

Privy Council Appeal Nos. 29 of 1983 and 34 of 1982

The Societe United Docks and Others *Appellants*

v.

The Government of Mauritius *Respondent*

and

The Marine Workers Union and Others *Appellants*

v.

The Mauritius Marine Authority and Others *Respondents*

FROM

THE SUPREME COURT OF MAURITIUS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 25TH OCTOBER 1984

Present at the Hearing:

LORD DIPLOCK
LORD KEITH OF KINKEL
LORD BRANDON OF OAKBROOK
LORD BRIGHTMAN
LORD TEMPLEMAN

[Delivered by Lord Templeman]

These two appeals were heard together because they both involved consideration of the question whether the appellants have suffered injury which entitles them to redress under the Constitution of Mauritius.

Chapter II of the Constitution dated 12th March 1968 is headed "Protection of Fundamental Rights and Freedoms of the Individual" and comprises sections 3 to 19 inclusive. Section 3 is in these terms:-

"3. Fundamental rights and freedoms of the individual.

It is hereby recognised and declared that in Mauritius there have existed and shall continue to exist without discrimination by reason of race, place of origin, political opinions, colour, creed

or sex, but subject to respect for the rights and freedoms of others and for the public interest, each and all of the following human rights and fundamental freedoms, namely -

- (a) the right of the individual to life, liberty, security of the person and the protection of the law;
- (b) freedom of conscience, of expression, of assembly and association and freedom to establish schools; and
- (c) the right of the individual to protection for the privacy of his home and other property and from deprivation of property without compensation, and the provisions of this Chapter shall have effect for the purpose of affording protection to the said rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

Section 8 is entitled "Protection from deprivation of property" and sub-section (1) provides as follows:-

- "(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied, that is to say -
- (a) the taking of possession or acquisition is necessary or expedient in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilisation of any property in such a manner as to promote the public benefit; and
 - (b) there is reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property; and
 - (c) provision is made by a law applicable to that taking of possession or acquisition -
 - (i) for the prompt payment of adequate compensation; and
 - (ii) securing to any person having an interest in or right over the property a right of access to the Supreme Court, whether direct or on appeal from any other authority, for the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any

compensation to which he is entitled, and for the purpose of obtaining prompt payment of that compensation."

Section 17 is entitled "Enforcement of protective provisions" and sub-section (1) is in these terms:-

"(1) If any person alleges that any of the foregoing provisions of this Chapter 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 that is lawfully available, that person may apply to the Supreme Court for redress."

On any such application for redress, the Supreme Court, by section 17(2), 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 sections 3 to 16] 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."

The appellants claim that they have been subjected by the Government of Mauritius to "deprivation" of property without compensation in contravention of section 3 of the Constitution and they seek redress under section 17. The respondents assert that section 3 does not confer rights more extensive than the rights specified in section 8 which applies only where property has been "compulsorily taken possession of" or "compulsorily acquired". The respondents have not compulsorily taken possession of or compulsorily acquired any property belonging to the appellants and therefore, it is said, the appellants are not entitled to any redress.

The Societe United Docks appeal

The export of sugar from Mauritius has long been organised by an association of growers and millers known as the Mauritius Sugar Syndicate. The appellant dock companies were engaged by the Syndicate to handle and store bagged sugar in warehouses belonging to the dock companies. The appellant stevedore companies were engaged by the Syndicate to load the sugar on board ships by manual labour. As early as 1954 there were proposals for the construction of a bulk terminal to replace the warehouses of the dock companies and for the installation of mechanised loading to replace the

manual labour of the stevedores. At first the dock companies envisaged that they would provide the bulk terminal themselves. Reports and estimates were commissioned but the dock companies made no progress, either because they lacked the will or the means. The Syndicate then decided to pursue the project. The minutes of a meeting held at the Chamber of Agriculture on 21st January 1970 attended by representatives from the Chamber of Agriculture, from the Syndicate, from the dock companies and the stevedore companies, recorded that:-

"All sugar associations, grouping millers and planters had agreed that the most appropriate way of settling the problem of financing and administering the sugar bulk terminal would be the setting up of a non-profit company run along the lines of a producers' co-operative society and operating as an offspring of the Mauritius Sugar Syndicate. This would have the merit of allowing all sugar producers to reap the full benefit of the anticipated economies since the new company would claim from the Mauritius Sugar Syndicate - which would be financing the project - the actual net cost of storage and loading."

