Neutral Citation Number: [2024] CA (Bda) 18 Civ

Civil Appeal Nos. 39, 40, 41, 41A of 2022

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL JURISDICTION**
**BEFORE THE HON. ASSISTANT JUSTICE SOUTHEY**
**CASE NUMBER 2021: No. 29**

Sessions House
Hamilton, Bermuda HM 12

Date: 11/06/2024 – 13/06/2024

**Before:**

**THE PRESIDENT, SIR CHRISTOPHER CLARKE**
**JUSTICE OF APPEAL SIR ANTHONY SMELLIE**
**and**
**JUSTICE OF APPEAL IAN KAWALEY**

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**CIVIL APPEAL No. 39 of 2022**

**BETWEEN:**

**COMMISSION OF INQUIRY INTO HISTORIC LOSSES OF LAND IN BERMUDA**

**Appellant**

**- and -**

**RAYMOND GERALD DAVIS**

**First Respondent**

**MYRON ADWIN PIPER**

**Second Respondent**

**CIVIL APPEAL No. 40 & 41A of 2022**

**BETWEEN:**

**MYRON PIPER and RAYMOND GERALD DAVIS**

**Appellants**

**- and -**

**THE PREMIER OF BERMUDA**

**COMMISSION OF INQUIRY INTO HISTORIC LOSSES OF LAND IN BERMUDA**

**Respondents**

The Appellants/Respondents appeared as Litigants in Person
Mr Delroy Duncan, K.C. and Mr Ryan Hawthorne, of Trott & Duncan Limited, for the Commission of Inquiry
Ms Lauren Sadler-Best of the Attorney General's Chambers, for the Premier of Bermuda

**Hearing date(s)**: 11-13 June 2024
**Draft Judgment circulated:** 18 September 2024
**Date of Judgment:** 11 October 2024

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**JUDGMENT**

**SIR CHRISTOPHER CLARKE, P**

1. This is an appeal from the judgments of Assistant Justice David Southey KC of **5 August 2022** and **22 October 2022** in respect of an application for judicial review brought by Raymond Davis (also known as Khalid Wasi) and Myron Piper (the "Applicants") against the Premier of Bermuda (the "Premier") and the Commission of Inquiry into Historic Losses of Land in Bermuda ("the COI"). The COI and Messrs Davis and Piper are the appellants.

2. The COI was appointed by the Premier on **31 October 2019**. The factual background to it is helpfully set out in paragraphs 7 – 23 of the 5 August 2022 judgment, which I will not repeat. The terms of reference of the Inquiry were as follows:

> "*1. Inquire into historic losses of citizens' property in Bermuda through theft of property, dispossession of property, adverse possession claims and/or such other unlawful or irregular means by which land was lost in Bermuda;*
>
> *2. Collect and collate any and all evidence and information available relating to the nature and extent of such historic losses of citizens' property;*
>
> *3. Prepare a list of all land to which such historic losses relate;*
>
> *4. Identify any persons, whether individuals or bodies corporate, responsible for such historic losses of citizens' property; and*
>
> *5. To refer, as appropriate, matters to the Director of Public Prosecutions for such further action as may be determined necessary by that Office."*

The Commission submitted its report to the Premier on **31 July 2021**. The report was submitted to the House of Assembly on **10 December 2021.**

***Mr Davis' involvement with the Commission***

3. At [36] of his first judgment the judge quoted Mr Davis' affidavit, which said:

> "15 *I sent a submission to the Commission which included two claims: (1) irregular lending practices in a General Improvement Area (GIA) combined with retaliation based on my political affiliation by officers of the Bermuda Housing Corporation (BHC), resulting in a significant loss of property; and (2) the targeting of myself and other black businessmen who were merely innocent clients of the Bank of Bermuda during a criminal investigation conducted by Scotland Yard, no less, of an alleged fraud ring involving former bank manager Arnold Todd, resulting in an enormous loss of real property and the financial ruin of many black Bermudian men and, by extension, their families, including myself."*

That summary of both claims (which are contained in lengthy documents which the judge had read) was regarded by the judge as broadly fair. I agree.

4. Mr Arnold Todd, together with (Mr Davis told us) four others, was the subject of criminal proceedings in a nine-week trial in Autumn 1996 on counts of theft, fraud and false accounting. He was also subject in 1991 to civil proceedings by the Bank of Bermuda. In the course of his oral submission to us Mr Davis filled us in on some of the background. Mr Todd was said to be the head of a ring of bankers and realtors who used the Bank's money "under the table" to enter into financial deals. Sums would be loaned to individuals. The money would not be used by those individuals but pooled and used to purchase tracts of land. Later the land would be sold and the money loaned would be paid back to the Bank and the individuals would get a cut. There also appeared to be a practice – he cited one example, involving a Bank employee other than Mr Todd - of getting borrowers to sign two sets of papers (although they sought only

one loan) and the second loan was available for use by the fraudsters. It appears that on some occasions money was advanced by the Bank purportedly against a personal loan application, which had been signed in blank and completed by Mr Todd with false information so that it appeared that the applicant qualified for a loan.

5. The COI concluded that Mr Davis' cases did not fall within its terms of reference. As the judge explained:

> "*38 The Commission of Inquiry ultimately concluded that Mr Davis's cases did not fall within its terms of reference. That decision was initially communicated in a letter dated 11 May 2020. In relation to the first complaint, the letter stated that:*
>
> > *The Commission is of the view that this is a commercial dispute between you and the Bermuda Housing Corporation and does not fall within the mandate of the Commission.*
> > *Without commenting on the merits of your case, the Commission is of the view that your dispute is best handled by the courts and you should seek legal advice regarding what remedies, if any, are available to you at this time.*
>
> *39. In relation to the second complaint, the letter stated that:*
>
> > *As in the case with your complaint relating to the Bermuda Housing Corporation, this is a commercial dispute between you and the Banks and the Pension Fund and, as such, is not within the jurisdiction of the Commission.*
>
> *40. Following that letter, the Commission of Inquiry met on 17 June 2020. The minutes record that:*
>
> > *The members agreed that the applicant had 'no claim' as both were commercial disputes.*
>
> *41. Mr Davis challenged the decision of the Commission of Inquiry in an e-mail dated 6 July 2020.*
>
> *42. On 1 October 2020 the Commission of Inquiry wrote to Mr Davis. It stated that:*
>
> > *As a result of several cases filed with it, the Commission has decided to investigate historical lending practices in Bermuda that may have led to a loss of land. Your allegations appear to raise issues that may be relevant to this matter. Thus the Commission is prepared to hear the evidence you have to offer relating to this matter as part of background information relating to banking practices on the Island, but in its final report it will not comment or make recommendations regarding your*

*specific case*[1]

*43. On 9 October 2020 the Commission of Inquiry e-mailed Mr Davis. It stated that:*

> *To be clear, the Commission is not a court of law. Rather, it investigates historical systemic issues relating to land grabs in Bermuda. It does not and cannot grant remedies to any claimant. If it decides that systemic issues need to be addressed, it may make a recommendation to the Government of Bermuda as may be required to resolve such systemic problems."*

*44. Mr Perinchief's affidavit records further detail of the history set out above. It should be noted that the affidavit states that:*

> *... the Commissioners never granted Mr. Davis standing in the sense of accepting that the BHC Claim or the Bank of Bermuda Claim fell within the [terms of reference] or scope of inquiry. The Commissioners always considered Mr. Davis's claims as not being systemic and being commercial disputes. While the Commissioners wanted to do all they could for Mr. Davis ..., ultimately it was decided that the investigation should not be pursued because it was neither systemic nor demonstrative of unlawful or irregular means by which land was lost. The claims were simply outside the [terms of reference] and so [the Commission] did not have jurisdiction to hear or investigate them. ...*
>
> *Mr. Christopher Swan, a property lawyer, gave evidence ... [counsel to the inquiry] put to Mr. Christopher Swan that in the perception of some borrowers, a recalled mortgage was "a land grab", it was the stealing or unlawfully taking. Mr. Christopher Swan responded "The bank owns the property until you pay off the debt and if you don't pay off the debt, it's not illegal for the bank to retrieve those monies that have been borrowed." In the absence of any evidence that the "retrieval" by the bank of monies borrowed by Mr. Davis was both an irregular means by which his land was lost and was systemic in the sense described above, the Commissioners took the view that the BHC Claim and the Bank of Bermuda Claim were not appropriate cases for the [Commission of Inquiry] and that any investigation into those cases should not proceed.*

*45. Mr Perinchief concludes his review of the Commission of Inquiry's approach to Mr Davis's case by stating that:*

[1] The COI had indicated in a letter sent by email on **6 July 2000** (although wrongly dated 11 May 2000) that, if Mr Davis submitted a sworn affidavit setting out in a chronological fashion the relevant dealings between him and the BHC, together with all relevant documentation evidencing the transaction, it would be prepared to accept this evidence "*for the purpose of considering whether your case is supportive of a systemic practice historically engaged by lending institutions*"' But their view continued to be that as he had a remedy before the courts (not identified) his case could not be considered to be a historical land grab. Mr Davis responded on **6 July 2020** . By letter dated **21 July 2020** the Commission told Mr Davis that it remained of the view that the first two natters in his application – the BHC and Bank of Bermuda claims - were not within the jurisdiction of the Commission and that the Commission declined to hear from him on those matters.

> *The Commissioners were prepared to investigate Mr. Davis's claims provided they met the criteria that his loss was the result of systemic practices that his loss of land was caused by irregular means. However, the Commissioners were ultimately of the view that there was no evidence upon which it could conclude that it was systemic or that the conduct of the lending institutions was unlawful or irregular. [Emphasis added]*

6. The judge accepted [46] that the COI relied on findings that (i) the loss of land in Mr Davis' cases was "*commercial*" and therefore his land was not lost by "*such other unlawful or irregular means*"; and (ii) the loss of land was not the result of something systemic, a concept that underpinned the COI. He went on to find – see below – that it was not necessary for the loss of land to result from something systemic and that it was wrong to exclude Mr Davis claims from consideration because the loss was a result of some commercial dispute.

7. As to Mr Piper's involvement with the COI, the judge found as follows:

> *"47 Mr Davis's 1st affidavit accepts that Mr Piper's complaint was 'partially investigated'.*
>
> *48. Mr Perinchief's affidavit states that:*
>
> *The fact is, however narrowly the Commissioners interpreted the ToR, Mr. Piper was granted standing before his application for judicial review was filed[2] and so he cannot now complain that he has been adversely impacted by the Commissioners' interpretation and application of the ToR.*
>
> *49. In oral submissions, Mr Piper essentially sought to argue that the Commission of Inquiry had failed to act fairly towards him. I have not set out the detail of the arguments because it appears to me that they are irrelevant. I have set out the grounds in support of the application for judicial review below. The important point to note is that they do not include a procedural challenge. They are focused on the Commission of Inquiry's terms of reference. Those terms of reference did not prejudice Mr Piper as his matter was found to be within scope."*

***Grounds***

8. The Form 86A filed by the Applicants on **27 January 2021**, identified the first two grounds as being as follows:

> "*The Commission is ultra vires the Commissions of Inquiry Act 1935 ("the Act") for the following reasons:*

[2] This is wrong. He was granted standing by a letter dated 8 March 2021, emailed to Mr Piper on 11 March 2021.

*(a) The Commission is ultra vires Section 1(1) of the Act due to the too broad wording of the Terms of Reference set by the Premier of Bermuda to establish the Commission. By way of the lack of specificity of the time-span of the Commission's remit (no definition of "historic"); the lack of specificity of what the terms "other unlawful or irregular means" constitute; the lack of specificity on which "individuals" and "corporate bodies" are covered by the Commission's remit - the Commission is, in effect, exercising an absolute discretion with regards to the Terms of Reference. This has led to a lack of consistency exhibited by erratic, arbitrary and constantly changing decisions as to what matters actually fall within its jurisdiction. and/or*

*(b) The Commission is ultra vires Section 6 of the Act. If the Premier deliberately intended the Terms of Reference to be broad, then the Commissioners are unlawfully restricting the remit by excluding certain individuals and/or corporate bodies from exposure and examination, and thereby not making a "full, faithful and impartial inquiry into the matter specified in their commission."*

*As a result of the above, the Commission is not properly operating under the Act and, in the process, is harming the public welfare contrary to the stated intentions of the Premier's appointment in the Official Gazette.*

*2) It is unreasonable and irrational that the appointing authority (the Premier of Bermuda) would not have given more detail and specificity as to the parameters (timeframe) and persons (whether individuals or corporate bodies) covered by the Terms of Reference as a matter of public interest - to avoid the confusion that has pursued the Commission's erratic decisions, which are themselves unreasonable and irrational."*

9. Sections 1 and 1A of the *Commissions of Inquiry Act 1935* provide:

*"**Governor may appoint commissioners of inquiry into matters of public nature***

*1 (1) The Governor may, whenever he considers it advisable, issue a commission appointing one or more commissioners and authorizing them, or any quorum of them therein mentioned, to inquire into the conduct of any civil servant, the conduct or management of any department of the public service or into any matter in which an inquiry would in the opinion of the Governor be for the public welfare.*

*(2) Each such commission shall specify the subject of inquiry, and may, in the discretion of the Governor, if there is more than one commissioner, direct which commissioner shall be chairman, and direct where and when such inquiry shall be made, and the report thereof rendered, and prescribe how such commission shall be executed, and may direct whether the inquiry shall or shall not be held in public.*

> *(3) In the absence of a direction to the contrary, the inquiry shall be held in public, but the commissioners shall nevertheless be entitled to exclude any person or persons for the preservation of order, for the due conduct of the inquiry, or for any other reason.*

***Premier may appoint commissioners of inquiry***

> *1A (1) The Premier shall, in addition to the Governor, have the authority to issue commissions of inquiry under this Act.*
>
> *(1) When the Premier acts under subsection (1), sections 1 to 6 and 11, and the First and Second Schedules, shall be read with "Premier" in place of "Governor", and the rest of those provisions shall be construed accordingly."*

10. Section 6 of the same Act provides:

***Duties of commissioners***

> *6 The commissioners shall, after taking the oath, make a full faithful and impartial inquiry into the matter specified in their commission, and shall conduct such inquiry in accordance with the direction (if any) in the commission, and shall, in due course, report to the Governor, in writing, the result of such inquiry; and the commissioners shall also, when required, furnish to the Governor a full statement of the proceedings of the commission, and of the reasons leading to the conclusions arrived at or reported."*

***The grant of leave***

11. The judge interpreted the first ground as amounting to a contention that the terms of reference were unlawfully vague or broad. On **3 March 2022** he granted leave to pursue the first two grounds and also granted leave to advance the following third ground, namely that:

> *"To the extent that the Terms of Reference are lawful, the Commission of Inquiry failed to apply their true breadth*."

on the footing that that ground overlapped with the second ground but was not dependent on section 6 of the 1935 Act. As is apparent, the leave granted was limited to those three grounds. The judge records [109] that Mr Piper sought to raise issues in his skeleton argument which were not covered by the leave granted.

