Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and that even if it were, it is not possible to provide for them in terms free from ambiguity. The English language is not an instrument of mathematical precision. . . . This is where the draftsmen of Acts of Parliament have often been unfairly criticized."

4.1.5 In the same case, Lord Denning went further to say (Quoted from p 13 of *The Discipline of Law* (London: Butterworths, 1979):

"We do not sit here to pull the language of Parliament . . . to pieces and make nonsense of it. That is an easy thing to do, and it is a thing to which lawyers are too often prone. We sit here to find out the intention of Parliament . . . and carry it out, and we do this better by. . . making sense of the enactment than by *opening it up to destructive analysis.*" (Emphasis added.)

4.1.6 Again in the same case of *Seaford Court Estates Ltd. v. Asher* (1949-2 All ER 155 at p.164), wherein Denning L.J. said-

"When a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament..... And then he must supplement the written word so as to give "force and life" to the intention of the legislature....A judge should ask himself the question, how if the makers of the Act had themselves come across this ruck in the texture of it, how would they would have straightened it out? He must do as they would have done. A judge must not alter the material of which it is woven, but he can and should *iron out the creases*." (Emphasis added)

4.1.7 In other parts of the Commonwealth, India in particular, in the case of *M. Pentiah and others v. Muddala Veeramallappa and others (*AIR 1961 SC 1107) at para 27 the Supreme Court of India, while referring to the judgment rendered by Denning L.J., sought to rectify a mistake committed by draftsman in the following words:

"Where the language of a statute, in its ordinary meaning and grammatical construction, *leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended*, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence.... .Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskillfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used. Nevertheless, the courts are very reluctant to substitute words in a Statute, nor to add words to it, and it has been said that they will only do so where there is repugnancy to good sense."

4.1.8 Lord Simon is also on record in *Ealing London Borough Council v. Race Relations Board* (12. (1972) AC 342 at 361) saying:

"The courts have five principal avenues of approach to the ascertainment of the legislative intention: (1) examination of the social background, as specifically proved if not within the common knowledge, in order to identify the social or juristic defect which is the likely subject of the remedy; (2) *a conspectus of the entire relevant body of the law for the same purpose*; (3) particular regard to the long title of the statute to be interpreted (and, where available, the preamble), in which the general legislative objects will be stated; (4) scrutiny of the actual words to be interpreted in the light of the established canons of interpretation; (5) examination of the other provisions of the statute in question (or other statutes *in pari materia*) for the light which they throw on the particular words which are the subject of interpretation." (Emphasis added)

4.1.9 Elmer Driedger, the distinguished Canadian legislative counsel, law professor and author has observed how the courts used to prefer the **mischief rule**, then later preferred the

literal rule and the role that the **golden rule** have played in the history of statutory interpretation. He concluded in *Construction of Statutes* (Toronto: Butterworths, 1983) at p 87 as follows:

"Today there is only one principal of approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense **harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament**." (Emphasis added)

4.1.10 He called this the modern principle of statutory interpretation. One of Driedger's formulations helps to state this not-so-new rule. He says that the modern principle of the interpretation of statutes, as he called it, is that an Act as a whole is to be read in its entire context so as to ascertain the intention of Parliament (literal rule), the object of the Act (the mischief rule) and the scheme of the Act (the golden rule). In other words, the three classical rules are combined and given equal emphasis. This is the latest approach to the interpretation of statutes.

4.1.11 The modern principle has been relied upon by many Canadian court decisions and the Supreme Court of Canada declared it to be its preferred approach in *Re Rizzo and Rizzo Shoes Ltd* ([1998] 1 SCR 27, at 41.)

4.1.12 Regarding the intention of Parliament, Driedger has said (*Construction of Statutes*, cited above, at106:

'The "intention of Parliament" is, in a sense, a fiction. It has not an intention formulated by the mind of Parliament, for Parliament has no mind; and it is not the collective intention of the Members of Parliament for no such collective intention exists. The only real intention is the intention of the sponsors of the Bill that gave rise to the Act: but that is not the intention of Parliament. The "intention of Parliament" can only be an agreement by the majority that the words in the Bill express what is known as the intention of Parliament.'

