

IN THE MATTER OF THE ROADS LAW

AND

IN THE MATTER OF A CLAIM FOR COMPENSATION BY

HAROLD BODDEN AND ABSHIRE BODDEN IN RESPECT OF BLOCK 28C

PARCEL 1

AND

IN THE MATTER OF A CLAIM FOR COMPENSATION BY HAROLD

BODDEN IN RESPECT OF BLOCK 28C PARCEL 178

BEFORE THE ROADS ASSESSMENT COMMITTEE

H H Mrs Ramsay-Hale, Chairman

Mr. David Arch, Member

Mr Alister Ayres, Member

HEARD ON THE 6th,13th,15th,17th DECEMBER,2010 and 6th JULY,2011

Ms Kate McLymont instructed by Broadhurst Barristers for the Claimant

Ms Dawn Lewis, Crown Counsel, for the Respondent

TO HIS EXCELLENCY THE GOVERNOR

FROM THE CHAIRMAN, ROADS ASSESSMENT COMMITTEE

REPORT

THE APPLICATION:

The application is made for an order of compensation in respect of two parcels of land compulsorily acquired by the state for the construction of a road now known as the East-West Arterial Highway.

On the 14th November, 2006 (the declared day) under section 3 of the Roads Law (2005) Revision, Boundary Plan 493 was published in the Cayman Islands Gazette No 23/2006 declaring the National Roads Authority's intention to acquire 3.31 acres of

the land that forms part of Block 28C Parcel 1 and 0.03 acres of Block 28C Parcel 178. At the date of the Gazette, the registered owners of Parcel 1 (hereinafter Property A) were Harold Bodden and his brother Abshire Bodden and Harold Bodden was the registered owner of Parcel 178 (hereinafter Property B)

THE LAW:

The right to claim compensation is provided under Section 8 (2) of the Roads Law which states;

For the purposes of this Law, a claimant does not qualify for compensation as having suffered a net loss unless, at the time of dispossession of such portion of land under this Law, any damage attributable to;

- (a) Loss of any standing crop or trees or portion of land;*
- (b) The severance of such portion of land from the claimant's other land;*
- (c) The injurious affection on the claimant's other land of the dispossession of such portion of land; and*
- (d) The loss of such portion of land, assessed at its market value, exceeds the value of the advantage to the claimant gained by the presence of the new or improved road adjacent to his land.*

The assessment and payment of compensation is governed by the Second Schedule to the Law and the relevant parts of paragraph 6(1) of that Schedule states:

'In determining the amount of compensation to be awarded in respect of any portion of land under this law, the Committee shall take into consideration

- (a) the market value of the land at the declared day*
- (c) any damage sustained by the claimant at the time of the taking possession of the land, by reason of the severing of such land from his other land:*
- (d) any damage sustained by the claimant at the time of the taking of the portion of land, by reason of the dispossession*

injuriously affecting his other property, moveable or immovable, in any other manner, or his earnings;

(f) any damage bona fide resulting from diminution of the profits of the land between the declared day and the time of the taking possession of the land; and

Which is likely to accrue from the use to which the land subject of the claim will be put”

Market value of the land taken: Section 1 of the Second Schedule of the Law defines market value as *“the amount which the land if sold on the open market by a willing seller might be expected to realize.”*

The term “might be expected to realize” refers to *the expectation of properly qualified persons who are informed of all particulars ascertainable and its capabilities, the demand for it and likely buyers.*

Section 6(2) states that

“In determining the amount of compensation to be awarded in respect of any portion of land under this law, the Committee shall not take into consideration

- (a) the fact that the action taken is compulsory;*
- (b) the degree of urgency which has led to the action taken;*
- (c) any disinclination on the part of the claimant to part with the land taken;*
- (d) any damage sustained by the claimant which, if caused by a private person would not render such person liable to a suit;*
- (e) any damage which is likely to be caused to the portion of land after the declared day by or in consequence of the use to which it will be put;*
- (f) any increase to the value of the portion of land likely to accrue from the use to which it will be put after dispossession;*
- (g) any outlay or improvements on, or disposal of, the portion of land commenced, made or effected without the sanction of the Roads Authority after the declared day: or*

(h) the special suitability or adaptability of the portion of land for any purpose if that purpose is a purpose to which it could be applied only in pursuance of statutory powers, or for which there is no market apart from the special needs of a particular purchaser.

