

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 55 OF 2021

BETWEEN

CTMH HOLDINGS LIMITED

Applicant

AND

THE GOVERNMENT OF THE CAYMAN ISLANDS

Respondent

AND

22/04/21

(1) NARAYANA HRUDAYALAYA PRIVATE LIMITED

(2) ASTER CARIBBEAN HOLDINGS LIMITED¹

Interested Parties

NOTICE OF MOTION

TAKE NOTICE that the Court at the Law Courts, George Town, Grand Cayman will be moved on
2021 at am/pm or as soon thereafter as counsel can
be heard on behalf of CTMH Holdings Ltd to grant the following relief:

- a. A Declaration that the Respondent's statutory powers to refuse to grant waivers of customs duty, work permit fees and stamp duty to the Interested Parties are unfettered.
- b. A Declaration that the Respondent is obliged to publish a transparent statement of the criteria it will apply when determining applications for waivers of customs duty, work permit fees and stamp duty.

¹ In the application for leave to apply for judicial review, Aster DM Healthcare Limited was named as the Second Interested Party. Since then, the Plaintiff has obtained the contract relating to Medcity Hospital, which identifies the counterparty as Aster Caribbean Holdings Limited, a wholly owned subsidiary of Aster DM Healthcare Limited. In

- c. A Declaration that the Respondent's decisions to grant waivers to the First and/or Second Interested Parties and/or refusal to grant waivers to the Plaintiff were unlawful and breached s.19 of the Constitution.
- d. An order for damages, to be assessed, against the Respondent, on the ground that the Respondent's grant of waivers to the First and/or Second Interested Parties and/or refusal of waivers to the Plaintiff, which were unlawful and in breach of s.19 of the Constitution, have caused financial loss to the Plaintiff in terms of the duty which the Plaintiff has paid and the competitive disadvantage caused by the difference in treatment.
- e. Such further relief as may be needed to give effect to the Court's judgment.
- f. Costs of these proceedings.

AND FURTHER TAKE NOTICE that the grounds upon which relief is sought are set out below.

A. INTRODUCTION

1. The Plaintiff's claim concerns the Government's purported divestment of powers of indirect taxation, to the detriment of the public purse and, thereby, to the detriment of all Caymanians. Accordingly, it is a matter of general importance locally.
2. The claim relates to two existing and two proposed hospitals in the Cayman Islands. The existing hospitals are:
 - 2.1. The Doctors Hospital, a hospital close to Owen Roberts International Airport, owned and operated by the Plaintiff. The Plaintiff is a majority Caymanian-owned company incorporated in the Cayman Islands ("**Doctors Hospital**").

those circumstances, Aster Caribbean Holdings Limited and not Aster DM Healthcare Limited is named as Second Interested Party in this notice of originating motion and will be served with this notice.

2.2. Health City, a hospital located near High Rock in the district of East End, owned and operated directly or indirectly by the First Interested Party, a company incorporated in India ("**Health City East End**").

3. The proposed hospitals are:

3.1. Health City Camana Bay, a proposed hospital in Camana Bay, to be constructed, owned and operated directly or indirectly by the First Interested Party ("**Health City Camana Bay**").

3.2. Aster Cayman Medcity Hospital, a proposed hospital at an unspecified location, to be constructed, owned and operated by the Second Interested Party, a wholly owned subsidiary of a member of a corporate group of which Aster DM Healthcare Limited, a company incorporated in India, is the ultimate parent ("**Medcity Hospital**").

