IN THE COURT OF APPEAL OF SEYCHELLES

CIVIL APPEAL NO. 4 OF 1989

1. Chamery Chetty by his Attorney Myrtha Chetty

2. Citra Hoareau — Appellants

v.

Government of Seychelles — Respondent

[illegible]rges for Appellants
Lucas for Respondent

JUDGEMENT OF MUSTAFA, P.

The above two appellants had filed two separate actions in the Supreme Court against the Respondent claiming compensation for the land and certain erections on the land owned by them and compulsorily acquired by the Respondent under the provisions of The Land Acquisition Act 1977. The two actions were consolidated for hearing at the trial, and similarly their appeals have been consolidated. Appellant Chetty was the owner of two parcels of land, being S1950 and S1951. Appellant Hoareau was the owner of Parcel S1949. All the properties were situated at Anse Aux Pins, Mahe.

Appellant Chetty's Parcel S1950 was empty land with no erections thereon, but on his Parcel S1951 there were several buildings erected. Appellant Chetty claimed for compensation for Parcel S1950 in the sum of Rs. 24,000 and for Parcel S1951 in the sum of Rs. 1,591,675. The Respondent offered Rs. Nil for Parcel S1950 and Rs. 650,000 for Parcel S1951.

Appellant Hoareau's Parcel S1949 had a house and several outhouses erected thereon and she claimed Rs. 576,939 in compensation. The Respondent offered a sum of Rs. 150,000 in respect thereof.

Both the Appellants had demanded that the Respondent should inform them whether compensation was to be paid in cash or in the form of a bond as they claimed that knowledge of the method of payment was essential before they could decide to accept or reject the Respondent's offer. The Respondent refused to give

such information on the ground that the method of payment of compensation was to be determined by the President of the Republic of Seychelles only after the amount of compensation for compulsory acquisition has been finally determined and concluded, and not before.

The Appellants applied to the Supreme Court to determine the amounts of compensation payable to them, and assessed their claims as above stated. They also asked the Supreme Court to assess compensation on the basis whether compensation was payable immediately in cash or payable in a bond encashable over a period of 20 years. The respondent maintained that its assessment, as mentioned earlier, was correct, and that the method of payment was to be determined by the President of Seychelles after the amount due for compensation has been finally determined.

The Supreme Court (Seaton C.J.) considered the rival assessments tendered in evidence. Expert evidence for the Appellants' assessment was given by Mr. Allen, and that for the Repsondent's assessment was given by Mr. Paranjoty. Seaton C.J. held that Parcel S1950 has nil value as it was empty land and had no income for the previous three years. He assessed Parcel S1949 at Rs. 152,300 and Parcel S1951 at Rs. 700,000. He held that the method of payment, ie. whether compensation was payable immediately in cash or in a bond over a period of years was a matter for the President of Seychelles to decide in terms of Sec. 27(A)(2) of the Land Acquisition Act 1977. He refused the prayer to specify the compensation due on the basis of immediate or deferred payment.

From that judgment the Appellants have appealed. The appeal is on three grounds:

1. The Chief Justice erred in not attaching any value to land itself per se on the basis that it has earned no income in the preceding three years.

2. Compensation for Parcel S1949 at Rs. 155,000 was manifestly inadequate.

3. The Chief Justice erred in not specifying the manner of payment.

On opening the appeal Mr. Georges for the Appellants argued what he called a constitutional point. He contended that The Land Acquisition Act 1977 did not go far enough to protect the rights of owners of acquired land, ie. not as far as was provided by

The Independence Constitution 1976 which he conceded had been abrogated and replaced by The Republic of Seychelles Constitution 1979. This was not raised in the Supreme Court nor was it a

ground in the Petition of Appeal, but since Mr. Lucas appearing for the Respondent raised no objection, we heard Mr. Georges on this contention.