12. The judge set out in some detail a number of relevant passages in cases to which he had been referred; and the submissions of the parties. In essence his analysis was as follows:

    (i) The COI was entitled (and probably required) to consider and interpret the meaning of its terms of reference at an early stage; but this could not mean that the COI had the power to determine its own terms of reference. It must correctly interpret the terms of reference set for it. [113].

    (ii) In considering the meaning of the terms of reference the following principles were applicable:

        (a) The starting point is the language of the terms, which should be applied if it is consistent with rationality and common sense;

        (b) The terms should be construed in a manner that favours upholding their validity; and an interpretation should be avoided which produces an unreasonable construction;

        (c) The judge can consider the context of the terms, including the parliamentary debate;

        (d) The judge should be cautious about seeking a precise meaning for a broad term that has been used to reflect the fact that it is intended to cover a wide range of circumstances. [116].

    (iii) The terms of reference are drafted in a manner that is far from perfect. Paragraph 1 is the central provision but that does not mean that paragraphs 2-4 are irrelevant to the interpretation of paragraph 1 [118] [a] & [b]

    (iv) Paragraph 1 has at least 2 terms that are potentially uncertain: '*historic*' and '*irregular*'. The starting point when seeking to understand those terms is their natural meaning. The first definition of the word '*historic*' in the Oxford English Dictionary, Online Edition is '*concerned with past events'*. That meaning of the word '*historic*' suggests that the terms of reference are concerned with anything that happened in the past. Applying that definition, there is no temporal limit on what past matters can be considered. For example, the terms of reference are not limited so that the Commission is only required to consider matters within the last 100 years. The word '*irregular*' must mean something other than unlawful because otherwise it would be otiose. The Commission of Inquiry appears to have applied this approach in relation to Tucker's

Town (and St David's) where land was expropriated[3] . The first definition of word 'i*rregular*' in the Oxford English Dictionary, Online Edition is *'[n]ot in conformity with rule or principle; contrary to rule; disorderly in action or conduct; not in accordance with what is usual or normal; anomalous, abnormal*". [118] (c)".

(v) The approach suggested by the language of (iv) above (which sets out paragraph 118 (c) of the judgment verbatim) would be likely to be unreasonable. It would allow anyone disgruntled by a land transaction in the past where they lost land to complain to the COI and seek a review. A powerful person could potentially allege illegality despite the fact that the COI was clearly intended to be focused on the powerful (by which I take the judge to mean that it was intended to focus on what the powerful had done which affected the weak). This would potentially impose an unreasonable burden on the COI, which was required to report within 40 weeks (although the time limit could be extended). [118] [d].

(vi) "*The context of the terms of reference is clear from the debate in the HOA, the HOA motion and the evidence of Mr Telemaque[4]. It appears to me that all these sources point in one direction. It appears to me that it is clear that there was concern that land had unjustly been lost as a consequence of the actions of 'the rich, the powerful and the connected' (per Mr Brown MP[5]). Further, the concern was to ensure that as many as such cases as possible were considered. For example, the motion referred to the need to review 'all such known claims'. Further, Mr Telemaque's evidence refers to the need 'to give a voice to as many of these people as possible'[6]. In considering the statements of Mr Brown, I have taken account of the fact that he is a single member of the HOA (albeit one who appears to have paid a key role in the process that led to the Commission of Inquiry). I have also taken account of the fact that there is no contemporaneous material that supports Mr Telemaque's evidence about the reasoning of the Cabinet. However, as already noted,*

[3] In respect of Tucker's Town, a law was passed in 1920 to compel the sale of a large acreage of land which enabled the company which purchased it (the Bermuda Development Company), *inter alia*, to carry out a massive tourism related development as well as make sales to certain old Bermuda families and others (including aliens).) The findings of the COI are at pp 98-101 of its report. Residents were removed from their land with devastating consequences and without adequate compensation or any right of first refusal on a resale. There was, the COI found, an element of some unjust treatment. It also found that expropriation of more land than was required "*for the greater public interest*" could be deemed to be an unjustified encroachment of the rights of previous owners. In relation to St David's, residents were relocated in 1940 and residents' homesteads were razed to create a United States military base and to protect the tourism industry (in that creating the base in any of the other suggested locations would adversely affect tourism).

[4] The Secretary to the Cabinet.

[5] The Hon C.Walton D. Brown, JP, MP, who promoted the idea of a Commission in Opposition, and then again when there was a change of Government.

[6] His reference was to "*those who considered themselves and their families to have suffered losses of land through theft of property, dispossession of property and through diverse other unlawful and irregular means over the past decades*": see [11] of his affidavit.

*all of this material is consistent with the terms of reference and so it appears to me that I can legitimately consider it".* [118] [e]

(vii) The terms of reference are not restricted to land expropriations or grabs; the focus is on power imbalance rather than particular mechanism used to deprive people of property [118] [g].

(i) "*The key consequence of my conclusion in paragraph e. above is that it appears to me that 'irregular' can and should be given a technical meaning in this context. It appears to me that 'irregular' can be understood to mean cases where there is a power imbalance as described by Mr Brown MP. I was initially minded to conclude that 'irregular' should also be interpreted* [as] *applying a ejusdem generis construction (i.e. a construction that would define 'irregular' by reference to the earlier categories of case identified in paragraph 1). It appeared to me that the use of the word 'such' in paragraph 1 might imply such an approach. However, having considered the matter further it appears to me that that approach is wrong. It appears to me read as a whole, that the use of the word 'irregular' in paragraph 1 is intended to ensure that the Commission was not limited by technical arguments about legality and nature of the mechanism used to deprive a person of their land. As a consequence, it was intended to be wider than the preceding words in paragraph 1. It appears to me that the use of the word 'such' was simply intended to make it clear that any irregularity must have resulted in land loss".* [118] [g]

(ii) *There is no implied power of the COI to exclude cases that would otherwise come within paragraph 1. It would be very difficult to determine objectively the scope of any such power. Secondly the evidence of Mr Telemaque suggests that the work of the COI was intended to be comprehensive. That is consistent with the terms of reference that suggest the need for a comprehensive investigation (e.g. paragraph 3 which requires a list of "all land" lost to be prepared). A discretion would cause some cases not to be considered. Thirdly it would have been easy for the terms or reference to make express reference to a discretion to exclude. Lastly the existence of a discretion does not fit easily with section 6 of the 1935 Act which requires a "full" investigation*." [118] [i].

13. In the light of that analysis the judge found that the terms of reference required an investigation of any case where it is alleged that there was an imbalance of power in the past that caused a loss of land [118[ [j]. In the light of that conclusion the terms of reference were "*sufficiently clear*". The COI was not left to determine its own terms

but to interpret them. The COI Report has included statements that suggested a need to determine its own terms but what the COI needed to do, and did, was to interpret its terms of reference.

14. The judge identified certain features of the COI's approach to its terms of reference namely [120]:

"*a* *Most importantly, it appears to me that the Commission of Inquiry appears to have concluded that it had an implied power to determine which cases it would consider. That is reflected in both the statement in the Commission's report about the need to 'determine its own scope of inquiry*[7]*' and its analysis of the details of specifics? within the terms of reference (as set out below).*

*b* *The Commission of Inquiry appears to have focused on whether cases demonstrated 'systemic failure'. There is some confusion in the reasoning of the Commission as to whether a complaint needed to relate to systemic failure or whether systemic failure was treated as an alternative to historic failure. The report of the Commission referred to the need to consider whether the evidence demonstrated 'a structural problem which was either historic in nature and/or which demonstrated systemic failure' [emphasis added]. However, the directions of Mr Whitehall QC (which appear to have been adopted by the Commission) appear to make it clear that 'systemic injury' was treated as a necessary aspect of the requirement for a complaint to be 'historic'. Similarly, Mr Perinchief's evidence was that 'the requirement for losses to be systemic to be critical'. The written advice of Mr Whitehall demonstrates that the word 'systemic' was used to indicate that the cause was required to be something that 'transcends the individual case'.*

*c* *To some extent the approach of the Commission of Inquiry in seeking 'systemic injury' appears to have been the basis of the approach in Mr Davis's case. For example, the evidence of Mr Perinchief highlights the need for systemic loss before stating that the Commission of Inquiry did not consider its purpose 'to be of assistance to individuals with a commercial dispute where the individual believed there was … irregularity'. That distinction between systemic issues and commercial disputes is then reflected in the reasoning in Mr Davis's case. For example, the evidence of Mr Perinchief states that the Commission was prepared to investigate Mr Davis's claims 'provided they met the criteria that his loss was the result of systemic practices'. That appears to me to be consistent with the contemporaneous documents. For example, the e-mail to Mr Davis dated 9 October 2020 states that the Commission 'investigates historical systemic issues relating to land grabs in Bermuda'*

*d* *The contemporaneous reasoning in the case of Mr Davis appears to me to support the analysis above. The initial decision dated 11 May 2020 appeared to conclude that Mr Davis's 2 cases were outside the scope of the terms of reference because they were a 'commercial dispute'. That reasoning is also reflected in the minutes of the meeting on 17 June 2020. It should be noted that*

[7] Page 9 of the Report.

*contemporaneous reasoning is important (Inclusion Housing Community Interest Company)".*

15. In the light of his analysis as summarised above the judge concluded that the COI had misdirected itself as follows:

    (i) The advice of Mr Whitehall QC demonstrated that the adjective "*systemic*" was used to rule out one-off cases. This diverted the focus of the COI from consideration of whether there was a power imbalance: 121 (b).

    (ii) The COI erred by apparently concluding that Mr Davis' cases were outside the scope of the terms of reference on the basis that they amounted to a "*commercial dispute*". There is no reason why a commercial dispute cannot relate to a power imbalance; there being no reason why commercial lenders cannot be particularly powerful: 121 (c).

    (iii) That misdirection was applied in Mr Davis' cases because the findings that his claims were not systemic and were historic influenced the decision that his case was outside scope: 123.

16. As to whether the misdirection was material the judge applied the approach in *Sadovska v Secretary of State* [2017] 1 WLR 2926 by seeking to determine whether, absent the misdirection, the outcome would "*inevitably have been the same*". As to that he could not conclude that if there had been no error of law the outcome would inevitably have been the same. Whilst there was a strong argument that Mr Davis' case did not come within the terms of reference such a conclusion was not inevitable. That was for the following reasons as set out in the judgment [125]:

    "*a The witness statement of Mr Davis regarding the 1st claim states that he believes that the Bermuda Housing Corporation refused to manage properties owned by him to punish him for political activities. This caused Mr Davis to sell his property and suffer a financial loss. The claimed forced sale of property can arguably be said to be a historic loss of property. On Mr Davis's account that would appear to be arguably 'irregular' as it resulted from improper political motives. The claim made by Mr Davis to the Commission of Inquiry makes no express reference to power imbalance. However, the statements of Mr Brown MP makes it clear that political power was seen as one of the potential sources of power imbalance.*

    *b The witness statement of Mr Davis regarding the 2nd claim alleges that the banks sought to deny credit to 87 black businessmen. This was said to be intended to punish people who were believed to be part of an unlawful scheme. He alleged that any illegality should have been addressed by the courts. He also claimed to have lost property as a result. It appears to me that again it might be said that there was a power*

*imbalance because the banks were more powerful.*

*c It appears to me to be significant that the Commission recognised that lending practices might come within its terms of reference and that Mr Davis's case might be relevant. That implies that it was concluded that there was no reason in principle why lending was outside scope of the terms of reference. It also implies that it was acknowledged that lending practices can be 'irregular'.*

*d. I should emphasise that I have made no findings as to whether the claims of Mr Davis are correct. I have no basis for carrying out such an assessment. I have simply concluded that it may be open to the Commission to conclude that Mr Davis's claims are in scope."*

17. As to Mr Piper the judge said this:

> *"[126] It appears to me that mis-directions are immaterial in the case of Mr Piper. The Commission was willing to consider his case. The dispute that followed was about procedure. It was not about the terms of reference."*

***The result of the Judgment***

18. In the light of his findings the judge held that there was no basis for making a declaration that the COI was *ultra vires* because of a lack of proper specificity in the Terms of Reference. As to exactly what relief should be granted, he invited further submissions from the parties.

19. In the event, following further submissions from the COI, the judge, by his October 2022 judgment, granted Mr Davis a declaration in the following terms:

> "*The Commission of Inquiry into Historic Losses in Bermuda unlawfully excluded Mr Davis' Bermuda Housing Corporation and Bank of Bermuda claims from the Terms of Reference in the Official Gazette dated 1 November 2019 by requiring the loss of land to be the result of some "systemic" issue and by excluding them as being "commercial disputes*".