4. Pursuant to statute, the owners of those hospitals are and/or will become liable to pay (i) customs duty in respect of the importation of medical equipment and other goods to the country, (ii) work permit fees in respect of foreign national workers, and (iii) stamp duty in respect of transactions relating to land. Such payments make an important contribution to the Treasury, to the advantage of all Caymanians.
5. The Respondent is responsible for collecting customs duty, work permit fees and stamp duty. It also has a statutory power to waive customs duty, work permit fees and stamp duty (as set out in section B, below).
6. By an agreement with the First Interested Party dated 7 April 2010 ("**the 2010 Agreement**"), the Respondent undertook to grant waivers of customs duty, work permit fees and stamp duty in respect of Health City East End for periods of up to 50 years ("**the Respondent's 2010 Undertaking**"). The Respondent has treated itself as bound by the 2010 Undertaking and has exercised its statutory powers in relation to Health City East End accordingly. For example, the Respondent considers itself unable to refuse to grant customs waivers in respect of each item of medical equipment imported by Health City East End, regardless of whether that is in the economic interests of the Cayman Islands at the time the waiver is granted. The Respondent thereby considers itself bound to forego many hundreds of

millions of dollars that would otherwise be received by the Treasury (the figures are set out at section E below).

7. On 19 February 2021, the Respondent announced that the 2010 Agreement would apply to Health City Camana Bay.
8. By an agreement with the Second Interested Party dated 21 December 2020 ("**the 2020 Agreement**"), the Respondent undertook to grant waivers of customs duty on all medical equipment and supplies in respect of Medcity Hospital for 25 years from the commencement of construction ("**the Respondent's 2020 Undertaking**"). If the Respondent considers itself bound by that undertaking, it will forego substantial revenue that would otherwise be received by the Treasury.
9. By contrast, the Respondent has treated the Plaintiff far less favourably, refusing to grant customs duty waivers in equivalent terms.
10. The Plaintiff advances two grounds for judicial review.
11. First, the Respondent cannot lawfully contract out of or otherwise fetter the exercise of its statutory discretion to waive (or refuse to waive) customs duty, work permit fees and stamp duty. The Respondent's 2010 and 2020 Undertakings are expressly stated to be subject to the laws of the Cayman Islands and, accordingly, (on their true construction) do not fetter the Respondent's powers. Alternatively, if (on their true construction) the Respondent's Undertakings purport to bind the Respondent then they are *ultra vires* and of no legal effect. Either way, the Respondent is currently operating under a misapprehension of its statutory powers to waive customs duty, work permit fees and stamp duty in relation to Health City East End. For the same reasons, the Respondent's 2010 Undertaking will not bind the Respondent in relation to Health City Camana Bay. And again, for the same reasons, the 2020 Undertaking cannot bind the Respondent to grant customs waivers to the Second Interested Party.
12. Second, the rule of law requires the Respondent to publish a transparent statement of the criteria to be applied when determining applications for the waiver of work permit fees, stamp duty and customs duty, to ensure that such applications are determined in a

consistent and non-arbitrary way. The Respondent's failure to publish such criteria is unlawful.

13. On the substantive claim for judicial review, the Plaintiff will seek declarations to the effect that (1) there is no fetter on the Respondent's statutory discretion to withhold waivers of customs duty, work permit fees or stamp duty in relation to Health City East End, Health City Camana Bay and Medcity Hospital, and (2) the Respondent is required to publish criteria for the exercise of its discretion to grant (or withhold) work permit fee, stamp duty and customs duty waivers.
14. A pre-action protocol letter was sent to the Respondent on 9 March 2021, which contained a request that the Respondent provide the Plaintiff with the Interested Parties' contact details as both companies are located outside of the jurisdiction, and to enable the Plaintiff to bring the Pre-action protocol letter to their attention. A response was required by 17 March 2021, so that the claim could be issued within 3 months of the Respondent's agreement with the Second Interested Party. The Attorney General's Office sent a holding response on 15 March 2021, stating that it would not be able to respond by the deadline. No substantive response has ever been received.
15. On 19 March 2021, the Plaintiff filed an application for leave to apply for Judicial Review of the matters raised in the pre-action protocol letter dated 9 March 2021, and on 15 April 2021 the Court made an order granting leave, noting that the Plaintiff has an arguable case.
16. For the avoidance of doubt, the Plaintiff does not make any claim or seek any relief against the Interested Parties. They are named as interested parties on the ground that they stand to be directly affected by the declaratory relief sought against the Respondent.
17. This document is structured as follows:
 - Section B - the statutory framework.
 - Section C – the prohibition on contracting out of statutory functions.
 - Section D – avoiding the arbitrary exercise of statutory discretion.
 - Section E - the Respondent's Undertakings and treatment of the parties.
 - Section F – ground 1: the Respondent is wrong to consider itself fettered.

