ANGUILLA

IN THE HIGH COURT OF JUSTICE

ANGUILLA CIRCUIT

CLAIM NO. AXAHCV 2003/0074

In The Matter of a Declaration dated the 30th day of October 2003 for the compulsory vesting in the Crown of lands forming part of the Forest Estate in the Island of Anguilla vide Registration Section South East Block 78913B Parcel 100

And

In The Matter of That Part of The Forest Estate vide Registration Section South East Block 78913B Parcel 126

And

In The Matter of That Part of The Forest Estate vide Registration Section South East Block 78913B Parcel 284

And

In The Matter of the LAND ACQUISITON Act, Revised Statues of Anguilla, Chapter L10, Sections 2, 3 (d), 4, 6, 9, 10, 11, 12, 16, 18, 19, 20, 23, and 28

And

In The Matter CROWN PROCEEDINGS ACT Chapter C160 Sections 16, 19, 20 and 21.

And

In the Matter of The
ANGUILLA
CONSTITUTION
ORDER 1982, Sections
1 (a) and (c) 2, 7, 9, 13, 16

BETWEEN:

BERNICE V. LAKE, QC	1st Claimant
AUCKLAND B. KENTISH	2nd Claimant
DR. CUTHWIN L. LAKE, CBE	3rd Claimant
RONALD BROOMES	4th Claimant
GEORGE L. M. KENTISH	5th Claimant
BERNICE V. LAKE, QC and DR. CUTHWIN L. LAKE, CBE (as Personal Representative of the Estate of Albenah Lake-Hodge)	6th Claimant
RONALD BROOMES (as Personal Representative of the Estate of Clarion Broomes	7th Claimant
AUCKLAND B. KENTISH (as Personal Representative of the Estate of Ellen Lake	8th Claimant
BERNICE V. LAKE, QC and AUCKLAND B. KENTISH (as Personal Representative of the Estate of Carmencita Arthurton	9th Claimant

AND

THE ATTORNEY GENERAL OF ANGUILLA
THE MINISTER OF SOCIAL DEVELOPMENT
THE MINISTER OF INFRASTRUCTURE

Defendants

Dr. Henry Browne and with him Mr George Lake and Mrs Navine Fleming-Kisob for the 1st, 2nd, 3rd, 4th, and 5th claimants.

Ms Joyce A. Kentish and Mrs Josephine Gumbs-Connor for the 6th, 7th, 8th, and 9th claimants in their capacity as Personal Representatives.

Mr Alan Alexander QC, Mr Patrick Patterson and Mr Ivor Greene for the defendants.

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2004: January 21, 22, 23, 24
April 5

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JUDGMENT

[1] BAPTISTE J: - The claimants are the owners of several parcels of land in Anguilla which together constitute the Forest Estate. These parcels are parcels 100, 126 and 284. The First and Fifth claimants are respectively the owners of parcels 100 and 284 in their respective personal capacities. The First, Second and Third claimants are the registered proprietors as beneficial owners of one-seventh share each of parcel 126, and the said claimants together with the Fourth claimants are the personal representatives and trustees of the remaining four shares of the said parcel 126.

[2] In July 2003 the Government of Anguilla took a decision to extend the Wallblake Airport to 6000 feet. The extension necessitates the acquisition of 26 acres of parcel 100. On 14th October 2003 the Government tabled a resolution before the House of Assembly to approve a Declaration made by the Governor in Council to compulsorily acquire 26 acres of Parcel 100. The resolution was passed by the House on the 16th October 2003. A Notice of Declaration of Acquisition under the Land Acquisition Act 2000 for the said acquisition was published in the Gazette on 31st October 2003. By the provisions of section 2 (3) of that Act, upon the second publication of the Declaration in the Gazette, the land vests absolutely in the Crown. On the 30th November 2003 the second publication of the Declaration was issued in the Gazette.

[3] The claimants commenced proceedings in the High Court challenging the constitutionality of the Land Acquisition Act 2000 and the Crown Proceedings Act. They submitted that the principles of assessment of compensation set forth in the Act contravene sections 1 and 7 of the Constitution of Anguilla 1982, in that they are denied just and full compensation. The composition of the Board of Assessment and the manner of determining adequate

compensation violate their fundamental right to have their civil rights adjudicated by an independent and impartial tribunal as guaranteed by section 9 (2) of the Constitution. They also challenged the constitutional authority of the legislature to provide for a Board of Assessment.

[4] The claimants also submitted hat the method of enforcement of payment of compensation by suit against the Attorney General in accordance with the provisions of the Crown Proceedings Act violates the constitutional requirement for prompt payment and adequate compensation. They contended that sections 16, 19, 20 and 21 of the Crown Proceedings Act are inconsistent with section 16 of the Constitution.

[5] The claimants contended that the works to be executed under the airport expansion project constitute more than minimal impairment to their enjoyment of their property, their rights to privacy and to life and health. They also alleged discrimination on the grounds of origin and political opinion. Further, they claimed that the decision or policy to extend the airport to 6000 feet was arbitrary, irrational and unreasonable, and a fair balance has not been struck between the public purpose and the protection of their rights to life, privacy, enjoyment of property and the protection of law. They alleged a breach of the separation of powers doctrine and further submitted that the vesting declaration is void and of no effect. They seek declaratory, injunctive and other relief.

IS THE VESTING DECLARATION VOID?

[6] I will first deal with the vesting declaration. The claimants contended that the Declaration for compulsory acquisition made pursuant to section 2 of the Land Acquisition Act is ineffective and void. They submitted that section 2 (2) of the Land Acquisition Act, in requiring a description of the land to be given and such particulars as are necessary for identification of the land, connotes a requirement for certainty by metes and bounds. They pointed out that the Declaration for compulsory acquisition relates to 26 acres of Parcel 100 and Parcel 100 is in excess of 110 acres. It is their view that in the absence of a

survey of the 26 acres, there are no particulars for statutory compliance that can identify the land. They contended that in the absence of such particulars on the face of the Declaration, the Declaration is void.

[7] Section 2, subsection 2 of the Land Acquisition Act states:

> "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 situated, and in the declaration shall be specified the following particulars relating to the land which is to be acquired.
>
> (a) the district in which the land is situated;
>
> (b) a description of the land giving the approximate area and such other particulars as are necessary to identify the land;"

Section 2 (3) states that 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. The defendants pointed out that the Land Acquisition Act makes special provisions as to the time when it will be lawful for the authorized officer to enter upon and survey the land which is in the process of being compulsorily acquired. Pursuant to subsection 3 of section 2, the authorized officer may enter upon the land and demarcate the same only after the publication of the second declaration and the vesting of the land in the Crown. Section 3 (a) and (d) authorizes the authorized officer to enter upon, survey and demarcate the land likely to be compulsorily acquired after the publication of the notification pursuant to the provisions of that section.

[8] The requirement in subsection 2 (b) of section 2, that the declaration shall specify a description of the land giving the approximate area and such other particulars as are necessary to identify the land, clearly does not connote a requirement for certainty by metes and bounds. The requirement for specifying "the approximate area" of the land to be required does not evince a legislative intention that there be certainty of the land by metes and bounds. In the circumstances, the requirements of the Land Acquisition Act

have been satisfied and the Vesting Declaration is not void. The claimants are not entitled to a declaration that the vesting declaration made pursuant to section 2 of the Act is void and ineffectual, neither are they entitled to an order quashing the said vesting declaration.

DOES THE LAND ACQUISITION ACT 2000 VIOLATE SECTION 7 OF THE CONSTITUTION?

