SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO. SLUHCV2004/0052

BETWEEN:

FRANCISCA JULES WATTLEY

Claimant

And

THE ATTORNEY GENERAL

Defendant

Appearances:

Mr. Kenneth Monplaisir QC with him Mr. Alberton Richelieu for the Claimant
Mrs. Georgis Taylor-Alexander with her Mr. Deale Lee for the Defendant

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2004: October 08,11
October 26

Land Acquisition ...Validity of declaration of acquisition ...whether particular wording of declaration necessary for valid acquisitions detrimental ....late posting of declaration on acquired land...whether last posting or failure to post notice detrimental to acquisition....Constitutional Motion... depravation of property, challenge of the procedure for acquisition

Judicial Review... Legitimate expectation...revocation of promise made to be confined to public authority who granted promise...Res judicata

Land Acquisition Ordinance, Cap. 109 Vol. 11 of the Revised Laws of saint Lucia 1957, section 3....The Saint Lucia Constitutional Order 1978 Section 6(2) (b)

JUDGMENT

1. HARIPRASHAD-CHARLES J: On 8th February 1944, Jones Augustus Jules purchased ten carres of family land dismembered from the "Massade or Beacue" Estate lands situate in the Quarter of Gros Islet (Exhibit "FJW3"). He wanted to develop the land but was unable to do so

because of the presence of squatters. So he donated the land to his three children including the claimant, Francisca Jules Wattley in order that they carry out the development. In or about 2000, the squatters vacated the land and Mrs. Wattley, armed with a Power of Attorney to represent her other siblings, engaged the services of Mr. Calvin George, a civil engineer and planner to obtain the various planning approvals in order for the development to commence. On 24th May 2001, the Planning Authority gave full permission to develop 28 acres of land in three phases (Exhibit FJW 8). In the process of raising funds for infra-structural development, Mrs. Wattley became aware of two Notices that were published in the Saint Lucia Gazette on 9th February and 16th February 2002 respectively whereby their family land was likely to be acquired by the Government for a public purpose of the construction of a new secondary school.

2. Mrs. Wattley was very amazed at this move by the Government especially since she had received planning approval to develop the land and had in fact, already sold land to commence the development. So she sought an appointment with the then Minister of Planning, Mr. Walter Francois. The result of the meeting caused the Minister to seek the services of the then Chief Surveyor, Mr. Foche Modeste for alternative sites. She made it known to the Minister that there was the Moise family lands adjacent to hers with similar characteristics which would be equally suitable for a school. She alleged that the Moise family is willing to negotiate with the Government.

3. In order to address the concerns of Mrs. Wattley, a team comprising Minister Francois, an official from the Ministry of Education and Mr. Modeste made a site visit of the area. The visiting team agreed on an alternative site consisting of 12 acres of land. The land owned by the Moise family was not considered due to the inadequacy of land and the fact that it is bounded by a ravine. A memorandum with respect to the alternative site was submitted to Cabinet for its consideration. By Cabinet Conclusion No. 436 dated 22nd April 2002, Cabinet reiterated its previous decision to acquire the original site belonging to Mrs. Wattley and her siblings.

4. By Declaration published in two consecutive issues of the Saint Lucian Gazette on the 5th and 12th August 2002, their property was compulsorily acquired for the declared public purpose of the construction of a secondary school.

5. This did not go down well with Mrs. Wattley. After all, she had planning approval to develop her land. Then again, she had recommended other people's lands in the neighbourhood. So, on 16th December 2003, she filed a claim for judicial review. On 13th January 2004, Justice Ola Mae Edwards heard the application for leave to make a claim for judicial review. The learned trial judge refused leave on the basis that Mrs. Wattley failed to establish grounds for leave.

6. Mrs. Wattley now brought this originating motion against the Attorney General alleging that the compulsory acquisition of her lands by the Government is in breach of her constitutional rights as guaranteed by section 6 (2) (b) of the Saint Lucia Constitution Order 1978. Her challenge is two-fold in nature namely:

   (i) That the procedure for compulsory acquisition was defective and consequently, the acquisition is null and void and of no legal effect.

   (ii) That she had a legitimate expectation that her property would not be acquired as she was already granted planning approval to develop her land.

The Saint Lucia Constitution Order: section 6

7. A good starting point may be to recite section 6 of the Saint Lucia Constitution Order. It protects citizens from the deprivation of property. It states as follows:

> (1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except for a public purpose and except where provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.
>
> (2) Every person having an interest in or right over property that is compulsorily taken possession of or whose interest in or right over any property is compulsorily acquired shall have a right of direct access to the High Court for –
>
> (a) ….
>
> (b) determining whether that taking of possession or acquisition was duly carried out in accordance with a law authorizing the taking of possession or acquisition."