Section G – ground 2: the Respondent’s failure to publish criteria.

Section H – relief sought.

B. THE STATUTORY FRAMEWORK

B1. Customs duty

18. Customs duty is governed by the Customs and Border Control Act (2021 Revision). Section 42(1), headed “*charge of duty*”, provides:

“(1) There shall be charged, collected and paid through Customs and Border Control to the Treasury upon all goods imported into the Islands and enumerated in Schedule 1 to the Customs Tariff Act (2017 Revision) the several duties therein set forth.”

19. Schedule 1 to the Customs Tariff Act (2017 Revision) makes detailed provision for the rates of duty applicable to imported goods. By way of example, the rate of duty for ultrasonic scanning equipment is set at 22%.

20. Section 43 of the Customs and Border Control Act (2021 Revision), headed “*liability for duty*”, provides:

“(1) A person shall not deliver or remove any imported goods until the importer of the goods has paid to the Customs and Border Control any duty chargeable on the imported goods, and that duty shall, in the case of goods of which entry for home use is made, be paid on making the entry.

“(2) The rates of duty chargeable on imported goods shall be — (a) if entry is made of the goods, except where the entry is for warehousing, those in force in respect of such goods at the time of presentation of the entry to Customs and Border Control; (b) if entry is made of the goods for warehousing, the rates in force at the time of the removal of the goods from the warehouse for home use; or (c) if no entry is made of the goods, those in force in respect of such goods at the time of their importation.”

21. Section 44, headed “*basis of valuation*”, provides:

“Unless otherwise provided in this Act or in the Customs Tariff Act (2017 Revision), all imported goods subject to duty shall be charged to such duty at an ad valorem rate expressed as a percentage of the value of such goods as ascertained in accordance with the method of calculation provided in section 45”.

22. Section 45, headed “*calculation of value*” provides that the value of imported goods shall be taken to be the normal open market price.

23. Thus, for example, if a hospital imports an ultrasound machine worth \$1million, it will be liable to pay customs duty to the Treasury in the sum of \$220,000.

24. Section 52, headed “*Cabinet may waive or order refund*”, provides:

“The Cabinet may, in any particular case, waive or order refund of any duty, package tax or part of any duty or package tax which would otherwise be payable or would not be liable to refund under this Act, subject to such conditions as the Cabinet may think fit to impose”.

25. Thus, for example, a hospital could request and the Respondent would be empowered to grant (or refuse) a waiver on the customs duty due on an ultrasound machine, in whole or in part.

B2. Work permit fees

26. Section 67(1) of the Immigration (Transition) Act (2021 Revision) provides that “*An application for a work permit shall be accompanied by the work permit fee and the application fee, which fees shall be paid into General Revenue*”.

27. Section 68 provides that it is an offence to engage in gainful employment without a work permit.

28. Work permit fees are specified by the Immigration Regulations (2019 Revision), which were made under the Immigration Law (2015 Revision) and continue in force pursuant to s.83 of the Immigration (Transition) Act (2021 Revision).

29. Regulation 17(1) provides that “[t]he prescribed fees for the purposes of the Law are specified in Schedule 1 and, where indicated to be annual fees, are payable annually”.

30. By way of example, schedule 1 to the Regulations specifies the annual fee for a medical doctor (general practice) or a surgeon employed on Grand Cayman as CI\$13,650.

31. Regulation 27 provides that:

“The Cabinet may, from time to time, waive or reduce any or all of the following fees in the Schedule 1 in relation to any person or group of persons”.

B3. Stamp duty

32. The Stamp Duty Act (2019 Revision) provides that stamp duties are payable on certain instruments.

33. Section 20(6) provides that “*The Commissioner may, at any time—(a) waive, refund or abate the whole or part of the duty payable...*”. Section 4 provides that the Minister of Finance shall be *ex officio* Commissioner.

