

DMC 5

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 103/05

**BEFORE: THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MRS. JUSTICE McCALLA, J.A.**

BETWEEN	NATALIE CAMPBELL-RODRIQUES	1ST APPELLANT
	VALRENE BENNETT	2ND APPELLANT
	ANDREW WHEATLEY	3RD APPELLANT
	ANTON YOUNG	4TH APPELLANT
	KEITH BLAKE	5TH APPELLANT
AND	THE ATTORNEY GENERAL OF JAMAICA	RESPONDENT

Oswald James, instructed by James and Company, for the Appellants.

**Michael Hylton, Q.C., and Miss Annaliesa Lindsay, instructed by the
Director of State Proceedings, for the Respondent.**

April 3rd and 4th, May 31st, and November 10, 2006

PANTON, J.A.

1. On May 31, 2006, we dismissed this appeal, affirmed the decision of the Court below, and promised to put our reasons in writing. This we now do. The appeal under challenge was from a decision of the Constitutional Court (Reid, Hazel Harris and Norma

McIntosh, JJ.) which, on September 26, 2005, dismissed the appellants' claim for a declaration that:

- (a) the implementation of a toll for the use of the Causeway Main Road will constitute a breach of their constitutional rights guaranteed by section 18 of the Constitution; and
- (b) their open and notorious use of the Causeway Main Road and Hunts Bay Bridge for more than twenty years have given them prescriptive rights pursuant to section 1 of the Prescription Act.

The appellants had also sought orders of prohibition or injunction to restrain the Government of Jamaica from implementing any toll for the use of the Causeway Main Road, and from demolishing the Hunts Bay Bridge.

2. The appellants contended before the Constitutional Court that their claim was maintainable under section 25 of the **Jamaica (Constitution) Order in Council 1962** (the Constitution) which provides for constitutional redress for breaches of sections 14 to 24 of the Constitution. They sought to prove their claim by advancing the idea that there was a link between sections 13 and 18 of the Constitution. Section 13 asserts the citizen's entitlement to the

enjoyment of property, and section 18 forbids the compulsory acquisition of property except under provisions of law. By the demolition and replacement of the bridge, the building of a new road, and the imposition of the toll, it was argued that the Government had deprived the appellants, residents of Portmore, of their property. Hence, their alleged entitlement to constitutional redress.

3. The Constitutional Court, in reasons for judgment crafted by Reid, J., and agreed to by the rest of the panel, held the following:

- (i) the authorities cited confirmed that “there is no room for vesting section 13 with the function of an instrument for providing redress”;
- (ii) it had not been shown that the Government had taken possession or acquired property belonging to the appellants; and
- (iii) the appellants had not shown any property rights capable of acquisition by the implementation of a toll.

The Court described the application for an order to prevent the demolition of the Hunts Bay Bridge as misconceived. It pointed out that even if it were not demolished, it would not be accessible to motorists as the existing roadway is to be replaced by a new one

which will be two metres higher, and the retention of the old bridge adjacent to the new one would be an environmental hazard as increased sedimentation would be conducive to flooding.

4. The factual basis on which the claim was based is set out in affidavits filed by Natalie Campbell-Rodrigues (first appellant). She deponed that she is a municipal councillor who has her true place of abode in Portmore. She decided to purchase a house in the community because of its affordability and the proximity to Kingston, with which she has substantial linkages and connections to maintain. These linkages and connections are in the nature of “job, school, family, business, social and political associations and friends”. The cost of transportation to and from her new home was reasonable and modest at the time of the purchase. The Causeway main road and the Hunts Bay Bridge made the transportation link very accessible and affordable; had it not been so, she said, it would have been unlikely that she would have chosen to purchase a home and raise her family in Portmore.

5. The first appellant acknowledges the existence of an alternative route in the form of the Mandela Highway. However, she points to

the alternative route being longer and thereby resulting in transportation costs being higher for her. Further, she states that the projected cost of the toll for the use of the new roadway is akin to an additional tax applicable to her solely by virtue of her being a property owner in Portmore, having the necessity to travel frequently into Kingston. This, she regards as an imposition of a financial burden which will diminish the enjoyment of her property. In paragraph 20 of her affidavit dated 5th May, 2005, she asserted:

“That I verily believe that although the Government have [sic] not take [sic] actual control of my property nor have caused a transfer of the title from me to someone else, in pursuance of its infrastructural project, that the proposed toll on the Causeway Main Road and demolition of the Hunts Bay Bridge has such negative effect for my peaceful enjoyment of my property as to be akin to a taking without adequate compensation”.

6. The respondent placed before the Constitutional Court affidavits from Dr. Wayne Reid and Mr. Dane Lawrence. These were aimed at refuting the appellants' statements. It is therefore important to set out in summary form the substance of these affidavits.

7. Dr. Wayne Reid has been practicing in the field of civil engineering since 1972. He holds the degree of BSc. (Civil Engineering) from the University of the West Indies, and has to his further credit the degree of MASc. as well as a PhD from the University of Waterloo, Ontario, Canada. He is a Fellow of the Jamaican Institution of Engineers and a Fellow of the American Society of Civil Engineers. At one stage in his career, he was the Chief Planning Engineer at Jamaica's Ministry of Works. He is now the managing director of National Road Operating and Construction Company Limited ("NROCC"). According to Dr. Reid, "in or about 1999 the Government decided to construct a toll road from Kingston to Montego Bay with a spur line to Ocho Rios which came to be called 'Highway 2000'." NROCC has been charged with the responsibility of implementing this project. Among its functions are the monitoring of the construction, and the maintenance and operation of the Highway.

