

2. The Constitutional Provisions

Chapter II of the Constitution is headed "Protection of Fundamental Rights and Freedoms of the Individual". It includes the following sections:-

"3. Fundamental rights and freedoms of the individual.

It is hereby recognised and declared that in Mauritius there have existed and shall continue to exist without discrimination by reason of race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, each and all of the following human rights and fundamental freedoms -

(a)

(b)

"(c) the right of the individual to protection for the privacy of his home and other property and from deprivation of property without compensation,

and the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions,

of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

"8. Protection from deprivation of property.

(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where -

- (a)
- (b)
- (c) provision is made by a law applicable to that taking of possession or acquisition -
 - (i) for the prompt payment of adequate compensation;
 - (ii)

"17. Enforcement of protective provisions.

"(1) Where any person alleges that any of the foregoing provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter that is lawfully available, that person may apply to the Supreme Court for redress.

(2) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1), and

may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of sections 3 to 16 to the protection of which the person concerned is entitled:

Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.

(3) The Supreme Court shall have such powers in addition to those conferred by this section as may be prescribed for the purpose of enabling that court more effectively to exercise the jurisdiction "conferred upon it by this section.

(4) The Chief Justice may make rules with respect to the practice and procedure of the Supreme Court in relation to the jurisdiction and powers conferred upon it by or under this section (including rules with respect to the time within which applications to that court may be made)."

It will be observed that paragraph (c) of section 3, which gives protection from "deprivation of property without compensation", is broader in its terms than the provisions of some other Commonwealth constitutions which provide only that no person is to be deprived

of property "save in accordance with law".

See, e.g. the Constitution of Malaysia, section 13(1), referred to in Government of Malaysia & Another v. Selangor Pilot Association, [1978] A.C. 337.

3. The Business of the Appellants.

25 1.19-21 In the Supreme Court two actions were consolidated. The Plaintiff in the first action, the Societe United Docks, is a partnership, the members of which are two dock companies, the New Mauritius Dock Company Limited and the Albion Dock Company Limited. The Plaintiffs in the second action are three stevedoring companies, Desmarais Brothers Limited, Taylor and Smith Limited and D'Hotman and Sons Limited.

25 1.25-27 All these companies had for many years (in some cases more than a century) been employed by the Sugar industry in Mauritius to store sugar at the docks at Port Louis, to transport the sugar from shore to ship, and to load it into ships. Since 1919 the sugar industry had acted through the Mauritius Sugar Syndicate, which employed the Plaintiff companies, to store and load the sugar produced by its members. The Ann 1 p.12 1.16 Syndicate was the sole sugar marketing organisation in Mauritius.

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Ann I p.23 1.28-30

67 1.1-29

The business of the dock companies was to receive sugar in bags from the millers, to unload the bags from lorries and to stack and store them in their sheds at the docks. They would then, as required, place the bags in their lighters, which were towed by their own tugs alongside ships in the harbour. Employees of the dock companies known as "elingueurs" or "lumpers" placed the bags in slings attached to the ship's tackle.

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68 1.1-14

At this point the stevedoring companies took over. Their stevedores would get the slings on board and unload the bags. At one time they stacked the bags in the holds, but from about 1950 they used the method of slitting the bags and letting the sugar pour into the hold, where they would trim it with shovels. In 1974 the stevedoring companies introduced machine trimming of the sugar in the holds.

Ann.1 p.41

Ann. 1 p.41 1.34-35
- p.42 1. 1 -7

Ann. 1 p.31 1.36-37

Ann. 1 p.32 1.1-5

This business was carried on by the dock and stevedoring companies until 25th July, 1980, when the last shipment of sugar was loaded by them. After that date (save for some sugar for local consumption which was stored by the dock companies until November, 1980), the storing and loading of the sugar in Mauritius was carried out by the Mauritius Sugar Terminal Corporation established by Act 6 of 1979. Since

68 1.47-55

July, 1980, the millers have placed their sugar in container lorries, which convey it to the Terminal, where it is stored in bulk,

Ann. 1 p.55 1.6-8

and in due course loaded by conveyor belt straight into the ships' holds.

