DRAFT/Delivered on the 11th of November 2009/Attorneys' submissions for amendments requested by Monday the 16th of November 2009 at 2:30 p.m. Kindly recall that submissions accepted for the final document are within the sole purview of the judge.

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN

Cause No: 491/2006

IN THE MATTER OF THE ROADS LAW (2005 REVISION)

AND IN THE MATTER OF THE LAND ACQUISITION LAW

AND IN THE MATTER OF A COMPENSATION CLAIM BY CONCEPT LTD. FOR THE ACQUISITION BY GOVERNMENT OF THE LAND KNOWN AS BLOCK 12C PARCEL 195

BETWEEN:

CONCEPT LTD.

CLAIMANT/APPELLANT

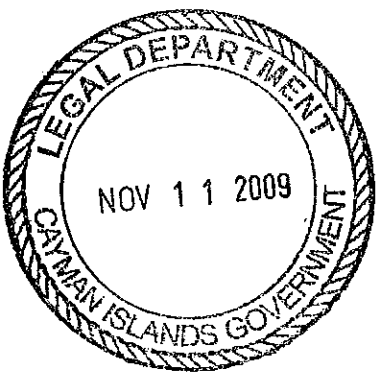
AND:

THE NATIONAL ROADS AUTHORITY ACTING BY THE DIRECTORS OF LANDS & SURVEY

RESPONDENT

APPEARANCES:
Mr Ramon D Alberga Q.C. and Ms Linda DaCosta, instructed by Thorp Alberga for the Appellant

Mr Guy Roots Q.C. and Ms Vicky Ellis for the Respondent



Before: **Hon. Justice Quin**

Heard: **11th – 14th August 2009**

RULING

1. At the outset of this hearing on the 11th of August 2009 I made a preliminary Ruling and allowed the Appellant's application pursuant to GCR O. 55 r.6(2), and r. 7(5) and O. 20 r. 8(1), and granted leave to the Appellant to amend its Form B claim for compensation

under Section 9(2) of the Roads Law, along with any consequential amendments necessary to the Appellant's Notice of Originating Motion and Amended Grounds of Appeal, to reflect the Amendment sought and granted.

2. For the purposes of this Appeal the Court was provided with the following material, together with the evidence of Liam John Day ("Mr Day"), on behalf of the Appellant and Iain Andrew Franklin ("Mr Franklin") on behalf of the Respondent.

i. All the documents in the Record of Appeal – Bundles 1 and 2.
ii. Analysis of Sale by Mr Day for Property Description: Block 12C Parcel 16
iii. Revised List of Appendices to Expert Report of Mr Franklin
iv. Summary of Alterations to the Expert Evidence of Mr Franklin (IF01, IF02, and IF03).
v. Aerial Photograph of Seven Mile Shops & Queen's Court 2004 – Block and Parcel: 12B, 154 & 64
vi. Aerial Photograph of The Strand 2004 – Block & Parcel 12C 350
vii. Aerial Photograph of West Shore Centre 2004 – Block & Parcel 12E 83.
viii. Aerial Photograph of Governor's Square 2008 – Block & Parcel 11D 4
ix. Aerial Photograph of Deckers 2004 – Block & Parcel 12E 93
x. Aerial Photograph of Galleria Place 2004 – Block & Parcel 12E 68.
xi. Aerial Photograph of Park Place 2004 – Block and Parcel 12C 16
xii. Aerial Photograph of Park Place 2008 – Block and Parcel 12C 16
xiii. Aerial Photograph of subject land and Parcel 12C 195.
xiv. Form B amended

xv. Respondent's Skeleton Argument, settled by Guy Roots Q.C. dated the 31st of July 2009.

xvi. Appellant's Skeleton Argument, settled by Ramon Alberga Q.C. and Linda DaCosta dated the 5th of August 2009.

xvii. Closing Submissions on behalf of the Respondent dated the 14th of August 2009

xviii. Note of the Final Submissions on behalf of the Appellant made on the 14th of August 2009 and settled by Ramon Alberga and Linda DaCosta on the 20th of August 2009.

3. In order to consider the salient issues before the Court and come to a determination on these issues, I think it is important to set out the history, background and chronology of events in this matter.

History

4. The Appellant was the owner of a property, registration Section West Bay Beach South Block 12C Parcel 195, consisting of approximately 1.15 acres. The Appellant's property has a commercial two-storey building, comprised of four shop units on the ground floor and one unit on the upper floor.

5. On the 5th of May 2005 a Notice was published in the Official Cayman Islands Gazette in compliance with Section 3 of the Roads Law, indicating the intention of the National Roads Authority ("NRA") intention to construct a road for which purpose there was an intention to acquire compulsorily 0.25 acres of land which formed part of Block 12C

Parcel 195. The 0.25 acres of compulsorily acquired land is referred to herein as the "subject land."

6. In compliance with Section 6 of the Roads Law the Governor authorised the Respondent to enter on to the Appellant's land and to construct the road, thereby compulsorily acquiring for this purpose 0.25 acres (10,891 square feet) of the subject land.

7. On the 27th of July 2005 the Appellant through its Agent gave Notice of intention to make a claim for compensation in compliance with Section 9(1) of the Roads Law. On the 8th of December 2005 the Appellant served its Notice in Form B in accordance with Section 9(2) of the Roads Law. This Notice was acknowledged by the Respondent on the 3rd of January 2006. The Appellant's Form B Notice was amended pursuant to this Court's Order dated the 11th of August 2009 and referred to in paragraph 1 above.

8. On the 16th of January 2006 Mr Franklin on behalf of the Director of Lands and Survey recommended compensation for the subject land in the sum of CI$70,791.50 or CI$6.50 per square foot, which offer was rejected by the Appellant.

9. On the 30th of January 2006 in Mr Franklin, again for the Director of Lands and Survey recommended an increased offer in the sum of CI$109,000.00 or CI$10.00 per square foot for the subject land, which offer was again rejected.

10. The Appellant through its then Agent, Deloitte, only relied on one head of claim, namely the market value of the Claimant's interest in the subject land, which the Appellant claimed at that time to be worth US$653,400.00 or CI$60.00 per square foot. The

Appellant did not submit any other claim under any other heading available pursuant to Paragraph 6 (1) of the Second Schedule to the Roads Law.

11. Negotiations regarding the subject land took place but agreement was not reached, and so the claim was referred to the Roads Assessment Committee ("RAC") pursuant to Section 10 of the Roads Law.

12. Pursuant to hearings which took place on the 13th of July, the 18th August and 1st of September 2006, an undated decision of the RAC was given in writing to the parties on or about the 26th of October 2006.