8. The thrust of Dr. Reid's evidence, contained in his affidavit sworn to on the 30th June, 2005, is that increasingly, Governments, being unable to finance major development projects solely from

public funds, have opted for collaboration with the private sector, with the latter being allowed to charge a fee to recover its investment. The construction of highways with tolls being charged thereon is one of the methods used internationally he said. However, he states further that an alternative route has been provided, and is available to the residents of Portmore. According to Dr. Reid, since 1995, the Mandela Highway has been an alternative route for the said residents as a "tidal flow" system has been in effect. He demonstrated this by saying:

"Under this system, during the morning rush hour... the Causeway road and bridge are one-way only, in the direction Portmore to Kingston, and during the evening rush hour...they are one-way in the other direction. During those periods, all traffic going in the opposite direction must use the Mandela Highway as the alternative route".

Dr. Reid's affidavit continues by pointing out that on those occasions that the Causeway road and bridge have had to be closed for repairs, the Mandela Highway has been the designated alternative route, and there had been no complaint then as to the latter's unsuitability. So far as the cost of travelling is concerned, Dr. Reid reminds that toll roads are constructed and operated on the basis of "user pays".

9. In respect of the appellants' proprietary rights being adversely affected by the imposition of a toll, Dr. Reid asserted that "the international experience with tolled highways is that they have resulted in an increase in the value of properties in the communities served by them". Dr. Reid also points to the fact that many persons who use the Causeway and will use the new toll road do not own property or live in Portmore, in the same way that there are many who live in Portmore but do not use the Causeway and will not use the new toll road. He also states that "the international experience and indeed the experience in Jamaica with the previous toll roads" indicate that contrary to more traffic being diverted unto the alternative route, the opposite is likely to happen. It is likely, he said, that "the result of the construction of the Portmore Causeway Toll Road will be a reduction in traffic on the Mandela Highway, not an increase".

10. Dane Lawrence, a signal technician employed to the National Works Agency, conducted a series of travel time studies between May 25 and June 21, 2005, to determine the time and distance

between various points in Portmore to various points in Kingston using both routes. He presented a detailed report on this activity for the information of the Constitutional Court. A total of twenty-eight trips were conducted along the two routes during the morning and evening peak hours. The starting points and destinations were listed and a comparison made in respect of the distances and times. Statistics were compiled showing speeds, stops, travel times, and the delays encountered on both routes. Traffic counts done by the National Works Agency between 1999 and 2004 show that approximately 68% of the vehicles exiting the Portmore area used the Causeway route while approximately 20% used the Mandela Highway. The remaining 12% used the exits towards Bernard Lodge and Braeton main road.

11. The grounds of appeal filed on October 3, 2005, may be summarized thus:

“(i) The Constitutional Court erred in law in concluding that section 13 of the Constitution of Jamaica cannot be construed as an instrument for providing constitutional redress;

- (ii) The Constitutional Court misdirected itself in formulating one of the central issues for determination as being whether the claimants could show any property rights capable of acquisition by the implementation of a toll. The Court failed to appreciate that the proper formulation of the issues before the Court should have been:

- (a) determining whether the effect of the toll would be such as to cause substantial and unconstitutional interference with the claimants right to enjoyment of property, and

- (b) determining whether the actions of the government in implementing the toll would have the effect of depriving the claimants of their proprietary rights as to come within the prohibition in section 18 of the Constitution against taking property without compensation.

- (iii) The finding of the Constitutional Court that it has not been shown that disproportionate inconvenience by the use of the alternative route would accrue when various factors are put in the balance, is wrong in law and contrary to the weight of the evidence presented by the claimants;
- (iv) The Constitutional Court erred in concluding that an order to prevent the

demolition of the existing Hunts Bay Bridge is misconceived .

12. In respect of ground 1, Mr. James submitted, in his written submissions, that the Constitutional Court erred in assuming “that all of the constitution’s substantive content with respect to fundamental rights and freedoms is enshrined in sections 14 to 24, and that section 25 is the only mechanism by which a breach of substantive aspects of the Constitution impacting upon fundamental rights and freedoms can be vindicated”. Section 13 of the Constitution, he said, has declaratory force. This view, he said, was in keeping with the opinion of the Privy Council in **Olivier v Buttigieg** [1967] A.C. 115, where consideration was given to a provision similar to section 13. At a minimum, he said, section 13 is to be viewed as an aid to the construction of section 18. In presenting his oral arguments before us, Mr. James submitted that “the values enunciated in section 13 point to a wider protection than section 18”, and he described section 13 as “the canvas on which we (meaning the Court) paint section 18 values”. The whole point of the appeal, he said, was when does section 25 apply to section 13.

13. It is convenient to set out sections 13 and 18 of the Constitution at this stage, followed by the response of the Solicitor General to the interesting propositions put forward by Mr. James.

Section 13.

“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) ...; and
- (c) ...,

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”.

Section 18 (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".

14. The Solicitor General submitted that section 13 does not grant any right, nor does it add to or subtract from the rights granted by the other provisions of Chapter III of the Constitution. He pointed to the fact that Lord Morris of Borth-Y-Gest, in **Olivier v Buttigieg (supra)** described the section as primarily a preamble and an introduction to

the sections that follow. He submitted that that interpretation was supported by the provisions of section 25. He said that there was a distinguishing factor in **Olivier v Buttigieg** (supra) in that the Maltese equivalent to Jamaica's section 25 provides redress for anyone who alleges the infringement of any of the provisions of the relevant Part of the Order. Under the Jamaican Constitution, particular sections are specified, namely, sections 14 to 24. The Solicitor General submitted that in the instant case, section 13 does not purport to expand on or alter the rights given by section 18, and should not be construed as doing so.

