

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

No. T-67 of 2003

No. 1965 of 2003

Between

ROBINSON CRUSOE LIMITED

Applicant

And

**THE ATTORNEY GENERAL
OF TRINIDAD AND TOBAGO**

Respondent

Before the Honourable Mr. Justice J. Tam

Appearances -

For the Applicant:

Dr. F. Ramsahoye, S.C.,
Mr. R. Harnanan,
Mr. A. Byrne (instructing)

For the Respondent:

Dr. L. Barnett, Q.C.,
Mr. J. Jeremie
Ms. R. Hosein
Ms. K. Founillier (instructing)

Decision

Before the Court is the applicant's Notice of Motion filed on July 4, 2003, pursuant to section 14 of the Constitution. There are 16 grounds set out in the motion. The applicant is seeking the following relief –

- (a) A declaration that the threatened and/or intended acquisition by the State of its property at Pigeon Point in the island of Tobago or any part thereof

contravenes sections 4 and 5 of the Constitution and may not be lawfully carried out;

- (b) An order that compensation and/or damages, including exemplary damages be assessed in respect of loss and damage suffered by it by reason of the unconstitutional threat by the State to acquire its property and business as a beach resort;
- (c) A conservatory order to preserve the property and business as its private property until the hearing and determination of the motion;
- (d) An injunction against the respondent as representing the State by itself, its servants and/or agents and/or its instrumentalities from acquiring the property and business or any part thereof;
- (e) Prior to the hearing of the motion, an interim order for discovery of all correspondence considered or dealt with by the State concerning the threatened acquisition and the reasons therefore;
- (f) Alternatively, a declaration that the State cannot acquire the property unless it has made fiscal arrangements to provide for and to promptly pay compensation for the property as a beach resort managed and operated as a going concern at the true market value of the land and the assets connected and/or used and/or enjoyed with the business of the resort; and
- (g) All such orders and directions as are necessary and/or appropriate to enforce the applicant's fundamental rights to ownership and enjoyment of its property and business and to prevent the applicant from suffering loss and damage by unconstitutional action by the State.

In support of the motion the applicant has filed 2 affidavits – the main affidavit was deposed to on July 4, 2003, by the applicant's general manager, Richard Lobo, while the other affidavit was deposed to on July 28, 2003, by instructing attorney, Adrian Byrne. In opposition, the respondent filed 2 affidavits – the first deposed to on July 31, 2003, by State attorney, Candice Cielto, and the second deposed to on August 5, 2003, by the Acting Chief Administrator of the Tobago House of Assembly, Michael Jerome Keens-Dumas. Dr. Barnett has informed the Court that there are no primary issues of fact in dispute. The claim for an interim order for discovery has already

been dealt with by my brother, Mohammed, J. The only issue now before this Court is the applicant's claim to be entitled to a conservatory order to preserve its property and business as its private property pending the hearing and determination of the substantive motion.

The Facts

The applicant is a company incorporated in Trinidad & Tobago and in the year 1996 became, and still is, the fee simple owner of a parcel of land in Tobago comprising of some sixty acres known as the Pigeon Point Estate on which the applicant operates and maintains a beach resort called Club Pigeon Point. The main commercial activity in Tobago is the business of tourism and in this regard the Pigeon Point Estate is of particular significance and importance to the island because, among other things, it possesses about two miles of the most beautiful of beaches in the Caribbean and is conveniently located in terms of access to other tourism-based activities. In Mr. Lobo's affidavit, he confirms this by his statement that "Club Pigeon Point has been developed and maintained by the applicant to the extent that it is the hub of the tourist industry in the island."