C. THE PROHIBITION ON CONTRACTING OUT OF STATUTORY FUNCTIONS

34. As set out above, the legislature has imposed duties to pay customs duty, work permit fees and stamp duty. The purpose of these duties is to fund the Treasury and, thereby, facilitate public expenditure for the benefit of all Caymanians.

35. The duties crystallise upon the specified events: the importation of particular goods to the Islands; an application for a work permit to enable a person to commence gainful employment; and the creation of a legal instrument relating to land.

36. The liability to make those payments may be waived. The legislation makes clear that applications for such waivers are to be determined by reference to the prevailing circumstances:

36.1. First, the liability only accrues (and can therefore only be waived) upon the occurrence of the specified events (*viz.* the importation or proposed importation of particular goods, an application for a work permit, or the creation of a legal instrument).

36.2. Second, the legislation provides that the power to waive applies to “*any particular case*” (s.52 of the Customs and Border Control Act (2021 Revision)), “*from time to time*” (reg.27 of the Immigration Regulations (2019 Revision)) and “*at any time*” (s.20 of the Stamp Duty Act (2019 Revision)).

37. The first issue in this claim is whether these powers of waiver can be contractually fettered, long in advance of the liability for payment accruing. The law relating to that issue is as follows.

38. In *Yarl's Wood Immigration Ltd and others v Bedfordshire Police Authority* [2009] 1 All ER 886, para.80, Beatson J (as he was) noted that: “*It is clear law that a contractual arrangement by a public authority may not fetter the authority in the exercise of its powers and duties*”. That principle has a long pedigree.

39. In *Birkdale District Electric Supply NHP Ltd v Corporation of Southport* [1926] AC 355, 364, Lord Birkenhead stated that it is “*a well established principle of law, that if a person or public body is entrusted by the Legislature with certain powers and duties expressly or impliedly for public purposes, those persons or bodies cannot divest themselves of these powers and duties. They cannot enter into any contract or take any action incompatible with the due exercise of their powers or the discharge of their duties*”.

40. The reason for this is that “*it is not competent for the Government to fetter its future executive action, which must necessarily be determined by the needs of the community when the question arises. It cannot hamper its freedom of action in matters which concern the welfare of the State*” (*R v Rederiaktiebolaget Amphitrite* [1921] 3 KB 500, 503). Whereas

the Government may bind itself by a commercial contract, in the same way as anybody else, it may not bind the future exercise of its executive powers.

41. In the context of legislation concerning the grant of mining licences, the Privy Council held that the discretion to grant licences had to be exercised “*at the stages laid down*” by the legislation and could not be fettered in advance by contract. This is because “*the freedom of the Minister or officer of the Crown responsible for implementing the statute to make his decisions, or use his discretions, cannot validly be fettered by anticipatory action; and if the Minister or officer purports to do this, by contractually fettering himself in advance, his action in doing so exceeds his statutory powers*” (*Cudgen Rutile (No. 2) Pty Ltd v Chalk* [1975] AC 520, 533).

D. AVOIDING THE ARBITRARY EXERCISE OF STATUTORY DISCRETION

42. As set out above, the Respondent’s statutory powers to grant waivers are cast in very broad terms. The second issue in the claim is whether the law imposes a requirement on the Respondent to explain how those broad powers will be exercised, to ensure consistency of approach and non-arbitrariness in decision making.

43. The statutory discretions are subject to section 19(1) of the Constitution, which requires that all decisions and acts of public officials “*must be lawful, rational, proportionate and procedurally fair*”.

44. It is a “*general axiom of rational behaviour*” that like cases should be treated alike and unlike cases should be treated differently (*Matadeen v Pointu* [1999] 1 AC 98, 109, Privy Council).

45. To achieve consistency and avoid arbitrariness, “[t]he rule of law calls for a transparent statement by the executive of the circumstances in which the broad statutory criteria will be exercised” (*R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245, para.34, *per* Lord Dyson).