15. In **Olivier v Buttigieg**, (supra) the Part of the Constitution of Malta dealing with the protection of fundamental rights and freedoms of the individual was considered. Section 5 thereof is in terms similar to Jamaica's section 13 (quoted above). This is what Lord Morris said:

"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 Part II are to have effect for the purpose of protecting the fundamental rights and freedoms, but the section proceeds to explain that since even those rights and freedoms must be subject to the rights and freedoms of others and to the public interest it will be found that in the particular succeeding sections which give protection for the fundamental rights and freedoms there will be “such limitations of that protection as are contained in those provisions.” Further words, which again are explanatory, are added. It is explained what the nature of the limitations will be found to be. They will be 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.” (pages 128E to 129B)

16. It seems to me to be beyond debate that section 13 of the Constitution provides confirmation that:

- (a) every individual in Jamaica is entitled to the fundamental rights and freedoms, including the enjoyment of property; and

- (b) the subsequent sections of Chapter III afford protection in respect of those rights and freedoms.

If the framers of the Constitution intended that section 13 was to have the effect claimed by Mr. James, it is difficult to understand why they stated the protection to be in the subsequent provisions, and then go on to provide in section 25 for the making of applications to enforce or secure the provisions of sections 14 to 24. In short, to agree with Mr. James' interpretation would be to read into section 13 a meaning which is completely out of sync with the words in the section. This ground is, with respect, without any merit whatsoever.

17. **Ground 2**

Mr. James submitted that the Constitutional Court, having erred in its interpretation of section 13 of the Constitution, failed to make a proper assessment as to whether the imposition of the toll would amount to an unlawful interference with the appellants' right to enjoyment of property. Sections 13 and 18 of the Constitution, he said, are similar in scope to Article 1 of the First Protocol to the European Convention on Human Rights which provides:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No

one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and the general principles of international law”.

The European Court of Human Rights as well as the Commission, he said, has held that the right to enjoyment of property guaranteed by the first sentence will be violated where there has been “interference with the substance of ownership” which restricts the attributes of property without depriving the owner of it. He cited in support the case **Sporrong and Lonnroth v Sweden** (1983) 5 E.H.R.R. 35 at para.63. Mr. James further submitted that there was no reason why the word “property” should not be given a liberal and wide connotation and should not be extended to those well recognized interests which have the insignia or characteristics of proprietary rights. The implementation of the toll would constitute an interference with the ability of the appellants to enjoy their properties, if there was sufficient evidence that the associated costs would be oppressive and constitute a charge for accessing their homes.

18. Mr. James concluded his submissions on this ground by saying that although the state was not exactly taking away the appellants’ properties, it was limiting and restricting the enjoyment of property, as

well as freedom of movement. This was so, he said, as a tax would now be imposed. Notwithstanding these submissions, Mr. James maintained that he was not saying that a toll road should not be built. I hope that I am not doing any injustice to his submissions in saying that he is really contending that a toll road may be built, but the neighbouring residents who use it ought not to be required to pay.

19. Mr. Hylton, the Solicitor General, argued that the right to use property in a particular way was not itself property, and the expansive interpretation of 'property' suggested by the appellants was untenable. The case **Belfast Corporation v O.D. Cars Ltd.** [1960] A.C. 490 was cited in support. There, section 5(1) of the **Government of Ireland Act, 1920**, stated that in the exercise of their power to make laws neither the Parliament of Southern Ireland nor the Parliament of Northern Ireland shall make a law to "take any property without compensation". The Parliament of Northern Ireland passed legislation giving to an unsuccessful applicant for planning permission the right to claim compensation from the local authority "in respect of any injurious affection of his property". The word "property"

fell, eventually, for consideration by the House of Lords. In delivering the main judgment, Viscount Simonds said:

“ I hope that I do not over-simplify the problem, if I ask whether anyone using the English language in its ordinary signification would say of a local authority which imposed some restriction upon the user of property by its owner that that authority had “taken” that owner’s “property.” He would not make any fine distinction between “take”, “take over” or “take away.” He would agree that “property” is a word of very wide import, including intangible and tangible property. But he would surely deny that any one of those rights which in the aggregate constituted ownership of property could itself and by itself aptly be called “property” and to come to the instant case, he would deny that the right to use property in a particular way was itself property, and that the restriction or denial of that right by a local authority was a “taking”, “taking away” or “taking over” of “property.” I do not seek to qualify in any way what has been said in such cases as **Central Control Board (Liquor Traffic) v. Cannon Brewery Co. Ltd.** (1919) A.C. 744; 35 T.L.R. 552. I have no right to do so. It is, no doubt, the law that the intention to take away property without compensation is not to be imputed to the legislature unless it is expressed in unequivocal terms. But this principle, upon which learned counsel for the respondents so vigorously insisted, seems to me to have no bearing upon the question what is the meaning of the phrase “take property without compensation” in a constitutional instrument

such as the Government of Ireland Act". (pp 517 to 518)

20. It seems to me that this passage from the judgment of the House of Lords in this case is an answer to the argument that has been boldly put forward by Mr. James on this question of property and the rights of enjoyment of property. A further quotation from Viscount Simonds at page 518 explains the situation thus:

"If, indeed, I must have recourse to any broad principle of law for the construction of these few simple words, I should remind myself that from the earliest times the owner of property, and in particular of land, has been restricted in his free enjoyment of it not only by the common law maxim *sic utere tuo ut alienum non laedas* but by positive enactments limiting his user or even imposing burdens on him. I do not therefore approach this question of construction with any predisposition to enlarge the scope of the vital words. For, my Lords, I would here point out that, if such restrictions as the Acts of 1931 and 1944 impose cannot be enforced without the payment of compensation, the practical effect must be to deprive the Parliament of Northern Ireland of the power to legislate, not only in this particular field in a manner recognized as necessary to its proper fulfillment in Great Britain, but in numerous other fields also in which it has been widely realised that the rights of the individual must be subordinate to the general interest."

21. Viscount Simonds acknowledged that it was right that “in the interpretation of constitutional instruments guidance should be sought from those courts whose constant duty it has been to construe similar instruments, if only because, ... a flexibility of construction is admissible in regard to such instruments which might be rejected in construing ordinary statutes or inter partes documents”. He went on to quote from Brandeis, J. in the American case **Pennsylvania Coal Co. v Mahon** (1922) 260 U.S. 393 at 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 abridgement 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.”

