

ANTIGUA and BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 16 OF 2002

BETWEEN:

[1] THE CABINET OF ANTIGUA and BARBUDA
[2] THE ATTORNEY GENERAL FOR ANTIGUA and BARBUDA

Appellants

and

H.M.B. HOLDINGS LIMITED

Respondent

Before:

The Hon. Sir Dennis Byron
The Hon. Mr. Satrohan Singh
The Hon. Mr. Albert Redhead

Chief Justice
Justice of Appeal
Justice of Appeal

Appearances:

Mr. A. Astaphan S.C., Mr. J. Fuller with him for the Appellants
Mr. G. Simonette, Mr. G Louison and Mrs. T. Benjamin for the Respondent

2002: November 12;
2003: January 28.

JUDGMENT

[1] **REDHEAD J.A.:** In September 1995 hurricane Luis struck Antigua and Barbuda with great ferocity. The respondent's hotel, the Half Moon Bay Hotel, was one of the many buildings destroyed by the hurricane. The hotel is said to be situated on one of the best beachfront areas in the world and was at one time a "flagship" making a significant contribution to the economy of Antigua and Barbuda.

[2] Prior to hurricane Luis the respondent and Clubs International, the company which had leased the hotel from the respondent, were experiencing financial difficulties in operating the hotel. The Respondent and the lessee parted company and the

respondent remained in debt. As a result of the damage done to the hotel by the hurricane, the hotel was closed and members of staff were sent home.

- [3] On 29th January 1997 the Minister of Tourism, wrote to the respondent expressing the government's concern over the closure of the hotel.
- [4] In 1999 as a result of an article which appeared in the local newspaper stating that the hotel would soon be re-opened the Minister of Tourism sought and received confirmation from the respondent that the article was true. On 28th April, 12th and 26th May 2000, the first appellant at the respondent's request granted extensive fiscal and other concessions and incentives to the respondent company called Tradewinds. These concessions were transferred to the respondent in its own name and for its own benefits on 14th March 2001.
- [5] In a letter dated 14th March 2000 from the Permanent Secretary to Miss Joyce Kentish, Solicitor for the respondent, informing Miss Kentish of the decision of the first named appellant to transfer the incentives and concessions granted to Tradewinds and H.M.B. Holdings Ltd. to H.M.B. Holdings Ltd, the Permanent Secretary advised the respondent:
- "These concessions and incentives were granted provided that the project commenced within the six (6) month time frame that was granted by the Ministry of Tourism."
- [6] The respondent then made a commitment to commence construction/renovation work on the hotel within six months and that the hotel would reopen for occupation by guests by 1st July 2000. The respondent was not able to commence the rebuilding or redevelopment of or reopen the hotel in the year 2000.
- [7] On 7th December 2000 the first appellant in accordance with the provisions of section 3 of the Land Acquisition Act Cap 233 had a proposal to acquire the respondent's land for a declared public purpose. On 8th December 2000 the respondent applied for and obtained an ex-parte injunction against the Cabinet

Secretary and each member of the first named appellant restraining them and each of them from acquiring the respondent's lands.

- [8] On an application by the second named appellant made on the 12th January 2001 the ex parte injunction was set aside. On 19th January 2001 the Hon. Mr. Molwyn Joseph, Minister of Tourism wrote to Messrs Lake and Kentish Solicitors for the respondent a letter without prejudice advising the respondent, that the appellants, as I understand it, were withholding for six (6) months the making of the application to acquire the respondent's land.
- [9] On 12th February 2001 the Court of Appeal made a Consent Order by that Consent Order the second appellant agreed that the government would not proceed any further with proceedings to acquire the respondent's lands for a period of six (6) months commencing from the 1st day of February 2001. This six months period was separate from the six (6) months referred to in paragraph 8 of this judgment.
- [10] At the respondent's request the Governor General acting on the advice of Cabinet granted a Mr. Ian Moncrief Scott a Non- National Citizens Land Holding License in or about the month of February 2001, on the representation by Mr. Moncrief Scott that he would provide financing for the hotel to the tune of \$12 million dollars [see letter from Miss Joyce Kentish to Hon. Molwyn Joseph dated 7 December 2000 paragraphs 1, 5 and 6 thereof.]
- [11] On 19th February the Minister of Tourism wrote to Mr. Moncrief Scott advising him that all concessions and licenses had been approved by Government. In the last paragraph of that letter the Minister emphasized the importance of the project being implemented within the six (6) months period effective 1st February 2001.