Section 6(3) states that

“ in assessing the value of any interest in respect of which the claim is made, it shall be assumed that-

- (a) planning permission would be granted in respect of the land in which the interest subsists (“the relevant land”) for a use which conforms with the planning use outline in the development plan for that location and for which it is reasonable to assume that planning permission would have been granted;*
- (b) where an order has been made under section 15 of the Development and Planning Law (2005 revision) in respect of the relevant land or any part thereof, requiring the removal of any building or the discontinuance of any use, that planning permission would not be granted in respect of the relevant land or any part thereof for the rebuilding of that building or the resumption of that use; and*
- (c) that planning permission would not be granted in respect of the relevant land or any part thereof for any development other than such development as is mentioned in paragraph (a); and if planning permission has been granted for such other development it shall be assumed that the planning permission has not been granted insofar as it relates to development that has not been carried out.*

The overriding principle in the assessment of compensation is that of equivalence. This means that the right to compensation is “the right to be put, so far as money can do it, in the same position as if the land had not been taken from the claimant”

In *Horn v Sunderland* (1941), it was stated that “*compensation must not exceed the owner’s total loss for, if it does, it will put an unfair burden on the public authority or other promoters who on public grounds have been given the power of compulsory acquisition, and it will transgress the principle of equivalence which is at the root of*

statutory compensation, the principle that the owner shall be paid neither less nor more than his loss.”

The aggregate of compensation under the heads of claim mentioned in paragraph 6 of schedule 2 of the Law is deemed to achieve equivalence.

THE DISCUSSION

The primary issue for resolution was whether Property A was landlocked as the acquiring authority contended or whether there was a prescriptive easement benefitting the parcel and giving it access to Hirst Road. The Respondent contended that the road frontage and access provided by the road to previously landlocked land had increased the value of the Claimants' holdings and that, in the circumstances, no compensation was payable.

The evidence of Heather Bodden went to show that the subject parcel belonged to her father and his brother and before that to her grandparents. She said it was enjoyed in common by all the family for more than 20 years. The fruit trees growing on the property were regularly harvested and had provided for everyone in the Newlands area in the 50's and 60's. Her uncle Hubert used to drive to the property through at Hirst Road in order to harvest the fruit trees until he was no longer able to do so and that staff continue to do so now.

Her evidence was that the access to the land was from Hirst Road was over Parcels 26 (the House Lot) 179 and 178 and that that access had been in use for more than 20 years. When the hearing resumed for closing submissions in July of this year, photos were tendered by the Claimants attorney that showed track marks going from Hirst Road through Parcel 26, and indeed through the neighbouring parcel 179, through Parcel 178 to the subject parcel.

The Committee was satisfied on all the evidence that there was a prescriptive easement benefitting Property A and that the parcel was not landlocked as alleged by the Respondent.

In the circumstances, the Committee rejected the assertion by the Respondent that the retained land in Property A had increased in value as a result of the Scheme as the assertion derived almost entirely from the position taken by the Respondent's expert that the land was landlocked before the road was put in.

The Committee was also satisfied that planning permission for low-density residential development would have been granted and rejected the assertion made by the Respondent that, given the size of the proposed development, two points of access would have been required in order to obtain planning approval.

PROPERTY A

THE LAND TAKEN

Over 3.313 acres (144,184sf) of Parcel 1 were acquired. The market value of the land was determined by the Committee by reference to the divers Comparables which were relied on by the two experts and were ostensibly selected based on their similarity to the subject land in terms of size, elevation, zoning, development potential and desirability. The Committee was also referred to several settlements in respect of other lands taken for the construction of the East West Arterial. It was accepted by both experts that the bigger the size of the parcel being purchased the lower the price psf achieved.