Viscount Simonds concluded that Brandeis, J., “that very learned judge”, had indicated in clear terms the distinction that should guide us in determining whether or not legislation which diminished the owner’s free enjoyment of his own property is a “taking” of that property. “It is clear”, stated Viscount Simonds at page 519, “that

such a diminution of rights can be affected [sic] without a cry being raised that Magna Carta is dethroned or a sacred principle of liberty infringed”.

22. Considering the arguments that have been advanced in support of ground 2, it seems that the appellants believe that the fact of their residence in a community which has the Portmore Causeway as one of the roads of choice, gives them a right over and above all other citizens who use the said road. This apparent position is irrational. The Portmore Causeway has not been shown by the appellants to be a road exclusively for the use of the residents of Portmore. It is a road accessible to the entire country. Does that mean therefore that the imposition of a toll would entitle all other persons, non-residents and visitors, who use or have used the Portmore Causeway to maintain that they have been unlawfully deprived of the enjoyment of their property? Certainly not. It seems to me that the State has an undoubted responsibility to provide roads where it has permitted the establishment of communities. The cost of making such a provision would ordinarily be borne by the taxpayers of the country as a whole. In the instant situation, the State has opted for a different approach in

respect of the bearing of the financial cost. It has decided to put the cost on only those who use the road. There is nothing wrong in principle with this method. So, this ground of appeal fails as the proprietary right claimed by the appellants does not exist and there cannot be a deprivation of the enjoyment of something that does not exist.

23. This brings me to **ground 3** which treats with the question of an alternative route. Section 8 (2) of the **Toll Roads Act** reads thus:

“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.”

Mr. James in his written submissions on this aspect of the case, said that the Constitutional Court failed to make findings of fact hereon; consequently, this Court should remit the case for a re-hearing on the point. He cited the case **Lascelles Chin v Audrey Chin** [P.C. 61/99 — delivered on February 12, 2001] as authority for the proposition that where an inferior court has failed to make findings of fact, the Court of Appeal may not make such findings except with the consent of the parties. I do not think that that case may be interpreted in that

way. Rather, it decides that such findings may not be made where the issue of credibility is involved considering that the Court of Appeal has not seen and heard the witnesses and so is not in a position to make the necessary assessment. In the instant case, I do not see the need for this Court to make any findings of fact or to remit the matter for that to be done by the Constitutional Court, for the simple reason that there are unchallenged statements, as to the existence and prior use of an alternative route. These statements provide powerful evidence that the Portmore Causeway has for several years been operated on a one-way basis for specific hours in the morning as well as the evenings with a view to easing traffic congestion. The road has also been closed both ways for specific periods to allow for maintenance and repairs. On such occasions, the Mandela Highway has been the designated alternative route. Complaints as to congestion on the Mandela Highway do not make the route an unsuitable alternative one. Congestion on the streets of the Corporate Area and neighbouring St. Catherine is a fact of life that may have resulted from a host of situations including the proliferation of privately-owned motor cars. It is also a notorious fact that there are several congested streets that are not alternative routes (as

Mandela Highway is), but rather the only route. In other words, there is no choice. In my view, the **Toll Roads Act** has been complied with in that an alternative route accessible to the public by vehicular or other traffic has been designated. There being no legitimate cause for complaint in this regard, this ground of appeal fails.

24. The final ground of appeal is to the effect that the Constitutional Court erred in concluding that an order to prevent the demolition of the Hunts Bay bridge was misconceived. In supporting this ground of appeal, the appellants contended that the Constitutional Court failed to appreciate that this item of relief was ancillary to the principal relief claimed by the claimants, namely a declaration that the imposition of the toll is unconstitutional and should be prohibited. The respondent's main submission in answer was that section 16 of the **Crown Proceedings Act** forbade the granting of an injunction against the Crown. I am of the view that in any event, the appellants have no ownership in the bridge, or any exclusive right to its use. It follows therefore that they cannot claim any legitimate right, over and above the average citizen of this country, to determine whether it is demolished or not.

25. In the light of the failure of the appellants to advance any sustainable ground, we found the appeal wholly without merit. Notwithstanding this finding, we made no order as to costs as we did not think that the action was frivolous or vexatious. The appellants have genuine cause for concern given the economic realities of the country, and the impending increase in travelling costs to themselves whether they use the new road or the alternative route. Genuine challenges to perceived constitutional breaches are not to be discouraged. It just happens that in this case there was no breach. In securing representation and conducting the challenge, sufficient costs have already been incurred.

COOKE, J.A.

1. I have had the opportunity of reading in draft the comprehensive judgement of Panton, J.A., with which I concur. However, I am moved to address some comments with respect to the first two grounds of this appeal. I consider those grounds as going to the heart of the matter. The fate of the other two grounds is contingent on the resolution of grounds 1 and 2.

2. The background to the circumstances giving rise to this appeal is succinctly and accurately set out in the respondent's skeleton submissions. This I now reproduce:

- i. "On March 12, 2002, the Minister of Transport & Works made the Toll Roads (Designation of Highway 2000 Phase 1) Order 2002 declaring the Portmore Causeway a toll road. Pursuant to the requirement in section 8 (2) of the Toll Roads Act ('the Act'), the Minister designated the Mandela Highway as the alternative route to the proposed new toll road.
- ii. The new toll road will replace the existing Portmore Causeway which is one of the roadways connecting the community of Portmore with the city of Kingston. The toll road project involves the construction of a new bridge across Hunts Bay and the demolition of the existing Hunts Bay bridge.
- iii. The Appellants are residents of the Portmore community and they contended in the court below (the Full Court) that their right to property under sections 13 and 18 of the Constitution would be violated by the imposition of a toll for the use of the proposed road, and by the demolition of the old Hunts Bay bridge. They sought a declaration to that effect and orders of 'Prohibition/Injunction' to restrain the Government of Jamaica from implementing a toll or demolishing the old Hunts Bay bridge.

iv. The Full Court unanimously dismissed their application, and the Appellants now appeal from that decision.”

