SAINT CHRISTOPHER AND NEVIS

IN THE COURT OF APPEAL

HCVAP 2007/015

BETWEEN:

LORIS JAMES

Appellant

and

THE ATTORNEY GENERAL OF SAINT CHRISTOPHER AND NEVIS

Respondent

Before:

The Hon. Sir Brian Alleyne, SC	Chief Justice [Ag.]
The Hon. Denys Barrow, SC	Justice of Appeal
The Hon. Errol Thomas	Justice of Appeal [Ag.]

Appearances:

Mr. Anthony E. Gonsalves for the Appellant
Mr. Arudranauth Gossai for the Respondent

2008: January 15
October 6.

Civil appeal – Constitutional law – Protection from deprivation of property without adequate compensation - Land Acquisition (Amendment) Act 1969 – Sections 19(1) (1) and (c) – compatibility with paragraph 10 of Schedule 2 to the constitution order

A dispute regarding the quantum of compensation payable for land that was compulsorily acquired by the Government led to the appellant filing a fixed date claim challenging the legal basis for the payment of such compensation. The trial judge decided that sections 19(1) (a) and (c) of the Land Acquisition Act as amended by the Land Acquisition (Amendment) Act 1969 (the Amending Act) did not conflict with Sections 10 (1) (a) to (c) of the Second Schedule to the Constitution of the Federation of St. Christopher and Nevis. The appellant sought to have the decision of the trial judge set aside on appeal contending that the Amending Act placed constraints upon the valuation criteria that did not exist under the Principal Act prior to the Amending Act. The appellant's constitutional right as a landowner to fair compensation was thereby unduly fettered by the imposition of conditions governing entitlement to compensation which were less favourable to the appellant contrary to paragraph 10 of Schedule 2 to the Constitution Order.

Held: allowing the appeal and setting aside the decision of the trial judge with costs to the appellant:

1. Sections 19 (1)(a) and (c) of the Amending Act were unconstitutional as they created a number of fetters which made the conditions governing entitlement to compensation or the amount thereof less favourable to the appellant contrary to paragraph 10 of Schedule 2 to the Constitution Order.

2. Sections 19(1)(a) and (c) were so intertwined or interrelated as to make severance inapplicable. What would remain after the impugned sections were declared invalid could not survive independently: Attorney General of Alberta v Attorney General for Canada [1947] AC 503 applied.

JUDGMENT

[1] THOMAS, J.A. [AG.]: On 8th June 2007 the learned trial judge, His Lordship, Francis Belle delivered a judgment in which he determined that sections 19(1)(a) and (c) of the Land Acquisition Act[1] ("the Act") as amended by the Land Acquisition (Amendment) Act 1969 ("the Amending Act") did not conflict with section 10(1)(a) to (c) of the Second Schedule to the Constitution of the Federation of St. Christopher and Nevis ("the Constitution"). This appeal is against that decision.

Background

[2] The background facts relating to this appeal are not in dispute and summarised in the judgment in the lower court. They are as follows: On 14th and 16th June 1987 the Governor General of St. Christopher and Nevis, pursuant to the Act made a declaration in SRO No. 15 of 1987 causing all the lands contained in certificate of title registered in Book 51 folio 16 and certificate of title registered in Book 51 folio 17 of the Register of Titles for St. Christopher comprising the estates commonly known as West Farm, Camps and Johnson's ("the West Farm Lands") to be acquired by the Crown for a public purpose, namely, agricultural housing and other developments.

[3] By instrument dated 6th June 1989 the Governor General pursuant to the Act appointed an authorized officer to carry out the functions prescribed by the Act.

[1] Cap. 273, Revised Laws of St. Christopher and Nevis

[4] Subsequent to the acquisition by the Government of St. Christopher and Nevis offers for payment of compensation were made to the persons who in law had interests in the land, including the claimant. The offers were refused. Thereafter the Governor-General, pursuant to section 12 of the Act caused a Board of Assessment ("the West Farm Board of Assessment") to be established to hear all questions and claims relating to the payment of compensation for the land acquired by the Crown. The West Farm Board of Assessment commenced hearings in 1998 in connection with the compensation to be paid to persons with claims. The claimant submitted a claim and made submissions to the Board through his attorney-at-law and also attended the hearings and gave testimony in support of his claim.

[5] A dispute regarding the quantum of compensation payable for the acquired land led to the claimant filing a fixed date claim challenging the legal basis for a payment of such compensation.

[6] On 29th June 2007 the appellant filed a notice of appeal against the decision in the High Court. In the notice the details of the order appealed are stated thus: the declaration by the Court contained in the judgment of 8th June 2007 that section 19(1) a) and (c) of the Act as amended did not run afoul of section 10(1)(a), (b) and (c) of the second schedule to the Constitution on the basis that they make the conditions for compensation less favourable than they were under the law prior to the amendment of the Act, that the said amendments therefore could not be the basis for a challenge to the Act pursuant to section 8 of the Constitution, and that section 19(1)(a) and (c) of the Act as amended are not in breach of section 8 of the Constitution.

