

ANGUILLA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.4 OF 2004

BETWEEN:

[1] THE ATTORNEY GENERAL OF ANGUILLA
[2] THE MINISTER OF SOCIAL DEVELOPMENT
[3] THE MINISTER OF INFRASTRUCTURE

Appellants

and

[1] BERNICE LAKE, QC
[2] AUCKLAND B. KENTISH
[3] DR. CUTHWIN L. LAKE, CBE
[4] RONALD BROOMES
[5] GEORGE KENTISH
[6] DR. CUTHWIN L. LAKE (Personal Representative of the
Estate of Albenah Lake-Hodge)
[7] RONALD BROOMES (Personal Representative of the Estate
of Clarion Broomes)
[8] AUCKLAND B. KENTISH (Personal Representative of the
Estate of Ellen Clarke)
[9] BERNICE LAKE QC and AUCKLAND B. KENTISH (Personal
Representatives of the Estate of Carmencita Arthurton)

Respondents

Before:

The Hon. Adrian Saunders
The Hon. Brian Alleyne, S.C.
The Hon. Suzie d'Auvergne

Chief Justice [Ag.]
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Allan Alexander S.C. with Mr. Patrick Patterson and Ms. Stella McFarlane for
the Appellants
Mr. Dennis Morrison Q.C. with Mr. George Lake and Ms. Naveen Fleming-Kisob
for the first Respondent
Ms. Joyce Kentish and Ms. Josephine Gumbs-Connor for the 2nd to 9th
Respondents

2004: December 7; 8;
2005: April 4.

JUDGMENT

- [1] **SAUNDERS, C.J. [AG.]:** The Respondents own the Forest Estate in Anguilla. The estate comprises three parcels of land namely, parcels 100, 126 and 284. Ms. Bernice Lake, the first Respondent, owns parcel 100 while Mr. George Kentish, the fifth Respondent, owns parcel 284. The other Respondents all have interests of varying kinds in parcel 126.
- [2] The Forest Estate lies just east of the Wallblake airport. In 2003, the Anguilla government decided to develop the airport by, among other things, lengthening the runway. The development necessitated the acquisition of lands. In October, 2003, the Anguilla legislature approved a declaration by the Governor in Council to acquire compulsorily 26 acres of Parcel 100. The Notice of declaration was published in the gazette on successive occasions and, upon the second publication, in keeping with the Land Acquisition Act ("the Act"), the lands acquired vested absolutely in the Crown.
- [3] The Respondents are aggrieved at the acquisition. They have challenged the constitutionality of the Act. They have alleged that their constitutional rights to life and to the enjoyment of their property have been or will be infringed by the acquisition as well as by the works the government intends to execute upon the lands acquired. They applied to the Court for a number of declarations and other orders.
- [4] The matter was heard by Baptiste, J. In a detailed and lucid judgment the learned Judge held that sections 18 and 20 of the Act violated property rights provisions contained in section 7 of the Anguilla Constitution. The Judge decided that, because the Act was a post constitutional law, it was not amenable to modification to bring it into conformity with the Constitution. He therefore struck down the Act in its entirety. He also held that "a fair balance [had] not been struck between the public interest in the airport expansion and the constitutional rights of the...[Respondents]...because the design and scope of the ...[proposed]...works

and the method of execution would have a disproportionate or excessive effect on the property rights of the ...[Respondents]...". Accordingly, the Judge issued, as against the relevant Ministers and persons acting on their behalf, an order restraining them all from entering or remaining upon the lands acquired and from taking any other action to the prejudice of the Respondents in pursuance of the Act. Damages of \$10,000.00 were awarded the Respondents along with costs.

- [5] This of course represented substantial success for the Respondents. However, in the course of his judgment, the trial Judge ruled against the Respondents on a variety of issues related to the constitutionality of various provisions of the Act. For example, the Judge declined to render void the vesting Declaration that had been made pursuant to the Act. The Judge also found that the appointment and composition of the Board of Assessment, established by the Act to determine the quantum of compensation payable for lands acquired, did not violate the constitutional right of the Respondents to an independent and impartial tribunal. The Judge also upheld the constitutionality of section 4 of the Act which empowers the Governor in Council to execute works on lands, intended to be acquired, without waiting for a formal vesting. Finally, in relation to the Act, the Judge did not consider that the structure and design of the Act, and in particular the central role the Act allots to the Attorney General, placed the Act in collision with the constitutional doctrine of the separation of powers. The Attorney General and the relevant Ministers have appealed the judgment. The Respondents have cross-appealed the decisions that have gone against them.

