[2013] UKPC 31
Privy Council Appeal No 0045 of 2012

JUDGMENT

Bethel and Others (Appellants) *v* The Attorney General of the Commonwealth of Bahamas (Respondent)

From the Court of Appeal of the Commonwealth of The Bahamas

before

Lord Mance
Lord Kerr
Lord Clarke
Lord Carnwath
Lord Hughes

JUDGMENT DELIVERED BY

Lord Carnwath

ON

24 October 2013

Heard on 3 October 2013

Appellants	*Respondent*
Kahill Parker Cedric Parker (Instructed by Cedric L Parker and Co)	Howard Stevens QC Edmund Von C Turner (Instructed by Charles Russell LLP)

LORD CARNWATH:

1. This appeal from the Court of Appeal of The Bahamas raises issues as to the proper construction of the Acquisition of Land Act (cap 252) and the related provisions of the Constitution. It concerns the compulsory purchase of land belonging to the appellants, commenced by a notice under the Act dated 19 January 2007. The acquisition was for a proposed development by a company called Park Ridge Securities Corporation ("Park Ridge"). By originating summons dated 28 April 2008, the appellants challenged the legality of the acquisition, both under the Act and under the Constitution. In a judgment given in December 2009, Albury J made declarations to the effect that compulsory acquisition "without prompt or any adequate compensation" was contrary to the Act and to article 27 of the Constitution, and that in default of payment of such compensation the appellants were entitled to immediate possession of their properties. That judgment was reversed by the Court of Appeal on 1 April 2011, the single judgment being given by Allen P. The appellants appeal to the Board as of right.

The statute

2. The Acquisition of Land Act was originally enacted in 1913 and has been subject to numerous amendments since then. The main issues in this case turn on the provisions of section 6 headed "Declaration of Intending Acquisition". This provides:

> "6. (1) Whenever it appears to the Minister that any particular land is needed for a public purpose a notice to that effect signed by the promoters shall be published in the *Gazette* and posted on some conspicuous part of such land, but no such notice shall be published or posted unless the compensation to be paid for such land is to be paid out of public revenue or out of the funds of some statutory corporation.
>
> (2) Such notice shall state the following particulars –
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> (a) the district in which the land is situate;
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> (b) the particular purpose for which it is required;

(c) its approximate area and all other particulars necessary for identifying it, and if a plan has been made of the land, the place where and time when such plan may be inspected;

(d) an intimation that all persons interested in the land shall, within thirty days from the publication of the notice or the posting of the same, state in writing to the promoters the nature of their respective interests in the land and the amount and particulars of their claims to compensation for such interests.

(3) Subject to a right of appeal to the Supreme Court as to the legality of the proposed acquisition which shall be filed within thirty days of the publication of the notice or the posting of the same, the notice shall be conclusive evidence that the land is needed for a public purpose, and is selected land within the meaning and for the purposes of this Act…."

As defined by section 2, the term "promoters" means "a Minister or any statutory corporation by or on behalf of which the selected land may be acquired under this Act". "Public purpose" includes, subject to article 27 of the Constitution, a number of specific purposes, including –

"(d) any purpose for which land is, in the opinion of the Governor General, required for providing hotel accommodation, or promoting the tourist traffic of The Bahamas, or providing increased harbour or dock facilities,…"

"Selected land" is defined as "any land required for a public purpose".

3. Provision for compensation is made by section 15, under which, if the promoters and those interested in the land are unable to agree a private purchase, and if the value exceeds $4,000, then the value of the selected land and the compensation payable for interests therein, shall be determined by the court (defined for these purposes as the Supreme Court). There is provision for application to the court either by the promoters or by "any person interested". Section 16 provides for various special cases: where, for example, the claimants are absent from The Bahamas or cannot be found, payment is to be made to the Treasurer for the credit of the person interested subject to control of the court.

4. Section 18 has the side note "when possession obtainable". Either on payment of compensation, or, "if in the opinion of the Minister it is necessary for a public

purpose" that possession should be obtained before payment, he may by notice in the Gazette declare that "the selected land has been appropriated for the public purpose mentioned in such notice", and thereupon, except as otherwise provided in the section,–

> "the selected land and the fee simple and inheritance thereof and all the estate, use, trust and interest of all parties therein shall thenceforth become vested in and become the property of the promoters for such public purpose, and the promoters may enter upon and take possession of the same . . ."