[7] The findings of law which are challenged are as follows:

(1) that section 19(1)(a) and (c) of the Land Acquisition Act Cap. 273 as amended by section 13 of the Land Acquisition Ordinance (Amendment) Act are not less favourable to the claimant than prior to the amendment and did not create any fetter that did not previously exist;

(2) that section 19(1)(a) and (c) of the Land Acquisition Ordinance as amended are not in breach of section 8 of the Constitution;

(3) that the attachment of the condition "for the purpose of being put to the same use to which such land was being put at the material time" did not so change the overall conditions of acquisition that it becomes unfavourable when compared with the earlier formulation of the Land Acquisition Ordinance;

(4) that the compensation payable to an owner of acquired land was that sum that was to put the owner in the position the owner would have been in had the land not been acquired;

(5) that the decision in Mills (Charles) and Another v Attorney General of St. Christopher and Nevis and Another (1993) 45 WIR 125 was not *obiter dicta* but was binding on this Court despite the ruling in the case of Attorney General of Anguilla et al v Bernice Lake QC et al Anguilla Civil Appeal No. 4 of 2004;

(6) that the issue was whether despite the amendments brought about by the Land Acquisition Ordinance (Amendment) Act 1969-10, the land could be sold on the basis of a sale in the open market by a willing seller;

(7) the determination that the second issue was whether the process of sale in the open market by a willing seller on the open market was fettered by the 1969 Amendment to the Land Acquisition Ordinance;

(8) that the Board could, within the confines of the Land Acquisition Ordinance as amended, so interpret the 1969 amending legislation that it could still arrive at a valuation as would be arrived at as by using the valuation to be accepted by a willing seller on the open market;

(9) that the problem argued and submitted by the Claimant was not a constitutional problem but one fit for due process of appeal if the assessment when completed appeared too low;

(10) that the reasonableness of the imposition of the assumed "agricultural use" concept in the compensation formula provided justification for upholding said concept as being constitutionally valid;

(11) that the particular legislative scheme under the Land Acquisition Ordinance Cap. 273 did not permit charges of fettering of the valuation or assessment process established under that scheme because there were fetters that existed previous to the 1969 Amendment;

(12) that with the agricultural use assumption was not less advantageous to anyone since it benefited the owner of unproductive wasteland;

(13) that the case of AG of Anguilla v Bernice Lake QC et al Anguilla Civil Appeal No. 4 of 2004 turned on its own peculiar facts;

(14) that the Land Acquisition Ordinance (Amendment) Act did not run afoul of section 10 of schedule 2 of the Constitution.

The grounds of appeal are as follows:

(a) that the decision of the Learned Judge is bad in law and is unsupported on a proper analysis of the impugned legislation, a proper application of section 10, in particular 10(1)(b) of Schedule 2 of the Constitution and a proper application of relevant and applicable judicial authorities;

(b) that the decision fails to follow applicable judicial precedent without any legally justifiable distinction;

(c) that the Learned Judge erred in determining that the imposition of the requirement that land be presumed to be agricultural land, did not impose a fetter on the valuation process and did not place a burden on the claimant to rebut, which fetter and burden were not contained in the original Land Acquisition Ordinance Cap. 273, and consequently erred in his conclusion that the foregoing impositions did not make the conditions governing entitlement to compensation of the amount thereof less favourable to the claimant as per section 10(1)(b) of Schedule 2 of the Constitution;

(d) that the Learned Judge erred in holding that the imposition of the requirement that land be valued on the basis that it was to be put to the same use as it was being used for at the material time (12 months prior to date of acquisition) did not place a fetter on the valuation process which was not contained in the original Land Acquisition Ordinance, consequently also erred when he found that the foregoing fetter did not make the conditions governing entitlement to compensation or the amount thereof less favourable to the claimant as per section 10(1)(b) of schedule 2 of the Constitution;

(e) that the Learned Judge erred in failing to appreciate the distinction between on the one hand the Board of Assessment applying the constitutionally correct valuation principles and still arriving at a quantification which may be questioned by the claimant, which would be the subject of an appeal, and in the alternative the Board applying constitutionally invalid valuation principles which would correctly be the subject of a constitutional action, and that this case involved the latter and not the former;

(f) that the Learned Judge erred in deciding that for the Claimant/Appellant to succeed he had to show that the Board was in fact arriving at a wrong valuation and in not appreciating that the Claimant's action was based on the likelihood of his rights being infringed by the Board applying the existing law before it;

(g) that the Learned Judge erred in placing a strained, inconsistent and incorrect interpretation on the law in determining that the Board was entitled (in spite of the rigid parameters set by the 1969 amending law to the Land Acquisition Ordinance requiring a valuation based on a presumed agricultural use and a continuation of existing use), to use agricultural use as a base valuation and then move on to still consider the potentialities of the land, instead of correctly striking down the infringing legislation;

(h) that the Learned Judge erred in failing to consider whatsoever in the analysis of his judgment the adverse effect of valuation requirement in the 1969 amending legislation that the land be valued as if it would be used for the same purpose for which it was used at the material time;