Mr Davis' application for damages consequent upon that declaration was refused.

***The October 2022 judgment***

20. This judgment was dated **22 October 2022** on the first page and **24 October 2022** on the signature page and, as we were told by the Registrar, a final draft was distributed on **27 October 2022**. In it the judge declined Mr Davis' request that he should appoint a new Commission of Inquiry. This was not relief that had been sought in the Form 86A; nor, as it seems to me, was it within the power of the judge, as opposed to the Governor or the Premier, to appoint a new Commission.

21. The judge also decided that there was no basis for making an award of damages in favour of Mr Davis for the following reasons:

    (i) A breach of public law does not automatically result in an award of damages. It needs to be established that there is some basis for claiming damages in tort; none had been identified nor could the judge see one. Nor was there any relevant contract.

    (ii) No claim could be made for breach of a statutory duty. There was nothing to indicate that the 1935 Act was intended to give rise to a claim for damages.

    (iii) The judge had no way of knowing what would have happened if the Commission had correctly interpreted the law. It is possible that the COI would have concluded that Mr Davis' case was outside the terms of reference or had no merits. Even if it had concluded that Mr Davis had been the victim of historic injustice that would not have resulted in an award of damages.

    (iv) The relief that he had ordered by way of a declaration might result in the matter being re-considered by the COI; but the judge had no idea what the re-consideration would be.

22. The judge declined to stay determination of the issue of costs until after this appeal. He ordered that the COI should pay the Premier's costs resulting from his defence of the application for judicial review to be taxed on the standard basis if not agreed; and that Mr Piper should pay the additional costs of the Premier and COI caused by his participation. The order for costs was stayed pending the appeal of the COI and of Mr Piper to this Court.

23. On **7 December 2022** Mr Davis filed a notice of appeal from the judgment of October 2022,

***The Court of Appeal judgment of 22 February 2024***

24. On **22 February 2024**, following a three-day hearing in November 2023 the Court of Appeal delivered a ruling addressing, *inter alia*, the contention that some or all of its members should recuse themselves; setting out the course of these proceedings and the related proceedings in which Ms Junos and Mr Moulder were the applicants; and making directions for the progress of the present appeals and those of Ms Junos and Mr Moulder.

25. In that judgment we:

(i) Gave leave to Mr Davis to file within 28 days a Notice of Appeal from the judgment of the Supreme Court of 5 August 2022; and indicated what the Notice of Appeal should include;

(ii) Gave Mr Piper an enlargement of time until 20 September 2022 for the filing of his Notice of Appeal (which had already been filed - four days out of time);

(iii) In respect of the appeals of Messrs Davis, Piper, Junos and Moulder:

a. waived the requirements for there to be a deposit under Order 2, Rule 9, or to make a deposit or give security by bond under Order 2 Rule 10 or to pay the fees for settling the Record of Appeal; and

b. made a Protective Costs Order.

***Submissions of the parties***

***1 The Commission of Inquiry***

26. The COI contends, first, that the judge erred in finding that it misdirected itself when it decided that the Davis Claims were outside the Terms of Reference because the Davis Claims were commercial disputes.

27. The Judge interpreted "*irregular*" to mean a "*power imbalance rather than particular mechanisms used to deprive people of property*" [118][f] and as "*cases where there is a power imbalance as described by Mr Brown MP*" [118][g]. The consequence of that interpretation is that the COI was required to investigate all complaints where land is lost and there is a power imbalance irrespective of the actual cause of the land loss. This of itself constituted an error of law. (I would observe that this latter contention would appear to be wrong: the judge regarded it as necessary to show that the relevant land was lost <u>because</u> of the imbalance of power. That said, if there was an imbalance of power it might not be very difficult to establish that the imbalance was the cause of the loss). The judge's definition of *"irregular*" as meaning cases where there was a power imbalance is both wrong and unworkable.

28. As to the former, the wording of the Terms of Reference is "*irregular means by which land was lost*". The word "*means*" clearly connotes a mechanism rather than a relative power status. By finding otherwise, the Learned Judge made the category of "*irregular*" wholly different from the preceding categories in the Terms of Reference. "Imbalance of power" may be a theme or theory underpinning the Terms of Reference, but it does not make sense for it to be a category of itself by which an applicant can be within the Terms of Reference and demand that the COI investigate his complaint.

29. As to the latter, most possession proceedings between banks and individuals are such that there is likely always to be a power imbalance: it cannot possibly be the case that

the COI was required to investigate all such matters. The COI was required to consider such matters but was entitled to take the view that the disputes in relation to the Davis claims were commercial disputes with consequences that take place in the ordinary (or regular) course of events. Even if there was a power imbalance it could still be rational and reasonable for the COI to exclude the Davis claims.

30. Reliance was placed on the case of *Chichester District Council v Secretary of State for Housing, Communities and Local Government* [2018] EWHC 2386 (Admin), in paragraph 31 of which Lindblom LJ drew a distinction between misdirection and misapplication as follows:

> "*The interpretation of planning policy is ultimately a task for the court, reading the policy sensibly and in its full context (see the judgment of Lord Reed in Tesco Stores Ltd., at paragraphs 18 and 19). Where the real complaint is that a particular policy has simply been misapplied, the court will only intervene where the decision-maker has fallen into "Wednesbury" error…" (see the judgment of Lord Carnwath in Hopkins Homes Ltd v Secretary of State for Communities and Local Government [2017] 1 W.L.R. 1865, at paragraph 26…*"

31. The reference to paragraph 26 in *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] 1 WLR 1865 is as follows:

> "*26. Recourse to the courts may sometimes be needed to resolve distinct issues of law, or to ensure consistency of interpretation in relation to specific policies, as in the Tesco case. In that exercise the specialist judges of the Planning Court have an important role. However, the judges are entitled to look to applicants, seeking to rely on matters of planning policy in applications to quash planning decisions (at local or appellate level), to distinguish clearly between issues of interpretation of policy, appropriate for judicial analysis, and issues of judgement in the application of that policy; and not to elide the two*."

32. The judge himself referred to the following authorities: *R(O) v Secretary of State for the Home Department* [2016] 1 WLR 1717 at [28]; *Gladman Developments Ltd v Canterbury City Council* [2019] EWCA Civ 69 at [22].

33. The COI also submits that the judge erred in not drawing a distinction between (or considering the interplay between) the interpretation of the Terms of Reference and the application of those Terms. The real complaint was one of misapplication of the terms and should have been (but was not) considered by the judge on *Wednesbury* principles.

34. As to that, in *HMB Holdings Ltd. v Antigua and Barbuda* [2007] UKPC 34 the Privy Council stated at paragraph 31:

> "*The test of irrationality will be satisfied if it can be shown that it was one which no sensible person who had applied his mind to the question to be decided could have arrived at*."

35. In *Coxon v The Minister of Finance* [2007] Bda LR 78 Nazareth JA stated at paragraph 23:

> "*Accordingly, we do not have to adumbrate and address the detailed and lengthy submissions replete with copious authorities contending for a desired formulation of irrationality or Wednesbury unreasonableness. It suffices to outline that formulation, which is to the effect that a decision would be Wednesbury unreasonable if it disclosed an error of reasoning which robbed the decision of its logical integrity; if such an error could be shown then it was not necessary for the applicant to demonstrate that the decision maker was "temporarily unhinged (R – v- Parliamentary Commissioner for the Administration ex. P Balchin [1998] 1 PLR 27 1). Put another way, irrationality and Wednesbury unreasonableness encompass flawed logic*."

36. In *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin) the Divisional Court considered the interplay between irrationality and unreasonableness and stated the relevant principles as follows at paragraph 98:

> "*The second ground on which the Lord Chancellor's Decision is challenged encompasses a number of arguments falling under the general head of "irrationality" or, as it is more accurately described, unreasonableness. This legal basis for judicial review has two aspects. The first is concerned with whether the decision under review is capable of being justified or whether in the classic Wednesbury formulation it is "so unreasonable that no reasonable authority could ever have come to it": see Associated Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223, 233-4. Another, simpler formulation of the test which avoids tautology is whether the decision is outside the range of reasonable decisions open to the decision-maker: see e.g. Boddington v British Transport Police [1999] 2 AC 143, 175 (Lord Steyn). The second aspect of irrationality/unreasonableness is concerned with the process by which the decision was reached. A decision may be challenged on the basis that there is a demonstrable flaw in the reasoning which led to it – for example, that significant reliance was placed on an irrelevant consideration, or that there was no evidence to support an important step in the reasoning, or that the reasoning involved a serious logical or methodological error. Factual error, although it has been recognised as a separate principle, can also be regarded as an example of flawed reasoning – the test being whether a mistake as to a fact which was uncontentious and objectively verifiable played a material part in the decision-maker's reasoning: see E v Secretary of State for the Home Department [2004] QB 1044*."

37. In *Minister of the Environment v Barnes* [1994] Bda LR 22, the Court of Appeal set out the Court's duty as follows at pages 13 to 14:

> "*Duty of Court*
>
> *This was not an appeal from a decision of the Minister. It was an application*

*for judicial review, in which the functions of the court are much more restricted than in an appeal from an administrative decision.*

*The court has only to decide whether no reasonable Minister could have concluded, on the evidence before her, that what she was doing was in the public interest, see R -v- Secretary of State for the Home Department, ex p. Ruddock (1987) 2 All ER 5 18 at p. 534.*

*This has not been argued as an instance of "Wednesbury unreasonableness" - i.e. a decision which is so outrageous, in its defiance of logic or of accepted moral standards, that no sensible person could have arrived at it.*

*Unfortunately, the judge has, in various passages, (e.g. page 19 of his judgment) suggested that it is part of his task to make findings of fact. This was beyond his proper function in an application for judicial review*

*It is important to remember that judicial review is not concerned with the merits of the decision in respect of which the application is made, but with the process of decision making itself - see Chief Constable of the North Wales Police -v- Evans (1982) 3 All ER 141 at p. 154 per Lord Brightman, 'Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made.'*

*The purpose of judicial review is to ensure that the individual is given fair treatment by the authority concerned. It is not the duty of a judge to substitute his own findings and to decide the matters in question. This restriction must be observed, or the court, purporting to prevent an abuse of power, may find itself usurping that power to itself."*

38. These principles have recently been applied in *Cheyra Bell v The Attorney General* [2021] SC (Bda) 43 Civ, in which the Bermuda Supreme Court considered the question of the Court substituting its own view in challenges based on irrationality or unreasonableness. The Chief Justice stated in paragraph 71:

> "*71. The starting point in considering this objection is that in judicial review proceedings the Court is not entitled to substitute its decision merely because the Court, had it been adjudicating the matter in the first instance, would have been more lenient and meted out a different penalty. The Court can only interfere with a decision if there have been material procedural irregularities or the decision is wrong as a matter of law, which would include a decision which is Wednesbury unreasonable. As correctly submitted on behalf of the Attorney General, where the matter is brought by way of judicial review "the functions of the Court are much more restricted than in an appeal from an administrative decision… Judicial review is not concerned with the merits of the decision in respect of which the application is made, but with the process of decision-making itself" (Minister of Environment v Barnes Civil Appeal No 16 of 2019)"*

39. As the COI submits, its decision not to investigate the BHC claim was based on the documents submitted to it. For the reasons set out in a "*Note on the BHC claim*" dated 13 July 2022, the COI was entitled to consider the matter not irregular as it was an ordinary commercial dispute.

40. The points made in that Note were, in essence, as follows:

    (a) The TOR reference is to "*such other unlawful or irregular means by which land was lost*". The word "*such*" should be interpreted as "of the type previously mentioned". Unlawful or irregular has to be a type of case similar to theft dispossession or adverse possession or be of a similar character[8];

    (b) Mr Ivan Whitehall QC, Counsel to the Inquiry, defined the phrase by reference to expropriation cases in Tucker's Town and St David's. This was a perfectly reasonable construction. These two losses were the appropriations with which residents of Bermuda were most familiar.

    (c) Theft, dispossession, adverse possession or unlawful means all suggest that some individual or entity has benefited from the wrongdoing. There was no benefit to BHC in the present case since it had lent money and was then eventually repaid. Ultimately BHC never got the land in question, and it is not suggested that the mortgage repaid was more than was borrowed.

    (d) BHC worked with Mr Davis between 1996 and 1999 via the appointment of the Official Recover. It was reasonable for the COI to conclude that the BHC's motives in appointing the Official Receiver were commercial and not political. It is not suggested that the Official Receiver was politically motivated or had any motivation other than a commercial one.

    (e) Had BHC's motive been political there would have been no appointment of a Receiver – an agent for BHC and Mr Davis to ensure repayment and that Mr Davis got the surplus. BHC was entitled as mortgagee to immediate possession and sale in order to secure repayment of Mr Davis' debt.

    (f) Mr Davis has numerous creditors and what he described as "financial hardships" which should be considered when considering BHC's actions and whether there was a realistic prospect of repayment. These were commercial considerations, demonstrated by BHC working with other creditors to ensure the arrears were paid.

[8] In submission to us it was said that there must be some element of improper behaviour or wrongdoing.

(g) Mr Davis' allegation of political motivation is seemingly based on a radio interview on **2 June 2000**. By that point BHC, by the Official Receiver, had been working with him for 4 years with his debt still unresolved.

(h) BHC did not initiate any court proceedings seeking an order for possession, or an order for sale, a bankruptcy order, or any other relief against Mr Davis.

(i) Mr Davis' claim to the COI was that he sold his units to pay a host of creditors not including BHC, which had been paid off by other lending. He says that he went to a private lender to borrow money to pay off the BHC mortgage and settle the debts with the banks and unsecured creditors. He then sold the units for an average of $ 440,000 each and had to give the equivalent of two units to the private lender for taking the risk of lending to him.

(j) Mr Davis had a plethora of other creditors.