4.1.13 The courts must not try to fill in clear gaps but must be very slow to declare that there is a gap. Maxwell cites a number of early cases relating to errors and gaps (Langan, P. St J., *Maxwell on the Interpretation of Statutes*, 3rd ed. (Bombay: NM Tripathi Private Ltd, 1976), 229 et al. In *The Beta* ((1869) 3 Moo. PC (NS) 23, cited from Maxwell), section 374 of the Merchant Shipping Act 1854 provided that no licence granted by Trinity House to pilots "shall continue in force beyond the 31st of January" after its date. It further provided that "the same may.... be renewed on such 31st day of January in every year, or any subsequent day". Strictly speaking, licences had to be renewed on that date or on a later date. However, the court held that licences could be renewed earlier than 31st

January but to take effect from that date. It was said that a strict application would have resulted in a district being left without qualified pilots for days or even weeks.

4.1.14 Even in criminal matters, this has been done. In *Adler v George* [1964] 2 QB 7 it was prohibited to be "*in the vicinity* of any prohibited place" and obstructing certain persons on duty there. The accused tried to escape conviction by arguing that he was not in the vicinity or neighbourhood of the Royal Airforce station but rather in the actual place. The court applied the provision as if it read "*in or in the vicinity*".

4.1.15 The Applicants are not seeking that the court to do something even as drastic as that.

4.1.16 In *Bourne (Inspector of Taxes) v Norwich Crematorium Ltd* [1967] 2 All ER 576, a revenue case, the court had to decide whether in a particular section human corpses should be considered to be "goods or materials". Stamp J said:

"English words derive colour from those which surround them. Sentences are not mere collections of words to be taken out of the sentence, defined separately by reference to the dictionary or decided cases, and then put back again into the sentence with the meaning which you have assigned to them as separate words, so as to give the sentence or phrase a meaning which as a sentence or phrase it cannot bear without distortion of the English language."

In the same vein, if a little more colourfully, in *Towne v Eisner* (1918) 245 US 418 at 425, Holmes J remarked:

"A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used."

4.1.17 This approach is supported by leading professional linguists. Ruth Sullivan, a Canadian authority on statutory interpretation, cites some of this learning in her book *Sullivan and Driegder on the Construction of Statutes* 4th ed (Markham, Butterworths, 2002) ((pp 15, 16). She observes that there is a theory of "conduit metaphor". This asserts that linguistic expressions are like vessels or conduits into which thoughts, ideas, or meanings are poured, and from which they can be extracted, exactly as they were sent, accomplishing transfer of possession. But she also observes that this view of language and communication has been discredited by modern linguists and cognitive psychologists. In place of the conduit metaphor, these experts assert, the texts must be seen as blueprints which define and constrain the extraction of meaning by readers rather than conveying it intact from one mind to another. It is further observed that virtually every word, whether noun, verb, adjective or preposition, can bear multiple senses and can be used to refer to an indefinite range of referents.

4.1.18 For example, in *R v Medical Appeal Tribunal ex parte Gilmore* [1957] QB 574, an industrial injuries scheme provided for industrial injuries to be assessed in accordance with a tariff. Gilmore lost sight in both eyes after two accidents. The tariff provided that loss of sight in both eyes entitled the applicant to an assessment of 100 per cent. His disablement was assessed at 20 per cent. The relevant statute provided that "the decision on any medical question by a medical tribunal . . . is final". Clearly, the tribunal had made an error of law. On an application for judicial review, the issue turned on the words "the decision on any medical question by the medical appeal tribunal . . . is final". The UK Court of Appeal held that the words did not oust the jurisdiction of the court. Denning LJ stated:

> ". . . the remedy of certiorari is never to be taken away by any statute except by the most clear and explicit words. The word 'final' is not enough. That only means 'without appeal'. It does not mean 'without recourse to certiorari". It makes the decision final on the facts, but not final on the law. Notwithstanding that the decision is by statute made 'final', certiorari can still issue for excess of jurisdiction or for error of law on the face of the record . . ." (at p 583).

4.1.19 The word "final" was not just given a dictionary meaning and then placed back in the provision. In my view, the interpretational issue that has arisen in relation to this matter is less complex than those which had to be faced in some of the cases cited above.

(b) The Registrar has enough general powers and, in the alternative, implied powers to register the rights in issue

4.1.20 In the first place, there is a general power conferred on the Registrar in general terms under section 5(1) of the Registered Land Law to the effect that, the Registrar "shall be responsible for administering the land registry in accordance with this Law". Then section 9(2)(c) stipulates that the register comprises, among other sections of the register, an "incumbrances section, containing a note of every incumbrance and every right affecting the land or lease." Therefore, it follows that whenever an incumbrance exists and has been proven, the Registrar has a duty to register it in accordance with her general power. The mere fact that, for the maximum clarity of the law some specific functions are mentioned does not derogate from the general power that is conferred. Indeed, if this were so, there are many things that the Registrar could not do. The doctrine of implied powers is one of the most useful tools for government institutions to perform their work effectively.