- [12] However when the said matter was investigated by the second-named appellant he averred in affidavits that he was unable to discover anyone by the name of "Moncrief Scott". Needless to say the financing never materialized.
- [13] The respondent failed to commence the rebuilding/refurbishing or redevelopment of the hotel within the said period of six (6) months. As a result the Government commenced fresh acquisition proceedings to acquire the respondent's lands.
- [14] The resolution to approve the acquisition of the respondent's lands was passed by a majority of the House of Representatives on 12th February 2002 and by the Senate on 21st February 2002 in accordance with the provision of Section 3 of the Land Acquisition Act Cap. 233. From the records before me I am satisfied that it is clear that a Declaration of Acquisition was made by the Secretary to the Cabinet and was published in the Official Gazette on 7th and 14th March, 2002 in accordance with Section 3 of the Land Acquisition Act Cap. 233. However the respondent in a challenge before Mitchell J to the acquisition by judicial review.
- [15] Mitchell J. in granting the respondent's application said:
- " (a) The Claimant's case, if it is possible to summarize it in one sentence is essentially and among other things that the Crown gave an undertaking and entered into a Consent Order in the Court of Appeal to hold off the acquisition for a period for six months to permit the Claimant to take certain steps that the Claimant relying on that undertaking took steps; and spent large sums of money and was entitled to consider that it was performing as it had agreed to, and a legitimate expectation was thereby created, that the respondents were under an obligation to give the Claimant notice on their reliance on the effluxion of time and their failure to give such notice was so unfair as to amount to an abuse of power and a breach of the natural justice and that for the respondents to have proceeded to compulsory acquisition in those circumstances amounted to an illegality, an abuse of power in disregard of their duties to treat with the Claimant fairly and reasonably. I prefer and accept the arguments advanced by the Claimant. I do not accept the arguments for the respondents that certiorari is never available in land acquisition matters; or that if the court were to grant the relief sought by the Claimant the Court will necessarily be substituting its judgment for that of the Cabinet; or that the remedy of compensation provided by the Act renders certiorari unavailable; or that the Attorney General cannot by an undertaking

especially one embodied in a Consent Order made in the Court of Appeal fetter the exercise of the Cabinet's discretion to acquire lands for a public purpose; or that the allegations of abuse of process in this case are not supported by particulars. The issue raised by the Claimant will be contested by the defendants. It will be for the Court having heard the evidence and the argument to determine the validity of the claim. But the claim passes the test of a 'scintilla of a cause of action' (my emphasis).

(b) the constitutional relief sought is as set out at paragraph (8) above and the grounds are at paragraph (7). If it is proved that a cabinet in a particular case of acquisition acted in "abuse of process" or in a manner that was discriminatory, arbitrary, irrational, unreasonable, capricious, and affected by bias as claimed at paragraph (8) (c) above then it cannot be doubted that such an act is outside of the power given to Cabinet by the Land Acquisition Act, and the Constitution has given to the Courts the task of exercising supervisory control over the Cabinet in those circumstances. It will be for the Claimant to prove that that is what happened in this case. It may well be a difficult task, but it is a justiciable issue, it is more than a 'scintilla of a cause of action.'

(c) The alternative claim of misfeasance in public office is one known to the law. If the Claimant were to prove all the matters that it has set out in the Statement of Claim, then it is possible, subject to any argument that might be presented that damages flow to the Claimant as a result of a breach of a duty of care owed by the respondents in the public duties as a result. Difficult as it might be for a Claimant to prove it, is more than a 'scintilla of action.'