The Land Acquisition Act 2000

- [6] Section 18 of the Act sets out some of the rules governing the assessment of compensation once lands have been acquired by the government. Section 18(4) states, inter alia:

(a) land shall be deemed to be used for agricultural purposes 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 purposes;

(b) “agricultural purposes” includes all purposes directly connected with the use of land as arable, grazing, or pasture land, or for dairy farming, or for any other purpose of animal husbandry including the keeping or breeding of poultry or bees, or for the growth of fruit, vegetables or flowers;

(c) “appropriate authority” means the authorized officer appointed under and for the purposes of this Act, a Board of Assessment appointed under and for the purposes of this Act, or, as the case may be, any Judge, Court, magistrate, tribunal, arbitrator or person authorized by this Act to determine the amount of compensation payable thereunder;

(d) “material time” means the date 12 months prior to the date of the second publication in the Gazette of the declaration under section 2

[7] Section 20 of the Act provides that in awarding compensation, interest may be granted at the rate of 4% per annum, calculated from the date upon which the authorised officer entered into possession of the land acquired, until the date of payment of compensation. Section 28 stipulates that compensation must be promptly paid in cash and that the right to compensation awarded shall be enforceable by suit against the Attorney General, as defendant, in accordance with the provisions of the Crown Proceedings Act.

[8] The trial Judge reasoned that the provision deeming land use to be for agricultural purposes violated the constitutional requirement of adequate compensation because it disregarded the potentialities of the land and ignored current market value. Secondly, the Judge held that the fixed rate of interest at 4% represented a denial of adequate compensation as did the stipulation that the date of the valuation of the land for the purpose of compensation should be a date 12 months prior to the date of the second publication in the Gazette. Thirdly, the Judge disagreed with the Respondents, who claimed as also unconstitutional, the provision requiring the landowner to enforce an award of compensation by civil suit against the Attorney General in accordance with the provisions of the Crown Proceedings Act.

Deeming land use to be for agricultural purposes

[9] The provision deeming land to be used for agricultural purposes, quoted at paragraph 6 above, is a legal presumption that is capable of being rebutted. In the absence of evidence to the contrary, land will be deemed to be used for agricultural purposes but, if it is proven that the land was being used for a non agricultural purpose, the presumption of use for agricultural purposes will be rebutted. It was conceded that Anguilla has long ceased to be an agricultural country and it would not, in these circumstances, be difficult for a seller to rebut this presumption.

[10] In **Sri Raja v. Revenue Officer**¹ Romer LJ expressed how one should go about a valuation of lands compulsorily acquired. Lord Romer stated:

"No one can suppose, in the case of land which is certain, or even likely, to be used in the immediate or reasonably near future for building purposes, but which at the valuation date is waste land, or is being used for agricultural purposes, that the owner, however willing a vendor, will be content to sell the land for its value as waste or agricultural land, as the case may be. It is plain that in ascertaining its value the possibility of its being used for building purposes would have to be taken into account. It is equally plain, however, that the land must not be valued as though it had already been built upon, a proposition that is embodied in sect. 24 (5) of the Act and is sometimes expressed by saying that it is the possibilities of the land, and not its realised possibilities, that must be taken into consideration".:

[11] Section 18(2) of the Anguilla Act states that

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

I would have thought that section 18(2) admitted of the same approach as was expressed in **Sri Raja** even though Lord Romer was analyzing legislation that was not identically worded. Given however, the constitutional right of a land owner to

¹ (1939) A.E.R. 317 @ 322

adequate compensation, I agree that it would not be proper for the legislature to place even the slightest fetter on that right. Accordingly, I agree with the Judge that deeming land to be used for agricultural purposes should be regarded as infringing the right to adequate compensation. I would similarly regard the latter words in section 18(2), namely, “for the purpose of being put to the same use to which such land was being put at the material time”.

The independence and impartiality of the Board of Assessment

- [12] Section 9(2) of the Anguilla Constitution provides that any Court or other authority prescribed by law for the determination of the existence or extent of civil rights or obligations shall be independent and impartial. The Respondents submitted that the Board of Assessment established by the Act was not an independent and impartial tribunal.
- [13] Section 11 of the Act mandates the Governor in Council to appoint the Board. The role of the Board is to determine all questions and claims relating to the payment of compensation under the Act. The Board is constituted in the following manner: a Judge of the High Court as 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. Section 12 requires the authorised officer, a functionary appointed by the Governor in Council, to forward certain reports and documents to the Board for their consideration. The inquiry to be held by the Board must be conducted in public². The procedure at the inquiry before the Board is governed by the provisions of the laws relating to civil proceedings in the High Court, but in the case of any doubt arising on any question of practice and procedure, the same may be settled by the Chairman³. The Board's Award must be filed in the High Court⁴. The decision of the Board may be made by a majority of its members and, if all the members of the Board differ, the mean between the amount decided upon

² See section 13 of the Act

³ See section 14 of the Act

⁴ See section 16 of the Act

by the Chairman and the amount of the other member whose decision most closely approximates to the amount decided upon by the Chairman shall be deemed to be the compensation awarded by the Board⁵. An appeal to the Court of Appeal shall lie against the decision of the Board⁶.