3. In (iii) (supra) the appellants are described as ‘residents’ in contrast to being owners of property. It was the contention of the respondent that none of the appellants had demonstrated the ownership of property in Portmore. This contention was premised on the basis that it was only to the owners of property that the Constitution afforded protection. I am not now prepared to say the constitutional protection of property is necessarily limited on every occasion, despite the particular circumstances, to persons who were possessed of title to that property. In any event, this issue which was not fully argued was not the focus of the debate in this court and I will not give a definitive view as to that.

4. Section 13 of the Constitution states as follows:

“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 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'."

(emphasis mine)

5. The appellants' stance in the court below, as here, was that section 13 declared rights which were enforceable — that this section was an "enacting" section. Therefore the "imposition" of a toll, which it was submitted was oppressive, constituted a charge on accessing their homes. Consequently, there was a contravention of the right "to the enjoyment, of property" within section 13. The first issue is whether section 13 is an "enacting" one. As to this, the court below held that:

“Section 13 of the Jamaican Constitution is a single sentence; its subject, the ‘subsequent provisions of this chapter.’ under rubrics (a), (b) & (c), merely adumbrated that which the provisions subsequent, namely sections 14 to 24 (inclusive) in unambiguous detail set out. The selective embrace of these to the exclusion of section 13 fulfills the mandate of Section 25. Accordingly we hold that in keeping with the authorities cited, there is no room for vesting Section 13 with the function of an instrument for providing redress”.

6. The attack on this view of the court below was set out in ground one of the appeal. It was couched thus:

“The Constitutional Court erred in law in concluding that section 13 of the Constitution of Jamaica cannot be construed as an instrument for providing constitutional redress. In this regard, the Court erred in law in failing to determine whether section 13 of the Constitution of Jamaica had substantive legal content which should be protected within the constitutional framework”.

It was submitted that:

“the Constitutional Court adopted too literal and (sic) approach to constitutional interpretation and erred in law to accord the purposive interpretation that must be given to constitutional instruments”.

In this regard, reliance was placed on a dictum of Lord Diplock who delivered the advice of the Privy Council in ***Attorney General of The***

***Gambia v Jobe* [1985] LRC (const) 556 at page 565** which stated that:

“A constitution and in particular that part of it which protects and entrenches fundamental rights and freedoms is to be given a generous and purposive construction”.

It was further contended that:

“The correct starting point for the Court, should have been to query whether section 13 of the Constitution has any substantive content and if so, in what manner could this content be enforced. Rather, the court erred by considering the issue to turn up on whether section 13 was made enforceable by section 25. This approach, if founded upon the fallacious assumption that all of the constitution’s substantive content with respect to fundamental rights and freedoms is enshrined in sections 14 – 24 and that section 25 is the only mechanism by which a breach of substantive aspects of the Constitution impacting upon fundamental rights and freedoms can be vindicated”.

7. The respondent submitted that section 13 granted “no rights and neither adds to nor subtracts from the rights granted by the provisions of Chapter III”. Great emphasis was placed on the words in section 13(c) which were “the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the

aforesaid rights and freedoms.” The critical subsequent provision, it was submitted, was section 25 which states:

“(1) 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.

(2) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said sections 14 to 24 (inclusive) to the protection of which the person concerned is entitled...”.

The conclusion which the respondent moved the court to accept was that section 25 established the constitutional framework through which an aggrieved party may seek redress. It was pointed out that section 25 expressly excluded section 13. The case of ***Grape Bay Ltd. v Attorney General of Bermuda*** [2000] 1 LRC 167 was cited to us. This was an advice from the Privy Council. At page 175 e-i Lord Hoffman who delivered the advice of the Board said:

"The Constitutions of certain of the UK Overseas Territories such as Bermuda and many of the former British possessions, now independent states, have a family resemblance. 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 s 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. For example, in ***Blomquist v A-G of Commonwealth of Dominica*** [1988] LRC (Const) 315 the Board was considering the Constitution of Dominica, which contains a general statement in s 1, followed by particular rights and freedoms in ss 2 to 15 and s 16(1) which provides that:

'If any person alleges that any of the provisions of sections 2 to 15 (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 High Court for redress.'

The Constitution therefore makes it clear that s 1 is not to be separately enforceable and the Privy Council so held”.

8. I am of the view that the court below was correct in its interpretation of section 13. I consider the submissions of the respondent as sound. Section 13 does not create any rights. I accept the view propounded by the respondent that section 13 does have some declaratory force in that the rights set out in Chapter III are not being created for the first time but existed prior to the Constitution. Section 13 is in essence a preamble; see *Olivier v Buttigieg* [1967] A.C. 115. A “generous and purposive interpretation” does not permit a distortion of the explicit relevant constitutional provisions. In this appeal it is clear that ground one is without merit – and fails.

9. Ground two of the appeal concerned section 18 of the Constitution. Subject to certain exceptions which are not here relevant, this section provides that:

“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...”.

The court below held that:

“In the present case it has not been shown on what basis it can be asserted that the Government has ‘taken possession’ or ‘acquired’ property belonging to the Claimants. It is not enough to demonstrate any array of rights associated with the Claimants or any of them. The Claimants have not shown any rights capable of acquisition by the implementation of the toll or in fact taken possession of”.