13. In its decision served on the parties on or about the 26th of October 2006 the RAC stated that the valuation of the property should be the market value of the property as at the declared day. The RAC awarded the Appellant the sum of CI$178,612.40 or CI$16.40 per square foot.

14. In addition RAC stated in its report "no details were provided to establish claims under Section 8(2)(a) for loss of standing crops and trees or under Section 8(2)(b) for severance, or under Section 8(2)(c)(iv) for injurious affection. Accordingly, the Committee declined to award any compensation under those heads."

15. On the 20th of November 2006 the Appellant gave Notice of Appeal against the decision of the RAC.

16. On the 6th of February 2007 the Respondent wrote to the Appellant indicating the Appellant's Notice of Appeal was lodged out to time. Following on this the Appellant filed an application seeking leave for an extension to file an appeal out of time.

17. On the 21st of May 2007 Henderson J granted the Appellant leave to amend the originating summons by substituting as the Respondent the NRA Acting by the Director of Lands and Survey, in place of the Cayman Islands Government Acting by the Director of Lands and Survey. Further Henderson J granted the Appellant an extension of time to appeal an undated decision of the RAC, and ordered directions in relation to adducing further evidence by either party.

18. On the 11th of May 2007 the Respondent filed an interlocutory summons for leave to appeal Henderson J's Order or alternatively for an Order for a stay of these proceedings.

19. On the 9th of August 2007 Levers J dismissed the Respondent's application with costs.

20. On the 5th of May 2008 the Appellant applied to the Grand Court for leave to adduce further evidence in the form of a Report of BCQS prepared by Mr Day, and for leave to amend its grounds of appeal.

21. On the 12th of August 2008 Levers J stated that the appeal will be by way of a rehearing pursuant to GCR O.55 r.2 and will involve an exercise of original jurisdiction as well as appellate jurisdiction. Levers J further stated that the question of public importance and the fact that this is a matter that is going to be re-tried *de novo* does constitute special grounds, and accordingly acceded to the Appellant's application and granted the

Appellant leave to adduce further evidence by way of the report of BCQS, prepared by Mr Day, and further allowed for the Memorandum of Grounds of Appeal to be amended.

22. On the 21st of August 2008 the Appellant served its Amended Memorandum of Appeal which sets out eight grounds:

i. That the award of the RAC to the Appellant was inordinately low and in making that award the Roads Assessment Committee erred as a matter of law.

ii. That the RAC wrongly valued the portion of the land to be acquired as though it was a separate and distinct parcel of land consisting of 0.25 acres and not a portion of a larger parcel of land consisting of 1.15 acres.

iii. That in proceeding in this way, the RAC erred as a matter of law and as a matter of principle. It should have attached a square footage value to the whole parcel of land owned by the Appellant and then applied this value to the small area of the whole parcel in arriving at the amount of compensation properly payable to the Appellant. Any other approach would be illogical and unreasonable and would be most unfair to the Appellant.

iv. That the RAC failed to act upon and apply the well established principle that a landowner who is compelled to part with his land has the right to be put insofar as money can do it in the same position as if the land had not been taken from him.

v. That although the Appellant did not specify or raise the question of an award under Section 6(1)(c) of the Roads Law ("the Law"), the RAC

should have in any event considered the question of whether or not the Appellant had sustained damage by reason of the fact that the Appellant's land which had been taken had been severed from other land owned by the Appellant. Such damage has been assessed in the report of BCQS as amounting to the sum of US$585,000.00.

vi. That if this 0.25 acres of land had not been taken from the Appellant its value as an integral part of the whole parcel of 1.2 acres would have been CI$60.00 per square foot amounting to CI$653,400.00 and this is the loss that the Appellant has suffered by being deprived of the 0.25 acres of its land. Alternatively, the value would be US$40.00 per square foot amounting to US$435,600.00 as assessed by the Appellant's expert and furthermore that pursuant to Section 6(1)(c) the Appellant suffered damages in the sum of US$585,000.00.

vii. That evidence of the Appellant's experts as to value was to the effect that the square footage value of the entire parcel was CI$60.00 or alternatively US$40.00 per square foot together with damages sustained by the Appellant pursuant to Section 6(1)(c)of the Law in the sum of US$585,000.00 and as a result the RAC did not consider the decrease in the value of the retained land after it was deprived of 0.25 acres.

viii. That the findings of the RAC both as to the assessment for compensation and in relation to costs were generally wrong in law and should be set aside.

23. Also on the 21st of August 2008 the Appellant requested the following Orders from the Court:

i. That the decision of the RAC that the compensation to be awarded to the Appellant in respect of the land consisting of 0.25 acres being a portion of the land comprised in Block 12C, Parcel 125 should be CI$178,612.40 be set aside;

ii. That the Appellant be awarded as compensation for the land compulsorily acquired by the Respondent, the sum of CI$653,400.00 or such sum in excess of the sum of CI$178,612.40 as may seem just (to the Court);

iii. That the costs of and incidental to this appeal and of the proceedings before the RAC be paid by the Respondent to the Appellant.

Relevant Legislation

24. Under Section 10(1) of the Roads Law if there is no agreement between the parties a claim under Section 9 should be submitted by the NRA to the RAC.

25. The assessment and payment of compensation is governed by the second schedule to the Roads Law, and Paragraph 6(1) of the second 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;

(b) the damage sustained by the Claimant by reason of the taking of any standing crops or trees which are on the land at the time of the taking possession thereof;

(c) any damage sustained by the Claimant at the time of 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, movable or immovable, in any other manner, or his earnings;

(e) if, in consequence of the dispossession, the Claimant is compelled to change his residence or place of business, the reasonable expenses incidental to such change;

(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

(g) any increase in the value of the Claimant's interest-

(i) in any remaining portion of the land in respect of which the claim is made; and

(ii) in other land contiguous or adjacent to (whether or not actually touching) any land mentioned in subparagraph (i) to which the Claimant was entitled in the same capacity on the declared day; and

which is likely to accrue from the use to which the land subject of the claim will be put."

26. Paragraph 1(1) of part 1 of the second schedule defines "market value" and states that it "means the amount which the land, if sold on the open market by a willing seller might be expected to realise."

27. Furthermore "might be expected to realise" "refers to the expectation of properly qualified persons who are informed of all particulars ascertainable about the property and its capabilities, the demand for it and likely buyers."

28. Finally "willing seller" "means a person selling as a free agent, as distinct from one who is forced to sell under compulsory powers."

29. On the 11th of August 2009 I granted the Appellant's application for leave to amend the Form B claim for compensation filed under section 9(2) of the Roads Law. Furthermore, based on the provisions of O.55, and the decision of the Grand Court in *Ford v Immigration Appeals Tribunal 2007 C.I.L.R. 258* I found that this Court is exercising both an original and appellate jurisdiction and therefore this appeal can be conducted as a rehearing *de novo* in which I am exercising an original, and, at the same time, appellate jurisdiction.