Where possession is taken in advance of payment of compensation, the promoters must pay, "in addition to the purchase money or compensation" agreed or awarded, interest at a prescribed rate from the date of the notice in the Gazette until payment.

5. Section 28 deals with the principles on which compensation is to be assessed, generally based on market value (increased by 10% under section 29) and other consequential losses, but disregarding certain specified matters, such as the degree of urgency of the acquisition and any increase in value due to its use after acquisition. By section 50 there is a general limit of twelve months for the making of claims for compensation under the Act.

6. Turning to the Constitution, article 27 has the side-note "Protection from deprivation of property". It provides that no property may be compulsorily taken unless the taking is "necessary" in the interests of various defined public purposes including –

> "the development or utilisation of any property in such manner as to promote the public benefit or the economic well-being of the community."

The necessity must be such as to afford "reasonable justification for the causing of any hardship that may result" to those interested in the property. It has been held that the word "necessary" does not import an absolute test, but involves "some elements of degree", referring to "what may be regarded as highly expedient in all the circumstances rather than to that which is quite indispensably required" (see *Baker v Attorney General* (1965 to 71) LRB 279, 283).

7. There must be provision for "the making of prompt and adequate compensation in the circumstances" to those interested, and for securing for them a right of access to the Supreme Court for the determination of the legality of the taking of the property

and of the amount of any compensation, and for the purpose of obtaining prompt payment. Article 28(2) gives the Supreme Court jurisdiction to determine applications alleging contravention of article 27, but subject to the proviso –

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

Background facts

8. The story begins with Heads of Agreement dated 9 November 2006, entered into between the government and Park Ridge providing for what was known as the "Albany Project". This was described as "an extensive multi-faceted land development scheme comprising a gated resort, exclusive residential areas, golfing and yachting amenities". As envisaged by the Heads of Agreement this development was concurrent in time with a separate proposal for the construction of a proposed new container port in Southwest New Providence. It was envisaged that there would be other public benefits, including improvements to the Clifton Heritage Park, and the provision of 320 acres of land to the government for affordable housing for Bahamians. Under the agreement the government agreed to secure the rerouting of a road which bisected the land upon which the project was to be developed. Park Ridge's commitment to the total value of the project was put by the agreement at $1.3 billion.

9. In relation to the "Proposed Port Road", Park Ridge undertook to contribute the funds necessary for the government to acquire additional land from other owners, referred to as "the acquisition properties" (cl 1.1.7). The government for its part undertook following the execution of the Heads of Agreement forthwith to commence the acquisition process in relation to the acquisition properties in accordance with the Acquisition of Land Act; it was provided that "the costs for the said acquisition shall be the responsibility of Park Ridge" (cl 9.9).

10. On 19 January 2007 a Declaration of Intended Acquisition was published, under the name of the responsible minister, giving notice that the lands described in the schedules were "needed for a public purpose, namely, construction of public roads and for uses related thereto..." All persons interested were required to state in writing to the promoter the nature of their interest and "the amounts and particulars of their claim to compensation". On 16 March 2007 a further notice was served stating that the responsible minister was of the opinion that possession should be obtained before payment of compensation and declaring that lands had been "appropriated" by the minister for the purpose mentioned in the Declaration with effect from the date of the notice. On 4 January 2008 there was published a "Declaration of Vesting" recording

that the land described in the schedule had been duly appropriated under the Act "for the public purpose, namely construction or improvement of public roads and for uses related thereto", and declaring "in pursuance of sections 18 and 36" of the Act that the land had been vested in the Treasurer. There is little evidence as to the date of entry by the promoters, or the subsequent progress of the development. Albury J recorded that by the time of the High Court hearing it had commenced and was "currently continu(ing) apace".

11. On 28 April 2008 the appellants filed an originating summons seeking, inter alia, declarations that the appellants were owners of the disputed land, that the public purpose for which the lands were being acquired had been abandoned on or about 2 May 2007, and that the purported exercise of the powers was beyond the powers of section 6 and unconstitutional.