The challenge to this view expressed by the court was stated in this ground to be

that:

“The Constitutional Court misdirected itself in formulating one of the central issues for determination as being whether the Claimants could show any property rights capable of acquisition by the implementation of a toll. The Court failed to appreciate that the proper formulation of the issues before the Court should have been:

- a) determining whether the effect of the toll would be such as to cause substantial and unconstitutional interference with the Claimants right to enjoyment of property and,
- b) determining whether the actions of the government in implementing the toll would have the effect of depriving the Claimants of their proprietary rights as to come

within the scope of the prohibition in section 18 of the Constitution against taking property without compensation.”

10. The appellants recognised that there was no direct contravention of section 18. What was postulated was that by taking an “expansive” and “purposive” approach, the “imposition” of a toll was such that amounted to a deprivation of rights given by that section. There were two arrows to the bow of the appellants. The first was a repetition of the submissions in respect of ground one that section 13 had a declaratory force thereby constituting it an enacting section. This submission has already been subject to scrutiny. Secondly, there was reliance on cases from other jurisdictions to which the court was invited to give weight to the effect that it was not only a direct contravention of section 18 which could give rise to constitutional redress. The action of the government, it was said, could be tantamount to such contravention. The court was asked to give a “purposive” and “expansive” interpretation to section 18 and to regard the “over-arching” impact of section 13 as an aid to construing section 18.

11. Since the appellants relied heavily on ***Lucas v South Carolina Coastal Council*** 505 U.S. 1003 (1992), I feel compelled to reproduce a somewhat lengthy extract from that opinion of the Supreme Court of the United States:

“Prior to Justice Holmes’ exposition in ***Pennsylvania Coal Co. v. Mahon***, 260 U.S. 393 (1922), it was generally thought that the Takings Clause reached only a ‘direct appropriation’ of property, *Legal Tender Cases*, 12 Wall. 457, 551 (1871), or the functional equivalent of a ‘practical ouster of (the owner’s) possession’. ***Transportation Co. v. Chicago***, 99 U.S. 635, 642 (1879). See also ***Gibson v. United States***, 166 U.S. 269, 275 – 276 (1897). Justice Holmes recognized in *Mahon*, however, that if the protection against physical appropriations of private property was to be meaningfully enforced, the government’s power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits. 260 U.S., at 414-415. If, instead, the uses of private property were subject to unbridled, uncompensated qualification under the police power, ‘the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed].’ *Id.*, at 415. These considerations gave birth in that case to the oft cited maxim that, ‘while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.’ *Ibid.*

Nevertheless, our decision in *Mahon* offered little insight into when, and under what circumstances, a given regulation would be seen as going 'too far' for purposes of the Fifth Amendment. In 70 odd years of succeeding 'regulatory takings' jurisprudence, we have generally eschewed any "set formula" "for determining how far is too far, preferring to" engage[e] in...essentially ad hoc, factual inquiries, *Penn Central Transportation Co. v New York City*, 438 U.S. 104, 124 (1978) (quoting ***Goldblatt v Hempstead***, 369 U.S. 590, 594 (1962). See Epstein, Takings: Descent and Resurrection, 1987 Sup. Ct. Rev. 1, 4. We have, however, described at least two discrete categories of regulatory action as compensable without case specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical 'invasion' of his property. In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation. For example, in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), we determined that New York's law requiring landlords to allow television cable companies to emplace cable facilities in their apartment buildings constituted a taking, *Id.*, at 435-440, even though the facilities occupied at most only 1 ½ cubic feet of the landlords' property, see *Id.*, at 438, n. 16. See also ***United States v. Causby***, 328 U.S. 256, 265 and n. 10. [1946] (physical invasions of airspace); cf. ***Kaiser Aetna v. United States***, 444 U.S. 164 [1979] (imposition of navigational servitude upon private marina).

The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land. See *Agins*, 447 U.S., at 260; see also *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 495 (1987); *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 295-296 (1981). As we have said on numerous occasions, the Fifth Amendment is violated when land use regulation 'does not substantially advance legitimate state interests or denies an owner economically viable use of his land.' *Agins, supra*, at 260 (citations omitted) (emphasis added)". (Emphasis mine)

In ***Fredin v. Sweden*** (1991) 13 E.H.R.R. 784 the European Court on Human Rights held that where the action of the government affected the use of private property it could not be said that there was a deprivation of property unless that action resulted in that property no longer having any meaningful use.

12. It is to be noted that in the two cases adverted to the complaints were in respect of regulations which directly affected the use of land. In **Sweden** it pertained to the revoking of a licence to mine. In **Lucas** it was a restriction of the use to which land could be utilized. In this

case it cannot be said that the declaration that the Portmore Causeway is to be a toll road is an act which affects the use of land of the appellants. The cases relied on by the appellants are of no assistance to them. Ground two fails.

13. It is for these reasons that I agreed that his appeal should be dismissed. I also agree that there should be no order as to costs.

McCALLA, JA:

The municipality of Portmore has been described as the fastest growing residential community in Jamaica during the 1980's and 90's. Consequently, there exist severe traffic problems for commuters travelling between Portmore and the city of Kingston.

When the Government of Jamaica implemented the Highway 2000 Project it was considered expedient for the Portmore to Kingston route to be included as part of the new highway.

In 2002, the Ministry of Transport and Works promulgated the Toll Roads (Designation of Highway 2000 Phase1) Order declaring the Portmore Causeway a toll road. The Minister designated the Mandela Highway as the alternative route to replace the existing Causeway which connects the Portmore community with the city of Kingston via the Hunts Bay Bridge. The construction of the toll road involves the demolition of the existing bridge, for reasons later stated herein.

The implementation of the toll road and demolition of the bridge will result in the residents of Portmore no longer being able to use the Portmore Causeway. They will be required to pay a toll for the use of the toll road.

It is in these circumstances that the appellants, all residents of the Portmore community, sought to obtain from the Constitutional Court Declarations and Orders of prohibition/injunction in respect of their rights

to property under sections 13 and 18 of the Constitution which, they claim, would be violated by the imposition of a toll for the use of the new road.