The Case for Mrs. Wattley

8. Mrs. Wattley claims that the purported compulsory acquisition was not in accordance with section 3 of the Land Acquisition Ordinance Ch. 109, Volume 11 of the Revised Law of Saint Lucia 1957 ("the Ordinance") in that:
    (a) There was a failure to publish the Declaration for acquisition.
    (b) The second publication does not contain any Declaration that would complete the acquisition.
    (c) There was a failure to post the gazetted notice on the property in which Mrs. Wattley has an interest, rendering the acquisition procedurally improper.

9. Mr. Kenneth Monplaisir QC appearing as Counsel for Mrs. Wattley submitted that in the light of the Privy Council case of *Boswell Williams v The Government of the Island of Saint Lucia*[1], he will abandon grounds (a) and (b).

10. He however vehemently argued that in accordance with section 3 (2) of the Ordinance, copies of the publication must be posted on the property in which Mrs. Wattley has an interest and the failure to do so rendered the acquisition defective.

11. Section 3(2) of the Ordinance reads as follows:

> "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…"

12. Mrs. Alexander appearing for the Attorney General submitted that this ground ought to fail because the declaration was in fact posted. She argued that Mrs. Wattley in her own affidavit filed on 21st January 2004 has admitted this fact when she stated at paragraph 23 that "no copies of the publication of the Gazette was posted on the land or exhibited elsewhere in the locality in which the land was situate until 1st December 2003."

13. Mrs. Alexander next submitted that Mrs. Wattley should not after the close of her case be allowed to adduce a new and further ground of late posting of the notice to bolster up her case.

[1] Privy Council Appeal No. 15 of 1968, (1968) 14 W.I.I. 177

14. I do not think that there is any hard and fast rule as to how a court would treat a tardy submission which is of some significance especially since I am of the opinion that Learned Queen's Counsel meant that there was late posting of the notice instead of no posting.

15. Mrs. Alexander contended that section 3 (2)(a) does not and cannot:

    (i) assume simultaneous posting of the notice in the Gazette and on the land as it refers to "copies thereof" of the Gazette publication being posted;

    (ii) there is nothing in the Ordinance to assume an immediate posting and that time is of the essence;

    (iii) Section 3 (1) (c) of the Ordinance states that "upon second publication of the declaration in the Gazette as aforesaid, the land shall vest absolutely in the Crown."

16. She argued further that section 3 (3) anticipates that the acquisition is complete after the second publication, and not after the posting on the property.

17. I find great force in these submissions although I am not entirely convinced that the posting on the property can be done anytime. The Ordinance is silent on the effective time for posting but in my opinion, it is prudent for the posting to be done simultaneously or within a reasonable time after the publication in the Gazette. But, at the end of the day, the question to be asked is: what was the intention of Parliament when it enacted this legislation? In my opinion, the intention could only have been to alert the world that the property had been acquired for a declared public purpose and for interested parties to come forward and lay their claim to compensation. I do not think that the section contemplates notification for that would have been achieved by virtue of the two notices in the February 2002 Gazette. I may further add that the Declaration on the property seems to be a mere formality and therefore, is not detrimental to the acquisition since that would have already taken place upon the second publication in the Gazette.

18. In my judgment, the constitutional challenge must fail.

Legitimate Expectation

19. Mrs. Wattley's second ground as contained in her application and supported by her affidavit, at best is as follows:

> "That having received planning approval from the Development Control Authority for a residential development, she had a legitimate expectation that her property would not be acquired."

20. Mr. Monplaisir contended that the Government did not act fairly in carrying out their decision-making process. He stated that the whole doctrine of legitimate expectation is rooted in fairness.

21. What is legitimate expectation? In *Attorney-General of Hong Kong v Ng Yuen Shiu*[2], Lord Fraser of Tullybelton (delivering the judgment of the Privy Council) said:

> "The phrase ' legitimate expectation' in this context originated in the judgment of Lord Denning MR in *Schmidt v Secretary of State for Home Affairs.*[3] It is in many ways an apt one to express the underlying principle, though it is somewhat lacking in precision. In *Salemi v MacKellar (No 2)*[4]*,* Barwick CJ construed the word 'legitimate' in that phrase as expressing the concept of 'entitlement or recognition by law.' So understood, the expression (as Barwick CJ rightly observed) 'adds little, if anything, to the concept of a right." With great respect to Barwick CJ, their Lordships consider that the word 'legitimate' in that expression falls to be read as 'reasonable.' Accordingly 'legitimate expectation' in this context are capable of including expectations which go beyond enforceable legal rights, provided that they have some reasonable basis: see *Reg. v Criminal Injuries Compensation Board, Ex parte Lain.*[5]*"*

22. Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service (the GCHQ case)*[6]*,* considered the concept when seeking to define the ambit of judicial review. He did so as follows:

> "The decision must affect some other person either by depriving him of some benefit or advantage which either:
>
> (i) he had been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do unless there has been

[2] [1983] 2 A.C. 629, 636
[3] [1969] 2 Ch. 149, 170
[4] (1977) 137 CLR 396, 404
[5] [1967] 2 Q.B. 864
[6] [1985] A.C. 374, 408

communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or

(ii) he has received assurance from the decision maker will not be withdrawn, without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn."

23. Sir Vincent Floissac, Chief Justice in *Chief Immigration Officer of the British Virgin Islands v Burnett*[7] restated the principle as follows:

> "A complainant will be held to have *locus standi* by way of a relevant or sufficient interest in an actual or intended decision or action of a public authority – if the decision or action disappointed or threatens to disappoint the complainant's legitimate expectation that certain benefits or privileges will be granted to him or that certain rules of natural justice or fairness would be observed in relation to him before the decision or action is made or taken."

24. Mrs. Alexander succinctly summarized the position as follows:

(a) A benefit conferred will not be withdrawn or varied without rational ground for doing so; and

(b) There is the expectation of the right to the observance of the '*audi alteram partem'* rule of natural justice.

25. Mrs. Wattley's grievance is that she was granted planning approval to develop her land and that gave rise to a legitimate expectation that she should be allowed to proceed with her development. Nowhere is there a withdrawal of planning approval. What has happened is that the land was compulsorily acquired by the Government to construct a secondary school. The Constitution does not limit the circumstances under which the Government can acquire land for a public purpose. In my considered opinion, Mrs. Wattley has in no way satisfied the court that she had been granted a right which was subsequently withdrawn or varied. In any event, if there was a withdrawal, there was rational ground for it, in that the Government is constitutionally entitled to acquire lands for a public purpose upon the prompt payment of full compensation.

[7] (1995) 50 WIR 153

26. I turn now to the *audi alteram partem* rule of natural justice. In her affidavit, Mrs. Wattley referred to her meeting with Mr. Francois and other officials of the relevant ministries. There she was afforded an opportunity to put forward her case and due considerations were given to it.

27. In *Fisher v The Minister of Public Safety and Immigration*[8], Lord Lloyd of Berwick stated at paragraph 23 of the judgment:

> "Legitimate expectations do not create binding rules of law…a decision maker can act inconsistently with a legitimate expectation which he has created, provided he gives adequate notice of his intention to do so, and provided he gives those who are affected an opportunity to state their case. Procedural fairness requires of him no more than that."

28. Like Mrs. Alexander, I am of the opinion that legitimate expectation can only operate in the context of a decision granted by a public authority being revoked by the same public authority, and cannot logically operate to have that decision restrict the operation of every other authority, department or ministry of government and the cabinet of ministers, as that would operate to completely frustrate the entire administrative operations of government. In *R v North and East Devon Health Authority ex parte Couglan*[9] paragraphs 55 and 56 of the judgment anticipate that legitimate expectation can only operate within the context of the promise being granted and revoked by the same authority. This seems to be the learning on legitimate expectation.

29. At paragraph 56, Lord Woolf MR said:

> "What is still the subject of some controversy is the court's role when a member of the public, as a result of a promise or other conduct, has a legitimate expectation that he will be treated in one way and the public body wishes to treat him or her in a different way. Here the starting point has to be to ask what in the circumstances the member of the public could legitimately expect. In the words of Lord Scarman in *Findlay v Secretary of State for the Home Department*[10]*:* 'But what was their legitimate expectation?'…This can involve a detailed examination of the precise terms of the promise or representation made, the circumstances in which the promise was made and the nature of the statutory or other discretion."

[8] Privy Council Appeal No. 35 of 1998
[9] [1999]
[10] [1984]3 All ER 801, 830

30. In the present case, the question is: what could Mrs. Wattley reasonable expect from the grant of planning permission? The only logical answer within the context of the authority that granted the permission is that the permission would not be revoked or that it would not be revoked prior to consultation with her. Planning has never revoked its permission for Mrs. Wattley to develop her land. The compulsory acquisition by Government is separate and distinct from planning permission. As I see it, there is no nexus between the two.