It was recognised that this development would put the dock companies and the stevedore companies out of business except for the storage and loading of small quantities of demerara sugar and domestic supplies which would not be handled by the bulk terminal. In these circumstances it was further recorded in the minutes of the meeting that:-

"The sugar industry had emphatically agreed that the dock and stevedore companies should be adequately compensated in some form or other having regard to the valuable and competent services which they had provided in the handling of Mauritian sugar over a great number of years. The actual terms of such compensation could be discussed at some later stage as there were other pressing matters to deal with, namely the labour redundancy aspect"

This decision of the Syndicate announced on 21st January 1970 tolled the death knell of the main business of the dock companies and stevedore companies, solacing them only with the hope of receiving some mark of gratitude from the Syndicate for past services. In order to finance the construction of the bulk terminal, the Syndicate sought and obtained government measures which raised levies on the proceeds of sale of the 1974 and 1975 sugar crops. The monies thus raised proved insufficient and further levies or other sources of capital were required. Finally, in 1979 the Government decided that the bulk terminal should be constructed by and should be vested in a statutory corporation which, despite the protests of the

Syndicate, would be controlled by a majority of representatives of the Government. The Government's decision resulted in the Mauritius Sugar Terminal Corporation Act 1979 ("The Sugar Terminal Act") which came into force on 30th June 1979. By section 3 the Act established the Mauritius Sugar Terminal Corporation as a body corporate. By section 4 the Corporation was directed to provide, operate and maintain facilities for the storage, sampling, bagging, packing, and loading and unloading of sugar. By section 7 the administration and control of the affairs of the Corporation were vested in a board consisting of a majority of members of government departments. The minority included representatives of planters and millers, a representative of the Syndicate and representatives of employees of the Corporation. All these representatives are, however, appointed by the Minister to whom responsibility for the Corporation is assigned. By section 17 of the Sugar Terminal Act, the initial capital of the Corporation was established at 300 million rupees made up of over 126 million rupees being the proceeds of the levies on the sugar crops for the years 1974 and 1975 and interest earned thereon, and over 173 million rupees being the amount contributed by the Government. By section 19 the revenue of the Corporation was directed to be applied in payment of certain costs, charges and expenses, including compensation payable to employees of the dock companies and to employees of the stevedore companies and any balance of revenue of the Corporation was directed to accrue:-

".... to such persons in such manner and in such proportion as the Board may determine."

Section 5(1) conferred an express monopoly on the Corporation in these terms:-

"... no person, other than the Corporation or an authorised body, shall -

(a) as from the appointed day store or load into ships any sugar manufactured in Mauritius;...."

By section 5(2):-

".... as from the appointed day -

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

By section 2 the appointed day was defined as a day to be appointed by the Minister for the purposes of section 5 and "authorised body" was defined as any person authorised by the Minister to receive or store sugar. No formal appointment of the appointed day has been made but by an order dated 28th February 1980 the Minister appointed the Syndicate to be an

authorised body. The bulk terminal was constructed and began operations in July 1980. The services of the dock companies and the stevedore companies for the export of sugar from Mauritius forthwith became redundant. The Corporation and the Syndicate as an authorised body will no doubt continue to avail themselves of the services of warehouses and stevedores, if offered by the appellants, so far as is necessary for the storage and loading of demerara sugar and domestic supplies which are not handled by the bulk terminal. But the main business of the dock companies and the stevedore companies came to an end when the bulk sugar terminal began its operations in July 1980.

Although the Sugar Terminal Act provided for compensation to be paid to the redundant workers of the dock companies and the stevedore companies, no provision was made for compensation to be paid to those companies themselves. The Syndicate had offered in 1970 to pay compensation in gratitude for past services. The offer was made when the Syndicate expected to become the owner of the bulk terminal but the Syndicate is no longer willing to pay compensation now that the bulk terminal is owned and controlled by the Corporation. In December 1980 the dock companies and the stevedore companies instituted these present proceedings. In their plaint with summons dated 23rd December 1980 the appellant dock companies assert that the Sugar Terminal Act:-

"(a) ... in so far as it creates a monopoly in favour of the Mauritius Sugar Terminal Corporation with regard to the storage and loading of sugar involves a compulsory acquisition or taking of possession of property

"(b) that the effect of [the Act] has been to deprive the [appellants] of that part of its property consisting in its business of storing and handling of sugar, without payment of compensation.

