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SAINT CHRISTOPHER NEVIS ANGUILLA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 6 of 1977

BETWEEN:

LEE LLEWELLYN MOORE, ATTORNEY-GENERAL OF THE STATE OF SAINT CHRISTOPHER NEVIS ANGUILLA and ESMOND ST. JOHN PAYNE, MINISTER OF AGRICULTURE OF THE STATE OF SAINT CHRISTOPHER NEVIS ANGUILLA	Defendants/ Appellants

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REGINALD DOUGLAS EVELYN YEARWOOD CHARLES EARLE BERKELEY WALWYN JOHN LESLIE WIGLEY DENNIS SYDNEY BLAKE AGNES EULALIE MAILLALIEU WILLIAM ARCHIBAID KELSICK DONALD LLOYD MATHESON CLIVE EDWARD JORDAN and STEUART ARTHUR HAMILTON DAVIS	Plaintiffs/ Respondents

Before: The Hon. Mr. Justice Peterkin - Ag. Chief Justice
The Hon. Mr. Justice Berridge - (Acting)
The Hon. Mr. Justice Renwick - (Acting)

Appearances: Attorney-General for Appellants
H. Browne with him.

F. Henville and F. Kelsick for
Respondents, C. Wilkin with them.

1978; July 3, 4, 5, 6, 7, 10 & 11
December; 11

J U D G M E N T

PETERKIN, J.A.:

This is an appeal from the judgment of Glasgow J in which he held that Act No. 2 of 1975, either in its original form or as amended by Act No. 8 of 1975, was null, void and of no effect in that it contravened or was ultra vires the Constitution. He accordingly held that a number of the estates the subject matter

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of this action are still vested in certain of the Plaintiffs/ Respondents, that they are entitled to possession, and that the purported acquisition of them was null, void, and of no effect. He also held that the entry into possession by the Government in pursuance of the Act and all acts done in purported execution of the enactment were unlawful, and he granted an injunction against the Minister of Agriculture restraining him and his servants or agents from entering or remaining on the lands, and awarded damages in favour of each of the successful Plaintiffs/ Respondents.

The facts which gave rise to the action are conceded to have been admirably set out in the judgment of the trial judge at pages 474 to 492 of the record. A short summary of these facts is necessary for the purposes of this appeal. The Sugar Industry is and has for a very long time been the only real industry in the State, and provides about 40% of Government revenue. In 1971 sugar production which in previous years had exceeded 50,000 tons dropped to about 25,000 tons. The increased costs of production and the low static price of sugar was in the main responsible for the decline of the industry. About one half of the sugar estates in St. Kitts were operating at a loss. The owners of those estates found it difficult to obtain financial assistance to enable them to produce a crop. Most of the remaining estates just managed to break even. Consequently, as a prelude to the 1972 sugar harvest the owners of the sugar estates through their representative the St. Kitts Sugar Association Limited, sought and received from Government a commitment to guarantee loans raised by the estates for operations connected with the 1972 harvest. In 1972 the Association made

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a similar approach to Government in connection with the 1973 harvest. Subsequently, a sub-committee was set up, and, after discussions, a proposal was put forward by the Association for the estate owners to pool their resources on the understanding that Government would finance the operations and recoup from the proceeds. It was put forward and agreed that the sugar industry rescue operation should be undertaken by a company called St. Kitt Holdings Limited, and that the Government should have equity in that Company. The Banks refused to lend money to the Company but expressed willingness to lend the Government the money on conditio that Government carried on the operations and assumed liability for the repayment. Government obtained loans from the Banks and began to spend money on the estates. The Sugar Industry Rescue Operation (SIRO) had come into being. Subsequent discussions led to what is known as the SIRO Agreement which was signed on 19th December, 1972. It was made between the Government of the State of the one part, and the Association acting therein "on behalf of its members who are the owners of the Sugar estates in St. Kitt listed in the Schedule" to the said Agreement of the other part. The Agreement is set out in part at pages 476 to 479 of the record

As far back as 15th March, 1972, negotiations commenced between the Government and the Association representing the owners of the sugar estates with a view to achieving a long term solutio for the industry which would be mutually acceptable. At a meetin held on that day the owners of the sugar estates, through the Association, offered to sell the Government all their sugar estat lands with the exception of certain houses and certain portions of land for £3.5 million. Government requested the Association to put the offer in writing, and nearly two years later (on 29th January, 1974) the Association put into writing a modified versic

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of the offer but increased the price to £4.1 million. On 7/6/74 the Secretary of the Association wrote to the Premier of the State indicating that the figure quoted would have to be increased, and by letter of 25/7/74 he again wrote to the Premier withdrawing the offer. On 16th September, 1974, in a further letter to the Premier the Secretary of the Association informed him that the members of the Association were now prepared to accept £4.9 million for all the estates which were included in the previous offer of £4.1 million.

By letter dated 19th October, 1974, the Minister of Agricultu offered the Secretary of the Association $4 million E.C. for the lands listed in the schedule to the writing entitled "Offer of sale of Sugar Estates to the Government" totalling 22,560¾ acres, less certain areas named. On 31/10/74 the Secretary of the Association wrote to the Minister stating that Government's offer of $4 million E.C. was totally unacceptable. The Minister replied by letter of 9th November, 1974, making it clear that the Government proposed to purchase all the land requisite to establish and maintain a viable sugar industry and was not interested merely in buying those areas which the various individual owners may happen to wish to sell. In regard to the price, the Minister further stated that the Government would be prepared to continue negotiat in the hope that agreement could be reached on an acceptable figu In reply to the Association's previous request for clarification as to the method of payment, the minister stated that payment sho be made in equal instalments of principal and interest.

