

**(1) Natalie Campbell-Rodrigues
(2) Valrene Bennet
(3) Andrew Wheatley
(4) Anton Young
(5) Keith Blake**

Appellants

v.

The Attorney General of Jamaica

Respondent

FROM
**THE COURT OF APPEAL OF
JAMAICA**

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL

Delivered the 3rd December 2007

Present at the hearing:-

Lord Hoffmann
Lord Scott of Foscote
Lord Carswell
Lord Mance
Lord Neuberger of Abbotsbury

[Delivered by Lord Carswell]

1. The city of Kingston has for some time had a problem of severe traffic congestion. Delays on the approach roads to the city became a matter of increasing

concern, in particular on the route from Portmore, a residential community whose population increase was the fastest in Jamaica in the 1980s and 1990s. The Government decided to put in train a major building programme known as “Highway 2000”, part of which involved the construction of a new section of road between Portmore and Kingston, on which a toll was to be charged, and the closure of the old road. The appellants, who are residents of Portmore, claim that this proposal, which has now been implemented, infringes their constitutional rights. The Constitutional Court (Reid, Harris and NE McIntosh JJ) dismissed their claim on 26 September 2005 and the Court of Appeal (Panton, Cooke and McCalla JJA) dismissed their appeal on 10 November 2006. The appellants have appealed to the Privy Council by leave of the Court of Appeal.

2. In 1999 the Jamaican government initiated a road building project termed Highway 2000, consisting of a toll road from Kingston to Montego Bay, with a spur line to Ocho Rios, which was to be constructed in phases. The segment of the project which is the subject of this appeal is the portion known as the Portmore Causeway Main Road, a heavily used road link between Portmore and Kingston. It was then a two-lane highway, which crossed over a part of Kingston Harbour by the Hunts Bay Bridge. This road was to be replaced by a new six-lane roadway and a new bridge, which would have a traffic carrying capacity approximately three times as great as the old road and bridge. The old bridge was then to be demolished.

3. The Government decided that the new Portmore Causeway road would be a toll road, for the reasons set out in paragraphs 5 to 7 of the affidavit of Dr Wayne Reid sworn on 30 June 2005:

“5. Increasingly, governments are unable to finance major development projects solely from public funds. An internationally-recognized, tested and proven model for funding such projects is the Public Private Sector Participation model. Under that model, Governments invite members of the private sector to invest in developments which will provide services to the public. The private investors are then allowed to charge a fee and so recover their investment.

6. Public Private Sector Participation is not new to Jamaica and has been operating in many sectors. These include education, health, the supply of water and electricity and even the provision of port facilities. The Government decided to construct Highway 2000 by way of Public Private Sector Participation, as a toll road, as it did not

have all the resources required to construct the Highway and it would not have been prudent to increase the public debt.

7. Toll roads are constructed and operated on the basis of ‘user pays’. The cost of a major highway development has to be met by someone. It will either be met by those who use the road (which is the case with a toll road) or by the entire taxpaying public, whether they use it or not.”

4. On 8 April 2002 the Minister of Transport and Works made the Toll Roads (Designation of Highway 2000 Phase 1) Order, pursuant to section 8(1) of the Toll Roads Act 2002, designating as toll roads two stretches of road, one of which was the “Portmore Causeway/Dyke Road Upgrading”. The order stated that in relation to the Portmore Causeway, Mandela Highway would be the alternative route required by section 8(2), which provides:

“No road shall be designated as a toll road under subsection 1(a) unless in the area in which the toll road is to be established there is an alternative route accessible to the public by vehicular or other traffic.”

Mandela Highway is a more northerly route to Kingston, which involves a somewhat longer journey from Portmore (the precise difference in length was the subject of dispute between the parties). Their Lordships do not find it necessary to go into the details of its suitability as an alternative route, since both the Constitutional Court and the Court of Appeal found that it was so suitable.

5. The appellants are all established residents of communities in the Municipality of Portmore, three of them being registered proprietors and two leaseholders. They claim that Portmore has developed “a strong and necessary dependence upon and strong structural and economic linkages” with Kingston, and that free and unrestricted access to and from Kingston is indispensable to the residents of Portmore and necessary for the appellants to have the peaceful and quiet enjoyment of their properties. They aver that the value of their properties will be reduced by reason of the need to pay tolls in order to travel to Kingston by the new road. This is disputed by the respondent: Dr Reid avers in paragraph 29 of his affidavit of 30 June 2005 that on the contrary “international experience with tolled highways is that they have resulted in an increase in the value of properties in the communities served by them.” In the absence of more precise evidence of the effect on the value of properties in Portmore their Lordships will not attempt to reach any conclusion on this issue, as they consider that the appeal will not turn on it.