[9] Section 7 of the Constitution deals with protection from deprivation of property. Section 7 (1) states:

> "No interest in or right over any property of any description shall be compulsorily acquired and no such property shall be compulsorily taken possession of, except by or under the provision of a written law which –
>
> (a) prescribes the principles on which and the manner in which adequate compensation thereto is to be determined;
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> (b) requires the prompt payment of such adequate compensation;
>
> (c) prescribes the manner in which the compensation is to be given; and
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> (d) the manner of enforcing the right to any such compensation."

[10] The claimants submitted that the principles of assessment detailed in section 18 of the Act are inadequate to assure to them the payment of adequate compensation. Section 18 (2) states:

> "The value of the land shall, subject as hereinafter provided, be taken to be the amount which the land in its condition at the material time, might be expected to realize if sold at that time in the open market by a willing seller for the purpose of being put to the same use to which such land was being put at the material time."

Section 18 (3) states:

> "In ascertaining the value of such land regard shall be had to the net amount of any income derived from that land at the material time, and where no income is derived therefrom at that time, to the rent at which the land might, at the material time, reasonably be expected to be let from year to year for the purpose of being put to the same use to which it was being put at that time."

Section 18 (4) states:

"For the purposes of subsections (2) and (3) –

(a) land shall be deemed to be used for agricultural purpose unless the party claiming compensation proves to the satisfaction of the appropriate authority that at the material time such land was being used for a purpose other than agricultural.

(b) 'material time' means the date 12 months prior to the date of the second publication in the Gazette of the declaration under section 2."

[11] The claimants contended that section 18 of the Act is also deficient in that there is no proper place for the principles of current market value. The prescription that lands are agricultural lands constitutes a denial of adequate compensation. That presumption is predicated upon a false premise, namely that the land is to be deemed to be agricultural land at a time when Anguilla is no longer engaged in agriculture as an economic activity, but rather promotes itself as a high end resort destination. The claimants submitted that the character and value of the land in question must be taken against this economic backdrop. The claimants also argued that a further fatal inadequacy of section 18 is evident in the provision that for the purpose of assessment of compensation, the date of valuation is 12 months before the Notice. Adequate compensation would require that the time of valuation must be at the time of assessment of the adequate compensation.

[12] The claimants also take issue with section 20 of the Act which imposes a fixed rate of interest of 4% on compensation assessed. Section 20 states:

> "The Board, in awarding compensation may add thereto, interest at the rate of 4% per annum, calculated from the date upon which the authorized officer entered into possession of the land acquired until the date of the payment of the compensation awarded by the Board."

The claimants contended that a fixed rate of interest is incompatible with the constitutional requirement for adequate compensation.

[13] The defendants stated that on a true construction of the Land Acquisition Act and the Constitution, the Act comports with the relevant provisions of the Constitution in every material particular. The defendants submitted that there is a presumption of

constitutionality which can only be displaced by evidence showing that there has been a clear transgression of constitutional principles, and the burden of showing this is on the claimants.

[14] The defendants also submitted that the compulsory acquisition of land is permissible constitutionally and not in contravention of the right to the enjoyment of property and the protection of the law guaranteed by section 1(a) of the Constitution, if the acquisition is carried out in accordance with the prescriptions and provisions of a written law which makes provisions for the matters stipulated in section 7 (1) (a), (b), (c) and (d) of the Constitution. They argued that the Land Acquisition Act satisfied the conditions and prescriptions laid down in section 7 (1) of the Constitution and is therefore constitutional.

[15] The written law which seeks to satisfy the requirements of section 7 of the Constitution in respect of prompt payment of adequate compensation is the Land Acquisition Act 2000. In that regard sections 18 and 28 (2) are important. With respect to adequate compensation, two factors emerge from section 18. They are: (i) the deeming of land to be agricultural land and (ii) the value of the land for the purpose of compensation being the date of 12 months prior to the date of the second publication in the Gazette. I now consider these factors. I consider the 12-month period to be inconsistent with the requirement for adequate compensation. Adequate compensation should involve a coincidence of the time of calculation of the value of the land and the time of assessment of the adequate compensation.

[16] With respect to the deeming of the land to be agricultural, it is not disputed that Anguilla is not an agricultural country. It promotes itself as a high-end resort destination. The court takes judicial notice of the fact that agricultural land would be of a lower sale value than non-agricultural land. The right to protection of property is a fundamental right. A person with an interest in property is under no obligation to use it for agricultural, industrial or any particular purpose. In a case such as the present where the country is not an agricultural country and the land is not being used for agricultural purposes but because of its

character, size or location, has a great developmental value, deeming the land to be used for agricultural purposes would in my view entail negative consequences for adequate compensation. The value of the land in question has to be judged against the economic reality of Anguilla, a non-agricultural island promoting itself as a high-end tourist destination. Deeming land to be used for agricultural purposes seems to me to have the effect of displacing or ignoring current market value which should be a critical guide for determining the adequacy of compensation. It also has the effect of disregarding the particular potentiality of the land. In the premises in so far as section 18 of the Land Acquisition Act deems land to be used for agricultural purposes in determining its value for the purpose of compensation, the section violates the constitutional requirements for the payment of adequate compensation, and I do declare.

[17] While it is true that the principles of assessment in section 18 are inadequate to assure adequate compensation, there is no merit in the submission that the design and structure of the Act is incompatible with the concept of a partial acquisition. The Act makes provisions for compensation consequent upon compulsory acquisition and its provisions cover both partial and complete acquisition.

[18] It appears to me that a fixed rate of interest of 4% on compensation assessed as provided by section 20 of the Land Acquisition Act is also a denial of adequate compensation; as the interplay of market forces is thereby stifled.

[19] Section 28 (1) of the Land Acquisition Act provides that compensation awarded by the Board shall be paid out of the Treasury on the warrant of the Minister of Finance. Section 28 (2) provides for prompt payment of compensation. It states that the payment of any compensation awarded shall be promptly made and shall be in cash. Section 28 (3) provides that the right to any compensation awarded is enforceable against the Attorney General in accordance with the provisions of the Crown Proceedings Act. The claimants contended that this is a prescription for inordinate delay of the payment of compensation. I do not consider that section 28 (3) violates the constitutional prescription for the prompt

payment of compensation.

IS THE LAND ACQUISITION ACT 2000 AMENABLE TO MODIFICATION?

[20] The claimants contended that the Land Acquisition Act 2000 is not an existing law. It is a post constitutional law which was revised and promulgated in 2000 and as such is not subject to modification, adaptation, qualification or exception. The claimants pointed out that prior to the Land Acquisition Act 2000, the law governing the compulsory acquisition of land in Anguilla was contained in the Land Acquisition Ordinance Cap 273 contained in the Revised Laws of St. Christopher, Nevis and Anguilla 1961 and it contains provisions markedly different from the Land Acquisition Act 2000.

[21] The defendants submitted that the Land Acquisition Act 2000 is an existing law within the meaning of section 6 (3) of the Anguilla Constitution Order 1982 and therefore its provisions can be modified pursuant to section 6 (2) of the said Order. Section 6 (2) of the Anguilla Constitution Order 1982 provides that the existing laws shall be construed with such modifications, adaptations, qualifications and exceptions as are necessary to bring them into conformity with the Constitution. The defendants stated that the Land Acquisition Act 2000 was revised and promulgated and brought into force as part of the Revised Statutes and Regulations showing the law as at 15th December 2000. In pursuance of section 7 (3) of the Revised Statues and Regulations Act No. 12 of 1998, the 5th of November 2001 was declared as the day upon which the edition of the Revised Statutes and Regulations came into force. The defendants also rely on section 9 (2) of the Revised Statutes and Regulations Act which provides that the Revised Statutes and Regulations shall not be held to operate as new law but shall be construed and have effect as a consolidation of the law contained in the Statutes and Regulations for which the Revised Statutes and Regulations were substituted.