(i) that the Learned Judge erred in considering that he was bound by the dicta in the case of Mills (Charles) and Another v AG of St. Christopher and Nevis and Another 1993 (45) WIR 125 that the Amendments brought about by the Land Acquisition Ordinance (Amendment) Act 1969 (10 of 1969) to section 19 of the 1969 Act did not run afoul of section 10(1)(b) of Schedule 2 of the Constitution, although the point was not the subject of full argument before that Court, and this was admittedly *obiter dicta* and although the case of AG of Anguilla v Bernice Lake QC et al Anguilla Civil Appeal No. 4 of 2004 was decided subsequent thereto, and the case of Attorney General v Yearwood – St. Kitts Civil Appeal 6 of 1977 of had been decided prior thereto;

(j) that the Learned Judge erred in determining that the legislative structure of the Anguilla Land Acquisition legislation in AG of Anguilla v Bernice Lake QC et al Anguilla Civil Appeal No. 4 of 2004 as different than that of St. Kitts when in fact the substantive and important provisions are in *pari materia,* and no relevant or justifiable distinctions were in fact alluded to by the Learned Judge;

(k) that the Learned Judge erred in determining that the fact that the dates of acquisition in the case of AG of Anguilla v Bernice Lake QC et al Anguilla Civil Appeal No. 4 of 2004 (i.e. 2003) and the acquisition in the present case (i.e. 1987) provided a good ground for distinguishing the case of AG of Anguilla v Bernice Lake QC case when the respective dates of acquisition as between the two cases were irrelevant;

(l) that the Learned Judge erred in determining that the problem at hand was not the legislation but the Board possibly placing too strained a construction of the legislation as far as valuation was concerned as the Learned Judge purported to give the Board authority that the statute did not confer on it, but conversely expressly took away;

(m) that the Learned Judged erred in his conclusion that because St. Kitts was very much an agricultural country, that it was not "unreasonable" to presume that land that was not used for some other purpose was agricultural land, when in fact this did not address the real and only issue which remained, and that is whether the new scheme imposed conditions governing entitlement to compensation or the amount thereof which were less favourable to the Claimant/Appellant than in the un-amended Ordinance;

(n) that the Learned Judge erred in attempting to justify and rationalize the presumption of “agricultural use” in the St. Kitts social context, and asked himself the wrong question, that is instead of asking whether the impugned amending legislation imposed conditions governing entitlement to compensation or the amount thereof less favourable to the claimant, asking himself whether it was reasonable in the context of St. Kitts to impose a requirement that the land be assumed to be agricultural land;

(o) that the Learned Judge erred in applying an incorrect interpretation of the legal principles stated in the case of Sri Raja v Revenue Officer [1939] 2 ALL ER 317;

(p) that the Learned Judge erred when he failed to appreciate that under the Land Acquisition Ordinance, it was the authorized officer who submits the original valuation report to the Board and not the Claimant and that the authorized officer is bound by the same principles of valuation and in presenting his report would be under no obligation to rebut any presumptions of agricultural use, thus resulting in a lower valuation then would have been the case under the Act in its un-amended form;

(q) that the Learned Judged erred in concluding that the legislation as drafted permitted valuations that were not hampered by the legal guidelines “agricultural use” and “continued same use” principles;

(r) that the Learned Judge erred and contradicted himself in stating that looked at positively the Amendment creates a scheme where one does not have to prove the land is agricultural, one only has to prove it is not, and while still accepting that a burden of proof is now placed on the Claimant that was not there before, yet held that the amending legislation did not make the amount of compensation payable less favourable to the claimant.

(s) that the Learned Judge erred in stating that the owner of land must be paid the sum to put the owner in the position the owner would have been in had the land not been acquired as that does necessarily reflect what a willing seller would accept for the land in the open market as this would not take into account the uses to which the land might be put.

(t) that the Learned Judge erred in failing to realize that payment that took account of potentialities cannot be received if as a principle the land is assessed as if it was being put to the same use as it was being used for at the material time;

(u) that the Learned Judge erred in concluding that the case of AG of Anguilla v Bernice Lake ,QC et al, Anguilla Civil Appeal No. 4 of 2004 was decided on its own peculiar facts and in considering that those facts were a difference in time of acquisition, legislative scheme and land use features as these did not provide any legally acceptable distinguishable factors;

(v) that the Learned Judge erred in introducing a concept of "base value," implying that within the existing legislation the valuation could "grow" to take account of potentialities, when the legislation limited the valuation to a use limited to the same use as the land was under at the material time;

(w) that the Learned Judge erred in failing to appreciate that an appeal would be on an allegation of wrong principles, and that a Constitutional Motion was not dealing with an appeal on quantum, but a challenge to the constitutionality of the existing statutory regime when tested against the principles enunciated in section 10 of schedule 2 of the Constitution;

(x) that the Learned Judge erred as there was no justification for the court to find that the amount of time that it has taken to deal with compensation as part of this land acquisition clouded the real issue that the operative value for the purpose of compensation is the value at the material time when there was no evidence for that conclusion;

(y) the decision of the Learned Judge upholding the constitutionality of the amendments brought about by section 13(a) of the Land Acquisition Ordinance (Amendment) Act is wrong in law and cannot be supported.

The following are the orders sought:

(a) An order allowing this appeal and setting aside the decision of the Learned Judge below particularly in paragraphs 33 and 34 of the Judgment.