"(c) that such deprivation amounts to a violation of the [appellants] fundamental right to protection against such deprivation guaranteed by section 3(c) and 8 of the Constitution of Mauritius."

The appellants accordingly applied for redress under section 17 of the Constitution.

Their Lordships consider that the business of the appellants was not compulsorily taken possession of, or compulsorily acquired by the Government, the Corporation or anyone else. Once the bulk terminal was constructed the business of the dock companies in providing warehouses for the storage of sugar for export from Mauritius and the business of the stevedore companies in providing stevedores to load sugar manually simply became irrelevant and ceased to

exist. The appellants contend that even so they are entitled to redress under the Constitution; they contend that the effect of the Sugar Terminal Act was to deprive them of their business without compensation in breach of the rights granted to them by section 3 of the Constitution. The Government of Mauritius deny that the Sugar Terminal Act deprived the appellants of any property but if it did so the appellants, it is said, are not entitled to redress because they cannot prove that their property was compulsorily taken possession of or compulsorily acquired. The Constitution offers redress where, in the words of section 8, property is compulsorily taken possession of or compulsorily acquired but not otherwise. Section 3 of the Constitution only contains a general recognition and acceptance of rights and freedoms and only affords protection in the circumstances specified in the subsequent sections of Chapter II of the Constitution. The relevant subsequent section is section 8 which only enables an individual to claim protection and to obtain redress if property is compulsorily taken possession of or compulsorily acquired without compensation. The appellants reject the Government's narrow construction of the Constitution and deny that section 8 has a limiting effect on section 3. The appellants contend that section 3 has effect in accordance with its terms and in suitable cases, such as the present, provides protection beyond the ambit of section 8. Alternatively, section 8 must be construed in the light of section 3 and so construed applies not only when property is compulsorily taken possession of or compulsorily acquired but also when property is destroyed.

Their Lordships have no doubt that all the provisions of Chapter II, including section 8, must be construed in the light of the provisions of section 3. The wording of section 3 is only consistent with an enacting section; it is not a mere preamble or introduction. Section 3 recognises that there has existed, and declares that there shall continue to exist, the right of the individual to protection from deprivation of property without compensation, subject to respect for others and respect for the public interest. Section 8 sets forth the circumstances in which the right to deprivation of property can be set aside but it is not to curtail the ambit of section 3. Prior to the Constitution, the Government could not destroy the property of an individual without payment of compensation. The right which is by section 3 of the Constitution recognised and declared to exist is the right to protection against deprivation of property without compensation. A Constitution concerned to protect the fundamental rights and freedoms of the individual should not be narrowly construed in a manner which produces anomalies and inexplicable

inconsistencies. Loss caused by deprivation and destruction is the same in quality and effect as loss caused by compulsory acquisition. If by the Sugar Terminal Act the appellants were deprived of property without compensation they are entitled to claim redress under the Constitution.

Mr. Newman, who appeared for the Government of Mauritius, relied on the decision of the Court of Appeal in *France Fenwick and Co Ltd v. The King* [1927] 1.K.B. 458. That case, however, only decided that a direction given pursuant to regulations made under the Emergency Powers Act 1920 that a vessel should not be unloaded did not amount to a requisition of the vessel and did not entitle the owner of the vessel to compensation for requisition or to compensation at common law. The case is not authority for the proposition that at common law compensation is not payable for deprivation or destruction of property. Indeed in *Burmah Oil Co. Ltd v. Lord Advocate* [1965] A.C. 75 the House of Lords by a majority held that there was a legally enforceable general right at common law to compensation for damage or destruction done in the exercise of the royal prerogative in relation to war.

