

**MIRBEL MARIE JEAN NELSON AND OTHERS v THE STATE OF MAURITIUS &
OTHERS**

2009 PRV 46

[2010] UKPC 16

Privy Council Appeal No 0046 of 2009

JUDGMENT

Marie Jean Nelson Mirbel and Others v The State of Mauritius & Others

From the Supreme Court of Mauritius

before

Lord Phillips

Lord Rodger

Lord Walker

Lord Brown

Lord Clarke

JUDGMENT DELIVERED BY

Lord Phillips

on

21 July 2010

Heard on 27 April 2010

<i>Appellant</i>	<i>Respondent</i>
Anil Gayan SC	Phillip Baker QC
Vijaya Sumpath	Rajesh Ramlooll
(Instructed by Lex Advoc Chambers)	Imran Afzal (Instructed by Royds LLP)

LORD PHILLIPS

Introduction

1. Section 18 of the Finance Act 2006 introduced into Mauritius a new tax called the national residential property tax ("NRPT"). The tax was introduced with effect from the year of income 2006 to 2007, so that the new tax would first be payable

in the year of assessment 2007 to 2008. The appellants are four citizens in Mauritius, who own land on the Island. On 1 September 2006 the appellants issued a Complaint with Summons ("the Complaint") before the Supreme Court. Although this did not expressly invoke the section, it is common ground that by so doing they were seeking constitutional redress under section 17(1) of the Constitution. The defendants, who are respondents to this appeal, were the State of Mauritius, the Ministry of Finance and Economic Development and the Mauritius Revenue Authority. The appellants alleged that the introduction of the NRPT infringed sections 3 and 8 of the Constitution. Before the NRPT took effect, its provisions were significantly amended by section 17 of the Finance Act 2007. This did not cause the appellants to make any amendment to the Complaint.

1. On 13 September 2007 the respondents filed a plea *in limine litis*. This sought the dismissal of the Complaint on three grounds:
 - a) The appellants had no *locus standi*.
 - b) The Complaint disclosed no cause of action.
 - c) The Complaint was in breach of the Constitutional Relief Rules.

The respondents' plea *in limine* succeeded on the first ground. The Supreme Court, K P Matadeen, Acting Chief Justice, and A F Chui Yew Cheong, Judge, held that the appellants had no *locus standi* and dismissed their Complaint with costs on this ground. The Court did not deal with the other two grounds.

1. Thus the sole issue raised by this appeal, which is brought by permission of the Board, is whether the appellants have, by their Complaint, alleged facts which give them *locus standi* to bring their claim. It is rightly common ground that this issue falls to be resolved on the assumption that the averments of fact made in the Complaint are accurate.

The Constitution

1. The following provisions of the Constitution are of particular relevance:

"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 -

...

(c) the right of the individual to protection for the privacy of his home and other property and from deprivation of property without compensation,

...

8 Protection from deprivation of property

(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 -

...

(4) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) -

(a) to the extent that the law in question makes provision for the taking of possession or acquisition of property -

(i) in satisfaction or any tax, rate or due;

...

17 Enforcement of protective provisions

(1) Where any person alleges that any of sections 3 to 16 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.

(2) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1), and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of 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 NRPT in its original form.

1. In its original form the tax was imposed on all owners of real property in a residential area, whether or not there was residential accommodation on the land. The tax was imposed at a flat rate of 10 rupees per square metre of land in a residential area, and 30 rupees per square metre on flats or similar high rise buildings or where a building had been added above another under "droit de surélévation". The tax was imposed at the same rate regardless of the location of the land and whether or not the land had development potential. There was an exemption from liability to pay the tax for those whose annual income did not exceed 215,000 rupees. There was also a right to deduct from the tax payable any sums paid by the landowner in the form of municipal rates.

The Complaint

1. Paragraph 1 of the Complaint alleged that the appellants were Mauritian citizens and set out particulars of the land that each was alleged to own. Paragraph 2 alleged, *inter alia*, that the appellants were taxpayers. Paragraph 3 alleged that the provisions of sections 3 and 8 of the Constitution of Mauritius "have been, are being and are likely to be contravened *in relation to them*" (emphasis added) by the enactment of the provisions of the Finance Act 2006 relating to the levying of NRPT. Paragraph 10 alleged:

"Plaintiffs aver that they fall within the net and conditions provided for by the National Residential Property Tax (NRPT)."