While overall responsibility for administering the country lies with the government of Trinidad & Tobago, the internal self-government of Tobago is largely conducted by the Tobago House of Assembly ("the Assembly"), which is led by its Chief Secretary. Shortly after the applicant became the owner of the Pigeon Point Estate, disputes arose between it and various fisher-folk regarding access to the beach and to a mooring area called Windhole. Between June and September 2001, further disputes arose between the Assembly and the applicant over the ownership and management of a historical jetty at Pigeon Point (and this is now the subject of proceedings pending before another court). The Assembly subsequently took up the plight of the fisher-folk, insisting that all Tobagonians (and I dare add, Trinidadians) should have free, unhindered and convenient access to the beach and to Windhole. Thereafter, representatives of both the Assembly and the applicant engaged in negotiations with a view to amicably working out their differences. It is not necessary at this stage to go

into the details of the various aspects of those negotiations. It is sufficient to say that they appear to have centered around four matters:

- (a) Pedestrian access to and from the public beach;
- (b) Accommodation of *bona fide* fisher-folk at Windhole;
- (c) Ownership and management of the Pigeon Point jetty; and
- (d) Removal of squatters occupying an area known as the Swallows.

Various meetings took place between representatives of the applicant and officials of the Assembly and much correspondence was exchanged. The negotiations went on until May 2003 (just under 2 years after they had begun), when the Assembly's Chief Secretary wrote to the applicant putting an end to the negotiations before full agreement had been reached. On May 13, 2003, the Assembly issued a press release announcing that the Pigeon Point Estate would be compulsorily acquired. This was shortly followed by an announcement by the Prime Minister that the Government of Trinidad & Tobago would support the acquisition of the estate. Subsequently, various reports appeared in the newspapers suggesting that the process of compulsory acquisition had begun.

On July 4, 2003, the applicant filed its Constitutional motion initiating this action against the State, claiming relief for, *inter alia*, a breach of its constitutional right to ownership and enjoyment of its property. As part of the relief being claimed, the applicant contends that it is entitled to a conservatory order to preserve the Pigeon Point property and business as its private property until the hearing and determination of the motion. The issue for determination at this stage is whether or not the applicant is entitled to the conservatory order that it seeks and the Court is not at this time concerned with determining whether there has been any breach of the applicant's rights under the Constitution. That matter will be dealt with in due course when the substantive motion is heard by the court.

The law

In its skeleton arguments of August 5, 2003, it is stated on behalf of the applicant that "the issue on this application is whether the court hearing the application by Constitutional Motion may properly grant interlocutory relief to prevent the

threatened acquisition pending the hearing and determination which is before the court” and that the application for a conservatory order “is intended to prevent the (Land Acquisition) Acts of 1994 and 2000 being applied to deny the applicant (sic) rights to its property pending the hearing and determination of the motion to question the constitutionality and legality of the proposed taking”. In those written arguments, the applicant further states that the “purpose of the conservatory order is to prevent the State from taking action to acquire while the High Court has before it the consideration of the constitutionality and legality of the taking” and that “the conservatory order will protect the applicant’s rights to its property during the hearing and will preserve the integrity of the legal system by disallowing action, the validity of which the Court has under its investigation.”

In his oral arguments Dr. Ramsahoye, after taking the Court through the affidavit evidence in some detail, raised several matters that, in the opinion of the Court, are better left to be dealt with at the hearing of the substantive motion. These cover issues ranging from whether the Assembly had been conducting the negotiations in bad faith, whether the exercise of the power to acquire is, in the circumstances, an abuse of the State’s powers, whether that exercise is motivated by political ill-will, whether the proposed/threatened acquisition is a reasonably proportional response to the differences between the applicant and the Assembly, to whether that acquisition is for a genuine public purpose. Those issues will no doubt have some bearing on whether or not any constitutional right of the applicant has been or is likely to be breached. The Court, however, prefers to keep the focus on the issue of whether or not it should grant the interim conservatory order pending the hearing and determination of the substantive motion.

Several authorities have been cited in the arguments presented to the Court. It is not necessary to refer to all of them, though reference will be made to those that the Court has found to be of assistance. In relation to the issue now before the Court, the basic principles that emerge from those authorities are:

- (a) That the Court should not grant an injunction against the State;

- (b) That the Court can make a conservatory order against the State in cases where, but for the making of that order, the jurisdiction of the Court is likely to be frustrated if the State proceeds with the proposed act (See: the decision of the Court of Appeal in *AG v. Sumair Bansraj* [1985] 38 WIR 286);
- (c) That in exercising its discretion whether to grant or refuse the application for a conservatory order, the Court must examine and consider factors similar to those that it is required to consider on an application for an interim injunction, but with modifications appropriate to the public law element of the case, namely -
- (i) Whether the applicant has shown that it has a cause of action in law that entitles it to substantive relief;
 - (ii) Whether there is urgency in that there is an impending threat to its legal rights; and
 - (iii) Whether the relief sought is obtainable against the named respondent (in this case the Attorney General)
- (See: HCA No. 1478 of 1994 *Central Trinidad Steel Limited v. Iron and Steel Company Limited and others*)