[16] I deal with the last point first. The learned trial Judge misconstrued the purpose of S.3 of the Land Acquisition Act, because in my view he could never consider misfeasance in public office unless and until it is established and it is proved beyond doubt that the members of Cabinet were motivated by fraud in acquiring the respondent's land. There is not one scintilla of evidence in support of this. Fraud has never been alleged. In this regard the learned trial Judge was embarking on an academic exercise.

[17] I now examine the question of legitimate expectation as raised by the respondent. This is predicated upon the consent order entered into by the learned Attorney General before the Court of Appeal that the Government would not proceed with the acquisition within six (6) months from that date. That undertaking to my mind

was clear, precise and unambiguous i.e. that the government would not proceed with the acquisition of the respondent's lands within six months of the giving of the undertaking. The undertaking was given on 10th day of February 2001 by a Consent Order in the following terms:

"It is ordered that the Respondent (the Attorney General of Antigua and Barbuda, Laurel Stevens, Cabinet Secretary and all Members of Cabinet) herein shall not proceed any further with proceedings to acquire the Half Moon Bay Hotel, the property of the Appellant/Applicant for a period of 6 months from the 1st day of February 2001 pursuant to the undertaking given to the Court of Appeal by the Honourable Attorney General on the 12th day of January (sic) 2001."

[18] Mr. Simonette, learned Counsel for the respondent in his written submissions argued that Cabinet failed or refused to institute or follow any consultation process with the applicant in effecting the government's change of policy to wit to resile from the agreement that had created the legitimate expectation of the applicant and instead to cause the acquisition of the applicant's land.

[19] Learned Counsel also argued that the government having given the undertaking, the respondent having spent money on the strength of the undertaking a legitimate expectation was created which could not be revoked by the effluxion of time. I entertain absolutely no doubt that the respondent's plea of legitimate expectation must fail. The argument that there was a change of government's policy is devoid of merit.

[20] It was stated quite clear and unequivocal that the government would not proceed to acquire the respondent's land for a period of six (6) months. The first Declaration to acquire the respondent's land was published on the 12th day of February 2002, some seven months after the expiration of the date of the undertaking.

[21] No promise was held out to the respondent that she would be consulted by Cabinet before the government embarked upon the acquisition as was argued by Mr. Simonette. (See for example **Attorney General of Hong Kong v NG Yuen**

Shin (1983) A. C. 629). The instant case is quite different. It was a bare promise that the government would not acquire the property within six (6) months. If the government had acquired within six (6) months, then of course different considerations would have arisen. But this is not the case here and therefore does not call for any analysis.

[23] I now turn to consider the Land Acquisition Act. Section 3(1) which provides:

"If the Cabinet considers that any land should be acquired for a public purpose they may, with the approval of the Legislature, cause a Declaration to that effect to be made by the Secretary to the Cabinet in the manner provided by this Section and the Declaration shall be conclusive evidence that the land to which it relates is for a public purpose."

[24] Section 3(2) provides:

"Every declaration shall be published in two ordinary issues of the Gazette and copies thereof shall be posted on one of the buildings (if any) on the land or exhibited at suitable places in the locality in which the land is situate, and in the declaration shall be specified the following particulars relating to the land which is to be acquired.

- [a] the parish or district in which the land is situate
- [b] a description of the land giving the approximate area and such other particulars as are necessary to identify the land.
- [c] in cases where a plan has been prepared the place where, and time when a plan of the land can be inspected.
- [d] the public purpose for which the land is required."

[25] Section 3(3) provides:

"Upon the second publication of the Declaration in the Gazette the land shall vest absolutely in the Crown, and the authorized officer and his agents, assistants and workmen may enter and take possession of the land accordingly."

[26] In **Spencer v the Attorney General and others** (1999) 3LR C. At page 17 of his judgment the learned Chief Justice Sir Dennis Byron said:

"The main objection to the prolonged argument on this issue is that it is well settled law that the effect of S3 (1) of the Land Acquisition Act..... makes the determination of the question as to whether an acquisition is made for a public purpose is non-justiciable in the absence of fraud."