I will deal with the "constitutional" issue first. Sec. 17(1) of the Independence Constitution 1976 gave owners certain protection for property compulsorily acquired. Sec 17(1) as amended by Constitutional Amendment Decree 1978 provided, in the case of acqusition:

> "for the prompt payment of adequate compensation provided that the Government shall not be obliged to compensate the owner in respect of any land or the land element in any property, to an extent beyond the restitution of the loss or the average net income derived regularly therefrom ..."

The Second Schedule to The Land Acquisition Act 1977 as amended by The Land Acquisiton (Amendment) Decree No. 43 of 1978 lays down the principles of compensation for acquired land and buildings. In respect of the assessment of land it is stated to be:

> "the return on land valued for compensation...shall be assessed as the average annual income accruing from the use, exploitation or letting of the land during the three years prior to the date of acquisition ..."

In respect of buildings it is:

> "the current use value of buildings valued for compensation ... shall be the amount which the buildings might be expected to realize at the date of acquisiton if sold between a willing buyer and a willing seller on the open market ..."

It will be seen that The Land Acquisition Act 1977 provides differently for land and for buildings as regards the assessment of compensation. In regard to land, The Second Schedule of The Land Acquisiton Act 1977 refers only to the average annual income and not "to the restitution of the loss" mentioned in Sec 17(1) of The Independence Constitution 1976. Mr. Georges submitted that the provisions in The Second Schedule of The Land Acquisiton Act 1977 did not go as far as those set out in The Independence Constitution 1976 in protecting the rights of owners whose properties have been acquired. He maintained that irrespective of any annual income, his clients suffered a "loss" when their land was acquired, and The Second Schedule to The Land Acquisiton Act 1977 was deficient in failing to provide for "restitution of

loss" and therefore to that extent invalid and in conflict with The Independence Constitution, which was the Supreme Law in Seychelles.

However, The Independence Constitution 1976 was abrogated and replaced by the Republic of Seychelles Constitution 1979, which

is the existing constitution. In the Republic of Seychelles Constitution 1979 there is no clause similar to Sec. 17(1) of The Independence Constitution 1976. The Repbulic of Seychelles Constitution 1979 specifically validated all Acts existing at the time of its own enactment, and the Acts validated included The Land Acquisition Act 1977. There is no conflict at all between The Land Acquisiton Act 1977 and the Republic of Seychelles Constitution 1979. The properties in suit were acquired in or about 1985.

Mr. Georges was attempting to seek in aid a constitution which had been abrogated and had become defunct. I do not think that a dead and indeed buried constitution can speak from its grave. This argument fails.

In regard to the method of payment ie. whether compensation should be computed on the basis of an immediate cash payment or by means of a bond extended over a number of years, this matter was dealt with recently by this Court in Civil Appeal No. 11 of 1988 - Government of Seychelles versus Shell Company of the Islands Ltd. In view of the decision in that appeal Mr. Georges did not proceed with his argument about the method of payment issue and stated that he did not wish any longer to challenge the finding of the Chief Justice on that point.

That leaves for determination the complaint that compensation for Parcel S1949 was manifestly inadequate. On Parcel S1949 was an old wooden building with several other erections, all built about 70 years ago. The life of such a wooden building was put at about 60 years. The main building has in fact outlived its natural span. The Chief Justice concluded that the building had been abandoned for commercial purposes at the relevant time and was being used as a place for rest and recreation. He found that the main building has depreciated considerably on account of its age. Mr. Allen had estimated the market value of the buildings at about Rs. 350,000. He stated that the main wooden building was a beautiful traditional Seychellois house and has been reparied fairly extensively. He conceded that the life span of that building was 60 years. Mr. Paranjoty was of the view that the total market value of the buildings which were very old and in a poor state or repair was Rs. 150,000. The Chief Justice gave the matter careful consideration. He rightly, in my view, was not prepared to take into consideration the fact that the main building might be an architect's or a collector's delight on

account of its being a traditional Seychellois wooden structure of some distinction. The Chief Justice considered the rival estimates submitted and concluded that the buildings should be valued at Rs. 152,300. It seems to me that Seaton C.J. in effect had accepted the market valuation placed on the buildings by Mr. Paranjoty, and not that by Mr. Allen, despite some curiously obscure phraseology in his judgment. I think that the Chief Justice was justified in arriving at the figure he did.