On 9th December, 1974, a meeting took place between representatives of the St. Kitts Sugar Association and the Government under the chairmanship of the Minister, and on 13th December, the Secretary of the Association wrote to the Minister a letter stati

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inter alia that in an effort to cooperate with Government the Association was offering on behalf of the owners to sell to Government certain specified estates subject to certain exceptions listed for $24 million E.C. They suggested either a cash payment of $6 million, with the balance to be secured by a mortgage payable over 12 years of equal annual instalments with interest; or the formatic of a centralised company. By letter of 18th December the Minister put forward two amended proposals, and asked for a reply by 24th December. By letter of 23rd December the Secretary informed the Minister that the Association required more time to consider the matter as they wished to obtain further professional advice and to consult with their principals. The Government regarded this letter as putting an end to the discussions as far as voluntary negotiations were concerned.

In the meantime, Government had already introduced in the House of Assembly a Bill for an Act to provide for the acquisition of the Sugar Estates lands in the island of St. Christopher and for the payment of compensation therefor and for matters incidenta thereto or connected therewith. The Bill was finally passed into law on 28/1/75 and entitled the Sugar Estates Land Acquisition Act 1975 (No. 2 of 1975).

The Minister purported to appoint the 31st day of January, 1975, as the date on which "there shall be transferred to and vested in the Crown any of the interests specified in Sections 2 and 3 of the Act". This purported appointment was made by an Order entitled the Sugar Estates' Land Acquisition (Appointed Day Order 1975 (S.R. & O. 1975, No. 4). The Order is stated to be made pursuant to sec. 10 of the Act. On 31st January the Ministe and other members of Cabinet entered upon the lands of Buckley's

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Estate, and formally took possession of all the Sugar Estates' lands in the Island of St. Christopher under the Act.

Three days after the Act was passed the Plaintiffs/Respondents caused a writ to be issued against the Defendants/Appellants claiming among other things, (a) a declaration that the Sugar Estates' Lands Acquisition Act, (No. 2 of 1975) is unconstitutional void, and of no effect, and, (b) an injunction restraining the Defendants/Appellants and either of them, by themselves or any other person authorised by them, from entering upon the lands purportedly acquired by the said Act, and from taking any other action to the prejudice of the Plaintiffs/Respondents. On 30th June, 1975 the Sugar Estates' Lands Acquisition (Amendment) Act 1975, No. 8 of 1975, was passed by the House of Assembly, and came into force on 2nd July, 1975. It made necessary the amended statement of claim and the amended Defence. The Plaintiffs/Respondents pleaded as follows at paragraphs 6, 6A and 9 of their statement of claim as amended:-

> "6. The Plaintiffs contend that the Act is unconstitutional void and of no effect in that it contravenes the provisions of the said Section 6 of the Constitution on the following grounds (inter alia):-
>
> (a) The Act does not prescribe the proper principles by which full compensation for the compulsory taking of the proprietary interests of the plaintiffs in the said lands may be determined.
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> (b) The principles set forth in the Act contravene the right of the plaintiffs enshrined in the said Section 6 of the Constitution in that the plaintiffs are thereby denied the just and full compensation to which on the true construction of the said Section 6 of the Constitution they are entitled; the said principles abridge their right to such compensation and would result in the determination of their compensation on an entirely arbitrary basis. <u>See for examples section 7(5) of the Act</u>.

/(c) The.....

(c) The Act by Section 4(2) Purports to limit the aggregate compensation payable to the owners of the estates named in the First Schedule to the Act to a maximum of $10,000,000 in disregard of the consideration that the proper value thereof may be in excess of that sum. On the true construction of Section 6 of the Constitution it is beyond the competence of the Legislature to limit the compensation payable as aforesaid. Further, the said provisions impose a limitation upon the jurisdiction of the High Court to determine the proper compensation payable.

(d) The Act denies and/or restricts and/or limits the right of the Plaintiffs to have direct access to the High Court for the determination of the amount of compensation to which they may be entitled or for the enforcement of the payment of such compensation.

(e) On the true construction of the said Section 6 of the Constitution compensation is payable promptly and in cash. However, Sections 5 and 9 of the Act provide for payment of compensation partly by bonds and partly by cash. Section 5 contains no provision as to the time when the cash payment therein referred to is to be made or when the instalments mentioned therein are to be paid; payment of the compensation is contingent upon the earning of profits; there is no provision for payment of interest on a lump sum payment or on instalments in Section 5; Section 9 confers on the Minister power to determine a mode of payment contrary to the provisions of Section 6 of the Constitution when properly construed, and to fix an arbitrary rate of interest; and the provisions of Section 5 in relation to the date of maturity of the bonds (if, contrary to the Plaintiffs contention, bonds are a permissible form of payment) are vague and uncertain.

(f) The Act contains no provision for the assessment or payment of compensation in respect of the "subsisting rights" referred to in Section 3(1) thereof which are purportedly acquired.

(g) The Act by Section 4(5) enables the Minister to make certain deductions therein referred from the compensation already arbitrary and limited as aforesaid which would or could result in an unjust diminution thereof.

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(h) The Act confers no power on the Minister to fix the appointed day as defined in Section 10 of the Act.

(i) The Act by Section 2(5) confers power on the Minister to add to the provisions of the First Schedule thereto; and by Section 2(7) enables the Minister at his absolute discretion to exempt from the acquisition provisions of Section 2(1) thereof any lands purportedly acquired by the Act.

(j) The First Schedule to the Act does not define the parcels of land purportedly acquired with reference to boundaries or survey plans or otherwise so as to enable them to be accurately identified. Further, the Second Schedule which purports to contain exemption areas fails likewise to define such areas so as to indicate precisely what portions of the lands purportedly acquired are the subject of such exemption".

"6A. The Plaintiffs, while not admitting the validity of the amending Act, contend that the Act as amended is unconstitutional void and of no effect in that it contravenes the provisions of Section 6 of the Constitution on the following grounds inter alia:-

(a) The amending Act does not prescribe proper principles by which full compensation for the compulsory taking of the proprietary interests of the plaintiffs in the said lands may be determined.