(b) An order that the provisions of section 19 (1) of the Land Acquisition Ordinance Cap. 273 (as substituted by section 13(a) of the Land Acquisition Ordinance (Amendment) Act 1969 (No. 10 of 1969)) run afoul of section 10 (1) (b) of Schedule 2 of the Constitution, are subject to review under section 8 of the Constitution, and are unconstitutional null and void.

Submissions

[8] Learned counsel for the respondent, Mr. Gossai, at the commencement of the hearing of the appeal indicated to the court that no submissions were filed on behalf of the respondent and for this reason the respondent will abide with the decision of the court.

[9] On behalf of the appellant the submissions by Mr. Gonsalves were copious and may be summarized thus: The basic proposition is that the learned trial judge erred in holding that the Act as amended did not infringe Schedule 2 to the Constitution because of a number of reasons given and inferences drawn from the judgment. 1. The determination that the basis for the payment of compensation was not less favourable and did not create a fetter that did not previously exist. 2. The words 'for the purpose of being put to the same use to

which such land was being put at the material time' did not admit of an interpretation that permits the potentialities and possibilities of the land to be considered. 3. The learned trial judge erred in considering that he was bound by the decision in Mills v Attorney General of Saint Christopher and Nevis[2] when there was a subsequent decision on the same issue in Attorney General v Bernice Lake QC and Ors[3]. 4. The learned trial judge erred in determining that the legislative schemes in Anguilla and St. Kitts were different. 5. The learned trial judge erred in saying that St. Kitts was an agricultural country and as such it was not 'unreasonable' to presume that land not used for some other purpose was agricultural land when in fact this did not address the issue of the conditions concerning the payment of compensation. 6. The constitution in this context does not depend on reasonableness but on whether the new legislation imposed a burden which resulted in an impediment making this compensation less favourable to the claimant. 7. The learned trial judge asked himself the wrong question in seeking to justify and rationalize the presumption of 'agricultural use' in the social context of St. Kitts and therefore asked the question whether the legislation was reasonable to impose a requirement that the land be valued on the basis that it was used for the same purpose for which it was being used at the material time. 8. The judge erred in applying an incorrect interpretation to the legal principles in Sri Raja v Revenue Officer[4].

The Constitutional context in outline

[10] Because of its features, such as its declaration that it is the supreme law, the Constitution of Saint Christopher and Nevis falls into a class of Constitutions that are commonly referred to as Controlled Constitutions. At a basic level this means that certain of its provisions are entrenched. Such provisions generally require certain prescribed procedures to be followed in order that they may be validly altered[5]. The following summary by Professor S.A. de Smith is relevant in this context:

> "The status of the constitution as supreme law is determined by the procedure prescribed for its amendment. Those provisions which are thought to be especially

[2] [1983] 45 WIR 125
[3] Civil Appeal No. 4 of 2004. (Delivered April 4, 2005)
[4] [1939] 2 ALLER 317
[5] S.A. de Smith, The New Commonwealth and its Constitutions (1964), pages 106-117

> important will be protected from alteration by legislation passed in the ordinary manner and form. It is likely that constitutional provisions establishing the essentials of responsible and representative government, those safeguarding…the independence of judges and public officers, and those guaranteeing fundamental human rights, will be specially entrenched…"[6]

[11] In more concrete terms section 2 of the Constitution states that "this Constitution is the supreme law of Saint Christopher and Nevis" and goes on to say that if any law is inconsistent with it, that law shall be void to the extent of its inconsistency.

[12] For present purposes it is of some importance to note that Chapter II of the Constitution, which includes the right or freedom from deprivation of property, and Schedule 2 to the Constitutional Order are some of the provisions that are entrenched by section 38(3) of the said constitution.

[13] Schedule 2 is also of special importance for it not only contains transitional provisions but paragraph 10 thereof, in effect supplements the right to protection from deprivation of property. This Schedule is also entrenched by virtue of Part I of Schedule 1 to the Constitution.

Section 8 of the Constitution

[14] As noted above, section 8 of the Constitution is central to the entire issue before the Court. In this regard section 8(1) provides thus:

> "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 the principles on which and the manner in which compensation therefor is to be determined and given."

[15] Apart from the basic right, the section also grants a right of access to the court by any person whose property has been compulsorily acquired[7]. The section further creates a number of exceptions which contemplate certain actions being taken and which may not

[6] Op. cit, at page 110
[7] Sections 8(2) and (3)

be held to be inconsistent with the constitution so long as they are authorized by law and the law embraced the prescribed exceptions[8].

Paragraph 10 of Schedule 2 to the Order (Transitional Provisions)

[16] Paragraph 10 of Schedule 2 bears the caption "Protection from deprivation of property" and paragraph (1) thereof provides as follows:

> "(1) Nothing in section 8 of the constitution (which deals with protection from deprivation of property) shall affect the operation of any law that was in force immediately before 27th February 1967 or any law made on or after that date that alters a law that was in force immediately before that date and does not –
>
> a. add to the kinds of property that may be taken possession of or the rights over and interest in property that may be acquired;
> b. make the conditions governing entitlement to compensation or the amount thereof less favourable to any person owning or having an interest in the property; or
> c. deprive any person of such right as is mentioned in subsection (2) of that section."