4.1.21 This position is supported by section 38 of the Interpretation Law. That section provides that:

"38. Where, in any Law, power is given to any person to do or enforce the doing of any act or thing, all such powers shall be understood to be also given as are reasonably necessary to enable the person to do or enforce the doing of the act or thing."

Accordingly, even if it were the case that there is no specific power conferred, this section would implicitly confer the power on the Registrar.

4.1.22 It is also worth noting that even where the legislation has not been as broad as section 5(1) of the Registered Land Law, courts have always been ready to consider that certain powers are necessarily implied. For example, in the Jamaican case of *Attorney General v Coconut Marketing Board*, (1994) 4 JLR 189, the Board had power to "***trade*** **in coconut and coconut products**". The issue arose whether this implicitly allowed the Board to "***manufacture*** **coconut products**". The court held that the manufacture of coconut products was **not incidental** to the power to trade on coconut and coconut products. In other words, even if there was no express provision, the court was ready to consider if the power was implied.

4.1.23 Another example is In *Margeston v Attorney General* (1968) 12 WIR 469, the Governor of Antigua had power to restrict immigration under a statute. He used his power to also regulate work permits. Essentially it was argued that, under the doctrine of implied powers, work permit issues are incidental to immigration. It was held that the minister had exceeded his power under the statute and therefore acted ultra vires.

4.1.24 This approach to statutory interpretation is supported by a specific rule relating to interpretation of regulation-making powers but which equally applies to any general power that is accompanied by specific powers. The Interpretation Law (1995 Revision) states that:

"27. Where a Law confers power on any authority to make or issue regulations, the following provisions shall, unless the contrary intention appears, have effect with reference to the making, issue and operation of such regulations-

...

(c) where any Law confers power on any authority to make regulations for any general purpose, and also for any special purposes incidental thereto, the enumeration of the special purposes shall not be deemed to derogate from the generality of the powers conferred with reference to the general purpose;".

By the same token, the specific powers of the Registrar do not restrict the general power of that office.

(c) Error of Law in interpreting the statute with regard to the procedure.

Basic interpretation of section 147 of the Registered Land Law

4.1.25 Paragraph 3 of the letter from the Attorney General dated 27th March 2017, **Exhibit AMC-5** to the 1st Joint Affidavit of the Applicants, which refers to the Statement of the Question, also says that: "Unless an Originating Motion is served on the Registrar, the Statement will not be filed with the Court." This is stated in relation to section 147 of the Registered Land Law, which reads as follows:

"147. (1) The Governor or any person aggrieved by a decision, direction, order, determination or award of the Registrar may, within thirty days of the decision, direction, order, determination or award, give notice to the Registrar in the prescribed form of his intention to appeal to the court against the decision, direction, order, determination or award.

(2) **On receipt of a notice of appeal, the Registrar shall prepare and send to the court and to the appellant, and to any other person appearing to him from the register to be affected by the appeal, a brief statement of the question in issue.**

(3) On the hearing of the appeal, the appellant, the Registrar and any other person who, in the opinion of the court, is affected by the appeal may, subject to any rules of court, appear and be heard in person or by a legal practitioner." **(Emphasis added.)**

4.1.26 The Applicants disagree with that position. First, the Registrar is conflating two separate procedures, either one of which can be used to bring the matter to a court. Once a party have given notice of intention to appeal under section 147(1) (which has not been amended), the Registrar is duty bound to prepare a statement under subsection (2). The Applicants take the position that the rules of natural justice require that the Registrar afford them an opportunity to be "heard" by submitting the full legal arguments. Further, they submit that that the words "subject to the rules of court" in subsection (3) are used in relation to who may or may not be heard at the hearing. They are not intended to suggest that the whole filing of the case must be in accordance with Order 55.

4.1.27 Second, the Registered Land Law is principal legislation passed by the Legislative Assembly. It takes precedence over the Grand Court Rules, which is subordinate legislation. Thus, whereas the GCR have to be used where the particular statute does not provide for the procedure of appeal, where the particular statute provides for a special procedure for appeal, a party is free to use that procedure. Once the party chooses that procedure, all that remains is for the authority concerned (the Registrar in this case) to bring the matter before the Grand Court.