46. As the Privy Council held in *De Freitas v Ministry of Agriculture* [1999] 1 AC 69, when determining whether a restriction on the political activities of civil servants was in accordance with the constitution of Antigua and Barbuda:

"One principle which has to be observed here is that of legal certainty. This was succinctly expressed by the European Commission on Human Rights in G v Federal Republic of Germany, 6 March 1989, Application No. 13079/87, 60 D & R 256, 261, where it was stated that 'legal provisions which interfere with individual rights must be ...formulated with sufficient precision to enable the citizen to regulate his conduct' ...where the line is to be drawn cannot in fairness be left to the hazard of individual decision" (78E-H, per Lord Clyde).

47. Absent published criteria, the Plaintiff (and other persons) are unable to determine in advance whether they will be held liable to pay customs duty when importing goods to the Cayman Islands. This is detrimental to the ability of businesses to plan their affairs and, accordingly, to the economy of the Cayman Islands.

E. THE RESPONDENT'S UNDERTAKINGS AND TREATMENT OF THE PARTIES

E.1 The Respondent's 2010 Undertaking

48. The 2010 Agreement is stated to be between the Respondent, represented by Mr. McKeeva Bush and Mr. Mark Scotland, and the First Interested Party. Recital C records that the Cabinet of the Cayman Islands had resolved, with the express consent of the Governor, to enter into the Agreement.

49. Recital B refers to a "*Project*", which is stated to involve three phases: (1) a 200 bed tertiary care hospital; (2) an educational institution, training academy and dental, nursing and medical college; and (3) assisted living homes for seniors. The Project is also stated to include other, undefined phases, until the hospital consists of 2,000 beds and covers 500 acres of land.

50. The Agreement records that the Respondent is "*committed to the development of new facilities to enhance the existing health-care system and to encourage the growth and development of medical tourism in the Islands*" (recital C).

51. Recital C records that *"The parties have agreed to provide certain undertakings for the implementation and completion of the Project subject to the terms and conditions of this Agreement"*.

52. Clause 1 is entitled *"the Company's warranty and undertakings"*. Clause 1.2(g) provides that the Company undertakes to offer a 20% discount on all surgical operations at the hospital to every Caymanian patient referred from the Cayman Islands Health Services Authority for tertiary, specialty care, *"which obligation continues for so long as the Company is in receipt of any revenue exemptions or concessions from the Government under clauses 2.8 to 2.10 inclusive..."*.

53. Clause 2 is entitled *"The Government's undertakings"*. Importantly, clause 2 begins: *"The Government undertakes to do the following for the advancement of the Project but only to the extent those undertakings are permissible by the laws of the Cayman Islands"* (emphasis added).

54. Under the subheading *"taxation, duties and fees"*, clause 2.9 provides:

"To ensure that a portion of work permit fees that would otherwise be payable for medical personnel employed or engaged at [the hospital] is waived by a percentage between 15% and 30%...".

55. Under the same subheading, clause 2.10 provides:

"To procure that, whilst [the hospital] is being built and/or operated by the Company, the Company receives the following exemptions and concessions from fees and duties:

- a. that the Company be exempted from liability to pay those classes of fees in relation to the establishment and operation of [the hospital] specified in Schedule 2;*
- b. that the Company is exempted from liability to pay any customs or similar duty on the first US \$800 million in value of all medical equipment and medical supplies brought to Grand Cayman for use in the operation of [the hospital], and that thereafter:*
 - (i) during the first 15 years immediately following the date on which the US \$800 million exemption has been exhausted (which date the parties agree*

to confirm in writing), the Company's liability to pay customs or similar duty on medical equipment and medical supplies brought to Grand Cayman for use in the operation of [the hospital] will not exceed 5% of the value of the medical equipment and medical supplies; and

- (ii) during the next 15 years, the Company's liability to pay customs or similar duty on medical equipment and medical supplies brought to Grand Cayman for use in the operation of [the hospital] will not exceed 10% of the value of the medical equipment and medical supplies.*

Subject to paragraph c of this clause 2.10, at the expiration of the second 15-year, the Company acknowledges that it will be liable to pay customs or similar duty on medical equipment and medical supplies at the then prevailing rates.

c. that, during the first 50 year period after the commencement of the construction of Phase 1, the Company be exempted from liability to pay any duty or other charges whatsoever on life-saving medical equipment and medical supplies...".

