

IN THE EASTERN CARIBBEAN SUPREME COURT

COURT OF APPEAL

COMMONWEALTH OF DOMINICA

CIVIL APPEAL NO. 6 OF 1998

BETWEEN:

**THE ATTORNEY-GENERAL OF THE
COMMONWEALTH OF DOMINICA**

DEFENDANT/APPELLANT

AND

JACQUELINE THEODORE

PLAINTIFF/RESPONDENT

**BEFORE: THE HON. MR. SATROHAN SINGH
THE HON. MR. ALBERT REDHEAD
THE HON. MR. ALBERT MATTHEW**

**JUSTICE OF APPEAL
JUSTICE OF APPEAL
JUSTICE OF APPEAL (AG.)**

**APPEARANCES: Mrs Heather Felix-Evans for the appellant
Mr. McDonald Christopher for the respondent**

[April 22: May 10, 1999]

JUDGMENT

SATROHAN SINGH JA

Sometime in August 1997, the Government of the Commonwealth of Dominica, unceremoniously seized lands from the respondent for the purpose of constructing a public road. They paid no compensation to the appellant for this deprivation of property, neither did they offer to pay. They purported to act under **S 9 of the Roads Ordinance Chapter 179 of the Laws of Dominica**, a law made in the year 1915.

This law reads as follows:

AFor the purpose of the construction or maintenance of roads the Government may take land without compensation: Provided that where a road is discontinued as a public road the land shall revert to the person who would be entitled to it if it had not been taken: And provided also that where buildings are disturbed or growing

crops are destroyed by the taking of land, compensation shall be made to the parties damnified, the amount of compensation to be assessed in the manner prescribed.@

On October 20, 1997, the respondent moved the Constitutional Jurisdiction of the High Court of Dominica to have this damnification of her recompensed. In her motion, she prayed for an order that the aforementioned law was Aunconstitutional and that the Government of Dominica had no power to enter and take her lands at Grand Platt, Calibishee for the construction of a road.@

On April 2, 1998, **Cenac J** ruled and declared Athat the taking of possession or acquisition of the applicant=s interest in the land was not duly carried out in accordance with the law authorizing the taking of possession or acquisition, namely, the **Land Acquisition Act Chapter 53:02**, and that the provisions of that **Act** should be applied to determine the quantum of compensation the applicant is entitled to under the law.@ The learned judge held that **S 9 of the Roads Act** was mischievous of **S 6 of the Constitution of the Commonwealth of Dominica**, because it did not provide for compensation to the respondent for this deprivation of her property. He therefore ruled that **Paragraph 2 (1) of Schedule 2 to the Constitution** had to be utilized in order to clothe it with constitutionality and bring it in conformity with **S 6 of the Constitution**.

The appellant, being dissatisfied with this decision, has appealed to this Court. In his grounds of appeal the Attorney-General seeks to maintain the constitutional sanctity of **S 9 of the Roads Ordinance** in its pristine form. He also challenges the judge=s opinion that the **Land Acquisition Act of Dominica Chapter 53:02** and the **Roads Act** are Statutes **in pari materia**. I propose firstly to deal with the constitutionality aspect of the **Roads Act**.

THE ROADS ACT: ITS CONSTITUTIONALITY:

S 6 (1) of the Constitution protects a person from deprivation of property

without payment within a reasonable time of adequate compensation. **S 9 of the Roads Act** provides for the deprivation of a person of his property without compensation. On its face therefore **S 9 of the Roads Act** is unconstitutional.

I note that the said **S 9** provides for the reversion to its owner of the land taken where a road is discontinued. I do not consider this proviso enough to clothe **S 9** with constitutionality. In reality it means nothing. In this part of the world once a public road is created, it becomes a dedication to the public and the person whose land is taken loses his property. I would therefore now look at the transitional provisions of the Constitution to determine whether this law can be saved.

Paragraph 2 (1) of those **Transitional Provisions** provides that:

A The existing laws shall, as from the commencement of the Constitution, be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution and the Supreme Court Order.@

S 9 could be saved if controlled by this paragraph of the **Constitution**. Because it would then be read with the deletion of the words **Awithout compensation@** after the word A land@ in the second line of the provision and the insertion therein of the words **Awith compensation@** as provided for by **S 6 of the Constitution**.