The particular qualifies the general

4.1.28 It has been specifically held in Cayman as in other jurisdictions that, a general provision must not be construed as repealing or derogating from a specific provision in an earlier piece of legislation unless reasonableness requires it. Indeed, this applies across statutes regardless of which statute was enacted earlier. This is how courts resolve ambiguities that exist between statutes or even individual provisions in a statute. The case at hand deals with two pieces of legislation providing differently for the same subject-matter.

4.1.29 In *Seven Mile Beach Resort Ltd v Planning Appeals Tribunal* (1997) CILR 400 (Grand Ct, Smellie J), the Central Planning Authority (CPA) granted planning permission to Company A. Company B appealed to the Planning Appeals Tribunal (PAT) against the grant. Due to the delay by Company B in complying with the appeals procedure and adjournments at its request, the PAT's decision dismissing the appeal was not given until seven months after planning approval had been given.

4.1.30 A person dissatisfied by a decision of the PAT could appeal to the Grand Court under the Grand Court Rules, O 55, r 3 by **notice of motion**. There was a time limit under that rule. However, under earlier legislation, namely, the Development and Planning (Appeals) Rules 1985, r 10, an appellant was to appeal by **notice of appeal** but was not required to serve their grounds of appeal until the Chairman of the PAT had given full reasons for the

decision. Company B filed the notice of motion but without grounds. Company A asked that this be struck out since it had no grounds. Further, Company A argued that, in any case, since Company B had appealed out of time, its appeal could not be heard unless they applied for an extension of time.

4.1.31 **Held:** The rule *generalia specialibus non derogant* (**the particular qualifies the general**). Smellie J quoted with approval the words of the Earl of Selborne in *See Seward v "Vera Cruz" (Owner)* where he said:

"Now if anything be certain it is this, that where there are general words in a later Act **capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation**, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so." (Emphasis added)

4.1.32 Accordingly, the company was not out of time under the old rules, which still applied in relation to the specific matters relating to planning appeals. The "old" rule under the Development and Planning (Appeals) Rules must be maintained as an exception to the general rule under the Grand Court Rules.

4.1.33 In *Wight v Wight* (2006) CILR 416 (Cayman Court of Appeal) the following were the facts. The appellant applied to the Grand Court for financial provision in divorce proceedings. The Grand Court made an order for financial provision in proceedings reported at 2006 CILR 1. The appellant appealed against the order without seeking leave from either the Grand Court or the Court of Appeal. The Court of Appeal agreed to decide, as a preliminary issue, whether her appeal against the ancillary order could properly be brought under the Matrimonial Causes Law without leave, or if it was necessary to seek leave and bring the appeal under the Court of Appeal Law.

4.1.34 The appellant submitted that under the **Matrimonial Causes Law** (2005 Revision), s.24, parties to a suit brought under that Law were **entitled to appeal as of right to the Court of Appeal against any decree or order made in the suit**, and she did not therefore need leave.

4.35 The respondent submitted in reply that the appellant required leave to appeal, since the **Court of Appeal Law** (2006 Revision), s.6(f)(iii) provided that **no appeal lay** from an interlocutory order of the Grand Court in a matrimonial cause **without the leave of the Grand Court or Court of Appeal** except in the case of a decree nisi, and the Court of Appeal Rules, r.12(6)(y) further provided that an order for ancillary relief in matrimonial proceedings, including a matrimonial property adjustment order, should be treated as interlocutory for the purposes of appeal.

4.1.36 **Held**, allowing the appeal to proceed:

(1) The appellant could appeal without leave because, under s.24 of the Matrimonial Causes Law (2005 Revision), as a party to a suit under that law she had a specific right of appeal to the Court of Appeal against any order made under that law. Although the exercise of that right conflicted with the requirement of the Court of Appeal Law (2006 Revision), s.6(f)(iii) that leave was required for an interlocutory appeal in these circumstances, the plain words of the Matrimonial Causes Law created an appeal as of right and could not be disregarded.

(2) The court, of its own volition, suggested that it would be desirable for the Matrimonial Causes Law to be amended in order to clarify the position with regard to appeals from orders for ancillary relief made in conjunction with decrees of dissolution in matrimonial proceedings. Quite apart from the question of leave or no leave, the two statutory regimes provided different appeal periods, and the extension of the single appeal period provided under the Matrimonial Causes Law appeared to be impossible, whilst under the Court of Appeal Law time could be extended.