Mr Newman next relied on *Olivier v. Buttigieg* [1967] A.C. 115. In that case Lord Morris of Borth-y-Gest, delivering the judgment of the Board, at page 128, described section 5 of the Constitution of Malta, which contains provisions similar in many respects to section 3 of the Constitution of Mauritius, as "an introduction to and in a sense a prefatory or explanatory note in regard to the sections which are to follow The section appears to proceed by way of explanation of the scheme of the succeeding sections". As Lord Morris also pointed out, section 5 of the Constitution of Malta "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". Section 3 of the Constitution of Mauritius on the other hand is not a preamble in form or in substance but is an enacting provision. In *Olivier v. Buttigieg* government employees were forbidden to introduce a specified newspaper into government hospitals and this prohibition was held to be an unconstitutional hindrance of the newspaper editor in the enjoyment of his freedom to impart ideas and information without interference, although the editor was not thereby debarred from expressing and circulating his views to the public. The Board were clearly not prepared to give a narrow construction to the freedoms granted by the Constitution of Malta.

In *Jaundoo v. Attorney-General of Guyana* [1971] A.C.972 the Board held that redress under Article 19

of the Constitution of Guyana, similar in terms to section 17 of the Constitution of Mauritius, could be obtained under the usual practice and procedure of the High Court and included redress by way of an award of compensation for damages. The same principles apply to the Constitution of Mauritius although on the present appeals the contrary was faintly argued.

In *Attorney-General v. Antigua Times* [1976] A.C. 16 it was argued that the redress given by the Constitution of Antigua to a "person" was not available to a corporation. Lord Fraser of Tullybelton delivering the judgment of the Board said, at page 25, that "... having regard to the important place in the economic life of society occupied by corporate bodies, it would seem natural for such a modern Constitution, dealing with, inter alia, rights to property, to use the words 'person' to include corporations". On the present appeals it was suggested on behalf of the Government of Mauritius that a different result should follow in the present case because section 3 of the Constitution of Mauritius referred to the right of "the individual". But no logical distinction can be drawn between the individual protected by section 3 and 'the person' protected by the remaining sections of Chapter II of the Constitution. Both expressions include a corporation where the context so allows, as it does in the present instance.

Mr. Newman relied on the decision of the Board in *Government of Malaysia v. Selangor Pilot Association* [1978] A.C.337 for the argument that the Constitution of Mauritius only entitled an individual to redress if his property was compulsorily taken possession of or compulsorily acquired. In the *Selangor* case an association of licensed pilots providing piloting services in Port Swettenham enjoyed a monopoly. By the Port Authorities (Amendment) Act 1972 and regulations made thereunder, the power to grant licences was transferred from the pilot board of Port Swettenham to a pilotage committee appointed by the port authority. Licensed pilots could only lawfully provide pilotage if employed by the port authority. The port authority offered employment to all the licensed pilots including the members of the association and began to operate a pilot service. Article 13 of the Constitution of Malaysia provided that "(1) No person shall be deprived of property save in accordance with law. (2) No law shall provide for the compulsory acquisition or use of property without adequate compensation". It was held that the rights of licensed pilots to provide pilotage services and to employ others as pilots were not rights of property within Article 13 (1) and (Lord Salmon dissenting) that there had been no compulsory acquisition or use of the goodwill or

business of the association. There are significant differences for present purposes between the Constitution of Malaysia and the Constitution of Mauritius. Article 13(1) of the Constitution of Malaysia affords no protection against the deprivation of property "in accordance with law" and the necessary law was passed. Article 13(2) provided compensation only for compulsory acquisition or use. Section 3 of the Constitution of Mauritius on the other hand recognises and declares the right to compensation for deprivation of property in accordance with law.

In *Maharaj v. A.G of Trinidad and Tobago* (No. 2) [1979] A.C. 385 the Board considered section 1 of the Constitution of Trinidad and Tobago which corresponds to section 3 of the Constitution of Mauritius. Lord Diplock, at page 395, said that section 1 of the Constitution of Trinidad and Tobago entitled the individual to the "... protection or non-interference under the law as it existed immediately before the Constitution came into effect" but, at page 396, "... the protection afforded was against contravention of those rights or freedoms by the state or by some other public authority endowed by law with coercive powers. The chapter is concerned with public law, not private law". The victim of coercive powers exercised by the Government was entitled under the Constitution to redress by way of an award of damages. The question in the present case is whether the appellants are the victims of the exercise of coercive power by the Government of Mauritius.