56. Schedule 2 (referred to at clause 2.10(a) above) provides, at paragraph 1, that while the hospital is being built or operated, "*the Government will procure that the Company receives the following exemption from fees ...all stamp duties under the Stamp Duty Law payable in respect of the leasing of any land by the Company to an affiliate or an affiliate to another affiliate...*".

57. If clause 2.10 were read in isolation, it would purport to exempt the First Interested Party from any customs duty on the first US \$800 million of imported goods. At a rate of 22%, that would amount to a state subsidy of US \$176 million. Thereafter, it would purport to bind successive administrations to provide waivers at the specified rate for a period of 30 years on all medical equipment and supplies. Successive administrations would also purportedly be bound to provide full waivers on all life-saving medical equipment for a period of 50 years. Clause 2.10, read in isolation, thereby purported to divest future administrations of the power to levy indirect taxes against the First Interested Party. The cost of this would run to many hundreds of millions of dollars.

58. In that way, the government of 2010, would - through clause 2.10 - have purportedly fettered the statutory powers of successor administrations for many decades, even if those future

administrations fundamentally disagreed with the public policy objectives underlying the agreement or considered that the prevailing conditions in the country made it contrary to the public interest to grant such waivers. To enable a government to bind its successors in this way would have alarming consequences for democratic rule.

59. Such a fettering of statutory discretion would be in clear breach of the prohibition on contracting out of statutory powers set out at section C above and would therefore be *ultra vires*. It would be liable to be severed under clause 14.1 of the contract.

60. However, clause 2.10 does not fall to be read in isolation. Rather, it is subject to the proviso at the start of clause 2 that the undertaking is only given to the extent that it is permissible by the laws of the Cayman Islands. Given that such a fettering of discretion would be contrary to the laws of the Cayman Islands, the Respondent is not bound by it.

E.2 The Respondent's treatment of the First Interested Party

61. At all times since entering into the 2010 Agreement, the Respondent has considered itself constrained to grant the waivers provided for by clauses 2.9 and 2.10 and has in fact, for that reason, granted waivers in those terms. It has not recognised that clauses 2.9 and 2.10 are non-binding because they are contrary to the laws of the Cayman Islands. This continuing course of conduct (the continuing grant of waivers) is amenable to judicial review.

62. On 19 February 2021, the Cayman Compass reported the Respondent's announcement of the development of Health City Camana Bay. The Cayman Compass reported that: "[Premier] McLaughlin said the concessions and duty waivers already in place for Health City would apply to the new facility". This not only implicitly confirms that the Respondent considers itself bound by clauses 2.9 and 2.10 of the 2010 Agreement, but also indicates that it will consider its statutory powers to be fettered in relation to Health City Camana Bay. It is strongly in the public interest that the Grand Court determines whether that is correct in law.

