THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
ST. CHRISTOPHER CIRCUIT
(CIVIL)

NEVHCV 2009 /0179

CARIBBEAN CABLE COMMUNICATIONS (NEVIS) LTD	Applicant
V	
THE NEVIS ISLAND ADMINISTRATION	1st Respondent
THE ATTORNEY GENERAL OF ST. KITTS AND NEVIS	2nd Respondent

Appearances: Mr. Mark Brantley, Dane Hamilton Q.C and Miss Elizabeth Harper for the Applicant.
Mr. Sylvester Anthony and Dr. Henry Browne for the Respondents.

2009: December 7th, 8th, 11th, and 22nd

JUDGMENT

[1] BELLE. J. On the 7th day of December 2009 the Nevis Island Administration ("NIA') effectively nationalized the Applicant's business in Nevis. The Applicant immediately applied for an injunction to stop the process from taking place. The court issued an injunction, which largely required that the NIA permit the Applicant's business to remain open and functional while the parties appeared in court to deal with the issues at hand.

[2] At the hearings on 9th and 11th December 2009 the 1st Respondent's counsel argued that the action of the NIA had created a new law, which could not be impugned by an injunction without first having, the law declared null and void or unconstitutional for some valid reason. They argued that the Applicant's application for an injunction was based on an application for leave to file an action for judicial review and not for a constitutional motion to seek to impugn the legislation. Legislation of the Sovereign Island of Nevis was not amenable to attack by way of an injunction in support of an application for judicial review and the authorities supported this, they argued.

[3] Pivotal to this dispute is an agreement, which the Respondents claim contains a clause, which contemplated nationalization. But the court will also have to construe this agreement to see how it deals with the handling of disputes. If the injunction is to be discharged then it would have to be on the basis that there is no jurisdiction for imposing it or continuing it based on constitutional law and that it was ordered in breach of the rules relating to injunctive relief generally, including the procedural rules.

[4] The issues to be determined therefore are:

1. What are the rules governing the imposition of injunctions against the use of Acts or Ordinances duly passed by the Parliament or Assembly?
2. Does the court have jurisdiction to impose an injunction against the use of an Ordinance passed by the NIA without first declaring it unconstitutional?
3. Can a constitutional breach be the basis of an application for judicial review?
4. Did the NIA have the legal authority to seize the property and business of the Applicant after the passage of the Ordinance?
5. Does the Agreement between the Applicant and NIA governing the Cables' business in Nevis provide for nationalization?
6. If the answer to paragraph 5 is yes then was there an omission by the Applicant to give full and frank disclosure in relation to the existence of this clause of the Agreement on application for the injunction?
7. Should the injunction be discharged for various breaches of the CPR 2000 including Parts 11, 17 and 56?
8. Does the applicant have any interest to protect in the circumstances?

[5] Perusal of the Agreement clarifies the purpose served by the applicant's business in Nevis and the nature of the relationship between the NIA and the Applicant. Some of the relevant provisions of the Agreement are quoted below:

(a) *The agreement defines technical upgrade as " the equipment associated with the introduction of new services of capabilities and materials utilized to significantly upgrade existing facilities. Examples include but are not limited to; increasing channel capacity, introduction of internet services including cable modems, adding new channels, addition of VSAT facility, and the like."*

Under the caption "Goals" Cable agreed;

(b) *"Cable commits to upgrading the present system to bi-directional 4S0 MHZ within twenty four (24) months of receiving all necessary approvals from Administration and the Federation which would permit the company to provide related telecommunications services including Internet service. The bidirectional capability would extend to all areas where such service is economically feasible."*

[6] It is clear that Cable received certain incentives to assist in making the investment profitable from the outset. However under the caption Cable Fees and Charges at paragraph (b) the following is stated:

" Cable presently provides Basic, Tier, and Premium programming. Cable may add, substitute or delete programming in accordance with Cable's assessment of customer needs and desires. Subject to clause 2(d) above Cable will consider the advice of the Administration in making program changes but the Administration shall not be responsible for the selections of cable television programming."