This appeal is from the decision of the Constitutional Court which refused the reliefs sought by the appellants.

The appellants' challenges to the findings of fact and law are as follows:

“(a) **Findings of fact**

That it has not been shown that disproportionate inconvenience by the use of the alternative route would accrue when various factors are put in balance such as travel time, vehicular wear and tear and the itinerary of residents from their varied locations and their daily destinations.

(b) **Findings of law**

- (i) That section 13 of the Constitution of Jamaica cannot be construed as an instrument for providing constitutional redress.
- (ii) That as a matter of law, the Claimants have failed to show any property rights capable of acquisition by the implementation of a toll or in fact taken possession of.”

The main grounds of appeal may be summarized as follows:

1. The Constitutional Court erred in its finding of law referred to at (i) above and in failing to determine whether section 13 had substantive legal content which should be protected within the constitutional framework;

2. The Constitutional Court misdirected itself in formulating one of the central issues for determination as being whether the Claimants could show any property rights capable of acquisition by the implementation of a toll. The Court failed to appreciate that the proper formulation of the issues before it should have been:

- (a) Determining whether the effect of the toll would be such as to cause substantial and unconstitutional interference with the Claimants' right to enjoyment of property and,
- (b) Determining whether the actions of the government in implementing the toll would have the effect of depriving the Claimants of their proprietary rights so as to come within the prohibition in section 18 of the Constitution against taking property without compensation.

Ground 3 deals with the burden of proof in relation to the proposed implementation of the toll as well as the proportionality requirements and ground 4 is with regard to the Court's refusal to grant injunctive relief.

The relevant sections of the Constitution are sections 13 and 18, which are in the following terms:

"13. 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.

Section 18 reads:

18.---(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."

Ground 1

The gravamen of the complaint relating to this ground is that the Constitutional Court adopted too literal an approach to the interpretation of the constitutional provisions. Placing reliance on the case of the ***Attorney General of Gambia v Jobe*** [1985] LRC (Const.) 556 Mr. James on behalf of the appellants submitted that a generous and purposive construction ought to have been given to provisions which protect and entrench fundamental rights and freedoms.

He urged that section 13 ought to have been construed as having significant declaratory force which conferred on it the status of an enacting section. The section itself would therefore confer substantive protection of the rights and freedoms specified therein.

Mr. Hylton, Q.C. argued that section 13 does not itself create rights but is primarily a preamble with its declaratory force limited to declaring that the rights set out in Chapter III existed prior to the Constitution.

He finds support in the provisions of section 25 (1) and (2) which make reference to the provisions of sections 14 to 24 of the Constitution, (thereby excluding section 13), which deals with the contravention of the rights conferred by these sections. Section 25 states:

" **25.—**(1) 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.

(2) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said sections 14 to 24 (inclusive) to the protection of which the person concerned is entitled:

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

Mr. Hylton said that the case of **Olivier v Butligieg** [1967] 115 A.C 115 relied on by the appellants is distinguishable in that, unlike section 25 of the Jamaican Constitution that limits redress to breaches of sections 14 to 24, section 16 of the Maltese Constitution provides for redress for every section under the relevant part of that Constitution, which begins with section 5, the equivalent to section 13 of the Jamaican Constitution.

Reid J, who delivered the unanimous decision of the Court below in addressing the submissions of Counsel and the cases cited, at paragraph

15 of the judgment said:

"Section 13 of the Jamaican Constitution is a single sentence, its subject, the 'subsequent provisions of this chapter,' under rubrics (a), (b) & (c), merely adumbrates that which the provisions subsequent, namely sections 14 to 24 (inclusive) in unambiguous details set out. The selective embrace of these to the exclusion of Section 13 fulfils the mandate of Section 25. Accordingly we hold that in keeping with the authorities cited, there is no room for vesting Section 13 with the function of an instrument for providing redress."

In ***Grape Bay Ltd. v the Attorney General of Bermuda*** [2000] 1LRC

167 the Privy Council considered constitutional provisions similar to those being reviewed in this appeal. At page 175 Lord Hoffman noted that:

"The Constitutions of certain of the UK Overseas Territories such as Bermuda and many of the former British possessions, now independent states, have a family resemblance. 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 sec. 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."

He made a distinction between those Constitutions where the enforcement sections referred to the introductory sections and those where they do not.

In the case of the Dominican Constitution, where the enforcement section does not refer to the introductory section, he stated that:

"The Constitution therefore makes it clear that Section 1 is not to be separately enforceable and the Privy Council so held (see ***Blomquist v the Attorney General of the Commonwealth of Dominica*** [1987]2 WLR 1185.)"

It is abundantly clear that in light of the Opinion of the Board in ***Grape Bay*** the appellants' submissions under this ground are not maintainable and the Constitutional Court was quite justified in rejecting them. Likewise, I am of the view, as contended by Mr. Hylton Q.C. that section 13 cannot be construed as expanding on or altering any rights given by section 18.

Ground 2

This ground of appeal deals with the effect of the imposition of the toll which the appellant contends would be such as to cause substantial and unconstitutional interference with the appellants' right to enjoyment of property and would have the effect of depriving them of their proprietary rights within the scope of section 18 of the Constitution, which prohibits the taking of property without compensation. Mr. James argued

that the word "property" should be given a "liberal and wide connotation."

Counsel submitted that the implementation of the toll would constitute an interference with the ability of the appellants to enjoy their properties, if there is sufficient evidence that the associated costs would be oppressive and constitute a charge for accessing their homes. He cited the case of ***Sporrong and Lonnroth v Sweden*** [1983] 5 E.H.R.R 35 and submitted that the European Court of Human Rights, as well as the Commission, have held that the right to enjoyment of property guaranteed by the Article 1 of the First Protocol to the European Convention of Human Rights, which states in part that "every natural or legal person is entitled to the peaceful enjoyment of his possessions", will be violated where there has been "interference with the substance of ownership", which restricts the attributes of property without depriving the owner of it. He argued that on the totality of the evidence, the imposition of a toll would interfere with the substance of ownership.