4.

The History of the Bulk Sugar Terminal and the Sugar Terminal Corporation.

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During the 1950's and 1960's the dock companies and the stevedoring companies, after preliminary investigation, began to work on a project for a bulk sugar terminal which, it was contemplated, would be established and operated by the companies themselves. This project had the support of the Chamber of Agriculture, an association representing all agricultural producers, including the sugar planters and millers.

Ann. 2 p.99-108
& 109-114

Ann 1. p.45 1.1-3

Ann.2 p.23-25,26,
28-30, 33-37

However, in January, 1970, the sugar industry, through the Sugar Syndicate, decided that it would itself set up a company to establish and operate the bulk terminal, to the exclusion of the docks and stevedoring companies. Although the companies argued against this decision, they had no means to resist it. All concerned realised that this would deprive the docks and the stevedoring companies of their sugar storing and loading businesses. The Sugar Syndicate therefore agreed at a meeting in January 1970, to pay ade-

70. 1.5-8

Ann.2 p.34,75.76
Ann.1 p.48 l. 1-8

quate compensation to the companies for the loss of their businesses and in respect of the redundancy payments which would have to be made to the companies' employees. This was confirmed in correspondence between the stevedoring companies and the Sugar Syndicate in February 1971.

70 1.42-46
Ann. 2 p.38, 39

Provision for the cost of the proposed terminal was made by means of statutory levies on sugar exports in 1974 and 1975.

70 1. 34-38
Ann.2 p.31-32, 42-43

In 1979 there was another change of course. The Government of Mauritius decided that the ownership of the proposed bulk terminal should vest not in the sugar industry but in a statutory corporation to be established and controlled by the Government itself. The decision was reflected in the Mauritius Sugar Terminal Corporation Bill, published in April, 1979, which became the Mauritius Sugar Terminal Corporation Act, No. 6 of 1979. The Act established the Mauritius Sugar Terminal Corporation, and came into operation on 30th June 1979.

Ann.2 p.82-84,86

During 1979 and 1980 the dock companies and the stevedoring companies requested payment of compensation for the loss of their businesses from the Sugar Syndicate. This was refused,

Ann.2 p.85,87

although responsibility for redundancy payments was accepted. The Syndicate said, in a letter of 18th September 1980 that -

Ann.2 p.85

"... when the whole bulk project was taken away from the aegis of the Syndicate and eventually became the responsibility of the Bulk Sugar Corporation, specific arrangements were agreed with you whereby legal compensation to all employees made redundant because of the advent of bulk, would be met by the Syndicate. It was never envisaged at that time that the Syndicate could be held responsible for payment of compensation for loss of sugar business or any other charges."

This last assertion is not in accordance with the documentary evidence; but the appellants accept that the Syndicate's agreement to pay compensation was on the basis and understanding that it and its members would be taking over the business of storing and loading sugar for their own benefit.

Ann.2 p.4-16

No compensation for loss of the companies' businesses was provided for in Act 6 of 1979, but the Government of Mauritius undertook in various agreements entered into in June, 1979, that the "Bulk Sugar Corporation" would make

pension payments to workers

"who have become redundant because of the coming into operation of the Bulk Sugar Terminal",

and section 19(1) (f) of the Act gave statutory effect to those agreements.

5. Act No. 6 of 1979, its operation and effect

Section 3 of the Act establishes the Mauritius Sugar Terminal Corporation and section 4(1) provides that its object is to

"provide, operate, and maintain facilities for the storage, sampling, bagging, packing, loading and unloading of sugar."

The next section begins as follows -

"Monopoly of the Corporation

5 (1) Subject to sub-sections (2) and (3) no person, other than the Corporation or an authorised body, shall -

(a) as from the appointed day store or load into ships any sugar manufactured in Mauritius..."