[14] The Respondents take exception to the fact that appointment to the Board is made by the Executive; that the Board is an *ad hoc* body; and that it is composed in part of nominees of the parties. They allege that the Board lacks institutional independence and they have cited a number of cases including **Begum v. London Borough of Tower Hamlets**⁷, **Bryan v. UK**⁸, and **Findlay v. UK**⁹.

[15] I would accept as a useful guide the test of independence and impartiality laid down by the European Court in **Findlay's** case where it was said that:

...in order to establish whether a tribunal can be considered as "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 represents an appearance of independence...

As to the question of "impartiality", there are two aspects to this requirement. Firstly, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect...

[16] I believe that it would be quite erroneous to consider the Board's alleged *ad hoc* nature, the fact that its members are appointed by the Governor in Council, and that nominees of the parties sit on it, in isolation from the rest of the provisions governing the establishment of the Board and the procedure that it is required to follow. The entire regime must be looked at as a whole, including the purpose for its unique features, before one can determine whether the Board can be said to be lacking in independence and impartiality.

⁵ See section 16(2) of the Act

⁶ See section 16(3) of the Act

⁷ [2003] UKHL 5

⁸ (1996) 21 E.H.R.R. 342

⁹ (1997) 24 E.H.R.R. 221

- [17] The facts in **Findlay's** case are far removed from this one. The Court martial that tried Mr. Findlay was comprised entirely of officers appointed by the convening officer who also performed the role of prosecuting authority; the officers of the board all lacked legal qualification or experience; their findings had no effect until confirmed by the said convening officer; the court-martial board could have been dissolved by the said convening officer either before or during the trial; the post-hearing review was shrouded in secrecy and Mr. Findlay had no opportunity to participate in any meaningful way in those review proceedings. In these circumstances, the Court found that Mr. Findlay had not been afforded a hearing before an independent and impartial tribunal.
- [18] Land valuation can sometimes be a complex and difficult exercise requiring special skills. Valuations of land can be notoriously subjective. It is perhaps for these reasons that the Anguilla Parliament has followed the model which has been adopted in many Caribbean countries. The land owner and the State are each allowed to nominate someone to sit with the Judge of the High Court. They may choose, for example, to nominate legal or valuation experts with specialised knowledge of the facts in issue. The High Court Judge chairs the proceedings and is required to conduct them in public in a manner that is virtually indistinguishable from the Judge's conduct of High Court civil proceedings. Where there is doubt on any matter of practice and procedure, it is the Judge who settles the matter. The Board's Award is available for public scrutiny and there is an unlimited right of appeal to the Court of Appeal. Nothing in the legislation suggests that the Board is under the control of the executive or any other body. It is true that the Governor in Council appoints the members but that is a mere formality. One must look behind that formality and explore the substance. In substance the parties each nominate a member to sit with a Judge of the High Court about whose institutional independence no one can seriously quarrel. With respect to the appointment of the Judge, the Act must be read in conjunction with the provisions of the Eastern Caribbean Supreme Court Order, 1967 and Part 2.5(6) of the Civil Procedure

Rules. The assignment of High Court Judges to Anguilla specifically, and throughout the sub-region in general, rests not with the Governor in Council but with the Chief Justice¹⁰. In practice therefore, it is the Chief Justice who ultimately will be responsible for the identity of the particular Judge that chairs the Board. As to the two nominated members, it may well be that the legislature intended that having each of the parties nominate one of them might have contributed to enhancing the prospects of an Award that reflected fair and adequate compensation. In all the circumstances, in my view, the appointment of the members of the Board by the Governor does not rob the Board of its independence and impartiality.

- [19] Like **Findlay's** case, I think **Bryan's** case, as well as **Begum's**, should be distinguished. What was troubling in **Bryan's** case was the circumstance that the Secretary of State, even during the course of the proceedings as they were in progress, could have issued a directive to revoke the tribunal's authority to hear the matter. That is not the case here. Nothing in the Anguilla Land Acquisition Act suggests that the Governor in Council could embark upon such a measure. Nor, for what it is worth, was it suggested that such a course had even been attempted anywhere in the English speaking Caribbean. Moreover, in **Bryan's** case as in **Begum's**, although there was only a limited right of appeal, on matters of law, the Court nonetheless held that the existence and scope of such a limited right of appeal was sufficient to render the proceedings compliant with the Article of the Convention requiring the provision of an independent and impartial tribunal. It is true that Lord Hoffman in **Begum** noted¹¹ that such limited rights of appeal may only be appropriate in instances related to "specialized areas of the law" such as regulatory and welfare schemes but, it must be borne in mind that under the Anguilla Land Acquisition Act, there exists an unqualified, full right of appeal to this Court from decisions of the Board of Assessment and the Act conferring jurisdiction on this Court expressly makes it clear that the Court of Appeal shall