Land Acquisition Act

[17] Section 8(1) of the Constitution contemplates the existence or enactment of a law concerned with the compulsory acquisition of property for public purposes. It further contemplates that such a law would "prescribe the principles on which and the manner in which compensation…to be determined and given." That law is the Land Acquisition Act of which section 19, to the extent of its materiality provides thus:

> "19. Subject to the provisions of this Ordinance, the following rules shall apply to the assessment of and award of compensation for the compulsory acquisition of land-
>
> (a) The value of the land shall, subject as hereinafter provided be taken to be the amount which the land if sold in the open market by a willing seller might have been expected to realize at a date twelve months prior to the date of the second publication in the gazette of the declaration under section 3:
> Provided that this rule shall not effect assessment of compensation for any damage sustained by the person interested by reason of severance,

[8] Sections 8(5) to 8(8)

or by reason of the acquisition injuriously affecting his other property or the earnings, or for disturbance or any other matter not directly based on the value of the land."

The Amending Act

[18] In the face of section 8 of the Constitution and paragraph 10(1) Schedule 2 to the Constitution Order, section 19 of the Act was amended by section 13 of the Amending Act by deleting paragraph (a) thereof and substituting the following:

"1(a) The value of 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.

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

(c) For the purposes of this subsection-

(i) 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;

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

(iii) 'the appropriate authority' means the authorized officer appointed under and for the purposes of this Ordinance or, as the case may be, any Judge, Court, Magistrate, Tribunal, Arbitrator or person authorized by the Ordinance to determine the amount of compensation payable thereunder;

(iv) 'the material time' means the date twelve months prior to the date of the second publication in the Gazette of the declaration under section 3 of this Ordinance…".

The matter of interpretation

[19] Given the fact that the issue centers on legislation, it follows that the question of statutory interpretation follows logically.

[20] In recent times the well established rules of statutory interpretation have been displace by the doctrine of purposive interpretation as enunciated by Lord Griffith in Pepper v Hart[9]. The doctrine is stated in these terms:

> "The days have passed when the Courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The Courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears on the background against which the legislation was adopted."

[21] V.C.R.A.C Crabbe[10] entered the purposive approach debate with these incisive comments:

> "The *Purposive Approach* thus takes account not only of the words of the Act according to their ordinary meaning but also the context. 'Context' here does not mean simply 'linguistic context'; the subject-matter, scope, purpose and (to some extent) background of the Act are also taken into consideration. There is no concentration on language to the exclusion of context (or, indeed, vice versa); the ultimate aim is one of synthesis.
>
> The language used by Lord Griffith in *Pepper v Hart* is clear and cogent: to give effect to the true purpose of the legislation. He did not say 'to give effect to the intention of Parliament.' And that, it is submitted, takes us again to a principle of the rule in Heydon's Case*[11].*
>
> That for the sure and true interpretation of all statutes…the office of all the judges is always to make such construction as shall [solve the problems which have arisen, and advance the solutions to the problem] and to suppress subtle inventions and evasions [which do not accord with the objects and purposes of the Act] and to add force and life to the cure and remedy according [to the objects and purposes of the Act, the demands of society and the dictates of common sense and justice."][12]

[9] [1993] 1 ALLER 42, 49
[10] Understanding Statutes (1994) at page 97
[11] [1884] 3 Co. Rep. 7a
[12] The italics and the words in the square brackets are supplied by the author.

Analysis

[22] I entertain no doubt that the legislature of St. Kitts in enacting the Amending Act had as its purpose a change in the basis of the payment of compensation for land compulsorily acquired. This brings the constitutional prescription contained in paragraph 10 of schedule 2 to the Order back into focus.

[23] It will be recalled that the provision in question permits the existence of a law enacted within a specific time period that relates to property rights. However there are three prescriptions that would render such a law void. That contained in paragraph 10(1)(b) is relevant and the wording is as follows: " …makes the conditions governing entitlement to compensation or the amount thereof less favourable to any person owning or having an interest in the property…".

[24] In summary the bases for the assessment of the value of the land for the payment of compensation is as follows:

> "(a) Under the original section 19 of the Act the value was determined on the basis of a sale by a willing seller in the open market at a date twelve months prior to the second publication of the declaration. This rule is however subject to a number of variables for the purposes of the assessment of compensation.
>
> (b) Under the new section 19(a), as enacted by the Amending Act, the concept of a sale by a willing seller is maintained but there are several innovations: (1) the sale of the land is to be for the purpose of being put to the same use to which the land was being put at the material time. (2) In ascertaining the value of the land the net income at 'the material time' must be considered and where there is no income the rent that might reasonably be derived therefrom at the material time 'for the purpose of being put to the same use to which it was being put at the material time. (3) The onus is put on the landowner to establish to the satisfaction of the appropriate authority that the land was being used for a purpose other than agriculture. This is because under the provision all land shall be deemed to be used for agricultural purposes."