Judicial Review

31. The third ground ventilated by Mrs. Wattley at trial is that:
    (i) There was an alternative parcel of land identified by her that could have been acquired and which was adequate in all respects.
    (ii) The owners were willing to sell.
    (iii) Cabinet did not fairly consider the alternatives.
    (iv) The Cabinet of Ministers acted unfairly, with bias and that amounted to an abuse of power.

32. Mrs. Alexander submitted that judicial review should not be entertained as it is procedurally improper in that it is firstly, *res judicata* and secondly, contrary to the fundamental rules of procedure relating to pleadings and application before the Court and is tantamount to trial by ambush.

(i) *Res Judicata*

33. On 16th December 2003, Mrs. Wattley filed Claim No. SLUHCV2003/0953 for judicial review. On 13th January 2004, Justice Edwards considered the application for leave to make a claim for judicial review, as mandated by Part 56.3 (1). The Learned Judge heard and determined the application and refused leave on the basis that the application failed to establish grounds for leave and particularly, it failed to justify her delay in bringing the action.

34. Mrs. Wattley has filed this originating motion claiming judicial review on essentially the same grounds as the previous claim. In so far as the originating motion seeks to revisit the previous claim for judicial review, I am of the opinion that it is *res judicata* and must be struck out.

(ii) Contrary to the Rules of Procedure

35. Except for vague submissions, Mrs. Wattley has not specifically pleaded judicial review in her motion and affidavit in support. Part 56.3(1) states that a person wishing to apply for judicial review must first obtain leave. Subsection (3) provides for the contents of the claim form to specify, among other things, the relief, the grounds on which such relief is sought and whether any time limit for making the application has been exceeded and, if so, why. Suffice it to say, the instant claim offends Part 56 and in particular, Part 56 (3), (4), (5) and (7).

36. Even if I were wrong to come to this conclusion, I am in agreement with Mrs. Alexander that there has been unreasonable delay in bringing this claim to court. Mrs. Wattley first instituted proceedings in this matter almost two years after she became aware of the intended action.

37. Part 56.5 (1) states that a judge may refuse leave or to grant relief in any case in which the judge considers that there has been unreasonable delay before making the application. Subsection (2) deals with the factors to be taken into account when considering whether to refuse leave or to grant relief.

38. Unlike the English Rules which expressly provide that an application for leave to apply for judicial review shall be made within three months after the date that the grounds arose (Rule 54.5[1]), our Rules are silent. It seems to me that where a time limit for the bringing of proceedings if not fixed by statute, relief should not be refused by the court solely on the ground that there has been delay in making the application, unless the court considers that the granting of the relief would cause substantial prejudice or hardship to any person or would be detrimental to good administration.

39. In *Regina v Dairy Produce Quota Tribunal for England and Wales,* ex parte *Caswell*[11], it was held that the fact that the application for leave was not made promptly or within three months at the latest, carries with it the inevitable consequence of undue delay, even where the applicant shows good reason for an extension.

[11] [1990] 2 A.C. 738

40. Applying this approach, it is obvious that there has been undue delay in the present case since three months has since long elapsed. Then there is the second question to consider: whether the granting of the relief would be likely to cause substantial hardship or be detrimental to good administration. Mrs. Alexander submitted that the granting of relief at this late stage would be detrimental to good administration as plans are well underway for the construction of the secondary school which is likely to commence very shortly.

The grounds for judicial review

41. Mrs. Wattley alleged that there was an alternative parcel of land which she identified and which was adequate in all respects.

42. Mrs. Alexander submitted that the letter of 3rd October 2002 written to Mrs. Wattley by the then Chief Land Surveyor, Mr. Foche Modeste speaks for itself: that the Moise property was considered unsuitable because of a ravine. An alternative site consisting of 12 acres of land was identified. A memorandum to that effect was submitted to Cabinet for their consideration. Cabinet maintained their original plan to acquire the lands belonging to Mrs. Wattley and her siblings.

43. Mrs. Wattley claimed that the Moise family were and still are willing to negotiate with the Government to sell their land. This falls within the ambit of heresay evidence which is inherently unreliable.

44. The third and final ground for judicial review is that the Cabinet of Ministers did not really consider the alternatives. There is not an iota of evidence to support this allegation. From the evidence, it seems to me that Cabinet did consider the alternatives but stuck to their original plan.

45. For all the reasons enunciated above, the originating motion brought by Mrs. Wattley must fail. In the circumstances, the motion is dismissed with costs to the Attorney General in the sum of $5,000.00 as agreed by the parties.

Indra Hariprashad-Charles

High Court Judge