[7] The agreement establishes an elaborate rate increase regime, which includes the modus operandi in terms of adequate notice and related matters. The Agreement also includes a reference to the length of its term in Nevis. The relevant clause reads as follows:

> *"The term of this Agreement shall commence on the date of this agreement and continue for a period of (10) years renewable every 5 years. At the end of this agreement Cable shall have the right to renew it for an additional five years upon terms and conditions to be determined by the Administration upon given notice to the Administration no earlier than the ninth (9th) year of the Agreement and no later than six (6) months prior to the expiration of the original term of the Agreement."*

[8] The Agreement also deals with the issue of curing of breaches. Under the relevant head, the Agreement states as follows:

> *" In the event of an alleged material breach by either party of any provision under this agreement written notice thereof shall be*

> *given to the other party. Any material breach that has not been cured in within ninety (90) days of such written notice shall be resolved by negotiations between the parties or by submission to the High Court. The decision of the High Court shall be final."*

[9] The agreement goes so far as to provide guidance as to what is considered adequate notice of any requests or approval under the agreement. It was required that such requests and approvals be in writing and sent to either party at their stated address under the agreement.

[10] It is interesting therefore that the only clause of the agreement repeatedly cited by counsel for the NIA is clause 12 which deals with Nationalization in the following terms:

> *"In the event of nationalization of Cable by the Administration, Cable or its shareholders shall be paid at full market value for the cable television system by the Administration in a prompt manner. The full market value is to be assessed by an independent assessor in accordance with international accepted standards and procedures."*

[11] On 11th December the parties presented the following arguments in relation to the injunction and the application to discharge it.

[12] Firstly the Respondents' counsel questioned the Applicant's standing. He argued that the Applicants were challenging an Ordinance passed in the Nevis Island Assembly. The Ordinance, counsel opined, at Section 36 provided for the compensation of the Applicant for assets, which were acquired. The Corporation was established pursuant to the Ordinance and the Applicant's assets became vested in the Corporation on the 7th December 2009. The Applicant therefore no longer has any assets to protect. The only purpose of the Application therefore would be to prevent the implementation of the Ordinance and this could not be done by an application for judicial review.

[13] A number of cases were cited in support of this submission. These cases supported the general point that the court had no jurisdiction to impose an injunction against the implementation of an Act of Parliament until it had been declared unconstitutional or invalid.

[14] Hall CJ in his judgment in Clinton and another v Ingraham and others (The Bahamas Bar Council Intervening) 5 ITELER 264 opined referring to the Plaintiffs' application in that matter for an injunction to exempt them from the effects of the Financial Transactions Reporting Act 2000, that,

> *"This is a matter of the public policy of the Bahamas as expressed through the parliamentary will. The courts could have no contrary policy position and could only intervene if the plaintiffs establish at trial, not merely a policy preference different from that pronounced by Parliament, but that Parliament was incompetent to do what it purported to do."*

[15] After a brief traversal of the Plaintiffs' arguments in favour of exemption from the application of the relevant Act in that case, Hall CJ followed the decision of the Court of Appeal of the Bahamas in Ingraham, et al v McEwan (Civil Appeal No.24 of 2002) (25 July 2002, unreported), where that court held;

> *"In other words, at the interlocutory stage, in light of the presumption of Constitutionality, the balance of convenience would favour the refusal of the order sought, unless it was clear beyond any reasonable doubt that the right [claimed] was an entrenched constitutional right and that the provision of the impugned subparagraph was not reasonably required in the interests of public order or public morality."*

[16] This and other cases were cited in favour of the presumption of Constitutionality, which arises when any Act is passed by Parliament. The other cases included Chief of Police and Another v Nias (2008) 73 WIR 201, and Attorney General and another v Antigua Times Ltd [1975] 3 All ER 81.

[17] However the latter in my view does not fully support the position of Respondents, based on my reading of the entire paragraph cited from the judgment of Lord Fraser of Tullybelton where he states:

> *"In some cases it may be possible for a court to decide from a mere perusal of an Act whether it was or was not reasonably required. In other cases the Act will not provide the answer to that question. In such cases has evidence to be brought before the court of the reasons for the Act and to show that it was reasonably required? Their Lordships think that the proper approach to the question is to presume, until the contrary appears or is shown, that all Acts passed by the Parliament of Antigua were reasonably required. This presumption will be rebutted if the statutory provisions in question are, to use the*

> *words of Louisy J, 'so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power but constitutes in substance and effect, the direct execution of a different and forbidden power'. If the amount of the licence fee was so manifestly excessive as to lead to the conclusion that the real reason for its imposition was not the raising of revenue but the preventing of the publication of the newspapers, then that would justify the conclusion that the law was not reasonably required for the raising of revenue."*

[18] The question left open then in relation to the main issue is whether the court, on the face of it, could determine that some aspect of the provisions of the Ordinance is so manifestly excessive as to lead to the conclusion that the real reason for it is some purpose other than the provision of cable services to the community. No doubt this may be difficult to prove but it remains a live issue.