(k) In the light of all the above the COI was entitled to take the view that the loss of land did not arise by "*such other unlawful or irregular means*" within the meaning of those words as used in the Terms. The dispute between him and BHC was properly described as a commercial dispute.

41. Similarly, the decision not to investigate the Bank Claim was based on the documents submitted to the COI and further information provided to it in correspondence by Mr Davis.

42. All that the judge had to do (and could properly do) was to decide whether a reasonable COI could have concluded, on the evidence before it, that the Davis Claims did not disclose "*irregular means by which land was lost*". What he in fact did was not to prevent an abuse of power by the COI but to usurp that power. The decision of the COI was neither irrational nor unreasonable. It was open to the COI to decide that the facts presented by Mr Davis demonstrated an ordinary commercial transaction in which Mr Davis had defaulted and suffered the ordinary consequences of default.

***Materiality***

43. The judge also erred in his adoption of the test set out in *Sadovska v Secretary of State* (a case which was not referred to by any party or counsel at the hearing and in relation to which no submissions were made). The correct approach to materiality is set out in the 13 July 2022 note. That note referred to *Singh v Secretary of State for Home Department* [2017] EWCA Civ 362; Dennis *v Hutchins* [2019] UKSC; and *Tesco Stores Limited v Dundee City Council* [2012] UKSC 13, which are to the effect that an

error of law which is immaterial to a decision does not make the decision unlawful. It would remain lawful if there was no real possibility that, but for the error, the decision might have been different.

44. In *Singh v Secretary of State for Home Department* [2017] EWCA Civ 362 the general proposition in relation to materiality is stated at paragraph 35 as follows:

> "*35…The mere presence within the decision of an immaterial error of law does not make the decision itself one which is to any extent unlawful, nor does the presence of such an error require the appeal to be allowed solely in order that it can be corrected*."

45. This was further developed in *Re an Application by Dennis Hutchins for Judicial Review* [2019] UKSC 26 by Lord Kerr at paragraph 44 as follows:

> "*44. There is certainly an argument that, contrary to the Divisional Court's view, the Director's assertion was at odds with what Girvan LJ said in Arthurs. But whether the Director erred is neither here nor there, provided he acted within the powers actually available to him and provided that, if he did indeed misapprehend the proper approach to the interpretation of section 1, that misapprehension was, in the event, immaterial to the decision that he took. On the true ambit of the Director's powers, what matters is the interpretation placed on the section by the courts. And the Divisional Court is unquestionably right that the wording of condition 4 invests the Director with a wide range of powers. Whether the section requires to be construed narrowly or broadly, the intrinsic breadth of the powers remains intact. Even if, therefore, the Director was wrong in his assertion that Parliament intended that the section should be interpreted broadly, there is no reason automatically to assume that this led to him exercising his powers in a manner that was not available to him on a proper construction of the provision. On the facts of this case, it is clear from the reasons that the Director has given for issuing the certificate that he was bound to have made the same decision if he had considered that section 1 required to be construed narrowly. If, indeed, it was an error on the part of the Director to consider that section 1 should be given a broad interpretation (on which I do not feel it necessary to express an opinion) it cannot be said that such an error would vitiate his decision for the reason that he was certain to reach the same decision, whatever view he took of the appropriate mode of interpretation of section 1."* (Emphasis added)

46. The correct standard to be applied to materiality is that set out in *Tesco Stores Limited v Dundee City Council* [2012] UKSC 13 per Lord Reed as follows:

> "*31 Finally, I would observe that an error by the respondents in interpreting their policies would be material only if there was a real possibility that their determination might otherwise have been different. In the particular circumstances of the present case, I am not persuaded that there was any such possibility*." (Emphasis added)

47. In the light of those authorities any misdirection in relation to the systemic issue (see below) or the meaning of the word "*irregular"* is immaterial as there was no real possibility that the COI's decision might otherwise have been different.

***Implied power to limit***

48. The scope of the implied power is not clear from the case law. In *Bermuda Emissions Control Ltd v The Premier of Bermuda & Ors* (Civil Appeal No. 16 of 2016) there was an express discretion in the terms of reference not to consider insignificant violations. The Court of Appeal stated that the commission of inquiry "*is, sensibly, not required to look into insignificant violations. Had this limitation not been expressly included it could very probably have been implied*." The implied power in *Bermuda Emissions* was relied on in paragraph 6 of the Note on Legal Framework that was requested by the Learned Judge, and given to him on day 1 of the substantive hearing.

49. The utility of such an implied power is easy to see on the present facts. It is necessary to make workable the unworkable interpretation of "irregular" by the Learned Judge. The implied power, at least in the terms expressed by the Court of Appeal in *Emissions Control* is to limit the scope (and not widen). It is not clear why the scope of the implied power would be difficult to ascertain. The COI would not be determining its own terms of reference. It would be determining that a case falls within the terms of reference but should not be considered for whatever reason. That reason can either be challenged on misdirection or irrationality, unreasonableness or unfairness grounds.

50. In a case such as this where the Learned Judge has given such a wide definition of the word "*irregular*", the COI's position is that it recognized there was a power imbalance in the Davis Claims but they were arm's length transactions and the possession proceedings were in the ordinary course of events and so a commercial dispute. In essence, while the majority (if not all) of the cases investigated by the COI involved an imbalance of power, it cannot be the case that all cases where there was an imbalance of power were to be investigated by the COI.

***The systemic issue***

51. The judge erred in finding that the COI misdirected itself by requiring loses of land to have resulted from a systemic issue. He stated that the approach to the interpretation of terms of reference was that in *Bermuda Emissions*, namely to find "*the natural and ordinary meaning of the words of an instrument, in their proper context*".

52. In *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, the Privy Council stated the relevant principles of interpretation as follows:

> "*16. Before discussing in greater detail the reasoning of the Court of Appeal, the Board will make some general observations about the process of implication. The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It*

> *is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed: see Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896, 912-913. It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument*."

53. The Learned Judge sets out the context in paragraphs 118 e and f of the judgment. But he does not go far enough. The House of Assembly debates set out specific examples of the type of land loss to be investigated. The continued emphasis on losses being caused by systemic issues is prevalent throughout those debates with contained references to the misuse of compulsory purchases (found by the COI to be irregular means by which land was lost), which is specific to the government and demonstrates a power imbalance. There are other examples demonstrating power imbalances but within established systems, structures and institutions, whether they were initiated by individuals and corporations.

54. On a proper construction of the Term of Reference in the proper context, being the House of Assembly debate, the intention was to investigate systemic and structural issues that caused land losses. The problem with stopping short at power imbalances, as the Learned Judge does, is that it characterizes the relationship (and identifies a theme or theory that underpin the Terms of Reference) but does not identify the means or mechanisms by which land is lost.

55. The relevance of systemic or structural issues being the cause of land loss and being utilized by powerful individuals and corporations against relatively powerless individuals is set out in paragraph 25-28 of the First Affidavit of Mr. Perinchief (for the COI). It was perfectly reasonable and in accordance with the relevant background for the COI to look at the underlying structures and institutions that allowed land to be lost. That is clearly what was intended by the Terms of Reference.

### *2 Mr Davis*

56. Mr Davis filed what appeared to be two Notices of Appeal. The first is dated **17 March 2024**. The second is dated **14 April 2024**. The two documents each give notice of appeal in the usual form in paragraphs 1 and 2; after which paragraph 3 in the first Notice is Headed "Grounds of Appeal" and in the second Notice is headed "Skeleton Argument". In both Notices of Appeal (and in much greater detail in the case of the second) Mr Davis sets out his complaint that the COI dismissed his Case No 51 with no explanation. Mr Davis informed us that the "*early submission was not produced properly therefore you should rely on my submission dated April 14th 2024*"[9].

[9] See his email to Mrs Swan of **29 May 2024**.

57. Case No 51, as set out in the Notice, is a complicated claim relating to the alleged loss of property by Emelius Darrell, Mr Davis' grandfather, through what is said to be a fraudulent claim of adverse possession. The COI entertained another case – Case No 39, based on the same Darrell property but with different information and evidence - brought by a great-niece of Emelius, who was a descendant of George Wellington Darrell, Emelius' son. Mr Davis says that the opportunity to join Case No 39 and his case was never formally presented to him.

58. We indicated to Mr Davis in the course of the hearing that we did not regard it as open to us to deal with this claim and we remain of that view. It had never formed part of the Form 86A by which the judicial review was initiated; no leave had ever been granted to apply for judicial review in relation to it; and no application had ever been made to amend that Form or the grant of leave[10]. Nor had the judge addressed it since he took the view [106], which he was entitled to take, that any specific issues arising from the Darrell family case could not be before him. I would also accept, as did the judge [6] of the October 2022 Remedies Ruling), that it is necessary to be cautious to ensure that any order reflects only the illegality in relation to the two cases of Mr Davis the subject of the judicial review application and does not extend to the effect of any misinterpretation of the Terms on other cases[11], the full facts of which are not before us and in respect of which we have not heard submissions by the parties concerned.

59. The Relief sought in the Notice of Appeal was as follows:

    (i) The Court should clarify for all the Darrell family and the descendants of Emelius Darrell in particular as to who is the rightful heir for a deceased person dying without an expressed will;

    (ii) The court should use its powers to remove any time restraints on any of the 18 grandchildren from making legal claims on behalf of the estate of Emelius Darrell or the Darrell family associated with Emelius Darrell;

    (iii) A public apology from the Darrell family (descendants of George Wellington Darrell) and the COI for false statements to the effect that

[10] Mr Davis relies on the fact that Case No 51 was only dismissed by a letter dated **2 March 2021**, over a month after Form 86A was filed; so that Case No 51 could not have been included in the Form 86A files over a month earlier. But that does not alter the fact that no leave to amend or to bring judicial review on the basis of Case 51 was ever sought or granted. On **2 March 2022** an addition was made to Mr Davis' skeleton submissions on the application for leave to issue judicial proceedings [ROA/12/83] but that said nothing about Case 51. Nor were we asked in **November 2023** to allow the Notice of Appeal from the judgment of the Supreme Court of 5 August 2022 (for which we granted an extension of time) to include the contentions now sought to be made in respect of Case 51. And I made clear in my judgment of **22 February 2024** that the Notice of Appeal "*should address only those matters for which leave to apply for judicial review was granted by the judge"* [58].

[11] The Commission received a total of 53 claims. 18 were heard. 15 were denied. 10 were withdrawn and 10 were closed by the Commissioners for jurisdictional reasons. Based on the claims heard the Commissioners made specific recommendations.

Mr Davis was trying to represent Case 39 as presented by that branch of the family[12];

(iv) A decision that the COI did not have authority to amend its terms of reference, that it went beyond its authority and ultra vires and must be struck down (sic);

(v) Full compensation for his trip to Bermuda in order to take part in the COI;

(vi) If the court has such a power, an order that the BHC and Bank of Bermuda cases and all associated parties' cases should have the ability to be heard and that the statute of limitations should be lifted on all cases refused by the COI so that they can properly be litigated by a court;

(vii) The recovery of all his costs;

(viii) A just payment for misfeasance;

(ix) The imposition of a fine in order to deter future abuses of public trust.

60. The summary that I have set out in the above paragraph adopts, for the most part, the language of the Notice of Appeal itself. The relief sought goes way beyond the relief sought in Form 86a. The relief sought in that Form was:

(i) an injunction staying the Commission until the Court's decision on whether the Commission was *ultra vires*;

(ii) a declaration that the Commission was *ultra vires* section 1(1) or section 6 of the 1935 Act;

(iii) A declaration as to the meaning of the terms "*other... irregular means*|" and as to what "individuals" and "*corporate bodies*" are meant to be covered by the Commission's Terms of Reference;

(iv) a ruling on whether the Commissioners have a potential bias or conflict due to their past history;

(v) an order reimbursing Mr Davis for the costs of his wasted travel to and stay in Bermuda in the past three months;

(vi) a Protected Costs Order.

Further, as is apparent some of the claims e.g. for the removal of statutory limitation periods, an order for an apology, or the imposition of a fine, attribute to the COI or the Court powers that it does not have in this case or extend to claims which are not the

[12] This was the identical remedy sought in respect of Grounds 3 and 4,

subject of these proceedings. That said it would always be open to the COI to make recommendations relating to matters that it considered to be in scope.

61. In his submission to us Mr Davis said that we should declare the Commission to be *ultra vires* and that a new Commission should begin again. In relation to the claim for damages, Mr Davis contends that the decision of the COI to determine its own scope had the effect that several people would become excluded from the revised remit and would preclude consideration of potential cases of land loss falling within the Terms; such that there was misfeasance in a public office.

### *3 Mr Piper*

62. The relief sought by Mr Piper in his Notice of Appeal of **20 September 20** was, primarily, a declaration that the COI was ultra vires section 1 (1) of the 1935 Act "*by way of the exercise of an absolute discretion due to a lack of proper specificity"* in the TOR and/or that the Commission was *ultra vires* section 6 of the Act because of the decision of the Commissioners to restrict the ambit of the Terms. Mr Piper said in his skeleton argument of **29 April 2024** that, for the sake of avoiding duplication, he agreed with Mr Davis' filings that the COI was *ultra vires* for the reasons outlined in *Ratnagopal v Attorney General* [1970] AC 194. The Commissioners were in effect wrongly exercising an absolute discretion with regard to the terms of reference. In addressing us he told us that he was not looking for any relief in relation to his own matter.

