

GOVERNMENT POWERS – Analysis by Carey Leonard, Callendars & Co.

Grand Bahama Port Authority (GBPA) and the License of Freeport Pilotage Company Limited

- The GBPA is delaying on the approval of the approved premises in order to try to put pressure on the Pilots.
- GBPA knows that they can't stop the Pilotage as they have already given a license, and the license has already been used, for pilotage in the Harbour from 1986.
- Ian Rolle, GBPA President is conflicted as he has been asked by Freeport Harbour to delay. Remember that Ian is also the president of Port Group Limited, a totally separate legal entity for the GBPA, which has ownership and clear interest in Freeport Harbour Company (FHC).
- There is a contract the Hawksbill Creek Agreement (HCA) between Government and the GBPA that can be enforced by Government.
- Under the contract the Government entrusted the GBPA to do certain things and they have a right to insist that the GBPA does not breach the Agreement and so Government can enforce it.
- Alternatively and in addition, The Government as a shareholder (7and ½%) of the GBPA is entitled to make enquiry and to push the GBPA directors to act in accordance with their duties as a quasi-governmental body.

GBPA and Government

1. The GBPA is a Quasi- Governmental body, a local government. These powers were given to it by the Government in the Hawksbill Creek Agreement. The Supreme Court of The Bahamas has confirmed this in several of its rulings.
2. It has the sole power to issue business licenses in the Port Area.
3. Like any public local authority with responsibility to the public, i.e. residents of the Port Area, any decisions in performing its duties may be subject to Judicial Review.
4. Judicial Review is concerned with a review by the Supreme Court of the acts, decisions, determinations, orders, and omissions of individuals and bodies performing public functions. In the last twenty-five years the circumstances in which the courts have been prepared to intervene to provide relief for unlawful administrative action have expanded dramatically.
5. The courts review the exercise by the public authority of its power. In some cases the court will substitute its own decisions of it is satisfied that the decision of the Public Authority was wrong.
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7. Therefore, in exercising its powers to license the GBPA ought to exercise the same as if every decision made by the GBPA would be subject to review by the Court.
8. Firstly, has the GBPA acted fairly? This goes to what is called "Natural Justice". This requires the GBPA to act in a disinterested and unbiased fashion. In the words of Justice Adams in the Shagrila case "The Port Authority is bound to exercise its monopoly in the public interest and for the public benefit in accordance with the terms of the Agreement."

Port Director

9. With respect to the Port Director. He represents the GBPA. He is appointed by the GBPA not Freeport Harbour Company, according to Freeport Harbour Rules.

10. The Port Director, when he acts as Port Director, must act in accordance with the provisions of the HCA. He must wear his GBPA cap acting in the “public interest.”

11. Port Director is in effect the Bahamas Government representative. “Public Interest” is key here.

12. The HCA calls for Freeport Harbour to be operated **“as will comply with accepted international practice.”** Pilotage and Safety Standards of today not 10 or 50 years ago. Freeport Harbour is no longer a sleepy harbour, in the last 20 years it has become a busy harbour. What do large busy harbours do?

13. Under section 3 of the Rules, the Port Director is appointed by The Grand Bahama Port Authority, Limited (GBPA) with the approval of the Minister of government responsible. In effect Orlando Forbes, when doing something as the “Port Director” is acting on behalf of the “Quasi-governmental body” the GBPA and not FHC.

14. The rules that the Port Director follows are created by Statute Law not what FHC management feels today. He must act in the best interests of the public which may not necessarily be those of FHC.

15. Freeport Harbour Rules are promulgated under the Port Authorities Act. It is all Statute Law.

GBPA is not your ordinary private company it is a quasi-governmental body. It is a “one of a kind”.

