42/84

IN THE PRIVY COUNCIL No.29 of 1983

ON APPEAL

FROM THE SUPREME COURT OF MAURITIUS
(CONSOLIDATED APPEALS)

BETWEEN:

THE SOCIETE UNITED DOCKS — Appellants

- and -

THE GOVERNMENT OF MAURITIUS — Respondent

AND

1. DESMARAIS BROTHERS LIMITED
2. TAYLOR AND SMITH LIMITED
3. D'HOTMAN AND SONS LIMITED — Appellants

- and -

THE GOVERNMENT OF MAURITIUS — Respondent

RECORD OF PROCEEDINGS

MESSRS. BERNARD SHERIDAN & CO.
14 Red Lion Square,
London, WC1R 4QL

Solicitors for the
Appellants

MESSRS. CHARLES RUSSELL & CO.
Hale Court,
Lincoln's Inn,
London, WC2A 3UL

Solicitors for the
Respondent

42/84

IN THE PRIVY COUNCIL No.29 of 1983

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FROM THE SUPREME COURT OF MAURITIUS
(CONSOLIDATED APPEALS)

B E T W E E N :

THE SOCIETE UNITED DOCKS — Appellants

- and -

THE GOVERNMENT OF MAURITIUS — Respondent

A N D

1. DESMARAIS BROTHERS LIMITED
2. TAYLOR AND SMITH LIMITED
3. D'HOTMAN AND SONS LIMITED — Appellants

- and -

THE GOVERNMENT OF MAURITIUS — Respondent

RECORD OF PROCEDDINGS

INDEX OF REFERENCE

A N N E X U R E

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FROM THE SUPREME COURT OF MAURITIUS
(CONSOLIDATED APPEALS)

BETWEEN :

THE SOCIETE UNITED DOCKS Appellants

- and -

THE GOVERNMENT OF MAURITIUS Respondent

AND :

1. DESMARAIS BROTHERS LIMITED
2. TAYLOR AND SMITH LIMITED
3. D'HOTMAN AND SONS LIMITED Appellants

- and -

THE GOVERNMENT OF MAURITIUS Respondent

RECORD OF PROCEEDINGS

No.1

PLAINT WITH SUMMONS

In the Supreme Court

No.1
Plaint with Summons
23rd December 1980

THE SOCIETE UNITED DOCKS, acting by and through Mr. Henri de Chazal
Plaintiff

vs

THE GOVERNMENT OF MAURITIUS Defendant

The Plaintiff complains against the Defendant as follows :-

1. The Plaintiff is a "societe", formed in 1973 and its members are two dock companies, namely the New Mauritius Dock Co.Ltd., and the Albion Dock Co.Ltd.

2. The dock companies had for more than a century before July 1971 been involved in, and been since 1951 employed by the Mauritius Sugar Syndicate for the storage and handling of sugar,which constituted a substantial part of their business, which business has been carried on by the Plaintiffs' Societe since its formation.

3. Since 1941 and until 1979, in terms of contracts made with planters, middlemen and co-operative credit societies, first under the Sale of Canes (Control) Ordinance, 1941, and then under the Cane Planters and Millers Arbitration and Control Board Act, 1973, millers were required to deliver to the companies' docks the sugar to which those planters, middlemen and societies were entitled.

4. In 1951, at a time when the shipment of sugar in bulk had become a vital issue, the dock companies co-operated with the stevedoring companies in devising and putting into operation a semi-bulk method of loading which was used until July, 1980.

5. In or about 1966, the dock companies, in conjunction with the stevedoring companies, began to work on a project for the introduction of bulk loading of sugar and for the setting up and operation of a bulk sugar terminal to be run as a joint venture by the dock companies and the stevedoring companies.

6. The sugar industry had been kept aware of the aforesaid project which had been discussed with all parties concerned.

7. Early in 1970, at a time when the said project had reached an advanced stage, a site for the terminal had been chosen, the conversion of existing mechanized sheds for bulk had been thoroughly gone into, and provisional financial implications and labour redundancy worked out, the dock companies were informed that the sugar industry had made the decision to undertake itself, through the agency of the Mauritius Sugar Syndicate, the mechanical bulk loading of sugar; but had also expressed the intention, in case its decision was implemented, to compensate the dock companies for any financial prejudice it might suffer as a consequence of its loss of business.

8. On February 24, 1971, the dock companies wrote to the President of the Mauritius Sugar

Syndicate requesting confirmation of the principle of the payment of compensation to the dock companies.

9. On February 26, 1971, the dock companies were advised that the Syndicate was at the moment carrying a through study on all problems connected with an eventual conversion to bulk handling of sugar in Mauritius; that consequently, if a decision was taken regarding the implementation of the new system, the Syndicate agreed to the principle of compensating all parties involved; and that there was no objection to the dock companies commissioning financial advisers, for its own account, to assess the size of compensation the dock companies might claim.

10. The operation of a bulk sugar terminal could not, in the event, be carried out either by the dock companies and/or the Plaintiff jointly with the stevedoring companies or by the sugar industry owing to the defendants's decision to entrust such operation to a statutory corporation.

11. By an Act which came into force on the 30th June, 1979, (the Mauritius Sugar Terminal Corporation Act, 1979 - No.6 of 1979) the defendant set up the Mauritius Sugar Terminal Corporation to manage and operate a bulk sugar terminal.

12. By section 5 of the Act, a monopoly was created in favour of the Corporation, it being provided that, from a day to be appointed by the Minister ("the appointed day"), no person other than the Corporation or a body authorized by the Corporation shall among other things, store or load into ships any sugar manufactured in Mauritius, and, by section 33, a contravention of those provisions, among others, was made a criminal offence.

13. The Plaintiff continued to operate its services with regard to the storing and handling of sugar until July 1980 when the Mauritius Sugar Terminal Corporation took over.

14. The Plaintiff avers -

(a) that Act No.6 of 1979 in so far as it creates a monopoly in favour of the

Mauritius Sugar Terminal Corporation with regard to the storage and loading of sugar involves a compulsory acquisition or taking of possession of property and is invalid in that there is no provision for ensuring that the persons who suffer financial prejudice as a result of such monopoly receive adequate compensation.

(b) that the effect of Act No.6 of 1979 has been to deprive the Plaintiff of that part of its property consisting in its business of storing and handling of sugar, without payment of compensation.

(c) that such deprivation amounts to a violation of the Plaintiff's fundamental right to protection against such deprivation guaranteed by section 3(c) and 8 of the Constitution of Mauritius.

(d) that the pecuniary prejudice suffered by the Plaintiff as a result of such deprivation amounts to Rs.10,800,000.

15. The Plaintiff accordingly applies for redress under section 17 of the Constitution and states that, to the best of its knowledge and belief, it has no other means of redress available to it under any other law.

16. And the Plaintiff prays for a judgment holding and declaring -

(1) that section 5 of Act No.6 of 1976, in so far as it creates a monopoly in favour of the Mauritius Bulk Sugar Corporation with regard to the storage and loading of sugar, involves an acquisition of property and is invalid in that there is no provision for ensuring that persons who suffer financial prejudice as a result of such monopoly receive adequate compensation, in breach of sections 3 and 8 of the Constitution.

(2) that the Plaintiff is entitled to compensation for that part of its dock business which has been compulsorily acquired by the Defendant, in the amount of Rs.10,800,000.- or such amount as the Court may deem fair and reasonable.

And the Plaintiff further prays for the issue of such orders, writs or directions as the Court may consider appropriate for the enforcement of the Court's judgment.

WITH COSTS

You, the said defendant are hereby summoned to appear before the above Court on Monday the 12th day of January 1981 at 10.30 of the clock in the forenoon and at such later time as the above Court may sit in order to answer the Plaintiff in the above matter.

Under all legal reservations
Dated at Port Louis, this 23rd day of December 1980
(Sd) illegible
Of No.8, George Guibert Street, Port Louis
Plaintiff's Attorney

To:

1. The Government of Mauritius, service to be effected on The Honourable The Attorney General of Port Louis

2. The Director of Public Prosecutions, of Port Louis

No. 2
Demand for
Particulars
4th February
1981

No. 2

DEMAND FOR PARTICULARS

Under paragraph 4 of the Plaint with Summons

1. Full particulars of the semi-bulk method of loading alleged to have been devised and put into operation.

Under paragraph 5 of the Plaint with Summons

1. Full particulars of the project alleged to have been worked out for-

   (a) the introduction of the bulk loading of sugar

   (b) the setting up of the bulk sugar terminal

2. Full details of the joint venture alleged to have been formulated by the Plaintiff in conjunction with the Societe United Docks.

Under Paragraph 6 of the Plaint with Summons

1. Who were the parties concerned?

Under paragraph 7 of the Plaint with Summons

1. The location of the site alleged to have been chosen for the terminal together with the deed of purchase of lease, if any, of the site so chosen

2. Full details of -

   (a) the proposed conversion

   (b) the financial implications relating to

      (i) the conversion to bulk
      (ii) labour redundancy

3. Details of the provenance of the necessary finance for alleged conversion

Under paragraphs 8 & 9 of the Plaint with Summons

1. Communication of any document in support of the allegations contained therein.

Under paragraph 10 of the Plaint with Summons

1. Full particulars of the action taken by the Plaintiff or the sugar industry before publication of Act No.6 of 1979 as a bill.

Under paragraph 14 of the Plaint with Summons

1. Breakdown the prejudice alleged to have been suffered.

2. Statement of profit and loss for the years 1970 to 1980 giving a breakdown for the part attributable to sugar and the part not attributable to sugar together with supporting audited statements.

Under all legal reservations.
Dated at Port Louis, this 4th day of February 1981
(Sd) G.Ramdewar
Of Jules Koenig Street, Port Louis
Acting Principal Crown Attorney & Defendant's Attorney

To: Mr. Guy Rivalland
Attorney at Law

No. 3
Answer to
Demand for
Particulars
25th March
1981

No. 3

ANSWER TO DEMAND FOR PARTICULARS

Under paragraph 4 of the Plaint with Summons

Q.1. Full particulars of the semi-bulk method of loading alleged to have been devised and put into operation

A.1. The method consisted in emptying sugar bags directly into the hold of the ship from the deck. Further particulars will be given in evidence.

Under paragraph 5 of the Plaint with Summons

Q.1. Full particulars of the project alleged to have been worked out for -

(a) the introduction of the bulk loading of sugar

(b) the setting up of the bulk sugar terminal

Q.2. Full details of the joint venture alleged to have been formulated by the Plaintiff in conjunction with the stevedoring companies.

A.1. & 2

Particulars are contained in a report dated June 1966 prepared jointly by the Chamber of Agriculture, Dock Companies and stevedoring companies.

The report can be inspected at the office of the undersigned Attorney at Law.

Under paragraph 6 of the Plaint with Summons

Q.1. Who were the parties concerned?

A.1. The Chamber of Agriculture, the Dock Companies and the stevedoring Companies.

Under paragraph 7 of the Plaint with Summons

Q.1. The location of the site alleged to have been chosen for the terminal together with the deed of purchase or lease, if any,of the site so chosen.

A.1. The location is shown on plans drawn up at the time which the Defendant may inspect at the office of the Plaintiffs' Attorney.

Q.2. Full details of -

(a) the proposed conversion

(b) the financial implications relating to

(i) the conversion to bulk
(ii) labour redundancy

A.2. Those particulars are to be found in a report by the joint Bulk Handling Committee dated June 1966. The report can be inspected at the office of the undersigned Attorney at Law.

Q.3 Details of the provenance of the necessary finance for alleged conversion.

A.3. Steps had been taken to obtain funds from various sources but matters were not pursued when Government decided to take over.

Under paragraphs 8 & 9 of the Plaint with Summons

Q.1. Communication of any document in support of the allegations contained therein.

A.1. The correspondence is at the disposal of the Defendant at the office of the undersigned Attorney at Law.

In the Supreme Court

No.3
Answer to Demand for Particulars 25th March 1981

(continued)

Under paragraph 10 of the Plaint with Summons

Q. Full particulars of the action taken by the Plaintiff or the sugar industry before publication of Act No.6 of 1979 as a bill.

A. If relevant, it is a matter of evidence.

Under paragraph 14 of the Plaint with Summons

Q.1. Breakdown of the prejudice alleged to have been suffered

Q.2. Statement of profit and loss for the years 1970 to 1980 giving a breakdown for the part attributable to sugar and the part not attributable to sugar together with supporting audited statements.

A. 1. & 2.

The documents in support of Plaintiff's claim are at the disposal of the Defendant at the office of the undersigned Attorney at Law.

Dated at Port Louis, this 25th day of March 1981

(Sd) Illegible
Of No.8, George Guibert Street, Port Louis
Plaintiffs' Attorney

Reg. A No.2872

No. 4

PLEA OF DEFENDANT

Plea in Limine Litis

1. The Plaint with Summons is time-barred.

2. On the facts alleged in the Plaint with Summons there has been no violation of the fundamental right to property vested by the Constitution in the Plaintiff.

3. The Plaintiff had alternative remedies available.

Plea on the Merits

1. The Defendant admits paragraphs 1, 2 and 11 of the Plaint with Summons.

2. As regards paragraph 3 of the Plaint with Summons, the Defendant avers that under the legislation referred to, millers were required to deliver the sugar to which planters, middlemen and co-operative credit societies were entitled to the docks in Port Louis and not necessarily to the Plaintiffs' docks.