Mr. James said that the Court below failed to conduct a proper analysis of the issue. He maintained that section 18 should be interpreted in light of the broader rights guaranteed by Section 13. According to him:

"The most important consequence of this interpretation is that an expansive view must be taken as to the category of actions that may suffice to fall within the constitution rubric of 'compulsorily taking possession of property' as used in section 18."

Quoting extensively from the judgment in ***Pennsylvania Coal Company v Mahon*** 260 U.S. 393 (1922) he contended that courts in the United States have long rejected the notion that property will be "compulsorily acquired" only when there was a vesting of physical possession in the State and they have been prepared to find compulsory acquisition where the negative effects of the measure upon property rights have been too much.

Implicit in this jurisprudence is that the Courts vindicate all the species of rights and interests that may properly fall within the ambit of proprietary rights, including the right of enjoyment. The toll will create a burden of such magnitude as to eliminate the right to quiet enjoyment as an incident of holding property.

As Mr. Hylton aptly noted, the appellants have not contended that they have any proprietary rights over the Causeway main road or the new toll road. In ***Belfast Corporation v O.D. Cars Ltd.*** [1960]A.C. 490 the House of Lords held that the rights which in the aggregate constituted ownership of property could not themselves be called "property" and so the right to use property in a particular way was not itself property. In ***Grape Bay*** (supra) the appellants had contended that the prohibited Restaurants Act 1997 had infringed the right to protection from deprivation of property under Section 13 of the Bermuda Constitution (the

equivalent of section 18 of the Jamaican Constitution). Lord Hoffman at page 178 opined as follows:

"It is well settled that restrictions of the use of property imposed in the public interest by general regulatory laws do not constitute a deprivation of that property for which compensation should be paid. The principles which underline the right of the individual not to be deprived of his property without compensation are, first, that some public interest is necessary to justify the taking of private property for the benefit of the state, and secondly, that when the public interest does so require the loss should not fall upon the individual whose property has been taken but should be borne by the public as a whole. But these principles do not require the payment of compensation to anyone whose private rights are restricted by legislation of general application which is enacted for the public benefit."

David Panton & Janet Panton v Minister of Finance and the Attorney General [2001] 59 WIR 418 was an appeal from the decision of this Court where the Judicial Committee of the Privy Council considered whether there had been a breach of Section 18 of the Constitution. There, the shareholders of a company had instituted proceedings against the Government claiming that their property had been acquired in breach of section 18 of the Constitution. The shareholders had been precluded from taking any action in respect of their management of the company or other property rights.

Lord Clyde in delivering the Opinion of the Board at paragraph 22

had this to say:

"The point here is a short one and admits of an immediate answer. The appellants have to show that the statutory provision constitutes a taking of their property. But what the Act empowers, and what the Minister did was taking over of the control of the company. The appellants were and remained shareholders of the company. Their shares would doubtless qualify as property, but their shares were not taken away. They no longer had the control of the company which was inherent in the shareholdings which they possessed. But the assumption of temporary management by the Minister did not involve the taking of any property of the appellants."

Further, in ***Attorney General for Gambia v Jobe*** (supra) the Court held that a limitation on access to property does not amount to a deprivation of property .

The authorities cited demonstrate that even if the appellants' use and enjoyment of their property have been affected, that would not constitute a "taking possession" or a "taking away" of their property.

Therefore the Constitutional Court was not in error in concluding that:

"In the present case it has not been shown on what basis it can be asserted that the Government has 'taken possession' or acquired property belonging to the claimants. It is not enough to demonstrate an array of rights associated with the claimants or any of them. The claimants have not shown any property rights capable of acquisition by the implementation of the toll or in fact taken possession of."

This ground of appeal also is without merit.

Ground 3

In this ground of appeal the appellants complained that the Court was wrong in finding that it has not been shown that disproportionate inconvenience by the use of the alternative route would accrue when various factors are put in balance.

Mr. James maintained that the Court failed to appreciate that assuming a threshold finding of constitutional violations, it is the defendant who bore the burden of proving the proportionality of the proposed measure.

The evidence shows that there is an alternative route to the Portmore community. The affidavit of the first appellant Natalie Rodriques was relied on by the appellants to demonstrate a saving of time and motor vehicle expenses could be achieved by the use of the Portmore Causeway Road. The Court also had before it the evidence of Dr. Wayne Reid and the calculations set out therein which were unchallenged. The Constitutional Court on the point found as follows:

"Nor has it been shown that disproportionate inconvenience by the use of the alternative route would accrue when various factors are put in balance. "

There is no basis on which the Constitutional Court's finding on the point should be disturbed and this ground of appeal also fails.

Ground 4

The appellants also complained that the Court erred in concluding that an order to prevent the demolition of the existing Hunts Bay Bridge is misconceived. They argued that the Court failed to appreciate that that item of relief was ancillary to the principal relief claimed, namely that the imposition of the toll is unconstitutional and should be prohibited.

Making reference to section 16 of the Crown Proceedings Act, the respondent submitted that the court is not empowered to grant the injunction claimed in this matter. Mr. Hylton submitted that in any event the new highway is being built on top of the Causeway main road and when completed will provide no access to the Hunts Bay Bridge. There are also environmental concerns with regard to the continued existence of that bridge.

In light of my conclusions in respect of the preceding grounds of appeal, I am of the opinion that the Constitutional Court was correct in denying the injunctive relief sought. It was for these reasons that I agreed that this appeal should be dismissed with no order as to costs.

PANTON, J.A.

ORDER:

1. The Appeal is dismissed.
2. The Order of the Court below is affirmed.
3. No Order as to Costs.