For the sake of completeness I will briefly deal with Parcel S1950 and Parcel S1951. Parcel S1950 was empty land and had no income accruing from its use. It was rightly valued by the Chief Justice at Rs. Nil. With regard to Parcel S1951 there was not much difference between the assessments of the market value of the buildings between Mr. Allen and Mr. Paranjoty. Mr. Allen valued the buildings at between Rs. 600,000 and Rs. 700,000. He also valued the land at Rs. 240,000 to Rs. 300,000. Mr. Paranjoty valued the buildings at Rs. 650,000 and nil value for the land. Mr. Paranjoty stated that in valuing the building he took into account "the size and shape of the land so that it has the same bearing to the building on the parcel of land. So this is in relation to market value". And again "in assessing the market value we must (sic) shapes and sizes into consideration of the curtilage".

I do not know whether Mr. Paranjoty meant that he took the curtilage into consideration when assessing market value. I think the land on which a building stands should not be too narrowly interpreted to mean only the actual area on which the erection is built. In my view such land as forms the curtilage should be taken into consideration in arriving at the market value of a building. After all, a curtilage is part of a building in its extended use. The location and any natural amenity arising therefrom would also normally be factors in such evaluation. However in the case of Parcel S1951 there was no evidence that there was any land used as curtilage, so that question did not strictly arise. I think that Seaton C.J. probably gave some consideration to the choiceness of location and amenity factors, as he determined the value of the buildings at Rs. 700,000 which was the upper limit of Mr. Allen's assessment of the value of the buildings.

In the result the Appellants have failed on all their grounds of appeal. I would dismiss the Appeal with costs.

Dated at Victoria this 5th day of April 1990.

A. Mustafa

A. Mustafa
President

IN THE COURT OF APPEAL OF SEYCHELLES

Chetty and or — Appellants

v.

Government of Seychelles — Respondent

Civil Appeal No. 4 Of 1989

Georges for Appellants

Lucas for Respondent

Judgment of Goburdhun J.A.

The two appellants instituted proceedings against the respondent before the Supreme Court claiming compensation in respect of their immovable properties compulsorily acquired under the provisions of the Land Acquisition Act 1977.

The first appellant (Chetty) claimed R 24,000 in respect of a property described as parcel S1950 and R 1,591,675 in respect of a property described as S1951.

The second appellant (Hoareau) claimed R 576,935 in respect of a property described as S1949.

The appellants also prayed the Court to determine the amount payable to them on the basis that the compensation would be paid in cash immediately or alternatively on the basis that compensation would be paid by a bond over a period of 20 years.

The plea of the respondent was that in proceedings under the Land Acquisition Act the Court can only determine the compensation payable to a claimant in the manner laid down in the second schedule to the Land Acquisition Act. The respondent prayed the Court to determine the amount of compensation due to the appellants in respect of their respective interests in the properties acquired in the manner outlined in the second schedule to the Act.

Evidence was heard and valuation experts from both sides gave evidence at length. The Learned Chief Justice who heard the case held that no compensation was payable in respect of parcel S1950 as there was no return in respect of the land. He assessed compensation in respect of parcel S1951 at R 700,000 and in respect of parcel S1949 at R 152,300.

He declined to determine the compensation payable on the basis of immediate or deferred payment.

The appellants are challenging that judgment of the Court on the following grounds:

(1) The Chief Justice erred in holding that as no income had been earned from the land in the three parcels S1949, S1950 and S1951 in the three preceding years, no compensation was due in respect of the land or the land element per se in the three parcels.

(2) Compensation for parcel S1949 was manifestly inadequate.

(3) The Chief Justice erred in not specifying the manner of payment of compensation. [This ground was very rightly not pressed at the hearing].