30. Accordingly, under the amended Form B, the Appellant is claiming compensation by way of the market value of the Claimant's interest, being US$435,640.00, or alternatively, US$40.00 per square foot and, in addition, the Appellant is claiming US$585,000.00 by way of damage sustained at the time of taking possession of the land by reason of the severance of the subject land from the Claimant's other land.

Issues before the Court

31. In summary the Appellant submits that the award of the RAC was inordinately low and in making the award the RAC erred as matter of law:

a. The RAC wrongly valued the portion of land to be acquired as though it was a separate and distinct parcel of land consisting of 0.25 acres, and not a portion of a larger parcel of land consisting of 1.15 acres

b. The Appellant submits that the RAC erred as a matter of law and as a matter of principle by not attaching a square footage value to the whole parcel of land owned by the Appellant, and then applying that value to the small area of the whole parcel in arriving at the amount of compensation.

c. The RAC failed to act upon the overriding principle that the Appellant who is compelled to part with his land has a right to be put, in so far as money can do, in the same position as if the land had not been taken from him.

d. The RAC should have considered the question of whether or not the Appellant had sustained damage by reason of the fact that the Appellant's land, which had been taken, had been severed from the other land owned by the Appellant.

32. In summary the Respondent submits that:

a. The RAC did not make an error of law and was correct in valuing the land taken as a separate and distinct parcel;

b. The RAC was correct in finding the Appellant to be a willing seller;

c. The Appellant's claim for Severance is fundamentally flawed.

The Evidence

Liam John Day ("Mr Day")

33. The Appellant called Mr Day as its expert witness. Mr Day is a principal with BCQS International and is a Quantity Surveyor. Mr Day states in his Second Affidavit that BCQS pioneered the valuation/appraisal industry in the Cayman Islands. Mr Day's

evidence is that it was in the early 1970's, without the benefit of a comprehensive Cayman Islands Government database, that it was agreed that the most appropriate means of determining value for the individual one-off properties was to rely on the "cost approach" method.

34. Mr Day accepts that "specialist" valuation surveyors have now entered the marketplace and indeed he stated that BCQS employs the largest team of specialist valuation surveyors in the Caribbean. However Mr Day maintains that the subject matter of the proceedings at hand is not overly complicated, and again lends itself to the skill set of a Chartered Quantity Surveyor in determining land value based upon a straight forward analysis of comparable sales, coupled with a cost/value-based severance calculation.

35. In Mr Day's first report he refers to the definition of "market value" from the Royal Institute of Chartered Surveyors as "the estimated amount for which a property should exchange on the date of valuation between a willing buyer and a willing seller in an arm's-length transaction after properly marketing wherein the parties had acted knowledgeably, prudently without compulsion."

36. Mr Day also acknowledges in his evidence that in the Cayman Islands market value is defined in Part 1 of the Second Schedule of the Roads Law.

37. Mr Day looked at five comparables.

    i. Comparable 1: Block 12C/Parcels 31-37: This land was an area of 1.68 acres in "Neighbourhood Commercial" zoning, which sold for

$2,706,280.00 in August 2004 – reaching a sales price of US$36.98 per square foot.

ii. Comparable 2: Park Place, Block12C – Parcel 16: This land was approximately 0.9998 acres which sold for US$3,750,000 in July 2005, realizing a sales price of US$86.11 per square foot. Again it was zoned "Neighbourhood Commercial" and had West Bay frontage.

iii. Comparable 3: Caribbean Club, Block 12C – Parcel 427: This land was an area of land of 2.059 acres, which sold for US$3,600,000.00 in June 2006, realizing a price of US$40.14 per square foot. Again it was "Neighbourhood Commercial" and had the benefit of West Bay frontage.

iv. Comparable 4: Deckers Land, Block 12E – Parcel 93. This land was an area of land of 1.066 acres, which sold for U$2,225,000.00 in June 2006 realising a comparable price of US$47.93 per square foot. Again this land was zoned "Neighbourhood Commercial" and benefitted from West Bay frontage.

v. Comparable 5: Fidelity Financial Centre, Block 12E – Parcel 103. This land was approximately .7193 acres, which sold in July 2005 for the price of US$1,268,978.00, realizing a square footage price US$40.50 per square foot. Again this land was zoned "Neighbourhood Commercial" and benefitted from West Bay frontage.

38. Mr Day's view was that his second comparable, the Park Place land, represented the best comparable in terms of a like-for-like comparison of the physical characteristics of the two properties. His opinion was that US$86.11 per square foot was inconsistent with other comparables, and therefore should be discounted accordingly. As such he valued

the subject property "part" parcel as at the 5th of May 2005 in the sum of US$435,600.00 or US$40.00 per square foot.

39. It is accepted that Mr Day valued the whole of the Appellant's property before it was compulsorily purchased at US$40.00 per square foot, and applied this square footage market value to the land taken which is the subject land.

40. In its judgment the RAC had held that the Mini Warehouse land at Block 12C Parcel 263 was a good comparable, in that it was in Neighbourhood Commercial and was a similar distance from the West Bay Road and sold in 2003 at CI$16.93 per square foot, allowing them to come to a figure of CI$16.40 per square foot for the subject land, or alternatively US$20.00 per square foot.

41. Mr Day's contention is that the RAC, and surveyors on behalf of the parties, had failed to recognise the fact that the subject "part" parcel is contiguous with land benefitting from West Bay Road frontage, and submits that the Mini Warehouse land was completely inappropriate as a comparable for valuing the subject property, as it had no direct linkage with property on the West Bay Road.

42. In his first report Mr Day referred to the concept of "tiered zoning" – referenced by the Lands and Survey Department. It was his view from his experience that rents achieved by the various Strip Malls located along the West Bay Road corridor, were such that the rear units furthest away from the West Bay Road achieved the same rents as units with direct West Bay frontage.

43. Based on this rationale, Mr Day was of the view that the rear portion of the property benefitting from frontage on West Bay Road should be valued at the same square foot dollar rate as the roadside portion.

44. In his first report Mr Day referred to Paragraph 6(1) (c) of the Second Schedule of the Roads Law which 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 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."