[22] Guidance on the matter is obtained from George Worme and Grenada Today Limited and the Commissioner of Police (Privy Council Appeal No. 71 of 2002) a case relied upon by the claimants. In George Worme attention was drawn to section 14 (2) of the

continuous Revision of the Laws Act 1994. The section provided that when the Governor General brings the whole or part of the continuous Revised Edition of the Laws into force, then from that date and to the extent specified in the proclamation, the enactment in the whole or the part so proclaimed shall be substituted for the enactments therein reproduced and revised. Lord Rodger opined at paragraph 33, that "it would not be legitimate to construe the term existing law" generously so as to cover such substituted provisions since, where that was intended other Caribbean Constitutions made special provision to include such re-enactments." The Constitutions of Jamaica, Barbados and Trinidad and Tobago were referred to. At paragraph 34, Lord Rodger continued: "It is indeed plain that in these other Constitutions, care has been taken to extend the meaning of "existing law" so as to cover re-enactments."

[23] The Land Acquisition Act 2000 postdated the Constitution. It formed part of the law of Anguilla only from 2001. It was not pat of the law before the 1982 Constitution. Prior to the Land Acquisition Act 2000, the law governing compulsory acquisition was contained in the Land Acquisition Ordinance Chapter 273. The Land Acquisition Act 2001 was in essence a substituted re-enactment for the Land Acquisition Ordinance Chapter 273. It would not be legitimate therefore to construe the term "existing law" generously so as to cover such a substituted re-enactment as the Land Acquisition 2000, since if that were intended the Constitution would contain provision to include such re-enactments. The Anguilla Constitution contains no provision to extend the meaning of "existing law" so as to cover re-enactments. In my judgment, the Land Acquisition Act 2000 is not an existing law and therefore is not subject to adaptations, modifications, qualifications or exceptions to bring it into conformity with the Constitution.

[24] IS THE BOARD OF ASSESSMENT CONSTITUTIONAL?

The claimants contended that the issue whether the Constitution has clothed the Legislature with authority to confer upon the Executive the power to appoint a Board of Assessment with jurisdiction alternative to but equal with that of the High Court in matters pertaining to land acquisition is central to the constitutionality of the Land Acquisition Act

2000.

[25] The claimants conducted an historical survey of the Anguillan Constitutions from 1967 to 1982. This survey revealed that the 1967 Constitution contained a provision – subsection 6 (2) - which was not re-enacted in the 1976 or 1982 Constitutions.

[26] Subsection 6 (2) states:

> "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 –
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> (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."

[27] The claimants pointed out that section 7 of the 1976 and 1982 Constitutions of Anguilla does not contain any equivalent to section 6 (2) of the 1967 Constitution. They therefore submitted that the 1982 Constitution does not make provision separate and apart from section 16 for any additional access to the High Court for the determination of matters relating to compulsory acquisition of land. They also submitted that neither the 1976 nor the 1982 Constitutions of Anguilla contain any proviso permitting the Legislature to set up an alternative tribunal as is also provided in section 6 (2) of the St. Christopher–Nevis-Anguilla Constitution 1967.

[28] The defendants submitted that the 1967 Constitution has no relevance to the interpretation of the 1982 Constitution. Further, the jurisdiction given to the High Court pursuant to section 6 (2) of the 1967 Constitution was a jurisdiction, separate and apart from its

general and traditional jurisdiction. They also contended that the conjoint effect of sections 47 and 7 of the 1982 Constitution suffices and that section 6 of the Constitution Order shows that the legislature would have such power.

[29] Section 47 of the Constitution provides the power to make laws for the peace, order and good government of Anguilla. Section 7 prohibits the compulsory acquisition of interest in or right over property and the compulsory taking of possession of such property except by or under the provisions of a written law which, inter alia, prescribes the principles on which and the manner in which adequate compensation is to be determined. Section 9 (2) contemplates the establishment of an authority prescribed by law, other than a court, to determine the existence or the extent of civil rights or obligations.

[30] Sections 47, 7 and 9 of the Constitution have to be read as a whole. The Land Acquisition Act 2000 seeks to satisfy the requirement of section 7 of the Constitution. A critical provision of the Act concerns the Board of Assessment. A Board of Assessment has full power to assess, award and apportion compensation. Questions or claims relating to the payment of compensation under the Land Acquisition Act 2000 would involve the determination of the existence or the extent of civil rights or obligations. Therefore A Board of Assessment established under the Land Acquisition Act 2000 is an authority prescribed by law for the determination of the existence or the extent of civil rights or obligations, in terms of section 9 (2) of the Constitution. Section 16 (3) states that an appeal shall lie against a decision of the Board to the Court of Appeal. In my judgment, the Constitution has clothed the legislature with the authority to confer upon the Executive the power to appoint a Board of Assessment in matters relating to land acquisition.

IS BOARD OF ASSESSMENT INDEPENDENT AND IMPARTIAL?

[31] The claimants argued that the Board of Assessment established by the Land Acquisition Act is not an independent and impartial tribunal appointed for the determination of their civil rights and obligations in accordance with section 9 (2) of the Constitution. They contended that the Board is appointed by the Executive to determine the Executive's

cause; is controlled by the Executive and is not therefore independent and impartial, albeit that a judge of the High Court is the Chairman. The Board is an ad hoc body and lacks institutional independence. No institutionalism can be imported into an ad hoc body appointed by the Executive to perform a judicial function upon a matter in which the Executive is a party. The claimants also submitted that the appointment of the other two members of the Board as nominees of the parties constitutes the Board as a parties' tribunal and robs it of the guarantees of both independence and impartiality. Applying the perception test, the Board, appointed as it is by the Executive, with each party having a nominee, cannot be perceived by the public or a party as an impartial tribunal. The claimants contended that the selection of a judge as Chairman speaks to the expectation of personal judicial independence, but the appointment to the post of Chairman emanates from the Executive and vitiates the requisite institutional judicial independence.

[32] The defendants argued that the words "independent and impartial" connote the freedom on the part of the tribunal to come to a just conclusion. The test to determine the question of impartiality is whether there is a reasonable apprehension of bias. The defendants contended that there is not, by virtue simply of the method of appointment, any real or apparent dependence of the Board of Assessment on the Executive, neither is there any actual or apparent interference nor the exercise of direct control of the Executive. The appointment by the Executive of one member of the Board, without any demonstration of actual interference or direct control is not enough to support the notion of dependency of the Board on the Executive.

[33] Section 9 (2) of the Constitution states:

> "Any court or other authority prescribed by law for the determination of the existence or the extent of civil rights or obligations shall be established by law and shall be independent and impartial."

[34] Section 10 (1) of the Land Acquisition Act provides that all questions and claims relating to the payment of compensation under the Act and to the apportionment of such compensation shall be submitted to a Board of Assessment to be appointed in accordance

with the provisions of section 11. Section 10 (2) provides that a Board of Assessment shall have full power to assess, award and apportion compensation.

[35] Section 11 (1) provides that as soon as it becomes necessary to do so, the Governor in Council shall cause a Board of Assessment to be appointed. The constitution of a Board is dealt with in section 11 (2). A Board of Assessment shall be constituted of a Judge of the High Court who shall be Chairman; a member to be appointed by the Governor in Council; and a member to be nominated by the owner of the land to be acquired.

[36] In Magill v Porter, Magill v Weeks 2001 UKHL 67, Lord Hope stated at para. 88.