12. The significance of 2 May 2007 was that there had been a change of government on that date. It seems that the new government did not support the proposal for relocation of the port, although they were apparently content to allow the remainder of the development project to proceed. In an affidavit sworn in support of the originating summons, Mr Wendell Munnings, the seventh appellant, and one of the dispossessed owners, stated that, when the intention to acquire their land had first been made known, they had been led to believe that it was needed to facilitate the moving of the container port, but that on the change of government in May 2007, it was made clear that this aspect of the project had "died". The appellants rely also on a statement by the responsible minister made during the budget debate on 30 June 2007, referring to the commissioning of a feasibility study for the relocation of the port, expected in July, and asserting that no decision had yet been made about the relocation of the port. Again, it is not clear from the evidence when the feasibility report was produced or with what result, or when a final decision was made.

13. In July 2008 the respondent applied to strike out the Originating Summons for non-compliance with the rules, and for an order that the proceedings continue as though begun by writ. The application was amended on the first day of the hearing before Albury J (on 19 November 2008) to include an application to strike out the appellants' proceedings, as an abuse of process, as contravening section 6(3). The hearing was concluded on 24 February 2009, and judgment given on 14 December 2009. It seems from the judgment that there may have been some confusion or difference of view as to the precise status of the hearing before the judge. The transcript (p 45) shows that the respondent's counsel indicated that the issue was whether the claim should be struck out, not the substantive issue of illegality. In a letter dated 4 March 2009 the respondent confirmed that he reserved their right to file evidence and make submissions on the substantive issues, if the application to strike out was unsuccessful. However, the judge seems to have proceeded on the basis that both aspects were before her, noting (para 26) that the appellants' evidence had not been "refuted or challenged" by the respondent.

Issues

14. Although the arguments have been formulated in different ways during the course of the proceedings, and the issues overlap to some extent, they can be conveniently grouped under three heads: (1) purpose of the acquisition; (2) compensation; (3) other constitutional issues.

Purpose of Acquisition

15. The appellants submit that the relocation of the port was an essential part of the scheme which justified it in the public interest. Without it, in the words of Mr Munnings, the project, far from being to the benefit of the Bahamian public, consisted of amenities such as a golf course, restaurants and a luxury hotel, which would be available only to guests. In the light of the way the matter proceeded, the court should conclude either that the relocation was never genuinely intended, so that that aspect of the scheme was in effect a sham, or alternatively it was subsequently abandoned (see *Simpsons Motor Sales (London) Ltd v Hendon Corporation* [1963] Ch 57), thus removing the public justification for the implementation of the acquisition.

16. The respondents submit that having regard to section 6(3) it is not open to the appellants to question the public purpose for which the order was made, not having done so within the thirty days prescribed by that provision. In any event the development, albeit subject to variations, was substantially in accordance with the public purposes stated in the original notice and the removal of the container port did not affect its legality. As to the allegation of abandonment on or about 2 May 2007, there were concurrent findings of fact below against the appellants on this point, with which the Board in accordance with its normal practice should not interfere. Furthermore, a change of purpose on that date could not affect the validity of the vesting of the land which had already taken place under section 18 on 29 March 2007.

17. On this aspect Albury J held in favour of the respondents. She held that the challenge to the public purpose was out of time under section 6(3), and therefore an abuse of process. She also rejected the submission that the government had abandoned the public purpose of the acquisition, noting that there remained the purpose concerning the improvement of the Clifton Heritage Park. The Court of Appeal disagreed on the construction of section 6(3); the words "conclusive evidence", in their view, must in the light of article 27 of the Constitution be read as raising only "a rebuttable presumption" (para 19). Although their judgment did not in terms address the nature of the purpose or its alleged abandonment, it appears to be implicit in their finding on the constitution issues, that they accepted the judge's conclusions on these points.