3. As regards paragraphs 4, 5, 6, 7, 8, 9, 10 and 12 of the Plaint with Summons, the Defendant -

(a) denies each and every averment contained therein and puts the Plaintiff to the proof thereof; and

In the Supreme Court

No.4
Plea of Defendant 30th April 1981

(continued)

(b) avers that at some time before 1979 the establishment of a method whereby sugar could be exported in bulk by a fully automated system had become a necessity for Mauritius.

4. As regards paragraph 13 of the Plaint with Summons, the Defendant admits that the Plaintiff in 1980 stored and handled sugar but denies -

(a) that the Plaintiff had stopped to store and handle sugar;

(b) that the Mauritius Sugar Terminal Corporation had taken over the storing and handling of sugar from the Plaintiff.

5. As regards paragraph 14 of the Plaint with Summons the Defendant -

(a) denies each and every averment contained therein and puts the Plaintiff to the proof thereof; and

(b) avers that, even if the Court were to come to the conclusion that there has been a violation of the fundamental right to property vested by the Constitution in the Plaintiff -

(i) the Plaintiff has failed in its duty to minimise damages; or

(ii) the pecuniary prejudice alleged to have been suffered is grossly exaggerated or self-inflicted.

6. As regards paragraph 15 of the Plaint with Summons, the Defendant avers that there are other remedies available to the Plaintiff, of which it has not availed itself.

7. The Defendant therefore moves that the Plaintiff's action be dismissed with costs.

Under all legal reservations.
Dated at Port Louis, this 30th day of April 1981
(Sd) Ramdewar
Of Jules Koenig Street, Port Louis
Acting Principal Crown Attorney and Defendant's Attorney

No. 5

PLAINT WITH SUMMONS

No. 5
Plaint with Summons
23rd December 1980

DESMARAIS BROTHERS LTD. acting by and through its Managing Director Mr. Guy Desmarais

TAYLOR AND SMITH LTD. acting by and through one of its Managing Directors Mr. Derek Taylor

D'HOTMAN & SONS LTD. acting by and through one of its Managing Directors Mr. Christian d'Hotman

Plaintiffs

vs

THE GOVERNMENT OF MAURITIUS

Defendant

The Plaintiffs complain against the Defendant as follows -

1. The Plaintiffs are stevedoring companies.

2. The activities of the Plaintiffs consist in carrying out all the operations connected with the handling of cargo on board ships.

3. The Plaintiffs have for many years been employed by the Mauritius Sugar Syndicate for the loading of sugar on board ships, which constituted a substantial part of the Plaintiff's stevedoring activities.

4. In 1951, at a time when the shipment of sugar in bulk had become a vital issue, the Plaintiffs devised and put into operation with the co-operation of the dock companies a semi-bulk method of loading which was used until July, 1980.

5. In or about 1966, the Plaintiffs, in conjunction with the dock companies, began to work on a project for the introduction of bulk loading of sugar and for the setting up and operation of a bulk sugar terminal to be run as a joint venture by the Plaintiffs and the dock companies.

6. The sugar industry had been kept aware of the aforesaid project which had been discussed with all parties concerned.

7. Early in 1970, at a time when the said project had reached an advanced stage, a site for the terminal had been chosen, the conversion of existing mechanized sheds for bulk had been thoroughly gone into, and provisional financial implications and labour redundancy worked out, the Plaintiffs were informed that the sugar industry had made the decision to undertake itself, through the agency of the Mauritius Sugar Syndicate, the mechanical bulk loading of sugar; but had also expressed the intention, in case its decision was implemented, to compensate the Plaintiffs for any financial prejudice they might suffer as a consequence of their loss of business.

8. On February 24, 1971, the Plaintiffs wrote to the President of the Mauritius Sugar Syndicate requesting confirmation of the principle of the payment of compensation to the Plaintiffs.

9. On February 26, 1971, the Plaintiffs were advised in writing by the President of the Mauritius Sugar Syndicate that the Syndicate was at the moment carrying a thorough study on all problems connected with an eventual conversion to bulk handling of sugar in Mauritius; that consequently, if a decision was taken regarding the implementation of the new system, the Syndicate agreed to the principle of compensating all parties

involved; and that there was no objection to the Plaintiffs commissioning financial advisers, for their own account, to assess the size of compensation the Plaintiffs may claim.

10. The operation of a bulk sugar terminal could not, in the event, be carried out either by the Plaintiffs jointly with the dock companies or by the sugar industry owing to the defendant's decision to entrust such operation to a statutory corporation.

11. By an Act which came into force on the 30th June 1979, (The Mauritius Sugar Terminal Corporation Act, 1979 - No.6 of 1979) the Defendant set up the Mauritius Sugar Terminal Corporation to manage and operate a bulk sugar terminal.

12. By section 5 of the Act, a monopoly was created in favour of the Corporation, it being provided that, from a day to be appointed by the Minister ("the appointed day"), no person other than the Corporation or a body authorised by the Corporation shall among other things, store or load into ships any sugar manufactured in Mauritius, and, by section 33, a contravention of those provisions, among others, was made a criminal offence.

13. The Plaintiffs continued to operate their stevedoring services with regard to the loading of sugar into ships until July 1980 when the Mauritius Sugar Terminal Corporation took over.

14. The Plaintiffs aver -

(a) that Act No.6 of 1979 in so far as it creates a monopoly in favour of the Mauritius Sugar Terminal Corporation with regard to the storage and loading of sugar involves a compulsory acquisition or taking of possession of property and is invalid in that there is no provision for ensuring that the persons who suffer financial prejudice as a result of such monopoly receive adequate compensation

(b) that the effect of Act No.6 of 1979 has been to deprive them of that part of their property consisting in their business of handling sugar on board ships, without

payment of compensation,

(c) that such deprivation amounts to a violation of the Plaintiffs' fundamental right to protection against such deprivation guaranteed by sections 3(c) and 8 of the Constitution of Mauritius,

(d) that the pecuniary prejudice suffered by the Plaintiffs as a result of such deprivation amount to Rs.10,714,285.

15. The Plaintiffs accordingly apply for redress under section 17 of the Constitution and state that, to the best of their knowledge and belief, they have no other means of redress available to them under any other law.

16. And the Plaintiffs pray for a judgment holding and declaring -

(1) that section 5 of the Act No.6 of 1978, in so far as it creates a monopoly in favour of the Mauritius Bulk Sugar Corporation with regard to the storage and loading of sugar, involves an acquisition of property and is invalid in that there is no provision for ensuring that persons who suffer financial prejudice as a result of such monopoly receive adequate compensation, in breach of sections 3 and 8 of the Constitution,

(2) that the Plaintiffs are entitled to compensation for that part of their stevedoring business which has been compulsorily acquired by the defendant, to the amount of Rs.10,714,285 or such amount as the Court may deem fair and reasonable.

And the Plaintiffs further pray for the issue of such orders, writs or directions as the Court may consider appropriate for the enforcement of the Court's judgment.

WITH COSTS.

You, the said Defendant are hereby summoned to appear before the above Court on Monday the 12th day of January 1981 at 10.30 of the clock in the forenoon and at such later time as the above Court may sit in order to answer the Plaintiffs in the above matter.

Under all legal reservations.
Dated at Port Louis, this 23rd day of December 1980.

(Sd) Illegible.
Of No.8, George Guibert Street, Port Louis
Plaintiffs' Attorney

No.5
Plaint with Summons
23rd December 1980

(continued)

To:

1. The Government of Mauritius, service to be effected on The Honourable The Attorney General, of Port Louis

2. The Director of Public Prosecutions, of Port Louis

No. 6

DEMAND FOR PARTICULARS

No.6
Demand for Particulars
4th February 1981

Under paragraph 4 of the Plaint with Summons

1. Full particulars of the semi-bulk method of loading alleged to have been devised and put into operation.

Under paragraph 5 of the Plaint with Summons

1. Full particulars of the project alleged to have been worked out for -

   (a) the introduction of the bulk loading of sugar;

   (b) the setting up of the bulk sugar terminal.

2. Full details of the joint venture alleged

In the Supreme Court

No.6
Demand for Particulars 4th February 1981

(continued)

to have been formulated by the plaintiff in conjunction with the stevedoring companies.

Under paragraph 6 of the Plaint with Summons

1. Who were the parties concerned?

Under paragraph 7 of the Plaint with Summons

1. The location of the site alleged to have been chosen for the terminal together with the deed of purchase or lease, if any, of the site so chosen.

2. Full details of -

(a) the proposed conversion;

(b) the financial implications relating to

(i) the conversion to bulk;
(ii) labour redundancy.

3. Details of the provenance of the necessary finance for alleged conversion.

Under paragraphs 8 and 9 of the Plaint with Summons

1. Communication of any document in support of the allegations contained therein.

Under paragraph 10 of the Plaint with Summons

1. Full particulars of the action taken by the plaintiff or the sugar industry before publication of the Act No.6 of 1979 as a Bill.

Under paragraph 14 of the Plaint with Summons

1. Breakdown of the prejudice alleged to have been suffered.

2. Statement of profit and loss for the years 1970 to 1980 giving a breakdown for the part attributable to sugar and the part not attributable to sugar together with supporting audited statements.

Under all legal reservations.
Dated at Port Louis, this 4th day of February, 1981
(Sd) G.Ramdewar
of Jules Koenig Street, Port Louis
Acting Principal Crown Attorney and Defendant's Attorney

To: Mr. Guy Rivalland
Attorney at Law
George Guibert Street
Port Louis

In the Supreme Court

No.6
Demand for Particulars
4th February 1981

(continued)

No. 7

ANSWER TO DEMAND FOR PARTICULARS

No.7
Answer to Demand for Particulars
25th March 1981

Under paragraph 4 of the Plaint with Summons

Q.1. Full particulars of the semi-bulk method of loading alleged to have been devised and put into operation.

A.1. The method consisted in emptying sugar bags directly into the hold of the ship from the deck. Further particulars will be given in evidence.

Under paragraph 5 of the Plaint with Summons

Q.1. Full particulars of the project alleged to have been worked out for -

(a) the introduction of the bulk loading of sugar

(b) the setting up of the bulk sugar terminal

Q.2. Full details of the joint venture alleged to have been formulated by the Plaintiff in conjunction with the Societe United Docks Companies.

In the Supreme Court

No.7
Answer to Demand for Particulars 25th March 1981

(continued)

A. 1 & 2

Particulars are contained in a report dated June 1966 prepared jointly by the Chamber of Agriculture, Dock Companies and Plaintiff/ companies.

The report can be inspected at the office of the undersigned Attorney at Law.

Under paragraph 6 of the Plaint with Summons

Q.1. Who were the parties concerned?

A.1. The Chamber of Agriculture, the Dock Companies and the Plaintiff companies.

Under paragraph 7 of the Plaint with Summons

Q.1. The location of the site alleged to have been chosen for the terminal together with the deed of purchase or lease, if any, of the site so chosen.

A.1. The location is shown on plans drawn up at the time which the Defendant may inspect at the office of the Plaintiffs' Attorney.

Q.2 Full details -

(a) the proposed conversion

(b) the financial implications relating to
(i) the conversion to bulk
(ii) labour redundancy

A.2. Those particulars are to be found in a report by the Joint Bulk Handling Committee dated June 1966. The report can be inspected at the office of the undersigned Attorney at Law.

Q.3. Details of the provenance of the necessary finance for alleged conversion

A.3. Steps had been taken to obtain funds from various sources but matters were not pursued when Government decided to take over.

Under paragraphs 8 & 9 of the Plaint with Summons

Q.1. Communication of any document in support of the allegations contained therein.

A.1. The correspondence is at the disposal of the Defendant at the office of the undersigned Attorney at Law.

Under paragraph 10 of the Plaint with Summons

Q. Full particulars of the action taken by the Plaintiff or the sugar industry before publication of Act No.6 of 1979 as a bill.

A. If relevant, it is a matter of evidence.

Under paragraph 14 of the Plaint with Summons

Q.1. Breakdown of the prejudice alleged to have been suffered

Q.2. Statement of profit and loss for the years 1970 to 1980 giving a breakdown for the part attributable to sugar and the part not attributable to sugar together with supporting audited statements.

A.1 & 2

The documents in support of Plaintiffs' claim are at the disposal of the Defendant at the office of the undersigned Attorney at Law.

Dated at Port Louis, this 25th day of March 1981
(Sd) Illegible
Of No. , George Guibert Street, Port Louis
Plaintiffs' Attorney

No. 8
Plea of
Defendant
30th April
1981

No. 8

PLEA OF DEFENDANT

In the Supreme Court of Mauritius

In re -

DESMARAIS BROTHERS LTD. acting by and through its Managing Director Mr. Guy Desmarais

TAYLOR AND SMITH LTD. acting by and through one of its Managing Directors Mr. Derek Taylor

D'HOTMAN AND SONS LTD. acting by and through one of its managing Directors Mr. Christian d'Hotman

Plaintiffs

vs

THE GOVERNMENT OF MAURITIUS

Defendant

PLEA OF THE DEFENDANT

Plea in Limine Litis

1. The Plaint with Summons is time-barred

2. On the facts alleged in the Plaint with Summons there has been no violation of the fundamental right to property vested by the Constitution in the Plaintiffs.