> "There is a close relationship between the concept of independence and that of impartiality. In Findlay v United Kingdom [1997] 24 EHRR 221, 244 para 73 the European Court said:
>
> > 'The Court recalls that in order to establish whether a tribunal can be considered "independent," regard must be had, inter alia, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.
> >
> > As to the question of 'impartiality' there are two aspects to this requirement. First the tribunal must be subjectively free from personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantee to exclude any legitimate doubt in this respect.
> >
> > The concept of independence and objective impartiality are closely linked…'
>
> In both cases the concept require not only that the tribunal must be truly independent and free from actual bias, proof of which is likely to be very difficult, but also that it must not appear in the objective sense to lack these essential qualities."

[37] A Board of Assessment is an ad hoc body appointed by the Governor in Council as soon as it becomes necessary to do so. As indicated in Morris v United Kingdom (2002) 34 EHRR 1253, paras 70 – 72, the ad hoc nature of the appointment of a tribunal is not

sufficient in itself to render the make-up of the tribunal incompatible with the independence requirement of article 6 (1) of the Convention. (The equivalent to section 9 (2) of the Constitution of Anguilla) It however made the need for the presence of safeguards against outside pressure all the more important. A Board consists of three members. A judge of the High Court is Chairman. Of the other two members, one is nominated by the owner of the land acquired, while the other is appointed by the Governor in Council. Does the Constitution of the Board lead to the conclusion that it does not satisfy the requirements of independence and impartiality postulated by section 9 (2) of the Constitution?

[38] With respect to a judge of the High Court as Chairman of the Board, it is to be noted that judges of the High Court are not appointed by the Governor in Council. They are appointed by the Judicial and Legal Services Commission. Judges enjoy security of tenure and there are concomitant safeguards in respect of their independence. A judge, as Chairman, is not liable to be disciplined in respect of any decision he may arrive at with respect to compensation. His prospects of advancement as a judge has nothing to do with his decision as Chairman or his functioning as Chairman. He is not liable to suffer any detriment pursuant to any decision he may arrive at as Chairman of a Board. A judge brings to his position of Chairman the independence and impartiality of his judicial office. There is no risk of outside pressure being exerted. Further a well-informed observer is aware that a judge is trained to be objective and dispassionate. I am of the view that as Chairman, a judge is both independent and impartial. His presence provides safeguard for the independence and impartiality of the Board.

[39] The allegation of impartiality is predicated upon the Constitution of the Board. The court has to examine all the circumstances which have a bearing on the suggestion that the Board is biased. It must then ask itself whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility or real danger that the Board was biased. (Porter and another v Magill [2002] 1 ALL ER 465). In R (on the application of PD) v West Midlands and North West Health Review Tribunal 2003 EWHC 2469, Silber J stated at para 16: One is entitled to conclude that such an observer

(a fair minded and well informed observer) will adopt a balanced approach. This idea was succinctly expressed in Johnson v Johnson 2000 CLR 488, 509 at para 53 by Kirby J when he stated that a reasonable member of the public is neither complacent nor unduly sensitive or suspicious, per Lord Steyn in Lawal v Northern Spirit Ltd. [2003] 1CR 856, 862 [14].

[40] Looking at the Constitution of the Board I am of the view that a fair minded and well informed observer, that is one who is neither complacent, nor unduly sensitive or suspicious, would come to the conclusion that the Board is impartial. Such an observer would undoubtedly consider that the Board is not stacked in favour of any one party. Both parties have one member on the Board, undoubtedly to look after their interests, and a judge of the High Court is the Chairman. Such an observer would also recognize that a judge is trained to be objective and impartial. The Board would be impartial from an objective viewpoint and clearly satisfies the test of objective impartiality. In the premises I do not accept the claimants' contentions and submissions. In my judgment, a Board of Assessment established by the Land Acquisition Act is an independent and impartial tribunal in accordance with section 9 (2) of the Constitution.

SEPARATION OF POWERS

[41] The claimants submitted that the provisions under the Land Acquisition Act 2000 for the appointment and constitution of the Board of Assessment as well as the retention of the Executive power to give directions to the Board violate the principles of the separation of powers. They also asserted that the discretionary powers of the Chairman are curtailed in that his discretion is exercisable in accordance with the directions of the Executive thus constituting a breach of the separation of powers.

[42] Section 11 of the Land Acquisition Act provides that where the Governor in Council is satisfied that the owner of the land has refused to exercise his right to nominate a member to the Board or has unreasonably delayed such nomination, or where the persons

interested in the land have failed to agree upon such nomination, the Governor in Council, by order in writing, may direct the Chairman to proceed with the inquiry and the Board should be deemed to be lawfully constituted without the presence of such member. I do not consider the section to curtail any discretion the Chairman has. The section confers a discretion upon the Governor in Council. There is a need for expedition in such matters. The Constitution speaks of prompt payment of adequate compensation. The role of the Board is critical in that regard.

[43] Section 12 provides for various documents to be sent to the Board by the authorized officer, including a report. Section 12 (2) states:

> "The report to be sent to the Board shall state the opinion of the authorized officer, and his reasons for such opinion, upon each of the following matters –
>
> (a) what is a fair and proper description of the land acquired, including particulars of any building, trees or standing crops thereon;
>
> (b) the approximate acreage of the land;
>
> (c) the value of the land for the purposes of compensation under this Act;
>
> (d) the amount of provisional compensation which should be paid for the land, including any damage payable in respect of entry into possession;
>
> (e) the apportionment of the provisional compensation among the persons interested in the land in respect of their interests."

[44] It must be noted that where a Board is appointed it has to hold a public inquiry. The procedure at the inquiry, the summoning of witnesses and all questions incidental to the inquiry shall be governed by the provisions of the laws for the time being in force relating to civil proceedings in the High Court. Section 15 authorizes the Board at any time, before, during or after an inquiry to enter upon and inspect any land for any purpose connected with such inquiry. It is only at the conclusion of the inquiry that the Board shall decide upon claims for compensation and make an award.

[45] The claimants further submitted that the process governing the acquisition under the Land Acquisition Act violates the doctrine of the separation of powers. The reasons being:

(a) the Attorney General is an integral part of the Governor in Council which made the decision to compulsory acquire the land;

(b) the Attorney General is part of the House of Assembly which must give statutory approval to the decision to make the declaration of compulsory acquisition under section 2 of the Act.

(c) the Attorney General is part of the composition of the Governor in Council which is authorized by section 11 of the Act to appoint the Board of Assessment;

(d) the Attorney General is part of the Executive Council which under section 26 of the Act directs the fees of the assessors and authorizes the reimbursements of travelling and subsistence expenses incurred by the Board of Assessment.

[46] I do not see how the involvement of the Attorney General in the matters referred to, violates the separation of powers doctrine. In my judgment, the Land Acquisition Act does not violate the separation of powers doctrine.

THE CROWN PROCEEDINGS ACT

[47] The claimants submitted that in light of the wide and unfettered powers of the High Court in its original jurisdiction conferred by section 16 of the Anguilla Constitution for the protection and guarantee of the fundamental rights and freedoms of the citizen, sections 16, 19, 20 and 21 of the Crown Proceedings Act are inconsistent with and violate the provisions of section 16 of the Constitution in so far as they:

(a) "preclude the Court from making orders, other than declaratory orders against the Crown;

(b) preclude the Court from granting injunctions or making orders to give relief against the Crown for the protection of the fundamental rights and freedoms declared, guaranteed and enshrined in Chapter 1 of the Constitution of Anguilla, 1982 or the European Human Rights Treaties and Protocols thereto.

(c) preclude the Court from making adequate orders with respect to the rate of interest commensurate with the payment of adequate compensation as mandated by section 7 of the Constitution."