1. Paragraph 11 alleged:

"Plaintiffs aver that they never have had to pay any such tax which affects and will continue to affect their rights as a property owner inasmuch as the tax is levied on them in their capacity as owners of land without the Defendants making available any corresponding benefits to them in the enjoyment of their property rights."

1. The pleading set out the provisions of the 2006 Act that established liability to pay NRPT and then went on to allege that these violated the Constitution for the following reasons:

"23. Plaintiffs aver that there is no factual, legal, constitutional or any imperative reason for the introduction of the new NRPT and they maintain that the NRPT is not a valid and proper taxing statute inasmuch as it amounts to a colourable device to get around their fundamental right to own property, a right which is sacrosanct and guaranteed by the Constitution of Mauritius.

24. Plaintiffs further aver that the purported NRPT is not a tax proper inasmuch as it results to a forced loan without compensation.

25. Plaintiffs also aver that the NRPT further violates their constitutional rights in another respect and must be struck down as being harsh, cruel and punitive particularly as regards the heavy penalties provided in cases of non-compliance.

26. Plaintiffs aver, in the further alternative, that the NRPT which is assimilated in the Act to an Income Tax is unreasonable inasmuch as Income Tax is of a recurrent nature whereas mere ownership of immoveable residential property cannot amount to an income liable to be taxed as Income Tax.

27. Plaintiffs aver that, by proceeding in respect of the NRPT as Defendants Nos. 1 and 2 have done and as Defendant No.3 is gearing up to administer, they are in effect depriving the Plaintiffs of their properties, which are fixed assets not generating any income.

28. Plaintiffs further aver that the NRPT which is being applied indiscriminately to all residential property without taking into account inter-alia the location, market value, quality of residential land, neighbourhood, availability of services and amenities etc cannot continue to stay on the [Statute] Book as it is unfair, arbitrary, unreasonable and oppressive.

29. Plaintiffs aver that it is the duty of Defendants Nos. 1 and 2 to ensure that any taxing statute is fair, efficient, proportionate and complies with the requirements of the basic principles of taxation.

30. Plaintiffs aver that a comparison in the application of the NRPT will, as an indication, demonstrate its unfairness, unreasonableness and the inequity. ... "

Examples were given of the manner in which the NRPT was alleged to operate unfairly and the pleading continued:

"32. Plaintiffs aver that, in the circumstances, the NRPT has unreasonably assumed that every person who is the owner of residential property and who is above the threshold of Rupees 215,000 per annum, is able to pay and such assumption defies reality and logic.

33. Plaintiffs aver that the NRPT has distortions and anomalies in its application which render it unequal and defeat the right in the Constitution to equality of treatment of all tax-payers.

34. Plaintiffs aver that any tax must satisfy the exigencies of equality, neutrality and fairness and they aver that the Defendants have failed to ensure that the NRPT meets these exigencies with the result that the NRPT is not a tax proper.

35. Plaintiffs aver that, while it is in order for the Defendants to impose taxes which are assessed on income-generating activities or on consumption in accordance with recognised and objective criteria, it is not open or lawful for the Defendants to act in violation of the fundamental rights of the Constitution or to impose and receive such a tax.

36. Plaintiffs aver additionally that the net result of the NRPT is to convert residential property 'en toute propriete' into State land and this is something which is an infringement of the Constitution.

37. Plaintiffs aver that the NRPT has the consequence of destroying the existing legal regime of ownership of property and it attempts to do so by circumventing the Provisions of the Constitution.

38. Plaintiffs aver that the imposition of the NRPT is a colourable device designed to get around fundamental Constitutional provisions as stated above and to deny them the protection of the law.

39. Plaintiffs aver that they are seeking redress from this Honourable Court for the purposes of protecting their legal and Constitutional rights as well as seeking orders or pronouncements that the Defendants are debarred from acting in a manner which is destructive of their acquired rights."

1. The relief claimed included a Declaration that the provisions of the Finance Act 2006 that related to the NRPT were null and void and of no legal effect by virtue of section 2 of the Constitution.
1. Minor amendments were subsequently made to the Plaint which are of no relevance to this appeal.
1. On 26 January 2007 the respondents served a demand for particulars of the Plaint. The appellants' response of 14 February 2007 dealt with many of these by the statement "this is a matter of evidence which will be adduced in Court". The Board would make the following comments in relation to this form of response. First the requests to which it was given were not requests for evidence, but for particulars of the appellants' case. Secondly, and more significantly, the

appellants' response exemplified an approach to pleadings which the Board deprecates. Pleadings are designed to identify the issues to be resolved by the Court, they should not be treated as a tactical game. At the same time it is fair to say that the demand for particulars suggests something of a scatter gun approach to the exercise of seeking particulars. Particulars should only be sought where they are really needed to elucidate the other party's case, not as a matter of course.