In *Manitoba Fisheries Ltd v. The Queen* [1979] 1RCS 101 under the Canadian Freshwater Fish Marketing Act R.S.C. 1970 the Freshwater Fish Marketing Corporation was granted the commercial monopoly in the export of fish from Manitoba and as a direct result of that grant a company engaged in the business of exporting fish from Manitoba was then unable lawfully to continue its business. It was held that the Corporation had not taken or acquired the business of the company but that the Act had deprived the company of its business and for such deprivation the company was entitled to compensation at common law. The Supreme Court of Canada rejected the argument that compensation was only payable where a business had been compulsorily acquired.

In *Thornhill v. Attorney-General of Trinidad and Tobago* [1981] A.C. 61 Lord Diplock again dealt with the Constitution of Trinidad and Tobago. He said that the existing rights and freedoms which "shall continue to exist" were "not described with the particularity that would be appropriate to an ordinary Act of Parliament nor are they expressed in words that bear precise meanings as terms of legal art. They are statements of principles of great

breadth and generality, expressed in the kind of language more commonly associated with political manifestos or international conventions...". Lord Diplock went on to reaffirm that the protection afforded to the individual was against contravention of rights and freedoms by the state or by some other public authority endowed by law with coercive powers and not by another private individual. And he continued, at page 70:

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

Finally, in *Attorney-General of The Gambia v. Momodou Jobe* [1984] 3WLR 174 Lord Diplock dealing with the Constitution of The Gambia said, at page 183:-

"A constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction."

Upon the true construction of the Constitution of Mauritius and upon authority, their Lordships conclude that if the dock companies and the stevedore companies have been deprived of property by the coercive actions of the Government then they are entitled to compensation. The dock companies and the stevedore companies have undoubtedly sustained a loss. They can no longer derive profit from or sell the goodwill of a business which consisted of providing warehouses and manual labour for the storage and loading of sugar for export. That loss would not have occurred if the bulk terminal had not been built. The Sugar Terminal Act authorised and procured the construction of the bulk terminal. But the dock companies and the stevedore companies have no right to complain about the erection of a bulk terminal.

The Constitution does not afford protection against progress or provide compensation for a business which is lost as a result of technological advance. At

some time between 1954 and 1970 the Syndicate and the appellants recognised that an efficient sugar industry required a bulk terminal. By 1970 everyone connected with the industry recognised that the bulk terminal once erected would put an end to the main business of the appellants. The dock companies and the stevedore companies could not complain of the effect of the construction of the bulk terminal by the Syndicate, by the Government or by anyone else. The bulk terminal was eventually erected by the Corporation as a result of Government insistence. The Government did not act in order to ruin the appellants but in order to preserve an efficient sugar industry in the national interest. The main business of the appellants was doomed once it became clear that an efficient sugar industry required a bulk terminal. The appellants point to section 5 of the Sugar Terminal Act which conferred a monopoly on the Corporation and claim compensation because section 5 prohibits the warehouse companies and the stevedore companies from loading and storing sugar. But the monopoly granted by section 5 did not in the event inflict any damage on the appellants. The statutory monopoly was unnecessary to prevent competition by the appellants with the bulk terminal. The appellants' business could not compete with the bulk terminal because the business of the appellants no longer provided an efficient service for the sugar industry. There is no reason to think and no evidence to support any argument that the subsidiary business of the appellants dealing with demerara sugar and domestic supplies has suffered because of the Sugar Terminal Act or because of the monopoly granted by section 5 of that Act. Where the services of the appellants remain relevant and useful they will no doubt be employed by the Corporation or by the Syndicate as an authorised body.

If the Act had deprived the appellants of any goodwill, then the appellants would have been entitled to compensation equal to the value lost. The appellants remained free to offer their services to the Corporation and to the Syndicate as an authorised body. But so far as those services were offered in respect of the export of sugar, these had long ceased to be relevant to a sugar industry which was free to modernise and was forced to modernise its operations by the use of a bulk terminal. The Act did not deprive the appellants of their goodwill attached to the services offered by the appellants in connection with export sugar. The Act did not deprive the appellants of the goodwill attached to the services offered by the appellants in connection with the handling of demerara sugar and domestic supplies. The appellants remained free to offer those services to the Corporation and to the Syndicate as an authorised body. Those services remained relevant to the sugar industry and were unaffected by the Act.