4.1.37 These arguments may have been irrelevant if the Registered Land Law had not contained specific provisions as to how to handle an appeal. For example, if it had merely stated that a person dissatisfied with a decision of the Registrar may appeal to the Grand Court or refer the matter to the Grand Court, then there may have been room for the argument that the general provision in the Grand Court Rules would apply. The difference here is that, in addition to conferring the right of appeal, the Registered Land Law, in section 147, goes further to state that the Registrar must submit the matter to the court. That is the applicable procedure. What can be read in are the rules of natural justice, which, in this case, would require that the Applicants be given an opportunity to state their case fully (which by submitting detailed grounds they exercised), which submission should have been submitted to the court. Indeed, the Applicants contend that once the Registrar had read the submission and responded, the Applicants should have been allowed a rejoinder, in the same way that court cases are conducted. Only then can the court have the complete picture as to the issues it needs to address.

Effect of the 2017 amendment

4.1.38 Also, there has been an amendment to section 9 of the Prescription Law (1997 Revision). Before the amendment, that section read as follows:

"9. Where the public or any class of the public have used any beach, land, road, track or pathway in the manner specified in section 4(1) for the period mentioned in the said subsection and such user is disputed, any person concerned in the dispute may lodge a

plaint in the Grand Court under the Judicature Law (1995 Revision), and the said Law shall apply to the matter in dispute." (Underlining added)

After the amendment, it now reads as follows:

"9. Where the public or any class of the public have used any beach, land, road, track or pathway in the manner specified in section 4(1) for the period mentioned in the said subsection and such user is disputed an application may be made to the Grand Court for settlement of the dispute by-

(a) any person concerned in the dispute; or

(b) the statutory authority or department or Governor or agency designated by Cabinet by order charged with the responsibility for ensuring access to public beaches on behalf of the public or any class of the public." (Underlining added)

The only substantive change is the addition of paragraph (b). Our view is that the appeal procedure under section 147 of the Registered Land Law still applies. Thus, even after the amendment, there can be no doubt that the Registrar of Lands has power to register the rights of way but fails to do so.

4.2. UNREASONABLENESS

The decisions to refuse to register the rights of way and, having refused to register the, the refusal to refer the matter to the Grand Court, are *Wednesbury* unreasonable even in the most conservative iteration of that principle as originally enunciated in *Associated Provincial Picture House Ltd v Wednesbury Corporation* [1948] 1 KB 223.) Where a statute specifically says that when certain conditions are met an authority "shall" do something, no reasonable public authority can conceivably hold that this is discretionary.

4.3 IMPROPER MOTIVES

The decision is occasioned by improper motives in that, quite apart from the fact that it is difficult to see whose interests it is serving, one can reasonably draw the inference that:

(i) there is intellectual dishonesty in the conclusions reached by the Registrar and the Attorney General;

(ii) the only reasonable inference is that the government would like to retain a free hand in allocating lands to investors and other people without having to deal with well-protected rights of way.

(*Porter v Magill* (2002) 2 AC 357 and *Margeston v Attorney General* 91968) 12 WLR 469, generally on improper motives.) The motive for this egregious flouting of the law can only mean that the government wishes to retain the ability to allow development in the Islands without having to deal with those who assert the rights of way.

4.4. IRRELEVANT CONSIDERATIONS

The decision has taken into account irrelevant matters such as the need to facilitate development without having to deal with the rights of way. Refusing to register the rights on the basis that the newly established Public Lands Commission would deal with it is an irrelevant consideration. The Public Lands Commission mandate is to regulate the use of public land in the interest of the public. The Commission may take legal measures to enforce public rights of way over private land to settle disputes if designated to do so by Cabinet under section 8 of the law. One Caymanian case (among many local and UK cases) that speaks to irrelevant considerations is *Graham Thompson and Associates v Liquor Licensing Board* (1988-89) CILR 25, GC.

4.5 BAD FAITH

The shear refusal to apply the clear and unambiguous language of section 147 amounts to bad faith.

4.6 FLAGRANT DERELICTION OF DUTY: CRIMINAL OFFENCE

4.6.1. As already pointed out, if the Registrar is of the view that she does not have a duty to register the rights, then she has a duty, under section 147, to prepare a record for submission to the Grand Court. Her failure to do so is a flagrant and deliberate neglect of a clear duty. In that regard, section 119 of the Penal Code provides as follows:

"119. A person who being employed in the public service wilfully neglects to perform any duty which he is lawfully bound to perform, provided that the discharge of such duty

is not attended with greater danger than a man of ordinary firmness and activity may be expected to encounter, commits an offence."