[25] In his judgment the learned trial judge identified the issue for determination as being "whether the language in the amended section creates conditions which are less

favourable to any person owning or having interest in property being compulsorily acquired." After an analysis of the evidence and the law, Mr. Justice Belle concluded that "…since section 19(a) and (c) of the Act are not proven to be less favourable to the claimant and does not create any fetter that did not previously exist, there can be no constitutional objection to section 19(a) or 1(c) of the Act. Indeed even if there were to be a valid attack on section 1(c) in my view there would be no need to do anything more than to say that the legislation as existing law should be modified to mean that the 'base' value in the acquisition of the land should be that of agricultural land. This guideline would be followed reasonably. This approach is supported by The Attorney General of Saint Christopher and Nevis and Anguilla v Reynolds…."[13]

[26] Despite the numerous grounds of appeal contained in the notice, the issue still centers on the constitutionality or otherwise of the Amending Act.

[27] Acting Chief Justice Adrian Saunders in the Bernice Lake QC case used the word 'fetter' to describe the conflicts created by the Anguilla legislation in relation to the Constitution of that state. Perhaps by coincidence or design learned counsel for the appellant used the same word to his objections to the legislation. As cited before, the appellant's contention is that Justice Belle's decision cannot be supported based on an analysis of the relevant constitutional provisions, legislation and judicial decisions, the introduction of the legal fiction that all land is deemed to be agricultural land unless the contrary is proven by landowner, valuation of land based on the same use principle at the material time, the application of a reasonableness test to the legislation which was unwarranted and a misunderstanding of the burden of proof in the Amending Act. All of these fetters, says the appellant, are new to the legislation concerned with the acquisition of land and as such render the compensation payable less favourable. Further doubt is cast on the judgment by the decision in the Mills and Bernice Lake QC cases plus the misapplication of the principles stated in the Sri Raja case.

[13] [1979] 43 WIR 108

[28] The purposive approach to the interpretation of legislation permits the court to look at extraneous material. In this regard Professor V.C.R. A.C. Crabbe contends, correctly, that the new purposive approach permits the context of the legislation to be looked at.

Context

[29] Whether acquisition of private land by the state be called expropriation, eminent domain[14] or compulsory acquisition, the payment of fair compensation is always the end result[15].

[30] On the narrower issue of the value of land, Britton, Davies & Johnson, Modern Methods of Valuation[16] has this to say:

> 'The market value or market price of a particular interest in landed property may be defined as the amount of money which can be obtained for the interest at a particular time from persons able and willing to purchase it. Value is not intrinsic but results from estimates, made subjectively by able willing purchasers, of the benefit or satisfaction they will derive from ownership of the interest. The valuer must, therefore, in order to value an interest, be able to assess the probable estimates of benefit of potential purchasers. It must be explained that what is valued is an interest in property, which gives legal rights of use and enjoyment to a property, and not the property *per se."*

[31] In the Bernice Lake QC case, the acting Chief Justice in delivering the decision of this court noted that although the legislation that was being construed in the Sri Raja case was different from that in the case of Anguilla, the principles enunciated therein were quite relevant. This is what Lord Romer said in speaking for the Privy Council:[17]

> "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

[14] In the US this is the power possessed by the State to appropriate private property for public use, see: Kelo v City of New London 545 US 469 2005.
[15] For example the fifth amendment to the constitution of the United State of America reads in part "…nor shall private property be taken for public use, without just compensation."
[16] (1980) at page 3
[17] [1939] 2 All E R 317, 322

> 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 realized possibilities, that must be taken into consideration."

[32] The acting Chief Justice is correct since Lord Romer is in essence speaking of an open market situation which is also reflected in the other learning quoted above. Importantly, however Lord Romer also speaks of the possibilities of the land in contrast to realized possibilities.

[33] In this context it is of some importance to recall that under the original section 19 of the Act the rules applicable to the award of compensation were concerned with, inter alia, the amount which the land, if sold in the open market by a willing seller might be expected to realize. This has now been changed by the legislature of St. Kitts.

[34] In light of the foregoing it is imperative to re-state the constitutional reality that the legislature of St. Kitts and Nevis is sovereign but the Constitution is supreme. Indeed there is in our jurisprudence very scholarly dicta that reflect this situation generally. It comes from the celebrated case of Collymore v Attorney General of Trinidad and Tobago[18], Fraser JA said: "No one not even Parliament can ignore the restrictions of the constitution with impunity." Even before that in the Privy Council Lord Pearce articulated the rule that "…a legislature has no power to ignore the conditions of the law-making that are imposed by the instrument which itself regulates its power to make law."[19]

[35] The other aspect of the context has to do with the situation with land and agriculture. In this case there is no concession by either side that; as in the Bernice Lake QC case, that St. Kitts has long ceased to be an agricultural state.

[36] It is in the context of the foregoing that the legislation must be considered, always bearing in mind the constitutional prescription that compensation payable cannot be reduced to the disadvantage of the landowner in the circumstances stated. Therefore, by legislating a

[18] [1967] 12 WIR 5, 35
[19] See: The Bribery Commissioner v Ranasinghe [1964] 2 ALLER 785, 792

legal fiction whereby all land is deemed to be agricultural in the above context bears directly on the constitutional prescription that is in issue.