Mr. Kentridge who appeared for the appellants recognised the difficulty of attributing the loss of the appellants' business to the effect of the Sugar Terminal Act. He argued in the alternative that the appellants lost the compensation which in 1970 the Syndicate had been willing to pay. The appellants may have been disappointed but they have not been deprived. It is possible that if the Syndicate had constructed the bulk terminal, the Syndicate would have honoured or could have been obliged by the law of Mauritius to honour its 1970 promise to pay something, doubtfully quantifiable by the Court, in recognition of the past services of the dock companies and the stevedore companies. The Government decided, in good faith and in the national interest, to construct the bulk terminal; that decision did not deprive the appellants of anything. The indirect result, possibly unknown to the Government at the time, was that the Syndicate never became under a duty to pay anything to the appellants. The Syndicate had promised to pay something if the Syndicate built the terminal. The Syndicate did not build the terminal and therefore the Syndicate never became bound to pay anything.

The Government's decision to build the terminal may have had many repercussions; the Government are not responsible for all those repercussions but only for depriving an individual of property by coercive action. The Syndicate, who were never in a position to construct the bulk terminal, never became bound to pay anything to the appellants. The Syndicate were dependent on the Government making available to the Syndicate the monies raised by the 1974 and 1975 sugar levies. The Syndicate were dependent on the Government imposing further levies and making the proceeds available to the Syndicate. The Government were not bound to finance the Syndicate by imposing and making available levies on sugar or by any other means. The Government refused to finance the Syndicate. That refusal made it effectively impossible for the Syndicate to construct the bulk terminal and the Syndicate never came under an obligation to honour the promise made in 1970 to the appellants.

It is true that if the Government had financed the Syndicate and if the bulk terminal had been constructed by the Syndicate, then the appellants would have expected the Syndicate to honour the promise made in 1970. But the refusal of the Government to finance the Syndicate did not deprive the appellants of anything. The refusal of a bank to lend money to a purchaser does not deprive the vendor's estate agent of his commission, although the result of that refusal is that the estate agent is disappointed and is never in a position to enforce the promise of the vendor to pay commission in the

event of a sale. The Government decided not to finance the Syndicate; the Government decided to construct the bulk terminal. The Government passed the Sugar Terminal Act to give effect to the decisions reached by the Government and not with the object of coercing the appellants. The Government owed no duty to the Syndicate or to the appellants not to reach the decisions which were made or to make any other decisions.

The Supreme Court of Mauritius (Moollan C.J. and Glover J.) decided that the dock companies and the stevedore companies were not entitled to redress under the Constitution. Their Lordships agree and it follows that the appeal from the Supreme Court must be dismissed. Their Lordships will humbly advise Her Majesty accordingly. There will be no order as to costs.

The Marine Workers Union appeal

The facts relevant to this appeal are not in dispute. The Ports Act which came into force on 1st July 1976 established the respondent, The Mauritius Marine Authority ("the M.M.A.") as a body corporate charged inter alia with the operation of ports in Mauritius. By 1979 the M.M.A. employed some 569 workers divided into 105 pay grades. The appellants are either workers employed by the M.M.A. or trade unions representing workers employed by the M.M.A.. Following industrial action designed to secure improvements in pay and allowances, there took place on 29th June 1979 a meeting attended by the Prime Minister and other Ministers, by representatives of the M.M.A. and by representatives of the trade unions. At that meeting the M.M.A. and the trade unions agreed that industrial action would cease and that the dispute should be submitted to arbitration.