[48] The defendants stated that no specific basis is set out in the fixed date claim form or the affidavit in support, establishing grounds for the unconstitutionality of sections 16, 19 and 21 of the Crown Proceedings Act. The defendants submitted that the injunction sought against the Ministers is an injunction against the Crown. They stated that there is no power at common law for the grant of an injunction against the Crown. (Juandoo v Attorney General of Guyana 16 WIR 141 (PC).) They contended that this position was preserved in section 16 of the Crown Proceedings Act.

[49] The defendants also argued that the Act precludes an injunction against officers and agents of the Crown if the granting of an injunction has the effect of an injunction against the Crown. They contend that the immunity will protect the officers or servants of the Crown where they are performing duties owed by the Crown itself. The Act does not preclude the grant of an injunction against servants and officers of the Crown to restrain unlawful action or to enforce the performance of a duty owed by the servant or officer himself (M v Home Office (1994) 1 AC 377).

[50] The issue of Crown immunity was visited by the Privy Council in Jennifer Gairy (as administratrix of the estate of Eric Matthew Gairy deceased v the Attorney General of Grenada, (Privy Council Appeal No. 29 of 2000) a case relied on by the claimants. In Jennifer Gairy, the Board specifically stated: "The Board cannot regard Juandoo as an accurate statement of the modern constitutional law applicable in Grenada." [Para 19 (4)]. With respect to M v Home Office, the Board said: "The reasoning in M v Home Office cannot be relied on to deny the appellant relief to which he was entitled under the Constitution of Grenada." [Para 19 (4)]. The Board stated that in M v Home Office, the House of Lords defined the circumstances in which injunctive relief may be granted against Ministers of the Crown and the extent to which such orders may be enforced. [Para 19 (4)].

[51] In Jennifer Gairy, the Board stated "it is fallacious to suppose that the rights, powers and immunities of the Crown are immutable. They have over time been attenuated and

abridged …" [Para 19 (1)]. Historical common law doctrines restricting the liability of the Crown or its amenability to suit cannot stand in the way of effective protection of fundamental rights guaranteed by the Constitution." [Para 19 2)]. In interpreting and applying the Constitution of Grenada today, the protection of guaranteed rights is a primary objective, to which the traditional rules of the common law must so far as necessary yield. [Para 19 (3)]. The Board stated at para 23:

> "Having proved a breach of the right protected by the Constitution having obtained a money judgment and having failed to obtain full payment, the appellant now seeks an effective not merely a nominal, remedy. The court has power to grant such a remedy. And if it is necessary to fashion a new remedy to give effective relief, the court may do so within the broad limits of section 16. Whereas, in granting a person constitutional relief not related to Chapter 1, the court may, under section 103 (1) "grant to that person such remedy as it considers appropriate being a remedy available generally under the law of Grenada in proceedings in the High Court," the court's powers under section 16 (2) are not so limited. The court has, and must be ready to exercise, power to grant effective relief for a contravention of a protected constitutional right."

[52] The observations made by the Board in respect of Grenada would also apply to Anguilla, as the constitutional provisions in section 16 are similar. Section 16 of the Constitution of Anguilla states:

> 16. (1) "If any person alleges that any of the provisions of sections 2 to 15 (inclusive) of this Constitution has been, or is being, contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress.
>
> (2) The High Court shall have original jurisdiction to hear and determine any application made by the person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said sections 2 to 15 (inclusive) to the protection of which the person concerned is entitled:
>
> Provided that the High Court may decline to exercise its powers under this subjection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law."

[53] In Jennifer Gairy, the Privy Council referred to the case of Byrne v Ireland and the Attorney General [1972] 1 R 241 at 248 where Walsh J in the Supreme Court said:

> "Where the people by the Constitution create rights against the State or impose duties upon the State, a remedy to enforce these must be deemed to be also available. It is as much the duty of the State to render justice against itself in favour of citizens as it is to administer the same between private individuals … There is nothing in the Constitution envisaging the writing into it of a theory of immunity from suit of the State (a State set up by the people to be governed in accordance with the provision of the Constitution) stemming from or based upon the immunity of a personal sovereign who was the keystone of a feudal edifice. English common-law practices, doctrines, or immunities cannot qualify or dilute the provisions of the Constitution…"

[54] In Jennifer Gairy, the Privy Council observed that the obligation to ensure that the debt owed by the State to the appellant is discharged, rested on the Minister of Finance. And there is no one to whom the court's order can more appropriately be addressed. (Para 25) The Privy Council went on to state that the "Minister of Finance shall take all steps necessary to procure that payment be made to the appellant forthwith …" The Privy Council also stated that "if the exigencies of public finance prohibit the immediate payment to the appellant of the full sum outstanding, the Attorney General, representing the Minister of Finance, may apply to the judge for approval of a schedule of payment by installments. The Board would however stress that the payment is already overdue and no deferment should be approved save on the basis of full, clear and compelling evidence."

[55] In view of the enlightened approach in Jennifer Gairy it is clear that sections 16, 19 and 21 of the Crown Proceedings Act do not preclude the court from making orders, other than declaratory orders against the Crown. Neither do the said sections preclude the court from granting injunctions or making orders to give relief against the Crown for the protection of the fundamental rights and freedoms declared, guaranteed and enshrined in Chapter 1 of the Constitution of Anguilla 1982. Further section 20 does not preclude the Court from making adequate orders with respect to the rate of interest commensurate with the payment of adequate compensation as mandated by section 7. The Court has power under section 16 of the Constitution to grant effective remedy and if necessary, to fashion

a new remedy to give effective relief for a contravention of a protected constitutional right. The impugned sections of the Crown Proceedings Act therefore do not impose any fetter upon the court's power granted under section 16 of the Constitution of Anguilla, 1982. The claimants are therefore not entitled to the declaration sought.

RIGHT TO LIFE

[56] The First and Third claimants seek a declaration that their right to life, protected by sections 1 and 2 of the Constitution is threatened. Section 1 of the Constitution states:

> "Whereas every person in Anguilla is entitled to the fundamental rights and freedoms of the individual, that is to say, the right … but subject to the respect for the rights and freedoms of others and for the public of the following, namely –
>
> (a) life, liberty, security of the person, the enjoyment of property and the protection of the law;
>
> (b) …
>
> (c) respect for this private and family life,
>
> The subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of that protection as are contained in those provisions being limitations designed to ensure that enjoyment of the said rights and freedoms by an individual does not prejudice the rights and freedoms of others or the public interest."

Section 2 (1) states: "No person shall be deprived of his life intentionally save in execution of the sentence of a court…"

[57] In my view there is no evidence in support of the claim by the First and Third claimants that their right to life is threatened. They have not proved that claim and as such are not entitled to the declaration sought. The defendants also submitted, and I agree, that section 16 of the Constitution which has bestowed constitutional jurisdiction in the High Court makes no provision in respect of threatened injury under the said section 16, but only provides protection where constitutional rights have been or are being violated. Accordingly, the Court has no jurisdiction to make the declaration that the rights of the First

and Third claimants to life, protected by sections 1 and 2 of the Constitution are threatened.

ULTRA VIRES FOR WANT OF SUFFICIENCY OF FUNDING

[58] The claimants sought a declaration that the exercise of the powers of compulsory acquisition in relation to the lands is ultra vires the Government of Anguilla for want of sufficiency of funding to defray all of the expenses of the airport project inclusive of the prescription for prompt payment of adequate compensation. It was the submission of the defendants that such a declaration was not maintainable on the basis of the evidence or the law. The defendants contended, and I agree, that the concept of an act ultra vires the Government connotes an absence of power to carry out the act complained of. The defendants pointed out that sections 5 and 6 of the Finance (Control and Audit) Act, provides authority to the Minister of Finance to raise funds, to prepare estimates for the raising of funds and to authorize the withdrawal of funds from the Consolidated Fund. Further, section 11 of the Act authorizes the Minister, in order to meet current requirements, to borrow by means of an advance such sums as may be approved by a resolution of the House of Assembly, for a period not exceeding 12 months. Any advance may be made by means of a fluctuating overdraft and the principal and interest of any such advance shall be a charge on the Consolidated Fund.