### *4 The Premier*

63. The Appellant, Mr Davis, does not in his grounds of appeal expressly appeal the judge's decision that there was no basis for declaring that the Commission of Inquiry was *ultra vires* the Premier because of a lack of proper specificity in the Terms of Reference. In his Ground 2 the Appellant suggests that the judge was in error in determining that he did not seek, as part of his application, the appointment of a new Commission of Inquiry and appears at first to repeat his objections to the COI narrowing of the scope of the inquiry and alleges that by doing so the COI acted *ultra vires*[13]. But he then appears to refer to the first ground of his application in the Court below, namely that the COI was *ultra vires* by virtue of the breadth of the original Terms as framed by the Premier – see the citation of the case of *Ratnagopal v Attorney General* [1970] AC 194. But he does not seek, in his claim to relief, the reversal of the judge's decision confirming the *vires* of the Terms of Reference. And he repeatedly expresses throughout his Notice of Appeal his approval of the original Terms.

[13] In the relevant passage there is an application, made on the first day of the trial, to amend the notice of application with a proposed new ground - that it was beyond the scope of the COI to determine the extent of its powers and that the Commission was, therefore *ultra vires*. This was not in fact a new ground. The original grounds 1 (a) and (b) included the contention that the COI was *ultra vires* sections 1 (1) and section 6 of the 1935 Act.

64. I would observe that the words *ultra vires* can relate to the actions of different people. If the TOR in fact left it to the Commission to determine what it should inquire into, the appointment of the Commission would be *ultra vires* the 1935 Act because it would not be in the power of the Premier under the Act to commission an inquiry on those terms; and, if the commissioning of the inquiry was *ultra vires* the Act the Commissioners would have no power at all. If the establishment of the Commission under its TOR was *intra vires* the Act, the Commission would have the task given to it by the Premier and the power to carry it out. And, if the Commissioners (who, themselves, have to interpret their Terms of Reference: see Jason Beers QC, *Public Inquiries (2011*) at 2.009-2.113 and the cases there cited) misinterpreted the Terms, it would not mean that the Commission was *ultra vires* the Act or the Premier or had no powers at all; but it would be *ultra vires* the Act for the Commissioners to purport to change that remit.

65. In any event, the TOR were not *ultra vires* the 1935 Act. The findings of the judge, made after considerable analysis of the circumstances and the applicable authorities, were these:

> "*119 If my interpretation of the terms of reference is correct, it appears to me that there is no failure to comply with the principle in Ratnagopal (as explained in subsequent judgments such as Bermuda Emissions Control Ltd). The Court cannot expect the terms of reference to be perfect (Haughey). The terms of reference need to be 'sufficiently clear' (Robinson). Here the terms of reference are 'sufficiently clear'. Properly interpreted there is clarity about what the Commission must investigate. It has very little discretion. I accept that the Commission's report includes statements that suggested it needed to determine its own terms of reference. However, it appears to me that what the Commission needed to do and did was interpret[14] its terms of reference. The key issue is whether it misinterpreted its terms of reference.*
>
> ….
>
> *128 It appears to me that there is no basis for making any declaration that Commission of Inquiry is ultra vires because of 'a lack of proper specificity in the appointed Terms of Reference'. As already noted, I have concluded that the terms of reference can be and should be interpreted in a manner that means that they are lawful,"*

66. This decision was entirely correct. The terms of reference are broad but that does not mean that they are unlawfully so. The decisions of the Court in *Bermuda Emissions*, both at first instance and on appeal, citing *Ratnagopal*, were relied on by the Appellant but they do not provide the support sought. The court in *Bermuda Emissions* found that the parameters of the Commission's inquiry were informed directly by the terms itself as well as, indirectly, by what was considered a preamble to the prescribed scope of the inquiry. The Court found that on that basis "*there can*

[14] The word "*determine"* has a certain elasticity, since it may refer to determining Terms, in the sense of deciding (a) what they shall be, or (b) what they mean.

*be no serious contention that the COI has been given a roving brief to investigate whatever it sees fit"*: see generally [19] – [23] of the Supreme Court judgment.

67. At first instance in *Bermuda Emissions* Kawaley CJ (as he then was) cited at paragraph 28, the following passage from *Berthel v Douglas* [1995] 1 WLR 794:

> "*Ratnagopal's case is authority for the proposition that in appointing a commission under statutory powers such as were contained in section 2 of the Ceylon Commissions of Inquiry Act and in section 2 of the Act of 1911 the Governor-General must specify the matters to be inquired into and is not entitled to leave it to the commission to determine what those matters are to be. In the present case the Governor-General did exactly that by confining the matters to those arising out of or in connection with the affairs of three named companies. There was accordingly no such delegation of discretion as occurred in Ratnagopal's case and no ground for challenging the validity of the reference."*

68. Similarly, the Court of Appeal in *Bermuda Emissions* found that the applicant's approach to the general nature of the terms of reference to be one which ignores the practicalities of the situation. Both judgments clearly demonstrate that the challenge to the TOR by the Appellant in the present case is without foundation. In *Bermuda Emissions* at first instance the court made reference to the case of *R (Mario Hoffman) v Commission of Inquiry and Governor of Turks and Caicos Islands* [2012] UKSC 17 where terms of reference of considerable generality were considered. These terms had been unsuccessfully challenged in the earlier case of *Robinson and Been v Auld and Attorney General* and the challenges made in *Robinson* were similar to those made in the instant case. The appellants in *Robinson* submitted that the failure to define certain terms resulted in an inquiry that was too wide and that "*by leaving the definition of those terms to the discretion of the Commission, the Governor has effectively delegated a duty placed exclusively on him by the Ordinance*". That challenge was dismissed,

69. As the judge said at [81]

> "*In Robinson and Been v Auld and Attorney General, Turks and Caicos Islands Supreme Court, CL 83/08, unreported, 28 July 2008 it was held that the terms of reference: … must be sufficiently clear to allow any person who is under inquiry or summoned before it to know the matters about which he is to be examined. What is sufficient in any particular case is a matter of degree and, however precisely the terms are specified, there will inevitably be some aspects which, in practice, have to be left to the sense and experience of the Commission to determine"*.

And in *Robinson* the Court later found that even the most carefully crafted terms of reference "*must leave some matters to the discretion of the Commission*" [20].

70. There is no proper basis on which to find a duty on the part of the Premier to define the terms referred to by the Applicants or that the failure to do so is irregular in any way. This would be so even if the terms were capable of different interpretations: *Haughey v Moriarty* [1999] 3 IR 1, 13-14. There is a presumption of constitutionality and validity with regard to the establishment of the Commission and the Court should be slow to make a determination that the establishment was invalid. As the Court found in *Bermuda Emissions* [24] the Commission is an official Government instrument which is entitled to the presumption of validity in relation to official acts and there is a general legal policy of interpretation leaning in favour of upholding the validity of statutory and other legal instruments

71. In *Haughey v Moriarty* at first instance (Geoghegan J) the court, against a background of concerns about the "*undoubted ambiguities and lack of clarity in the terms of reference*", found that the relevant resolutions should ideally clearly and concisely state the definite matter or matters of urgent public importance to be inquired into but indicated that it did not take the view that "*a resolution not in perfect form must necessarily fail*". The Court regarded the terms of reference in that case as undoubtedly ambiguous in some material respects and said that as a matter of basic fairness the plaintiffs were entitled to know how the Tribunal itself resolves these ambiguities. Failing that it had been left to the Court to do so and the Court had (reluctantly) to form a view[15]. This is a clear indication that the lack of specificity in terminology is in no way fatal to the *vires* of the TOR of a Commission.

72. At first instance the Appellant contended that it was unreasonable and irrational that the appointing authority did not give more detail and specificity as to the parameters (timeframe) and persons (whether individuals or corporate bodies) covered by the TOR as a matter of public interest. This was ill founded. The TOR were clearly justified by the circumstances leading to the establishment of the Commission, which was of clear importance to the Bermudian public. It was reasonable to establish a commission whose terms of reference permitted it to hear as many of those affected as possible. As Mr Marc Telemaque stated in his evidence: "*The breadth of cases suggested the need for an investigation that would be wide enough to allow such cases to be reported and heard*" [11].

## *Analysis*

[15] I note that the Supreme Court set out the following proposition (the validity of which seems to me debatable):

> *"176 The learned High Court Judge in the course of his judgment expressed his views as to how the terms of reference set out in the resolution should be interpreted. The Court does not find it necessary to express any opinion as to whether the terms of reference are capable of more than one construction and, if so, whether that adopted by the learned High Court Judge is correct, because the Court is satisfied that it is not the function of the High Court or this court to interpret the terms of reference of the Tribunal* ***at this stage****. The interpretation of the terms of reference of the Tribunal is,* ***at this stage****, entirely a matter for the Tribunal itself."* [Emphasis added]

The Supreme Court decided that the Plaintiffs were entitled to a Declaration that the Sole Member of the Tribunal of Inquiry was obliged to explain to the Plaintiffs/Appellants his interpretation of its Terms of Reference in so far as they related to the Plaintiffs/Appellants.

73. I am entirely satisfied that the establishment of the COI was not *ultra vires* the Premier on the basis contended for, namely that the Terms of Reference for the Inquiry left it to the COI, themselves, to determine what they should inquire into (or on any other basis). The terms create some difficulty in interpretation but that does not mean that the COI was purportedly given some sort of free rein to decide what to investigate (and what not to investigate) such that the COI was really the party which would determine what it would inquire into. Nor was it irrational or unreasonable to establish a Commission on those Terms.

74. As to the true construction of the Terms, the focus should, as it seems to me, be on the actual words of the Terms. The parties to the present proceedings and the judge have introduced different words to interpret the actual wording. Thus, the COI took the view that, in order to come within the terms of reference, the conduct complained of must be "*systemic*" and not a "*commercial dispute*". The judge took the view that the loss of land did not have to be the result of some systemic conduct but must result from an imbalance of power and that a claim should not be excluded from consideration simply because it was part of a commercial dispute.

75. I appreciate that, in seeking to interpret the words of an instrument it is common (indeed, perhaps inevitable) to do so in words that differ from those that are to be interpreted. But there is a risk that in doing so the interpreter ends up proceeding on the basis that the words to be interpreted were different to those that were written down.

76. In the present case it seems to me that the terms of reference do not require the loss of land to result from either systemic conduct or an imbalance of power, although, if the loss does result from either of those, it may well come within the terms. As to the former, land can be lost by a single act (or set of acts) which is unlawful or irregular without being capable of properly being characterised as "*systemic*" – a word that does not appear in the terms. Further the fact that the loss of land in the Tucker's Town case could be said to be systemic[16] does not mean that that adjective is to be incorporated, impliedly, into the wording of the TOR. As to the latter it is not necessarily sufficient that the loss of land results from an imbalance of power. Someone who has greater power than another may be enabled to do that which causes the other to lose his land when what he does is neither unlawful nor irregular. I would, also accept, that an imbalance of power is a status rather than a means and that, in context, "*means*" must involve some (unlawful or irregular) activity which leads to a loss of land.

77. As to the supposed error in excluding "*commercial disputes*" from the terms of reference, much depends on what exactly is meant by that phrase. The mere fact that there is what could be termed a commercial dispute between the parties would not

[16] A proposition which could, itself, be said to be debatable. The decision to take over the land was, in essence a single decision, although the result could be said to be systemic insofar as it applied separately to each person whose land was acquired.

necessarily mean that the loss of land was not the result of some irregularity or unlawfulness. But, as it seems to me, the COI used the expression "*commercial dispute*" to signify a dispute between commercial parties in relation to which there was a loss of land, without there being any irregularity or unlawfulness.

78. Whether conduct is irregular or unlawful for the purposes of the terms of reference must depend on the particular facts of any given case. It is plain that, since the offending conduct can be either irregular or unlawful, the irregularity is not confined to unlawfulness (as the judge rightly held). If driven to explain by further wording what irregularity covered, I would regard it as potentially including behaviour that involved unacceptable elements such as discrimination, abuse or misuse of power, including legal rights, or fundamental unfairness[17].

79. I am not minded to accept that there is an implied power on the part of the COI to limit its consideration so as to exclude consideration of something which in fact falls within the terms of reference. I agree with the judge that there are difficulties in determining what the extent of any implied power of limitation should be. If the Terms do not, on their proper interpretation, call for some systemic fault and do not necessarily cover a situation where there is a power imbalance, could the Commissioners decide that, in order for there to be an investigation, there must appear to be some systemic fault, or that there has to be an investigation whenever there is a power imbalance which may have caused a loss of land? Could an investigation be refused if the value of the land lost was small? I would think not in any of those cases. And, if that be right it is, indeed, difficult to see what form of limitation could properly be implied[18]. It is true that in the *Bermuda Emissions* case there was a duty to inquire into "*any violation of law or regulations ….by any person or entity, which the Commission considers significant* ..." and that the Court thought (*obiter*) that had this limitation not been expressly included it could very probably have been implied. But the present case was not one where the Commission decided not to investigate because any land loss was insignificant.

80. Lastly, the Commissioners' decision was that the claims did not fall within the scope of their inquiry. They did not purport to exercise a power not to investigate the present cases even though they did fall within scope - an exercise which would have involved some consideration as to the nature of the claims and whatever reasons were put forward as to why, even though they fell within scope, they should not be investigated, and which would call for some explanation of the reason for rejecting an in-scope claim. And I do not think that they can be taken impliedly to have exercised any such power, if it existed.

[17] I note that in their report the COI said that claims were organised into a number of themes including "*Unfair practices*" and "*Practices relating to default debts secured by a mortgage deed*"; and , in relation to loss of property by irregular means considered whether expropriation , "*even if it was lawful on the face of it was the legislation that was passed irregular?"*.

[18] I note that the reliance on such a power by the COI proceeds on the assumption which it, in my judgment rightly disputes, that the relevant question is whether there was a power imbalance.

81. If one were to stop there, it could be said that both claims should have been investigated. There was no need for some systemic cause. Power imbalance was not the test. And it was wrong to exclude the claims because they were commercial disputes (on the assumption that by that the Commissioners meant that there was no irregularity or unlawfulness). It is, however, in my judgment necessary to examine the case further for two reasons. First, it is necessary to consider whether the evidence presented to the Commission did, in fact, reveal apparent irregularity; and secondly, if it did, whether the decision to reject the two cases can be impugned only if the decision to do so was *Wednesbury* unreasonable (and whether the decision was in that category) or can be impugned on other grounds (such as that the Commissioners failed to take account of some material fact(s)).