At the hearing of the appeal Mr Georges raised a "constitutional point". He contended that the Land Acquisition Act of 1977 is in conflict with the constitutional rights of an owner of property compulsorily dispossessed of his property. He was of the view that the second schedule of the Land Acquisition Act 1977 is violative of Sect 17(1) of the Independence Constitution 1976. He argued that the Land Acquisition Act 1977 refers only to the "average annual income" and not to the "restitution of the loss" mentioned in Sect 17(1) of the Independence Constitution 1976.

Mr. Lucas rightly submitted before us that the case is governed by the Republic of Seychelles Constitution 1979 and not the Independence Constitution 1976 which is defunct.
The Republic of Seychelles Constitution 1979 validated all Acts existing at the time of its enactment. The question of conflict between the Land Acquisition Act and the existing Constitution does not arise. I agree that the point raised by appellants' Counsel is of no merit.

I turn now to the other grounds of appeal. The Learned Chief Justice delivered a long and considered judgment. He closely analysed the evidence and applied his mind to the salient points of the case. I cannot do better than cite the following extracts from his judgment:

"I would agree with Counsel for the defendant's submission that in estimating the market value of the land one could not take into consideration any special value that the land might have to the buyer, for example, the fact that some eccentric millionaire who had a hobby of collecting old, delapidated but architecturally interesting houses might be prepared to pay very highly for the main timber house on Parcel S1949.... The Court must determine compensation on the basis that the willing buyer would continue to use the buildings for whatever purpose they had been used immediately prior to the acquisition."

"With respect to the properties on parcel S1949, as I accept the testimony of Mr Allen (P.W.3), the court cannot entirely ignore the fact that the main building has a replacement cost of R 312,000/- and the others R 112,000/-. On the other hand, it cannot ignore the fact that after 70 years the main building at least, has much depreciated from that value. Assuming that a willing buyer would continue to use it for the purpose of rest and recreation I would estimate that R 100,000/- is a correct valuation for the main house and R 152,300/- for the whole of the buildings on Parcel S1949.

With regard to the buildings on Parcel S1951, the expert witnesses for both parties are in agreement and experts who testified were of the same opinion that the value of the buildings were R 650,000/- to R 700,000/-. I am of the view that the amount of R 700,000/- is a fair amount of compensation to be payable for the buildings on this parcel." ...

"Counsel for the plaintiffs did not dispute that no income has been earned from the land on the three parcels S1949, S1950 and S1951

in the three preceding years. However, he contended that a certain amount should be payable for the land as part of the buildings under Schedule 2 to the Act." ...

"Counsel for the defendant referred this Court to the case of Pool & Standard Chartered Bank v. Government of Seychelles (C.S. 139/85 judg. dat.. 14.1.86) in which the court held that no amount of compensation was payable for land that was attached to buildings per se but that the amount of compensation that was payable to the building should take into consideration the value of any land to which it was attached. ... The land on Parcel S1950 had no buildings and counsel ... was correct in my view in his submission that the law which provides in para. 1 of Schedule 2 of the Act for the valuation of lands and buildings pre-supposes that that which is land alone without there being buildings thereon shall be valued on the basis of the return of the land and if there is no return then there is a nil valuation. Hence, there being no return, with respect, I must hold that counsel for the defendant's submission is valid in law and no amount of compensation is payable in respect of parcel S1950.

With regard to Parcel S1951, there was one building which was used as a Bar and Cinema House. Certainly this could be considered a commercial building and the land to which it was attached would have a certain value which would make more attractive the buildings to a buyer. In my view this would still not mean that the land should be compensated separately from the buildings. In the instant case I would not give any extra compensation for the land per se; under Schedule 2 to the Act no compensation is therefore payable".

I have examined the facts of the case in the light of the remarks of Counsel. It must be borne in mind that there are limits to interference by an appellate court of an award granting compensation. An appellate Court will not interfere unless there is something to show, not merely that on the balance of evidence, it is possible to reach a different conclusion but that the judgment cannot be supported by reason of a wrong application of principle or because some important point affecting valuation has been overlooked or misapplied.

There has been no misdirection by the learned Chief Justice who has correctly applied the right principles to all the issues raised in the case. I do not find the conclusion reached by him unreasonable.