[59] In light of the provisions of the Finance (Control and Audit) Act which authorizes the Minister of Finance to raise funds and to authorize the withdrawal of funds from the Consolidated Fund, it cannot be asserted that there is a "state of want of sufficiency of funding". In the premises, there in no basis for granting the declaration sought.

DISCRIMINATION

[60] The claimants challenged the validity of the Executive decision with respect to the airport expansion on the ground that the decision to adopt the policy for the airport project was arrived at in circumstances of discrimination. As an example of discrimination in the decision making-process the claimants point to the fact that only two persons from the

Forest Area were consulted. No consultation or interview was undertaken with the claimants, the major landowners in the Forest Area. The claimants contended that the discrimination was rooted in the political divide between themselves and the elected members of the Executive as well as the Attorney General. Further, the said discrimination was effected with intent to favour the economic interests of Flag Luxury Properties Anguilla (Flag Luxury), a foreign company, over their economic interests.

[61] The claimants are essentially alleging discrimination on the ground of political opinion and origin. This takes us to section 13 of the Constitution which deals with discrimination. Section 13 states:

> "(2) … no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.
>
> (3) In this section, the expression "discriminatory" means affording different treatment to persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinion, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description."

[62] The claimants are Anguillians by birth and lineage. Their family have been a strong political family. The first claimant stated that she has been regarded as an opponent of the Government and over the years, in several fora transmitted by radio, she has criticized the Government for dereliction from good governance.

[63] The first claimant asserted that the decision to extend the airport to 6000 feet is inter alia, rooted in the deep political divide between the Minister of Finance and the owners of Forest Estate. The claimants averred that political and discriminatory considerations informed the decision of Government to compulsorily acquire a portion of parcel 100 with a view to favouring the interests of a foreign investor, Flag Luxury, over those of their own.

[64] The evidence shows that at the time of the decision to extend the airport there was on the drawing board the Conch Bay Development Resort (Conch Bay). That was a concept for the development of the Forest Estate, comprising an 18 hole golf course, marina with surrounding villas and a Boutique Hotel, with a capital expenditure in excess of 200 million United States dollars, in addition to the land to be utilized. Application for outline planning approval of the project was submitted to the planning department in August 2001. Its consideration was deferred pending the undertaking of a detailed Environmental Impact Assessment Study. A fairly costly exercise.

[65] In or about July 2002, the Government entered into a Memorandum of Agreement with Flag Luxury for the development of a golf course in the western part of the island known as Tenemus. The first claimant alluded to what she called the extraordinary concessions and the extraordinary tax exemptions that the Government under the Memorandum of Agreement committed to grant to Flag Luxury without even the benefit of an environmental impact study. The first claimant stated that the decision to extend the airport to 6000 feet was influenced by political considerations which motivated the disregard for the full development of the Forest Estate, thereby securing economic disadvantage to the claimants by way of punishment for their criticisms of governmental actions over the years.

[66] The claimants asserted that the exclusive licence granted to Flag Luxury to carry on golf course business, discriminates against them on the basis of origin. The Memorandum of Agreement granting the exclusive licence was executed as between the Government and Flag Luxury with full knowledge that Conch Bay was still very much in the pipeline and with deliberate intent to prefer and advance the economic interests of a foreigner over them (the claimants) as Anguillians. According to the claimants, it was also intended to stifle the benefits that would accrue to them under the Conch Bay Project for the benefit of a foreigner.

[67] The defendants submitted that in so far as the claimants allege discrimination in relation to Conch Bay, there is no evidence that the first and second claimants have any legal interest

and thus a basis upon which to complain on behalf of Conch Bay. There is no shareholding shown and no financial interest in the project. The evidence of the claimants is that the concept of Conch Bay is structured upon a joint venture arrangement between the owners of the Forest Estate and Senton Corker Marshall as venture partners. Conch Bay Development company is a vehicle designed for the joint venture partnership under the directorship of some of the overseas partners and some members of the Lake family, the third claimant and Joyce Kentish. I agree with the claimants that by virtue of their beneficial ownership of the land and economic interest in its development by the vehicle of Conch Bay Development Company, they enjoy real, significant and overriding locus standi.

[68] Have the claimants brought themselves within the anti-discriminatory provisions of section 13 of the Constitution? The definition of the word discriminatory is of prime importance. Although the claimants assert discrimination against them because of their political opinion, it is interesting to note that the first, second and third claimant discussed the Conch Bay Development project with the current chief minister who professed enthusiasm for the project and gave the assurance of his government's fullest support. By letter dated 13 November 2000 the Chief Minister assured the Government's support of the Conch Bay Project and Government's agreement in principle to give favourable consideration to the grant of all tax and duty free concessions as well as exemption from stamp duty, licences fees and taxes applicable to the transfer and vesting of the land to the Conch Bay Project. To my mind, that is certainly not consistent with political discrimination.

[69] The claimants contended that Flag Luxury was given preferential treatment in obtaining planning approval on or before July 2002, for the development of a golf course at Tenemus without having to submit on environmental impact study to the Land Development Control Committee. That committee had some 18 months previously, required Conch Bay to submit such a study before it considered its application for outline approval for Conch Bay. However, the evidence disclosed that in July 2002 Flag Luxury had not been granted planning permission, either outline or detailed. Further, when it acted contrary to the Land Development (Control) Act, the Authorities called upon it to desist. Also, with regard to the

Conch Bay application for outline approval, a right of appeal lay against the refusal of the committee to grant Conch Bay planning permission. Conch Bay failed or refused to exercise that right.

[70] With respect to the concessions, it is not unheard of in developing countries for government to grant concessions to attract foreign investors.

[71] The claimants have great concerns with respect to the proposed airport expansion and its effect on their property as well as concerns relating to the concessions offered to Flag Luxury. It however cannot be concluded that the claimants have been discriminated against because of either their political opinion or place of origin. The evidence does not support the allegation of discrimination. There is no evidence that the decision to adopt the policy for the airport project was arrived at in circumstances of discrimination against the claimants and in violation of their right to have their civil rights and obligations determined by in independent and impartial tribunal. The claimants are therefore not entitled to a declaration that a fair balance has not been struck between the public interest in the airport expansion and their constitutional rights, in that regard.

WANT OF GOOD FAITH, ARBITRARINESS AND IRRATIONALITY

[72] In support of their assertion of lack of good faith the claimants contended that the decision to extend the airport to 6000 feet was not informed by the public purpose of facilitating the American Eagle ATR 72 to secure the economic well being of Anguilla. They asserted that it was informed by a capricious and speculative intention to acquire a portion of Parcel 100 to the extent of 26 acres for possible future and undefined uses, as well as to fulfill the desire of Flag Luxury to provide "universal services" for their clientele by extending the airport to provide for jet landing and jet parking facilities. The extension was also informed by the manifested policy of the Minister of Finance to establish a Land Bank and to dismember large undivided blocks of land held by families. They also posited that the decision runs counter to the recommendations made by SW Atkins in their final report of February 2002. The report recommended inter alia: (1) the development of the airport be

undertaken on a phased basis; (2) the minimum cost option as designed, is considered as the first phase and undertaken as soon as is practicable and (3) land should be reserved against the requirement for the future development of the airport and where practical, purchased on a gradual basis. They stated that the decision also runs counter to the clear recognition by the Wallblake Expansion Board that "Option 1 a makes provision for extra take-off run to meet America Eagle's request for 4,600 feet of runway length, as the minimum requirements for the operation of the ATR 72 aircraft." "This could be achieved either by extending the eastern end of the runway by 323 metres and constructing a 130 meter starter slip at the western end of the runway by 455 metres."