45. Accordingly, Mr Day instructed the architectural firm of CGMJ Limited to determine the impact of the severance on the development potential of the property. Mr Day stated that CGMJ viewed the whole of the Appellant's land on Parcel 12C 195 with regard to site development potential. CGMJ conducted a site study, and under Central Planning Authority regulations, commercial development at seventy percent (70%) coverage which approaches the maximum allowable. CGMJ did an analysis before the compulsory purchase of the Appellant's land, and after compulsory purchase. Before, CGMJ's estimate was that the land amounted to 37,573 square feet, and after the compulsory purchase the land available for development was 29,405 square feet. CGMJ's review was also based on the fact that parking is provided with one space per 300 square foot area. Before the compulsory purchase the Appellant's land could provide for the development of two three-storey buildings of nine thousand (9,000) square feet and eighty (80) car parking spaces. After the compulsory purchase the Appellant's land could accommodate only one (1) three-storey building of nine thousand (9,000) square feet and fifty (50) spaces for car parking.

46. Mr Day conducted a Severance calculation, which is found at page 20 of his report on Market Value and Methodology. Mr Day's report was based on a number of factors, including construction costs, government fees, professional fess, financing and he determined that there was a loss based on development profit of US$585,000.00 as set out in the Severance calculation on page 20.

Iain Andrew Franklin ("Mr Franklin")

47. The Respondent called Mr Franklin, who is a member of the Valuation Faculty of the Royal Institute of Chartered Surveyors – having been admitted in September 2005. Mr Franklin holds a Bachelors Degree in Land Management and a Masters Degree in Urban Planning and Development from the University of Reading in the United Kingdom. He is currently a Valuation Officer with the Valuation and Estates Office of the Lands and Survey Department of the Cayman Islands Government.

48. In Mr Franklin's report dated the 31st of July 2009, he also, like Mr Day, states that in order to establish the market value of the land taken the best evidence is comparable arm's-length open market sales transactions, making appropriate adjustments to reflect the differing physical characteristics of each individual property or differences in date. However a fundamental difference is that Mr Franklin only values the land taken, without reference to the land retained by the Appellant.

49. Like Mr Day, Mr Franklin valued a number of comparable properties. For the purpose of this Ruling I only refer to the most relevant of Mr Franklin's comparables:

a. Comparable 1: Block 12C Parcel 263, the Mini Warehouse land: This land was 24,395 square feet, zoned for Neighbourhood Commercial development and sold for CI$413,040.00 by transfer, dated the 18th of November 2003, approximately 18 months prior to the valuation date. This realised a price of CI$16.93 per square foot.

b. Comparable 2: Block 12C Parcel 31-37, (now known as Block 12C Parcel 429) the Esso Land. This property, zoned Neighbourhood Commercial, extending to approximately 71,925 square feet, sold for CI$2,219,150.00 on the 13th of December 2002, which equated to an overall figure of CI$30.85 per square foot. In the case of this land Mr Franklin states that the first 150 feet of depth are the most valuable. He values the property in two parts. The valuable prime land adjoining West Bay Road has a value of CI$49.30 per square foot. He states that the use of this comparable is to value the non-prime land – namely the remainder of the land at CI$19.70 per square foot.

c. Comparable 3: The subdivided land: Block 12D – parcels 30 and 32 (now Block 11D Parcels 85-89). This was approximately 391,108 square feet, zoned Neighbourhood Commercial and sold for US$3,516,00.00 on the 23rd of January 2004 – equating to a valuation of CI$7.37 per square foot. However, what is particularly revealing is that this parcel was subsequently subdivided into parcels 85-89, and in the subsequent transfer of the land, effected by the 2004 purchase agreement, values were apportioned to the separate parcels, namely:

   i. 11D 89 (19,559 sq. ft) US$166,204.00, realizing CI$8.49 per square foot;

   ii. 11D 87 (102,460 square feet) US$870,012.00, realizing CI$8.49 per square foot;

iii. 11D 86 (68,246 square feet) US$579,230.00 realising CI$6.95 per square foot;

iv. Parcel 88, which was the only one of the four subdivided parcels with West Bay frontage, extending to 155,825 square feet, was re-sold on the 23rd of March 2006 – eleven months after our valuation date – for CI$2,255,00.00 or CI$14.47 per square foot;

d. Comparable 4: Caribbean Club land – Block 12C parcel 427. This land was comprised of 2.059 acres (89,690 square feet) with extensive frontage to West Bay Road. It was zoned for Neighbourhood Commercial development and realized a price of US$3,600,000.00 (CI$2,950,200) on the 30th of June 2006, some fourteen months after our valuation date, equating to CI$32.90 per square foot. Similar to his valuation of the Esso Land, Mr Franklain valued the prime land benefitting from West Bay frontage at CI$43.80 per square foot, but significantly, he valued the non-prime land at CI$21.91 per square foot.

50. Mr Franklin's analysis of the comparable evidence leads him to the conclusion that the value of the subject land is to be $17.50 per square foot, with compensation therefore payable of CI$190,500.00.

51. It is correct that Mr Franklin candidly admits that his evidence in his previous Proofs of Evidence has changed as a result of reading the advice from the Respondent's leading counsel, Mr Guy Roots Q.C. Accordingly Mr Franklin relies upon the evidence contained in his July 2009 Proof of Evidence.

Market Value

52. I will now analyse the question of market value. The Appellant contends that the RAC was wrong to treat the subject land – i.e. 0.25 acres – as a separate and distinct parcel for the purpose of attaching a square footage value to it. It claims that the tier zone principle does not apply in Cayman and further, the Appellant should be fully and fairly compensated for its loss by receiving a price per square foot, which reflects the value of the whole property and not just the square footage value of the subject portion.

53. This Court has heard submissions on the question of tiered zoning and what, if any relevance, it has to the market value of the subject land. The subject land, and indeed the Appellant's retained land, are very different from the U-shaped shopping malls that Mr Day had analysed for the purposes of his submission that the floor of a U are the same/similar to rents on the West Bay Road, because shoppers in the Cayman Islands come by vehicle rather than on foot.

54. No expert evidence has been called to support this contention but, in any event, it is very difficult for this Court to see how a typical U-shaped shopping mall could fit into the Appellant's property. Therefore it is this Court's view that in the circumstances of this particular appeal, the concept of tiered zoning does not influence the market value of the subject land.

55. It is common ground that the Appellant could have subdivided its land and would have been in a position to sell the portion of the land that has become the subject land, which compulsorily acquired by the Cayman Islands Government pursuant to the Roads Law.

56. In *Penny v Penny 1868 LR 5 EQ 227* Wood VC stated that land taken must be valued in its existing state on the valuation date "...the value to be ascertained is the value to the seller of the property in its actual condition at the time of expropriation, with all its existing advantages and with all its possibilities..." And further in the English Court of Appeal decision of *Inland Revenue Commissioners v Craig 1994 RVR 129 at page 136* Hoffman LJ, as he then was, stated:

> "Certain things are necessarily entailed by the statutory hypothesis. The property must be assumed to have been capable of sale in the open market, even if in fact it was inherently unassignable or held subject to restrictions on sale. The question is what a purchaser in the open market would have paid to enjoy whatever rights attached to the property at the relevant date...Furthermore the hypothesis must be applied to the property as it actually existed and not to some other property..."

