Clayton Comments

Richard Clayton QC

COMMISSIONS OF ENQUIRY AND PRINCIPLES OF FAIRNESS

In 2018 Richard Clayton was instructed to defend several judicial review claims in Trinidad brought against a Commission of Enquiry concerning the construction of the Las Alturas Housing Towers. These cases raised a number of interesting fairness challenges to Commissions of Enquiry. The first case to be decided was brought by the former Managing Director of the Urban Development Corporation (the UDC), Mr Calder Hart: see *Calder Hart v Commission of Enquiry at Las Alturas Housing Towers* CV2016-04448.

The Commission decided that Mr Calder Hart, as Managing Director of the UDC, was instrumental in acquiring the land for the Las Alturas Project. He failed to do what a prudent purchaser would do when land was being acquired. The Commission concluded that Mr Calder Hart's failure resulted in the land being generally unsuitable for low cost housing and recommended that civil action be taken against him. Mr Calder Hart then judicially reviewed the Commission alleging that it had breached its obligation to treat him fairly.

Background

In 2004 the UDC approved and awarded a contract for T & T $ 67,620,000 to construct nine 4-storey apartment buildings at the Towers. At a very early state construction had to cease because of significant slope movement. Construction continued on other blocks- although the project, itself, had to handed over to the Trinidad Housing Development Corporation (the HDC). In 2008 the HDC contracted to construct 134 units for $74,876,000. Construction began in 2009 but the buildings had cracking and became uninhabitable, despite variations and remedial works. By 2011 partial demolition began and in March 2019, the HDC ordered their complete demolition.

In 2014 the Government appointed a Commission of Enquiry to enquire into the construction of the Towers. The Commission held public sittings and over 25 witnesses testified. Mr Calder Hart was invited by the Commission to participate as the Chairman of the UDC.

Correspondence between Mr Calder Hart's attorneys and the Commission ensued, focusing on a request for documents he said he needed before he could give evidence before the Commission. These documents were not in the Commission's possession and could not be provided to him. Consequently, Mr Calder Hart declined to provide any witness statement to the Commission.

The Commission took evidence for 18 months but Mr Calder Hart never gave evidence. In 2016 Commission's report was published and criticised Mr Calder Hart. He then brought judicial review proceedings challenging the Commission's decision in very broad terms, although he failed to spell out specific factual allegations in any detail. He claimed that the Commission's decision was illegal, unreasonable, disproportionate, arrived at in a procedurally improper manner, was an unreasonable, irregular, or improper exercise of a discretion, an abuse of power and unfair and in breach of the principles of natural justice and of his legitimate expectations, was *ultra vires* and in breach of the constitutional right of equal protection of law and right to a fair hearing.

At the hearing Mr Calder Hart argued that the Commission acted unfairly by failing to provide him with a Salmon letter so as to inform him of any adverse allegations before he gave evidence. Salmon

letters take their name from the 1966 Royal Commission into the coal mining disaster at Aberfan, Wales which collapsed, killing 116 children and 28 adults. More than 1.4 million cubic feet of debris covered a section of the village in Aberfan within minutes.

The Commission rejected Mr Calder Hart's complaint that it failed to provide him with documents. It argued that it made all reasonable attempts to source the information Mr Calder Hart requested from the UDC: it was not the Commission's function to provide documents which was not within its custody. The Commission, nevertheless, provided Mr Calder Hart with all the documents disclosed to it (including all of its documents and witness statements).

Furthermore, as its first line of defence, the Commission argued that the Claimant raised new grounds for judicial review in his Written Submissions which were not advanced in his original Claim Form. It, therefore, contended that Mr Calder Hart was abusing the process of the Court by raising new legal submissions without first applying to the Court to amend his grounds for judicial review: see eg the Privy Council in *Fishermen and Friends of the Sea v Environmental Management Authority* [2018] P.T.S.R. 1979 (Lord Hope at paras 18 and 32) and *Johnatty v AG of Trinidad* 4 Civ App No. P 252 of 2015 (Jamadar JA at paras. 37-38).

Abuse of process

The Judge, Harris J, found that Mr Calder Hart failed to advance any positive case on the facts to support of his challenges in the Claim Form. He accepted the Commission's submission that that the most that could be gleaned from the substantive application (together with the evidence filed in support) was that Mr Calder Hart had a generalised complaint about his lack of involvement in the enquiry process. The Commission argued that this approach was wrong in principle, and the Court should debar Mr Calder Hart from advancing any of the new challenges in his Written Submissions.

The Commission submitted that Mr Calder Hart had failed to apply for leave to amend his judicial review claim to argue the new grounds advanced in his Written Submissions. Any application to amend to add the new grounds to the Written Submissions was bound to fail since more than 3 months have elapsed since the grounds first arose, the time limit prescribed by s 11(1) of the Judicial Review Act and CPR 56.5. Furthermore, Mr Calder Hart had failed to identify any good reason to extend time. Leave would inevitably be refused: see *R(Page) v Darlington BC* [2018] EWHC 1818 (Admin) paras 30-34. Mr Calder Hart's attempt to circumvent the leave requirement for judicial review was an abuse of the process of the Court and the Court should not enable him ambush the Commissioners at trial by putting forward a new and/or inadequately pleaded case- long after the timetable for the service of pleadings and evidence.