3. The Plaintiffs had alternative remedies available.

Plea on the Merits

1. The Defendant admits paragraphs 1, 2, 3 and 11 of the Plaint with Summons.

2. As regards paras. 4, 5, 6, 7, 8, 9, 10 and 12 of the Plaint with Summons, the defendant -

(a) denies each and every averment contained therein and puts the Plaintiffs to the proof thereof; and

(b) avers that at some time before 1979 the establishment of a method whereby sugar could be exported in bulk by a fully automated system had become a necessity for Mauritius.

3. As regards paragraph 13 of the Plaint with Summons, the Defendant admits that the Plaintiffs in 1980 operated their stevedoring services with regard to the loading of sugar into ships, but denies -

(a) that the Plaintiffs had stopped to load sugar into ships;

(b) that the Mauritius Sugar Terminal Corporation had taken over the loading of sugar into ships from the Plaintiffs.

4. As regards paragraph 14 of the Plaint with Summons, the Defendant -

(a) denies each and every averment contained therein and puts the Plaintiffs to the proof thereof; and

(b) avers that, even if the Court were to come to the conclusion that there has been a violation of the fundamental right to property vested by the Constitution in the Plaintiffs -

(i) the Plaintiffs have failed in their duty to minimise damages, or

(ii) the pecuniary prejudice alleged to have been suffered is grossly exaggerated or self-inflicted

5. As regards paragraph 15 of the Plaint with Summons, the Defendant avers that there are other remedies available to the Plaintiffs, of

In the Supreme Court

No.8
Plea of Defendant 30th April 1981

(continued)

which they have not availed themselves.

6. The Defendant therefore moves that the Plaintiffs' action be dismissed with costs.

Under all legal reservations.
Dated at Port Louis, this 30th day of April 1981

(Sd) G. Ramdewar
Of Jules Koenig Street, Port Louis
Acting Principal Crown Attorney and
Defendant's Attorney

No. 9

MINUTES OF CONSOLIDATION
NOT TRANSMITTED

In the Supreme Court

No.9
Minutes of Consolidation
Not transmitted

No.10

JUDGMENT OF CHIEF JUSTICE M. RAULT

No.10
Judgment of Chief Justice M.Rault
7th December 1981

IN THE MATTER of :

SOCIETE UNITED DOCKS — Plaintiff

v.

GOVERNMENT OF MAURITIUS — Defendant

AND

IN THE MATTER of :

1. DESMARAIS BROTHERS LTD.
2. TAYLOR AND SMITH LTD.
3. D'HOTMAN & SONS LTD. — Plaintiffs

v.

GOVERNMENT OF MAURITIUS — Defendant

The plaintiff in the first case (hereinafter called the Docks) is a partnership formed from a merger of two partnerships which for more than a century had been employed by the Mauritius Sugar Syndicate for the storage and handling of sugar, which constituted a substantial part of their business. The plaintiffs in the second cases (hereinafter called the Stevedores) are stevedoring companies employed by the Syndicate for loading sugar on board ships, which also constituted a substantial part of their business. By the Mauritius Sugar Terminal Corporation Act (No.6 of 1979) (hereinafter called the Act) the

defendant set up the Mauritius Sugar Terminal Corporation (hereinafter called the Corporation) to manage and operate a bulk sugar terminal. By s.5 of the Act, it was provided that as from "the appointed day" no person other than the Corporation, or a body authorised by the Minister, should store, or load on any ship sugar manufactured in Mauritius. S.33 of the Act made it a criminal offence to contravene that provision. The plaintiffs continued their storing and loading operations until July 1980, when it is averred that those operations were taken over by the Corporation. The plaintiffs aver :-

(a) that the Act creates a monopoly in favour of the Corporation with regard to the storage and loading of sugar, and that this involves a compulsory acquisition or taking over of property, which is invalid as there is no provision to compensate them for the financial prejudice they suffer as a result of the monopoly;

(b) that the Act deprives them without compensation, of that part of their property which consisted in their respective businesses of storing and loading sugar;

(c) that the deprivation amounts to a violation of their right under ss.3(c) and 8 of the Constitution;

(d) that they have suffered prejudice which the Docks assess at Rs. 10,800,000, while the Stevedores, (more modest or more precise) value their prejudice at Rs. 10,714,285.

In its plea, the defendant has taken the following preliminary objections :

1. The Plaint with Summons is time-barred.

2. On the facts alleged in the Plaint with Summons there has been no violation of the fundamental right to property vested by the Constitution in the Plaintiff.

3. The Plaintiff had alternative remedies available.

Learned Counsel for the defendant, however, addressed us only on the second objection, and in this judgment I shall confine myself to that objection. On that subject he gave six reasons why, in his view, the plaint should fail. I shall deal with those reasons in turn.

The first reason is that the plaintiffs have attacked the law itself, and not complained of any act done under it. For the reasons given by my learned brother Glover, I find that they are complaining not only of the act, but also of what was done under it.

The second reason is that the plaint is premature, since there is no taking over yet of the plaintiffs' right to store or load sugar. S.5 of the Act provides that the exclusive powers of the Corporation shall come into force only "as from the appointed day" - which is defined as a day appointed by the Minister for the purposes of s.5 - and it is not averred in the plaint that the appointed day has arrived. In fact, no official document has appeared appointing any day for that purpose. Learned Counsel for the Stevedores (who by consent argued the case on behalf of both plaintiffs) replied that we should look not only at s.5 of the Act, but also at the correspondence between the parties and the conduct of the Corporation. On the 23rd January, 1980, the Association of Port and Harbour Employers acting on behalf of the plaintiffs wrote to the Corporation, asking for confirmation in writing that the Corporation would be operational by the 30th June 1980, as programmed, and that it would take over the responsibility for loading all sugars produced during the 1980 harvest and afterwards. On the 22nd February, 1980, the Corporation answered this: "We advise that the Corporation anticipates that the Bulk Sugar Terminal will be operational as programmed to take over the responsibility for loading all the sugar that will be produced during the 1980 harvest and afterwards." Further, the plaintiff aver in para.13 of their plaints that they continued to operate their services until July 1980 when the Corporation took over.

It is the settled practice of this Court when dealing with preliminary objections to act on the basis that the defendant accepts all the averments in the plaint, but nevertheless contends that no cause of action is showed. The

effect of para.13 is that I must assume, until the contrary is shown, that the Corporation has taken over the plaintiffs' services. In other words, it is the defendant's objection which is premature.

The third reason is that any injury sustained by the plaintiffs is self-inflicted, as the Act does not create an absolute monopoly: it envisages that storing and loading of sugar may be carried out not only by the Corporation but also by "authorised bodies" - i.e. persons authorised by the Minister "to receive or store sugar....." It was therefore open to the plaintiffs to apply to the Minister to become authorised bodies: as there is no averment that there has been such an application, and a refusal, the plaintiffs have only themselves to blame.

On that point too, I agree with Mr.David that the Act, taken in conjunction with the correspondence between the parties, may be read as meaning that it was throughout intended that the Corporation should take over the business of the plaintiffs. On that issue, it is relevant to refer to s.19(1) of the Act, which provides that "the revenue of the Corporation in any financial year shall be applied in payment of or to provide for -

.....

(f) any compensation payable to employees of the United Docks, the stevedoring companies.....as per agreements signed by the Minister of Labour.....on behalf of the Government" with various trade unions.

The documents produced show that it was intended that employees of the plaintiffs should become redundant as a result of the operations of the Corporation, and the law made provision for the payment of compensation by the Corporation to those employees. In those circumstances I agree with Mr. David that the plaintiffs, at this stage of the trial, are entitled to say that it would have been pointless to apply for an authorisation which would have been refused as a matter of course.

The fourth reason given by Mr. Venchard is that the Act did not prohibit the Mauritius Sugar Syndicate from employing the plaintiffs. The result would be that if the Syndicate ceased to employ the plaintiffs, the latters'

remedy would be an action for breach of contract against the Syndicate, and that Government should not be blamed for a decision taken by a third party. It seems to me that here again the argument overlooks the hard realities averred in the plaint. The plaintiffs argue that the parties, as well as the Syndicate contemplated that the business previously carried out by the plaintiffs on behalf of the Syndicate should, by operation of law, and whether the plaintiffs agreed or not, be transferred to the Corporation. Faced with that necessity, the plaintiffs had no choice but to declare a number of their employees redundant, on terms that compensation for redundancy should be paid by the Corporation. It is worthy of notice that Government was a party to the negotiations on redundancy. In the event the plaintiffs were driven to a partial dismantling of their organisation, with the result that, as from the taking over averred in para.13 of the plaint, they were no longer able to provide the former services to the Syndicate. I conclude that, always on the assumption that the averments in the plaint are correct, the cause for the stoppage of the plaintiffs' activities is not to be sought in a free decision of the Syndicate, but in the operation of the Act, and notably of s.5(2).

I must now turn to the fifth and sixth reasons put forward by Mr. Venchard. In his able argument, he made it clear that those reasons were those he most relied upon, and they raise points of great constitutional importance. First he submitted that our Constitution did not guarantee to any one the right to carry on a business: in his view, such a guarantee would lead to a complete paralysis of the State in that it would lose the power to control the economic activities of the country. He referred to various instances where Parliament had restricted, or even suppressed certain commercial activities without any one claiming that such legislation was unconstitutional. Thus, Parliament had suppressed the licence of money-changers, and enacted that only banks could deal in foreign exchange transactions. Restrictions had been placed on bookmakers' licences, and the licences increased. The right to import a number of goods had been limited and quotas imposed on imports. Could the money-changers, the bookmakers, or the importers claim compensation on the ground that their profits had been suppressed,

or curtailed?

We agree with Mr. Venchard that they could not, but the reason is that all those cases illustrate a legitimate use of the regulatory power of the State. There was reason to believe that some money-changers engaged in the illicit exportation of foreign currency to the great detriment of the country which sorely needed that foreign currency. It was therefore perfectly licit for Parliament to intervene to stop a drain on essential resources. No one could deny the right of the State to increase bookmakers' licences, if it appeared that bookmakers commanded an inexhaustible supply of fools to enrich them. Again, the limitation on imports was essential to palliate the imbalance between our exports and imports. Even if it is held that s.3 of the Constitution is fully operative (a problem to which I shall revert), such legislation is authorised by the section itself, which provides that the rights and freedoms to which it refers are subject to "limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest". In the examples set out above, the limitations are clearly imposed in the public interest. But it does not follow that where a person is exercising a legitimate activity from which he derives profit, the State may, by an exercise of its regulatory power, destroy his activity without compensation.

Mr. Venchard's sixth point was to the effect that the plaintiffs could not succeed unless they established that there had been a compulsory acquisition of the goodwill which had belonged to them. He submitted that s.3(c) of the Constitution had no separate existence, and that s.8 so operated to limit s.3 that only the rights specified in s.8 were protected. The result was that if the plaintiffs' business was destroyed, but not compulsorily acquired by the defendant,no compensation was due.

Before I decide those two issues, I must answer the most perplexing question of all: does s.3 of the Constitution have any specific operation apart from the other sections of Chapter II which enshrine the fundamental rights and freedoms of the individual? It was said that it was now well-settled both by our own judgments and by decisions of the Privy Council that s.3 had no independent existence, and that the rights referred to in it were enforceable only if they were specifically set out in the succeeding sections. The Mauritian cases cited

in support of that proposition were Jaulin v. D.P.P. (1976) M.R.96, Hawaldar v. Government of Mauritius (1978) M.R.317, Jeekahrajee v. Registrar of Cooperatives (1978) M.R.215 and Reufac v. Minister of Agriculture and Natural Resources and the Environment (Judg.326 of 1980). The relevant passage in Jaulin is at p.99, where a Court of three judges had this to say concerning ss.3 and 16: "It is essential that an attempt be made to distinguish or reconcile, if possible, at all, those two equally operative sections of the Constitution. The basic difference between them is that the implied guarantee against discrimination proclaimed in s.3 relates expressly to the enjoyment of each of those rights and freedoms which are specifically set forth in its paras. (a), (b) and (c). The guarantee in s.3 has, consequently, no separate existence. But a measure which, in itself, conforms to the requirements of the particular section of Chapter II affording protection to the right or freedom concerned may nevertheless infringe that section when read in conjunction with s.3 on the ground that it is discriminatory. In other words, it is as though the introductory declaration in s.3 formed an integral part of each of the sections enshrining the individual rights and freedoms enumerated in paras. (a), (b) and (c).

Two points in the passage quoted should be underlined. First, there is an unqualified declaration that s.3 and s.16 are "equally operative". Secondly, a measure which does not specifically offend the rights enshrined in ss.4 to 16 may be held unconstitutional when any of those sections is read in conjunction with s.3. That can only mean that s.3 adds some protection which is not expressly set out in the succeeding sections. Why then did the popular misconception that s.3 is merely introductory arise? To our minds the answer is that one particular sentence was read outside its context. That sentence is: "the guarantee in s.3 has, consequently, no separate existence". When those words are replaced in the passage to which they belong, they cannot mean that after expressly stating that s.3 is operative, the Court changed its mind four lines further down, and came to a contrary conclusion. Nor can they be taken to negative the sentence which immediately follows, and which recognises that s.3 complements the rights enshrined in the other sections of Chapter II. The true meaning of the sentence is that the guarantee in s.3 is expressly limited

to the rights set out in its paras. (a), (b) and (c). That such was the intention of the Court is shown by the fact that it adds: "Section 16 on the other hand applies to all enactments whether they affect a right or freedom protected by the Constitution or not". In other words, the Court distinguishes between s.3, which protects only the fundamental rights it specifies, and s.16, which protects against discriminatory laws or conduct, whether they refer to fundamental rights or not.