(b) The principles set forth in the amending Act contravene the rights of the plaintiffs enshrined in the said Section 6 of the Constitution in that the plaintiffs are thereby denied the just and full compensation to which on a true construction of the said Section 6 of the Constitution they are entitled, the said principles not being in accordance with accepted principles.

(c) The new Section 4(2) created by the amending Act is unconstitutional in that it limits the value of the lands and does not take into consideration all the possibilities and potentialities of the lands. The proviso is unconstitutional in that it deprives the plaintiffs of the benefits of the improvements to the lands and estates effected by Government since the 30th day of April, 1972, to which the plaintiffs are entitled by virtue of the agreement made between the Government and the Association, acting therein on behalf of the plaintiffs and others, on the 19th day of December, 1972, (commonly called the SIRO agreement). The said new section takes no account of the revenues and income received

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by Government during this period under the said SIRO Agreement. The said new section thereby deprives the plaintiffs of compensation to which they are entitled under Section 6 of the Constitution.

(d) The amending Act contains no provision for the assessment or payment of compensation in respect of the "subsisting rights" referred to in Section 3(1) thereof which are purportedly acquired.

(e) The new Section 5(1) created by the amending Act requires all claims in respect of any land transferred to or vested in the Crown under the Act to be sent to the Minister within a period of ninety days from the appointed day (31st January, 1975) and provides that after the expiration of the said period all claims not so made and sent to the Minister shall be forever barred and precluded. This new section is deemed to have had effect from the 28th day of January, 1975, but was actually introduced into the Act on or about the 30th day of June, 1975, (some one hundred and fifty days after the appointed day). The result of this is to deprive the plaintiffs and others of the compensation to which they are entitled under Section 6 of the Constitution. Up to the 10th day of July, 1975, the amending Act had not been printed and published in the Gazette and was unavailable to the public."

"9. The Plaintiffs contend that the whole of the Act is unconstitutional void and of no effect. The plaintiffs therefore claim:-

(1) A declaration that the whole Act is unconstitutional void and of no effect.

(2) A declaration that the said estates purportedly acquired by the Act are still vested in the Plaintiffs and that they are entitled to possession thereof and that the purported acquisition is null void and of no effect.

(3) That the entry into possession of the said estates by the Government in pursuance of the Act and all acts done in the purported execution of the Act are unlawful.

(4) A declaration that sections 16 and 19 of the Crown Proceedings Ordinance (Cap.22) are inconsistent with and/or not in conformity with section 16 of the Constitution and are therefore void in so far as they -

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(i) preclude the Court from making orders, other than declaratory orders, against the Crown, and

(ii) preclude the Court from granting injunctions or making orders to give relief against the Crown - for the protection of the fundamental rights and freedoms set out in Chapter 1 of the Constitution.

(5) An injunction restraining the Minister in his capacity as Minister of Agriculture or otherwise, or any other person authorised by him or acting on his behalf from entering or remaining upon lands purportedly acquired by the said Act and from taking any other action to the prejudice of the Plaintiffs or any of them under or in pursuance or in pretended execution of the provisions of the Act.

(6) Damages.

(7) Costs.

(8) Such further and other relief as the nature of the case may require."

Section 6(1) and (2) of the St. Christopher Nevis and Anguilla Constitution Order 1967 reads,

"6.-(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except by or under the provisions of a law that prescribes the principles on on which and the manner in which compensation therefor is to be determined and given.

(2) Every person having an interest in or right over property which is compulsorily taken possession of or whose interest in or right over any property is compulsorily acquired shall have a right of direct access to the High Court for-

(a) the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right and the amount of any compensation to which he is entitled; and

(b) the purpose of enforcing his right to payment of that compensation:

Provided that if the Legislature so provides in relation to any matter referred to in paragraph (a) of this subsection the right of access shall be by way of appeal (exercisable as of right at the instance of the person having the interest in or right over the property) from a tribunal or authority, other than the High Court, having jurisdiction under any law to determine that matter."

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The learned judge at the end of the trial concluded as follows:

> "In my judgment, the provisions of section 6 of the Constitution have been, are being and are likely to be contravened in relation to the first-named, second-named, third-named, seventh-named, eighth-named and ninth-named plaintiffs and each of them. I hold for the reasons which I have given, that both the principal Act and the principal Act as purportedly amended by the amending Act, are unconstitutional void and of no effect.'
>
> It is accordingly declared -
>
> (1) that both the principal Act and the principal Act as purportedly amended by the amending Act, are unconstitutional void and of no effect;
>
> (2) that the following estates, namely Brighton Estate, Lodge Estate, West Farm Estate, part of Lime Kiln Estate, Lower Bourryeau Estate and Brotherson Estate are still vested in the first-named, second-named, third-named, seventh-named, eighth-named and ninth-named plaintiffs, respectively, and that they are entitled to possession thereof and that the purported acquisition is null void and of no effect;
>
> (3) that the entry into possession of the said estates by the Government in pursuance of the principal Act and all acts done in the purported execution of the principal Act are unlawful."

(At an earlier stage the fourth, fifth, and sixth named plaintiffs were excluded from the proceedings by the judge's ruling on a preliminary objection taken by the Defence.)

The trial judge then went on to grant to the successful Plaintiffs/Respondents an injunction enjoining the second-named Defendant/Appellant (The Minister) in his personal capacity from entering or remaining upon the lands of the Plaintiffs/Respondents and from taking any other action to their prejudice, whether by himself or by his servants or agents. He further awarded to each of the Plaintiffs/Respondents the sum of $500 as nominal damages.

A number of matters, all of which have been set out in the various grounds of appeal, fall to be considered. I would list

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them under the following heads:-

(a) The question of the constitutionality of the Principal Act, Act No. 2 of 1975, in its original form.

(b) The question of severability.