The Judge applied the approach taken by Kokaram J in *A-G of Trinidad v Evolving Technologies* CV2007-00387 at para 4.2, the "*principles of proper pleading has not been jettisoned by the general wording of rules 8.6(1) and (2) CPR. The duty to state material facts necessitates a careful attention to the details of the case that are material to establishing a claim*." He, therefore, refused to grant Mr Calder Hart permission to advance his new grounds.

Mr Calder Hart's complaints of unfairness

The Judge then examined the complaints of unfairness and decided that that the Commission's terms of reference, themselves, put Mr Calder Hart on notice of the findings that it might make. He

found that Mr Calder Hart's essential complaint was that he had not given a fair opportunity to take part in the proceedings, even though his Written Submissions focused substantially on the alleged failure to provide a Salmon letter.

The Salmon principles for fairness at public inquiries

The Salmon Report lays down six cardinal principles of fair procedure which have become known as the "Salmon principles". The Salmon principles require:

1. before any person becomes involved in an inquiry, the Commission must be satisfied that there are circumstances which affect him which it proposes to investigate;
2. before any person is called as a witness, he should be informed of any allegations made against him and the substance of the evidence in support of those allegations
3. he should be given an adequate opportunity to prepare his case and assisted with legal advisers whose expenses should normally be met out of public funds;
4. he should have the opportunity of being examined by his own solicitor or counsel and to state his case in public at the enquiry;
5. any material witnesses he wishes to call at the enquiry should, if reasonably practicable, be heard; and
6. he should have the opportunity of testing by cross-examination conducted by his own solicitor or counsel any evidence which may affect them.

The second Salmon principle means that Salmon letters were commonly issued to witnesses where there was potential criticism that might be made of their conduct

The Judge held that Salmon letters must only be given to witnesses at an enquiry, and only shortly before they are due to give their oral evidence. However, Mr Calder Hart never agreed to be a witness, and never attended the enquiry. The Judge, therefore, decided that the duty of the Commissioners to issue a Salmon letter simply never arose.

The Attorney General of Trinidad had intervened in support of Mr Calder Hart and submitted that fairness required the "Maxwellisation" procedure, that the law required Mr Calder Hart to be informed of any criticism to appear in the final report, before it was published. The Maxwellisation principle was recommended in 1996 when Lord Scott's published his Report on arms sales to Iraq by Matrix-Churchill. Lord Scott criticised the Salmon Principles as being more relevant to adversarial processes than an inquisitorial procedure. He, therefore, adopted the process of warning those concerned of possible criticism further than the Salmon letter. Instead, he copied adverse passages from his draft report to those concerned, so they had an opportunity to respond and seek to change his mind, based on from practice in investigations under the Companies Act.

However, the Commission pointed out that in *Maxwell v Department for Trade and Industry* [1974] QB 523 the Court of Appeal rejected this argument, holding (in line with the existing law on Salmon letters) that fairness required only that a person be given an opportunity to respond to the substance of what other witnesses were to say during the Inquiry.

The Judge dismissed the complaint that the Commission failed to follow the Maxwellisation procedure. He ruled that the requirement of fairness required only that Mr Calder Hart be given the opportunity to be heard and that he had been afforded such an opportunity. The reasons Mr Calder

Hart proffered for his non-participation did not provide sufficient grounds for contending that he was not afforded the opportunity to be heard. The Judge also ruled that the decision in *Maxwell* did not apply. Mr Calder Hart was merely a person mentioned in the Commission report, as opposed to being an actual witness. The Judge also held that the examples of Maxwellisation were mostly based on UK Inquiry Rules which have not been duplicated in Trinidad and Tobago.

The Commission had taken view that Mr Calder Hart had no intention to give evidence to the Commission. The Judge accepted that its conclusion was one which the Commission was plainly entitled to reach and was unimpeachable on *Wednesbury* reasonable grounds.

The Judge next held that Mr Calder Hart had no legitimate expectation and that, even if the Court were to find that the Claimant's legitimate expectation was disappointed, the Court would not grant relief. He also rejected the complaint that the Commission was somehow bound to exercise its discretionary statutory powers so as to provide the Claimant with documents and other assistance and breached its statutory powers under sections 5 and 11 of the Commission of Enquiry Act Chap 19:01 as misconceived. Finally, he also dismissed the submission that the Commission had acted *ultra vires* and irrationally.

Richard Clayton QC successfully represented the Commissioners of Enquiry in Trinidad and practices at Exchequer Chambers in London, England at richard.claytonqc@exchequerchambers.com
The judgment in Calder Hart v Commission of Enquiry at the Las Alturas Housing Towers is at http://webopac.ttlawcourts.org/LibraryJud/Judgments/HC/Harris/2016/cv_16_04448DD25sep2020.pdf

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