It thus appears that Jaulin, which is relied upon as an authority for the proposition that s.3 has no independent existence, supports exactly the opposite view. That basic misunderstanding of Jaulin detracts from the authority of judgments which purported to follow it.

The next case is Hawaldar (supra), where it is said that "Section 3(c) of our Constitution which refers in a general way to the right of the individual to protection from deprivation of property without compensation does not create a right independent of, and more comprehensive than the right safeguarded by s.8(1)." But it appears from the headnote as well as from the body of the judgment that the plaintiff in that case was complaining of the violation of his rights under s.8. It follows that whatever was said concerning s.3 was merely obiter. In particular, the weight of the dictum is diminished by the fact that at no time the learned judges' minds were directed to a possible distinction between the "deprivation" mentioned in s.3, and the compulsory acquisition referred to in s.8.

As for Jeekahrajee (supra), it also supports the view that s.3 has a positive value. After quoting with approval the passage in Jaulin which says that s.3 is as operative as s.16, the Court says this: "We are of opinion that s.3 of the Constitution operates to protect people against discrimination on a definite number of grounds in relation to the rights and freedoms which are broadly set out therein and more specifically set out elsewhere in Chapter II of the Constitution". The passage points out that s.3 uses broader terms that the succeeding sections, but the operative words are "Section 3 operates". Thus Jeekahrajee is to the same effect as Jaulin, and not as Hawaldar.

Again in Reufac v. Minister of Agriculture and Natural Resources and the Environment (Judg.80 of 1980), (known as Reufac No.1) we find this significant passage: "S.24 of the Cane

Planters and Millers Arbitration and Control Board Act (No.46 of 1973) is not unconstitutional, but an act done in the purported execution of the powers conferred by it may be unconstitutional, particularly if its effect is to deprive a citizen of his fundamental right to his property". It is clear that Reufac No.1 was not concerned with compulsory acquisition: it dealt with the Minister's right of refusing to a non-viable factory the right to stop business. The passage quoted therefore clearly expresses the view that a deprivation of property not amounting to compulsory acquisition may be unconstitutional.

It must be conceded that in all the cases mentioned above, the question whether s.3 was operative or not was not directly in issue. But the above analysis shows that, with the exception of Hawaldar, all the dicta on the subject prior to Reufac v. Minister of Agriculture and Natural Resources and the Environment (Judg.No.326 of 1980) (known as Reufac No.2) treated s.3 as adding something to the guarantees contained in the other sections of Chapter II.

We now turn to Reufac No.2. In that case the plaintiffs once more averred that by refusing them the right to close down a factory which was making losses, the Minister was infringing their constitutional rights guaranteed by ss.3 and 8. Learned Counsel for the Crown countered by arguing that (a) the minister's refusal did not amount to compulsory acquisition of property; (b) the established practice of the Courts showed that deprivation of property, unaccompanied by compulsory acquisition, was not protected by the Constitution. If Counsel's second point is right, it would show that there is a serious gap in our Constitution in the protection of fundamental rights. The argument really implies that Parliament may, by a simple majority, vote a law authorising Government to burn a man's house as long as it does not take possession of it. The argument also suggests that our Courts have acknowledged the existence of that gap, and have done and said nothing about it. On that point, we have already seen that Counsel's submission is unfounded.

The Court, however, seemed to accept that

argument, and said this "No doubt s.3(c), or the rest of s.3 for that matter, is not without meaning or purport altogether. S.3 can certainly be of assistance to enable the Court to obtain the necessary guidelines for giving effect to the succeeding sections which particularise our fundamental rights, but, as stated in Hawaldar and in other decisions of this Court, s.3 does not create a right independent of, and more comprehensive, than the one safeguarded by s.8....."

"It follows in our view that the only constitutionally entrenched right relating to deprivation of property is that of protection against any executive decision which (directly or indirectly) involves the acquisition or taking of possession of the plaintiffs' property."

It cannot be denied that in those passages the Court considered s.3 as an interpretative section, merely providing "guidelines for giving effect to the succeeding sections", and took the view that where property rights are concerned, it did not give any protection apart from that granted in s.8. But in spite of the above passages, it does not seem that the true ratio decidendi of Reufac No.2 is that the executive may deprive a citizen of his property without compensation (implying that Mauritians own property only during the Government's pleasure). To my mind the true basis of the decision is found in the following: "Any person who embarks upon a business which is regulated by law must bear the consequences, and if the law provides that he can only opt out under certain conditions, he must abide by the law....." That implies that the Court considered that the plaintiffs had not been deprived of property at all, but that having embarked on a hazardous activity, in full knowledge of the risks involved, they had to satisfy various conditions laid down by law before they could be allowed to close down. On that view, what was said about s.3 is merely obiter.

It is also worthy of note that, when referring to s.3, the Court purported to follow "Hawaldar and other decisions". Our analysis has shown that Hawaldar stands alone, and that the other decisions are to the opposite effect. The Court was also influenced by the view it took of two Privy Council cases, Government of Malaysia v. Selangor Pilot Association (1977) 3 W.L.R. 901, and Thornhill v. A.G. of Trinidad and Tobago (1980) 2 W.L.R.

510. The Court said that the decision in the Malaysia case was binding upon them, and seemed to afford a complete solution of the problem.

It seems to us that the above statements must be qualified. The decisions of the Privy Council are binding upon us when they apply Mauritian law. In the Malaysia case, they were construing Malaysian law, and their decision would be binding only if it were first shown that, on the point in issue, Malaysian law and Mauritian law are identical. It is worth while to set side by side our s.3 and s.13 of the Malaysian Constitution, which was the relevant text in the Malaysia case:

MAURITIUS

3. 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, namely -

(a) the right of the individual to life, liberty, security of the person and the protection of the law;

(b) freedom of conscience, of expression, of assembly and association and freedom to establish schools; and

(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 the said rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not

prejudice the rights and freedoms of others or the public interest.

MALAYSIA

13. (1) No person shall be deprived of property save in accordance with law.

(2) No law shall provide for the compulsory acquisition or use of property without adequate compensation.

It seems impossible to equate those two enactments. Our sections 3 and 8 as well as the Malaysian section draw a distinction between deprivation and compulsory acquisition. But in Malaysia, while it is provided that where there is compulsory acquisition there must be compensation, the safeguard is relaxed in the case of deprivation: under s.13(1), deprivation is permitted if it is "in accordance with law". That can only mean that the Malaysian Parliament may, by a simple majority, vote a law which deprives a citizen of his property without offending the Constitution. Apparently, to the framers of the Malaysian Constitution it seemed a sufficient safeguard of the right of property that legislative action was a prerequisite to any deprivation. [Cf. State of West Bengal v. Subodh Gopal Bose (1954) (India) S.C.R.587]. The position in Mauritius is entirely different. The Constitution declined to entrust such a power to a simple majority. Protection against deprivation of property is entrenched in s.3, and that section cannot be altered except by the votes of not less than three quarters of all the members of the Assembly.

In the Malaysia case, the majority of the Privy Council says: "If in the present case the association was in consequence of the Amending Act deprived of property, there was no breach of s.13(1) for that deprivation was in accordance with a law which it was within the competence of the legislature to pass". That being so, it is obvious that the ratio decidendi in the Malaysian case does not apply to us. Valuable guidance may, however, be derived from the reasoning of their Lordships, but that reasoning certainly does not support those who deny the effect of s.3. Indeed, it points the other way. Thus their Lordships draw a clear distinction between deprivation and compulsory acquisition: "Deprivation may take many forms - A person may be deprived of his property by another acquiring it or using it but those are not the

only ways by which he can be deprived. As a matter of drafting, it would be wrong to use the word "deprived" in s.13(1) if it meant and only meant acquisition or use when those words are used in s.13(2). Great care is usually taken in the drafting of constitutions. Their Lordships agree that a person may be deprived of his property by a mere negative or restrictive provision but it does not follow that such a provision which leads to deprivation also leads to compulsory acquisition or use". If one remembers with what care our Constitution was drafted, one may apply the above reasoning to s.3 and s.8, and say that when the draftsman of s.3 speaks of deprivation, he is referring to something different from the compulsory acquisition mentioned in s.8. A necessary consequence is that even when both sections refer to the same subject-matter, property, the rights protected by s.3 do not exactly coincide with those protected by s.8.

It is, perhaps, of some interest to note that in his dissenting judgment Lord Salmon said that if the Malaysian authorities had made it a criminal offence for any one to be employed or offered employment as a stevedore in a port except by the port authorities, that would be a clear case where the stevedors would be entitled to compensation.

The other Privy Council case on which the Court in Reufac No.2 relied is Thornhill (ut supra). The issue in that case concerned the right of detained persons to have access to a lawyer without delay, and therefore is not directly applicable to our case, where a right to property is at stake. But the Privy Council had to construe s.1 of the Constitution of Trinidad and Tobago, which provides:

> " It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist.... the following human rights and fundamental freedoms, namely, (a) the right of tne individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law; (b) the right of the individual to equality

before the law and the protection of the law...."

The close kinship between that section and our s.3 is obvious, and what their Lordships say of the effect of s.1 will repay careful study. It is true that their Lordships point out:

> " Sections 1 to 3 of the Constitution proceed on the presumption that the human rights and fundamental freedoms that are referred to in sections 1 and 2 were already enjoyed by the people of Trinidad and Tobago under the law in force there at the commencement of the Constitution of 1962. The enacting words of section 1 are that the then existing rights and freedoms that are described in paragraphs (a) to (k) "shall continue to exist". In those paragraphs the rights and freedoms that are declared to have existed on August 31, 1962, and are to continue to exist, are not described with the particularity that would be appropriate to an ordinary Act of Parliament nor are they expressed in words that bear precise meanings as terms of legal art. They are statements of principles of great breadth and generality, expressed in the kind of language more commonly associated with political manifestos or international conventions, like the United Nations' Universal Declaration of Human Rights of 1948, and the European Convention for the Protection of Human Rights and Fundamental Freedom (1953) (Cmd.8969), to which, indeed, Chapter I of the Constitution of Trinidad and Tobago and similar provision in the Constitutions of other Commonwealth countries owe their origins of Minister of Home Affairs v. Fisher [1979] 2 W.L.R. 889,894."

But their Lordships are far from suggesting that as 1 to 3 are couched in too general terms to be operative. Indeed, they add this :

> " But section 2 also goes on to give, as particular examples of treatment of an individual by the executive or the judiciary, which would have the effect of infringing those rights, the various kinds of conduct described in paragraphs (a) to (h) of that section. These paragraphs spell out in greater detail

(though not necessarily exhaustively) what is included in the expression "the due process of law" to which the appellant was entitled under paragraph (a) of section 1 as a condition of his continued detention and "the protection of the law" to which he was entitled under paragraph (b)."

It is impossible to say more firmly that s.1 of the Trinidad Constitution (and, by inference, s.3 of our Constitution) has a distinct operation of its own, and that the "particular examples" given in the succeeding sections do not cover "exhaustively" the rights which it enshrines. Their Lordships then proceed decisively to discard the notion that sections such as s.1 of Trinidad, or our s.3, are too vague to be operative:

> " In contrast to section 2, section 1, as has already been pointed out, deals not only with rights and freedoms that prior to the commencement of the Constitution had been enjoyed by the private citizen de jure as a matter of legal right but also with those that he had enjoyed de facto only as a result of a settled policy of abstention from interference by the executive or a settled practice as to the way an administrative or judicial discretion had been exercised. In respect of rights and freedoms in this category what section 1 does by declaring that they shall continue to exist, is to convert them into rights and freedoms which henceforth are to be enjoyed not simply de facto but also as a matter of legal right for contravention of which a legal remedy is provided by section 6."

Applying that reasoning to our s.3, I conclude that by declaring that the right not to be deprived of property without compensation "shall continue to exist" it converts it into a right "which henceforth is to be enjoyed not simply de facto, but also as a matter of legal right".

One may here refer to Maharaj v. Attorney General of Trinidad and Tobago (No.2) 1979 A.C. 385, where the Privy Council quoted this passage from the judgment of Phillips J.A. :

" The combined effect of these sections [1, 2 and 3], in my judgment, gives rise to the necessary implication that the primary objective of Chapter I of the Constitution is to prohibit the contravention by the state of any of the fundamental rights or freedoms declared and recognised by section 1."

The trend of the judgment shows that the Privy Council took the same view of the operative value of s.1. In the same case, Ld. Hailsham of Marylebone examining the Trinidad Constitution said that sections 1, 3 and 6 were of critical importance, and later added that s.1 was more important than s.3. Ld. Hailsham's was a dissenting judgment, but there is nothing in the majority judgments to suggest that, on that point, the other noble and learned lords took a different view. It seems therefore permissible to say that the Privy Council has consistently taken the view that enactments closely comparable to our s.3 are fully operative.

Let us now abandon what was said around and about s.3, and take a close look at what it says about itself.

I find nothing either within the four corners of s.3 or in the context where it occurs to suggest that it is a mere zombie without an independent life of its own. Such a construction appears to me completely foreign to the spirit in which we are wont to read a Constitution. The fundamental rule is that a Constitution is a meaningful document: its voice carries higher and further than that of ordinary legislation, and it is unthinkable to dismiss the solemn pronouncements of s.3 as so much hot air.

