

## OPINION &amp; INSIGHTS

# What the Hilaire-Chastanet ruling on the CIP really means

Upon the release of the High Court judgment of the Eastern Caribbean Supreme Court denying the injunctive relief sought by Allen Chastanet against Dr Ernest Hilaire, minister responsible for the Citizenship by Investment Programme (CIP), supporters of both political parties celebrated, albeit for contrasting reasons.

The SLP viewed it as a precursor to the dismissal of the substantive case and a vindication of Dr Hilaire and the legality of the programme, especially following the earlier Caribbean Court of Justice ruling in his favour.

The UWP, meanwhile, sought to clarify that the failure to secure injunctive relief was not fatal to the substantive case, urging the public to await the final judgment before counting proverbial eggs.

Yet, the missing centre of this discourse was a clear understanding and public education on interim injunctions, particularly in public law. Little attention was paid to the rationale, nature and impact of such a case.

## So, what is an interim injunction?

It is a court order requiring a party to perform or refrain from a specific action. It may be requested before or after the substantive hearing.

The case of **American Cynamid Co v. Ethicon Ltd [1975]** established a two-pronged test for granting or refusing interim injunctions:

1. Whether there is a serious issue to be tried.
2. Whether the balance of convenience favours granting or refusing the injunction.

In the first prong, the Court assesses whether the case is frivolous or vexatious and whether it has some prospect of success, without resolving substantive questions of fact or law.

The second prong – balance of convenience – is where most debate occurs. Here, the Court asks if the injunction is refused and the claimant later succeeds, could they be adequately compensated in damages?

If monetary compensation is sufficient, the injunction is refused. The Court also considers whether the party can afford to pay damages. If damages are inadequate, the injunction must be considered.

## The specifics of the case

In this case, though, the claimant, i.e., Allen Chastanet, brought a claim for judicial review, arguing:

- That the increase in allocation of qualifying investment units under the Canelles Resort Project is unlawful and unreasonable, as evidenced by the

astronomical increases in the number of applications and approvals;

- That there is an illegal approval or failure to properly regulate and prohibit the grant of passports at discounted prices as low as US\$65 000 below the minimum CIP investment price in the real estate projects;

- The lack of regulations to accompany the legislation for the Enterprise Project, particularly the Infrastructure Project, thereby making applications illegal, in addition to the nature, criteria, or approval of the entire project;

- The approval of the contracts was made ultra vires of the **Public Procurement and Asset Disposal Act**, among other pieces of legislation.

In summary, the preliminary arguments to support the above mentioned from Allen Chastanet and the counterclaims by Dr Ernest Hilaire and the CIP Unit include that:

The former is of the view that as noted in paragraph [14] that the passports are being undersold, as noted in an email from Mr Gerard Sansoni and the minister and the government are aware and are encouraging it.

The defendants denied this claim and noted that prior to any citizenship being granted, they must confirm that the full amount has been paid into the escrow account and that the government receives administrative fees as per paragraphs [30] and [40] of the judgment.

However, as noted by the judge, there is no evidence at this stage to support underselling or that it is being encouraged. The claimant's argument does not rely on direct evidence of misconduct within Saint Lucia's CIP. Instead, it is premised on alleged irregularities in other CIP jurisdictions involving the same entities, suggesting, by inference, that similar conduct must be occurring in Saint Lucia.

Paragraph [57] is instructive on this point when the judge noted that the claimant noted that the firms were involved in corrupt practices and the "use of shell companies to obscure ownership which fraudulently misrepresent compliance with statutory investment requirements". And as such, these actions in "other countries" should have come to the government's attention as noted in other court cases.

But again, the knowledge does not provide the required evidence.

Moreover, the Government in paragraph [46] also noted that much of the same processes and procedures which were present during the term of the former Prime Minister remain present and operational. This, however, is not an argument for legality or illegality per se, as legality is not conditional on an individual, but on actions. The claimant further contended that the Infrastructure



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## AS I SEE IT



By Rahym R. Augustin-Joseph

Option and the BEMAX Agreement were implemented in the absence of requisite regulations and in contravention of applicable legislation. Consequently, as stated in paragraph [15] of the judgment, these arrangements were described as "clandestine, secretive and shadowy".

In response, the government argued that the guidelines were on the website and that, in any event, the projects were suspended because of the inability to reach consensus with developers after the increase in the price of the investment and in the case of BEMAX, because of the legal issues relating to their directors as per paragraphs [40, 41], et cetera. As such, this point may be academic.

But the Leader of the Opposition suggested, as per paragraph [53], that there was no evidence that Cabinet terminated the contract. And even if they did, Cabinet could not terminate the agreement because they were not a party to the contract.

In reply, the corporate secretary to the CIP Unit provided evidence of the termination of the agreement through letters provided to them. The quagmire of the Court, though, as noted by the judge quoting Lord Hoffman in **Films Rover International v. Canon Films Sales**, is that in "granting an interim injunction, the Court runs the risk of granting the injunction to a party who fails to establish their right later on at trial or fails altogether at trial. As such, the Court must take whichever course which appears to have carried the lowest risk of injustice if it should turn out to have been wrong in the sense that has been described".

## Serious issue to be tried

The claimant failed to satisfy the Court that there was a serious issue to be tried, an evidentiary threshold that, according to established case law, is ordinarily low and readily surmountable.

The Court noted in effect that "the claimant's allegations of corruption, fraud, et cetera are serious at first blush, but upon considering the stark conflicts of fact and the substance of the concerns, it is clear that there has been no direct evidence of the illegal fraudulent schemes at play in Saint Lucia and that these allegations are based on circumstances in neighbouring countries which the claimant says was the best evidence."

Further, the expansions of the projects, the lack of regulations and the minister's inability to comply with statutory responsibilities, as argued by the claimant, as per the Court in paragraph [75], do not conform to the evidence provided.

As a matter of fact, "the claimant does not assist the Court by indicating what provisions have been violated." The

Court thus noted that "while violations of legislation may be serious issues to be tried, the Court cannot presume to know what the claimant alleges has been breached or not complied with, as direct reference to the provisions could have assisted the Court in their assessment."

Moreover, given the termination of the projects in question, there is no continuing injustice as alleged by the claimant, and no further citizenships can be granted under those initiatives.

It will therefore be a monumental hurdle for the claimant to establish government illegality at trial, particularly given that, at this preliminary stage, the allegations appear unsubstantiated at best and speculative at worst.

## Adequacy of damages/ Balance of convenience

In this assessment the Court noted that while the claimant is not seeking to injunct the entire programme, the injunction can result in lack of investor confidence as it shows there is a problem in the programme and could have effects on the local economy, which as per paragraph [25], could cause loss of revenue for the country's development, staff retrenchment, et cetera.

Further, because of the lack of provision of adequate and satisfactory evidence to demonstrate underselling, the Court is inclined to rely on the internal CIP Legislation, which, under Section 32, already prevents the granting of an application if the financial criteria are not satisfied, i.e., the payment of the fees and compliance with due diligence, etc.

If the claimant's allegations are ultimately proven, the resulting harm may nonetheless be mitigated by existing statutory safeguards, particularly in light of the current absence of supporting evidence. As noted in paragraph [90], the CIP framework includes inbuilt mechanisms, such as the revocation of citizenship, which address the types of misconduct alleged.

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