Section 33 makes contravention of any provision of the Act a criminal offence.

Ann.1 p.126 l.5-8 No day has yet been formally appointed by the Minister for the purposes of section 5. But on
Ann.1 p.128 p.22-24 28th February 1980, the Sugar Syndicate was by order of the responsible Minister made an "authorised body", a status which is relevant only to the provisions of section 5.

The Government and the Corporation gave further indications that from time to time that the Bulk Terminal came into operation, the Corporation was to have the monopoly contemplated by section 5. Thus the pension agreements entered into by the Government linked redundancy to the coming into operation of the bulk sugar terminal. Further, the correspondence between the Corporation and the Association representing the companies in January and February, 1980, made it clear that the companies were not to have anything to do with the handling of sugar after the bulk terminal came into operation in mid-1980. The companies acted accordingly and dismantled their sugar business.

Ann.2 p. 4-16

Ann.2 p.1-2,3

Ann.1 p.52 l.24-27

The Act was intended by the Government to create a monopoly and, in fact, it did so, notwithstanding the unexplained failure to appoint a day.

Ann..1 p.53-55

Its passing effectively terminated the business of the companies in respect of the storage and loading of sugar, and ensured that that business was carried on only by the Corporation.

6. The "property" of which the companies were deprived.

Sections 3 and 8 of the Constitution refer to "property", without qualification. This is

"the most comprehensive of all the terms which can be used, in as much as it is indicative and descriptive of every possible interest which the party can have" -

per Pepys M.R. in Jones v. Skinner (1835) 5 L.J. Ch. 87 at 90.

"Property" includes the incorporeal elements which go to make up a business, including its goodwill, i.e.

"the whole advantage, whatever it may be, of the reputation and connection of the firm ..." -

Trego v. Hunt [1896] A.C. 7 at 24 -

which may be built up by trade connections,
fixed premises, experience and good repute -

Ulster Transport Authority v. James Brown
& Sons Ltd., [1953] N.I. 79 at 109-110.

At the time when the Act came into force the
business of the companies had a goodwill.
But for the Act they would have been entitled
to store sugar and to load it if asked to do so
by any sugar exporter. They had the facilities,
the experience, the trade connections and the
good repute. It is true (and much cross-
examination by respondents' Counsel was devoted
to this point) that, once the Sugar Syndicate
had decided to create a bulk terminal which it
would own and operate itself, the long-term
prospects of the companies' business were

Ann.1 p.74

But this relates to the value of the goodwi
limited. /not to its existence. Immediately
before the commencement of the Act, the companies
had a business, and but for the Act could have
continued it, even if on a much reduced scale.
But for the Act it would have remained open to
the Sugar Syndicate to use the services of the
companies whenever it wished to do so.

Ann.1 p.71 1.25-34 Moreover, but for the Act, the Companies' claims
for compensation from the Sugar Syndicate would
have been a valuable asset.

Ann.1 p.89 1.24-31 Mr. D'Hotman, managing director of one of the appellant companies said, in answer to the question: "What did the Government's decision do to you?" -

"Well, it just prevented us from obtaining compensation from the sugar industry when it has ousted the sugar industry themselves and we could not do it ourselves because a monopoly had been created so that we were out of business as far as sugar was concerned."

It is submitted therefore that Act No. 6 of 1979 in itself and in its implementation -

- (a) deprived the appellants of their business of storing and loading sugar, and
- (b) has resulted in the acquisition of that business by the Sugar Terminal Corporation.

in each case without payment of any or any adequate compensation, in violation of sections 3 and 8(1) of the Constitution.