57. I come now to examine the provisions of the Roads Law and the starting point is Section 3(1) which states "Whenever it appears to the Governor, upon recommendation by the Roads Authority, that any particular portion of land is needed for the layout of a new public road...a declaration to the effect shall be gazetted ..." And Section 3(2) states "The declaration shall state (a) the intention of the Roads Authority to construct a road or portion of road over the portion of land and (b) the locality in which the portion of land is situated ...and (d) the approximate area of the portion of land..."

58. Section 8 of the Roads Law deals with rights to compensation by stating: "Any person having an interest in any portion of land to which the declaration under section 3 relates..." which again demonstrates the legislation is highlighting the specific subject land which is going to be compulsorily acquired.

59. Section 8(2) states that a ..."claimant does not qualify for compensation as having suffered a loss unless, at the time of dispossession of such portion of land under this

Law, any damage attributable to ... (b) the severance of such portion from the claimant's other land ... (d) the loss of such portion of land assessed at its market value."

60. It is clear that section 8(2)(d) is referring to the subject land and refers to the loss assessed at its market value, whereas section 8(2)(b) refers to the severance of such portion of such of land from the claimant's other land. Again the "portion of land" is the subject land which has been compulsorily acquired, whilst the claimant's other land is the land retained by the Appellant after the compulsory acquisition.

61. With respect to the Second Schedule to the Roads Law entitled "Assessment and Payment of Compensation" the guiding provisions for both the RAC and this Court on the assessment of compensation is where Paragraph 6(1) 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" and, in Paragraph 1 of the Second Schedule market value is defined as "the amount which, if sold on the open market by a willing seller, might be expected to realize."

62. It is clear to this Court that when one is talking about the market value of the land that the Roads Law is referring to the subject land which has been compulsorily acquired and not to the land retained by the Appellant.

63. This can be further demonstrated by the fact that Paragraph 6(1)(c) of the Second 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 – any

damage sustained by the Plaintiff at the time of the taking possession of the land by reason of the severing of such land from his other land."

64. Accordingly, this Court accepts the submissions by the Respondent that there can be no doubt that the task set by the statute is to assess the market value, as defined, of the parcel of land taken which is the subject land.

65. In this case the parcel of land is the 0.25 acres or 10,891 square feet of land, which became the subject land compulsorily acquired by the Respondent on behalf of the Cayman Islands Government. It is that subject land for which this Court has to assess its market value at the declared date of the 5th of May 2005. And further, when deciding its market value, this Court must ignore, for the purposes of Paragraph 6(1)(a) of the Second Schedule of the Roads Law, the land retained by the Appellant.

66. Accordingly, it is this Court's view that the RAC was correct when they applied the decision of the Lands Tribunal in *Cooke v Secretary of State [1974] 229 E.G. 117* to their decision in the *H. O. Merren* case where the Committee held that the land is to be valued as a separate holding and not as part of the larger holding of the actual owner, where he owns the land acquired with other land. This Court holds that the subject land should be valued as a separate and distinct parcel.

Willing Seller

67. The Appellant submits that the issue as to how the assessment of the compensation to an owner who loses a portion of a larger parcel of land owned by him by compulsory acquisition, and which portion he would have been unlikely to have ever sold on its own,

has never been decided by this Court. Further, the Appellant submits that it has never been decided by this Court whether that the Appellant would only ever have sold, as a willing seller, the subject land, as part of the whole property with the West Bay frontage.

68. Mr Day, on behalf of the Appellant, relies on the definition of market value from the Royal Institute of Chartered Surveyors as set out in paragraph 35 above.

69. Paragraph 1(1) of the Second Schedule to the Roads Law defines willing seller as: "A person selling as a free agent, as distinct from one who is forced to sell under compulsory powers."

70. Lord Justice Megaw described a "willing seller" in the English Court of Appeal decision of *Trocette Property Co Limited v Greater London Council [1974] 28 P.&C.R. 408 ("Trocette") at page 416*:

> "The willing seller is a hypothetical character. There is no justification for attaching to him, so as to increase or reduce the compensation, any special characteristics. He is to be assumed to be willing to sell at the best price which he can possibly get in the open market."

71. Accordingly the RAC in my view was right and correct in considering, for the purposes of compensation, that the Appellant is a willing seller of the subject land, which is separate from any other parcel, and, in particular, separate from the remainder of the Appellant's property. The RAC was right in applying the same reasoning as Lord Justice Megaw in *Trocette* and this Court follows and applies the same principle in holding that for the purposes of assessing compensation under the Roads Law the Appellant is a willing seller.

Comparables and Value per square foot

72. By using comparables, the Appellant contends that the subject land taken should be valued at US$40.00 per square foot.

73. I have held that this Court, when considering the market value of the land at the declared day, is only concerned with the value of the subject land or the land taken, and not concerned with the value of the Appellant's land as a whole.

74. I now come to address the question of relevant comparables and whether there is a difference in the market value of the land on the West Bay Road and the subject land, which is some distance away from the West Bay Road.

75. It is common ground that the subject land is zoned as Neighbourhood Commercial. It has an east-to-west right-of-way that partially sterilizes a 20-foot strip of land adjoining the southern boundary, and this could constitute a restriction.

76. At the valuation date I think it is common ground that it was uncleared and unfilled, even though the right-of-way land was cleared and filled. The subject land does not have frontage with the West Bay Road.

77. Mr Franklin, the expert witness on behalf of the Respondent, reviewed the Caribbean Club land – Block 12C Parcel 427. The sale price was CI$2,950,200.00 on the 30th of June 2006, fourteen months after our valuation date, equating to CI$32.90 per square foot. Mr Franklin described this as an exceptional development site with strong widths-to-depths ratios, and much of the value lies in the fact that it is prime land benefitting

from West Bay frontage. Mr Franklin's valuation for the prime land was CI$43.80 per square foot, but, more importantly, for the use of the Comparable, (with) the subject land, the non-prime land value was $21.91 per square foot.

78. Similarly with the Esso land, now known as Block 12C Parcel 429: Mr Franklin valued the prime land with West Bay frontage at CI$49.30 per square foot. But the non-prime land which is a more direct comparison with the subject land, is valued at CI$19.70 per square foot.

79. Mr Day, whilst being cross examined by the Respondent's leading counsel agreed that on his valuation the market value of the land at the declared date has the same per square foot value as the land on the frontage of the Appellant's property.