6. The appellants claim that the imposition of tolls on the Portmore Causeway road constituted breaches of sections 13 and 18 of the Constitution of Jamaica. Chapter III of the Constitution, entitled “Fundamental Rights and Freedoms”, is introduced by section 13, which reads:

“Whereas every person in Jamaica is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his 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, to each and all of the following, namely—

- (a) life, liberty, security of the person, the enjoyment of property and the protection of the law;
- (b) freedom of conscience, of expression and of peaceful assembly and association; and
- (c) respect for his private and family life, the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of that protection as are contained in those provisions 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.”

Sections 14 to 17 deal respectively with protection of the right to life, protection from arbitrary arrest or detention, protection of freedom of movement and protection from inhuman treatment. Section 18 then makes provision in respect of compulsory acquisition of property. The material subsection for the purposes of this appeal is subsection (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 by or under the provisions of a law that –

- (a) prescribes the principles on which and the manner in which compensation therefor is to be determined and given; and
- (b) secures to any person claiming an interest in or right over such property a right of access to a court for the purpose of—
 - (i) establishing such interest or right (if any);

- (ii) determining the amount of such compensation (if any) to which he is entitled; and
- (iii) enforcing his right to any such compensation.”

Section 25(1) is also material:

“Subject to the provisions of subsection (4) of this section, if any person alleges that any of the provisions of sections 14 to 24 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.”

7. It was contended on behalf of the appellants that section 13 had independent effect in the conferment of constitutional rights, which their counsel Mr James described as “declaratory force”. Alternatively, as a minimum he submitted that it was to be given effect as an aid to construction of section 18. Both the Constitutional Court and the Court of Appeal rejected the argument that section 13 had the function of an instrument for providing redress. They relied in particular on the wording of section 25(1), providing for redress in the event of contravention of any of the provisions of section 14 to 24 of the Constitution, without reference to section 13.

8. In *Grape Bay Ltd v Attorney General* [2000] 1 LRC 167, 175 Lord Hoffmann adverted to the “family resemblance” between certain constitutions of UK Overseas Territories and former British possessions, now independent states. He went on:

“Typically they contain a chapter on the protection of the fundamental rights and freedoms of the individual which is introduced by a provision such as section 1 of the Bermuda Constitution, stating those rights and freedoms and their limitations in general terms, followed by a series of sections dealing with particular rights and more detailed exceptions and qualifications. Finally, there is an enforcement provision which gives any person who alleges a contravention of some or all of the provisions of the chapter the right to claim constitutional relief from the court.

On the other hand, the constitutions differ in detail and also on whether the general statement of fundamental rights and freedoms at the beginning of the chapter is separately enforceable.”

9. Some assistance may be obtained from decisions of the Board in relation to different constitutions, which Lord Hoffmann discussed in some detail in the *Grape Bay* case. At one end of the spectrum is that of Mauritius, considered in *Société United Docks v Government of Mauritius* [1985] LRC (Const) 801. Section 3 of the Constitution of Mauritius contains a general statement declaring the existence of a number of rights, including that of protection from deprivation of property without compensation. Section 17(1) provides for application for constitutional relief “where any person alleges that any of sections 3 to 16 has been ... contravened in relation to him.” In the opinion of the Board, given by Lord Templeman, the wording of section 3 was “only consistent with an enacting section”, rather than a mere preamble or introduction, and its ambit was not to be curtailed (p 841).

10. At the other end of the spectrum is the Constitution of Dominica, which bears significant resemblances to that of Jamaica. The opening words of section 1, “Whereas ... each and all of the following”, are identical with those of section 13 of the Constitution of Jamaica. The rights and freedoms specified are phrased differently, but include protection from deprivation of property without compensation, then the final portion referring to limitations is in almost identical terms. It was considered by the Board in *Blomquist v Attorney General of the Commonwealth of Dominica* [1987] AC 489. Section 6 of the Constitution provided for protection from compulsory acquisition without compensation in terms which were in the material respects exactly the same as those of section 18 of the Jamaican Constitution. Section 16 gave a right to apply for redress to any person who alleged a contravention of any of the provisions of sections 2 to 15 (inclusive), but did not refer to section 1. The Board held, in a judgment given by Lord Mackay of Clashfern, that the power to provide such redress was limited to that provided for in section 6 and rejected the argument that section 1 conferred an independent and wider power which was separately enforceable.