Nature of the relief

The Court is of the view that the real nature of the interim relief sought by the applicant is injunctive and not a true conservatory order. As a final order, part of the relief that the applicant is seeking in its motion is “an injunction against the respondent herein as representing the State by itself, its servants and or agents and or its instrumentalities from acquiring the property and business of the applicant at Pigeon Point or any part or parts thereof”. The Court accepts the argument of Dr. Barnett; that in essence this must mean that the applicant is thereby seeking to restrain the State from initiating any process for acquisition of the property. By whatever name one chooses to call it, in the view of the Court, this is clearly in the nature of injunctive relief and is not aimed at the preservation of the property.

Dr. Ramsahoye relied heavily on the decision of the Court of Appeal in AG v. Bansraj (supra.) and submitted that the instant case is governed by that decision. But while the principles set out in that decision are applicable, the facts of that case are materially different and, to borrow the words of Dr. Barnett, the decision in the Bansraj case does not really give much comfort to the applicant. In that case, the conservatory order granted by the Court was directed towards specific persons who were parties to the action and not, as in the instant case, to the Attorney General in her representative capacity. Unlike the instant case, the complaint in the Bansraj case was that the provisions of the Land Acquisition Act had not been complied with and that the State had proposed to proceed with demolishing the applicants' homes before their motion could be heard. It is clear from that case that by virtue of the combination of sub-sections 14(2) and 14(3) of the Constitution and the State Liability And Proceedings Act, Chapter 8:02, the Court is prohibited from making an order in the nature of an interim injunction against the State, though in special circumstances a Court may grant what has now come to be known as a conservatory order, for the preservation of the property. In the course of his judgment in the Bansraj case, Kelsick, CJ, made it clear (at page 290d) that he was referring to an instance where it was just to prevent the State from "destroying or disposing of" the relevant property until the determination of the constitutional proceedings and there is a final determination by the Court. In the instant case, the evidence does not support the proposition that the State is about to either destroy or dispose of the applicant's property. It is the Court's view that the applicant has failed to demonstrate that there is any special circumstance that warrants the making of a conservatory order.

Dr. Ramsahoye has pointed to the loss of the applicant's business if the State proceeds with the acquisition. In the Court's opinion, this to is not a reason for granting the conservatory order since the Land Acquisition Act clearly provides for compensation to be paid to the applicant, such compensation being a charge on the consolidated fund.

Whether a cause of action in law entitling applicant to substantive relief

The applicant alleges that there is a threatened/intended acquisition of its property by the State in contravention of its rights under sections 4 and 5 of the Constitution. The basis for this contention appears to be the pronouncement of certain officials of the Assembly, the Prime Minister (as reported in the media) and subsequent newspaper reports. However there is no evidence that the State has done anything to initiate the acquisition process under the Land Acquisition Act. This would not be the first time that politicians and public officials have made pronouncements without follow-through action. Nevertheless at the heart of the issue is whether or not the Court should make an order, even an interim one, the effect of which would be to prevent the State from exercising a statutory power given to it by Parliament, in this case the power to acquire the applicant's property via the provisions of the Land Acquisition Act.

Section 4(a) of the Constitution guarantees the right to the enjoyment of property and the right not to be deprived thereof except by due process of law. However, the right to enjoy one's property is not an absolute right since one can be deprived of one's property so long as due process is followed. The land Acquisition Act allows the State to acquire private property and prescribes certain statutory procedures to be followed. An important aspect of those statutory procedures encompasses the right to fair compensation. There is no constitutional right to be protected from the lawful acquisition of one's private property by the State. The right that the Constitution provides is the right not to be deprived thereof except by due process. To prevent the State from proceeding with any plan to acquire property, the applicant would have to show that the State was unlikely to follow due process and there is absolutely no evidence before the Court that the State will not follow due process. Accordingly, in the Court's view, it appears that there is no serious issue to be tried in relation to section 4(a) of the Constitution.