(c) The question whether or not the amending Act, Act No. 8 of 1975, is a valid exercise of the power of the Legislature.

(d) The Appointed Day.

(e) The Injunction.

(f) Damages.

As to (a), I would commence by emphasising that Act No. 2 of 1975 is a post-constitutional law. Section 34 of the St. Christopher, Nevis and Anguilla Constitution Order 1967 reads,

> "Subject to the provisions of this Constitution, the Legislature may make laws for the peace, order and good government of Saint Christopher, Nevis and Anguilla."

The Constitution provides in Section 6(1) for protection from deprivation of property. Section 6(1) reads,

> "6.-(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except by or under the provisions of a law that prescribes the principles on which and the manner in which compensation therefor is to be determined and given."

This in turn brings first into consideration the question of the meaning and justiciability of compensation. Understandably we have been referred by both sides to a number of Indian authoriti in the course of the arguments in this appeal. There is a great deal of learning in their law which we cannot afford to ignore. It may not be binding but it certainly is persuasive. In India there has been a serious and prolonged battle over this question. Dr. Basu in his book Limited Government and Judicial Review has described it in this way,

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> "The history of the decisions of the Supreme Court on this subject, read with the successive amendments of the Constitution, may be said to be a race between the Court and the Parliament, in which the Court has had the last word, -- to pick up some aperture in the constitutional text for the time being through which it could secure relief to the individual whose property was sought to be expropriated."

Prior to the Constitution (Fourth Amendment) Act, 1955, the very word 'compensation' was interpreted as full compensation, i.e., the full monetary equivalent of the property at the date of the acquisition. Clause 2 of Article 31 of the Indian Constitution stated that any law authorising the acquisition of property had to provide for compensation for the property taken possession of or acquired and, "either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given." The material parts before the Fourth Amendment were the same as in the St. Kitts, Nevis and Anguilla Constitution. Clause 2 was amended by the Fourth Amendment Act of 1955 to provide that the constitutionality of a law coming under Article 31(2) could no longer be questioned on the ground that the compensation provided by the law was not 'adequate'. But even after this amendment the Supreme Court, in some cases culminating in the Bank Nationalisation case, adhered to its pre-amendment view that the word 'compensation' not having been eliminated by the amendment, 'full compensation' must be payable, notwithstanding the amendment. (Vide: Vajravelu v Deputy Collector, AIR 1965 S.C., 1017 (1023). Also, Cooper v Union of India, AIR 1970 S.C., 564).

Certainly the question whether the compensation was adequate or not, and whether the principles were just and reasonable or not, remained justiciable till the amendment made to the Constitution in 1955. In the case of Raman Das v State of U.P., 1952 7 DLR, 12,

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'compensation' was held to mean, "just and reasonable compensation or a just equivalent for the property taken." In the case of Fraser v City of Fraser Ville, 1917 DC 187, the measure of compensation was posited to be,

> "the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities but excluding any advantages due to the carrying out of the scheme for which the property is compulsorily acquired."

The learned trial judge has referred to the judgment of Sastri C.J. in the case of The State of West Bengal v Mrs. Bella Banerjee et al, A.I.R. 1954, S.C., 172. I think the passage cited may be adopted and applied for the purposes of this case. It reads,

> "While it is true that the legislature is given the discretionary power of laying down the principles which should govern the determination of the amount to be given to the owner for the property appropriated, such principles must ensure that what is determined as payable must be compensation, that is, a just equivalent of what the owner has been deprived of. Within the limits of this basic requirement of full indemnification of the expropriated owner, the Constitution allows free play to the legislative judgment as to what principles should guide the determination of the amount payable. Whether such principles take into account all the elements which make up the true value of the property appropriated and exclude matters which are to be neglected is a justiciable issue to be adjudicated by the Court. This, indeed, was not disputed."

I would hold with him that he could properly adjudicate upon the question whether the principles prescribed by the Principal Act took into account all the elements which make up the true value of the property appropriated. I would also agree with Counsel's submission that if, even with the limitation of the Fourth Amendment, the Indian Courts considered the several various aspects of compensation necessary to prevent the final result from being illusory, then a fortiori this court must consider those

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various aspects. I turn now to the Principal Act itself in its original form.

The principles for the determination of the compensation to be given are set out in Section 4(2) and Section 4(4) of the Principal Act; Act 2 of 1975.

The sections read respectively,

> "4.(2) The aggregate compensation to be paid for the lands transferred under the provisions of Section 2(1) shall be determined on the basis of the commercial value at the 30th day of April, 1972 which a purchaser would attribute to such lands as part of a commercial undertaking for the production of sugar cane and matters ancillary, incidental and related thereto and shall not exceed ten million dollars."
>
> "4.(4) In determining the compensation payable in respect of all the lands or of individual estates transferred -
>
> (a) no allowance shall be made for any probable enhancement in the future of the value of such lands or such estates;
>
> (b) no allowance shall be made on account of the acquisition being compulsory;
>
> (c) no account shall be taken of any value established or claimed to be established by or by reference to any transaction or agreement involving the sale lease or other disposition of any estate land or part thereof where such transaction or agreement was entered into after the 30th day of April, 1972;
>
> (d) no allowance shall be made on account of any improvements effected on any of the lands transferred after the 30th day of April, 1972."

The trial judge has commented as follows:-

> "On the 31st January, 1975, before the SIRO Agreement was due to terminate, most of the lands listed in the Schedule to the SIRO Agreement and other lands in St. Kitts were acquired by the Crown. At that date the value of the lands listed in Part I of the Schedule to the SIRO Agreement, with the exception of such portions thereof as are set out in Part II of the said Schedule, had increased, owing to the fact that Government had spent a considerable amount of money in rehabilitating and cultivating the said lands. During the currency of the SIRO Agreement the owners were entitled to receive from Government nothing but

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a refund of certain expenses which they had incurred prior to the date of the SIRO Agreement in the preparation, planting and care of sugar cane for the 1973 crop. I am of the view, therefore, that the lands belonging not only to those owners but to all other persons whose lands were acquired on the 31st January, 1975, should be valued as at the date of acquisition. It must have been in the contemplation of the parties to the SIRO Agreement when they entered into the agreement that on the termination of the said Agreement the owners would regain control of their lands in the improved condition in which Government would put the said lands.