- [27] The respondent in the case at bar is not challenging the acquisition on the ground of fraud. It is not alleging that the acquisition is not for a public purpose. All that the respondent alleges is that the government could not lawfully acquire its property without first having consultation with the respondent based on a legitimate expectation by the government that the respondent's land would not be acquired for a period of six months.
- [28] In my considered opinion once it is established that the provisions of Section 3 were complied with and the acquisition was for a public purpose then the land shall vest in the Crown. What is justiciable in my view is whether or not there was strict compliance with the law and whether the acquisition was for a public purpose.
- [29] In my judgment thereafter, if it is established that the acquisition was in strict conformity with S.3 of the Land Acquisition Act and the acquisition was for a public purpose, then the provisions of the Antigua and Barbuda Constitution are triggered. That is to say the compensation must be fair, it must be within a reasonable time, (see section 9 of the Antigua and Barbuda Constitution.)
- [30] I entertain no doubt that any constitutional matter which may arise, may only arise after the acquisition of the property because s.3 of the Land Acquisition Act is preserved by paragraph 9 of Schedule 2 of the Constitution of Antigua and Barbuda. (see **Mills (Charles) and Another Attorney General of St. Christopher and Nevis** 45 W.I.R. 125.)
- [31] Before I leave this appeal I must perforce deal with an issue raised by the respondent in its written submissions. Under the relief sought by the respondent and repeated in its submissions.
- [32] An order of certiorari to remove into the High Court of Justice and quash the decision of Cabinet to cause the Parliament to approve by resolution that a

declaration be made by the Secretary to the Cabinet in a manner provided by the Act to acquire the Applicant's lands as described in the Schedule of a resolution passed by Parliament namely in the House of Representatives on 12th day of February 2002 and in the Senate on 21st February 2002.

[33] What is amazing to my mind is that the respondent was not alleging that the declaration was contrary to the provisions of the Act. What was contended for was: "Quash the decision of the Cabinet in the manner provided by the Act...." on the 8th December 2000 the learned trial Judge was misled and granted an ex parte injunction against the Cabinet to prevent the acquisition of the land. This to my mind is tantamount to preventing Parliament from passing legislation. It is an interference with legislative policy of the government. That cannot be the role or function of the Court. If and when the legislation is enacted, the Court's functions is, if a challenge is mounted eg. on the basis of constitutionality or non-compliance with legislative provision to examine the legislation to determine whether or not it satisfies or confirms with any of those requirements.

[34] The Court must be careful not to trespass into the domain of the legislature. I cannot think of anything more important than this concept in maintaining our judicial independence. We are a branch of government which does not face the hostility of the public in campaigns to explain our policy to them. The politicians are faced with that task they make up the Executive. They are answerable to the public for their economic mismanagement. We as judges are not. That is in my view what prompted Bernard J.A. (as he then was) to make the following observation in **Attorney General v K. C. Confectionery Ltd** 34 WIR 387 at page 417 when he said:

"The Minister's functions are purely executive in nature. That being so, I mean no disrespect in making the observation that in matters of the kind courts must be careful not to appear to usurp functions which are purely within the plenitude of the powers of another organ of the State. Constitutionally the executive is the entity which is charged with the responsibility for the economic development of the country and by and large it is the body to determine how this is to be charted. There are

ultimate constitutional means whereby the citizen can record his disapproval of executive policy.”

[35] I have no doubt in my mind that the issue of legitimate expectation cannot avail the respondent. This in my opinion was the main plank of the attack of the respondent as to the validity of the acquisition of the property. The other issue raised was the constitutionality of the acquisition. As I have said above that matter arises after the taking of the respondent's property. The respondent having challenged the acquisition it cannot be said, if payment was not made, that it was not prompt. In any event this is not before us.

[36] There being no challenge to the validity of the legislation except what is referred to above which in my opinion must fail.

[37] The appeal is therefore allowed. The decision of the learned trial Judge is hereby set aside.

[38] Costs to the appellant agreed at \$ 100,000.

Albert Redhead
Justice of Appeal

I concur

Sir Dennis Byron
Chief Justice

I concur

Satrohan Singh
Justice of Appeal