¹⁰ See West Indies Associated States Supreme Court Order 1967 section 16

¹¹ See Para 56 of the *Begum* judgment

have all the powers, authority and jurisdiction of the Court below¹². Further, the rules of evidence and the practice and procedure of the Board are governed by the same rules that apply to a Court of law. Looking at the entire picture in the round, it is my judgment that the Board of Assessment can be said to be, and has all the appearances of one that is, independent and impartial. That was also the conclusion arrived at by Liverpool, JA in **San Jose Farmers Cooperative v. The Attorney General of Belize**¹³ when he construed very similar provisions.

The separation of powers doctrine

- [20] The Respondents have further alleged that the Anguilla Constitution precluded the legislature from removing from the existing judicial system and conferring upon the executive the power to establish a Board of Assessment which could determine “matters relating to the citizens’ fundamental rights and freedoms”. In my view this submission flies in the face of the clear provisions of section 9(2) of the Anguilla Constitution. Those provisions state:

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; and where proceedings for such a determination are instituted by any person before such a court or other authority, the case shall be given a fair hearing within a reasonable time.

- [21] If one accepts the argument that the Board of Assessment is not a Court, the Constitution itself allows for certain “other authorities” apart from Courts to be involved in the determination of the existence or the extent of civil rights or obligations. All that is required is that these other authorities must be independent and impartial, established by law and that they must conduct their hearings in public¹⁴. The Board of Assessment meets all these criteria. It is incorrect to state that access to the Courts (for the purpose of alleging that the fundamental rights provisions of the Constitution have been or are being contravened) has been

¹² See Eastern Caribbean Supreme Court Anguilla Act, Revised statutes of Anguilla Cap. E15, section 29(1)b

¹³ (1991) 43 W.I.R. 64 at page 81

¹⁴ See section 9 of the Anguilla Constitution

denied or compromised by reason of the establishment of the Board. Access to the Court for this purpose continues to remain available for those who seek to complain of a breach of a fundamental right. Such access cannot be and has not been transferred to the Board of Assessment.

- [22] Section 7 of the Constitution, which addresses the protection from deprivation of property, specifically permits the passage of laws that provide for the compulsory acquisition of property by the State. Any such law is sanctioned¹⁵ if it
- a)prescribes the principles upon which and the manner in which adequate compensation thereto is to be determined;
 - b)requires the prompt payment of such adequate compensation;
 - c)prescribes the manner in which compensation is to be given; and
 - d)prescribes the manner of enforcing the right to any such compensation.

It is interesting to note that nothing in section 7 requires that the quantum of compensation must be determined by a Court of law.

- [23] Finally, in complaining that the process governing the acquisition under the Act violates the doctrine of the separation of powers, the Respondents have cited the respective roles of “the authorised officer” and of the Attorney General.

- [24] The authorised officer is an official appointed by the Governor in Council, from time to time, pursuant to and for the purposes of the Act. The authorised officer is charged with specific responsibilities. That officer may enter, take possession of and do certain things on the land before and after the acquired land becomes vested in the Crown¹⁶. The officer is empowered to negotiate with the land owner the purchase of the land¹⁷. The officer also demarcates the land¹⁸, issues the notice of acquisition¹⁹ and may require information from owners or occupiers as to interests in the land²⁰. Upon the appointment of a Board of Assessment, the

¹⁵ See section 7 of the Anguilla Constitution

¹⁶ See sections 2 and 3 of the Act

¹⁷ See section 5 of the Act

¹⁸ See section 6 of the Act

¹⁹ See section 6 of the Act

²⁰ See section 7 of the Act

authorised officer is required to forward to the Chairman of the Board a variety of documents along with a report on several matters including the officer's opinion on the approximate acreage of the land being acquired, the value of the land for the purposes of compensation and the amount of provisional compensation which should be paid²¹. The Respondents complain that the authorised officer is, according to them, "the guiding hand" of the Board of Assessment for the purpose of determining the amount of compensation and that this trespasses upon the separation of powers doctrine.

[25] The Attorney General is, ex officio, a member of the Executive Council which made the decision compulsorily to acquire the land. The Council is involved in the determination of the fees to be paid to the assessors which fees are set upon the recommendation of the Chairman of the Board²². The Attorney General is also, ex officio, a member of the House of Assembly of Anguilla. It is the House that gave statutory approval to the decision to make the declaration of compulsory acquisition. The Respondents submit that all this makes the position of the Attorney General untenable.