Apart from the general rule that every pronouncement of a Constitution must be presumed to enshrine a principle of abiding value, there exist in the language of s.3 itself reasons to give it its full effect. The concluding part says: "the provisions of this Chapter shall have effect for the purpose of affording protection to the said rights and freedoms subject to such limitations of that protection as are contained in those provisions.... It should be noted that what are said to "have effect" are not "the succeeding provisions of this Chapter", but "the provisions of this Chapter"; as "this Chapter" includes s.3, that means that s.3 is not purely introductory, but that it also,

as much as the succeeding provisions, has effect to afford protection "to the rights and freedoms" referred to. One must also not overlook the phrase "the said rights and freedoms." That can only refer to rights and freedoms already existing, i.e. the rights and freedoms specified by s.3 itself. Combining those two propositions, I conclude that s.3 has effect to protect the rights specified in it.

There are weightier reasons than those linguistic arguments to attach importance to s.3. One should remember in what spirit the Constitution was framed. Those who thought of independence as a dangerous gamble as much as those who looked upon it as an inspiring adventure were agreed on one point: before embarking on such an enterprise, we had to equip ourselves adequately for it. One does not climb Everest with a day-tripper's knapsack. And it was accepted by all that an indispensable safeguard was a Constitution enshrining those reasons to live which are more precious than life itself. Now some of the other sections in Chapter II no doubt sounded highly technical to non-lawyers, but to all who care for human rights and liberty, s.3 spoke loud and clear. It set out the essence of the pact entered into between the people and Government on the eve of independence. If the other sections are severed from their common origin in s.3, they will lose their fundamentality at the same time as their foundation. They will be left over as unlinked fragments which may for a time protect bits and pieces of liberty, but fail to give comprehensive cover to liberty against those who seek to curtail and mutilate it. Nothing better illustrates the vital importance of s.3 than the arguments of those who deny its effect: they are led on to say that the executive may destroy a citizen's property as long as it does not enrich itself by doing so. Just as a foreknowledge of the genus gives us the standard required to value the different species that compose it, it is s.3 which enacts a general principle for understanding and giving effect to the particular rights set out in the succeeding sections.

One may note here that the words "without discrimination" in s.3 do not limit the scope of the rights it sets out, but define a particular mode of violating it. S.3 is not confined to forbidding discrimination. Thus a provision to sterilise all persons who displease

the Board of Film Censors would not be discriminatory, but it would offend against s.3.

If our Courts fail to give full effect to s.3, they would be guilty of the betrayal denounced by the Privy Council in Thornhill: "The hopes raised by the affirmation in the preamble of the Constitution that the protection of human rights and fundamental freedoms was to be ensured would indeed be betrayed if Chapter I (our Chapter II)" did not preserve to the people all those human rights and fundamental freedoms that in practice they had hitherto been permitted to enjoy".

I may add that if s.3 did not operate to protect fundamental rights, there would be no reason for s.47 of the Constitution to classify it among those essential provisions which cannot be amended except by the votes of not less than three-quarters of all the members of the Assembly.

While I refuse to whittle s.3 away I am not unmindful of the danger of giving it such an extensive interpretation as would paralyse the executive at every step. That is why I fully endorse what the Privy Council said in Thornhill, at p.516:

> " The lack of all specificity in the descriptions of the rights and freedoms protected contained in section 1, paragraphs (a) to (k), may make it necessary sometimes to resort to an examination of the law as it was at the commencement of the Constitution in order to determine what limits upon freedoms that are expressed in absolute and unlimited terms were nevertheless intended to be preserved in the interests of the people as a whole and the orderly development of the nation; for the declaration that the rights and freedoms protected by that section already existed at that date may make the existing law as it was then administered in practice a relevant aid to the ascertainment of what kind of executive or judicial act was intended to be prohibited by the wide and vague words used in those paragraphs."

It therefore becomes relevant to enquire whether deprivation without compensation would

have been tolerable prior to 1968. To ask the question is to answer it. No one could imagine Robert Farquhar uprooting a peasant's canes to provide a better track for his horse, or John Pope Hennessy razing a neighbour's house to improve the prospect from his verandah. Even more, in the decades preceding independence, when the mild and friendly British presence was far more convivial than imperial, no Mauritian who was deprived of his property by the executive doubted that he could obtain redress from our Courts.

I may add that the protection against deprivation did not depend solely on the benevolence of the state. It had received legislative recognition in various ordinances passed before independence. Thus, by s.18 of the Town and Country Planning Ordinance (No.6 of 1954) any person whose property was injuriously affected by the operation of a scheme under the Ordinance was declared entitled to compensation in the amount by which his property had decreased in value. In the same spirit, s.28 of the Land Acquisition Ordinance (No.77 of 1952) provided that:

> "28. A person interested in any land which, without any portion thereof being compulsorily acquired, has been injuriously affected by the erection or construction on land compulsorily acquired of any works in respect of which the land was acquired, shall be entitled to compensation in respect of such injurious affections."

The 1952 Ordinance has been replaced by the Land Acquisition Act (No.54 of 1973) which provides by its s.19 that compensation is due not only to a person whose land is compulsorily acquired, but also to a person who sustains loss"as a result of severance of other lands owned by him from the land compulsorily acquired", and to a person who sustains "any other loss.... as a result of the compulsory acquisition".

Those enactments do not innovate. They declare a basic assumption of our law that where a person suffers loss as the result of the activity of the state, he should receive compensation if justice and fairness so require.

It is interesting to note that in French law, which has evolved from the same source as our law, deprivation is a ground for compensation

even if it does not amount to compulsory acquisition. Thus, if as the result of the acquisition of part of his land the remaining part loses its access to a public road, the owner is entitled to compensation for the diminished value of the part he retains: Trib.gr.inst. Versailles, 21 juill. 1969, in J.C.Administratif, Vo, Propriété, n.41. Generally, if the part not compulsorily acquired is depreciated, compensation is due: Paris 16 mai 1968, eodem varbo, n.43. In J.C.Administratif, vo. Propriété, n.250 and 252 show that a trader is entitled to an indemnity not only for "perte de clientele" but also for "trouble commercial". The plaints before us clearly aver not only "perte de clientele", but also "trouble commercial".

The 3e Chambre Civile of the Cour de Cassation has also held that "l'interruption temporaire de l'activité commerciale d'un exproprié est la source d'un préjudice matérial que ne répare ni l'allocation de la valeur vénale du fonds ni l'indemnité de remploi": [J.C.P.G.iv.221]. If a total temporary stoppage gives a right to an indemnity, there is no reason why a permanent partial stoppage should not.

It follows that s.3 is not making an empty boast when it declares that the right not to be deprived of property without compensation has existed in Mauritius. And when it declares that this right shall continue to exist, it imposes a duty which is binding on the executive, the legislative and the judiciary alike.

I find further assurance for my views in the remarkable evolution which has led the Conseil Constitutionnel in France to assert its power to protect fundamental rights by construing the Preamble to the 1958 Constitution as forming an integral part of the Constitution, and, in consequence, as operating to protect the rights to which it refers. One should note that the rights in question are not expressly set out in the text of the Constitution: they are merely alluded to in the Preamble, which refers to the Déclaration des Droits de l'homme et du citoyen du 26 aout 1789, and to the Preamble to the 1946 Constitution. It had long been thought that the 1958 Preamble was not a binding enactment. Thus M. Janot, one of the draftsmen of the Constitution, had stated: "Ces principes n'ont pas de valeur juridique; ce ne sont pas des dispositions

normatives. C'est simplement une déclaration d'intention, ca n'a pas d'autre signification". [Quoted in Vingt ans d'application de la Constitution de 1958, Presses Universitaires d'Aix-Marseille, 1978, p.242]. But in 1971, the Conseil Constitutionnel (in what was described as a French equivalent of Marbury v. Madison) held that it had jurisdiction to control whether a given law conformed to the Constitution viewed as a whole, including the Preamble. The French assembly had voted the Loi du 30 juin 1971, which amended the Loi du ler juillet 1901 by requiring persons wishing to form an association to obtain a prior authorisation. The Conseil held that the law was unconstitutional as violative of the right of association, which constitutes one of the "principes fondamentaux reconnus par les lois de la République", recognised by the Preamble of the 1946 Constitution. [Favoreu et Philip, Les Grandes Decisions du Conseil Constitutionnel, p.267]. The following passages of the judgment are important:

> Vu la Constitution, et notament son préambule;
> .....
> Considérant qu'au nombre des principes fondamentaux reconnus par les lois de la République et solennellement réaffirmés par le Préambule de la Constitution, il y a lieu de ranger le principe de la liberté d'association, que ce principe est a la base des dispositions générales de la loi du ler juillet 1901 relative au contrat d' association; qu'en vertu de ce principe les associations se constituent librement et peuvent être rendues publiques sous la seule réserve du dépôt d'une déclaration préalable; qu'ainsi, à l'exception des mesures susceptibles d'être prises à l'égard de catégories particulières d'associations, la constitution d'associations, alore même qu'elles paraftraient entachees de nullité ou suraient un objet illicite, ne pout être soumise pour sa validité a l'intervention préalable de l'autorité administrative ou même de l'autorité judiciaire.

The Commentator of the decision states (at p.279) :

> Pendant les premières années, le Conseil constitutionnel n'a pas eu l'occasion de statuer sur la conformité au Preambule de la Constitution, et on a eu tot fait alors de dire que la Haute Juridiction n'oserait pas le faire ou même avait renoncé. On a meme avancé que,: dans la décision Magistrate musulmans du 15 janvier 1960, le Conseil avait réfuse de faire prévaloir le principe général d'égalité à l'encontre d'une loi et que, par le même, il avait renonce à un contrôle de conformité au Préambule. En fait, l'explication n'est pas celle-là: c'est l'incontestabilite de l'ordonnance organique qui a empéché ce contrôle.

The above decision was followed by the Conseil in its judgments dated 28 Nov. 1973, 21 dec. 1973, and 15 jan.1975, and it is now settled that the Preamble has a positive enacting value.

It seems to me that the line adopted by the Conseil Constitutionnel is in full harmony with the trend of enlightened legal opinion which considers that where human rights are concerned, constitutional provisions should be given their full force and effect.

If the Conseil Constitutionnel thus considered a mere Preamble to be fully effective to protect fundamental rights, it is a safe inference that it would, a fortiori, consider s.3 of our Constitution, which has the same legislative form as the succeeding sections, to be fully operative.

Having now held that s.3 forbids deprivation without compensation, I turn to the issues raised at this stage. I shall once more assume that the averments of the plaint are admitted for the purposes of the preliminary objection. I must now decide whether there has been either a compulsory acquisition or a deprivation of property. In his submission that there had been a compulsory acquisition, Mr. David relied on the Northern Ireland case of Ulster Transport Authority v. James Brown & Sons Ltd. (1953) N.I.79 and the Canadian case of Manitoba Fisheries Ltd. v. Reg (1979) 1 R.C.S.101.

The facts in the Ulster case are taken from the judgment of Ld MacDermott, C.J.: "So far as the Statute book is concerned, one has first a general acquisition of road

undertakings on payment of compensation. But the undertakings of furniture removers and storers are excepted and the owners are left free to ply their trade. Then, with no further provision as to acquisition with compensation, these owners are forbidden to carry on a substantial part of their business.

Ld MacDermott held that s.5 of the Government of Ireland Act, 1920, forbad any legislative device designed to achieve acquisition without compensation, though not purporting to do so:

> A colourable device of this nature ought not to be ascribed readily to the legislature, but when the nature of the relevant legislation and of its consequence....are considered I can see no escape from the conclusions I have mentioned.
>
> Parliament must be presumed to intend the necessary effect of its enactments, and the answer to this question cannot overlook the fact that in this specialised field.....the natural consequence of the enforcement of the relevant prohibition would be to divert to the appellants the business, or at least the substantial part of the business, which their erstwhile competitors were no longer allowed to transact... I think, therefore, that the legislation and the nature of its subject matter justify the answer that the intention was to enable the appellants to capture the prohibited business, and to do so without expense.

I am not prepared to say that our Act contains a "colourable device" to acquire the plaintiffs' property without expense. The Courts ought to be very slow to impute motive to Parliament, and in any case the Act puts, as it were, all its cards frankly on the table. But if I am not concerned with the motive of the legislator, I must decide what is the effect of the legislation. I agree with Ld MacDermott that the natural and intended consequence of the prohibition contained in ss.5 and 33 of the 1979 Act will be to divert to the Corporation that part of the plaintiffs' business which consisted in storing and loading sugar. Adapting the learned judge's words, I find that the Act will

divert to the Corporation the business which the plaintiffs are no longer allowed to transact: the business can go nowhere if it does not go to the Corporation, as intended and enacted by Parliament.

In the Manitoba case, a statute granted a monopoly to a corporation for the export of fish. As a result, the plaintiff was compelled to cease its business, which consisted of exporting fish. It claimed compensation, and the Canadian Supreme Court held:

> " The legislation in question and the Corporation created thereunder had the effect of depriving the appellant of its goodwill as a going concern and consequently rendering its physical assets virtually useless and the goodwill so taken away constituted property of the appellant for the loss of which no compensation whatever had been paid. There is nothing in the Act providing for the taking of such property by the Government without compensation and as the Court found that there was such a taking, it followed that it was unauthorised having regard to the recognized rule that "unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation."