18. In the Board's view the meaning of section 6(3) is clear: if no appeal is made to the Supreme Court within 30 days of publication of the notice, it becomes "conclusive evidence" that the land is needed for a public purpose. The Court of Appeal were wrong with respect to hold that this was no more than a "rebuttable presumption". They were concerned that to hold otherwise would result in a deprivation of a right of access to the courts, guaranteed by the constitution. However, there is a marked difference between a complete ouster of the court's jurisdiction and exclusion after a defined period. There is nothing objectionable in principle in limiting the right of access to the court to a relatively short period, in view of the importance attached to certainty in relation to a major development of this kind (see for example *R v Secretary of State for the Environment Ex p Ostler* [1977] 1 QB 122, upholding an absolute six-week period for any legal challenge under the equivalent English legislation).

19. On the other hand such clauses are to be construed strictly. The Board would therefore reject Mr Stevens' submission for the government that the bar extends to any challenge to the legality of the acquisition, not simply to a challenge to the purpose. It is true that the first part of section 6(3) provides for a right of appeal to the Supreme Court as to the "legality of the proposed acquisition" within 30 days, but that in the Board's view is to be treated as of no more than procedural significance. It is only in respect of the issue of public purpose that the notice becomes conclusive after 30 days.

20. It follows that, by the time the proceedings were begun in April 2008, the notice of intended acquisition had become conclusive evidence that the land was "needed for a public purpose", as at the date of the notice. It was not open to the appellants thereafter to question the content of those purposes, or to claim that they were insufficiently "public" for the purposes of the Act.

21. This conclusion makes it unnecessary to resolve the issue discussed in argument as to how far it is permissible to go behind the purpose as stated in the notice. There were apparently conflicting statements in some of the authorities to which we were referred. However, it appears to the Board that those apparent conflicts may well be explained by the differences in the facts and statutory provisions. It is clear on the one hand that there may be cases in which it is open to an owner to show that the purpose behind the acquisition is not genuine. A striking example was *Toussaint v Attorney General of St Vincent and the Grenadines*, [2007] 1 WLR 2825, in which it was alleged that the true reasons for the acquisition were political and that the stated purpose of having a learning resource centre was a sham (per Lord Mance, para 6). There was no dispute that this was a proper subject of investigation by the courts, the main issue being whether it was permissible to look at a statement by the Prime Minister to the House of Assembly to determine that issue. By contrast in *Proctor and Gamble Ltd v Secretary of State for the Environment* (1992) 63 P&CR 317, the English Court of Appeal accepted that changes in the components of a

> "… the means of achieving the regeneration or redevelopment of an area will almost inevitably alter with the lapse of time if only in order to accommodate requirements which hitherto were unforeseen…."

He accepted that in some cases it might be appropriate to look behind the stated purpose for the order where there was evidence that it was either a sham or outside the powers conferred by the Act, but the "natural focus of attention for both layman and lawyer" would normally be on the purpose stated in the notice. (pp 325-6).

22. In the present context, although section 6(3) does not say so in terms, it seems logical that the public purpose of which the notice is conclusive evidence should be that stated in the notice itself. In any event, whether one looks at the particular purpose stated in the notice, that is "the construction of public roads and uses related thereto", or the wider purposes of the overall project, it is not clear why the answer would be any different. On the one hand, it is not in dispute that the land was acquired, and has been used, for the construction of "public roads and related purposes". There was nothing in the notice itself to tie it specifically to the roads required for relocation of the port. On the other hand, if one looks at the wider project, there appears to be no reason to suggest that it was not a proper public purpose within the scope of legislation. That in terms permits acquisition for purposes which are commercial in nature, such as the provision of hotel accommodation or "promoting the tourist traffic of The Bahamas".

23. The fact that the notice is conclusive evidence of the public purpose at the time of the notice would not necessarily preclude an argument that it had been abandoned subsequently. This would only arise if, contrary to the approach suggested in the previous paragraph, the relocation of the port was an essential part of the relevant purpose. On that narrow issue, given the incomplete state of the evidence, and the limited reasoning of both courts, the Board would be reluctant to proceed simply on the basis that there were concurrent findings. Indeed, it remains unclear on the evidence at what point a final decision was made not to proceed with the relocation. The statement to Parliament in June 2007 suggests that, contrary to Mr Munnings' evidence, no immediate decision had been made by the new government in May.