About 24,414 acres of land were acquired by the Crown. Approximately 16,000 to 17,000 acres of land acquired is arable land, but only about 12,000 acres of the arable land is suitable for sugar cane production. In those circumstances I am unable to support the principle prescribed by section 4(2) of the principal Act whereby compensation is to be paid for all of the lands acquired on the basis of the commercial value which a purchaser would attribute to such lands as part of a commercial undertaking for the production of sugar cane and matters ancillary, incidental and related thereto.

It is provided by paragraph (c) of subsection (4) of section 4 of the principal Act that no account shall be taken of any value established or claimed to be established by or by reference to any transaction or agreement involving the sale lease or other disposition of any estate land or part thereof where such transaction or agreement was entered into after the 30th day of April, 1972. Between February, 1973 and December, 1974, less than 300 acres of Pond and Needsmust Estates were sold to various persons for $799,035.25. The land sold includes 39.9 acres sold to the Government for $79,800.00. Pond and Needsmust Estates were acquired by the Crown on the 31st January, 1975. Immediately prior to those sales, the total land area of Pond and Needsmust Estates was 1422 acres. The ratio of the acreage of Pond and Needsmust Estates - which are adjoining estates owned by the same persons - to the total acreage of the lands acquired is 5.8. Assuming that the aggregate compensation to be paid for all the lands acquired is ten million dollars, the compensation payable under section 4(3)(a) of the principal Act in respect of the said 1422 acres of Pond Needsmust Estates would be $580,000.00. But if the Minister, as he is empowered by section 4(5) of the principal Act to do, pays as compensation for all the portions of Pond and Needsmust Estates sold as aforesaid between February, 1973 and December, 1974 the actual purchase price paid for the said portions of land, and deducts such payment from the compensation payable in respect of Pond and Needsmust Estates of which they formed part on the 30th April, 1972, there is a possibility that the owners of Pond and Needsmust Estates will receive no compensation at all for their

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> remaining land. The remaining land comprises about 1200 acres, 1000 acres being arable land. Figures were produced on behalf of the plaintiffs which shew that the compensation payable under section 4(3)(b) of the principal Act in respect of Pond and Needsmust Estates would be even less than $580,000.00. Pond-Needsmust Estate - as Pond and Needsmust Estates are commonly known - is ideally suitable for the extension of the town of Basseterre. Potential building land situated close to towns and villages is more valuable than sugar cane land not so situated."

In dealing with section 4(2), the learned Attorney General conceded that all the lands were not included in the S.I.R.O. agreement, but claimed that acquiring them as a single enterpris did no violence to the Factual situation because even the owners had at least begun to conceive of the estates or lands as one undertaking. He argued that at least a part of the lands acquir were directly involved and recognised by everyone to be so invol in the production of sugar cane, and that the words "matters ancillary and relating thereto" included general agriculture, housing and food. He submitted that the taking of the lands as one undertaking was justified. On the question of the valuation at an anterior date, he submitted that the fixing of an anterior date is sanctioned by authority provided the date was relevant. He claimed that the 30th April, 1972 was a relevant date as it was as close as possible to the 8th May, 1972 when the S.I.R.O. Agreement took effect. He then argued that Government's action in entering to rescue the Industry in May, 1972, was analogous t a notification for acquisition purposes; that the owners should not either benefit or suffer from anything that happened in the interim; and further that on the facts of the case any improveme or enhancement which took place after 1972 took place as a resul of Government expenditure. Finally, he submitted that the words "and shall not exceed ten million dollars" do not fix nor purpo

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to fix the compensation, but merely put a ceiling on the compensation. He argued that before they could be struck down as invalidating the principles they would have to be shown to be unreasonable by positive proof, whereas the evidence showed the contrary.

Section 4(4) expands the principles set out in Section 4(2). In dealing with this section, the learned Attorney-General argued that the justification for (c) is the relevance of the date, and that it hinged upon the submission made with regard to section 4(2). He also argued that section 4(4)(d) was self evident as the owners were refunded all monies which they had expended on the 1973 crop prior to the entry into force of the S.I.R.O. Agreement, so any improvement would have been from expenditure of the Government money.

The recitals of the S.I.R.O. Agreement taken in conjunction with clause 6 show that the parties agreed that in consideration of the Government applying monies during the course of the Agreement as and when required for the purpose of restoring the Sugar Estates to a proper condition up to the termination of the reapi of the 1975 crop, the Government would be entitled to receive al of the monies which would otherwise have been payable to the estate owners as the purchase price of their cane delivered to the factory during the 1973, 1974, and 1975 crops. In my view, it amounted to Government operating the lands under a licence. Clause 10(1) mentions the termination of the Agreement as the last day of the 1975 sugar harvest, but in any event not later than the 1st September, 1975. There was always the possibility of achieving a long term solution for the Industry acceptable to both sides. But Government had asked the owners to extend the

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terms of the Agreement and the owners had refused. In the absenc of such an agreement the lands would revert to the owners. I can see nothing wrong with the trial judge's finding that it must hav been in the contemplation of the parties when they entered into the Agreement that on its termination the owners would regain control of their lands in the improved condition in which they were put by Government. It could only be otherwise if a long term solution acceptable to both sides could have been found.