82. The basis of the complaint as evidenced before the Tribunal is largely contained in Mr Davis' witness statements of **March 6 2020** and **March 16 2020**. These statements are lengthy, discursive and sometimes lack clarity or appear contradictory. They were read by the judge. But he made no reference to the detail thereof, only to the summary by Mr Davis in his affidavit to which he referred at [36]. I propose to provide a somewhat more extensive summary, much of which follows Mr Davis' own wording. Mr Davis supplemented those statements to us in his oral submissions.

83. In relation to the BHC case Mr Davis' account was this:

    (i) [19]In **1984** he purchased (from his aunt, as he told us) for c £ 184,000 7 houses and a commercial building (which became a Laundromat) on approximately 2/3rd of an acre of land. In 1985 he was approached by the BHC who wanted to "*fix up the neighbourhood*". They suggested that, as well as adding kitchens and bathrooms to the existing houses, he should build new properties because they wanted to make an example for others to follow. Mr Davis was reluctant. BHC then offered to take the houses under their control for 25 years and occupy them with tenants selected by BHC. After 25 years the property would be returned to him debt free and in good order – the property was intended to be part of the BHC housing stock for tenants living in a General Improvement Area[20].BHC gave him the plans to build. New building took place between 1985 and 1987.

    (ii) On **30 July 1985** the BHC had approved $ 800,000 financing on the basis that they would manage the property at 17 Rawling Lane and receive rents until the mortgage[21] was retired. In 1987 further 3 room

[19] The account in this sub-paragraph is derived from Mr Davis' email to the COI of **6 July 2020.**

[20] The source of information for this sentence is Mr Davis' email of **30 June 2020** to the COI.

[21] In the course of his submissions to us Mr Davis expressed some as to doubt whether there ever was a mortgage as opposed to an entitlement of BHC to the rents until the debt to it was repaid. And in his Response to Mr Perinchief's affidavit, dated **27 April 2024** he said that there never was a mortgage written. In his email to the COI of **30 June 2020** he said that he had no recollection of ever signing or seeing an original mortgage. But, in the light of the terms of the March 6 2020 statement, which has several references to a mortgage, and the fact that a receiver was appointed, and foreclosure was later threatened, it is tolerably clear that there was at some stage a

residential buildings were completed and BHC put new tenants in them, who paid BHC directly Mr Davis had additional works (including a parking lot and retainer walls) completed in 1998. The new cost due to additional building was c $ 965,000. Until the events set out below BHC continued to perform as agreed, collected the rents, and loaned him some more money[22].

(iii) Up until the general election (see below) the BHC continued to place tenants in the units constructed by Mr Davis, to collect rent, to answer any tenant concerns and to loan Mr Davis more money to fix the driveway, build proper retaining walls and parking for the tenants[23].

(iv) Mr David Lines was a UBP stalwart and, in **1985,** the Chairman of the BHC. (He was, also, Mr Davis told us, the brother of the Chairman of the Bank of Bermuda). By **1987** he had stepped down. In **1989** Mr Davis ran as an independent candidate in the Pembroke East Central District. (This date appears to be an error - the election having taken place in November 1998). Mr Davis ran as an independent on a platform that was highly critical of North Hamilton zoning and proposing development in the back of town: see his email of July 6 2020 at ROA/15/769 At some date after 1998 (Mr Davis told us) he joined the UBP.

(v) Mr Barritt, a UBP candidate, lost his seat. Mr Lines told Mr Davis that the votes for him had caused Mr Barritt to lose his seat[24] .

(vi) The BHC then "*walked away*" from their management commitments. The BHC contacted Mr Davis on **11 March 1989** to tell him that he was now to collect the rents; and presented him with a new mortgage

mortgage. It may well be however that the mortgage was only created after the general election in November 1998 as Mr Davis stated in his email of *29* **June 2020** and his email of **30 June 2020** . Paragraph 1 (B) of his March 6 2020 statement suggests the same: but 1 (A) suggests that there was a mortgage in 1985.

[22] Mr Davis told us that BHC were tenants from him and sub-let to the tenants living in the houses. But he also said that he could not recall if he had a lease. In his response to the COI's skeleton argument of 5 May 2024 he asked:" Would *it not be irregular for a lender to select tenants and set the rents and tenancy agreement in the "lender's" name for the tenancy*?" The exact position in relation to leases is unclear. It may be that Mr Davis had leases with the tenants who had been found by the BHC, whose rent was paid to an account of BHC, which, initially, collected it and applied it against the loans to Mr Davis. At any rate by April 2000 it was Mr Davis who was notifying the occupants of a proposed increase in rent: see [83] (xii) below. In paragraph 1 (A) of his March 6 2020 statement Mr Davis said that the promise was that the BHC would manage the property and receive the rents and this promise was similar (he does not say identical) to the current private sector rental programme (under which BHC becomes a tenant of the owner and sub-lets to the occupier), which, was a scheme which BHC was not prepared to apply in Mr Davis' case. In [19] of his statement Mr Davis refers to the laundry as paying rents to an account at in his name at the BHC. It may be that the lease arrangements changed at some stage.

[23] See Mr Davis' email to the COI of **7 July 2020**.

[24] He told us that Mr Lines said to him "*After all we have done for you, why do you want to run against us?"*

schedule, leaving him with tenants who had the legal right to stay and some of whom would eventually become rental delinquents[25].

(vii) Mr Davis believed that Mr Lines, who was known to be highly influential behind the scenes, had a hand in the decision not to manage the properties as punishment for Mr Davis causing the loss of that seat, in 1989.

(viii) In around **1996** Mr Davis' financial hardships had grown to the extent that it affected his mortgage (by which Mr Davis told us he meant that it affected his ability to pay his debt to BHC), causing BHC to appoint a Receiver pursuant to the mortgage on **25 October 1996**. At that time the value of the property exceeded the money owing under the mortgage.

(ix) In **February 1997** Somers Mortgage and Finance began foreclosing on another property of Mr Davis and threatened to auction 17 Rambling Lane under the power contained in their second mortgage of that property.

(x) Assisted by Mr Titterton of Deloitte & Touche, Mr Davis engaged with his creditors with a view to reaching agreement in relation to his debts. Mr Tittering arranged meetings with Mr Davis' major creditors – Bank of Butterfield, Bank of Bermuda and Bermuda Commercial Bank- and got general agreement on a workout scheme subject to specific conditions. Mr Davis' statement gives details of those negotiations and the appointment and involvement of a manager of the property for the purposes of managing the scheme with all the major creditors. A draft memorandum of understanding was drawn up[26].

(xi) In late **December 1999** and **January 2000** Mr Davis asked BHC for $ 150,000 for renovations. Mr Raymond Dill, the general manager, told him on the telephone and at a meeting that BHC were not going to put any more money into his property. Mr Davis said that the previous management had agreed to put funds into the property and Mr Dill said that the previous management had made many promises that he had no intention to fulfil. Mr Davis decided to do the repairs that were outstanding under the workout scheme and make the rental increases which were contingent on those repairs.

[25] One of the problems for Mr Davis (as he said to us) was that under the General Improvement Area scheme tenants would have their premises improved; with a potential Court imposed rental increase which they would then have difficulty in honouring. The property in question does not appear to have been subject to directions under the Bermuda Housing Act but the same problem of difficulty of recovery of increased rents from tenants following improvements, arose. So, every month between 3 and 5 would not pay, some would pay late, and rents started going into arrears.

[26] Mr Davis told us that the plan was to commission a 10-year project the proceeds of which would pay the debts of all the creditors; and that all the parties to it agreed.

(xii) By **March 2000**[27] Mr Davis had carried out much of the repair and maintenance work that he thought was needed. In **April 2000** he asked for an update on his mortgage and rental collection and discovered that both were in arrears, the rents outstanding being in excess of the $ 40,000 rent arrears. He asked Mr Dill, to bring his mortgage up to date by taking responsibility for the rent arrears and applying then to the mortgage arrears.

(xiii) In **May 2000** Mr Davis was convinced that the treatment and new attitude that he was getting from the BHC, evidenced through Mr Dill, was because of his political associations, and that he needed to find a way to get through. He decided to take his wife to a meeting with Mr Dill. In the course of the meeting Mr Dill conceded to Mr Davis' request. At this stage the atmosphere was friendly, and Mr Davis asked whether Mr Dill's attitude and resistance to Mr Davis' proposals was because the current administration of the BHC had the view that the previous administration had been doing favours for him and that the new PLP administration would have nothing to do with it. Mr Dill replied that there "*was plenty of those attitudes round here".*

(xiv) Further discussion in relation to a proposed Memorandum of Understanding took place including the possibility of a six-month payment holiday under the mortgage, allowing for the rents collected to be used to pay off small creditors. Mr Davis' accountant produced a new schedule of payments and secured an understanding with the major creditors.

(xv) On **11 June 2000** Mr Davis went on the Shirley Dill Sunday morning talk show. While on the show he made comments about both political parties essentially stating that neither party was capable of taking the country where the people wanted to go because they were both too steeped in a racial struggle. His interview stirred a heated debate.

(xvi) On **16 June 2000** he wrote to all the tenants informing them that if they did not comply with the increase in rents proposed they would be evicted the following month. (He had sent the tenants a letter in April 2000 outlining the increases that he was seeking from June 1st). On the same day, unbeknown to him, a tenant went to Mr Dill and complained about the increases and was told not to worry because BHC was going to take the property back and that Mr Davis owed BHC a lot of money. Also on the same day he had an argument with Mr William Richardson instigated by him. He called Mr Davis a UBP fool telling him that he was going to lose all his property because BHC was going to take it.

[27] The statement says March 1999, but this would appear to be an error.

(xvii) On **21 June 2000** the BHC had a board meeting when the board heard arguments about the possibility of taking the property back. They were instructing their officers to explore the legalities of taking back the property. On **28 June 2020** the BHC was presented with a report of the property which Mr Davis claims to be based on out-of-date valuations and to contain misleading passages.

(xviii) In **July 2000** Mr Davis was presented with a document which stated that BHC was foreclosing on his property. He then had a spirited conversation with Mr Burchall, the Chairman of the BHC, in which, according to Mr Davis, Mr Burchall was entirely dismissive of his case. He saw Mr Burchall as "*a man bereft of reason adamant on seeing me bankrupt. I told him that for him politics is thicker than blood. It was not that I wanted to use the family to cause him to do something unprofessional. I was only hoping to get him to relate to me normally*". Mr Burchall was a cousin of Mr Davis.

84. In paragraph 63 of his 16 March 2020 statement to the COI Mr Davis outlines four "*particular waves of action"* which he considered amounted to discrimination in the delivery of goods and service because of his political opinion. His beliefs are:

(a) That the financial restructuring plan which was instigated by the UBP administration was professionally sound, well-funded and can be proven then and now to have been in the best interest of all creditors, including the BHC. It was aborted for no rational reason and for the benefit of no one except to satisfy a political objective of non-support for what Mr Larry Burchall, a PLP man, would see as a UBP initiative to be avoided and "*hopeful financial denigration of me",*

(b) BHC's belligerence in not accepting responsibility for the $ 58,000 BHC arrears was a result of them believing that he had benefited from his UBP association and had "*reached what they deemed the justified the end of the rope"*. The fact that the rental arrears were $ 58,000 due to their negligence and the mortgage was $ 40,000 in arrears "*would cause a moral and rational agent to consider where* [sic] *BHB was complicit*". Raymond Dill was right when he confirmed that the reason for their reluctance was because of his perceived ingratiation with the UBP.

(c) His layout of his political agenda on the Shirley Dill show on **11 June 2020** in which he attacked the core of the PLP ideology and reason for existence infuriated some PLP supporters, some of whom wanted to show him a lesson like "*don't bite the hand that feeds you*". "*They collaborated like a team to create the illusion of mayhem because they hated what I had to say".*

(d) The remedy sought on **16 July 2020** was inspired by a hate attributable to his political position and a wish to completely destroy a political opponent. Mr Burchall, the Chairman of the BHC, had included Mr Davis in a satirical article in the Bermuda Times in November 1994 and demonstrated bias towards him thereby. Rather than recuse himself from acting he had become the orchestrator of Mr Davis' fate.

In his response to the affidavit of Mr Perinchief of **14 April 2024**, which was not before the COI, Mr Davis also makes the point that it was unfair to arrange with him that he should build new units in a GIA area, the BHC should manage the tenants, collect the rents, and use them to pay off its loans to him, and hand everything back to him in 25 years; but, then, within a couple of years, hand everything back to him, with tenants who could not all pay the rent due for the revamped premises, and refuse to put him under the private rental guarantee scheme.

85. The result of what BHC did was that Mr Davis was forced to go to a private lender "*at tremendous cost*" to pay off the BHC mortgage and settle the debts with the banks and the unsecured creditors. He then made condominiums out of the 11 units which was family property that he had had no intention of selling[28]. He was able to sell the units for an average of $ 450,000 each but had to give the equivalent of two units to the man who took the risk of lending him funds. It was never his desire or interest to sell his family property. He would much prefer to have kept all the property as a possession and retired on his earnings.

86. The BHC had refused to put his property under the private sector rental guarantee programme (under which the BHC guaranteed the payment of rent by becoming the tenant of the owner and sub-letting to the occupier) or to engage in the scheme of arrangement organised by Mr Davis' major creditors and agreed by all the banks. Under it his debt would have been cleared in ten years and he would have received thereafter somewhere in the region of $ 18-20,000 per month.