11. In an intermediate position come the Constitutions of Malta and Bermuda. Section 5 of the Constitution of Malta, like section 1 of the Constitution of Dominica, was framed in terms identical with those of section 13 of the Constitution of Jamaica in the opening and closing portions of the section. Section 16 contained an enforcement provision similar to that contained in section 17 of the Constitution of Mauritius, applicable to all of the preceding provisions conferring rights and freedoms. Section 5 was not excluded by the wording of section 16. The case did not turn on the enforceability of section 5, but Lord Morris of Borth-y-Gest, giving the judgment of the Board in *Olivier v Buttigieg* [1967] AC 115, observed at p 128:

“It is to be noted that the section begins with the word ‘Whereas’. Though the section must be given such declaratory force as it independently possesses, it would appear in the main to be of the nature of a preamble. It is an introduction to and in a sense a prefatory or explanatory note in regard to the sections which are to follow. It is a declaration of entitlement — coupled however with a declaration that though ‘every person in Malta’ is entitled to the ‘fundamental rights and freedoms of the individual’ as specified, yet such entitlement is ‘subject to respect for the rights and freedoms of others and for the public interest.’ The section appears to proceed by way of explanation of the scheme of the succeeding sections ...”

The provisions of the Constitution of Bermuda are very similar in material respects to that of Malta. They were considered by the Board in *Grape Bay Ltd v Attorney General* [2000] 1 LRC 167. Lord Hoffmann, giving the judgment of the Board, did not find it necessary to decide whether the general statement in section 1 was to be a preamble or to have independent force, but reviewed the cases to which their Lordships have referred and drew a clear distinction between provisions such as those in sections 13 and 25 of the Constitution of Jamaica and those contained in the Constitution of Mauritius.

12. Both the Constitutional Court and the Court of Appeal rejected the appellants’ argument that section 13 conferred separate and independent rights. They regarded it as in essence a preamble and accepted the respondent’s submission that its declaratory force was confined to declaring that the rights set out in Chapter III of the Constitution were not being created *de novo* but existed prior to the Constitution. Their Lordships are satisfied that section 13 does not confer any freestanding rights and that on the clear interpretation of the provisions of Chapter III the rights and freedoms enforceable under section 25 are to be those set out in sections 14 to 24 inclusive. They agree with Cooke JA when he said (Record, p 379) that “a ‘generous and purposive interpretation’ does not permit a distortion of the explicit relevant constitutional provisions.”

13. The appellants argued in the alternative that the provisions of section 13 could give some assistance in the interpretation of the subsequent provisions of Chapter III. That may in principle be so, since a statute has to be read as a whole, if there is any ambiguity in the meaning of any of those provisions and if the language of section 13 throws any light on the intention of the legislature as to their meaning. For the reasons which they will give, however, their Lordships do

not consider that there is any ambiguity in the terms of section 18 on which the wording of section 13 would throw any light. They do not propose therefore to express an opinion on whether the words “enjoyment of property” in section 13 are intended to connote anything more than the individual’s right not to be deprived of his or her property.

14. The second argument advanced on behalf of the appellants was that the replacement of a public highway with free access by one on which a toll is charged constituted a breach of their rights under section 18 of the Constitution. It was submitted that this amounted to either the compulsory taking possession of property or the compulsory acquisition of an interest in or right over property, the latter phrase possibly connoting something rather wider than the former. It is difficult to see how the imposition of a toll for use of the new road could constitute taking possession of any property, in the sense of land or buildings. Unless the word “property” can be construed in a much wider sense, if the appellants are to succeed they need to bring the case within the acquisition of an interest in or right over property.

15. It may be observed, first, that there may be a taking which is not a direct physical appropriation of property or an ouster of possession: cf the remarks of Scalia J in *Lucas v South Carolina Coastal Council* (1992) 505 US 1003. Nor does it appear necessary to show that there has been a transfer or change of ownership or possession from one person to another person or body: see *OD Cars Ltd v Belfast Corporation* [1959] NI 62, 84, per Lord MacDermott LCJ in the Northern Ireland Court of Appeal. Some limitation of the apparent breadth of legislative provisions prohibiting the taking of property without compensation must be implied: *ibid*, p 88.

16. It is necessary to take care not to be over-analytical in examining the separate components of a phrase which requires construction, and the issue is to be determined by considering the application of the phrase as a whole. It may be of assistance, however, to consider first the meaning in this context of interests in or rights over property and then turn to that of acquisition or its synonym “taking”. Mr James for the appellants submitted that the word “property” should be given a wide or purposive construction and argued that the right to obtain access to one’s property without economic burden constituted a property right. Examination of this concept, however, reveals the existence of a number of difficulties. Every member of the public is entitled to passage over a highway, which is a way that has been dedicated to public use. This right is not appurtenant to any particular property, but is shared by all persons. So the former Portmore Causeway Main Road and Hunts Bay Bridge could be used without restriction not only by