I would dismiss the appeal with costs.

Dated at ....Victoria..... this .....5th.... day of .....April.... 1990.

H. Goburdhun
Justice of Appeal

IN THE SEYCHELLES COURT OF APPEAL

CHAMERY CHETTY	1st Appellant
MRS CITRA HOAREAU	2nd Appellant
v/s	
GOVERNMENT OF SEYCHELLES	Respondent

Civil Appeal No. 4 of 1989

Mr. Georges for Appellants
Lucas for Respondent

JUDGEMENT

The appeal raises issues as to the correct method of determining under the Land Acquisition Act 1977 (the Act) the value of property consisting of lands with buildings thereon. At the hearing, Mr Georges for the appellants also challenged what he termed the constitutionality of the Second Schedule of the Act.

Three parcels of land - S1949, S1950 and S1951 - all situated at Anse Aux Pins - had been compulsorily acquired on 29th October 1984. S1949 had been the property of Mrs Citra Hoareau; S1950 and S1951 had belonged to Chamery Chetty who was represented in these proceedings by his agent under a power of attorney, Mrs Murtha Chetty.

On 25th October 1985 the Government had made an offer of SR650,000 for parcel S1951. Before accepting that offer Mrs Chetty wished to know how payment would be made. Through her counsel she wrote making that enquiry but the Government refused to disclose how payment would be made. In due course the claimants sought a determination by the Supreme Court of the amount of compensation payable.

Parcel S1949 has an area of approximately 34,814 sq. metres. Of this 7000 square metres is flat land with a sea frontage of 38 metres. The main road runs through this. From this flat area the land rises to a rocky hill with a height of about 150 metres above sea level. On the flat portion of the land are a dwelling house, a watchman's house, three chicken coops, a reservoir and a water tank.

Parcel S1950 comprises 1623 square metres of flat land some 110 metres from the main road. There are no buildings on this parcel.

Parcel S1951 is approximately 6,342 square metres in area. There is a sea frontage of 80 metres. The land is flat for some 160 metres from the sea and thereafter rises steeply to a rocky hill top of a height of 150 metres. That part of the land would be unsuitable for development. On the flat land there are the following buildings - a cinema hall, a cottage on the seaward side, a shop, a guest-house, a calorifer, several stores, a chicken coop and pig sties.

Section 1 of the Act defines "land" as :-

> "The surface area of the land and any material features crops, trees or growth thereon and any quarry, mineral or other rights attaching thereto or thereunder being compulsorily acquired under this Act."

"Buildings" are defined as :-
"Any building as defined in section 2 of the Town and Country Planning Act and any equipment, fittings and fixtures therein being compulsorily acquired."

"Building" is defined in section 2 of the Town and Country Planning Act as including :-

"Any structure or erection and any part of a building so defined, but does not include plant or machinery comprised in a building."

The Act makes different provisions for the assessment of the value of lands and that of buildings. Section 3 provides that the basis for assessing the value of lands shall be the annual return of the land. This is set as the annual income accruing from the use and exploitation or letting of the land during the three years prior to the date of acquisition but excluding any income which was attributed to the use, exploitation or letting of any buildings. Section 4 and 5 set out exceptional circumstances which may be taken into account if they affect this average annual income. Section 5 then sets out the formula by which the value of the land is to be calculated on the basis of its average annual return.

Section 6 provides for the assessment of the current use value of Buildings. It reads :-

> "The current use value of buildings valued for compensation under this Part shall be the amount which the building might be expected to realise at the date of acquisition if sold between a willing buyer and a willing seller on the open market but with right or permission only for a continuation or exercise of the same current and lawful use but without any permission, right, expectation or prospect of changing the said use."

The Act thus appears to contemplate the separate assessment of compensation to be paid in respect of lands on the one hand and of buildings thereon on the other. Where land is concerned the determination is to a large extent arithmetic. The average annual income of the land over a three-year period is ascertained and a formula is applied. In the case of buildings an opinion must be formed as to the price which a willing buyer would be prepared to pay a willing seller.