1. The particulars sought included particulars of the plaintiffs' tax account numbers. This was, perhaps, intended to assist the third respondent to check on the appellants' tax status. The appellants unhelpfully responded by averring "this is privileged information". When further and better particulars of this were sought on 29 June 2007 (not placed before the Board) the response provided on 12 July 2007 was: "This is a privileged document. Defendant is free to summons the MRA". As the Mauritius Revenue Authority was a party to the litigation this response was bizarre. It may be that the Authority was having some difficulty in checking the appellants' assertion that they were taxpayers, in which event it would have been helpful to provide the assistance sought.

Amendments to the NRPT

1. The Finance Act 2007 was passed by the National Assembly on 7 August and received the assent of the President on 21 August 2007. It made the following significant amendments to the NRPT:
 - i) The income threshold for liability to pay the tax was raised to 385,000 rupees.
 - ii) A cap of 5% of the total income of the taxpayer was placed on the NRPT payable.
 - iii) Residential land on which there was no residential building was excluded.
1. These amendments to the NRPT removed features of the tax which might have been thought to be harsh or inequitable. They also raised questions in relation to the appellants' *Plaint*. If this was treated simply as an attack on the NRPT in its original form, the issues raised by the *Plaint* were of historical interest only and there was no good reason why the proceedings should be taken further. If, however, it was the appellants' case that the amendments made to the NRPT did not affect the substance of their claim, amendments to the *Plaint* were desirable. Some of the averments made in the *Plaint*, such as that which alleged that the tax threshold was an income of 215,000 rupees and that which alleged that the tax applied to bare land, were no longer accurate. An amendment to bring these averments into accord with the tax as amended would have clarified the appellants' case. Most of the pleading was, however, as capable of application to the tax in its new form as it had been to the tax in its original form.
1. The appellants had, in fact, made it plain before the Finance Act 2007 was enacted that the changes that were to be made to the NRPT would not affect the relief that they were claiming. In their response of 12 July 2007 to the further and better particulars sought on 29 June the appellants stated:

"The Plaintiffs are challenging the very basis and concept of the NRPT in as much as it is being imposed without any Judicial or

reasonable foundation. The very fact that the Minister has altered the original basis in itself indicate of (sic) the lack of 'reason and basis' for such a tax which will, in the words of the Minister in his Budget 2007/2008, undergo further transitional arrangements. These arrangements are transitional until the valuation roll is ready."

The plea in limine litis

1. The plea *in limine litis* was combined with a plea on the merits. The plea on the merits addressed the Plaintiff on the premise that it fell to be considered in the light of the amendments that had been made to the NRPT by the 2007 Act. Thus, where appropriate, the respondents pleaded the amendments that had been made to the tax in answer to the provisions of the original tax that the appellants had cited in their pleading.
1. The relevant part of the plea *in limine litis* simply alleged that the plaintiffs had no *locus standi* to enter the Plaintiff. The plea on the merits went on, however, to challenge the averments in the Plaintiff that underpinned the plaintiffs' *locus standi*:
 - "3. Defendants deny paragraph 3 of the amended plaintiff with summons and aver that plaintiffs have failed to disclose their annual income and to show that they are liable to pay the National Residential Property Tax."
 - "8. Defendants deny paragraph 10 of the said affidavit (sic) in its form and tenor and reiterate the averments made at paragraph 3 above."
1. The Board has been surprised that the respondents should have chosen to make this particular challenge to the appellants' *locus standi*. Before the Board it has been common ground that the appellants had, at the least, to prove that they were liable to pay the NRPT if they were to be entitled to relief under section 17(1) of the Constitution. Liability to pay the tax fell on those who had an annual income of 215,000 rupees, raised by amendment to 385,000 rupees, but there was no reason to believe that the appellants did not enjoy this relatively modest income. They had pleaded that they were taxpayers. Liability also depended, by reason of the amendment of the tax, upon ownership of land carrying a residential building. The appellants had pleaded that they were owners of portions of land, giving particulars of those portions by reference to entries in the land register. In the case of at least three of the appellants the location of the land appears to tally with the address of the appellant in the pleadings. It is hard to believe that the respondents would have had any difficulty in checking whether the appellants owned residential buildings on their land. Had there been any doubt about this the matter could have been informally resolved between the parties. It would, after all, have been very odd if the appellants had chosen to attack a tax that did not apply to them. On the face of it a citizen is likely to be content that others should be liable to pay a tax from which the citizen is himself exempt. Thus the challenge to the appellants' *locus standi* on the ground that the Plaintiff did not adequately claim that the appellants were liable to pay NRPT appears to have been no more than a pleading point. It may be, however, that there was more to the respondents' challenge than readily meets the eye.