[19] The Respondents' counsel also argued that the Application before the court is one for Judicial Review and this remedy could not be used to challenge the Ordinance since it did not constitute a constitutional challenge. The Parliament was not an inferior tribunal and the Applicant would have to challenge it with reference to specified heads in the constitution.

[20] Counsel also opined that the injunction was granted contrary to Part 56 of the CPR 2000, which speaks to a hearing in open court if certain kinds of remedies are to be imposed. He also submitted that the Applicants should have stated in the Application why no notice was given. He argued that the court must be satisfied that no notice was possible in the circumstances and that giving notice would defeat the purpose of the application.

[21] Additionally counsel submitted that the Applicant's failure to disclose that the Agreement between the parties under which the Applicant operated provided for nationalization or showed that the parties contemplated nationalization constituted material non-disclosure and should prevent it from obtaining equitable relief by way of an injunction.

[22] Finally, counsel submitted that the imposition of an injunction is an equitable remedy. It should not be used where there is adequate provision for damages or where damages

would be an adequate remedy. The Constitution of the Federation contemplates that the state may acquire private property for a public purpose and in so doing the person affected would have the right to compensation. The Ordinance makes provision for such compensation and therefore there should be no need for an injunction.

[23] Mr Dane Hamilton Q.C responded for the Applicant that the application filed, was supported by a certificate of urgency. The reasons for the urgency are adequately set out in the affidavit of Damion Hughes. The allegation is that the NIA stealthily without notice presented a Bill namely the Cable Corporation Ordinance, which was never Gazetted. The sole avowed purpose was to provide for the acquisition of private property. After three readings the Bill was made into law. On the same date of the acquisition the Respondent sent a letter to the Applicant informing him of the acquisition. The result of all of this was that nothing could be done about the acquisition. There was also an entry into the property by the Minister accompanied by senior police officers when the Minister informed the Applicant that the business belonged to the Government.

[24] Counsel submitted that the Ordinance provided for a statutory corporation operating in a businesslike manner. Nothing was vested in Mr. Robelto Hector the Minister. Directors were to be appointed. A CEO was to be appointed. The Minister exercised executive power to evict the applicants, but nothing vested in the Minister nor in his government. The property vested in the Board of Directors.

[25] The letter from the Minister, Counsel said, served notice of acquisition and at the time nothing was said about compensation nor the payment of salaries etc. This background is relevant to the Application for some remedy by the High Court.

[26] The Court he argued may grant an injunction pursuant to Part 56 (4) of the CPR 2000. The form of the application was dictated by the circumstances. He opined that the rules permit an application to be made without notice and without the filing of a claim form.

[27] Counsel further submitted that at common law an injunction can be granted by affidavit. But there must be a pre-emptive cause for the application.

[28] Directly in response to the Respondents' submission that the Applicant filed no application in relation to a constitutional breach, he said the application did cite the constitution in ground 5 (a). It cites section 8 (1) of the constitution and the court should also refer to section 8 (2) which refers to direct access to the High Court in matters such as this. Section 18 should also be considered in the circumstances.

[29] Counsel attacked the legislation for its lack of safeguards for compensation in a reasonable time. He cited authorities to show that the issue of compensation for compulsorily acquired property gave rise to the right of direct access to the High Court as is exemplified in San Jose Farmers' Co-operative Society Ltd v Attorney General (1992) 43 WIR 63.

[30] Counsel's argument could be summarised as a presentation intending to demonstrate the number of ways in which an Act of Parliament could be challenged including at the time when it was going through the process of being enacted. See: The Bahamas District of the Methodist Church in the Caribbean and the Americas and Others v Symonette and Others [2000] 5LRC 196. But in any event relief could be applied for even before a claim was filed or remedy sought. But importantly, the Application before the court cited a constitutional ground.