87. In relation to the Bank of Bermuda/Bank of Butterfield/ Bermuda Hotel Pension Fund case Mr Davis' statement to the COI, also of March 16 2020, was to the following effect:

(i) On a Monday morning in 1994/5 he received a call from a Mr Arthur Haycock on behalf of the Bank of Bermuda who asked him if he was aware of a $ 400,000 overdraft facility that he had at the bank.

(ii) Mr Davis told Mr Haycock that he had obtained a facility a couple of years before because he was intending to purchase a cottage and convert it to a double condo unit. He explained that Mr Arnold Todd had suggested that he arrange an overdraft because it would be easier to increase the overdraft to accommodate the renovation than to get a

[28] The exact number of units at the property from 1984 onwards is somewhat unclear, there being discrepancies as between the statement of 6 March 2020 and the email of July 6 2020, and ambiguities in each document.

separate loan. Mt Haycock said that the file indicated that there should be a deed placed to secure the overdraft. Mr Davis explained that he had not in fact bought the property and that he had not used the facility.

(iii) On Friday of the same week Mr Davis received notice from both the Bank of Bermuda and the Bank of Butterfield saying that he had to repay pay all his debts within 30 days.

(iv) On the following Monday he received a call from Mr Ottiwell Simmons of the Bermuda Hotel Penson Fund asking him to come to their office. He owed the Fund $ 2,200 on a mortgage on 5 apartments in Pembroke. He went to the meeting with a cheque for the exact amount in his hands. He was then told that the Fund was calling the mortgage in and wanted the whole amount to be paid immediately.

(v) At this time his laundry business was owing c.$350,000, down from some $850,000, reduced to that level in a little over 2.5 years. He asked "them" (in his oral submissions Mr Davis explained that this was a reference to the Bank of Butterfield) to consolidate the debt into a new facility. This was refused as was a request for $10,000 to do some repairs. They were however prepared to finance his partner but not him.

(vi) He went to a lawyer' s office on Parliament Street to get legal advice, but was walked out of the office and told by the lawyer that he could not take Mr Davis on the record- no reason was given.

(vii) At around the same time he met a Mr David Dunkley on Reid Street and was asked why he did he not sell his laundry business to Mr Walter Cox. When Mr Davis asked why, Mr Dunkley said it was because he had heard from sources that Mr Davis had gone as far as he could go and that it was better to get out now because they were going to take him down.

(viii) He approached Ronald Simmons and Oluremu Badenist about his financial situation and they both agreed to look at a possible way out. They both recognised that his position was very recoverable, but he needed a cash injection which was being denied by the banks. Mr Simmons offered to purchase a 49% stake in Mr Davis' laundry business and was proposing to go to the bank to refinance his laundry debt with an equitable stake. Mr Simmons talked to Mr James Gibbons at Gibbons about lending him funds to settle Mr Davis' accounts under a scheme which Mr Simmons would arrange and offered the deeds of his South Shore tourist accommodation as collateral. Mr Gibbons refused the application without explanation. Thereafter Mr Gibbons was prepared to finance Mr Davis Latham to purchase one of Mr Davis' laundromats

but not to support Mr Simmons' attempt to assist him to remain in business.

(ix) Later he heard from several persons that there was a list of individuals, who were targeted by the Bank of Bermuda and circulated to other banks asking them to honour a ban on any credit for 87 persons all of whom were black businessmen, most involved in property development[29].

88. Mr Davis' contention before the COI was that there was, as it seemed to him, an overall conspiracy and that he was part of a broader scheme to punish a number of businessmen whom they thought might be involved in an illicit arrangement with a particular bank officer – Mr Arnold Todd - at the Bank of Bermuda. The effect of what happened is said by him to have been that he "*was systematically destroyed financially and suffered the loss of numerous cottages, businesses, family disruptions totalling millions of dollars*" and was "*reduced to suffer insolvency[30], embarrassment and incarceration"*[31] and wrongly punished for something of which he was not guilty. His complaint (set out at the beginning of his March 6 2020 statement) was that the BHC had "*acted in a manner so as to deprive me of my property by using the power of their mortgage unethically and unprofessionally avoiding best practice or reasonable remedy to take possession and refusing me services because of my political opinion*".

89. I have made an extensive summary of Mr Davis' statements because they reveal what appears to me to be the true gravamen of his case which was:

(a) That in the BHC case, the BHC had reneged on the original arrangement whereby the BHC would select the tenants and collect the rents so that over the years Mr Davis' borrowing would be repaid; and had done so because he sat as a candidate in an election which had the result that a UBP candidate lost his seat, i.e. for political as opposed to purely commercial reasons and because of political bias against him.

(b) Later, the BHC had declined to take the sensible commercial course of acceding to the proposed Memorandum of Understanding to deal with his financial position, the acceptance of which would have been to everyone's benefit; and had, again, done so for political rather than commercial reasons and because of political bias against him.

[29] In his emails to the COI of **30 June 2022** and **6 July 2022** Mr Davis said that he would get the letter from the Bank of Bermuda sent to the Bermuda Hotel Pension fund and other banks encouraging a "collective squeeze" on the blacklisted names, and he told us that when he appeared before the COI on **2 December 2022**, he told them that he could get that list.

[30] Mr Davis told us that the Bermuda Government petitioned for the winding up of his construction company for $125,000 (he was 3 months behind on payroll tax). He had 100 people working for him on a very large project.

[31] In his oral submissions Mr Davis told us that he had lost two apartment and a laundry at Somerset which his mortgagees had sold at way under their value; and six condominiums and 2 commercial premises which the Bank of Bermuda told him he had to sell at a gross undervalue. He also had to sell 3 units in Pembroke to pay off the aforementioned private lender to him.

(c) That in the Bank of Bermuda case Mr Davis together with over 80 other black businessmen had their debts called in or further credit banned because of an apprehension that they might be linked to nefarious activity on the part of Mr Todd, a bank employee, when, in Mr Davis' case, and – it may well be - others[32] he was in no way involved in anything that Mr Todd may have done wrong. Apart from asking him whether, at the time he was asked, he had an overdraft (the answer to which was that he had been afforded a facility but had never actually overdrawn any funds against it) no further investigation appears to have taken place as to whether he was in any way involved in any wrongdoing of Mr Todd.

(d) In each case, as a result of what was done, Mr Davis has lost a large amount of, *inter alia*, land which he would otherwise have retained.

90. In my judgment these matters, if established would, or, at the least, could fall properly to be regarded as "*irregular*". The first complaint – in essence of political victimisation - involves an abuse, or at best, misuse of power. Corporations such as the BHC cannot properly act against someone in Mr Davis' position on the politically motivated basis upon which it is alleged to have acted. The second complaint does likewise and may also involve racial discrimination. It may well have been lawful to call in the debts of over 80 black businessmen in that it was open to the Bank to do so in accordance with their terms. But it must, or, at least, could be thought to be irregular to call in a whole lot of debts on the footing that the debtors on a black list (in more senses than one) may have had some link with a corrupt bank employee without any serious investigation, as - allegedly - in the case of Mr Davis, and, it may well be, in the case of several others, of whether they were in fact involved in anything wrongful – conduct described by Mr Davis in his email to the COI of July 6 2020 as "*commercial bullying*". In both cases, the matters complained of appear to be fundamentally unfair.

91. I would add that to entertain these complaints would fit with the observations of the late Hon C. Walton D. Brown, JP, MP, that the establishment of the Inquiry was prompted by concerns that land had been unjustly lost as a consequence of the actions of *"the rich, the powerful and the connected*", into which category the banks of Bermuda and Butterfield and the BHC fall; and the need to give a voice to as many of those who had lost lands as possible: [12] (vi) above.

92. The COI contends that we have no right to treat their decision as unlawful unless we are satisfied that they could not rationally have come to it. Reliance is placed on a line of authority in planning cases, which distinguishes between the meaning of a policy and its application. Whatever may be the position in a planning case it seems to me that in this case our power is not so restricted. We are not concerned with the application of a policy but with a decision as to whether a complaint, if well founded, was within or outside the scope of the Inquiry – a decision which was made at a preliminary stage and before any significant investigation. I accept that a complainant needs to establish that

[32] In his email to the COI of June 30 2020 Mr Davis said that there were "many" on the list who were not involved in anything that Mr Todd had done wrong.

his case is one which it is appropriate for the Commission to investigate (and that he cannot simply invite an investigation as to whether there is something to investigate). But on the material before the Commission the case was one which it was appropriate to investigate.

93. A decision on such a topic may be challengeable if it is *Wednesbury* unreasonable in the sense that it could not have been reached by a reasonable actor. But it may also be challenged if the decision maker fails to take into account relevant or ignores relevant considerations (unless the decision would clearly have been the same but for these errors).

94. In the present case it appears to me that the COI has not taken into account the essential basis of the complaints as I have summarised them. The grounds of the COI's rejection of the complaints were summarised by Mr Perinchief as follows (see [5] above):

> *"…the Commissioners were ultimately of the view that* ***there was no evidence upon which it could conclude*** *that it was systemic or* ***that the conduct of the lending institutions was*** *unlawful or* ***irregular****."* [Emphasis added]

95. That there was a dispute between Mr Davis and the BHC and the Banks which could properly be classified as commercial is not in dispute. But I can detect no indication in the COI's responses to Mr Davis' complaints that the Commission addressed its collective mind to the considerations that I have summarised above, including the motivation of the relevant actors, the real possibility of discrimination and the apparent unfairness. Nor was there any substantial response by the Commission to Mr Davis' case (wordily expressed) as to why these disputes were more than mere commercial disputes.

96. Mr Delroy Duncan KC submitted that when the Commission expressed its view in the letters that were written to Mr Davis that the claims were not within scope that must signify that they considered his complaint about political interference. In circumstances where the responses to Mr Davis were of a most general kind, did not address the potential significance of political interference, and in the case of the primary response of **11 May 2020** said that the COI had to determine "*whether your case is but one example of some systemic "land grab" and/or whether it should make a report to the Director of Public Prosecutions for further action*, which is a partially inaccurate and, in any event, non-comprehensive summary of the scope of the Commission, I am not convinced that must be so, particularly in the absence of any explanation as to why they thought that there was no political interference (if that was what they thought) or why any such political interference was irrelevant (if that was their view).

97. Further, to say that there was <u>no evidence</u> that the conduct of the lending institutions was irregular seems to me to be simply wrong and an error that can properly be regarded as irrational in the Wednesbury sense – "*an error of reasoning which robbed the decision of its logical integrity" and*/or *"a demonstrable flaw in the reasoning which*

*led to it".* Lastly, I cannot regard this error as immaterial since it is not apparent to me that, had the COI addressed their minds to the gravamen of Mr Davis' complaints, they would have reached the same conclusion and been entitled so to do.

98. I should emphasize that this decision is, in effect, that the COI erred in failing to investigate the two complaints. Upon any investigation the complaints might have turned out to be ill founded and we cannot, any more than could the judge, reach any conclusion that they are well founded, and do not do so.

99. I am conscious that we have had submissions made to us which, in substance, amount in part to evidence that was not before the Commissioners. I have endeavoured to indicate in my summaries when what I have summarised is derived from what we were told at the hearing. I recognize that the question is whether the Commission wrongly decided not to investigate the claims made on the basis of the evidence that was before them. I am satisfied that it did.

100. I also wish to record that I appreciate the burden that lay on the Commission, whose original budget was $ 350,000 with a time for completion of 40 weeks (both of which were, in the event, extended, with the total costs exceeding $ 1,000,000); and which was appointed under Terms of Reference which were not perfectly drafted. But neither of those considerations can, in my judgment lead to a conclusion different to the one to which I have come. Nor can the fact that I have found it necessary to spend a considerable amount of time examining the contents of the mass of material which Mr Davis has produced, in order to discern what seems to me to be the true nature of his complaints.

101. I would, accordingly, dismiss the appeal of the Commission, and allow (in part) appeals of Mr Davis and Mr Piper. Mr Davis has succeeded insofar as I have found he advanced three complaints which the COI should have heard (the Judge referred only to two). In addition, I propose below a somewhat expanded form of declaratory relief. Mr Piper succeeds to the extent that he supported Mr Davis's position.

102. As to the relief to be given I have it mind that we should make a declaration to the following effect:

> *"The Commission of Inquiry into Historic Losses in Bermuda unlawfully excluded Mr Davis' Bermuda Housing Corporation and Bank of Bermuda claims from the Terms of Reference in the Official Gazette dated 1 November 2019 by (a) requiring the loss of land to be the result of some "systemic" issue and (b) by excluding them as being "commercial disputes*".
>
> *The exclusion was wrongful in relation to (a) because the Inquiry was not limited to considerations of systemic issues and in relation to (b) because the Commission failed to take account of all relevant considerations and wrongly, and without good reason, decided that there was no evidence of any irregularity, as explained in the judgment of the Court of [insert date]"*

103. As Mr Piper has supported Mr Davis's appeal while seeking for himself no specific relief, it is appropriate, in light of the decision expressed in [101] above, that we simply here note that no declaratory relief is required in his case.

104. Mr Duncan submitted that, if we were against him, we should make the declaration made by the Court below, which was in the terms of the first paragraph set out in [102] above. In a sense that declaration would be appropriate except that the reasons for our making it would not be the same as those of the judge. I have, therefore, suggested the additional provision. The parties are at liberty to suggest another form of wording.

105. As to the claim for damages for misfeasance in a public office I am entirely satisfied that it is not open to us to give effect to any such claim. A misinterpretation by the Commissioners of their Terms of Reference comes, in my view, nowhere close to supporting such a claim. In addition, it would be quite wrong to entertain such a claim without identification of the specific individuals who are supposed to have been guilty of the tort of misfeasance (and exactly why they were) and for them to be given an opportunity to be heard. It would also be necessary to determine whether any loss had been suffered which would, itself depend on determining what would have been the outcome if the Commission had entertained the claims. Similar considerations apply to any claim for breach of statutory duty. The 1935 Act does not, as it seems to me, create or recognize any such duty, and the same reasons for not entertaining any such claim apply.