The Canadian Court quoted this passage from Government of Malaysia v. Selangor Pilot Association (ut supra) :

> "The restriction placed on the activities of individual licensed pilots did not deprive them of property and if this be the case, it is hard to see that it can be said to have deprived the licensed pilots who were partners in the association of property. All they lost was the right to act as pilots unless employed by the authority and the right to employ others on pilotage, neither right being property."

and commented that the difference between the restriction placed on the pilots' activity was totally different from the obliteration of the plaintiffs' entire business. The Court went on to say: "In the Malaysian case, the licences of the pilots were not disturbed, except to the extent that they were required to be employed by the Port Authority which offered them employment."

If the total obliteration of a business gives a right to compensation, there is no reason why the obliteration of a substantial part of a business should not give rise to compensation in proportion to the loss sustained.

I may here dispose of a collateral argument put forward on behalf of the defendant vis. that there is no continuity between what the plaintiffs did, and what the Corporation is doing: the Corporation is said to have set up an entirely new business, bulk loading, which cannot be compared with the plaintiffs' former business. The plaintiffs are clearly saying that the same business is being carried on; that business is still the loading and storing of sugar, and mechanisation does not change the nature of the business. In the absence of evidence, it is not possible at this stage to say whether the plaintiffs are right or not.

Even if it were found that there had been no passing of goodwill from the plaintiffs to the Authority, or, to adapt Ld MacDermott's phrase, if there had been no taking over, but merely a taking away, that taking away would still, in my opinion, amount to a deprivation of property within the meaning of s.3. In our law, the value of an "entreprise" (which may roughly be equated to a going concern) is not made up exclusively of physical assets plus goodwill. "Entreprise" has been defined as "la somme des elements humains et materiele concourant a la realisation d'une fin economique de production ou de distribution". In consequence, in assessing its value one must pay regard to the organisation of the business, the procedures devised to promote efficiency and reduce waste, the gradual collection of specialised manpower, the training and deployment of skilled employees, and all the intangible assets which tend to build up the undertaking into a valuable business endowed with a capacity to make profit. If, as they aver, the plaintiffs have been deprived of part of those intangible assets, they are entitled to compensation for that deprivation on the terms specified in s.3.

I therefore hold that the plaintiffs may have a remedy both under s.3 and under s.8.

It should be noted that in para.14 of the plaint, the plaintiffs allege both a compulsory

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(continued)

acquisition and a deprivation, and that, logically, they rely on both s.8, which deals with compulsory acquisition, and on s.3, which is concerned with deprivation. But in the prayer they speak of acquisition only. In the arguments addressed to us, however, the question of deprivation and of the application of s.3 were discussed. In any case, I would be loath to decide a case involving important constitutional issues on a mere point of pleading. I therefore call the attention of Counsel to that apparent difference between para.14 of the plaint and the prayer.

As my brother Glover has come to the same conclusion, we overrule the preliminary objection which was argued before us.

Sd: N.Rault
N.RAULT
Chief Justice

7th December 1981

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7th December 1981

No. 11

JUDGMENT OF JUSTICE V.J.P. GLOVER J.

In the matter of:-

SOCIETE UNITED DOCKS — Plaintiff

v.

GOVERNMENT OF MAURITIUS — Defendant

AND

In the matter of:-

1. DESMARAIS BROTHERS LTD.
2. TAYLOR AND SMITH LTD.
3. D'HOTMAN & SONS LTD. — Plaintiffs

v.

GOVERNMENT OF MAURITIUS — Defendant

The plaintiffs apply for redress under section 17(1) of the Constitution against the defendant. In compliance with rule 3 of the Constitutional Rights (Application for Redress or Relief) Rules 1967 (G.N.No.106 of 1967), they have set out the provisions of the Constitution which have been contravened in relation to them, and the details of the

contravention, as follows in the plaints:

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"14. The plaintiff avers -

(a) that Act No.6 of 1979 in so far as it creates a monopoly in favour of the Mauritius Sugar Terminal Corporation with regard to the storage and loading of sugar involves a compulsory acquisition or taking possession of property and is invalid in that there is no provision for ensuring that the persons who suffer financial prejudice as a result of such monopoly receive adequate compensation;

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(continued)

(b) that the effect of Act No.6 of 1979 has been to deprive the plaintiff of that part of its property consisting in its business of storing and handling of sugar, without payment of compensation;

(c) that such deprivation amounts to a violation of the plaintiff's fundamental right to protection against such deprivation guaranteed by sections 3(c) and 8 of the Constitution of Mauritius."

The final paragraph of the plaints reads as follows :-

"16. And the plaintiff prays for a judgment holding and declaring :

(1) that section 5 of Act No.6 of 1976, in so far as it creates a monopoly in favour of the Mauritius Bulk Sugar Corporation with regard to the storage and loading of sugar, involves an acquisition of property and is invalid in that there is no provision for ensuring that persons who suffer financial prejudice as a result of such monopoly receive adequate compensation, in breach of sections 3 and 8 of the Constitution;

(2) that the plaintiff is entitled to compensation for that part of its dock business which has been

compulsorily acquired by the defendant, to the amount of Rs. 10,800,000 or such amount as the Court may deem fair and reasonable.

And the plaintiff further prays for the issue of such orders, writs or directions as the Court may consider appropriate for the enforcement of the Court's judgment. " (The underlining is mine).

The defendant has raised three matters in a plea in limine litis. At the preliminary hearing only one was pressed (the other two, relating to the six-months time limit and the availability of other remedies were reserved). The point which was pressed was that, assuming the facts stated by the plaintiffs to be true, the plaints disclosed no cause of action because they did not show that any right to property as guaranteed by the Constitution had been violated.

Before examining the point, we must be clear as to the precise nature of the plaintiffs' complaints. They are saying, and this is confirmed on reading over the shorthand notes of Mr. David's address, that the defendant has, by engineering the enactment of the Mauritius Sugar Terminal Corporation Act 1979 (No.6 of that year in this judgment referred to as "the Act"), procured the compulsory acquisition, or taking over, of their property (i.e. their business or rather a substantial part thereof) by the Mauritius Sugar Terminal Corporation (hereafter referred to as "the Corporation"), in breach of the provisions of the Constitution which protect the right against deprivation of property without compensation, namely sections 3(c) and 8. The complaint is grounded on the fact that the Act, obviously a law within the meaning of section 8(1)(c), does not satisfy the requirements of section 8(b)(c)(i) because it contains no provision for payment of compensation. We are accordingly asked to invalidate the offending part of the Act and to order the defendant to pay compensation to the plaintiffs.

The relevant provision of the Act reads thus :

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; or

(b) during such time as may be fixed by the Minister, by Order published in the Gazette, store any commodity specified in the Order.

(2) Subject to sub-section (3) and to such conditions as may be prescribed as from the appointed day -

(a) every miller shall cause all sugars manufactured by him to be delivered to the Corporation or, with the approval of the Corporation, to an authorised body;

(b) the sugar delivered under paragraph (a) shall be consigned to the Syndicate in the name of the owner thereof;

(c) the Corporation or an authorised body shall receive all sugars manufactured in Mauritius and delivered to it under paragraph (a).

(3) The Board may authorise a miller to store sugar on his premises or at such place as the Board may approve.

On the other hand the relevant sections of the Constitution are as follows :

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(continued)

Fundamental rights and freedoms of the individual

3. It is hereby recognised and declared that in Mauritius there have existed and shall continue to exist ....each and all of the following human rights and fundamental freedoms, namely -

(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.....
.....

Protection from deprivation of property

8.(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 the following conditions are satisfied, that is to say -

(a) the taking of possession or acquisition is necessary or expedient in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilisation of any property in such a manner as to promote the public benefit; and

(b) there is reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property; and

(c) provision is made by a law applicable to that taking of possession or acquisition -

(i) for the prompt payment of adequate compensation; and

(ii) securing to any person having an interest in or right over the property a right of access to the Supreme Court, whether direct or on appeal from any other authority, for the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled, and for the purpose of obtaining prompt payment of that compensation.

A look at those texts reveals that while section 3(c) and the marginal note to section 8 relate to deprivation of property, section 8 (a comprehensive provision including limitations and exceptions) refers to acquisition in relation to interests in or rights over property but only to taking of possession with regard to property itself. In the course of his speech, Mr. David urged that, with the assistance of section 3(c) and the marginal note to section 8, and on the basis of decided cases in British and Commonwealth Courts, we should give a liberal meaning to the word acquisition. In his equally able address, Mr. Venchard observed that this Court has had occasion to hold that section 3 does not create a right which is independent of, or greater than, the ones catered for in section 8.

We have seen that the plaintiffs complain that their property has been acquired or taken possession of (para.14 of the plaints), and again that it has been acquired (para.16). But the other important words in the plaints are to be found in para.13 of the plaints which avers that they continued to operate their services until July 1980 when the Corporation "took over". They have also put in a copy of a letter from the Chairman of the Corporation's Board wherein he says, in answer to an enquiry to that effect

from the plaintiffs, that the bulk Terminal "will be operational as programmed to take over the responsibility for loading all the sugar that will be produced during the 1980 harvest and afterwards".

Now it is clear that where X is running a business (and it is accepted that this is property), then if Y can be shown to have procured the taking over of the property by Z, that will amount to a taking of possession of property. In such a case, the matter can rest squarely on section 8 without any other provisions of the Constitution having to be invoked.

My brother the Chief Justice, whose judgment I have had the advantage of reading, rightly points out that paragraph 14(b) of the plaints complains specifically of a deprivation of property but that paragraph 16 does not. Whether, as he suggests, counsel for the plaintiffs wishes to consider his pleadings further and reframe them so as to claim that, even if he fails eventually on section 8, he is entitled to a separate remedy (as an alternative) under section 3 is, in view of the conclusion I have reached, a matter with which I need not concern myself at this stage.

On those assumptions, the determination of the preliminary objection will depend on whether the Court could, assuming all the facts stated in the plaint to be correct and in the light of any other self-evident truths, find that -

(a) the plaintiffs owned a business;
(b) that business constituted property;
(c) someone has taken possession of it;
(d) the plaintiffs did not consent to this;
(e) the Act makes no provision for payment of compensation;
(f) the plaintiffs may be entitled to seek redress against the defendant.

We may, at this state, conveniently note two points. No issue is raised as to whether the taking is necessary or expedient, in terms of section 8(1)(a) or as to the justification for causing hardship in terms of section 8(1)(b). On the other hand, whilst the plaintiffs have invoked a compulsory acquisition of property, it is clear that they need not go so far, as it would have been sufficient for them to aver and it will be enough for them to prove, a taking of possession.

For the defendant it is submitted that the preliminary objection should succeed on six counts, viz.

(1) The plaintiffs are attacking the validity of part of the Act whilst they should complain of some act or omission committed by the defendant. The answer to this has already been given when the plaintiffs' contentions were summarised above. The plaintiffs are, by using what has been described elsewhere in judicial pronouncements as the "colourable device" approach, saying that it is the defendant who has engineered the whole scheme and secured the passing of a law to divest the plaintiffs without complying with section 8(1)(c)(i) of the Constitution, even though the person who took over their business is not the Government but the Corporation, in which the Government is a majority shareholder. The plaintiffs are also saying that the relevant part of the Act is unconstitutional, and therefore of no effect, a consequence which would naturally follow from section 2 of the Constitution which reads as follows:

> 2. This Constitution is the Supreme law of Mauritius and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void.

In my view they are perfectly entitled to say this. Of course, if they eventually succeed and the impugned enactment is struck down, this may have a direct bearing on their entitlement to compensation.

(2) The relevant section of the Act (section 5) provides that the monopoly created in favour of the Corporation shall have effect as from the appointed day and no such day has been appointed as yet. Moreover defendant's counsel says that some 80,000 tons of sugar are still being handled by the plaintiffs. That may be so but, on the preliminary objection, I am required to give a decision on the assumption that the facts averred by the plaintiffs are true, namely that the Corporation has in effect "taken over" the plaintiffs' business. The point is therefore, in my view, wrongly taken at this stage.

(3) The same section of the Act says that sugar can no longer, from the appointed day,

be stored or loaded by any person other than the Corporation or an authorised body. It is therefore suggested that the injury is self-inflicted in that there is apparently nothing to prevent the plaintiffs from applying to become authorised bodies, and it is pointed out that the Mauritius Sugar Syndicate 1951 (established by Ordinance No.87 of 1951 and hereafter referred to as "the Syndicate") has, by Government Notice No.50 of 1980, been given the status of an authorised body. Once again I feel that we must approach the problem on the assumption that the defendant's scheme is such that it is not contemplated to allow the plaintiffs to compete with the Corporation. Moreover it is difficult to follow the defendant's line of argument: if there is as yet no appointed day, what was the point (if not the legal effect) of making the Syndicate an authorised body?

(4) The plaintiffs say in the plaints that, for many years, they were "employed" by the Syndicate to handle sugar, obviously meaning that they contracted to offer their services to the Syndicate. The plaints, say Counsel for the defendant, are silent about who stopped contracting with whom and, in any event, the plaintiffs have not attempted to show why they cannot continue to be "employed" by the Syndicate. The short answer to this is contained in section 5(2) of the Act which requires every person milling sugar to bypass the plaintiffs - on the assumption that the latter are not, and will not be, allowed to compete with the Corporation.