80. I now address evidence given by Mr Franklin in relation to the subdivided land – formerly Block 11D Parcels 30 and 32, now Block 11D Parcels 85-89. This land came to approximately 391,108 square feet, zoned for Neighbourhood Commercial, and a sales price of CI$2,883,120.00 was achieved by a purchase agreement dated the 23rd of January 2004 – approximately 16 months prior to our valuation date. This equated to CI$7.37 per square foot.

81. This Parcel was subsequently divided into Parcels 85-89 as set out in Appendix IF10. It is very instructive that Parcel 88 – the only parcel of the four subdivided parcels with West Bay frontage – extending to 1,555,825 square feet – was re-sold on the 23rd of March, some eleven months after our valuation date, for CI$2,255.00, which equates to CI$14.47 per square foot.

82. The other parcels, namely:

    a. Parcel 11D 89 – some 19,559 square feet – was sold for US$166,204.00, equating to CI$8.49 per square foot.

    b. Parcel 11D 87 – extending to 102,460 square feet – was sold for US$870,012.00 equating to CI$ 8.49 per square foot.

    c. Parcel 11D 86, the parcel furthest away from the West Bay Road – extending to 68,246 square feet – was sold for US$579,230.00, equating to CI$6.95 per square foot.

83. In his evidence to this Court Mr Franklin stated that the principal conclusion was that the original purchase price of $7.37 per square foot was an average achieved across the entire 8 acres of the site. Mr Franklin "the average is formed from many different values and effect that the different parts of the site convey, and that was subsequently proven when the property was resold."

84. It is clear from Mr Franklin's evidence that the front portion of the property sold for a considerably higher amount, namely $14.47 per square foot; the middling area selling for CI$8.50 per square foot; and, the area furthest away from the West Bay Road and most suitably comparable to the subject land, sold for CI$6.95 per square foot.

85. Accordingly, it is clear to this Court that land close to West Bay Road is more valuable than land further away from the West Bay Road and that the land decreases in value as one moves away from the West Bay Road.

86. Finally, in relation to the question of market value, I draw attention to the Mini Warehouse land at Block 12C Parcel 263. This land extended to approximately 24,395 square feet, zoned Neighbourhood Commercial, and slightly further eastward from the West Bay Road than the subject land. A sale price of CI$413,040.00 was achieved on the 18th of November 2003, approximately 18 months prior to our valuation date, and this equated to CI$16.93 per square foot.

87. The Appellant's former valuer and Mr Franklin, at the hearings in 2006 before the RAC, agreed that this was a good comparable, given that it has the same zoning, and is of a similar distance from the West Bay Road.

88. In his report, Mr Day states that Mini Warehouse land represented a good comparable, given that it has the same zoning and is a similar distance from the West Bay Road as is the "part" parcel in question, and further stated: "If the subject "part" parcel had been a separate and distinct parcel, we would agree that the comparable would have been somewhat applicable."

89. Further, in cross examination, Mr Day agreed and stated "I maintain that fact that this is a good comparable, subject of course to it being adjusted to reflect its differing characteristics and the land taken.

90. It is this Court's view that the subdivided land is a good comparable to the subject land and on the evidence before it the best available comparable for the purpose of assessing the market value of the subject land.

91. The Mini Warehouse land's valuation at 16.93 square feet for the transfer dated the 18th of November 2003, approximately 18 months prior to the valuation date in this case.

92. Both experts have confirmed that land valuations increased significantly after Hurricane Ivan in September 2004.

93. Indeed it is noteworthy to see the increase in valuations and recommendations. Mr Franklin was a Valuation Assistant in the Lands and Survey Department from September 2004 to September 2006. He is now a Valuation Officer with the Lands and Survey Department of the Cayman Islands Government and acted as an agent for the NRA.

94. On the 16th of January 2006, Mr Franklin, acting for the Director of Lands and Survey, recommended an offer of CI$6.50 per square foot for the market value of the subject land and there is no indication that this figure included any amount for severance, injurious affection or any other heads of damage under Section 6 of the Second Schedule to the Roads Law.

95. On the 30th of January 2006 Mr Franklin stated that having looked at the background and with regard to other comparables, he was revising his recommendation and raising to CI$10.00 per square foot.

96. In July of 2006, in his written statement to the RAC, Mr Franklin stated that after reviewing comparables which show a strong correlation "after analysis" he was therefore of the opinion that compensation for land taken should be CI$11.00 per square foot.

97. In Mr Franklin's last statement dated the 31st of July 2009 he states that having considered the evidence before him he considered the value of the land taken to be CI$17.50. Accordingly, Mr Franklin has been persuaded to increase his valuation as to the market value on the subject land on four occasions.

98. The Respondent's counsel has highlighted the difference to be drawn between the report to a client and an independent expert's report. I accept that both experts are trying to assist the Court by using their expertise, experience and best endeavours to ensure that the Appellant is compensated fairly and fully for its loss in accordance with the Roads Law.

99. The Respondent's expert, Mr Franklin, challenges the basis of Mr Day's valuation. Furthermore, Mr Franklin values the prime land adjoining the West Bay Road of the Esso Land at CI$49.30 per square foot, and the non-prime land at CI$19.70 per square foot.

100. Similarly Mr Franklin values the Caribbean Club land and attributes the prime land benefitting from West Bay frontage a valuation of CI$43.80 per square foot. But the non-prime land away from the West Bay Road is valued at CI$21.91 per square foot. This seems to this Court to be a sensible and reasonable approach.

101. However, the most compelling evidence before this Court is the price acquired for the four subdivided parcels of what was described as "the subdivided land" at Block 12D Parcels 30 and 32, and now registered as Block 11D Parcels 85-89. I refer to paragraphs 80, 81, and 82 above, and it can be seen that the closer the land is to the

West Bay Road, the more valuable it is and, conversely, the further the land is away from the West Bay Road, the market value decreases.

102. It is this Court's view that if the Appellant were to sell the portion of its land at the front of the West Bay Road it would be much more valuable than the subject land and would attract a much higher market price.

103. I have been persuaded that the Mini Warehouse land is the best comparable. As stated before, its sale price equated to CI$16.93 per square foot on the sale date of the 18th of November 2003. This sale was completed some eighteen months before the valuation date in the Appellant's case.

104. Mr Franklin's analysis of the comparables he examined confirms that there is a range of CI$18.50 to CI$19.50 per square foot at the valuation date. He states that each comparable is superior to the land taken, both in terms of location, size, flexibility of use (bearing in mind the right-of-way over the land taken) and, of particular importance, shape, for which due allowance must be made when applying the evidence to the land taken. Accordingly, it was Mr Franklin's view that the value of the land taken is CI$17.50 per square foot, with compensation therefore payable of, say, CI$190,500.