[31] As far as part 56 was concerned, counsel was of the view that that Part of the CPR 2000 provided for the leave to file an application for an administrative order. The choice was theirs to ask for either judicial review or redress under the constitution.

[32] Counsel also submitted that the issue whether the NIA had the power to enact the Ordinance pursuant to section 1 and 2 of Schedule 5 is one that could be argued at trial.

[33] He questioned the constitutionality of the Board of Assessment in the Ordinance on the basis that it did not provide the same kind of safeguards in the quality of the Board of Compensation as in other Ordinances. The result was that the Ordinance was less favourable than other similar Ordinances with regard to the provisions for compensation. Consequently it could be argued that damages would not be an

adequate remedy. Counsel referred to the kind of losses being suffered, including, the claimant losing its business and, employees losing their jobs etc. and reiterated the point that compensation would not be an adequate remedy.

[34] By way of conclusion Mr Hamilton argued that the court should limit its injunction to suspending the operations of sections 36 and 37 of the Ordinance and make an order for the filing of a Fixed Date Claim in 7 or 14 days.

[35] I can quickly deal with the matter of the Respondents' technical objections to the injunction. Parts 11, 17 and 56 may appear to have been breached. But these were extraordinary circumstances, which had to be managed by the court in the effort to do justice in accordance with Part 1 of the CPR 2000.

[36] I conclude that these irregularities referred to were largely cured by the order for abridgement of the usual time of Notice and a swift inter-partes hearing, which took place within 24 hours. Secondly the remedy of the injunction was made at a time when the court was not aware of the nature of the claim, which would be filed, but only of the drastic nature of the action taken by the NIA. There was no doubt that the matter was one of urgency and no notice would have been required.

[37] As far as the non-disclosure point is concerned, the issue of whether the clause 12 of the Agreement has the meaning that counsel and the Respondents appear to give to it, is debateable, and would have to be settled at trial. It is therefore not necessary for counsel to specifically refer to it at the time of an application for an injunction. In any event the entire Agreement was disclosed at the inter-partes hearing one day after the imposition of the injunction when the Respondents had not yet complied with the court's order. Indeed no harm was done by the omission to specifically mention clause 12 of the Agreement.

[38] The more substantial points made by counsel for the Respondent had to do with whether there was an application to remedy a constitutional breach, and whether judicial review could be used as an attack on the constitutionality of an Ordinance of the Nevis Island Assembly.

[39] In my view the answer is yes to both questions. Firstly as counsel for the Applicant has pointed out, Part 56 of the CPR 2000 provides for the right to apply for an administrative order. The term judicial review according to Part 56 (3) includes remedies (whether by writ or order) of – (a) certiorari, for quashing unlawful acts; (b) mandamus, for requiring performance of a public duty, including a duty to make a decision or determination or to hear and determine any cause; and (c) prohibition, for prohibiting of unlawful acts. Part 56 (4) then sates: In addition to or instead of an administrative order the court may, without requiring the issue of any further proceedings, grant –

(a) an injunction;
(b) an order for return of any property, real or personal ;or
(c) restitution or damages.

[40] The court acknowledges that Part 56 .4 (3) (b) requires that where the application includes a claim for immediate interim relief the judge must direct that a hearing in open court be fixed. This means that the grant of an injunction in this matter was irregular. But in these special circumstances which required swift action I think the injunctive relief could not immediately have been seen to be in support of an Application for judicial review. Indeed the application for leave for judicial review was filed after the initial emergency application for an injunction and by that time the injunction was already granted.

[41] The injunction included a normal undertaking to pay any damages caused by the order of the court and a swift return date in 24 hours, which brought the parties together for an inter-partes hearing. Since the Respondents had not yet complied with the injunction at that time they would not have suffered any inconvenience nor damage as a result of the court's order. I therefore think that it is possible to consider this irregularity to be remedied by the expeditious manner in which the court dealt with the matter. Indeed Part 26.9 addresses the issue of procedural errors and it states in paragraph 26.9(2) that an error of procedure or failure to comply with a rule, practice direction, court order or direction does not invalidate any step taken in the proceedings , unless the court so orders. In the circumstances I decline to make such an order because the proceedings were driven by special circumstances.

