

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA

CLAIM NO: ANUHCV2010/0406

IN THE MATTER OF THE CONSTITUTION OF ANTIGUA AND BARBUDA SECTION 9(1)

AND

IN THE MATTER OF THE LAND ACQUISITION ACT CAP 233
OF THE REVISED LAWS OF ANTIGUA AND BARBUDA

AND

IN THE MATTER OF THE ACQUISITION OF PARCELS 55, 56 AND 57 BLOCK 32 3282A
ST. PHILLIPS SOUTH REGISTRATION SECTION KNOWN AS THE HALF MOON BAY RESORT

BETWEEN:

HMB HOLDINGS LIMITED

Claimant

and

ATTORNEY GENERAL OF ANTIGUA AND BARBUDA

Defendant

Appearances:

Mr. John Carrington and Ms. Stacy Richards-Anjo for the Claimant
Mr. Justin Simon Q.C. and Ms. Luann DeCosta for the Defendant

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2012: January 24
May 23
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JUDGMENT

- [1] **MICHEL, J:** Half Moon Bay Resort is a beach-front property with a hotel and other related amenities sitting on 108.17 acres of land registered as Parcels: 55, 56 and 57, Block: 32 3282A, Registration Section: St. Phillip's South.
- [2] The Claimant, HMB Holdings Limited, is a company formed in 1971 to own and operate the Half Moon Bay Resort, which it did operate until 1995 when the hotel was severely damaged by Hurricane Luis. The Defendant, the Attorney General of Antigua and Barbuda, is named as defendant in this suit in his capacity as the representative of the Government of Antigua and Barbuda.
- [3] When six years had elapsed after Hurricane Luis and the resort - located on what is acclaimed to be the best beach in Antigua and Barbuda and touted by Antiguans as the best beach in the Caribbean and (some say) the world – remained closed, the Cabinet of Ministers of Antigua and Barbuda resolved to proceed with the acquisition of the resort and, by the following year, the Government began the process of compulsorily acquiring the property under the provisions of the Land Acquisition Act, Cap.233 of the Laws of Antigua and Barbuda Revised Edition 1992. After approval by both Houses of Parliament of a resolution authorizing the acquisition by Government of Parcels 55, 56 and 57 and the publication of notice thereof in the Gazette in March 2002, the Claimant immediately sought and obtained the leave of the High Court to apply for judicial review of the Government's decision to compulsorily acquire its property. Having obtained the leave of the Court, the Claimant instituted proceedings in the High Court in April 2002 to quash the Government's decision, which proceedings continued to the Court of Appeal and to the Privy Council, which in June 2007 upheld the decision of the Court of Appeal of the Eastern Caribbean Supreme Court confirming the compulsorily acquisition by the Government of the Claimant's

property. By letter from the Attorney General to the Claimant dated 9th July 2007, the Government gave notice of its intention to enter into possession of the property on 23rd July 2007, in response to which the Claimant vacated the property on 13th July 2007 and so advised the Attorney General. The Board of Assessment set up to assess the compensation to which the Claimant was entitled for the compulsory acquisition of its property, determined that the property was acquired by the Government under the provisions of the Land Acquisition Act as of 23rd July 2007, which determination was accepted by the Claimant in its affidavit evidence and in its written submissions filed in this matter.

- [4] The Board of Assessment was appointed by the Governor General in June 2008 with one representative each of the Claimant and the Defendant and with a High Court Judge as Chairman. The hearing before the Board of Assessment took place in July 2009 and the Board made its award in January 2010, assessing the compensation due to the Claimant at US\$23,820,999, together with interest at the rate of 10.25% per annum from July 2007 to the date of full satisfaction of the award. The Board also made an award for the cost of the Claimant's expert witness and for assessment of the Claimant's legal fees and disbursements. The Claimant appealed the quantum of the award made by the Board of Assessment, which appeal was pending before the Court of Appeal at the date of the institution of the present proceedings by the Claimant. Since the filing of this case, the Court of Appeal has made an order increasing the award made by the Board of Assessment, which order has been appealed by the Defendant to the Privy Council.
- [5] By its Amended Fixed Date Claim Form filed in this matter on 12th August 2010, the Claimant claimed against the Defendant the following relief:

1. A Declaration that the continuing failure of the Government of Antigua and Barbuda to satisfy the compensation and costs awarded by the Board of Assessment in its ruling dated 5 January 2010 amounts to breach of the right guaranteed to the Claimant under the Constitution of Antigua and Barbuda section 9 to protection from the deprivation of its property.
2. An Order compelling the Minister of Finance of the Government of Antigua and Barbuda to procure payment forthwith to the Claimant of all sums awarded to the Claimant including interest and costs.
3. Damages for breach of the Claimant's constitutional rights.
4. Costs.
5. Such further or other relief as the Court deems just.