E.3 The Respondent's 2020 Undertaking

63. The 2020 Agreement is stated to be between the Respondent, represented by Mr. Samuel Rose, and the Second Interested Party. Recital D records that the Cabinet of the Cayman Islands had resolved, with the express consent of the Governor, to enter into the Agreement.
64. Recital B refers to a "*Project*", which is stated to involve three phases: (1) a 150 bed hospital offering primary, secondary, tertiary and quaternary care; (2) assisted living and independent living centres, each comprising 100 units; and (3) a medical university and the expansion of the hospital up to 500 beds and the assisting living and independent centres up to 300 units each.
65. The Agreement records that the Respondent is "*committed to the development of new facilities to enhance the existing health-care system with the twin aims of providing affordable healthcare to all residents of the Cayman Islands and of furthering the growth and development of medical tourism in the Islands*" (recital D).
66. Recital D records that "*The parties have agreed to provide certain undertakings for the implementation and completion of the Project subject to the terms and conditions of this Agreement*".
67. Clause 1 is entitled "*the Company's warranty and undertakings*". It commits the Second Interested Party to progressing the development and, *inter alia*, funding an annual scholarship.
68. Clause 2 is entitled "*The Government's undertakings*". Importantly, clause 2 begins: "*The Government gives the following undertakings in this clause 2 for the advancement of the Project, but only to the extent those undertakings are permissible by the laws of the Cayman Islands*" (emphasis added).
69. Under the subheading "*taxation, duties and fees*", clause 2.8 provides: "*The Government undertakes to confer on the Company, and on each Project subsidiary, the financial incentives specified in Schedule 2*". Schedule 2 provides that the Second Interested Party is "*entitled*" to a 100% customs duty exemption on all medical equipment and supplies for 25 years from the commencement of construction of Phase 1. Schedule 1 indicates that the

construction of Phase 1 is likely to commence by around March 2023², in which case the Respondent and its successors would be bound to waive customs duty otherwise payable by the Second Interested Party until around March 2048, regardless of the economic circumstances then facing the Cayman Islands. The loss to the Treasury would be substantial.

70. Again, such a fettering of statutory discretion would be in clear breach of the prohibition on contracting out of statutory powers set out at section C above and would therefore be *ultra vires*. It would be liable to severance under clause 12.5 of the contract.

71. However, clause 2.8 and schedule 2 do not fall to be read in isolation. Rather, they are subject to the proviso at the start of clause 2 that the undertaking is only given to the extent that it is permissible by the laws of the Cayman Islands. Given that such a fettering of discretion would be contrary to the laws of the Cayman Islands, the Respondent is not bound by it.

72. In addition, clause 1.3 provides that the Second Interested Party is permitted to terminate the agreement on written notice if the Respondent has not complied with certain conditions precedent, including clause 2.8, by 21 September 2021. However, again, that is subject to a proviso that this is only "*to the extent permissible by the laws of the Cayman Islands*".

E.4 The Respondent's treatment of the Plaintiff

73. The Respondent has treated the Plaintiff substantially less favourably than it has treated (and continues to treat) the First Interested Party and proposes to treat the Second Interested Party. By way of example:

73.1. On 14 February 2019, the Respondent granted only a partial waiver of customs duty for the importation of an ultrasound machine, reducing the duty rate to 11% (a 50% reduction).

² The Second Interested Party has 9 months to submit its plans, the Respondent agrees to use its best endeavours to facilitate the approval of those plans within 6 months, and the Second Interested Party is required to commence construction within 12 months of approval.

- 73.2. On 21 February 2019, the Respondent granted only a partial waiver of customs duty on a radiology machine, to a duty rate of 11% (a 50% reduction).
- 73.3. On 1 April 2019, the Respondent refused to grant any waiver of customs duty for the importation of orthopaedic accessories, microscope components and an ultrasound bed.
74. On 30 May 2019, the Plaintiff's attorneys requested details of any criteria by which customs waiver applications are determined. However, as at the date of filing this Notice of Originating Motion the Respondent has not responded to these requests.
75. On 31 March 2020, the Plaintiff requested a blanket duty waiver for all Covid-19 testing supplies. On 1 April 2020, the Respondent refused, on the ground that it is not permitted to grant blanket waivers. The Respondent thereby recognised (correctly – as set out at section C above) that the statutory discretion to grant waivers must be exercised on a case-by-case basis.
76. On 11 August 2020, followed by chasing letters, the Plaintiff's attorneys asked the Respondent to grant the Plaintiff exemptions from customs duty on equivalent terms to the First Interested Party. The Respondent has failed to provide a substantive reply.
77. By its pre-action protocol letter, the Plaintiff asked the Respondent to commit to publishing criteria for the determination of work permit fees, stamp duty and customs duty. No substantive reply has been received.