[42] However in order to further remedy the irregularity the court will deliver its decision in this matter in open court.

[43] As far as the other matters of procedure are concerned, I note that the Applicant includes in its grounds at paragraph f. a ground based on section 8 of the constitution. This section states:

> *"(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 by or under the provisions of a law that prescribes principles on which and the manner in which compensation therefore is to be determined and given".*

[44] The grounds for the Application also attack the avowed "public purpose" for which the acquisition was made and indicate that the Applicant was already providing an efficient cable service and would have been able to provide an even more efficient one but for the failure by the NIA to cooperate with its moves to greater efficiency and increased programming opportunities. The effect of the expropriation will potentially be to deprive the Applicant of the support of its erstwhile parent company in many areas of provision of services and render the Nevis operation less, rather than more, viable and cost effective.

[45] This was one of the stated grounds for the Application for orders that:

1. The time for hearing this application be abridged ;
2. The Nevis Island Administration (NIA) whether by itself , its servants , agents or assigns be restrained from :
    a. acquiring the assets of the Applicant pursuant to the Nevis Cable Communications Corporation Ordinance, 2009 or otherwise;
    b. interfering with the assets or business of the Applicant;
    c. in any way interfering with or altering the existing licence arrangements and agreements between the Nevis island Administration and the Applicant.
    d. Entering upon the premises of the Applicant situate at Springates Government Road, Nevis or any other premises of the Applicant.
3. Leave be granted to the Applicant to issue judicial review proceedings against the respondents to review the decisions leading to the purported acquisition of the assets of the applicant.

[46] In construing paragraph 3, I consider the fact that the applicant is arguing that the NIA did not acquire the Applicant's business for a public purpose. In practical terms

therefore, this is a claim for a constitutional remedy requiring a determination by the High Court.

[47] In construing the procedures for an Administrative Order it is instructive that such an order includes judicial review and constitutional motions. Furthermore because of the fact that our constitutions are written and are the supreme law of the land, judicial review can be brought on the ground of "unconstitutionality." This is recognised by the learned academic writer Professor Albert Fiadjoe in his book Commonwealth Caribbean Public Law at page 26 where he states:

> *" Because there is considerable overlap among the remedies, Lord Diplock has in recent times sought to rationalise the grounds for judicial review into three categories: procedural impropriety, irrationality, and illegality. Lord Diplock may be forgiven for not adding a fourth and most important category as far as the Caribbean States are concerned: unconstitutionality. In the light of the fundamental rights provisions in the Caribbean constitutions, it is now permissible to frame a challenge to administrative action in terms of both the common law and the constitution."*

[48] Hence the administrative order can be either a claim for constitutional relief or judicial review or, in my view both things, including an award for return of property to the Claimant: See part 56 .8 (2) (c).

[49] Among the interesting points raised by the Applicant is the fact that the respondent is not the Corporation. The Corporation according to section 3 (2) of the Ordinance shall be a body corporate with perpetual succession and a common seal, and shall have power as such, subject to the provisions of the Ordinance (a) to enter into contracts, (b) to sue and be sued in its corporate name, (c) to acquire, hold, mortgage lease, and dispose of all kinds of property, movable and immovable; (d) to do and perform all such acts and things as a body corporate may by law do and perform.

[50] Pursuant to Section 15 (1) © of the Ordinance it is the Corporation which has the power to:

> *"Sell, alienate, demise, give, grant, let, charge, improve, develop, exchange, lease, mortgage, convey, assign, dispose of, turn to account, or otherwise deal with any property, movable or*

immovable, both present and future held by or vested in the Corporation."

[51] The respondents are the NIA and the Attorney General of the Federation. The NIA has no right under the Ordinance to take possession of the Corporation's property. The Board of Directors is the body empowered to run the business and use the Corporation's property for that purpose. The Minister has a number of policy making powers but section 25 of the Ordinance states that the Board shall ensure that the Corporation operates on sound commercial principles, and its affairs shall be managed in such a manner as to meet its financial obligations out of the funds available to the Corporation. Thus it is arguable that the Minister had no power to take possession of the business premises of the Applicant.