The reality would be, however, that the willing buyer would be acquiring the land used and occupied with the building which has been acquired. Section 6 does not contemplate the break-down value of the building. It contemplates continuation of its "same current and lawful use." The willing buyer, willing seller price would take into consideration not only the actual land space occupied by the building being purchased, but also lands adjacent thereto which enhance its desirability. The willing purchaser's offer would not be based merely on an assessment of the buildings as a structure made up of bricks or blocks or stone kept together by cement or timber held together by nails.

By way of illustration one can assume two buildings of identical size and age and constructed of the same materials. One is situated on half an acre of land with a moderate elevation commanding a vista of valley and sea. The other is a half an acre of flat land on the outskirts of an undistinguished development. It has no view and is surrounded by smaller buildings in a general state of disrepair. The willing purchaser would plainly make a much higher offer for the first building than for the second. The difference would represent the elements of location and amenity. The value of the land in each case would have been taken into account in arriving at the price offered for each building.

In my view it would be improper to seek to make separate valuations for land and building in arriving at the figure which could be fairly reached in each of these cases. This is so because the Act does not permit any value to be placed on land except by calculating the average annual income

derived therefrom and applying the formula. The land occupied in connection with each of the buildings would be producing no income and no figure could be found to which the formula could be applied. The concept of the market value which would be paid by a willing purchaser to a willing seller does however allow what could be called the site factor to be taken into account.

It follows from this analysis that the area of land to be included in this exercise need not be limited merely to that occupied by the building which is to be acquired. In most cases there would be little difficulty. The plot enjoyed with the building would be clearly defined. In other cases the building may be situated on a large area of land some of which may be by reason of its configuration inaccessible and not capable of use directly as an amenity of the building. A willing buyer would sensibly not take that land into account in arriving at the offer to be made except to the extent that the buyer considered that that area contributed by way of ensuring privacy for the remaining area which was being purchased. Even in such circumstances any increase would be minimal if the difficulty of the terrain would of itself preclude any developement likely to encroach on privacy. Where the buildings stand on comparatively spacious grounds some of it undeveloped and clearly not directly used in connection with the buildings, the issue would be the extent to which such areas enhance the amenities of the buildings to be purchased and for that reason should be considered in arriving at the price the willing purchaser would pay the willing buyer. The issue would be one of fact to be determined on an assessment of the expert evidence.

Mr Paranjothy's approach in this case, as can be gathered from his evidence, was closer to that which I consider correct. He stated that he had taken into account the site on which the buildings stood in assessing the market value of the buildings. He also stated that he had not taken the curtilage of the buildings into account in arriving at an assessment. This would, in my view, be erroneous. A willing buyer would consider in making an offer the amenities which the curtilage provided.

In the end the actual figures reached by each expert were not that far apart. Mr. Allen's opinion was that the value of parcel S1951 was between SR600.000 and SR700.000. Mr Paranjothy's opinion was that the total compensation payable in respect of S1951 should be SR650.000. The Chief Justice awarded SR700.000. As I have indicated Mr Paranjothy's approach to the valuation was closer to that which I consider correct. The award of a sum of SR50.000 more than the assessment reached by Mr Paranjothy cannot be said to be erroneous. I see no reason to alter it.

There was no building on parcel S1950. It was bare land, lying unused. It produced no annual income. Under the Act accordingly it had no value in terms of compensation. The Chief Justice correctly so concluded.

The dispute between the parties in relation to the value of parcel S1949 centred principally on the condition of the buildings standing on that parcel. Mr Allen's view was that compensation should be fixed at SR450.000. Mr Paranjothy's view was that it should be SR100.000. The Chief Justice awarded SR152.500.