By the Code of Civil Procedure, an arbitration award, subject to any challenge to its legality or validity, is enforceable by an order of a judge of the Supreme Court. Accordingly, at the meeting which agreed on arbitration, the Prime Minister, according to the minutes of the meeting provided by the Ministry of Labour and Industrial Relations, stressed that "... both parties would have no alternative than to abide by the decision of the arbitrator". Pursuant to the agreement, terms of reference were agreed, an arbitrator and assessors were appointed and evidence was submitted. The principal task of the arbitrator was to examine and review the salary scales and allowances of employees of the M.M.A. The arbitrator made his award dated 2nd August 1980 and on 12th December 1980 application was made by summons to the Court for the award to be made executory and enforced. No challenge was mounted to the legality or the validity of the award but the Government took

the view that the increases of salary and allowances awarded by the arbitrator would have undesirable repercussions on the level of wages in the public sector and would have grave inflationary effects on the national economy. In these circumstances the Minister responsible for ports made an order under section 9(1) of the Ports Act directing the M.M.A. not to implement the award.

Section 9(1) of the Ports Act provides that "the Minister may, in relation to the exercise of the powers of the Authority under this Act, after consultation with the Authority, give such specific and general directions to the Authority, not inconsistent with this Act, as he considers necessary in the public interest and the Authority shall comply with those directions". The Authority is the M.M.A. which, on receiving the order from the Minister, opposed the application to the Court to make the award of the arbitrator executory on the grounds that the Minister had directed the M.M.A. not to implement the award. Before the Court gave a decision on the application to make the arbitration award enforceable, the Government, perhaps conscious of the difficulties of taking effective action under section 9 of the Ports Act, took further legislative action.

By the Code of Civil Procedure (Amendment) Act 1981, which came into force on 8th April 1981, the Code of Civil Procedure relating to arbitration was amended by the insertion of a power for the Attorney-General to object to the enforcement of any arbitration award which in his opinion was contrary to the public interest. Notice of the objection was required to be served on the parties and copies of the notice were required to be lodged in the Registry of the Supreme Court. It was expressly provided that the objection of the Attorney-General should constitute a bar to any application for the enforcement of the award and where the objection was lodged during the pendency of the hearing of an application to make the award executory, the judge or, in the case of an appeal, the Supreme Court should not proceed with the hearing of the application or appeal.

Finally section 3 of the Amendment Act provided that the amendment should apply to any arbitration award made or given before the commencement of the Act whether or not judicial proceedings had been instituted for the enforcement of the award. Although the Amendment Act is of general application, it is common ground that the Act was intentionally passed for the express purpose of preventing the enforcement of the arbitration award dated 2nd August 1980 relating to the employees of the M.M.A..

On 9th April 1981 the Attorney-General served and lodged notice of objection to the execution of the arbitration award dated 2nd August 1980 relating to the employees of the M.M.A. on the ground that the execution of the award was, in the opinion of the Attorney-General, contrary to the public interest. That objection prevented the Court from making an order enforcing the award.

The appellants filed affidavits complaining that the retrospective provisions of the Amendment Act deprived the appellants, and were intended to deprive the appellants, of the benefit of the arbitration award and complaining that the retrospective provisions interfered with the exercise of judicial power. The appellants also complained that the Amendment Act was contrary to the provisions of section 8 of the Constitution. These complaints were referred to the Supreme Court pursuant to section 84 of the Constitution which directs that any question as to the interpretation of the Constitution involving a substantial question of law shall be referred to the Supreme Court.

On 21st December 1981 the Supreme Court (Rault C.J. and Glover J.) rejected the appellants' application to ~~make the award executory on the grounds that the Minister responsible for ports had lawfully exercised his powers under section 9 of the Ports Act to prevent the M.M.A. from enforcing the award and on the alternative ground that the objection of the Attorney-General pursuant to the Amendment Act lawfully prevented the award being made enforceable.~~ The Supreme Court held that the Minister responsible for ports had not exceeded his jurisdiction under section 9 of the Ports Act, that the Amendment Act did not offend the Constitution and that the actions of the Minister, of the Government and the Attorney-General were justified in view of the public interest involved. By leave of the Supreme Court the appellants now appeal to the Board.

Although no doubt the Minister responsible for ports considered that he possessed the power and was under a duty in the public interest to forbid the M.M.A. to give effect to the award, their Lordships cannot accept that section 9(1) of the Ports Act conferred on the Minister the requisite authority. The Minister can only give directions to the M.M.A. "... in relation to the exercise of the powers of..." the M.M.A.. By the agreement for arbitration which resulted in the award, the M.M.A. became contractually bound to accept and give effect to the award. The M.M.A. are not authorised by statute and have no power lawfully to commit a breach of contract. The Minister cannot direct the M.M.A. to exercise a power which the M.M.A. do not possess.