registered proprietors and leaseholders of property in Portmore, such as the appellants, but by property owners in other parts of Jamaica who wished to travel on it, persons who had occasion to drive along it to other places and tourists visiting the island. All of these would have been economically affected to some greater or lesser degree by the imposition of a toll. It is impossible that section 18 was intended to give such a wide class of people a right to compensation. If one attempts to limit the ambit of those entitled to claim to property owners whose property is depreciated in value by the imposition of the toll, one does not get rid of the difficulties. Some freeholders might claim to be so affected and possibly some leaseholders, but such people as licensees or lodgers probably would not. Nor would it be easy to determine the geographical limits within which property might be adversely affected in value. The resulting claims would be so numerous and so difficult to value that one can scarcely suppose that the legislature intended them to be justiciable under section 18. Panton JA held in the Court of Appeal that the proprietary rights claimed by the appellants did not exist (para 22), but the other members of the court did not express an opinion on this point, since they concluded that there had not been a taking or acquisition. Their Lordships would not rule out the possibility that in an extreme (and remarkably unlikely) case, for example, if the sole road access to premises were to be blocked off by official action or a prohibitive or discriminatory charge for access were levied, there might be a breach of section 18. They do not consider that the facts of the present appeal come anywhere near such a case. They do not propose to give a concluded opinion upon the limits of justiciable rights over property, for they are satisfied that no such right has been taken or acquired in the present case.

17. It has been generally recognised, both in a long series of cases in the United States and in other jurisdictions, that taking is not limited to direct appropriation, but may encompass regulation of the use of land which adversely affects the owner to a sufficiently serious degree: see, eg, *Lucas v South Carolina Coastal Council*, *supra*; *Penn Central Transportation Company v New York City* (1978) 438 US 104. It is equally well recognised that states may pass legislation regulating the use of land in the public interest which does not carry the right to compensation as a taking of property, even though it may have significant adverse economic effects for property owners. The American cases are constantly cited in this context and examples may be found from other jurisdictions. It may be necessary to use such authorities with a degree of caution, bearing in mind the differences in wording of the applicable constitutional provisions, but a common thread is visible in a number of developed systems. The principle was approved by the House of Lords in *Belfast Corporation v OD Cars Ltd* [1960] AC 490, which was concerned with planning restrictions on the use of land. Viscount Simonds, at p 519, cited with

approbation a passage from the judgment of Brandeis J in *Pennsylvania Coal Co v Mahon* (1922) 260 US 393, 417:

“Every restriction upon the use of property imposed in the exercise of the police power deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgment by the State of rights in property without making compensation. But restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking. The restriction here in question is merely the prohibition of a noxious use.”

The qualification which Viscount Simonds made was that adumbrated by Holmes J in the same case (260 US 393, 415), that if regulation goes too far it will be recognised as a taking, it being a question of degree.

18. The cases on regulation provide analogies which give a measure of assistance in approaching the issues in the present appeal. It is always necessary to exercise a degree of care in relying on analogies, not to press them too far, but their Lordships consider that they provide some useful guidance in deciding the issues before them. They establish clearly that there are limits to the concept of taking property and that some types of state action which could linguistically be so regarded are not to be regarded as justiciable. It is well established that measures adopted for the regulation of activity in the public interest, such as planning control or the protection of public health, will not constitute the taking of property, notwithstanding the fact that they may have an adverse economic effect on the owners of certain properties. So too in the Jamaican appeal of *Panton v Minister of Finance (No 2)* (2001) 59 WIR 418 the Board held that the assumption under statutory powers by the Minister of Finance of the temporary management of certain companies whose affairs were under investigation did not constitute a taking of the appellants’ property. It is the respondent’s case that the replacement of an existing highway by an improved road on which a toll is charged is governed by the same principle.

19. Their Lordships regard the analogy as persuasive. The project involved the replacement of an inadequate public road and bridge by an improved road and a new bridge, designed to enure for the benefit of the public in general by speeding the flow of traffic and relieving congestion. It was to be financed, not by the taxpayers as a whole, but by charging tolls to be paid by those using the road. Their Lordships consider that the words of Viscount Simonds in the *OD Cars* case at p 517 were apt, when he asked rhetorically whether anyone using the English

language would say that this meant that the authority had taken property. The appellants cannot in their Lordships' opinion establish that the construction of the new road and the charging of a toll for its use constituted a taking or acquisition of any proprietary right capable of coming within section 18.

20. Mr James attempted to pursue before the Board an issue decided against him in the courts below, a claim that Mandela Highway did not form an alternative route accessible to the public, as required by section 8(2) of the Toll Roads Act. Both the Constitutional Court and the Court of Appeal found that it did so form an alternative route. These are concurrent findings of fact which, in accordance with its settled practice, the Board will not review. None of the exceptions referred to in the Board's judgment in *Devi v Roy* [1946] AC 508 is applicable in the present case.

21. The appellants also claimed an injunction restraining the Government from proceeding with the demolition of the Hunts Bay Bridge. Mr James did not attempt to advance this claim with any vigour before the Board, rightly in their Lordships' opinion, for they consider that its summary rejection by the Constitutional Court and the Court of Appeal was entirely justified.

22. For the reasons which they have given the Board will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the costs of the appeal to the Board.