On another aspect of the matter, I think it is fair to say that some of the lands taken are potentially suitable for develop ment. The evidence shows that some of this land was ripe for development and that there was demand for it, which would of course affect its potential value. I think that the learned tria judge had ample evidence on which to arrive at his findings and conclusions. It is my opinion that even if the words "and shall not exceed ten million dollars" were taken out of section 4(2), would still remain unconstituional because it excludes many of the elements of compensation which should be taken into considera tion in order to arrive at a full compensation to which the pers whose lands were acquired would be entitled. Also, I would agre with learned counsel that this is not an acquisition of one piec of land or even one kind of land but a multitude of varieties of land to many of which different principles of compensation must apply.

The inclusion of the words "and shall not exceed ten millio dollars" is clearly unconstitutional in my view as by fixing a limit the legislature has deprived the Court of its jurisdiction under section 6(2)(a) of the Constitution to determine the amoun of the compensation. All that the Legislature may do is to pre- scribe principles. It cannot fix the amount of compensation as

/it is.....

it is empowered to do in India. As I see it, any attempt to limit the Court in this regard would be unconstitutional.

With regard to section 4(4), sub-sections (a), (c), and (d) it is submitted as follows on behalf of the Respondents:-

(a) It is unconstitutional under the principle laid down in Cedars Rapids Manufacturing Co. v La Coste and Others, 1914 A.C., 569.

(c) It would deny the use of the method of comparable valuation to the owners, as they would be deprived of using comparables.

(d) This would deprive the owners of compensation for improvements effected under the S.I.R.O. Agreement to the value of which improvements they would be entitled by the terms of the Agreement.

I would agree. As good examples of (c) above the following two passages referred to by Counsel may be cited. The second is what may be referred to as an arms-length transaction. They rea respectively:-

> "I know Fountain Estate. I know a company called the Fountain Agricultural and Development Co. Ltd. That Company purchased Fountain Estate in 1971 for $180,000.00. I am a director and shareholder of that company. The area of that estate is about 172 acres. The area of the sugar cane land on Fountain Estate is around 50 acres. There are about 50 acres of arable provision land, and between 30 and 40 acres of forest and ghauts. There are about 40 acres of pasturage. I agree that compared to Pond-Needsmust, Fountain land is hilly and sloping. It is hillier than Buckleys and Shadwell. I wouldn't sell my land up there for less than what I paid for it. If the forest land at Fountain Estate were given a nominal value, the remainder would have a value of over $1,000 an acre."

And again,

> "Admit that Government offered to purchase Molyneaux Estate for $625,000 cash. Admit that Government asked Mr. Kelsick, the solicitor for the owners, to reduce the price from $650,000 to $625,000 cash. I accept that the total area of Molyneaux is 1,219 acres and the potential cane area is 390¾ acres, the provision land 110 acres, the coconut and other orchard crops 8¾ acres and the rest of the land 675 acres, the acreage of the arable land is 509.5. If 510 acres cost $625,000, 1 acre would cost $1,225.00.

/$17,870,000.....

> $17,870,000 would be the value of 14,582 acres arable land at an assumed price of $1,225.00 an acre. I think that Government's offer of $4,000,000.00 for all the land was unreasonable but I think that was a negotiating position."

The principles for the determination of the compensation to be given are set out in section 4(2) and 4(4) of the principal Act. They are as I see it, the core of this appeal. Both are in my opinion unconstiutional, null and void for the reasons given, I would agree that they should be struck down.

The learned Attorney-General in dealing with the question of the presumption of consitutionality submitted that the learned judge did not, or did not fully appreciate the rule governing the onus of proof in this case, and that in ruling against the validi of the legislation he acted on slight implication and vague conjecture. I do not agree. Though the Court may avoid the questio of constitutionality if a case can be decided on other issues, an though the Court starts with the presumption of constitutionality of the statute which is impugned, once the decision of the controversy rests on a constitutional question and the fact of trans gression of the Constitution is clearly established, the Court cannot shrink from its duty to declare the statute as unconstitutional. The doctrine of presumed constitutionality can be rebutted.

The learned trial judge has dealt with other sections of the Act in its original form which he regards as being unconstitutior He has mentioned, for instance, the question of the right of acce to the Court for the enforcement of the protective provisions. Section 6(3) of the Constitution provides that the Chief Justice may make rules with respect to the practice and procedure of the High Court which may include rules with respect to the time withi which applications to the High Court may be brought. At the moment there are no such rules. I would agree that in the absenc

/of.....

of any such rules the right must remain unfettered and cannot be circumscribed by any prerequisites. Any provision to the contrary would be struck down as being unconstitutional. "Also, (it was conceded that if the Court rejected the scheme of the legislation and held that the acquisition could not validly have been related back to 30th April, 1972, then section 4(5) would also fall.)" But for the purposes of this appeal I do not consider it necessary to go beyond the sections discussed. They are the sections which principally purport to make provisions that prescribe the principl on which and the manner in which the compensation is to be determined. I would support in their entirety the trial judge's findir and conclusions in regard to them.

(b) I turn next to the question of severability. The doctrine o severability in short, means this: A statute consists of differen provisions and even the same section may contain different subjec matters in different clauses. It may be that some particular par of these provisions offends against the Constitution. In such a case, if the offending portion stands separate from the rest of the statute and the statute remains workable without the offendin portion, the Court will invalidate only the offending part instea of the entire statute. A good example of this is to be found in the case of The State of Bombay v Balsara, 1951 S.C.R., 682. Thu where the legislature prohibits the possession and sale of 'all alcoholic liquids consisting of alcohol', and the prohibition off against an Article of the Constitution in respect of medicinal an toilet preparations which contain alcohol (Article 19(1)(f),) but the legislature has dealt with the alcoholic liquors under differ sub-categories, the restriction will be void only in respect of tiolet and medicinal preparations and not in respect of other alcoholic liquors. If, however, the offending part is inextricab mixed up with or forms part of a single legislative scheme with the rest of the statute, the Court would be obliged to strike

/down.....

down the entire statute; to expunge the offending portion in such a case would involve judicial legislation. The intention of the legislature is the determining factor, and to determine the legislature's intent on the question of severability one can legitimately look into the history of the legislation, its object, title and preamble. It has been argued in this appeal on behalf of the Appellants that even if the sections as struck down by the trial judge, namely, sections 4(1) to 8, and section 9(2) were deleted, there would still be left a complete code within the terms of the Constitution. I very much doubt it. It would be so thin as to be in substance different from what it was as it emerge from the legislature and so the whole statute would have to be rejected. The principles for the determination of the compensatio to be given are set out in section 4(2) and section 4(4) of the Act. In my view they are inextricably mixed up with, and form pa: of a single legislative scheme with the rest of the Act. If they offend against the Constitution, and I have found them so to do, then the entire Act would have to be struck down. Manifestly, what is left would not provide a law that prescribes the principl on which and the manner in which the compensation is to be determined and given.