105. However, this Court notes that Mr Franklin has been persuaded to increase his valuation on four different occasions, and further the Court takes into account that both experts have indicated that land values increased significantly after Hurricane Ivan in September 2004. Taking this into consideration, and the fact that the best comparable, namely the Mini Warehouse land, sold at CI$ 16.93 per square foot some eighteen

months before the valuation date of the land in question, it is this Court's view that a fair market value for the subject land is CI$18.50 per square foot, which amounts to CI$201,385.64.

Severance

106. The RAC in its Ruling dated October 2006 stated that ... "no details were provided to establish claims under Paragraph 6(2)(b) for Severance (and other heads) and accordingly the Committee declines to award compensation under these heads."

107. The Respondent's leading counsel contends that there is nothing in the Roads Law which suggests that the role of the Assessment Committee is to investigate and assess compensation of its own motion.

108. The Court, respectfully, does not agree with the Respondent's submission. However, this Court has great sympathy for the position in which the RAC found itself during the hearings on the 13th of July, the 18th of August and the 1st of September 2006, because it is quite clear that the Appellant did not make any claim under Paragraph 6(1)(c) for Severance, nor was any evidence adduced by either party. It is therefore not surprising that the RAC declined to award compensation for Severance.

109. However, Paragraph 6(1) of the Second Schedule to the Roads Law makes it quite clear that the Court should, of its own motion, investigate the other heads of claim and, where appropriate, assess compensation if any damage has been sustained by a claimant in a compulsory acquisition.

110. I re-state Paragraph 6(1) of the Second Schedule to the Roads Law: "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; (b) ...(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 its 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, movable or immovable, in any other manner, or his other earnings; (e)...(f)...(g)..."

111. It is clear that the words "the Committee shall take into consideration" impose a mandatory direction and one which was not followed in this case. The Legislature must have envisaged that many claimants would not be legally represented and, accordingly, to protect unrepresented claimants, and in the interest of justice, Paragraph 6(1) directs the Assessment Committee to investigate and assess compensation of its own motion, even when not raised by the parties before it.

112. This Court has considered the facts as set out in the two Affidavits of Mitzi Callan, the two Affidavits of Liam Day, and, the two Affidavits of Iain Franklin, together with the oral evidence of Mr Day and Mr Franklin, and finds that the Appellant has not sustained any damage pursuant to Paragraph 6(1)(b), (c), (e), (f)and (g) of the Roads Law and is not entitled to compensation under any of these heads.

113. Accordingly, this Court is only left to consider the Appellant's claim for damage, which the Appellant contends it sustained at the time of the taking possession of the land, by reason of the severing of such land from its other land.

114. I come now to examine the case law cited by leading counsel for the parties. The English Court of Appeal in *Horn v Sunderland Corporation [1941] 2 K.B. 26*, considered the Law under the Land Clauses Act 1845 and the Acquisition of Land (Assessment of Compensation) Act of 1919 for the purposes of defining Compensation, and the categories of compensation.

115. Lord Justice Scott in classic and often-cited dicta from *Horn v Sunderland Corporation* set out the principles at page 42 when he stated: "The Land Clauses Act 1845 was a consolidation of standard clauses usually inserted in private Acts, as appears from its title and preamble. It possesses two leading features. The first is that what it gives to the owner compelled to sell is compensation – the right to be put, so far as money can do it, in the same position as if his land had not been taken from him. In other words, he gains the right to receive a money payment, not less than the loss imposed on him in the public interest, but on the other hand, no greater."

116. That principle enunciated by Lord Justice Scott in 1941 is still good today and applies to the case before me. Lord Justice Scott went on to add "The other (leading feature) is that the Legislation recognises only two kinds or categories of compensation to the owner, from whom land is taken (1) the fair value to him of the land taken, and (2) the fair equivalent in money of the damage sustained by him in respect of other lands of his, held with the lands taken, by reason of severance or injurious affection."

117. In 1919 the Acquisition of Land (Assessment of Compensation) Act introduced six rules which are found at Section 5 of the Land Compensation Act 1961. Leading

counsel for the Respondent helpfully drew this Court's attention to these provisions which were introduced following on from Scott LJ's dicta in *Horn v Sunderland Corporation* in the knowledge that the objective was "equivalence", which is no more and no less than the loss sustained.

118. Accordingly, and following Scott LJ's dicta in *Horn v Sunderland Corporation* this Court finds that the aggregate of compensation under the various heads in Paragraph 6 of the Second Schedule to the Roads Law is deemed to achieve equivalence.

119. Leading counsel for the Appellant referred this Court and the Defendant's expert witness to the Australian work "Land Acquisition" by Mr Douglas Brown ("Mr Brown") – a Senior Lecturer in Law at the University of Western Australia.

120. Mr Brown stated at page 263 "Severance Damages are a recognition of the economic fact that a landowner often can get more out of his land by using it as a unit rather than piecemeal. The basis of this item of compensation is that the severed part and the retained part have a unity of use and a unity of ownership, prior to the acquisition."

121. Mr Franklin in cross examination accepted that statement, because, as he stated in evidence, it "specifically contemplates a situation where the retained land's use is diminished by the loss of the land taken over and above, what is compensated for by the land taken."

122. In the case of *Cooke v Secretary of State for the Environment [1973] 27 P.&C.R. 234*, Douglas Franks Q.C., in dealing with the question of determining the amount of compensation payable upon the compulsory purchase of farm land for road improvement and for injurious affection or remainder of the land stated at page 238 that "The correct approach to this matter is first of all to assume that the claimant is a willing seller. That having been done, the next exercise is to ascertain the market value for the land acquired, as is done by the District Valuer. Then that has to be added to the market price compensation for severance and injurious affection, that is to say, compensation for depreciation in the value of the land not taken. The amount is the difference between the value of the land not taken before the severance or other injurious effect and the value after that date. ... Those values are arrived at on the same basis as the value of the land acquired, i.e. by reference to the market values, as were done by the District Valuer."

123. In the English Court of Appeal decision of *Hoveringham Gravels Ltd. v. Chilton District Council [1977] 35 P&C.R. 269*, the English Court of Appeal considered the question of compensation under Section 7 of the Land Compensation Act 1965 in the United Kingdom. For the purposes of this appeal, this case provides some helpful guidance on the question before this Court in relation to market value, pursuant to Paragraph 6(1)(a) and, in relation to severance, pursuant to Paragraph 6(1)(c) of the Second Schedule of the Roads Law.