·The case law supports this:

Shangrila (1982) Limited v. The Grand Bahama Port Authority, Limited [1984] BHS J. 29

Justice Adams states “..I am of the view that Mr. Smith’s submission that the Port Authority has powers and obligations that are not dissimilar to those of a local authority is not without merit. Mr Smith puts it this way. He contends that the Port Authority, although on the face of it, a private making enterprise de jure, by the Agreement and scope of its terms, by the duties and powers entrusted it by virtue of the Agreement as enabled by statute, is in effect or de facto a public local authority whose responsibility lies to the residents in the Port Area to administer and control the Port Area in accordance with the terms and conditions of the Agreement.”

This clearly shows that the GBPA is a quasi- governmental body. Yes it is a private company, but one with public duties.

He goes on to say “The power lies in the 1st defendant, which has to arrive at its own decision after an exercise of its discretion based on all the facts and circumstances. It cannot transfer its power to grant a license or delegate it to the decision of the Government of The Bahamas, which has no jurisdiction in this matter. I therefore hold that conditions (b) and (f) of the license are repugnant, ultra vires and void.”

This shows that just like any governmental body, the decisions made by the GBPA are subject to Judicial Review and that the court, as I mention to you before can instruct the GBPA to do as it should do and not what it feels like doing.

You can’t make an application for Judicial Review on PharmaChem or Polymers for example, but you can on the GBPA.

Commonwealth Brewery Limited v. Attorney General 1997 No. 14 Equity Side

Chief Justice Joan Sawyer states “Considering the Hawksbill Creek Agreement as a whole, it appears to me that to the extent of the Port Area, the Government gave the Port Authority the powers which one would normally associate with Local Government authorities and thereby created a special enclave in order to encourage the development of that particular part of The Bahamas.”

GBPA responsible for the good management of the Port Area.

There are countless sections in the Hawksbill Creek Agreement that speak to this, Hawksbill Creek, Grand Bahama (Deep Water Harbour and Industrial Area) Act Chapter 261

Section 1.(2) states that the GBPA covenants as follows:

*“Upon completion of the Port Project maintain the same in good repair and condition and keep the said channel and turning basin clear and free from obstruction and assume full responsibility for the provision of such navigational aids and markers as in the opinion of the Port Authority shall be requisite for the proper operation of the deep water harbour as a private port, **and as will comply with accepted international practice.**”*

Section 1.(8) states

“If and when the Port Authority engage in aviation activities, operate the same in conformity with The Colonial Civil Aviation Order 1949 or any amendment or re-enactment thereof and The Colonial Air Navigation (Application of Act) Order 1952 or any amendment or re-enactment thereof and all orders, rules, and regulations made thereunder.”

Section 2.(14) states

“That the Port Authority shall have the responsibility of and for the administration and control of the Port Project and the laying out of the development of the Port Area (subject to the provisions as regards administration by the Government in this Agreement contained) the administration and control thereof.”

Government may and should intervene where the governmental functions are being neglected

·The GBPA is unlike any other foreign investor.

·It is a one of a kind.

·It affects the lives of one sixth of the population of the country.

·Places like the Harbour and the Airport provided essential services to one sixth of the population.

·It has a duty to act in the interests of the public. The courts say that.

·**They have a contract with the Government to exercise these functions.**

·The Government can write and state what it believes should be happening and can let the GBPA know that action will be taken if the GBPA does not act in accordance with the interests of the Public (the Country).

·What are the “accepted international practice in harbours the size of Freeport Harbour with that amount of traffic?

·What about all the incidences, not just the recent ones but ones going back over the last twelve years such as the M.V. Brussel?

I can understand that in the normal course of events Government does not interfere with the private foreign investor but this is not the normal course of events and the GBPA is not a normal foreign investor. It needs to be prodded to do what it needs to do. Government should write and say that Cabinet has expressed their concerns and feels that the following should be done.

They can then set out what is happening in other ports and state that they would expect Freeport Harbour to be doing the same.

They can remind the GBPA that these are public functions dealing with facilities that are open to the public and are recognized by Government as international gateways into the Country.