However, Mrs. Heather Felix-Evans for the appellant contends that **paragraph 2 (1)** did not apply because of the provisions of **paragraph 12** of the said **Transitional Provisions** which states:

ANothing in Section 6 of the Constitution shall affect the operation of any law in force immediately before 1 March 1967 or any law made on or after that date that alters a

law in force immediately before that date and that does not -

(a) add to the kinds of property that may be taken possession of or the rights over and interests in property that may be acquired.

(b) make the conditions governing entitlement

to compensation or the amount thereof
less favourable to any person owning or
having an interest in
the property; or

(c) deprive any person of such right as is
mentioned in subsection (2) of that
section.@

The submission of learned counsel is that this provision preserves **S9** of the **Roads Act** in its pristine form. I do not agree with this submission. When **paragraph 12** is read with all its constituent parts together, it is obvious that it is speaking of laws passed before March 1st 1967 which **ex facie** are not unconstitutional. The provisions of **sub-paragraph (b)** make it abundantly clear that **paragraph 12** is referable only to laws providing for the deprivation of property where the relevant Statute has made provision for compensation for such deprivation. In my judgment therefore, **paragraph 12** cannot be used as an aid to clothe **S 9 of the Roads Act** with constitutionality. I therefore hold that for **S 9** to be saved it has to be read with the modification aforementioned. The cases of **Mills -v- A.G. of St. Kitts and Nevis [1993] 45 WIR 123 (CA)**, **Blomquist -v- A.G. of Dominica (1988) LRC (Const) 315 PC**, **Windward Properties Ltd and Another -v- Williams and Another (1988) LRC (Const) 407 H.C** and **Baldwin Spencer -v- A.G. of Antigua and Barbuda et al Civ App. N:20A of 1997**, referred to by learned counsel for the appellant, do not assist in this matter. They all speak to **Land Acquisition Statutes** which are not **ex facie** unconstitutional. This ground of appeal therefore fails and the trial judge=s opinion on this issue is accepted. I now address the concept of **In Pari Materia**.

IN PARI MATERIA

The learned trial judge held that the **Roads Act** and the **Land Acquisition Act**

are **in pari materia**. Mrs Felix Evans argues to the contrary and relies on the criteria needed to consummate this concept as suggested in a book by **Francis Benion** called **Statutory Interpretation**, the third edition 1997. Learned counsel contends that these two Statutes do not satisfy that criteria.

Benion at page 461 gives examples of Acts that are in **pari materia** (1) Acts which have a collective title or a single subject matter (2) Acts which are required to be construed as one, again a recognition of a single subject matter (3) Acts which have short titles that are identical and (4) other Acts which deal with the same subject matter on the same lines.

In my opinion, these thoughts of **Benion** more support the finding of the judge on the concept than the arguments of counsel for the appellant. The **Land Acquisition Act** sanctions the compulsory acquisition of private property for a public purpose. The **Roads Act** sanctions the taking of the private property for the purpose of building public roads. I see no difference. The taking of the property for the purpose of building a public road is the taking of private property for a public purpose. In my judgment these are two Acts dealing with the same subject matter along the same lines. They have a single subject matter i.e. the taking of a person=s private property for a public purpose. Accordingly, I agree with **Cenac J** that these two Acts are in **pari materia**: They are more than similar, they are more or less equal except that the **Roads Act** did not provide for the requisite compensation. **Par** or **Paris** means equal. This ground of appeal also fails.

CONCLUSION

For all these reasons, I would affirm the judgment of the trial judge and dismiss this appeal with costs to the respondent to be taxed if not agreed. It is interesting to note that the **Roads Ordinance** is not included in the **1990 Revised Laws of Dominica**.

SATROHAN SINGH
Justice of Appeal

I concur

ALBERT REDHEAD
Justice of Appeal

DOMINICA
Civil Appeal No.6 of 1999
ATTORNEY-GENERAL v JACQUELINE THEODORE

MATTHEW J.A. (Ag.)

I regret not being able to agree with my learned brethren, a view I held from the beginning. I had therefore begun to write this judgment before I read the majority judgment and my views remain unchanged.

On October 20, 1997 the Respondent by notice of motion approached the High Court for an order that section 9 of the *Roads Ordinance, Cap. 179* is unconstitutional and that the Government of Dominica had no power to enter and take the Respondent=s land at Calibishie for construction of a road.