[37] Section (4)(a) to (d) of the Land Acquisition Act of Anguilla is in material terms similar to section 19(1) (a) to (c) of the Amending Act. In construing the Anguilla legislation in the Bernice Lake QC case acting Chief Justice Adrian Saunders made this ruling: "Given however, the constitutional right of a landowner to adequate compensation, I would 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."[20]

[38] Justice Francis Belle, faced with this high authority, sought to distinguish the case by saying this:[21]

> "In my view the case of Bernice Lake v Attorney General et al turns on its own peculiar facts. The acquisition in that case was made in Anguilla in 2003 while the acquisition in this case was made in St. Kitts in June 1987. The specific legislative scheme and the land use features of St. Kitts and Nevis do not appear to apply to Anguilla. What was reasonable for Anguilla in 2003 may not have been reasonable in St. Kitts in 1987 nor 2007 and vice versa when it comes to land use and valuation."

[39] I agree with learned counsel's submission that the two points raised by the Learned Judge in seeking to distinguish the Bernice Lake case do not arise. To begin with there are no peculiar facts and date of acquisition is quite irrelevant. What makes the case partially distinguishable is that under the Anguilla Constitution there is no provision akin to paragraph 10(1)(c) of Schedule 2 to the St. Kitts and Nevis Constitution Order. In the circumstances the court arrived at its conclusion based on the constitutional requirement for fair compensation and the creation of the legal fiction deeming all land to be agricultural lands and the concession that Anguilla had long ceased to be an agricultural state.

[40] Another aspect of the question of the value is the proposition that the land is sold for the purpose of being put to the same use for which the land was being used at the material

[20] Civil Appeal No. 4 of 2004. Decided on April 04, 2005
[21] At paragraph 32

time. This is another innovation and its sole purpose is to keep the value of land based on existing use and nothing more.

[41] Yet another aspect of the matter of the value is the requirement of the legislation that the net income at the material time must be considered. Further, if there is no income, consideration must be given to the reasonable rent that may be derived from the land at the material time. The obvious question in this regard is why net income and not gross income.

[42] The onus placed on the landowner is also novel in this context since the law now requires the landowner to establish to the satisfaction of the 'appropriate authority' that the land was being used for a purpose other than agriculture. The learned trial judge treated this as a simple matter of proof.

[43] The legal reality is that the appropriate authority is vested with an unclothed or unfettered implied discretion. I say unclothed because the legislation does not bear any guidelines as to the manner in which the appropriate authority should exercise this quasi-judicial power. It is one thing to say that such a power must be exercised reasonably. But this depends on whether or not authority is confined to certain requirements as to proof in relation to non-agricultural use. Put otherwise, what should be on the land in order to establish non-agricultural use.

[44] The case of Attorney General of the Bahamas v Ryan[22] helps to illustrate the point. Under the Constitution of the Bahamas, Article 5(2) provided that an application for registration as a citizen of The Bahamas "shall be subject to such exceptions or qualifications as may be prescribed in the interest of national security or public policy." In turn the Bahamas Nationality Act, 1973 prescribed five grounds upon which citizenship may be refused. An additional ground gave the Minister the discretion to reject an application 'if for any other sufficient reason or public policy he is satisfied that it is not conducive to the public good that the applicant should become a citizen of The Bahamas."

[22] [1980] AC718

[45] Mr. Ryan's challenge to the legislation after his application was refused succeeded in the Court of Appeal of The Bahamas and the Attorney General's appeal was dismissed by the Privy Council on a number of grounds. To the instant issue it was held that the exceptions which Article 5(4) of the Constitution authorized Parliament to prescribe must be spelt out in legislation and cannot be left to the discretion of the executive.

[46] In the same way that Mr. Ryan had no idea as to the reason for the refusal, so too the landowner will have no idea as to why his attempt to prove that his land is no longer agricultural land was not successful.

[47] Lord Diplock in giving the decision of the court noted at page 728 the following in relating to the enactment of legislation pursuant to Article 5(4) of the Constitution:

> "Article 5(2) and (3) of the Constitution gives to every person who possessed Bahamian status on July 9, 1973, a prima facie legal right to be registered as a citizen of The Bahamas on making timeous application and satisfying the requirements of paragraph (3). Paragraph (4), however, authorizes the Parliament of The Bahamas to make that prima facie legal right subject to "exceptions or qualifications" in the interests of national security or public policy. Any such exception or qualification, if it is to be valid under the Constitution, must be "provided by or under an Act of Parliament."

In their Lordship's view this entails that the exceptions and qualifications must be spelt out clearly in legislation, either primary or subordinate; they may not be left to the discretion of the executive. The description of the circumstances the existence of which in relation to an applicant are to deprive him of his legal right to insist on being registered as a citizen must be set out in an Act of Parliament either in full detail in the Act itself or in more general terms in an Act which also confers power upon some executive authority to make subordinate legislation providing for more detailed descriptions or particular circumstances falling within those general terms. The circumstances so far as they involve matters of fact must be described in the legislation (whether it be primary or subordinate) in such terms that whether they exist or not can be determined objectively, so that a would-be applicant upon reading the legislation can know whether he falls within a category of persons whose

applications for registration may lawfully be refused notwithstanding that they satisfy, the requirements of article 5(2) and (3).