1. The plea *in limine litis* was heard by the Supreme Court on 4 June 2008. Mr Bhaukaurally, the Assistant Solicitor General, appeared for the respondents and Mr Gayan SC appeared for the appellants, as he did before the Board. The transcript suggests that, on the issue of *locus standi*, it was common ground, as it was before the Board, that the appellants had to establish that they were liable to pay the NRPT if they were to have *locus standi* to bring proceedings under section 17 of the Constitution. Mr Bhaukaurally submitted that the appellants' Pleint did not adequately plead that they were so liable in that there was no averment in the pleading that the plots of land that the appellants claimed they owned were "constitutive of the tax base ... in respect of which they would be liable to tax".
1. In making submissions in support of the part of the plea *in limine litis* that alleged that the appellants' pleading did not disclose a cause of action, which Mr Bhaukaurally rightly observed was closely linked with the attack on *locus standi*, he submitted that there was no averment that the appellants fell within the tax threshold needed to give them standing for relief. He submitted that the Pleint as a whole tended to show that the appellants were trying to establish a case of public interest litigation, which was not acceptable in Mauritius.
1. That suggestion appeared to receive some support when Mr Gayan SC began his submissions for the appellants. He invoked the relaxed approach to *locus standi* that now prevails in judicial review proceedings in the United Kingdom and a similar approach that he submitted prevailed in relation to constitutional issues in India. He submitted that it would be a pity if a pressure group, or even a public spirited taxpayer, were prevented by "outdated technical rules" of *locus standi* from bringing the matter to the attention of the Court to vindicate the rule of law and to get the unlawful conduct stopped.
1. Mr Gayan went on, however, to submit that the appellants' case was that they did have *locus standi*. Their claim was that they were going to be affected by the imposition of the NRPT and wished to test its constitutionality. Later, when dealing with the submission that the Pleint disclosed no cause of action, he submitted that the amendments to the tax did not destroy the basis upon which the case was being advanced.
1. The Court, in giving judgment, found for the respondents on the issue of *locus standi*. It drew attention to the fact that the pleading had not been amended to reflect the changes made by the Finance Act 2007 to the NRPT. Referring to paragraph 10 of the pleading, the Court commented that this could only mean, when interpreted in the light of the other averments, that each of the appellants had a total income that exceeded 215,000 rupees. The appellants had averred that they were owners of land, but they had not averred that they were owners of "residential property" as expressly defined in the Act, nor that each was in receipt of an annual income exceeding 385,000 rupees. The appellants had failed to show that they had a personal interest in the proceedings and the Constitution did not allow them to bring an action in the Court to litigate a matter of general public interest.

A misunderstanding resolved

1. When this appeal came before the Board it became apparent that there was a misunderstanding on the part of the respondents as to the position of the appellants. By this time payment of the NRPT had, in accordance with its provisions, become due by those liable to pay it. None of the appellants had paid the tax. The respondents appear to have assumed that this was because the appellants considered that they did not fall within the provisions of the tax but Mr Gayan indicated that this was not the position. At the request of counsel the Board granted a short adjournment so that counsel could resolve the matter. On the Board's return, Mr Baker QC for the respondents said that Mr Gayan had explained that his clients accepted that, if the tax was lawful, they were liable to pay it, together with such penalty as might be due for non-payment. The reason why they had not paid the tax was that they contended that it was unlawful. In the light of this assurance Mr Baker, while submitting that the Supreme Court had correctly decided the issue of *locus standi* on the ground given by the Court, devoted most of his energies to seeking to support the decision on a different basis.
1. Mr Gayan for his part, while arguing that his clients' *locus standi* was adequately averred on the pleadings, once again attacked reliance on *locus standi* on the ground that it hindered access to justice and was at odds with the more generous approach now adopted in judicial review proceedings in the United Kingdom.