[6] In order to obtain the declaration which it seeks in paragraph 1 of the prayer, the Claimant must establish that there has been a continuing failure by the Government of Antigua and Barbuda to satisfy the compensation and costs awarded by the Board of Assessment, which failure amounts to a breach of the Claimant's right to protection from the deprivation of its property guaranteed under section 9 of the Antigua and Barbuda Constitution. The relief sought by the Claimant in the other paragraphs of the prayer in the fixed date claim flows from the relief sought in paragraph 1, because if there has not been a continuing failure by the Government to satisfy the award, then there would be no basis for the Court to make an order compelling the Minister of Finance to procure payment forthwith to the Claimant of the sums awarded, or to award damages, costs and other relief to the Claimant for breach of its constitutional rights.

[7] Several cases were referred to by the Claimant in its written submissions filed on 10th November 2010, copies of which cases were provided to the Court by the Claimant.

- [8] In the case of **San Jose Farmers' Co-operative Society Ltd v Attorney-General**¹, the Court of Appeal of Belize held that a provision in the Land Acquisition (Public Purposes) Act, which gave a discretion to a Minister to order compensation for compulsory acquisition of the appellant's land to be paid to the appellant over a ten-year period, did not provide for payment of compensation within a reasonable time in accordance with section 17 (1) (a) of the Constitution of Belize.
- [9] Probably of greater relevance to the present case is the statement of Liverpool, JA at page 83 of the judgment that – "Compensation within a reasonable time can only mean that payment must be made in full as soon as is reasonably practicable after the amount of compensation due has been finally settled, either before the Board for the Compulsory Acquisition of Land or on appeal from its decision."
- [10] In the case of **Gairy v Attorney General**², the Privy Council – on appeal from the Court of Appeal of the Eastern Caribbean Supreme Court – held that the appellant having proved a breach of a right protected by the Constitution, the court had the power to grant an effective remedy to the appellant or to fashion a new remedy to give effective relief.
- [11] The Gairy case arose out of the confiscation of properties belonging to Sir Eric Gairy (the appellant in that case) by the People's Revolutionary Government of Grenada in 1979 under a law which both parties to the case agreed was in contravention of the provisions of the 1973 Constitution of Grenada guaranteeing protection from compulsory acquisition of property without prompt payment of full compensation. In 1987 the High Court in Grenada had ordered that the appellant's property be returned to him and awarded compensation to him for the unlawful confiscation of his property.

¹ [1991] 43 WIR 63

² [2001] 4 LRC 671

By 1997 a large portion of the compensation awarded remained unpaid and so the appellant issued a notice of motion seeking an order of mandamus directed to the Minister of Finance requiring him to make prompt payment of the balance of the compensation. The motion was dismissed by the High Court; the High Court's decision was upheld by the Court of Appeal; the Court of Appeal's decision was, however, reversed by the Privy Council which held that, having found that there was a breach of a right protected by the Constitution, the court has the power to grant an effective remedy or to fashion a new remedy if necessary to give effective relief.

[12] In the case of **Bloomquist v Attorney-General of the Commonwealth of Dominica**³, Lord Mackay of Clashfern – in delivering the opinion of the Judicial Committee of the Privy Council – opined that delay in the payment of compensation to a landowner whose property had been compulsorily acquired could have the effect that the acquisition was not duly carried out in accordance with the law authorizing the acquisition.

[13] Of significance is the fact that the Privy Council held that the only remedy of the landowner for delay in the payment of compensation to him was an order for interest payable on the assessed compensation from the date of acquisition of the property to the date of payment of the compensation.

[14] In the case of the **Attorney General of Antigua and Barbuda v Bufton**⁴, the Court of Appeal of the Eastern Caribbean Supreme Court reduced but did not overturn an award by the High Court in Antigua and Barbuda for damages for breach of the appellant's constitutional right not to have his

³[1987] 35 WIR 162

⁴[2004] OECS Civil Appeal No. 22 of 2004

property compulsorily acquired without the payment to him of fair compensation within a reasonable time.

[15] The issue before the Court of Appeal in the Bufton case was not whether there was a breach of the landowner's constitutional right to payment of fair compensation within a reasonable time, as provided by the Antigua and Barbuda Constitution, but only as to the quantum of the compensation awarded under various heads. It is to be noted that Barrow, JA - in delivering the judgment of the Court of Appeal - left no doubt that he did not consider that there should be any award made by way of damages for breach of the landowner's constitutional right to compensation over and above the compensation awarded for the value of the property acquired and that delay in payment of the compensation awarded is adequately compensated by an award of interest. The Learned Justice of Appeal stated however (at paragraph 40 of the judgment) that, despite his clearly-expressed position, it would be wrong for him to disallow the award of compensation for breach of the constitutional right of the respondent in that case, because the entitlement to it was not challenged by the Attorney General.

[16] In the case of **Maharaj v Attorney-General of Trinidad and Tobago (No. 2)**⁵ the Privy Council opined that an order for payment of damages for breach of a right protected under the Constitution is clearly a form of redress which a person is entitled to claim under the fundamental rights and freedoms' provisions of the Constitution. In that case, the breach was in respect of deprivation of the appellant's liberty otherwise than by due process of law, and it was clearly stated in the judgment of the Privy Council that, the appellant having served out the full term of imprisonment

⁵ [1978] 2 ALL ER 670

unlawfully imposed on him, the only practicable form of redress available to him was monetary compensation.