24. However, the appellants face a further difficulty, as Mr Stevens submits. The cases referred to by Mr Parker show that the abandonment principle is relevant to the implementation of a compulsory purchase procedure, but do not support its application once the acquisition has been fully implemented and land has changed hands. By 2 May 2007, the purchase procedure had not merely been initiated but, at

least as between the owners and the government, it had been completed by the appropriation and consequent vesting of the land on 16 March 2007. All that remained was the assessment of compensation, but that under section 18 did not prevent the vesting of land. Although the notice of that date did not in terms refer to section 18, the content of the notice makes clear, in the Board's view, that this was the source of the power. It is that section which gives the power to appropriate land in advance of payment of compensation, and, as has been seen, the effect of the appropriation was not merely that the government became entitled to possession but that the land thenceforth became "vested in and… the property of the promoters". Although the subsequent "declaration of vesting" was not made until 4 January 2008, it is clear from the wording of that section that its purpose is, not itself to effect a transfer of property, but simply to record at the Registry a vesting which has previously taken place under section 18.

Compensation issues

25. Two issues arise in respect of compensation, the first under section 6(1), relating to the source of compensation, the second, under the constitution, relating to its payment.

26. As has been seen section 6(1) provides that no notice may be published under section 6 unless the compensation to be paid "is to be paid out of public revenue or out of the funds of some statutory corporation". For the appellants Mr Parker says that this requirement was not satisfied here. As is clear from the agreement, the compensation for this acquisition was not to be paid out of the public revenue but was to be "the responsibility of Park Ridge". Accordingly a precondition of the valid exercise of the statutory power was not satisfied. Furthermore the challenge on this ground is not precluded by section 6(3), under which the notice is conclusive only as to the "public purpose" of the acquisition, not as to any other legal pre-conditions. For the reasons already given, the Board agrees with him on the latter point.

27. On this issue the learned judge agreed with the appellants. She said that the acquisition was effected on behalf of, and for the benefit, of Park Ridge, who in turn had agreed to pay the financial compensation for the land (para 60). The Court of Appeal disagreed. In their view the judge's interpretation would make "commercial nonsense", in that it would "seriously curtail the government's ability to fund from private sources any economic development which involves compulsory acquisition of land". In their view the relevant provisions of section 6(1) meant simply that, before the notice is published, "the government or statutory corporation, is financially prepared and ready to pay compensation" (para 25 to 26).

28. Neither side, in the Board's view, was able to provide a convincing explanation for this part of section 6(1). Although it has been part of the legislation at least since 1913, the Board was given no information as to its genesis, nor was it referred to any parallels in the legislation of other comparable jurisdictions. Mr Parker, for the appellants, submitted that it was intended to prevent "the corrupt marriage of executive power and private wealth". That seems unconvincing. In an Act which clearly envisages the use of compulsory powers to facilitate commercial development, such as hotels, it is difficult to see any fundamental objection to a proposal of this kind. There is no general principle of the common law which precludes the use of compulsory powers to facilitate private development of this kind (see eg *Standard Commercial Property Securities Ltd v Glasgow City Council (No 2)* 2007 SC(HL) 33 para 6). Furthermore, even on Mr Parker's case, it seems that the promoters could have achieved precisely the same commercial result if the agreement provided for payment to be made in the first instance out of public revenue but subject to an indemnity by Park Ridge.

29. More importantly, the provision is not necessary for the protection of the land owner. The statutory right to compensation, and the right to apply to the court to enforce it, are conferred by the Act itself, as confirmed by the constitution. The liability under the Act falls on the "promoters", in this case the responsible minister. To that extent it can be seen as ultimately a charge to the public revenue, regardless of any agreement between the government and a particular developer as to how it is to be funded. In the Board's view the words of section 6(1) do no more than confirm what is implicit in any event. The Board therefore agrees with the interpretation of the Court of Appeal. It is satisfied in any event that this requirement should not be read as a mandatory pre-condition to the exercise of the statutory power, breach of which is fatal to the validity of all that follows. On the facts of the present case, there was no suggestion that in practice the government would be unable or unwilling to meet the statutory obligation to pay compensation once its amount had been established.