Mr Georges' criticism of the Chief Justice's judgment was that he appeared to pull the final figure from a hat. He stated

> "With respect to the properties on parcel S1949, as I accept the evidence of Mr Allen (P.W.3), the Court entirely ignores the fact that the main building has a replacement value of SR312.000 and the others SR112.000. On the other hand it cannot ignore the fact that after 70 years the main building at least has much depreciated from that value. Assuming that a willing buyer would continue to use it for the purpose of rest and recreation I would estimate that SR100.000 is a correct valuation for the main house and SR152.000 for the whole of the building on parcel S1949."

Mr Georges sumbits that the Chief Justice while in effect accepting Mr Allen's evidence has in relation to figures decided in favour of those given by Mr Paranjothy.

I do not find this to be the case. It would appear that what the Chief Justice accepted was that Mr Allen was correct in assessing the replacement cost at SR312.000. He made no detailed review of the evidence in relation to the state of the buildings. Implicit in his comment as to their age would be a finding that were not in good condition. The Chief Justice may well have misunderstood the purport of Mr Allen's evidence. From the notes it would appear that what Mr Allen said was that he had calculated the replacement cost and thereafter he had depreciated it because of the state of some of the buildings; thus arriving at the figures which he gave in evidence.

The fact was that the buildings were very old buildings. In terms of years they had exceeded their useful life and would require constant renewals to remain habitable. Mr Allen agreed that the main house did have the features of a very old house, but did not appear to agree that this would enhance its market value. The broad effect of the judgment was that the Chief Justice accepted Mr Paranjothy's

[redacted]uation as correct. On the evidence it cannot be said [redacted]t he fell into error in so doing.

[redacted]turn now to the constitutional point. The Independence [redacted]stitution of the Seychelles S.I. No.46 of 1976 set out in [redacted]tion 17 provisions protecting the right to property. No [redacted]perty or interest in property could be acquired except [redacted]er certain conditions therein specified among them the [redacted]mpt payment of adequate compensation. This was amended [redacted]Decree No.42 of 1978 the Constitutional Amendment Decree 1978. This also provides for the prompt payment of adequate compensation. There was however a proviso :-

> "provided however that the Government shall not be obliged to compensate the owner in resepct of any land or the land element in any property, to an extent beyond the restitution of the loss or the average net income derived regularly therefrom prior to the taking possession or compulsory acquisition, and in respect of any other form of property at more than its lawful current and actual use at the time."

M[redacted] Georges' submission was that this formulation clearly co[redacted]templated compensation being payable for actual loss, the co[redacted]pensation being the restitution of the loss or [redacted]titution of average net income derived from the land acquired. The amendment to the Second Schedule of the Act was passed in 1979 while the constitutional provision set up above was still in force viz - The Lands Acquisition Amendment Decree 1978 (to which reference has already been made) provided only for compensation for land compulsorily acquired on the basis of average annual return. It made no provision for compensation on the basis of restitution of loss. That decree was therefore, deficient in that it did not fully provide for the situations set out in the constitutional amendment and for that reason it could be said to be unconstitutional.

The fact is, however that the Constitution containing the amended Section 4 was abrogated when the 1979 Constitution came into force. That Constitution did not contain a clause protecting the right to property. The acquisition in this case took place in 1984 long after the abrogation of the 1976 Constitution. Had the acquisition taken place while the amended 1976 Constitution was still in force the argument could have been advanced that in so far as the amendment to the Act had failed to provide for compensation on the basis of restitution of loss it had not fulfilled the conditions laid down in the Constitution and was therefore unconstitutional. The amendment to the Act cannot be viewed against the backdrop of a constitutional provision which had long been abrogated. To be termed unconstitutional it can only be viewed against the existing Constitution. It has not been argued that it offends this in any way. The submission therefore fails.

Mr Georges in effect conceded that his third ground of appeal, which alleged that the Chief Justice's failure to specify the method of payment of compensation was an error, could not be pursued in the light of the judgment of this court in Government of Seychelles v/s Shell Company of the Islands Ltd, Civil Appeal No.11 of 1988. The judgment in that case had been delivered subsequent to the filing of that ground.

Accordingly the appeal fails and should, in my view, be dismissed with costs.

P T Georges
Justice of Appeal

Delivered at Victoria this 5th day of April, 1990.