Locus standi under section 17(1) of the Constitution

1. Section 17(1) of the Constitution is designed to afford an additional or alternative remedy for someone who contends that one or more of the fundamental rights that he enjoys under Chapter II of the Constitution have been, or are likely to be, infringed. The section provides a personal remedy for personal prejudice. It is not an appropriate vehicle for a general challenge to a legislative provision or an administrative act, brought in the public interest. This is made clear by the phrase "in relation to him" in section 17(1). It has also been repeatedly emphasised by the Supreme Court. In this case the Supreme Court rightly cited *Tengur v Ministry of Education and Scientific Research and Another* [2002] SCJ 48, [2002] MR 166 as exemplifying, in a tax context, the distinction between a claim under section 17(1) and a claim for judicial review. Mr Gayan's attempt to rely on principles of *locus standi* in relation to judicial review was misconceived.

The reasoning of the Supreme Court

1. The reasoning of the Supreme Court in this case is as follows. The Plaintiff had addressed the NRPT in its original form. Paragraph 10, in averring that the appellants fell "within the net and conditions provided for" by the NRPT alleged that the conditions for liability to pay the tax, as laid down by the NRPT in its original form, applied to the plaintiffs. Those conditions had been amended, but the pleading had not. *Ex hypothesi* paragraph 10 did not aver that the conditions of liability to pay the tax laid down by the NRPT in its amended form were satisfied.
1. The Board appreciates the force of this reasoning, but has on reflection concluded that it is not sound. The Plaintiff has been treated by the parties as addressing the NRPT in its amended form. Paragraph 10 of the pleading avers that the appellants fall "within the net and conditions" provided for by that tax.

While it is arguable that this should be read having regard to the conditions of the tax specified in the pleading, the Board considers that the better approach is to treat paragraph 10 as applying to the conditions provided for by the NRPT as they now are. Thus paragraph 10 should be read as asserting that the land that the appellants own carries residential buildings and that their annual incomes exceed 385,000 rupees. This approach accords with the approach to the appellants' claim that the parties have adopted. It also avoids striking out the proceedings on a pleading point where there is, in reality, no lack of clarity as to the real issues that divide the parties. For this reason, the Board is not able to uphold the decision of the Supreme Court on the basis of the reason given by the Court.

The alternative argument on locus standi.

1. Mr **Baker**'s alternative argument appears from this extract from his written case:

"...in principle it may be possible for a taxpayer to show that a particular tax has imposed an excessive burden on him such as to impair his economic viability and to amount to expropriation of property rather than genuine taxation. However, to do so the taxpayer would need to bring details of: his financial situation, the burden of the tax, and its impact on him. Such information might be contained in averments in the original plaint, but such information would be necessary to show in what way the constitutional rights were contravened 'in relation to him'".

It was Mr **Baker**'s case that the appellants, as taxpayers, could not contend that they were personally prejudiced by reason of being required to pay an unlawful tax unless they could demonstrate that the features that made the tax unlawful impacted adversely on them as opposed to others who have to pay this tax.

1. The Board has concluded that this argument is unsound. If a plaintiff attacks one provision of a tax statute on the ground that that provision discriminates unfairly against some of those who have to pay the tax, then it is arguable that the plaintiff must show that he is one of those unfairly prejudiced by the provision in question in order to establish *locus standi* to bring a claim under section 17(1) of the Constitution. That is not, however, this case. The appellants are making a frontal attack on the whole of the NRPT on a variety of grounds, alleging that it is contrary to the Constitution and consequently null and void. It should not be inferred that the Board has concluded that there is any merit in this attack. That is not a matter with which the Board has been concerned. There is, however, no doubt that if the attack is sound, the appellants are personally prejudiced by being required to pay a tax that is, *ex hypothesi*, unlawful, even if they are in the same boat as all the others who are being required to pay this tax.

Disposal

1. For these reasons the Board has concluded that the attack on the appellants' *locus standi* has not been made out and that this appeal must be allowed. The Board imposes, however, the following conditions that are designed to ensure that the pleadings clearly and unequivocally identify the issues:

The appellants shall, within 28 days:

- i) amend the Plaint with Summons to plead the provisions of the NRPT in its current form;
- ii) provide particulars of the incomes that they contend render them liable to pay NRPT;
- iii) provide particulars of the residential buildings, ownership of which they contend renders them liable to pay NRPT.

Subject to compliance with these conditions, this appeal is allowed.

Costs

1. For the reasons that the Board has given, this interlocutory skirmish has not reflected well on either of the parties. The Board has reached the provisional conclusion that a special order for costs is appropriate. Unless either party makes written submissions to the contrary within 28 days, the Board awards the appellants their costs in the cause. This means that if these proceedings are ultimately successful the appellants will get their costs in relation to the plea *in limine litis*, here and below, but there will be no order for these costs if the appellants' claim does not ultimately succeed.