Mr Treacy for the Claimant referred to Comparables at Spotts, Prospect, Prospect Point Rd. and Shamrock Rd all of which had more desirable locations and all of which had substantial road frontage which the land taken did not and were to that extent more desirable.

Mr Obi referred to several Comparables which had much lower price points of \$1.96, \$1.77, \$1.21 and \$2 psf respectively. The parcels were in the same Newlands area as the subject parcel, in Spotts Newlands and Lower Valley. Mr Obi then discounted the values on the assumption that the land taken had inadequate access. Assuming a cost of \$1.10 psf for obtaining a vehicular right of way and constructing a road, he arrived at a value of .75c psf for the land taken.

The Committee expressly found, however, that the land had access. Having reviewed the evidence of Comparables and Settlements, the Committee determined the **market value of the land taken to be \$1.75.**

The amount of money payable as compensation for the LAND TAKEN is \$252,322.

THE RETAINED LAND

The retained land is made up of 23.69 acres (1,031,936 sf). The issue for resolution by the Committee was whether there was any diminution in value of the land as a result of the acquisition.

SEVERANCE

The Committee assessed the value of the land before the Scheme at \$1.25 psf (\$1,289,920) a value psf lower than the value of the land taken because of the agreed effect of the size of the parcel on the value of the land.

The defendant's expert averred that the effect of the severance was to reduce the development potential of the land by reducing the amount of land available for development by some 5 % to 10% because of the awkward shape of the remainder.

More particularly, the Claimant's expert averred that 17,500sf of the retained land cannot be developed or used for amenities and therefore has no value; that 14,700 sf cannot be developed cannot be developed but has some amenity value but lesser than the value psf of the whole; and that 49,987sf of the retained land (being 5% of the retained land that is not dead land as a result of section 18 of the Roads law or because it is in an acute corner where the highway joins the property) cannot be developed because the new shape of the parcel and the access ways to the Highway create a need for additional infrastructure and therefore has no value.

Mr Obi challenged the evidence and reminded the Committee that the developer would have to retain 5% of the land for public purposes as a matter of law and that the areas lost to development as a result of the road could simply be factored into public lands in any future development.

The Committee was satisfied on the evidence of Mr Treacy that there had been a diminution in value to the land as a result of severance as outlined in his evidence. We accepted the Respondent's assertion that 5% of the land would have to be set aside for public purposes in any event, but were satisfied that there was a diminution in the value of the land of a further 5% as a result of the severance.

The Committee assessed the amount of compensation payable as and for severance at \$64, 496.

INJURIOUS AFFECTION:

It was also submitted that there was injurious affection to 150,000 sf of the retained land that was adjacent to the new highway as a result of noise, vibration, smell, air pollution and artificial light disturbance affecting that land. The evidence of injurious affection was traversed by the Respondent. Mr Obi asserted that the sale of lots in the Frank Hall Homes development was clear evidence that the value of the land had not been anyway diminished by the Scheme.

The Committee was satisfied that there was some diminution in value to the lands adjacent to the highway which it valued at 10% of the value of the land which we valued at \$1.25 psf.

The Committee assessed the amount of compensation payable as and for injurious affection at \$18,750.

PROPERTY B:

LAND TAKEN

No claim was made for land taken from Property B as the issue was settled before the matter came before the Committee.

RETAINED LAND

INJURIOUS AFFECTION

The Committee was satisfied that there was injurious affection to the remainder, which comprised 41,818 sq ft. of land which now had 120 feet of highway running along its boundary and assessed the diminution in value as 10 % of the value of the land to which we have ascribed a value of \$1.75 psf at the Declared day.

The Committee therefore assessed the amount of compensation payable as and for injurious affection at \$7,318.15

Accordingly, the Committee finds that the total amount of compensation to which the claimant is entitled is \$342,886.15.

Costs to be assessed or agreed.

Dated this 29th day of September, 2011



CHAIRMAN

Margaret Ramsay-Hale



MEMBER

David Arch



MEMBER

Alister Ayres