7. The litigation in the Supreme Court

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13-17

In each action the Plaint was issued and served on 23rd December 1980. The redress sought was a

4 1.26,16 1.33
11-12, 22-24
11 1.3-10,22 1.
22-29

declaration and monetary compensation of some Rs 10,800,000 (about £600,000) in each case. In each case the Plea, filed on 30th April 1981, included a Plea in Limine Litis raising three defences:-

1. that the Plea was time-barred;
2. that on the facts alleged in the Plea there was no violation of the plaintiffs' constitutional rights of property;
3. that the plaintiffs had alternative remedies available.

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In October, 1981, the Supreme Court (Rault C.J. and Glover J.) heard argument on the second of these objections. On 7th December, 1981, separate judgments were given dismissing this objection.

41 1. 8-10

Rault C.J. held that section 3 of the Constitution including paragraph (c), operated independently of the other sections of Chapter II, including Section 8, and that it effectively protected the rights specified in it, including the right not to be deprived of property without compensation. He held, assuming the correctness of the allegations in the Pleas, that the Plaintiff companies had been deprived of their businesses without compensation and, further, that, Act No. 6 of 1979 had the effect of diverting to the

Corporation that part of the appellants' business which consisted in the storing and loading of sugar.

56 l. 35-43
63 l. 44-47
64 l. 1-15

Glover J., after setting out the facts which it was for the plaintiffs to prove in order to succeed, held that the Government's case required the Court to make assumptions which at that stage he was not prepared to make. Consequently he was unable to find that the Plaintiffs disclosed no cause of action. On this ground he overruled the objection.

64 l. 19-23

The case then went to trial and was heard by Moollan C.J. and Glover J. between 9th September and 11th October 1982. On 11th November 1982, the Court gave a single judgment dismissing the appellants' claims.

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67 l.16-68 l. 36
68 l.37-69 l.11

The Court, after analysing the evidence and, in particular, the evidence of the manner in which the business of the appellants and the business of the Corporation/^{was} respectively carried on,

74 l. 15-21

held that the latter's methods of operation were so different from those of the appellants that it could not be said that the business of the appellants had been taken over by the Corporation. Accordingly, the appellants had not shown that any property of theirs had been compulsorily acquired without compensation. The

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Court rejected the plea that the Plaintiffs were time-barred and did not find it necessary to deal with the contention that the appellants had alternative remedies available. In view of its finding, the Court did not deal with the quantum of the compensation which had been claimed.

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Surprisingly, the Court did not advert to section 3 of the Constitution and made no finding at all on the complaint that the Plaintiffs had been deprived of their property in contravention of that section.

8. The Appellants' Constitutional Rights

It is submitted that Rault C.J. correctly held that section 3 of the Constitution establishes enforceable rights independent of the other sections of Chapter II. This interpretation of the section has the support of the judgments of the Privy Council in Maharaj v. Attorney-General of Trinidad & Tobago (No. 2), [1979] A.C. 385, and Thornhill v. Attorney-General of Trinidad & Tobago, [1981] A.C. 61, and is in any event required by the clear wording of the section.

It follows that the constitutional right not to be deprived of property without compensation is

the independent of/ rights afforded by Section 8. That section does not limit the protection given by paragraph (c) of section 3. Compulsory acquisition is but one manner and not the only manner in which one may be deprived of one's property.

Government of Malaysia v. Selangor Pilot Association, [1978] A.C. 337 (P.C.), at 347H-348C, per Viscount Dilhorne, and 353D-G, per Lord Salmon.

In the present case, whether or not the appellants businesses were acquired by the Corporation, the appellants were deprived of their businesses or of those elements of value in their businesses referred to in paragraph 6 above.

It is accepted that the Constitution does not confer on anyone the right to carry on any particular business. But if a lawful existing business possesses assets such as goodwill or rights against a third party, which constitute "property", the destruction of the business by governmental prohibition, with resulting loss of those assets, is a deprivation of that property. In the absence of compensation, it is unconstitutional and entitles the owner to redress under section 17.