[26] In my judgment, it is inappropriate to regard the authorised officer as "the guiding hand" of the Board of Assessment. That officer does not control or exert any undue influence over the Board. The authorised officer merely provides appropriate assistance to the Board whose members are free to make such findings of fact as they wish. Nor should the role of the Attorney General present cause for alarm. The Constitution invests the Attorney General with a high level of trust. In this respect one notes that in spite of the Attorney General's membership of both the legislative and the executive arms of Government, the same Constitution bestows upon that official exclusive power to institute, undertake, and discontinue at any stage criminal proceedings against any person.

²¹ See section 12 of the Act

²² See section 26 of the Act

- [27] The learned trial Judge examined all the safeguards in the Act to secure the Board's independence and impartiality and held that the Act did not violate the separation of powers doctrine. In my judgment, the Judge was right so to do.

The Crown Proceedings Act and the manner of enforcement of the Award

- [28] Section 28 of the Act addresses payment of compensation once an Award has been made by the Board. Sub-section 1 states that the monies payable are to be paid out of the Treasury on the warrant of the Minister of Finance. Sub-section 2 stipulates that payment of compensation awarded shall be promptly made and shall be in cash. Sub-section 3 expresses the right of the land owner to enforce the Award by suit against the Attorney General in accordance with the Crown Proceedings Act.
- [29] The Respondents have submitted that section 28(3) violates the constitutional prescription for prompt payment of adequate payment because it Courts inordinate delay in the payment of compensation and it resorts to a circuitous route for enforcement of payment. I do not agree with this submission. The Act, in accordance with the Constitution, expressly mandates prompt payment in cash. The warrant of the Minister of Finance should cause no undue delay and if undue delay is occasioned after the Board's Award, the Minister is amenable to an order of mandamus. See: **M v. Home Office**²³. Sub-section 3 merely directs the land owner to the steps that can be taken to enforce an Award that is not promptly paid in cash. It is not a provision that should in any way be regarded as detracting from the right to compensation guaranteed by section 7 of the Constitution.

The admittedly unconstitutional provisions of the Act

- [30] The learned trial Judge in the course of his judgment struck down the Act in its entirety because parts of sections 18 and 20 of the Act were in contravention of

²³ (1994) 1 A.C. 377

the Constitution. The aspects in question here relate, in the case of section 18, to the deeming of land to be used for agricultural purposes and to the provision that the material time for valuing the land acquired should be a date 12 months before the land was vested in the Crown. In the case of section 20, the provision stipulating a fixed rate of interest of 4% on the award of interest was held to be unconstitutional. In striking down the entire Act the Judge evidently did not consider the possibility of the severance of these unconstitutional provisions.

[31] Mr. Alexander, SC, for the Appellants, conceded the possibility that the impugned provisions might be unconstitutional. He and counsel for the Respondents, Mr. Morrison, QC, differed as to the consequence of holding these provisions to be unconstitutional. Mr. Alexander states that the Act is “an existing law” and is therefore amenable to modification by the Court²⁴ pursuant to paragraph 6 of the Anguilla Constitution Order 1982²⁵. But if, argues Mr. Alexander, the Act is not an existing law, the learned trial Judge should have resorted to the principle of severance and, on that basis, upheld the Act as constitutional. Mr. Morrison on the other hand asserts that the Act is not an existing law and is therefore incapable of modification by the Court. On the issue of severance, Mr. Morrison states that the appropriate test is whether the offending provisions can be separated from the Act in such a way as to preserve the basic scheme of the Act. He submits that this is not possible because the scheme of the Act is to limit the compensation payable to the owner. This, he submitted, is demonstrated by the deeming provision regarding agricultural land; by the limiting of the interest payable to the landowner irrespective of current underlying economic realities; and by the provision which calls for compensation to be assessed as at a date 12 months before the acquisition.

²⁴ See for example *Windward Properties*, supra and also *Beausejour Estates Ltd. v. AG of Grenada*, Civil Appeal No. 11A of 1988

²⁵ That paragraph states 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.....”

[32] I agree with Mr. Morrison as to the applicable test for severance. In *Hinds et al v. R*²⁶, Lord Diplock re-affirmed the test of severability by quoting the Judicial Committee's judgment in **Attorney General for Alberta v. Attorney General for Canada**²⁷. It was stated in the latter judgment that

The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is *ultra vires* at all.

[33] A considerable portion of the time allotted to this appeal was taken up with the issue of whether the Act is or is not an existing law. This was a highly contentious issue because, although the Act in its original form was passed by the legislature in 1959, it was revised and brought into force in 2000 as a part of the Revised Statutes and Regulations. Much of the argument therefore turned on the consequence of the revision. Had I been persuaded, perhaps, that numerous other provisions of the Act were unconstitutional, I might have found it productive to enter upon the debate over the consequences of the law revision exercise so far as the same impacted upon the question of whether or not the Act, in its current form, is or is not an existing law. However, the offending provisions of the Act so neatly, so readily lend themselves to severance that I find it quite sterile to engage in any such endeavour.