F. GROUND 1 – THE RESPONDENT IS WRONG TO CONSIDER ITSELF FETTERED

78. The legislative provisions set out at section B above require the Respondent to collect customs duty, work permit fees and stamp duty unless it decides to grant a waiver based on the circumstances applicable to the transaction in issue (*viz.* the importation of particular goods to the Islands, the application for a work permit, or the creation of a legal instrument relating to land).

79. As set out at section C above, the Respondent is prohibited by the laws of the Cayman Islands from contracting out of or fettering its statutory powers.

80. Accordingly, as set out at section E above, on its proper construction the 2010 Agreement does not fetter the Respondent's powers to refuse waivers to the First Interested Party. Alternatively, if on its proper construction the Respondent's Undertaking does purport to fetter its powers, the Respondent had no power to give the 2010 Undertaking, such that the 2010 Undertaking is legally invalid. Either way, the Respondent's 2010 Undertaking does not limit the Respondent's powers to refuse waivers to the First Interested Party in relation to Health City East End. The Respondent continues to treat itself as bound to comply with the Undertaking. That is a continuing error law.

81. For the same reasons, the Respondent's Undertaking will not limit its powers to refuse waivers in relation to Health City Camana Bay. Further or alternatively, the proposed development at Camana Bay falls outside the scope of the 2010 Agreement because it does not form part of the defined Project.

82. For the same reasons, on its true construction the 2020 Agreement does not fetter the Respondent's powers to refuse waivers to the Second Interested Party, or (if it does purport to do so) the Respondent had no power to give the 2020 Undertaking, such that the 2020 Undertaking is legally invalid. Either way, the Respondent's 2020 Undertaking does not limit the Respondent's powers to refuse waivers to the Second Interested Party in relation to Medcity Hospital.

G. GROUND 2 – THE RESPONDENT'S FAILURE TO PUBLISH CRITERIA

83. For the reasons set out at section D above, the Respondent is under a duty to publish a transparent statement of the criteria applicable to the exercise of the broad statutory discretion to waive customs duty, work permit fees and stamp duty. Such a statement is needed to promote consistency and guard against arbitrary decision-making. This is particularly important in the context of statutory discretions which provide relief from taxation (at a loss to the Treasury) and, in substance, amount to state subsidies of private businesses. Transparent criteria enable businesses to predict whether a waiver application

is likely to be granted, enabling them to plan accordingly. Transparent criteria also provide a valuable safeguard against corruption.

84. The Respondent has breached that duty. To be clear, the Appellant does not complain about the substance of criteria that have been published. This is a complaint about the Respondent's failure to publish any criteria at all.

H. THE RELIEF SOUGHT

Declarations

85. A Declaration that the Respondent's statutory powers to refuse to grant waivers of customs duty, work permit fees and stamp duty to the Interested Parties are unfettered.

86. A Declaration that the Respondent is obliged to publish a transparent statement of the criteria it will apply when determining applications for waivers of customs duty, work permit fees and stamp duty.

87. A Declaration that the Respondent's decisions to grant waivers to the First and/or Second Interested Parties and/or refusal of waivers to the Plaintiff were unlawful and breached s.19 of the Constitution.

Financial Orders

88. An order for damages, to be assessed, against the Respondent, on the ground that the Respondent's unlawful grant of waivers to the First Interested Party and/or unlawful refusal of waivers to the Plaintiff, in breach of s.19 of the Constitution, has caused financial loss to the Plaintiff in terms of the duty which the Plaintiff has paid and the competitive disadvantage caused by the difference in treatment.

89. Such further relief as may be needed to give effect to the Court's judgment.

Costs

90. The Plaintiff is entitled to its costs.

Dated the 22 day of April 2021
Filed the 22 day of April 2021

McGrath Tonner

McGrath Tonner
Attorneys-at-Law for the Applicant

TO: The Clerk of the Court

THIS NOTICE OF ORIGINATING MOTION was filed by McGrath Tonner, Attorneys-at-Law for the Plaintiff, whose address for service is 5th Floor, Genesis Building, PO 446 GT, Grand Cayman.