Further, the effect of Act No. 6 of 1979 has been to transfer the business of the appellants to the Corporation. The methods by which the Corporation now stores and loads sugar differ from the methods formerly used by the appellants but in both cases the business is the business of storing and loading sugar. That is the business which, by section 4 of the Act, the Corporation is empowered and required to carry on (by any method, not necessarily in bulk), and which, by section 5, the appellants are prohibited from continuing. In this way the Corporation took over the business of the appellants, including its goodwill. The analyses of Lord MacDermott in Ulster Transport Authority v. James Brown & Sons Ltd., [1953] N.I. 79 at 112-113, and of Ritchie J. in Manitoba Fisheries Ltd. v. The Queen, [1979] 1 R.C.S. 101 at 107 and 115, apply to the present case.

The Supreme Court was moved by the consideration that the appellants were likely to have lost their businesses anyway by reason of the sugar Industry's determination to establish a bulk terminal. This was indeed expected to occur - but it did not. The Government stepped in first and compulsorily diverted the custom of the sugar industry from the appellants to the Corporation. The possibility or probability that the companies would in any

value of the business diverted, not the fact of its diversion.

9. The Remedies available

Section 17 of the Constitution gives broad powers to the Supreme Court. The Court may give redress in any appropriate fashion. In theory, the provisions of Section 5(1) of the Act, being unconstitutional, may be void. See Government of Malaysia v. Selangor Pilot Association, supra, at 350H - 351A, per Viscount Dilhorne.

But where irreversible action has been taken under the "void" statute, the only realistic and appropriate redress available is monetary compensation. See

Jaundoo v. Attorney-General of Guyana,
[1971] A.C. 972

Manitoba Fisheries Ltd. v. The Queen,
supra, at 118

Government of Malaysia v. Selangor Pilot Association, supra, at 359A-B, per Lord Salmon.

The appellants have, whether de jure or de facto, been deprived of their businesses in consequence of the passing and implementation of an Act of the Legislative Assembly of Mauritius, and it is proper that the Government of Mauritius should pay compensation therefor.

Maharaj v. Attorney-General of Trinidad & Tobago (No. 2), [1979] A.C. 385 at 398-399.

It is submitted that it would be right to remit the case to the Supreme Court for assessment of the compensation payable.

10. The appellants humbly submit that the Supreme Court erred in rejecting the appellants' claims to redress and that their appeals should be allowed for the following, among other,

REASONS

- (1) BECAUSE the goodwill and other incorporeal assets of the appellants' businesses, including their claim for compensation from the Sugar Syndicate the principle of which had been agreed on, constituted property
- (2) BECAUSE the passing and implementation of

Act No. 6 of 1979 deprived them of that property.

- (3) BECAUSE in consequence of the passing and implementation of Act No. 6 of 1979, the goodwill of the appellants' businesses was acquired by the Sugar Terminal Corporation without the appellants' consent.
- (4) BECAUSE in neither case did the appellants receive compensation
- (5) BECAUSE the appellants' constitutional rights under sections 3 and 8 of the Constitution were thereby infringed.
- (6) BECAUSE the appellants, having no other remedy, are accordingly entitled to monetary compensation from the Government of Mauritius.
- (7) BECAUSE the judgment of the Supreme Court dismissing the appellants' claims was wrong and ought to be reversed.

S. KENTRIDGE

J. RAYMOND HEIN

IN THE PRIVY COUNCIL
ON APPEAL FROM THE SUPREME
COURT OF MAURITIUS

B E T W E E N :-

SOCIETE UNITED DOCKS

Appellant
(Plaintiff)

-and-

THE GOVERNMENT OF MAURITIUS

Respondent
(Defendant)

-and-

DESMARAIS BROTHERS LIMITED

TAYLOR AND SMITH LIMITED

D'HOTMAN AND SONS LIMITED

Appellant
(Plaintiff)

-and-

THE GOVERNMENT OF MAURITIUS

Responde
(Defendant)

CASE FOR THE APPELLANTS

Bernard Sheridan & Co.,
14 Red Lion Square,
London WC1R 4QL.

Ref: CG