The Respondent stated the grounds of his application as follows:

1. The Roads Ordinance has been in operation since 1915 and being a law passed before March 1, 1967 makes conditions governing entitlement to compensation unfavourable to her and deprives her of her right to compensation for her property in the context of paragraph 12 of Schedule 2 of the Commonwealth of Dominica Constitution Order.
2. The Respondent is one of the persons protected by section 6(1) of the Dominica Constitution against deprivation of property, except where provision is made by law for payment within a reasonable time for payment of adequate compensation.
3. The taking of the Respondent=s land is inconsistent with the provisions of the Constitution; and such acquisition is not authorised by the provisions of section 6(6) of the said Constitution of Dominica.
4. Section 9 of the Roads Ordinance Cap. 179 is a statutory provision in *pari materia* with the Land Acquisition Act. Cap. 53.02 which provides for a procedure for Government=s acquisition of land and by section 4(g) and section 5 of the said Act it is mandatory that compensation shall be paid for damage.@

The notice of motion was supported by an affidavit of the Respondent filed on the same day. I shall have something to say later arising out of this affidavit for there is no affidavit in reply and it is the only affidavit on the record.

On March 23, 1998 the matter came before *Cenac J.* and he reserved judgment. On April 2, 1998 the learned Trial Judge held that the taking of the Respondent=s land under section 9 of the Roads Ordinance does not fall within any of the exceptions under subsections (6) and (7) of section 6 of the Constitution and, as already stated, no provision

is made in section 9 of the Roads Ordinance for compensation to be paid other than for buildings disturbed or the destruction of crops.

The learned Judge said, that to remedy this mischief, paragraph 2(1) of the Second Schedule to the Constitution Order provides:

The existing laws shall, as from the commencement of the Constitution, be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution.YYYYYYYY.@

He went on to hold that section 9 of the Roads Ordinance must be read in *pari materia* with the Land Acquisition Act, that the taking of possession of the Respondent=s land was not carried out in accordance with the Land Acquisition Act and that the provisions of that Act should be applied to determine the quantum of compensation which the Respondent is entitled to under the law.

He made the appropriate declaration and ordered the Appellant to pay the Respondent=s costs to be taxed.

The Appellant has appealed from that decision.

Grounds of Appeal

1. The decision is erroneous in point of law because:
 - (a) the learned Trial Judge relied on paragraph 2(1) of the Second Schedule to the Commonwealth of Dominica Constitution Order, 1978 in holding that the Roads Ordinance Cap. 179, 1961 Revised Laws of Dominica must be interpreted in conformity with section 6(1) of the Constitution;
 - (b) the learned Trial Judge held that the Land Acquisition Act being in *pari materia* with the Roads Ordinance forms one system and should be construed as such;
 - (c) the learned Trial Judge held that the taking of the Respondent=s land is an acquisition of the said land;
 - (d) the learned Trial Judge did not take cognizance of paragraph 12 of Schedule 2 to the Commonwealth of Dominica Constitution Order, 1978.
2. The learned Judge misdirected himself on all matters referred to at No.1 above.

Relevant Legislation

I think I should set out first of all the relevant legislation applicable to this case. The Roads Ordinance Cap.179 came into effect in 1915. Section 9 states:

<p>ΔLands may be taken for road purposes without compensation.</p>	<p>For the purposes of the construction or maintenance of roads the Government may take land without compensation: Provided that where a road is discontinued as a public road the land shall revert to the person who would be entitled to it if it had not been taken: And provided also that where buildings are disturbed or growing crops are destroyed by the taking of land, compensation shall be made to the parties damnified, the amount of compensation to be assessed in the manner prescribed.@</p>
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The Constitution of Dominica came into effect on November 3, 1978. The Constitution is set out in Schedule 1 of the Constitution Order. Section 6 of the Constitution gives effect to the fundamental right to protection from deprivation of property. Section 6(1) states:

<p>ΔProtection from deprivation of property.</p>	<p>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 where provision is made by a law applicable to that taking of possession or acquisition for the payment, within a reasonable time, of adequate compensation.@</p>
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The Constitution Order states that the Constitution of the Commonwealth of Dominica set out in Schedule 1 to the Order shall come into effect in Dominica at the commencement of the Order, subject to the Transitional Provisions set out in Schedule 2 to the Order.