[73] On the ground of irrationality the claimants submitted that the decision was made with reckless disregard to the damage which will accrue to Forest Estate and to the real development prospects for the Estate as evidenced by the Conch Bay Development Project. In that regard, the claimants contended that the design works and drawings are the expression of the reckless and irrational approach of the decision to effect the expansion. The said design works and drawings were made ready for tender without their being informed by any clear and referable terms of reference for the said works, or by the benefit of an Environmental Impact Assessment Report.

[74] With respect to arbitrariness, the claimants submitted that the decision to extend the airport to 6000 feet was not founded upon ay reliable scientific evaluation and without any environmental impact assessment resulting from the use of the fill from the garbage dump at Corito.

[75] The defendants contended that the evidence provides no support for the assertions of irrationality, want of good faith and arbitrariness. They stated that the decision was based upon technical and professional advice, which sought to ensure the most practical, economic and feasible option for the improvement and enhancement of air transport services to and from Anguilla in the circumstances. They further submitted that the decision was clearly based upon a large number of studies conducted over a number of

years geared not only to assessing the financial feasibility of, but also the impact on the community and the environment and the means of addressing any detrimental factors. Reference was made to the studies of Sir William Halcrow and Partners, WS Atkins and Scott Wilson.

[76] The evidence of Alan Campbell provides significant insight with respect to the issues raised. Alan Campbell is the expert witness for the defendants. He is a civil engineer with over 15 years experience in the aviation sector. He is a technical director employed by the firm of Scott Wilson. Scott Wilson was appointed in December 2002 to undertake the design and procurement of the runway extension and other airport improvements at Wallblake Airport, Anguilla on behalf of the Government of Anguilla. The project was preceded by other studies conducted by Scott Wilson and the firm of W S Atkins. The first such study was carried out for the Overseas Development Agency and a report was produced in 1994 entitled "Wallblake Airport Anguilla, Runway Extension Feasibility Study, Final Report. W S Atkins carried out a comparative Airport Study in 2000 and a report was provided. A further study was conducted on the matter of the extension to the airport and a further report was produced in February 2002, entitled 'Extension to Wallblake Airport Runway – Option and Funding Study'. That study referred to the ATR 72 as their design aircraft throughout the document. The Report of February 2002 considered three options for the extended runway length – 1199 m, 1272 m and 1799 m. Only the latter option provided unrestricted operations of the ATR 72 in both directions. This report includes reasonably detailed considerations of each option including environmental aspects and Conch Bay.

[77] Alan Campbell deposed that the terms of reference for Scott Wilson's appointment in December 2002 outlined the process involved in arriving at the requirement to extend the runway and referred to the W S Atkins reports as the basis for establishing the terms of reference. The terms indicated that budgetary restrictions resulted in option 1 A being the preferred option. The specific objectives of the study included requirements to 'take into account feasibility for future extension (to Option 3) and to 'undertake an Environmental

Impact Assessment'. The key issues in delivering the project included accommodating the ATR 72 with minimal constraints and minimizing disruption to the airport operations during construction. Alan Campbell deposed that in progressing the design, it became apparent that the Government's current requirements were different from the original terms of reference and that certain assumptions made by WS Atkins were not now viable. This resulted in the need to modify the terms of reference and the revisions were agreed at a meeting with the Government and the Department of International Development of the Government of the United Kingdom on 10th February 2003. The main difference between the option now being preferred and sought to be implemented by the Government of Anguilla and Option 1 A included operations of ATR 72 at maximum take-off weight in both directions, runway length, runway classification, runway strip width and obstacle limitation surface. The flatter obstacle limitation surface required that the western threshold be displaced by some 425 m and, when the runway length required for the ATR 72 is taken into account (1402 m) the runway length required equates to 1827 m. The main consideration with respect to the length of the main runway (6000 feet) is the requirement to be able to operate the ATR 72 without constraint. Taking into account the aircraft performance and the appropriate regulatory design procedure, a runway length of 1827 m is required to allow the ATR 72 to operate in both directions with no obstacle allowed in the obstacle limitation surface. Reference to options 1 and 2 assumes the use of the WS Atkins report when, in fact, the runway length options were developed in more detail by Scott Wilson after their appointment in December 2002.

[78] I accept the evidence of Alan Campbell. It is quite cogent. The evidence shows that over the years several studies have been done in respect of the expansion of the Wallblake Airport and several reports have been produced in that regard. The main consideration with respect to the proposed extension to 6000 feet was the requirement to be able to operate the ATR 72 without constraint. This would not have been achieved under option 1 A. The main difference between the option to extend to 6000 feet and option 1A included the operation of the ATR 72 at maximum take-off weight in both directions, runway length, and the obstacle limitation surfaces. In that regard a runway length of 1827

metres would be required. I agree that the decision to expand was based upon technical and professional advice which sought to ensure the most practical economical and feasible option for the improvement and enhancement of air-transport services to and from Anguilla and was based upon a large number of studies over a number of years. In my judgment the assertion that the decision to extend to 6000 feet was irrational, arbitrary or taken in bad faith, cannot be sustained by the evidence. I come to that conclusion notwithstanding the evidence of the claimant's expert, Carlyle Glean. Carlyle Glean pointed to the deficiencies in the design and drawings, the possibility of flooding and subsidence of the claimants' land, noise pollution and the absence of an environmental impact study on the extraction of fill from the Corito garbage dump. I find these matters more germane to the issue of proportionality and I will consider them in more detail there.

PROPORTIONALITY

[79] The claimants contended that extensive and irreparable harm is likely to accrue to their property by the proposed work in the course of and in consequence of the extension of the airport. Further a fair balance has not been struck between the public interest and their constitutional rights.

[80] The defendants submitted that a fair balance has been struck between the public interest and the constitutional rights of the claimants. The defendants pointed out that the rights that the claimants refer to and rely upon in section 1 of the Constitution are subject to the rights and freedoms of others and to the public interest. Further, the protective provisions at sections 2 to 15 are subject to the limitations contained in those sections which are designed to ensure the enjoyment of those rights does not prejudice the rights and freedoms of others and the public interest.

[81] The defendants argued that in determining the fair balance, the test is not one of minimum interference. They state that the authority exercising the power is to be given a broad margin (of appreciation) to determine appropriate policy.

[82] The claimants submitted in their reply, that the doctrine of Margin of Appreciation has no relevance to domestic litigation. They referred to R v Director of Public Prosecutions, ex p Kebilene, [1999] 3 WLR 972 where Lord Hope stated:

> "The doctrine is an integral part of the supervisory jurisdiction which is exercised over State conduct by the international court. By conceding a margin of appreciation to each national system, the court has recognized that the convention, as a living system, does not need to be applied uniformly by all States but may vary in its application according to local needs and conditions. This technique is not available to the national courts when they are considering convention issues arising within their own countries."

[83] In determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the Court should ask itself whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objectives are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective. (de Freitas v Permanent Secretary of Agriculture, Fisheries, Lands and Housing (1999) 1 AC 99).

[84] As stated by Dyson J in Samaroo and Sejek v Secretary of State for the Home Department [2001] UK HRR 1150, in deciding what proportionality requires in any particular case, the issue will usually have to be considered in two distinct stages. At the first stage, the question is: Can the objective be achieved by means which are less interfering of an individual's right? At the second stage, the question is: Does the measure have an excessive or disproportionate effect on the interests of the affected person?