[34] The examples cited by Mr. Morrison QC to support the conclusion that the scheme of the Act is to limit compensation are not, in my view, convincing. To each of them, an alternative explanation can perhaps be put forward that might support the contrary conclusion. If one had to deduce the scheme of the Act, shouldn't one consider the realities that existed in 1959 when the Act was originally passed? Anguilla then was not the sophisticated, up-market tourist destination that it now is. Deeming land to be agricultural in the absence of evidence to the contrary may, in 1959, have been quite a natural thing to do since there was little else being done

²⁶ (1975) 24 W.I.R.326 @ page 343

²⁷ (1947) A.C. at page 518

on large tracts of lands in Anguilla at that time. We have heard no evidence on the point but I would be very surprised if a rate of interest at 4% per annum would have been considered unduly low in Anguilla in 1959. Provisions in Land Acquisition laws that purport to assess compensation at a date 12 months prior to the date of acquisition are not unique to Anguilla. The same are to be found in many other countries of the English speaking Caribbean and, since the introduction of constitutional Bills of Rights guaranteeing property rights, these provisions have been routinely modified or struck down²⁸. Barring unusual circumstances it is unlikely that land values in the Caribbean would jump dramatically over the course of a 12 month period and this must have been even more the case in Anguilla in 1959. It seems likely therefore that the true explanation for the 12 month provision has less to do with a deliberate attempt aimed at depressing the amount of the award to the land owner than with a policy that was applied across the board to many of the former colonies either to prevent speculation in land or to assist in arriving at a fair valuation.

- [35] In all the circumstances I do not agree that to sever the provisions that offend the Constitution would alter or destroy the scheme of the Act. I am of the view that the concept of adequate compensation for expropriated land pre-dated the Constitution and the scheme of the Act is consistent with and intended to promote that concept. In my judgment to sever the offending provisions will do absolutely no harm to the remainder of the Act and indeed, will improve the Act's efficacy. Accordingly, I would sever those offending provisions. I would delete from section 18(2) the words "for the purpose of being put to the same use to which such land was being put at the material time". I would remove entirely section 18(4) (a) and (b). I would excise from section 18(4) (d) of the Act²⁹ the phrase "the date 12

²⁸ See for example, *Windward Properties*, *supra*; *San Jose Farmers Cooperative*, *supra*; and *Beausejour Estates Ltd*, *supra*

²⁹ Section 18(4)(d) states: " "material time" means the date 12 months prior to the date of the second publication in the Gazette of the declaration under section 2".

months prior to". I would also sever from section 20 of the Act³⁰ the phrase "at the rate of 4% per annum".

The right to life and freedom from discrimination

- [36] The learned trial Judge dealt with the submissions on the right to life of the relevant Respondents at paragraphs 56 and 57 of his judgment. The Judge also addressed the Respondents' allegation that they were being discriminated against at paragraphs 58 to 71. With respect to the right to life, the Judge found no evidence in support of the claims made by the relevant Respondents. He therefore found that this claim was not proved. Regarding the allegation of discrimination, the Judge found no sufficient evidential basis upon which to ground the allegation. Accordingly, the Judge rejected both claims. On the evidence presented, the Judge was fully entitled to the conclusions to which, on these points, he arrived and I would not interfere with those conclusions.

The declaration that a fair balance has not been struck

- [37] The Respondents had contended in the Court below that a fair balance had not been struck between the public interest in the Airport Expansion and their constitutional rights and they had sought from the Court a declaration in those terms. The Respondents posited, in support of this declaration, that they had been discriminated against; that the tribunal determining their rights was not independent and impartial; and 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 their property and their right to life.
- [38] As we have previously noted, the learned trial Judge, justifiably, was impressed neither with the allegations regarding the independence and impartiality of the

³⁰ 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 authorised officer entered into possession of the land acquired until the date of the payment of the compensation awarded by the Board".

Board of Assessment nor with the alleged infringement of the right to life. The Judge however found for the Respondents on the matter of the design and scope of the works and the proposed method of execution. The learned Judge carefully examined the reports of experts on the ecological and environmental harm that could or was likely to arise as a result of the acquisition and concluded that the injury likely to accrue to the Respondents was disproportionate to the public interest in the airport expansion. He granted a declaration in the precise terms prayed for by the Respondents.