There are two provisions in Schedule 2 which are significant in this case and which have already received a fair amount of judicial consideration. I have already set out the provisions of paragraph 2(1) above. The other provision is at paragraph 12 and is as follows:

ΔNothing in section 6 of the Constitution shall affect the operation any law in force immediately before 1st March 1967 or any law made on or after that date that alters a law in force immediately before that date and that does not-

- (a) add to the kinds of property that may be taken possession of or the rights over and interests in property that may be acquired;
- (b) make the conditions governing entitlement to compensation or the amount thereof less favourable to any person owning or having an interest in the property; or

- (c) deprive any person of such right as is mentioned in subsection (2) of that section.”

I do not find it necessary to refer to the text of the Land Acquisition Act, Chapter 53:02. I might say straight away that in my judgment it is irrelevant to the consideration of this case.

Decided Cases

In his skeleton arguments, learned Counsel for the Respondent referred to Civil Appeal No.3 of 1976 **Grande Anse Estates Ltd v The Attorney-General of Grenada**. This case dealt with the acquisition of approximately 25 acres of the appellant=s land for the purpose of a communal pasture. The Land Acquisition Act of Grenada had the usual provision found in the legislation of the other islands that the value of the land had to be assessed at a time twelve months prior to the date of acquisition.

When the appellant approached the Court, *St. Bernard J.A.* giving the judgment of the Court held that the provision infringed the fundamental right to full compensation enshrined in section 6(1). The learned Justice of Appeal used a provision similar to paragraph 2(1) of Schedule 2 to the Dominica Constitution Order for the purpose. That is all that was involved in the case. No provision similar to paragraph 12 came into operation.

In **Bloomquist v Attorney-General of Dominica** 1988 LRC (Const.) 315 the appellant=s land was compulsorily acquired. The Government would not pay. He went to the High court and argued that his fundamental rights to his property had been infringed. The trial Judge assessed the value of his land and gave compound interest at 10 percent. Some reliance was placed on the Court of Appeal=s decision in the **Grande Anse** case. The Judicial Committee of the Privy Council stated:

ΔGrand Anse Estates Ltd v de Gale was distinguished because the Constitution of Grenada, in guaranteeing protection of fundamental rights, included a different provision which required existing laws to be construed with such modifications etc. as were necessary to make them conform with the Constitution: The Court of Appeal of Grenada was therefore obliged to enforce a constitutional provision which over-rode any provision in an existing law which called for something less than full compensation.”

The Judicial Committee of the Privy Council in **Bloomquist** operated on a provision similar to paragraph 12 and it is on this basis they agreed with the Court of Appeal who had reduced the 10 percent compound interest awarded by the Trial Judge to the 6 percent simple interest contained in the legislation.

In the High Court in St.Vincent and the Grenadines in **Windward Properties Ltd. And Another v Williams and Another** (1988) LRC (Const.) provisions similar to paragraphs 2 and 12 had to be considered. The report states at page 407-

A The effect of paragraph 11 of Schedule 2 to the Saint Vincent Constitution 1979 (which saved laws in force before 27th October 1969 in respect of section 6 relating to compulsory acquisition of property) was to maintain the Land Acquisition Ordinance 1946 in the form it was before the entry into force of the previous Constitution of 1969. Whatever modifications by which the Ordinance had to be construed when the 1969 Constitution was in force, section 104 thereof (which provided that existing laws should be construed with such modifications etc. as might be necessary to bring them into conformity with that Constitution) did not have the effect of amending the Ordinance.@

The Judicial Committee of the Privy Council had to deal with another aspect of the **Orange Hill Acquisition** in St.Vincent in the case of **Windward Properties Ltd. V Government of Saint Vincent and the Grenadines** (1996) 1 WLR 279.

Here the Board considered provisions similar to paragraphs 2 and 12. The Board, in effect, rejected the decision in the **Grande Anse** case. In the **Windward Properties Ltd** case the Board of Assessment had determined the value of the claimants land as at a period twelve months before the compulsory acquisition. This Court, following **Grand Anse** on appeal by the claimant, held that compensation had to be assessed at the date of compulsory acquisition, since an assessment dated twelve months before would contravene section 6(1) of the Constitution of Saint Vincent and the Grenadines and that paragraph 2(1) of Schedule 2 of the Constitution enabled section 19(a) of the Land Acquisition Act to be so construed.

The Judicial Committee held that since the Land Acquisition Act had been in force immediately before the Constitution came into effect, on the proper construction of paragraph 11 of Schedule 2 of the Constitution, section 6(1) of the Constitution did not

affect section 19(a) of the Act, and so the estate had to be valued as at a date twelve months prior to the compulsory acquisition by the Government.