(5) and (6) I confess that the manner in which the last two objections were presented was not easy to follow. This is how the shorthand notes of Mr. Venchard's speech read on this point [learned Counsel is recapitulating items (2) (3) and (4) and introducing points (5) and (6)]

> " I shall now come to the more meaty part of my objections. There are two reasons in law on which I would like to submit. The first one is that that plaint is premature, the second one is that the deprivation is self-inflicted, the third one is that they are employees, the fourth one, the complaint that they had been deprived of their right to carry on a business. This is not a right in my submission which is guaranteed by the Constitution. This is the fourth

one. Looking at the plaint, there is no averment at all that they have been deprived of their goodwill of the business, they merely complain that the business has been taken over. My fifth ground would be that even if the plaint would be construed as averring that the goodwill is being taken away there has been no compulsory taking over of possession of a goodwill. The plaint is completely silent on the question of goodwill and whatever is being complained in the plaint is, having taken over the business of handling sugar consisting in the business of handling sugar on board ships without payment of compensation. That, in my submission, is not a right which is contemplated in the Constitution. If that were so, there would be alarming repercussions and would be very serious restrictions on the sovereignty of a State....."

Counsel went on to elaborate on his fifth point by saying that, as this Court has previously observed on other occasions, there is no parallel in our Constitution to the guaranteed right of individuals "to practice any profession, or to carry on any occupation, trade or business" such as is to be found, for example, in article 19(1)(g) of the Constitution of India. But the plaintiffs have not sought redress on the specific ground that their right to do business, or their entitlement to carry on a business, has been curtailed. They are clearly complaining that the business itself (or a substantial part of it), which they say is property, has been taken over by the Corporation, or more precisely that the defendant is responsible for having brought about the transfer of that part of their property into the hands of the Corporation. In my opinion, this fifth point need not therefore concern us at this point.

Again the plaintiffs do not say that all they have lost is goodwill. Their contention is that a business, or an enterprise, or an "activity", call it what you will, consists of tangible and intangible assets i.e. machinery and plant on the one hand, and, inter alia goodwill ("achalandage") and "custom" ("clientèle") on the other. The plaintiffs say nothing about any taking over of physical assets but they do say that the business has been taken over.

Now Mr. Venchard made six points on this sixth leg of his argument, which may be

summarised as follows :

(i) the plaintiffs may have lost their goodwill, or been deprived of it: but since section 3 of the Constitution does not operate to create and protect a specific right against deprivation, as opposed to a right against taking of possession or acquisition, and in any event the plaintiffs have in the plaints rested their case on the combined operation of sections 3 and 8, they can only succeed if they can show that goodwill has been taken over.

But the issue, as raised by the plaintiffs does not relate to goodwill alone: it concerns the business. And, as already indicated, I propose to determine the point argued before us with reference to a "taking over";

(ii) the goodwill, if any, belonged to its sole customer, the Syndicate;

(iii) it is the Syndicate that decided to switch its custom to the Corporation, as witnessed by the fact that the Act shows that the sugar industry is a partner in the Corporation, contributing to its share capital and receiving revenue therefrom through the Syndicate [see sections 17 and section 19(4)];

(iv) the plaints show that, long before the Government intervened in the matter and it was decided to procure the passing of the Act, the sugar industry and the Syndicate had had their own say in considering the process of passing from handling sugar in the traditional way to bulk handling. Paragraphs 4 to 9 of the plaint read as follows :-

> 4. In 1951, at a time when the shipment of sugar in bulk had become a vital issue, the dock companies co-operated with the stevedoring companies in devising and putting into operation a semi-bulk method of loading which was used until July, 1980.
>
> 5. In or about 1966, the dock companies, in conjunction with the stevedoring companies, began to work on a project

for the introduction of bulk loading of sugar and for the setting up and operation of a bulk sugar terminal to be run as a joint venture by the dock companies and the stevedoring companies.

6. The sugar industry had been kept aware of the aforesaid project which had been discussed with all parties concerned.

7. Early in 1970, at a time when the said project had reached an advanced stage, a site for the terminal had been chosen, the conversion of existing mechanized sheds for bulk had been thoroughly gone into, and provisional financial implications and labour redundancy worked out, the dock companies were informed that the sugar industry had made the decision to undertake itself, through the agency of the Mauritius Sugar Syndicate, the mechanical bulk loading of sugar; but had also expressed the intention, in case its decision was implemented, to compensate the Dock Companies for any financial prejudice it might suffer as a consequence of its loss of business.

8. On February 24, 1971, the dock companies wrote to the President of the Mauritius Sugar Syndicate requesting confirmation of the principle of the payment of compensation to the dock companies.

9. On February 26, 1971, the dock companies were advised that the Syndicate was at the moment carrying a thorough study on all problems connected with an eventual conversion to bulk handling of sugar in Mauritius; that consequently if a decision was taken regarding the implementation of the new system, the Syndicate agreed to the principle of compensating all parties involved; and that there was no objection to the dock companies commissioning financial advisers, for its own account, to assess the size of compensation the dock companies might claim.

So Counsel goes on to say, if matters had rested there, could the plaintiffs have

been heard to say that the Syndicate had compulsorily taken possession of their business, or would not their sole remedy have been contractual?

(v) the existence of goodwill must obviously depend on whether the operator has the wherewithal to operate his business. Now the Act itself (section 19(1)(f)), as well as certain documents which were put in, show that the plaintiffs had taken part in negotiations which assumed that their workers would become redundant and sought to ensure that the Corporation would grant pension rights to the plaintiffs' workers. Having done this, apparently of their own free will, Counsel goes on to ask, how can the plaintiffs be heard to say that, but for the taking over of their business by the Corporation, they could have carried on?

(vi) the business which existed in the hands of the plaintiffs was one thing, whilst the Corporation has set up a totally different business. It follows that there has been no taking over of the plaintiffs' business: that business had, on the plaintiffs' admission, become obsolete and there was never any question but that it had to be abandoned.

In reply, Mr. David had no difficulty in answering the grounds (1) to (4) put forward by his opponent, mostly along the same lines as those which my brother the Chief Justice and I have followed to dispose of them. He did not dwell upon the question raised in the fifth ground, namely whether there is in Chapter II of the Constitution a guaranteed right to operate business. I have explained that, in my view, this does not arise.

On the sixth ground of objection, he aptly summed up the main part of the problem by saying that we had to answer two questions: has the defendant been able at this stage, to show that there is no justiciable issue concerning the fact that the plaintiffs owned a business which constituted property and the fact that, at the Defendant's instance, the business has been taken over, or taken possession of, by the Corporation? He relied particularly on Manitoba Fisheries Ltd.

v. Reg. (1979) 1 R.C.S.101 and on Re Tooth & Co.Ltd. (No.2) (1978) F.L.R. 112 to submit that we should answer the question in the negative. But Counsel was rather less eloquent on the issue whether the taking over was compulsory.

Before I embark on the final lap it is necessary to make a few observations about the Syndicate Ordinance No.87 of 1951, which gave it statutory basis, does not reproduce the contents of the notarial deed whereby it was set up but that Ordinance, and its predecessors (Ordinances No.16 of 1942 and No.12 of 1946) tend to show that the object of the deed was to pool all the sugar produced in Mauritius and consign it to the Syndicate, which became responsible for marketing the product. A number of later enactments, and indeed the Act itself, show that the Syndicate is apparently authorised to represent the sugar industry (planters and millers) and to identify itself with the industry. One may refer to the following provisions :

Customs Tariff Act (No.54 of 1969), s.6(6)

Cane Planters and Millers Arbitration and Control Board Act (No.46 of 1973) s.42, Schedule paras.10

Sugar Insurance Fund Act (No.4 of 1974) ss.24, 28, 34, 44 and 50.

Sugar Industry Development Funds Act (No.45 of 1974) s.14

Sugar Industry Labour Welfare Fund Act (No.45 of 1974) s.18

The Act, s.19(4)

I also note that, according to the plaints, the plaintiffs dealt solely with the Syndicate which, on their own admission, was their sole client in relation to the handling of sugar.

I said earlier that the fate of the objection depended on six questions to which I may now come back:

(a) did the plaintiffs operate a business: this is not disputed;

(b) did the business constitute property: this is a matter of law and, as

Mr. Venchard is ready to concede that at least goodwill is property, the matter cannot affect the interlocutory ruling;

(e) the Act makes no provision for the payment of compensation: this is evident.

The three other questions are as follows, question (d) and (f) raising matters which will depend on the answer to question (c)

(c) did the Corporation take over, or take possession of the business;

(d) did the plaintiffs consent to it;

(f) are the plaintiffs entitled to redress against the Defendant.

It is in relation to those questions that the points set out at (ii) to (vi) above and made by Counsel for the defendant become, are in my opinion, relevant. But learned counsel, in asking us to hold at this stage that the plaints disclose no cause of action, requires us to make too many assumptions. I cannot, without hearing evidence inter alia about the nature of the old business and of the new one, the true vocation and objects of the Syndicate, the details of the negotiations between the various bodies concerned, find my way to go as far as that.

That part of the preliminary objection argued before us should, in my judgment, be overruled.

A copy of this judgment will be filed in each record.

Sd: V.J.P.Glover
V.J.P.GLOVER
Judge

7th December, 1981.

No.12

JUDGMENT OF CHIEF JUSTICE MOOLLAN AND V.J.P.GLOVER

In the matter of:

SOCIETE UNITED DOCKS — Plaintiff

v.

GOVERNMENT OF MAURITIUS — Defendant

AND

In the matter of:

DESMARAIS BROTHERS LIMITED AND ORS. — Plaintiffs

v.

GOVERNMENT OF MAURITIUS — Defendant

As explained in the Interlocutory Judgments delivered in these consolidated cases on the 7th October (sic) 1981, the plaintiffs claim redress, in the form or monetary compensation, on the ground that the defendant has been directly instrumental in the taking over by the Bulk Sugar Terminal Corporation of a very substantial part of their business. This, they say, is tantamount to a dispossession or a deprivation of property in breach of sections 3 and 8 of the Constitution, inasmuch as they have received no compensation, or rather as the law which sanctions the new situation (Act No.6 of 1979) makes no provision for the payment of compensation.

One of the interlocutory judgments (No.445b of 1981), more particularly those parts of it which set out the main issues involved, will be a convenient starting point for our finding on the merits. We may recall that we are also faced with two further pleas in limine litis (the first one of the original three, to the effect that the plaints themselves disclosed no cause of action, having been overruled earlier). They refer to (a) the availability of alternative remedies and (b) the six months time limit prescribed for constitutional relief applications.

The following are the relevant extracts of

the interlocutory judgment to which we just referred:

" On those assumptions, the determination of the preliminary objection will depend on whether the Court could, assuming all the facts stated in the plaint to be correct and in the light of any other self-evident truths, find that -

(a) the plaintiffs owned a business;
(b) that business constituted property;
(c) someone has taken possession of it;
(d) the plaintiffs did not consent to this;
(e) the Act makes no provision for payment of compensation;
(f) the plaintiffs may be entitled to seek redress against the defendant. "

" I said earlier that the fate of the objection depended on six questions to which I may now come back:

(a) did the plaintiffs operate a business: this is not disputed;

(b) did the business constitute property: this is a matter of law and, as Mr.Venchard is ready to concede that at least goodwill is property, the matter cannot affect the interlocutory ruling;

(e) the Act makes no provision for the payment of compensation: this is evident.

The three other questions are as follows, questions (d) and (f) raising matters which will depend on the answer to question (c):

(c) did the Corporation take over, or take possession of, the business;

(d) did the plaintiffs consent to it;

(f) are the plaintiffs entitled to redress against the defendant. "

We shall therefore start by analysing issue (c): has it been proved that the plaintiff's business (or a substantial part of it) has been taken over by the Corporation? To do this we must first examine what the plaintiffs' business consisted of. Let us start with the first plaintiffs, the dock

companies. Sugar produced at the factories by millers was bagged there, and then loaded and taken to the docks. At first most of the bags were taken to the harbour by rail but, as from the early 1960's sugar bags were placed on what we may, for reasons which will become apparent shortly, call ordinary lorries, to find their way to the docks. The law provided that millers had to include in their contacts with planters a clause that they undertook to cause the produce to be taken "to the docks", and it is agreed that this meant the plaintiffs' docks. So much for the participation, in the enterprise, of the millers and the transporters. The docks had a category of workers (known as dockers) whose task was to unload the lorries and stack the bags in the docks' sheds, where they were stored. Later the same dockers carried the bags from the sheds and stacked them in the docks' lighters. In some instances, though, the bags were directly off-loaded from the lorries into the lighters. The docks' tugs then towed the lighters alongside ship where a second group of workers took over. They were the lumpers ("elingueurs") who placed the bags in slings worked by rope. That was the part played by the docks in the operation involved in getting sugar from the factory to the ship. Two points are worth noting here. Firstly, as can be seen from the evidence, the process involved an enormous amount of manual work, although the actual stacking of bags in the sheds was eventually mechanised to a certain extent. Secondly, part of the sugar produced in the country was dealt with in other ways: sugar for local consumption, which eventually found it way by land from the docks to the shops, and special sugar for export (such as the demerara type) which could not be handled manually with hooks because of the special type of bagging, and which went aboard in containers. We need not concern outselves with those two categories of sugar, because on the one hand they involve an insignificant part of the business and, on the other, the docks are still involved with the handling of those sugars.

In the Supreme Court

No.12
Judgment of Chief Justice Moollan and V.J.P.Glover
11th November 1982

(continued)

What then of the part played by the stevedoring companies? Their workers, the stevedores, were responsible for getting the slings containing the bags from the lighters on to the ship and for placing the sugar in the ship's hold. At first the bags were stacked in the hold just as they were in the docks' sheds.