[39] A convenient starting point in reviewing this finding of the learned Judge is to examine the structure of Chapter 1 of the Anguilla Constitution. The Chapter is entitled “Protection of Fundamental Rights and Freedoms”. Section 1 is an introduction that reads like a preamble, beginning as it does with the word “Whereas”. Section 1 is a statement, in very general terms, indicating the basic rights that are assured to every person in Anguilla, along with the broad qualifications that attend the enjoyment of those rights. Section 1 ends by declaring that “the subsequent provisions of the 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...”

[40] Faithful to what is spelt out in the latter part of section 1, sections 2 to 15 elaborate, in some detail, the precise scope of the guaranteed rights and freedoms and the specific manner in which these rights and freedoms are or can be limited. Section 16 indicates how the guaranteed rights and freedoms are to be enforced by persons who allege a breach of any of them. It is section 16 that gives access to the Courts for the purpose of enforcing a right. Section 16 is important enough for me to quote in part its first sub-section. That sub-section states:

If any person alleges that any of the provisions of section 2 to 15 (inclusive) of the Constitution has been, or is being, contravened in relation to him 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.

Sub-section 2 of section 16 expressly gives to the High Court jurisdiction to hear and determine applications made in pursuance of sub-section 1. Section 17 of Chapter 1 gives the Governor the power to declare a state of emergency and section 18 is an interpretation section that defines various terms used in the Chapter.

[41] The first point to note is that these provisions of Chapter 1 make a very clear distinction between the broad rights declared in section 1, on the one hand, and the elaborately set out rights described in sections 2 – 15, on the other. That distinction is critical. Any of sections 2 – 15 can be enforced by the mechanisms provided for by section 16. One searches the Constitution in vain however for any provision that tells a person in Anguilla whether, or how, that person can enforce the rights declared in section 1. The conclusion seems to me inescapable. The rights declared in section 1 are incapable of being enforced save in so far as they are contained in some section lying between sections 2 and 15 (inclusive) and then, only to the extent that the relevant section permits. In effect, what can be enforced is not section 1 but rather the particular section that contains the right in question. Section 1 is a mere statement of the broad principles upon which the fundamental rights and freedoms adumbrated in sections 2 to 15 are crafted. Any purported breach of section 1 is not justiciable.

[42] The above analysis of Chapter 1 is not novel. Their Lordships in the Privy Council have had occasion to pronounce upon this. See: **Blomquist v. Attorney-General of the Commonwealth of Dominica**³¹ and **Grape Bay Limited v. Attorney General of Bermuda**³². It follows that the Respondents were entitled to allege breaches of section 7 of the Constitution, i.e. the section protecting persons from unlawful deprivation of property, but they were not entitled to allege a breach of a general right of enjoyment of property unless the breach related to some specific infringement of section 7.

³¹ [1987] A.C. 489

³² [2000] 1 W.L.R. 574

- [43] One must also consider the manner in which section 16 is drafted. Bearing in mind that this is the section that gives access to the Court, one must look to see the precise extent of the constitutional protection that is afforded to a person who apprehends an infringement of her or his rights. Section 16 only gives access to persons who allege that a fundamental right “*has been, or is being, contravened*”. The section does not give access to the Court, for constitutional relief, to persons who desire to allege that there is a threat to contravene a right laid out in sections 2 to 15.
- [44] The omission to give protection to *likely* contraventions must have been deliberate because this Anguilla Constitution was drawn up long after many others in the region had been in force and, in most of the latter, protection is specifically afforded to persons who allege that a right is *likely to be* contravened³³. The trial Judge’s analysis of the facts and circumstances that, in the Judge’s view, entitled the Respondents to the declaration in question, is replete with statements of what *could* occur, what *was likely* to happen and what *possibilities* existed if the works were executed in the manner proposed. In effect, the learned Judge gave relief on threatened or likely injury when the Constitution, perhaps regrettably so, does not expressly afford relief on such a basis.
- [45] Mr. Morrison, QC, urged on the Court, with profound eloquence, that it would be inappropriate that a person, whose enjoyment of property is disturbed, should be deprived of a constitutional remedy merely because that person did not fall within section 7. The Constitution, according to counsel, must be given a generous and purposive interpretation bearing in mind that it represents the compact between the citizen and the state and is intended to endure for a long time through all manner of social and economic circumstances. In this connection, Counsel recalled **Minister of Home Affairs v Fisher**³⁴ and the oft quoted dicta of

³³ See for example the Constitutions of Montserrat, Belize, Jamaica, Trinidad & Tobago, Barbados, Bahamas, Saint Christopher & Nevis

³⁴ (1979) 3 AER 21

Wilberforce, LJ in that case³⁵. Counsel also drew attention to the impact of international jurisprudence, especially relating to the observance of human rights, on the interpretation of domestic law. Counsel conceded that a litigant, affected by what appears to be a breach of section 1 or by a threatened injury, might still be able to bring a common law action but, counsel reminded the Court, we have gone beyond the days when causes of action were stymied for form. Moreover, a declaration from the constitutional Court can have a protective effect as distinct from a common law action which may only give the litigant damages in circumstances where that remedy may not be adequate especially bearing in mind the size of the land here and its uniqueness.