[48] His Lordship continued thus at page 729:

> 'What article 5(4) does not permit Parliament to do is to make the right of persons with Bahamian status to be registered as citizens of The Bahamas subject to the discretion of the executive branch of the government. Yet that, in their Lordships' view, is the effect of the words which form the last part of the proviso to section 7 of The Bahamas Nationality Act 1973. In contradistinction to paragraphs (a) to (e) of the proviso, what they do in substance is to leave to the Minister sole discretion to refuse registration to any applicant whose admission to citizenship would in his opinion not be conducive to the public good; for his freedom under section 16 from any obligation to give any reason for his refusal of registration makes him, in effect, the sole judge of what constitutes "any other sufficient reason" for refusing the application."

[49] In the end the principle that emerges is that in the context of any enactment where a requirement is contemplated in terms of proof of change of use, in the case of property, or the grounds upon which the refusal of registration may be grounded, in the case of applications for citizenship, such a requirement must be prescribed by or under, that enactment or some other enactment..

The Authorities

[50] I have already addressed the Bernice Lake QC[23] case by saying that although there was no saving clause equivalent to paragraph 10(1)(c) of Schedule 2 to the Saint Christopher and Nevis Order, in all other respects the legislation and the right to be compensated for acquired property were in *pari materia*. Therefore the case was only partially distinguishable.

[51] The other authority is Mills [24] which was decided on the basis of the same constitutional provisions and the legislation that also fall to be considered in the case at bar.

[23] Supra
[24] Supra

[52] In that case it was determined that the questions in dispute were: (1) Has the court got the power to inquire whether land, which has be compulsorily acquired, has in fact been acquired for a public purpose; and (2) does paragraph 10 of Schedule 2 to the 1983 Constitution Order shield the Land Acquisition Act from being declared unconstitutional. However in the course of addressing the second issue Liverpool JA said this:

> "It is convenient at this stage to examine the effect of the amendments made to the Land Acquisition Act after 27 February 1967. As I have stated earlier the Land Acquisition Ordinance (Amendment) Act came into operation on 30 June 1969. None of the amendments which it effected to the Land Acquisition Act were in any way at variance with the matters mentioned in paragraph 10. That was conceded by counsel for the appellants."[25]

[53] Justice Belle in the court below concluded that the portion of this court's decision in the case "was not essential to the final ratio…" His Lordship nevertheless treated the decision of the court as being binding on him.

[54] The fact of the matter in my view is that there was no question as to the constitutional validity of the Amending Act before the court. The remarks thereon were therefore obiter.

Did the Amending Act offend the Constitution

[55] It is always a constitutional possibility to override any entrenched or other provision of the Constitution non-textually[26], provided that there is compliance with the various requirements of section 38 of the Constitution, as may be appropriate.

[56] An examination of the Land Acquisition Ordinance (Amendment) Act 1969 does not reveal a certificate as required by section 38(2) of the Constitution. This is conclusive[27] and its absence invites the reasonable inference that because there was non-compliance, the Amending Act could not have offended the Constitution non-textually or otherwise.

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[25] Loc. cit at page 132

[26] See: Kariapper v Wijesinha and another [1967] 3 All ER 485, PC; Lloyd G. Bar nett, The Constitutional Law of Jamaica(1977) at pages 261& 338. See also section 49(6) of the Barbados Constitution which expressly prohibits implied amendment of that Constitution.

[27] The Bribery Commissioner v Ranasinghe [1964] 2 ALL ER 785 (PC), supra

Conclusion

[57] It is therefore my conclusion, in agreement with learned counsel for the appellant, that the Amending Act created a number of fetters which "make the conditions governing entitlement to compensation or the amount thereof less favourable" to the appellant contrary to paragraph 10 of Schedule 2 to the Constitution Order. Put otherwise, the legislation now places constraints upon the valuation criteria that did not exist under the principal Act prior to the Amending Act. In such circumstances 'the court is concerned with the competence of the legislature to make it and not with its wisdom or motives."[28]

Severance

[58] The locus classicus for the test of severance is the case of Attorney General for Alberta v Attorney General for Canada[29]. The test was stated in these terms:

> "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."[30]

[59] To my mind the provisions of the new section 19(1)(a) to (c) are so intertwined or interrelated as to make severance inapplicable. This is illustrated by the 'same use sale', the method of determining the value, the legal fiction of deeming all land to be used for agricultural purposes, the onus of proof placed on the landowner and the implied discretion vested in appropriate authority in relation to the onus of proving the use of land for purposes other than agriculture. In the circumstances what remains after the fetters are declared invalid cannot survive independently.

Result

[28] [1983] 31 WIR 176, 178
[29] [1947] AC 503
[30] Ibid, page 518

[60] In the circumstances the orders sought by the appellant are granted, namely the decision of the learned trial judge is set aside and section 19(1) of the Land Acquisition Ordinance, as amended by section 13 of the Land Acquisition Ordinance (Amendment) Act 1969, is in conflict with section 8 of the Constitution and paragraph 10(1)(c) of Schedule 2 to the Constitution Order and therefore void.

Costs

[61] The costs order made in the court below is set aside and the appellant is awarded his costs in the court below and in this court in accordance with Parts 65.5 (2)(b)(iii) and 65.13 (b) of CPR 2000, respectively.

Errol L. Thomas
Justice of Appeal [Ag.]

I concur.

Sir Brian Alleyne, SC
Chief Justice[Ag.]

I agree that the appeal should be allowed.

Denys Barrow, SC
Justice of Appeal