[52] I therefore think that there is a prima facie issue of ultra vires actions of the Minister arising on the facts, which have been revealed. Section 36 (1) effectively vests the business and all of its property in the Corporation and we heard nothing of a decision of the Board vis-a-vis taking any action to take possession of its property. This is a live issue.

[53] The Applicant has not specifically pleaded any grounds in relation to sections 36 and 37 of the Ordinance and I will therefore decline to make any declaration or order in relation to these sections. The circumstances extant in the case of Factortame Ltd and Others v Secretary of State for Transport (No 2) [1991] 1 All ER 70 do not exist in this case, however it is possible to glean from that decision dicta explaining the way in which the guidelines of Lord Diplock in American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 504 are to be applied in cases involving challenges to public policy and institutions. In Factotame Lord Goff of Chieveley had this to say at paragraph e. on page 118:

"I do not read Lord Diplock's speech as intended to fetter the broad discretion conferred on the courts by s 37 of the 1981 Act; on the contrary, a prime purpose of the guidelines established in the Cyanamid case was to remove a fetter which appeared to have been imposed in certain previous cases, viz that a party seeking an interlocutory injunction had to establish a prima facie case for substantive relief. It is now clear that it is enough if he can show that there is a serious case to be tried. If he can establish that, then he has, so to speak, crossed the threshold; and

the court can then address itself to whether it is just or convenient to grant an injunction."

[54] Lord Goff then went on to discuss the issues to be considered after crossing the threshold. These steps include the issue whether damages would be an adequate remedy for the applicants or whether on the other hand damage done to the respondents could be remedied in the payment of damages. I have come to the conclusion based on this discussion that the matter cannot be determined at this stage since damages being paid in the circumstances of the compulsory acquisition may not at all be adequate, because they may not be based on the principles of the common law but on principles convenient to the state. Furthermore no undertaking in damages would protect the public interest in a case such as this. It is necessary therefore to go onto the balance of convenience.

[55] Lord Goff therefore picked up on the issue of the balance of convenience in cases where the court is considering imposing an injunction against a public authority or where it is considering an injunction in favour of a public authority based on a law, which the respondent argues is invalid, as follows at page 120 f:

"I myself am of the opinion that in these cases, as in others, the discretion conferred on the court cannot be fettered by a rule; I respectfully doubt whether there is any rule that, in cases such as these, a party challenging the validity of a law must (to resist an application for an interim injunction against him, or to obtain an interim injunction restraining the enforcement of the law) show a strong prima facie case that the law is invalid. It is impossible to foresee what cases may yet come before the courts; I cannot dismiss from my mind the possibility (no doubt remote) that such a party may suffer such serious and irreparable harm in the event of the law being enforced against him that it may be just or convenient to restrain its enforcement by an interim injunction even though so heavy a burden has not been discharged by him. In the end, the matter is one for the discretion of the court, taking into account all the circumstances of the case. Even so, the court should not restrain a public authority by interim injunction from enforcing an apparently authentic law unless it is satisfied, having regard to all the circumstances, that the challenge to the validity of the law is, prima facie, so firmly based as to justify so exceptional a course being taken."

[56] Just as important in the applicant's favour is that the Ordinance does not contain any provision for the High Court to have jurisdiction over the manner of the compulsory acquisition, or the determination whether the purpose of the acquisition was a "public purpose" or, the nature of the compensation. Based on the authority of San Jose Farmers' Co-operative Society Ltd v Attorney-General (1992) 43 WIR the Ordinance, being one by which property has been compulsorily acquired must have a provision in those terms. This is another issue, which puts the case squarely among those kinds of cases where the validity of the law must be highly questionable and this is a triable issue.

[57] As Liverpool JA stated in the San Jose case:

> *"The law must also secure to any person who claims an interest in or right over the property a right of access to the courts for the following purposes: (a) to establish his interest or right; (b) to determine whether the taking of the possession or acquisition was duly carried out for a public purpose in accordance with the law authorising the taking of possession or acquisition; (c) to determine the amount of compensation to which the person may be entitled; and (d) to enforce that person's right to the compensation."*

[58] Although these issues were not spelt out in these terms in Caribbean Cable's application I have to consider them as part of the record before me and as pertinent to any Administrative Action, which may be filed. I must add that it is clearly wrong to argue that the Applicant has no interest to protect and therefore has no right to an injunction. The right they have is a public right to resist any apparent abuse of power under any guise whatsoever, which is justiciable.