(c) This brings me to the question of the Amending Act, No. 8 of 1975. The issue here is whether or not the amending Act is a valid exercise of the power of the Legislature.

Section 4 of Act No. 2 of 1975 was amended by Act No. 8 of 1975, section 3. Section 3 substitutes a new section 4(1). It provides for the payment of compensation generally, and also provides for the payment of compensation to mortgagees and chargees specifically. As regards the new 4(2) (which is substituted by section 3 of No. 8 of 1975) the principles laid down are the same except that (i) the date for the valuation of compensation is

/altered.....

altered from 30th April, 1972 to the date of acquisition, and (ii) the words "and shall not exceed ten million dollars" have been omitted. A proviso has been added authorising deduction for the value of the improvements between 30th April, 1972 and the dat of acquisition. The section as amended, it is said, is not vitiat by any anterior date, nor by any limitation in the amount of compensation. Section 4(4) has been altered by deleting paragraph (b Also, the new paragraph (d) which is added by section 3(c) is claimed to be intended to preserve the concept of the lands in relation to the production of sugar cane. Act No. 8 of 1975 also makes amendments to sections 5, 7, and 10 of the principal Act.

The learned Attorney General argued that Act No. 8 of 1975 was not an Act which was intended to alter any section or provisio of the Constitution, and was therefore a law which the legislature had full power to pass under Section 34 of the Constitution. Also that the legislature had power to give it retroactivity under section 41(4) of the Constitution. He submitted that it would follow that the legislature could pass a law to repeal a statute declared to be void and replace it. He pointed out that Act No. 8 of 1975 was passed prior to the declaration touching Act No. 2 of 1975, and that there was no question of revival. He finally submitted that the amending Act was within the power of the Legislature and that the cumulative effect of Act No. 2 of 1975 and Act No. 8 of 1975 is what was before the Court for considerati at the time when it came to make the declarations sought. I do not agree.

In dealing with the classical doctrine of nullity ab initio, Dr. Basu in his book - Limited Government and Judicial Review - states that the doctrine was propounded by Cooley in his book - Constitutional Limitations in the year 1868, and that it was given

/judicial.....

judicial recognition in 1885 in the case of Norton v Shelby County, 1885 118 U.S., 425. As he puts it, "though a judicial verdict is required to pronounce the unconstitutionality of a law, the unconstitutionality is not dependent upon the Courts declaration." In the words of the Australian High Court in the case of South Australia v Commonwealth, 1942, 65 C.L.R, 373, (408),

> "A pretended law made in excess of power is not and never has been a law at all..... The law is not valid until a Court pronounces against it - and thereafter invalid. If it is beyond power it is invalid ab initio."

Among the consequences of an unconstitutional statute are the following listed by the author:-

(i) An unconsitutional statute cannot be revived by subsequent amendment of the Constitution, unless it is expressly retrospective. It is void ab initio and is not therefore revived even if the Legislature acquires legislative power over the subject by a subsequent amendment of the Constitution, unless, of course, the constitutional amendment is expressly given retrospective effect. In such a case the amending authority directs that the Constitution should be read, as amended, since it its inception; as a result, the offending statute could not be said ever to have violated any provision of the Constitution. Where the amendment of the Constitution is not retrospective, the text of the fundamental right as it stood at the time of the making of the offending statute would hit the statute and render it void. (So that the removal or curtailment of that fundamental right by a subsequent propesctive amendment of the Constitution cannot revive the still-born legislation).

(ii) An unconstitutional statute cannot be revived by retrospective amendment of that statute. It would follow from (i) above that such unconstitutionality cannot be retrospectively removed by any subsequent amendment of that very statute which was dead ab initio.

The learned author has this to say at pages 444 and 445:-

> "It has been argued that if the Legislature can repeal an unconsitutional statute with retrospective effect, that shows that the unconstitutional statute was still in existence; and that, accordingly, there is no reason why the legislature should not be competent to amend the unconstitutional statute, prospectively or retrospectively. This involves arguing in a circle. An unconstitutional statute is dead in the eye of the law."

/And.....

And again,

> "(a) Where the amendment is prospective, it virtually amounts to a re-enactment of the unconsitutional statute in a constitutional form, applicable to future cases, - to which there cannot be any objection.
>
> (b) If, however, the statute is sought to be retrospectively amended, that would constitute a violation of the Constitution (assuming that it has not been retrospectively amended in the meantime), because to enforce the statute with the retrospective amendment in relation to cases arising prior to the amendment or to validate such unconstitutional cases would be to give legislative support to a breach of the Constitution, which is beyond the competence of a legislature created and limited by the Constitution."

I would adopt this learning and apply it to the instant case. I would hold as the trial judge has held, that nothing but an appropriate retrospective amendment of the Constitution itself could make the principal Act constitutional. Accordingly, in my view, it no longer becomes necessary to examine the principal Act as amended by Act No. 8 of 1975. As I see it, the provisions of the amending Act would no longer fall to be considered.