[17] The case of **Fuller v Attorney-General of Jamaica**⁶ (decided by the Court of Appeal of Jamaica) was referred to by the Claimant only on the issue of the measure of damages for breach of a constitutional right where an award of monetary compensation is determined by the court to be appropriate in the circumstances of the particular case.

[18] Counsel for the Claimant also referred the Court to Wade & Forsyth on Administrative Law on the issue of the availability of mandamus in the enforcement of public duties and to a ruling of the Appeal Committee of the House of Lords in the case of **Re Fletcher's Application**⁷ that mandamus is not available to compel a public officer to perform a function where a statute confers on him a discretion whether or not to perform the function.

[19] What these judicial and textbook authorities cited by the Claimant show is that a person's constitutional right to the protection of his property from compulsory acquisition by government will be enforced by the court whenever the court determines that government has not complied with the statutory requirements contained in the relevant legislation of if, as in the Gairy or San Jose Farmers' Co-operative Society cases, the statute itself contravenes the Constitution. Even if the statute does not contravene the Constitution and the statutory requirements have been complied with, government can still run foul of the Constitution if it fails to pay full compensation to the landowner within a reasonable time. If the government should default in any of these respects, the cases show that the appropriate government official can be compelled by mandamus to comply

⁶ [1998] 56 WIR 337

⁷ [1970] 2 ALL ER 527

with the law and that the court can make an award of damages against the government for breach of the person's constitutional right.

[20] The cases differ as to whether damages should be awarded to the landowner for breach of his constitutional right to protection from deprivation of his property over and above the compensation awarded to him for the compulsory acquisition of his property. This is to be distinguished from a situation like the one in the Maharaj case where vindication of the claimant's constitutional right may only be attained by an award of damages to him, having regard to the fact that what was contravened was the claimant's right to protection from deprivation of his liberty without due process and, by the time his case was heard, the unlawful deprivation of his liberty had already run its course. The cases also differ as to whether interest on the compensation awarded to a landowner is sufficient to compensate the landowner for any delay in the payment to him of the compensation awarded.

[21] In the closing submissions of the Defendant, Learned Counsel for the Defendant referred to several of the authorities cited by the Claimant, distinguishing some and adopting others (though not necessarily on the same point which Learned Counsel for the Claimant was relying on). Learned Counsel for the Defendant also cited and provided the Court with the case of **HMB Holdings Ltd v Cabinet of Antigua and Barbuda**⁸ as being relevant to the issues for determination by the Court.

[22] The utility to the Court of some of the cases to which it was referred was, however, circumscribed by the pertinent facts of the instant case as reflected in the findings and determinations hereafter

⁸[1970] 2 ALL ER 527

made by the Court.

[23] Having reviewed the facts of the case, the submissions made and the authorities referred to by the parties, the Court has made the following findings and determinations –

1. The date of compulsory acquisition of the Claimant's property by the Defendant - as determined by the Board of Assessment and expressly accepted by both parties - is in July 2007 when the Claimant vacated and the Defendant assumed possession of the property.
2. The compensation payable by the Defendant to the Claimant has up to the present time not been "finally settled" (adopting the terminology used by the Court of Appeal of Belize in the San Jose Farmers' Co-operative Society case cited by the Claimant). The Board of Assessment set up on 4th June 2008 to determine the quantum of compensation to be paid by the Defendant to the Claimant made an award of compensation to the Claimant on 5th January 2010 in the sum of US\$23,820,999; on appeal by the Claimant, the Court of Appeal (on 5th December 2011) increased the award to US\$45,499,102.09; the Defendant has appealed the Court of Appeal's award, which appeal has not yet been heard by the Privy Council. Learned Counsel for the Claimant - in paragraph 8 of the Reply by Claimant to the Closing Submissions of the Defendant – correctly stated that the Land Acquisition Act permits an appeal against the decision of the Board of Assessment and so "any amount awarded on appeal must be treated as an amount awarded 'under' the Land Acquisition Act."
3. The amount awarded under the Land Acquisition Act by way of compensation for the compulsory acquisition of the Claimant's property not having been "finally settled", the Defendant cannot be held to be failing to satisfy the compensation awarded by the Board of

Assessment when that award was appealed to the Court of Appeal by the Claimant, which then made an award that was appealed to the Privy Council by the Defendant and the hearing of which appeal has not yet taken place.

4. The Defendant has not breached the Claimant's constitutional right to protection from the deprivation of its property by reason of any failure on the part of the Defendant to pay fair compensation to the Claimant within a reasonable time. Indeed, although the filing of an appeal does not operate as a stay of execution, it cannot reasonably be concluded that the Defendant has failed to pay compensation to the Claimant for the compulsory acquisition of its property when the quantum of the compensation payable to the Claimant by the Defendant has not been finally settled.

[24] Based on the foregoing findings and determinations, the Claimant's case against the Defendant is dismissed, with costs to the Defendant in the sum of \$15,000.



Mario Michel
High Court Judge