30. Mr Parker had a separate point based on the alleged failure of the government to pay compensation promptly as required by article 27. He referred inter alia to a letter written to his firm on 23 May 2008 by the Director of Investment advising that a cheque representing the value of the land owned by his client was available for collection. He suggested that this was evidence of an attempt by the government, in collusion with Park Ridge, to circumvent the statutory requirement for assessment of compensation by the court, by seeking a private purchase for a price fixed by reference to a "ceiling" agreed with Park Ridge. In the Board's view this point is unarguable.

31. The judge saw merit in this point, holding that the defendant had contravened article 27(c) of the constitution by failing to pay prompt and adequate compensation for the land in the manner prescribed by law and made a declaration to that effect. (para 58, 61) The Court of Appeal disagreed, pointing to the right of either party

under section 15 of the Act to apply to the Supreme Court for assessment of compensation, that being an essential preliminary to any claim for breach of article 27.

32. The Board agrees with the Court of Appeal. As provided by section 6(2), the original notice invited the owners to state in writing the amount and particulars of their claims to compensation. That in the normal way is the starting point for negotiation and if possible, agreement of compensation, but failing that either party has the right under section 15 to refer the matter to the Court. There is nothing in the Act to suggest that there is any obligation on the promoter to start that process. Special provision is made for circumstances where the person entitled to compensation cannot be found (section 16), but that has no application here. If the owner has reason to think that the promoter is dragging its feet, his remedy is to refer the matter to the Court. There is no evidence in this case of any attempt by the owners to formulate their claim, let alone to secure its determination by the court. In those circumstances, they can have no valid complaint of delay on the part of the promoter.

Other constitutional claims

33. As Mr Parker in effect accepted, the constitutional claims cover much the same ground as the statutory claims, although there are some differences in wording. The judge held that the claims under the constitution were made out on two grounds: first, under article 27(b), that the promoters had shown no reasonable justification for the consequent hardship caused by the acquisition to the appellants; and secondly, under article 27(c), they had failed to pay prompt and adequate compensation. The latter has been addressed in the previous section of this judgment.

34. As to the issue under article 27(b), it seems that the judge was wrongly influenced by her mistaken belief that the appellants' evidence was, and would remain, undisputed. However, even on that basis, in the Board's view the appellant's case was bound to fail, in the absence of any evidence of the use which they were making of the land, let alone of any "hardship" on their part. In the absence of such evidence, there was nothing to set against the public purposes for which the land was being acquired, of which no valid challenge had been made within the time permitted. In the Board's view Mr Stevens was correct to submit that any separate challenge under the constitution was precluded by the proviso to article 28 of the constitution, given the availability of a means of challenging the order under the Act. The fact that that was in some respects limited in time does not mean that it was not an "adequate means of redress" for the purposes of article 28.

Conclusion

35. For these reasons the Board agrees with the Court of Appeal that the claim should be dismissed.

36. It is necessary finally to comment on the last paragraph of the Court of Appeal's judgment. In allowing the appeal, they directed that the matter be remitted to the Supreme Court for the assessment of compensation for the land, adding that this was –

> "without prejudice to the respondent's right to challenge the legality of the acquisition and the merits of the acquisition pursuant to article 27 of the Constitution and section 15(6) of the Act and if necessary to appeal the same on its merits at some other time". (para 37, 41).

It seems that no specific order was drawn up.

37. It is not clear precisely what the Court of Appeal had in mind when reserving a right to challenge the "legality" and "merits" of the acquisition under article 27. Mr Stevens fairly takes no issue on the order remitting the issue of compensation to the Supreme Court. He specifically (and on instructions) takes no limitation point under section 50 of the Acquisition of Land Act. On the other hand he submits, rightly in the Board's view, that there is no basis for reserving any other claim under the constitution as to the legality or merits of the acquisition. Any further constitutional claim arising out of the matters covered by the present claim would be precluded by the proviso to article 28. There might be grounds for a future claim, if the process of determination by the Court or payment thereafter is unreasonably delayed. However that would be a new ground of challenge which requires no reservation in the present proceedings. For these reasons the Board considers that this part of paragraph 41 cannot be supported.

38. For these reasons the Board will humbly advise Her Majesty that the appeal should be dismissed with costs, and that there should be remitted to the Supreme Court the assessment of the value of the selected land and the amount of compensation payable.