(d) The issue of the "appointed day" is relevant because, accordin to section 6(2) of the Constitution, every person having an interes in or right over property which is compulsorily taken possession of or whose interest in or right over any property is compulsorily acquired shall have a right of direct access to the High Court for among other things, the determination of the legality of the taking of possession or acquisition of the property, interest or right. It is one of the matters raised in the pleadings of the Plaintiffs/ Respondents. The objection raised to the order is that there was no power to make it, and that consequently the properties have not vested in law. It was contended for on behalf of the Appellant that Section 2(1) of Act No. 2 of 1975 had to be read in conjunctio with Section 10 which is the definition section, and that by transposing the meaning of "appointed day" in Section 10 to Section

/2(1) and.....

2(1) and then reading Section 2(1) with the meaning so transposed there is clear power in the Minister to appoint the appointed day. It was submitted that once it is recognised that the Minister had power to make an appointment then he could make it by any appropriat method known to the law such as is to be found in Sections 21 and 22 of Chapter 166 of the local laws.

Section 2(1) of Act 2 of 1975 reads,

> "On the appointed day the lands forming part of the estates listed in the First Schedule hereto shall be transferred to and vested in the Crown in right of the Government of the State by virtue of this section and without the need for further assurance free from all mortgages charges or incumbrances and the Crown and any person duly authorised from time to time in that behalf may thereupon enter and take possession of the said lands."

Section 10 reads in part,

> "In this Act, unless the context otherwise admits -
>
> "the appointed day" means the date appointed by the Minister as the date on which there shall be transferred to and vested in the Crown any of the interests specified in Sections 2 and 3;"

Nowhere in the Act is power given to the Minister to appoint a day. Nowhere in the Act does it say how the Minister should appoint a day. I would agree with the sumbission of Counsel made on behalf of the Plaintiffs/Respondents that there has to be a method set out by the person who is giving the power to appoint; that the Minister must follow strictly the terms in which the power is given to him; and that express and unambiguous language was necessary here. In short, I would agree that power to appoint a day and how the appointment should be made should have been specifically conferred, and that consequently the lands in question would not have vested in law.

(e) The argument against the granting of the injunction was put in this way:

> That it was not open to the Court in this case to grant the injunction which it purported to grant (whether or not it

/used.....

used the words "in his personal capacity") because the effec would be to grant an injunction against the Crown, and an injunction cannot be granted wither directly or indirectly against the Crown either before or after the Constitution. That while the Court must give the most effective remedy it is confined to giving remedies known to the law. The answ I think, is to be found in the case of Jaundoo v The Attorn General of Guyana, 1971, 16 W I R, 141 (148). Lord Diplock in delivering the judgment of the Board said,

> "At the relevant time, the executive authority of Guyana was vested in Her Majesty and exercised by the Governor-General on her behalf under Article 33 of the Constitution. At the time of the hearing of the motion in the High Court, an injunction against the Government of Guyana would thus have been an injunction against the Crown. This a Court in Her Majesty's Dominions had no jurisdiction to grant. The reason for this in Constitutional theory is that the Court exercises its judicial authority on behalf of the Crown. Accordingly, any orders of the Court are themselves made on behalf of the Crown, and it is incongruous that the Crown should give orders to itself."

He later, however went on to say,

> "But if the matter were urgent, it would have been open to the landowner to add, as an additional party to the motion, the Director of Works or the Minister in whom the powers of the Director of Works under the Roads Ordinance are now vested, and to claim an injunction against him. This would give the Court jurisdiction to grant an interim injunction if the urgency of the matter so required. This was the course adopted in the Canadian case of Carlic v The Queen and Minister of Manpower and Immigration, although their Lordships do not accept as correct that the interim injunction granted in that case should have been expressed to be against both defendants instead of against the Minister to the exclusion of the Queen."

In my view, in the instant case the trial judge had jurisdiction to grant the injunction which he did.

(f) The award of damages is justified in my opinion by the dec in the case of Maharaj v The Attorney General of Trinidad and Tobago, P.C. Appeal No. 21 of 1977. Lord Hailsham of Saint

/Marylebone.....

Marylebone puts it in this way in his dissenting judgment,

> "A great deal of argument necessarily turned on the meaning to be attached to the word "redress" in in Section 6(1) and "enforcement" in Section 6(2). It was contended for the appellant, and it is accepted by the majority decision, that either or both of these words is sufficiently wide, or at least sufficiently indeterminate in meaning, to include a right to damages or a direction for the assessment of damages as one of the remedies available to the High Court. Not unnaturally the attention of the Board was directed to its decision in Jaundoo v Attorney-General of Guyana (1971) A.C. 972, a decision based on the substantially analogous provisions of the Guyana Constitution. In that case, in allowing the applicant's appeal, the Board remitted the motion to the Court of first instance with a direction to hear and determine it on its merits, and, if these were found to be favourable to the applicant, to assess and give a direction for the payment of damages or compensation. This it was contended, entirely supports the appellant's argument in the instant appeal to the effect that the references in Section 6 to "redress" and "enforcement" include, or at least may include, a right to damages as a form of relief. Though the contrary was contested strongly on behalf of the respondent, I see no reason to differ from the majority conclusion in this."

As Lord Diplock has reasoned in the majority judgment, the claim is not a claim in private law for damages for the tort of trespass, under which the damages recoverable are at large, but a claim in public law for compensation for deprivation of property alone. The trial judge in his award has spoken of "nominal" damages, but there has been no cross-appeal in this matter, and I have therefore confined myself to the question only of his jurisdiction to make an award of damages.

Finally, for the reasons stated I would endorse the conclusion reached by the trial judge and sustain the judgment.

Also, I would affirm the declarations and orders made by him including the order enjoining the Minister, and that for the award of damages.

/In the.....

In the result, I would dismiss the appeal with costs to th Plaintiffs/Respondents to be taxed.

(N.A. Peterkin)
CHIEF JUSTICE (ACTING)