[46] These are all valid points. In construing a Bill of Rights, Courts may and should adopt a generous approach in order to guarantee results that do not deprive the citizen of the full measure of the right assured. Thus, in **Fisher**,³⁶ the Privy Council departed from the common law construction of “child” in order to bestow upon children born out of wedlock the full plenitude of assured constitutional rights. In the consolidated cases of **Hughes**³⁷ and **Spence**³⁸, a majority of this Court, in a decision that was subsequently upheld by the Privy Council, decided that the broad, unqualified constitutional right to protection from inhuman punishment or other treatment embraced treatment that was inherent in laws that prescribed a mandatory death penalty for murder.

[47] These cases provide examples of “generous” interpretations in a context where the text of the Bill of Rights allowed for a measure of elasticity. It is another matter altogether where the framers of the Constitution take what can only be regarded as a deliberate decision to exclude text that might provide a basis for such “generosity”. Courts, which derive their jurisdiction from the very Constitution, should be wary of subverting the manifest intent of the instrument. Some

³⁵ At page 25 where Lord Wilberforce speaks to the need to avoid “the austerity of tabulated legalism” in interpreting the Bill of Rights

³⁶ (1979) 3 AER 21

³⁷ St. Lucia Criminal Appeal No. 14 of 1997

³⁸ St. Vincent Criminal Appeal No. 20 of 1998

Commonwealth Constitutions specifically allow for the enforcement of sections akin to Anguilla's section 1³⁹. Most do not⁴⁰. Some are somewhat ambiguous on the point⁴¹. If in interpreting these variously worded Constitutions Courts all arrive at the identical result, then it might be said that the Courts are giving effect not only to what is stated in the Constitution but also to what the Courts consider ought to have been stated.

[48] There is another somewhat elementary point but one which I think needs to be made. One cannot treat the principle of proportionality, certainly not under Anguilla's Constitution, as though it were a fundamental right that can be infringed. Anguilla's Constitution does not allow a person to obtain a declaration that the principle of proportionality has been or is being infringed. Proportionality is instead a principle to be applied when considering a substantive constitutional right and whether the latter has been or is being infringed. In the case of Anguilla, that would mean a breach of one of the rights expressed in sections 2 – 15 (inclusive). An application of the principle of proportionality might assist in determining whether one of the substantive rights has been or is being infringed. However, absent a violation of such a substantive right, the principle of proportionality is of academic importance.

[49] For the foregoing reasons it is my judgment that it was inappropriate for the learned trial Judge to grant a declaration that a fair balance had not been struck since no enforceable constitutional right of any of the Respondents had been or was in the process of being contravened. The Constitution clearly sets out the entitlement of a land owner whose lands are acquired by the State. The fundamental right of the land owner is to receive prompt payment of adequate compensation. If a person, interested in property adjacent to lands compulsorily acquired, has been affected by works executed on the acquired land, then that

³⁹ See for example the Constitutions of Mauritius (as discussed in *Grape Bay supra*), Antigua and Barbuda, Belize and Saint Christopher and Nevis

⁴⁰ See for example the Constitutions of Grenada, St. Vincent and the Grenadines, Dominica, Saint Lucia, Barbados, Bahamas and Jamaica

⁴¹ As may said to be the case in Bermuda and Trinidad & Tobago. See *Grape Bay, supra*

person is by law entitled to compensation in respect of such injurious affection⁴². An Anguillian land owner cannot complain of an infringement of a *constitutional* right to the enjoyment of property over and above rights declared in section 7 and in any of the other rights laid out between sections 2 to 15 as may be applicable.

[50] I would allow this appeal, dismiss the cross-appeal and quash all the orders made by the learned trial Judge save that I do order as follows in keeping with paragraph 35 above:

- (a) that in section 18(2) the words “for the purpose of being put to the same use to which such land was being put at the material time” are to be deleted;
- (b) that section 18(4) (a) and (b) of the Act are to be excised;
- (c) that in section 18(4) (d) of the Act, the phrase “the date 12 months prior to” should be removed; and
- (d) that from section 20 of the Act the phrase “at the rate of 4% per annum” is to be severed.

I would order each party to bear her/his own costs.

Adrian Saunders
Chief Justice [Ag.]

I concur.

Brian Alleyne, SC
Justice of Appeal

I concur.

Suzie d’Auvergne
Justice of Appeal [Ag.]

⁴² See section 23 of the Land Acquisition Act