As for the applicant's contentions under subsections 4(b) and 4(d) of the Constitution (i.e., its right to equality before the law and the protection of the law, and its right to equality of treatment from any public authority in the exercise of any functions), again the Court entertains much doubt whether, on the evidence now before it, the applicant is likely to make out its case.

Dr. Barnett has put the matter this way, that in order for the applicant to obtain a remedy in the nature of an interim injunction against the Attorney General, where its effect would be to prevent the government from exercising its powers under the Land Acquisition Act, the applicant must satisfy a much higher evidential threshold of demonstrating a strong *prima facie* case. In the Court's opinion, the applicant has yet to demonstrate such a case.

Urgency

The evidence is that the State has done nothing whatever to initiate the proposed/threatened acquisition. It is even a possibility that the State may decide against acquisition at all, although, by the same token, it is at least an equal possibility that it may indeed follow through on the pronouncements of the various officials. In any event, the evidence does not suggest that there is any imminent threat that the applicant is about to lose its property and the business being carried on there, so that no evidence of any urgency has been shown. Indeed, the Court dares to say that it is quite unlikely that any acquisition will be completed before the substantive motion is heard and determined, given the statutory framework that must be followed and the notorious pace at which Government departments tend to carry out their affairs. Further, the dictum of Braithwaite, JA, in the *Bansraj case* makes it evident that the court is to give priority to cases of this nature.

Is the relief sought obtainable against the Attorney General

In view of the fact that I have found the true nature of the interim relief being sought to be injunctive (i.e., to restrain the State from exercising its statutory power), and not conservatory (i.e., to preserve the property by preventing its likely destruction or disposal), the order being sought is not obtainable against

the Attorney General because the Attorney General merely acts in a representative capacity. The right to an injunction is a right *in personam*. To obtain relief, the applicant would at least need to identify a particular person or persons against whom the order can be directed. This has not been done.

There is no doubt that in those special cases where the State proposes to carry out an act, the doing of which is likely to result in the frustration of the Court's jurisdiction, because the very subject-matter of the litigation will be lost or destroyed, it is open to the Court to make a conservatory order directed against the Attorney General. However the instant case is not such a case.

Conclusion

Between the completion of the hearing of the application before the Court and the date of this decision, the Court was referred to 2 cases that it was felt would be helpful to its deliberations. These are the decisions of the Privy Council in **Gairy and another v. AG of Grenada** (2001) 3 WLR 779 and Privy Council Appeal No. 47 of 2003 **The Belize Alliance of Non-Governmental Organizations v. Department of the Environment and** another (a decision handed down on August 13, 2003). In the Court's view, the **Gairy case** is of little importance to the issue before it. In that case, there was an agreed breach of the appellant's constitutional rights (unlike the instant case). The case does demonstrate, however, that where there is a clear breach of a constitutional right, it is the duty of the Court to provide an appropriate remedy, even if that remedy may involve a mandatory direction against an official of the State. In the instant case, breach of a constitutional right is still to be established. **The Belize Alliance case** is more helpful, particularly the passages at paragraphs 35 and 36. At paragraph 36 Lord Walker of Gestingthorpe, approved of the dictum of Lord Goff of Chieveley in **The Queen v. Secretary of State for Transport, Factortame Limited (No. 2)** (1991) AC 603 at 671-4. To quote Lord Goff, "...the Court should not restrain a public authority by interim injunction from enforcing an apparently authentic law unless it is satisfied, having regard to all the circumstances that

the challenge to the validity of the law is, *prima facie*, so firmly based as to justify so exceptional a course being taken.” In the instant case, the plight of the applicant is even more difficult, since what is being challenged is not the validity of the statute itself, but the manner and circumstances in which the State proposes to use its power under the statute.

The Court must express its thanks to Counsel for both parties for their invaluable assistance in this matter. In all the circumstances, the Court is of the view that the application for a conservatory order is misconceived and must be refused. The applicant shall pay the respondent’s costs of the application, certified fit for Senior and Junior Counsel to be taxed in default of agreement.

Dated this 25th day of August, 2003.

Joseph Tam
Judge