This is the short point made by learned Counsel for the Appellant. The Road Ordinance was an Act in force immediately before 1st March 1997 and on the proper construction of paragraph 12 of Schedule 2 to the Dominica Constitution Order, Section 6(1) of the Constitution did not affect section 9 of the Roads Ordinance.

I agree with that submission. *Sir Michael Hardie Boys* who delivered the judgment of the Board stated at page 283:

As Counsel pointed out, the Court of Appeal did not have its attention drawn to paragraph 11 of the transitional provisions in schedule 2 which states:-

Nothing in section 6 of the Constitution shall affect the operation of any law in force immediately before 27th October 1969 or any law made on or after that date and that does not B (a) add to the kinds of property that may be acquired; (b) make the conditions governing entitlement to compensation or the amount thereof less favourable to any person owning or having an interest in the property; or (c) deprive any person of any such right as is mentioned in subsection (2) of that section=.

In their Lordships= view the two categories of law which are excluded by this paragraph from the effect of Section 6 of the Constitution are first, any law in force immediately before 27th October 1969 (when the Constitution became operative), and secondly, any subsequent amendment that does not do any of the things described in subparagraphs (a), (b), and (c). The Land Acquisition is within the first category and consequently is not affected by section 6 of the Constitution. Accordingly, section 19(a) is to be applied as it stands."

I have deliberately set out the grounds of the Respondent=s motion at the beginning of the judgment for I perceived that her Counsel=s interpretation of paragraph 12 was not to keep the two categories mentioned by *Sir Michael* distinct and he seemed to have received some judicial encouragement.

Learned Counsel for the Appellant is submitting that the Roads Ordinance is within the first category. It was passed in 1915. It is a law in force immediately before 1st March 1967 and, consequently, is not affected by section 6 of the Constitution. Accordingly, section 9 of the Roads Ordinance is to be applied as it stands.

Liverpool J.A. was of the same view in **Mills v Attorney-General** (1993) 45 WIR 125 where he had to interpret provisions similar to paragraphs 2 and 12. This was another land acquisition case and the fact that the authorities pertain to land acquisition matters, and not to roads, do not affect the principle. At page 135 of the judgment, after referring to a passage by *Sir Isaac Hyatali C.J.* in **Trinidad Island-Wide Cane Farmers= Association Inc v. Prakash Seereeram** (1975) 27 WIR 329 the learned Justice of Appeal stated:

I would adopt those words of the Chief Justice and hold that the effect of paragraph 10(1) of Schedule 2 to the 1983 Constitution Order, albeit that it is contained in a part of that Constitution Order entitled *Transitional Provision* is to protect from scrutiny any law in force on 27th February 1967 which provided for the compulsory acquisition of property.

The Respondent=s Affidavit

I said earlier that I would return to the affidavit in support of the motion. In that affidavit the Respondent stated that she is a widow and on August 22, 1997 her employee, Auguste Registe, made a report to her and consequently on August 25, 1997 she visited her lands at Calibishie and saw earth-moving equipment on the land. She said she had given no one permission to enter the lands. Later on she learnt that a private company, Island Timbers Ltd was authorised by the Appellant to enter upon her land to cut and have timber for their saw mills at Woodford Hill. Besides, she has been subject to threats and even an assault by the servants of Island Timbers Ltd.

She stated that it was as a result of Court proceedings by writ which she instituted and which are pending against Island Timbers, that a reply was received from the Chief Technical Officer of the Ministry of Communications and Works of the Government of Dominica, that the Government was constructing a road on the said private lands and had authorized Island Timbers Ltd. to enter upon the said land and no compensation was payable to her on taking of her land.

As I said there has been no counter affidavit. My limited role is to determine the constitutionality of section 9 of the Roads Ordinance but I must have regard to the background to the case if only to make an appropriate costs order. I cannot discern that

the servants or agents of the Appellant have behaved with the required courtesy and decorum becoming or expected of the Appellant.

Because of the view I take of the law having regard to the authorities cited, I am of the opinion that section 9 of the Roads Ordinance is saved in its pristine form. I would allow the appeal and set aside the decision of the Trial Judge. I thought very seriously of awarding costs against the Appellant but perhaps it is enough to make no order in their favour at this time.

The appeal is allowed but owing to the conduct of the Appellant there will be no order as to costs.

A.N.J. MATTHEW
Justice of Appeal (Ag.)