124. Roskill LJ refers in his judgment to the judgment of Scott LJ in *Horn v. Sunderland Corporation* and refers to what he calls "the rule of market value" and also what Scott LJ called "the principle of equivalence which is at the root of statutory

compensation, the principle that the owner should be paid neither less nor more than his loss." At page 307 of his judgment Roskill LJ states: "The basic philosophy of the statutes is to give the appellants compensation for the loss they have suffered, no more, no less, and that loss seems to us to be required to be calculated by reference to the value of the back land itself, which is compulsorily acquired, to which has to be added the damage, if any, suffered by the appellants as owners of the front land in consequence of the back land being severed from the front land. We see no reason to put too narrow a construction on Section 7 (UK Compulsory Purchase Act, 1965) so as to deny the appellants compensation for this extra loss if, viewing the matter broadly, that extra loss can fairly be said to be have been caused by severance, or indeed in a case where severance, though not the sole cause of that extra loss, is a substantial cause."

125. Section 7 of the Compulsory Purchase Act 1965, which provides that in addition to the value of the land to be purchased the owner is entitled "to the damage, if any, to be sustained ...by reason of the severing of the land purchased from the other land of the owner, or otherwise injuriously affecting that other land by the exercise of the powers."

126. The Respondent's expert witness, Mr Franklin, relied upon the work of Barry Denyer-Green ("Mr Denyer-Green") "Compulsory Purchase and Compensation", 7th Edition, which states at page 234: "Severance occurs when the land acquired from the claimant contributes to the value of the retained land, so that when severed from it the retained land loses value." Furthermore Mr Denyer-Green states at page 236 "severance

may injuriously affect retained land because the loss of the part acquired depreciates the value of that retained..."

127. Mr Denyer-Green sets out a number of examples at page 237 and states "the compulsory acquisition may take some of the claimant's land, and leave the retained land with no access so that Planning permission for that retained land is delayed: *Bolton Metropolitan Borough Council v Waterworth [1981].* Alternatively, if land with potential development value is severed, the density or timing of development on the retained land can be seriously affected: *Hoveringham and Gravels Ltd. v Chilton District Council* and *Abbey Homestead's Group Ltd v Secretary of State for Transport.*

128. The Appellant relies on the letter from Chalmers Gibbs dated the 26th of February 2008 with the attached sketch map and, based on that, Mr Day does a Severance calculation, which comes to the loss of development profit in the sum of US$586,769.00. The sketch map drawn by Chalmers Gibbs does not contain any dimensions. There does not seem to be any specific allowance for set back. It shows the existing building and somehow reconfigures the parking spaces which are shown in the aerial photograph exhibited to Mr Franklin's Affidavit. The Chalmers Gibbs sketch map does not show the right-of-way, which is at the southern boundary of the subject land, and at the corner of the southern boundary of the retained land, and which, on Mr Franklin's evidence, is an area of 2,500 square feet, to a depth of 80 feet. This right-of-way must have a negative impact on the parking and on the maximum residual development of the land retained. There is no evidence that Chalmers Gibbs took into account the right-of-way when considering the question of severance.

129. Mr Day's calculations purport to assess the developer's profit which might have been earned, and takes into account the financing, professional fees, government fees, construction costs and commissions, in addition to land value. This Court does not think it is appropriate to claim under the headings of financing, professional fees, government fees, construction costs and commissions. This Court accepts the Respondent's submissions that, as these costs have not been incurred, there is no reason why compensation should award the Appellant for an investment that has not been made and risk to which it has not been exposed. Furthermore, I accept the Respondent's submission that a claim for loss of profits would conflict with the established, legal principles relating to causation and remoteness of damage.

130. The Appellant has merely produced an architect's sketch map. There are no drawings of the parking lay-bys on the West Bay Road. There are no drawings showing any pavements or sidewalks or setbacks. There is no drawing of the right-of-way which measured some 2,250 square feet. There is a complete absence of dimensions.

131. The question this Court has to ask is whether the Appellant suffered any Severance Damage by way of the value of the retained land being further reduced in value.

132. This Court cannot identify any evidence of Severance Damage to the Appellant's existing building or to the retained undeveloped land. It appears to the Court that the Appellant's existing building has not been reduced in value as a result of the compulsory acquisition. Furthermore, the retained, undeveloped land has a rectangular shape, which

can be efficiently developed. The retained land has road access on two sides and increased visibility from the new road, which initiated the compulsory acquisition.

133. Mr Franklin stated under cross examination: "The retained land could still be put to a development of either one building, as demonstrated, or in an alternative scheme that maximizes the use of the retained land." Putting it another way Mr Franklin said: "The development potential is inherent in the value of the retained land in exactly the same way as it is inherent in the value of the land taken." Under cross examination by leading counsel for the Appellant, Mr Alberga Q.C., Mr Franklin submitted that his position was that "the compulsory acquisition has not affected the ability to develop the undeveloped land, nor has it affected the value of the building."

134. Mr Franklin, in cross examination, in response to questions from the Appellant's leading counsel stated that there are two reasons why Severance does not arise in this case. Mr Franklin stated that, firstly, the Claimant has been compensated for the land taken, and has been put, as such, in the position where she, the Claimant, could purchase another piece of land and undertake a development on this land, and, secondly, the retained land can still be developed. The loss of the land taken has not reduced the ability to develop the retained land and, as such, no claim of Severance has arisen.

135. This Court has carefully examined the reports of Mr Day and Mr Franklin and cannot see how any Severance Damage has taken place because the taking of the subject land does not affect the development potential of the retained land. It is correct that the area has been reduced. However, the Appellant will be compensated for the

land taken, but there is no additional Severance Damage to the land retained. As Mr Franklin states in cross examination by Mr Alberga: "Any scheme to be built on the retained land would obviously be of a smaller size than had the land not been taken. But the value of that scheme or the potential to that (retained) land has not been reduced in any way, and hence there is no decrease in value." This Court finds on the evidence before it that the Appellant will receive compensation for the land taken, being the subject land, but there is no loss through Severance to the retained land as its development potential has not been disproportionately reduced through the acquisition of the land taken.

136. This Court finds that the Appellant's retained existing building and retained undeveloped land have not lost any value as a result of the Respondent's compulsory acquisition of the subject land. Or, to adopt Mr Denyer-Green's words "The loss of the part acquired (by the Respondent) has not depreciated the value of the land retained."

137. Accordingly, having taken into consideration the Appellant's Amended Form B Claim for compensation, and having considered the evidence of Mr Franklin and Mr Day, this Court finds that the Appellant has not made out any case for damage sustained by the Appellant at the time of the taking possession of the land by reason of the severing of such land from its other land. The Appellant's claim for damage under this heading is rejected.

138. This Court orders the Respondent to pay the Appellant compensation in the sum of CI$201,385.64, which the Court finds to be the market value of the subject land at the declared day.

139. I make no Order as to costs, although I will grant liberty to apply.

Dated this 11th day of November 2009

Quin J
Judge of the Grand Court