106. I would reserve for further consideration any question relating to costs.

**SMELLIE, JA**

107. I agree with the judgment of my Lord President. I would only add that while the Commission may now be regarded as *functus officio*, there is no reason why the Premier should not have regard to the declarations made by this Court and determine whether any, and if so, what investigation of Mr Davis' complaints should be undertaken. Any such investigation would of course, for the reasons explained by Kawaley JA, from his unique perspective of the local context and conditions, afford to those who may be affected (or their descendants), an adequate opportunity to respond.

**KAWALEY JA**

108. I also agree with the disposition of these appeals proposed by the President above. I would like to briefly add some remarks of my own.

109. Firstly, the President (at [90] above) pivotally concluded that Mr Davis's complaints alleged political and/or racial discrimination on the part of public and private sector entities against him, occurring in a commercial context. So did the

Judge. Why this is so legally, and why these complaints had significance beyond the narrow group of Black Bermudian businessmen Mr Davis claimed to symbolically be representing in advancing them, requires brief elaboration. His complaints, moreover, appear to assume that any tribunal receiving them would have a tacit understanding of the social context of what is in many respects a bygone era.

110. For almost 150 years after Emancipation, economic and political power was concentrated in a comparatively small group of hands within a constitutional system which defined citizenship by reference to property ownership and a legal framework which allowed racial segregation and discrimination. Most Bermudians, in particular those born before, perhaps 1965, would have been raised to expect some form of economic retribution as a reprisal for public political dissent. And most would at a drop of a hat be able to count (at least on one hand) legendary examples of such occurrences, all pre-dating the present century and none involving any legal vindication for wrongful discrimination which was perceived as having occurred. The modern internationalised Bermudian economy, most would readily agree, operates within an environment which is almost unrecognisable from that which appertained in the era spanned by the present complaints.

111. The law often moves ahead of social practice, promulgating new values which society takes time to absorb and manifest in social behaviour. The Bermuda Constitution 1968 introduced a Bill of Fundamental Rights and Freedoms which for the first time prohibited discrimination by the "State' on the grounds of, *inter alia*, political opinions and race. Discrimination on the grounds of, *inter alia*, political opinions and race on the part of private persons and bodies was prohibited by the Human Rights Act 1981 although until the present century, a Government Minister's consent was required to refer a complaint to a Board of Inquiry. These potentially powerful legal tools have to my mind been underutilised. As a result, it is highly doubtful that the idea that it is legally wrong for a powerful person or organisation to take punitive economic action against someone perceived to be, for whatever reasons, a 'transgressor', has fully engaged the Bermudian popular (or even legal) imagination.

112. Against this background, it was inevitably difficult for the COI to grapple with the question of whether or not Mr Davis's complaints, set in the comparatively modern post-1968 Constitution era and commercial context, fell within its remit. Viewed through a purely private law lens, for instance, creditors enforcing loans are to be judged according to whether or not they are acting entirely within their legal rights, whatever their motives may be. However, superficial analysis of the Human Rights Act makes it obvious that if a business or public authority singles out someone for adverse treatment on any of the prohibited grounds of discrimination, a breach of the Act at least potentially occurs[33]. Assistant Justice Southey (at [118]) aptly drew

[33] Section 2 (2) (a) of the Act provides that a person discriminates against someone if they "*deliberately treat… him differently to other persons…because (vi) of his religion or beliefs or political opinions*". Section 5,

the various strands of the context which gave rise to the COI's Terms of Reference together in a way which linked them to Mr Davis's complaints:

> *"(e) The context of the terms of reference is clear from the debate in the HOA, the HOA motion and the evidence of Mr Telemaque. It appears to me that all these sources point in one direction. It appears to me that it is clear that there was concern that land had unjustly been lost as a consequence of the actions of 'the rich, the powerful and the connected' (per Mr Brown MP). Further, the concern was to ensure that as many as such cases as possible were considered. For example, the motion referred to the need to review 'all such known claims'. Further, Mr Telemaque's evidence refers to the need 'to give a voice to as many of these people as possible'. In considering the statements of Mr Brown, I have taken account of the fact that he is a single member of the HOA (albeit one who appears to have paid a key role in the process that led to the Commission of Inquiry). I have also taken account of the fact that there is no contemporaneous material that supports Mr Telemaque's evidence about the reasoning of the Cabinet. However, as already noted, all of this material is consistent with the terms of reference and so it appears to me that I can legitimately consider it…*
>
> *(g) The key consequence of my conclusion in paragraph e. above is that it appears to me that 'irregular' can and should be given a technical meaning in this context. It appears to me that 'irregular' can be understood to mean cases where there is a power imbalance as described by Mr Brown MP...*"

113. In my judgment the Terms of Reference did indeed embrace any loss of property attributable to the abuse of power. The popular assumption that a debtor has no legal standing to complain of debt enforcement action motivated by discriminatory grounds is legally misconceived. However, it is easy to make wild and unfounded allegations of victimization and it will typically (in the loan enforcement context) be difficult to prove that discriminatory differential treatment occurred. I do not ignore these considerations in finding that Mr Davis's complaints should have been accepted by the COI as worthy of consideration.

114. It is also important to emphasise that there is a fundamental distinction between a finding that a complaint is arguable, deserving of investigation by the COI, and a finding that a complaint has been proved. No valid judicial or administrative finding of serious misconduct can be made against any person or entity without affording them a reasonable opportunity to be heard. In the present context, as Ms Junos pointed out at the interlocutory hearing in November, fairness required claims asserted on behalf of ancestors to be answered, so far as such persons wish to do so, by the descendants of alleged perpetrators of "land grabs". Similar concerns would not arise with the same force as regards complaints about Governmental action where no individual reputations are explicitly being besmirched. But Mr Davis at least implicitly impugns the conduct of two individuals who are deceased and one

prohibiting discrimination in the provision of goods and services applies to private individuals, organizations and public authorities.

corporate entity which no longer exists in its original form. With these considerations in mind, I set out briefly:

(a) why I agree with my brother Justices of Appeal that Mr Davis raised three potentially valid complaints in factual terms; and

(b) attempt to contextualise the complaints

115. Firstly, Mr Davis himself is a senior member of the Bermudian community who, it seems to me, is widely respected and admired for the leadership he has provided more narrowly to self-employed Black Bermudians and more widely (and recently) as a non-partisan thought leader. The first and last of his complaints would justify a biographer describing him as a man who lived in a highly mercantile society, earned a living as a businessman but clearly valued his principles more than his pockets. He is, on the face of it, an entirely credible 'witness'.

116. The first complaint amounts to this. He had a favourable arrangement with the BHC, a public corporation, to build houses on family land in North Hamilton. The BHC would manage the leases, including the engagement with the tenants and guarantee the rents. In the February 1989 General Election, disgruntled with local decisions the UBP Government had made, he ran as an independent candidate in Pembroke East Central. Although the UBP won the General Election overall, the UBP incumbent (Mr Robert Barritt) lost his seat. The next month, Mr David Lines (BHC Chairman) met Mr Davis, blamed him for the loss of the UBP seat in the constituency Davis had himself contested and indicated that the BHC would be terminating its existing arrangements with him. This left him with the responsibility for collecting rent from the tenants, many of whom were impecunious, and deprived him of a reliable income stream from which to finance his mortgage obligations. On its face, this is a clear allegation that BHB, directed by Mr Lines, victimised Mr Davis because of his political opinions in the context of a commercial relationship.

117. He was a prominent member of the Bermuda business and professional community, a man who was not born with a silver spoon his mouth. He was widely respected and admired, and well known in the commercial litigation and insolvency law sphere. Were Mr Lines to contest this allegation, he too would at the outset be viewed as a credible witness. Most who knew Mr Lines in the professional sphere would probably agree that he was a confident and sometimes somewhat combative man of conviction who would not be likely to pursue a course of action he recognised as legally or morally wrong. Equally, he was probably the sort of man who would not react with equanimity to any perceived attack on his own interests and/or principles.

118. Against this background, I consider Mr Davis's complaint as plausible for the following main reasons. First, he effectively admits engaging in what by 1989 Bermudian standards was highly provocative conduct on the part of a businessman hoping to maintain the long-term continuity of public sector contracts. Second,

flowing from this, it would not be surprising if Mr Lines was to have become outraged by Mr Davis's undoubted breach of trust, as he would likely have perceived it. Most people in such a position at the time would have likely recited the homily which Mr Davis himself recited to the Court: "Don't bite the hand that feeds you." What would be surprising (and I consider inherently improbable) is the notion that Mr Lines (or anyone else at BHC) contemplated or was advised that altering the terms of the arrangement should not be pursued because it was potentially unlawful.

119. Even in the context of modern liberal democracies, few Government contracts are entered into on the express or implied understanding that the awardee is free to publicly kick the Government in the shins during the currency of the contract. However, unless such a contract expressly or impliedly excluded certain forms of public political expression (as civil service and judicial contracts do), it would still probably today be regarded as improper and unlawful to peremptorily terminate a contractual arrangement in an obviously retaliatory manner based on prohibited grounds of discrimination.

120. Mr Davis's second complaint is also arguable on its face. It alleges victimisation instigated by the Bank of Bermuda resulting in loans being called in by various lenders properties being sold at an undervalue in a disproportionate and unjustified response to unfounded suspicions that Mr Davis was involved in unlawful dealings involving Mr Arnold Todd, a Bank employee. His complaint alleges Black borrowers were specifically targeted. If this occurred, the conduct complained of was clearly improper and an abuse of power within the COI's Terms of Reference. Moreover, an arguable case of indirect racial discrimination is also advanced.

121. Judicial notice can be taken of the fact that Mr Arnold Todd was charged and tried in 1996 on 17 charges of dishonesty and found not guilty on 6 counts with a hung jury on 11 other counts (which were left on the file). The charges related to his employment with the Bank and the Police investigation began in or about 1992. The Bank no longer exists as such, and I do not discern any individuals at the Bank being specifically accused of misconduct. Nonetheless, if the Bank had sufficient evidence of wrongdoing to persuade the Crown to lay criminal charges against its former loans officer, it is not implausible that a wave of moral outrage unleashed a disproportionate commercial response targeting persons believed to have been involved in wrongdoing, but who in fact were not. Mr Todd sadly died in 2022. No adverse findings against him form part of my Judgment (nor indeed the President's).

122. Mr Davis also did not appear to me to cast any aspersions on the other financial institutions which closed the accounts of those suspected of being members of Mr Todd's supposed "ring". In that era, Capital G Bank (part of the Gibbons Group) and the Bermuda Industrial Union's Credit Union would (for historical reasons) have been regarded as safe financial havens by those who viewed the then locally owned Front Street banks as bastions of the old Establishment. The most obvious explanation for this part of Mr Davis's account (assuming veracity on his part), which seems implausible in modern terms, is that accounts were closed by

other financial institutions to avoid them becoming embroiled in the Police investigation which had commenced at the Bank of Bermuda.

123. Mr Davis's third complaint amounts to this. Having been victimized by the UBP in 1989, in the mid-1990s he decided "if you can't beat them, join them". Having joined the UBP his financial difficulties which peaked in or around 1996, were mitigated by an arrangement with creditors organized by Deloitte and Touche's Glenn Titterton. This was the backdrop against which he was the recipient of abuse of power by the PLP Government which was elected in November 1998.

124. By his own account, it seems to me, the offence he caused was comparatively mild. On the popular Sunday morning Shirley Dill call-in radio show on 11 June 2000, he waxed eloquently about the shortcomings of the PLP's ideology. A few days later, on 16 June 2000, he himself wrote a letter to tenants (warning of eviction if they did not pay rent at the recently increased rate) which he admits resulted in a complaint being made to the BHC. In July 2000, he received notice from the BHC that his mortgage was being foreclosed. As a result of a lack of sympathy displayed by BHC Chair Larry Burchall, a cousin with whom he had crossed political swords in the past, Mr Davis believed the foreclosure was based on political prejudice. The complaint was advanced in a very moderate way, with no hint of exaggeration and volunteered the fact that his own letter to tenants contributed to the BHC Board meeting at which the foreclosure decision was made.

125. In my judgment this complaint only just reaches the threshold of arguability, based on circumstantial rather than direct evidence of an abuse of power. Applying the presumption of regularity in relation to official acts, it is arguable that the COI should have assumed that the existing arrangement with creditors which Mr Davis had negotiated prior to the 1998 General Election were legitimate. A potentially valid complaint of an abuse of power and discrimination on the grounds of political opinions was advanced. There was, marginally, a case to answer in the context of the role the COI was expected to play in allowing grievances to be heard.

126. Mr Larry Burchall, who sadly died in 2017, was also a prominent Bermudian thought leader. A former military man, he became notable for his journalism, advocacy for the PLP and what might broadly be called 'good governance'. He too would be a highly credible witness, if called to respond to this complaint. Were he able to contest this complaint, he might well aver that the COI genuinely believed that Mr Davis had been the recipient of inappropriate political patronage and the relevant commercial arrangements were not objectively sustainable. The essence of the complaint, however, is that the BHC's actions were pivotally triggered by the critical political opinions he expressed about the political powers behind the BHC.

127. It remains to consider the concerns expressed by Sir Anthony Smellie about what the practical result of this Court's declaratory relief should be. In an ideal world, the COI would be re-opened to hear these complaints. I do not consider it is necessary for this Court to commend to the Premier what his response to this Judgment should

be. In my judgment, the declaratory relief it is proposed to grant, irrespective of what further investigations may take place, do serve an important function. They ought to have the effect of formally signifying that Mr Davis's complaints, supported by Mr Piper, are both (a) worthy of being heard and (b) have been heard (without being substantively determined) by the Supreme Court and by this Court.