4.6.2 Furthermore, it is a dereliction of a clear duty and therefore a criminal offence under another section. Section 121 of the Penal Code provides that:

"121. A person who wilfully disobeys any law by doing any act which such law forbids, or by omitting to do any act which such law requires to be done, and which concerns the public or any part of the public, commits an offence and, unless the law provides for some other penalty, is liable to imprisonment for two years."

4.6.3 It does not need elaboration that, in refusing to refer this matter to the Grand Court, upon the advice of the Attorney General, the Registrar has committed a criminal offence and the Attorney General has induced and counselled her to commit a criminal offence. In this matter the Applicants have utilized the administrative procedure created by the legislation which allowed them to challenge the Registrar's decision but the Attorney General has wrongly advised that the Applicants have to either have the rights of way registered or, failing that, to refer the matter to the Grand Court. This is yet another reason why an extension of time should be granted as prayed for under heading 5 below.

5. REASONS FOR THE DELAY IN BRINGING THE PROCEEDINGS

5.1 It must be observed that there is abundant authority for the position that courts must grant an extension of time if it is in the interest of justice to do so. In considering such an application, the cases are very clear that some of the factors to be considered are: (a) whether granting the application may cause undue hardship or injustice to a party; (b) the length of and reasons for the delay; (c) the merits of the appeal. Among many cases where this has been reaffirmed include *Palata Invs. Ltd.* v. *Burt & Sinfield Ltd.*, [1985] 1 W.L.R. 942, as well as *Beacon Hill Asset Management v Bullmore* (2004–05) CILR Note 45.

5.2 The Applicants are of course aware of the case involving them, namely, *Coe, Multon, Smith and Ebanks v. Governor and Four Others* (2014) 2 CILR 465. There, the Grand

Court and the Court of Appeal refused to grant an extension of time for the filing of the application. The matter was lost on that procedural issue alone. However, that case did not reject the principles upon which an extension may be granted. It only refused to do so in the circumstances of the particular case. Indeed, the grant of applications made out of time is an important aspect of the delivery of justice.

5.3 It is worthy of note that in the *Coe* Case, the issue related to West Bay Road only and in particular to the rights of way and accesses to the beach and foreshore served by that Road. Whereas it was an important matter and many legal observers in Cayman have noted that because of the importance of the matter as well as its strong merits an extension should have been granted. The current case is an appropriate one for the grant of an extension of time. In applying the 3 criteria referred to above, the following also needs to be stated.

5.4 **First**, that there would be no hardship to anyone. If anything, there would be great hardship to those people who have used these rights of way for decades and whose existence and use is ingrained in their lives and culture. In contrast to the *Coe* Case, the issues arising here do not just affect one area of Cayman, but all 3 islands. Also, the number of rights of way is in the hundreds and the approximately 500 affidavits referred to above support this assertion.

5.5 **Second**, the delay in this matter is very understandable. The Applicants filed an appeal with the Registrar within the time allowed. They also indicated that their failure to make an application to the court was because they needed to seek legal aid since the litigation was going to be expensive. The chronology relating to this and related matters are in the 1st Joint Affidavit of the Applicants.

5.6 **Third**, and most important, the merits of the case need to be considered. The Registrar and the Attorney General have acted in flagrant disregard of their clear duty to consider the rights of way brought to their attention. They cannot rely on a time limitation to escape a clear duty. In this regard, there is also apparent bad faith. The Applicants point out in paragraph 17 of the 1st Joint Affidavit of the Applicants a discrepancy between the date of the letter **Exhibit AMC-5** and the date of postmark **Exhibit AMC-6** which seem to indicate that the letter was withheld to let the time expire.

5.7. On the whole therefore, considering all the relevant factors, this is a case in which the interest of justice can only be served by a grant of leave to make the application out of time. If an extension of time cannot be granted in a case where a significant part of Caymanian heritage, country-wide, is in danger of being completely eroded and in a matter where the law is very clear, it is difficult to imagine other cases where such an application might be granted. This case will also create a landmark precedent and send a

message to public authorities as to the need to comply with legislation where it is clear.

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Date: 29th April 2019

THIS APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW is filed by H. Phillip Ebanks, Attorney-at-Law, whose address for service is 19 Walkers Road, PO Box 30422, Grand Cayman KY1-1202