[85] The claimants rely on the joint expert witness report of Messrs Glean and Daniel as well as the evidence of Mr Glean. Mr Glean's testimony which remains uncontroverted, is that the proposed works relating to the airport expansion and the inadequacy of the mitigating measures would render substantial portions of Parcels 100 and 126 sterile and unfit for human habitation. He opined that the storm-water control measures proposed by Scott Wilson were seriously lacking and bordering on the reckless. This opinion remains unchallenged.

[86] Mr Glean stated that the table on noise pollution contained in the Scott Wilson Environmental Impact statement and the conclusions drawn therefrom were a misrepresentation of the noise pollution that would impact the homes of the First and Fifth claimants. The defendants through their consultants knew that according to the noise level test done, the noise pollution that would affect the homes of the First and Fifth claimants exceeded the safe decibels level for the human ear by some 28 to 30 decibels. Yet they represented that the increase in noise pollution was insignificant.

[87] Alan Campbell, the defendants' expert witness, stated that no assessment was done in respect of the environmental impact resulting from the use of the fill to be taken from the garbage dump at Corito, for the airport expansion. Mr Glean opined that an environmental assessment of the extraction of 450,000.00 cubic meters of fill from the Corito Dump site was necessary to determine the impact of possible contamination of the ground water supply as a result of toxins leaching into the aquifer from the land fill. He was also of the opinion that an impact assessment ought to have been done in relation to the real potential for contamination of the ground water supply in Parcels 100 and 126 as a result of the likely overflow and flooding of the lands in Parcels 100 and 126 both during construction and after completion of the extension as a result of the use of contaminated fill from the Corito site. This was identified as a real environmental concern both in the Scott Wilson Report of 2003 as well as in the W S Atkins Final Report of February 2002.

[88] The designs for the extension of the runway to 6000 feet entailed the construction of a 35-foot high embankment constructed of 465,000.00 cubic metres of imported fill. That compaction of that mass fill requires approximately 300,000 gallons of water per day for the duration of the construction works. The evidence of Mr Glean in commenting on the Scott Wilson June 2003 environmental appraisal is that there is no adequate assessment of the availability of that volume of water without having to resort to the ground water supply in the aquifer. Mr Glean also commented that there is no assessment as to whether the aquifer could sustain that volume of supply with the result that if there were over-extraction from the aquifer without the ready recharging of the source the risk of

subsidence of the lands in Parcels 100, 126, 284 and other surrounding lands including the airport was very real.

[89] Mr Glean also highlighted the issue of uncontrolled storm water run-off as a grave threat, both as to flooding, toxicity and the resulting sterility of Parcels 100, 126, and 284. He opined that the design and capacity of the proposed ponds and drainage systems were inadequate to contain and control storm water run-off and that given that the drains were unlined earth drains there was very real prospect for silting and blockage from vegetation growth. Mr Glean stated that the location of the drains placed the residences of the First and Fifth claimants within 50 metres and 100 metres of the drains. He stated that he saw no evidence from the designs of any attempt to channel the floodwaters in a controlled way into the existing natural courses of which there are two, one on Parcel 100 and the other on Parcel 126.

[90] The evidence of Carlyle Glean clearly demonstrates the deleterious effect the proposed expansion could have on the property of the claimants and the possibility of irreparable damage being done thereto. The live issues concern: (i) subsidence of the land; (ii) uncontrolled storm water run-off endangering the parcels; (iii) inadequate drainage systems posing a very real prospect for sitting and blockage and the effect on the residences of the First and Fifth claimants located within 50 and 100 metres respectively of the drains; (iv) the real potential for contamination of the ground water supply in parcels 100 and 126 and (v) the noise pollution that could affect the homes of the First and Fifth claimants exceeding the safe decibel level by 28 to 30 decibels.

[91] All of these factors lead me to the conclusion that a fair balance has not been struck between the rights of the claimants and the public interest in the airport expansion. It is clear that the design and scope of the work and the proposed method of execution of the proposed airport expansion to 6000 feet would have an excessive or disproportionate effect on the property interests of the claimants. In the circumstances the claimants are entitled to a declaration that a fair balance has not been struck between the public interest

in the airport expansion and their constitutional rights in that the design and scope of the works and the proposed method of execution have not been carefully crafted enough to cause minimal impairment to the property of the claimants and the enjoyment of the use thereof.

DAMAGES

[92] The claimants seek damages and exemplary damages on account of the violation of their fundamental rights. I have found that sections 18 and 20 of the Land Acquisition Act violate the provisions of section 7 of the Constitution. Exemplary damages are awarded when there is oppressive, arbitrary or unconstitutional action by servants of the government. The claimants have not satisfied the conditions necessary for the Court to make an award of exemplary damages. No exemplary damages are therefore awarded. The claimants are awarded damages in the amount of $10,000.00.

CONCLUSIONS

[93] In so far as the principles of assessment in section 18 of the Land Acquisition Act deems land to be agricultural for the purpose of compensation, it violates the requirement in section 7 of the Constitution for the payment of adequate compensation, as there is no proper place for the principles of current market value. Adequate compensation should also involve a coincidence of the time of calculation of the value of the land and the time of assessment of the adequate compensation. In that regard the provision of section 18 (a) of the Land Acquisition Act that material time means the date of 12 months prior to the date of the second publication in the Gazette, also infringes the constitutional requirement of adequate compensation, prescribed in section 7 of the Constitution. The discretion given to the Board to add interest at the rate of 4%, in awarding compensation also denies the requirement of adequate compensation. First of all, the Board has a discretion in the matter and secondly, a fixed rate of interest stifles the inter play of market forces. In the premises, the right of the claimants to the enjoyment of their property as guaranteed by sections 1 and 7 of the Constitution are infringed by the provisions of sections 18 and 20 of the Land Acquisition Act. As a post constitutional law the Land Acquisition Act is not

amenable to modifications, adaptations, qualifications or exceptions to bring it into conformity with the Constitution.

[94] A fair balance has not been struck between the public interest in the airport expansion and the constitutional rights of the claimants because the design and scope of the works relating to the airport expansion and the proposed method of execution would have a disproportionate or excessive effect on the property rights of the claimants.

[95] The claimants are not entitled to an award of exemplary damages as they have not established the facts necessary to satisfy such an award. The allegations of arbitrariness, irrationality or want of good faith have not been proved. There is no merit in the allegation of discrimination on the basis of origin or political opinion.

DECLARATION AND ORDERS

[96] The claimants, having proved their entitlement to some of the relief claimed, the following declarations and orders are made.:

[97] It is declared that:

1. Sections 18 and 20 of the Land Acquisition Act 2000 are unconstitutional, void and of no effect in that they contravene the provisions of section 7 of the Constitution of Anguilla 1982;

2. The right of the claimants to the enjoyment of their property as guaranteed by sections 1 and 7 of the Constitution of Anguilla is infringed by the provisions of section 18 and 20 of the Land Acquisition Act.

3. A fair balance has not been stuck between the public interest in the airport expansion and the constitutional rights of the claimants in that the design and scope of the works and the proposed method of execution have not been carefully crafted enough to cause minimal impairment to the property of the claimants and their enjoyment of the use thereof.

[98] It is ordered that:

An injunction is granted restraining the Ministers in their respective capacities as Ministers of Land, Communications and Works or otherwise, or any other person

authorized by them or acting in their respective behalf from entering or remaining upon the lands acquired under the Land Acquisition Act and from taking any other action to the prejudice of the claimants or any of them under or in pursuance or in pretended execution of the provisions of the Land Acquisition Act.

[99] The claimants are awarded damages in the amount of $10, 000.00.

[100] The claimants are to have their costs. Written submissions on the issue of quantum of costs to be filed and served within 2 weeks.

Davidson Kelvin Baptiste
High Court Judge