The Minister cannot direct the M.M.A. to commit a breach of contract.

The Amendment Act and the Attorney-General's objection given thereunder made the award unenforceable and deprived the appellants and all the workers employed by the M.M.A. of the benefit of the award. The award improved the gross salaries of employees of the M.M.A. from 1st January 1980 and their allowances from 1st July 1980. These improvements were directed to endure until 30th June 1983. The Amendment Act and the objection of the Attorney-General thereunder prevented the implementation of the award and deprived each worker employed by the M.M.A. at any time or times between 1st January 1980 and 30th June 1983 of the difference between the salary and allowances in fact paid to him and the increased salary and allowances payable to him pursuant to the award.

Prior to the Amendment Act the appellants were entitled to an order of the Court making the award executory and enforceable and each relevant employee was entitled to sue the M.M.A. for, and to recover, the difference between the salary and allowances in fact paid to him and the salary and allowances to which he was entitled pursuant to the award during the duration of the award. The Amendment Act has thus deprived and was intended to deprive each worker of a chose in action, namely the right to sue for and recover damages for breach by the M.M.A. of its contract of employment.

Section 3 of the Constitution of Mauritius recognises and declares inter alia the right of the individual to protection from deprivation of property without compensation. The Board have already determined in connection with the contemporaneous case of the *Societe United Docks v. The Government of Mauritius* that the protection afforded by section 3 is not confined to property which has been compulsorily taken possession of or compulsorily acquired within the meaning of section 8. The appellants rightly complained on behalf of the workers employed by the M.M.A. that the workers have been deprived of property, namely their right to sue for and recover damages for breach by the M.M.A. of its contract of employment, contrary to section 3 of the Constitution. Section 17(2) confers on the Supreme Court original jurisdiction to "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 foregoing provisions of this Chapter to the protection of which the person is entitled". The appropriate redress for each worker is compensation equal to the increased salary and allowances of which that worker has been deprived by the Amendment Act.

The attention of the Supreme Court was not directed to the provisions of sections 3 and 17 of the Constitution but to the question whether the retrospective provisions of the Amendment Act, aimed specifically at the award, constituted an unconstitutional infringement by the legislature of the judicial powers. In *Liyanage v. The Queen* [1967] 1 A.C. 259 the Parliament of Ceylon passed Acts pursuant to a legislative plan *ex post facto* to secure the conviction and enhance the punishment of particular individuals, legalising their imprisonment while they were awaiting trial, making admissible statements which had been inadmissibly obtained, altering the fundamental rules of evidence so as to facilitate their conviction and altering *ex post facto* the punishment to be imposed on them. The Board held that the Acts involved the usurpation and infringement by the legislature of judicial powers inconsistent with the written constitution of Ceylon which, though not in express terms, manifested an intention to secure to the judiciary freedom from political, legislative and executive control. Similarly in *Hinds v. The Queen* [1977] A.C. 195 the Board, at page 213, affirmed the principle that "implicit in the very structure of a Constitution on the Westminster model is that judicial power, however it be distributed from time to time between various courts, is to continue to be vested in persons appointed to hold judicial office in the manner and on the terms laid down in the Chapter dealing with the judicature, even though this is not expressly stated in the Constitution".

In the present case the Board have not heard full argument and do not pronounce upon the submission by the appellants that the Amendment Act was an unconstitutional interference with the rights of the Supreme Court.

It suffices that the Amendment Act was a coercive act of the Government which alone deprived and was intended to deprive the appellants of property without compensation and thus infringed the Constitution. The Supreme Court reached the opposite conclusion and the appeal must therefore be allowed and a declaration made that each worker employed by the M.M.A. at any time or times between 1st January 1980 and 30th June 1983 is entitled by way of redress under section 17 of the Constitution to be paid by the M.M.A. or the Government of Mauritius the difference between the salary and allowances in fact paid to him and the increased salary and allowances which would have been payable to him pursuant to the award. Their Lordships will humbly advise Her Majesty accordingly. The respondent must pay the costs of the appellants here and below.