Later on, following representations from the overseas purchasers and/or refiners, who preferred not to be involved in the handling of bags, a new system for placing the sugar in the hold was devised: a number of wooden planks was placed over the mouth of the hold, and the bags were slit open there to allow the sugar to fall into the hold. When this new operation was started, it involved the stevedores levelling out the sugar with shovels, but later electric trimmers were used to receive the contents of the bags after they were opened and level them out in the hold. Again the amount of manual labour involved was impressive, notwithstanding the introduction of trimmers. Of course, by that later method, the sugar was transported in bulk by the ship and, similarly, off-loaded in bulk at the other end, but to say that, as certain witnesses for the plaintiffs will have it, that heralded the introduction of a semi-bulk system in Mauritius in the process of sugar handling by all the plaintiffs is, in our view, at best a euphemism and, at worst, an erroneous and misleading statement.

Finally, one must note the way in which all the operations involved in getting the sugar from factory to ship were closely linked together: this involved certain operations of a certain type on the part of the millers and of the transporters, and the work of the two sets of plaintiffs was even more interwoven: indeed one set depended on the other for the successful carrying on of its own business.

We shall next consider what is involved now that we have a proper bulk handling operation functioning. To begin with the millers no longer bag sugar; in fact they have had to bring certain structural adjustments to their gear to enable the finished product to be funnelled into the top part of the "containers" which the special type of lorries now in use carry. Secondly, certain persons have had to commission, and put in use, the lorries which have become a new feature of our landscape during the crop season and which carry the sugar in bulk to the terminal. At the terminal, the sugar pours out of the side of the containers to be stored, if necessary, in bulk; it is eventually channelled along mechanical conveyor belts straight into the ship's hold. The process involves a minimal use of manual labour, requires no rope or

slings, has no use for the docks' tall sheds, and has required a terminal to be sited on the sea front where ships can berth near a deep water quay. And the contrast between the previous operation, whereby 175 tons of sugar could be loaded on a ship in two hours "avec une bonne equipe d'hommes" (with a good gang of efficient manual workers), and the present one which can load one thousand tons in an hour, is glaring.

Now, let us examine in what circumstances the change intervened. There is no doubt that suggestions for an eventual switch to bulk operations were made very early on, in the 1950's, but, as usually happens, those who, like Mr. Paturau, strongly advocated the change were taxed with being dreamers. It is also proved that the dock companies were pioneers in the field; they intended to take their "partners", the stevedoring companies, along with them in what they saw as a necessary, and profitable, venture towards modernization. But we do not feel it is a correct assessment of the situation at the time to say that all that was required for the plaintiffs to go bulk was the "blessing" of the sugar industry and of the Government. They had to convince the sugar industry, their only clients in the business, of the need for the change and, as we shall soon see, of the financial implications of the scheme. With regard to the Government, it was not only a matter of persuading it to face the fact that a switch to bulk would involve laying off about 1800 workers, thus creating a serious social problem. But, as we have earlier intimated, it was also a sine qua non for the project to be even envisaged that Parliament should amend the law which enjoined millers to convey sugar to the docks, that is to say, to the premises of the dock companies, and nowhere else. Be that as it may, the various partners in the sugar industry, namely the producers (including planters and millers) eventually saw a golden opportunity to reduce their production costs by eliminating the plaintiffs' profit margin from them. Thank you very much, said they, to the several plaintiffs, for having produced a brilliant idea. However, think no more of it: we will set up, own and manage the bulk operations. You have been concerned for years with the reception, storage and loading of our sugar on a profit-making basis. Henceforth we propose to substitute ourselves to your good

selves and do so on a non-profit making basis. And quite naturally, a reduction of their production costs would involve a bigger profit for them. Very magnanimously, one may say, they readily conceded that they would compensate the plaintiffs, in a manner to be determined later, for being put out of business.

We agree that it cannot be contended, as submitted on behalf of the Government, that right there, as from 1970 or 1971, the plaintiffs had actually lost their business. There still remained the big question mark, namely whether the Government could be persuaded. And yet again, whilst the evidence and the submissions on behalf of the plaintiffs will have it that it was merely a question of coaxing the Government to find a solution to the redundancy problem, that ignores the point which we have already laboured about amending the law, which could not be done unless the Government cast its votes in Parliament. Now Counsel for the defendant did not press this point to the full, but we hasten to add that, as Counsel for the plaintiffs have very fairly and very courteously stressed, leading counsel for the defence had to face the difficult situation of trying, in the short space of time available since he was appointed to act as Solicitor-General, to master an extremely complex brief of which he had no previous knowledge.

Eventually the Government became convinced of the need to modernise, and proposed the setting up of a parastatal body, the Bulk Sugar Terminal Corporation to operate the scheme. As from then, admittedly, a substantial part of the plaintiffs' business, along with that of others involved in the process of getting the sugar from the factory to the ship, was doomed. At first the Government made provision, by legislative measures, for the industry to raise a special levy on its profits and set aside sums of money to finance the project. It was then the Government's intention to be a minority partner in the enterprise. But very soon, or perhaps others would say none too soon, the Government realised that it had the means to break into a highly lucrative operation and take what some have called the lion's share, but which others may claim to be its rightful mission to ease the common taxpayer's burden, by transferring obvious substantial profits from the private sector to its own coffers, provided

it can maintain the appropriate norms of efficiency. In this connection, we note that provision was made in Act No.6 of 1979 to ensure that the plaintiffs' redundant workers (and others who were laid off in other sectors as a result of the switch to bulk) would, in addition to severance allowance which had been taken care of otherwise, receive a monthly pension paid out of the profits of the Corporation. And we highlight the fact that the Corporation has, in the last two financial years, been able to set aside about Rs.16m in each year to pay those pensioners without any problem. No doubt the sum required to pay these pensions will eventually decrease progressively, but no one has suggested that the Corporation cannot continue to fulfil its legal obligations on that score. So, eventually, the Government announced its intention of setting up the Corporation, with a majority shareholding and a controlling interest, and the sugar industry, albeit unwillingly because it had no choice other than that of letting the Government go it alone, joined in the enterprise. So this is how the situation which, the plaintiffs say, adds fuel to the fire of their claims, arose.

It is desirable, in order to complete the picture, to point out that, while we have been referring to the sugar industry, and its decisions concerning the various steps in the change, the evidence shows that no single producer could have stood any chance of going it alone by trying to export its sugar otherwise than, not so much by toeing the line prescribed by the Mauritius Sugar Syndicate or the Chamber of Agriculture, but by going along with the method prescribed by law.

Having set out the relevant evidence, we may now consider the two issues raised in limine litis. On the question of the time limit, as rightly pointed by Mr.David, this Court retains a discretion to entertain a claim lodged beyond the six months period. But, having regard to what we have said earlier, it is clear that the final change over actually took place when the Corporation "took over", that is in July 1980. So that we would in any event have agreed to entertain the suit on that score.

With regard to the issue of availability of other remedies, the defendant has now withdrawn

the objection. But according to the proviso to section 17(2) of the Constitution, we are precluded from entertaining the present suits if we are satisfied that the plaintiffs have alternative means of redress. The question arises in the following manner: the plaintiffs submit that when the sugar industry, or its component parts, agreed in writing to compensate them, this converted what previously was only an "obligation naturelle ou morale" into a legal contract. But, according to their reckoning, that obligation was strictly conditional on the contingency that the industry would, either on its own or possibly as the major partner, set up, own and manage the bulk operation. Since the industry is now merely a minor partner in the enterprise, and an unwilling one at that, the plaintiffs submit that they have no ground to claim anything from the sugar industry. It would appear that the defendant concurs in this view. Assuming, however, for the moment that we do have jurisdiction, let us see what would be our conclusion on the issue posed on the facts regarding what, in the interlocutory judgment referred to, was issue (c). Has the defendant procured the taking over,or taking of possession, of the plaintiffs' property, that is its business (or rather a substantial part thereof) consisting as it did in receiving, storing, and handling of sugar for export? The interlocutory judgment already referred to posed the problem as follows :

> "Now it is clear that where X is running a business (and it is accepted that this is property), then if Y can be shown to have procured the taking over of the property by Z, that will amount to a taking of possession of property. In such a case, the matter can rest squarely on section 8 without any other provisions of the Constitution having to be invoked."
>
> .....
>
> "But learned counsel, in asking us to hold at this stage that the plaints disclose no cause of action, requires us to make too many assumptions. I cannot, without hearing evidence inter alia about the nature of the old business and of the new one, the true vocation and objects of the Syndicate, the details of the negotiations between

the various bodies concerned, find my way to go as far as that."

We have absolutely no hesitation in saying that, on the evidence placed before us, the answer to the question must be in the negative. And this is, in our view, the basic flaw in the otherwise admirable argument on behalf of the plaintiffs. At times, Mr. David referred, quite aptly, to the possibility which existed earlier on for the plaintiffs to "convert" their business. With that phraseology we have no quarrel. But when he uses other language as in the following extracts from his speech:

> "...At that moment the plaintiffs inevitably lose their business, a business which as from then is run by the Corporation...."
>
> "...the situation of the plaintiffs being ousted of their business, that business being henceforth carried on by the Corporation....",

we are afraid we cannot go along with learned counsel.

Let us assume for one moment that, if the sugar industry had not written Document "T1" to commit themselves to a legal obligation vis-a-vis the plaintiffs, and they had set up the present bulk system, bearing in mind that they would have had to restructure their factories and assuming that they had provided the special lorries, set up the terminal, and the new quay and invested the required sum of over Rs.375 million, could the plaintiffs have been heard to say that the industry had taken over its very business? Surely it would have been open to the eventual defendant to say to the several plaintiffs: we have been making use of your particular services for exporting our sugar and we now no longer need them. Sugar is now, ex factory to ship, no longer to be handled in the same manner. In the new scheme, that is to say in the new global scheme, not in the new method of storing and loading sugar, there is no room for stevedors in any case. The dock companies' sheds, as well as their lighters and tugs, are no longer appropriate for our purpose.

As was intimated in the extracts of the

Interlocutory Judgment we have just quoted, if the then Solicitor-General had, before pressing his argument on the first part of the plea in limine litis, waited until evidence on the lines we have indicated had been adduced, that would, in our view, have been an end of the matter. We say this whilst stressing once again that, given the particular circumstances in which he was called upon to deal with the case, we mean no criticism of the Acting Solicitor-General who only made that argument his own, whilst canvassing the host of other issues raised in the plea.

For the reason that, as we see it, whatever the defendant had done, via the Corporation, it cannot by any stretch of the imagination be said that it has taken over the business previously carried on by the plaintiffs, the plaintiffs must, in any event, have failed on the merits.

That being so, we feel that, because of any faint possibility of litigation involving other parties, it is preferable not to pronounce on the issue of alternative remedies raised in limine.

Both actions are accordingly dismissed with costs.

A copy of the judgment will be filed in each record.

C.I.MOOLLAN
Chief Justice

V.J.P. GLOVER
Senior Puisne Judge

11th November 1982

No.13

In the Supreme Court

No.13
Order granting Final Leave to Appeal to Her Majesty in Council 4th July 1983

ORDER GRANTING FINAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

On Monday the 4th of July, 1983 in the 32nd year of the reign of Queen Elizabeth II

In the matter of :-

THE SOCIETE UNITED DOCKS Applicant

v.

THE GOVERNMENT OF MAURITIUS Respondent

UPON hearing M. de Speville QC replacing R.Hein QC of counsel for the applicant; E.Balancy of counsel for the respondent having no objection;

IT IS ORDERED THAT the applicant BE and IS HEREBY GRANTED FINAL LEAVE to appeal to Her Majesty's Privy Council against a judgment of the above Court delivered on 11th November, 1982.

BY THE COURT

(V. Koolomuth)
for Master and Registrar

Certified a true copy
Sd: Illegible
for Master and Registrar
Supreme Court
11/7/83

In the Supreme Court

No.14
Order granting Final Leave to Appeal to Her Majesty in Council 4th July 1983

No. 14

ORDER GRANTING FINAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

On Monday the 4th of July, 1983 in the 32nd year of the reign of Queen Elizabeth II

In the matter of :-

DESMARAIS BROS. & ORS. Applicants

v.

GOVERNMENT OF MAURITIUS Respondent

UPON hearing M. de Speville Q.C. replacing R. Hein, QC of counsel for the applicants; E. Balancy of counsel for the respondent having no objection;

IT IS ORDERED THAT the applicants BE and ARE HEREBY GRANTED FINAL LEAVE to appeal to Her Majesty's Privy Council against a judgment of the above Court on the 11th November, 1982.

BY THE COURT

(V.Koolomuth)
for Master and Registrar

Certified a true copy
Sd: Illegible
Master and Registrar
Supreme Court
11/7/83

IN THE PRIVY COUNCIL No.29 of 1983

ON APPEAL

FROM THE SUPREME COURT OF MAURITIUS
(CONSOLIDATED APPEALS)

BETWEEN:

THE SOCIETE UNITED DOCKS — Appellants

- and -

THE GOVERNMENT OF MAURITIUS — Respondent

AND

1. DESMARAIS BROTHERS LIMITED
2. TAYLOR AND SMITH LIMITED
3. D'HOTMAN AND SONS LIMITED — Appellants

- and -

THE GOVERNMENT OF MAURITIUS — Respondent

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