[59] Consequently the logical conclusion of this array of facts and law is that the Applicant is entitled to file an application for judicial review to challenge the legislation on the ground inter alia that compulsorily acquiring the Applicant's business does not conform with the provisions of section 8 of the constitution. Of course the Applicant may also file a Fixed Date Claim Form or motion claiming breaches of section 8 of the constitution including any deficiencies in sections 36 and 37 of the Ordinance.

[60] On the basis that the Ordinance does not empower the Respondent NIA to take possession of the property itself but only the Corporation, and contains no provision for redress in the High Court I would say that on the balance of convenience the injunction seems fair. It should remain in force. It cannot be said that the Applicant will not suffer irreparable harm because of the acquisition. Its business investment in Nevis has been taken away and its ability to pursue its investment in this business has been severely curtailed. Compensation is on the cards but there is no guarantee that it will be prompt. The livelihoods of a number of employees are at stake and again no government Minister can guarantee what the Board of the Corporation may do in relation to their employment if the Corporation is to be run on a sound commercial footing.

[61] The cases cited by counsel for the Respondents which appear to hold that a law must be proven unconstitutional before the state can be restrained from using it, can be distinguished on the facts, since the potency of the constitutional attack on the Ordinance is quite evident in this case and the issue whether the Minister had the authority to seize the Applicant's property remains arguable on the construction of the law itself which clearly vests the property in the Corporation and not in the Minister nor his Ministry.

[62] Even if it could be argued that after the passage of the Ordinance the Applicant had no right to continue to run the business, nevertheless, the matter of an interest in the property must be an arguable issue since the Applicant enjoys a right to compensation and this right is guaranteed by the Constitution. Indeed it must be considered whether this is an extreme case in which on the face of it, the Legislation appears to be prima facie, open to constitutional scrutiny rather than being presumed reasonably necessary in a democratic society. I would say that this is an extreme case, where a serious abuse of power may have taken place. Furthermore the rules cited by the Respondent applicable to cases involved in restraining the use of legislation, do not arguably establish a fetter on a judge's discretion in the circumstances, as I have already discussed in relation to the dicta of Lord Goff in Factortame Ltd and Others v Secretary of State for Transport (No 2) .

[63] It is also instructive and relevant that there is an Agreement which states at clause 14 that in the event of an alleged breach by either party of any provisions under this

Agreement written notice thereof shall be given to the other party and any material breach that has not been cured within (90) days of such written notice shall be resolved by Negotiations between the parties or by submission to the High Court and the decisions of the High Court shall be final.

[64] Why would this clause be written into the Agreement if there was an overriding consideration that the business may be nationalized at any time? If nationalization would render the resort to negotiations or proceedings of the High Court nugatory then why make it mandatory that disputes be settled by negotiation or the High Court? This is clearly a triable issue as well.

[65] The court is entitled to make an Order, which is equitable in the circumstances although not going as far as counsel for the Applicant suggested. See: Minister v Treatment Action Campaign (South Africa) [2002] 5 LRC 216.

[66] Therefore the Court's order is as follows:

(1) In light of section 14 in the Agreement the court refers the parties to mediation.

(2) The ordinary time of 45 days for a mediation to be held is hereby abridged to 30 days. In this mediation the parties are to attempt to resolve any issues arising in this action, which they consider they are able to resolve.

(3) A mediator is to be selected in 10 days to conduct the mediation, failing which the court will appoint one.

(4) The Applicant is granted leave to file an application for judicial review in 14 days. The first hearing of the matter shall be on January 26th 2010.

(5) The Applicant is to serve the said Fixed Date Claim Form on the Respondents in 14 days.

(6) The injunction granted on December 8th is to remain in force as against the Respondents, until the determination of this matter either by mediation or at trial.

(7) Any negotiated agreement between the parties for the purpose of managing the Cable business remains unfettered unless it comes into conflict with this order.

(8) In any event the proceedings of January 26 2010 will be stayed and another date set if the mediation is not yet completed by that date.

(9) Liberty to apply.

Francis H V Belle
High Court Judge