

1 **THE ROADS ASSESSMENT COMMITTEE**

2 **HOLDEN AT GEORGE TOWN, GRAND CAYMAN**

3

4 **IN THE MATTER OF THE ROADS LAW (2005 REVISION)**

5

6 **AND IN THE MATTER OF A CLAIM BY GARDEN OF REFLECTIONS**
7 **(CAYMAN ISLANDS) LTD/ FOR COMPENSATION IN RELATION TO**
8 **THE ACQUISITION OF 0.83 ACRES OF LAND SITUATE AT BLOCK**
9 **23C PARCEL 44**

10

11

12 *CORAM: Nova Hall, Chairman, Roads Assessment Committee*
13 *Alister Ayres, Member, Roads Assessment Committee*
14 *Georgette Myrie, Justice of the Peace*

15

16 **APPEARANCES:**

17 *Peter McMaster, QC and Jeremy Walton instructed by Appleby appearing*
18 *for the Claimant*

19 *Guy Roots QC and Anne Marie Rambarran instructed by the National*
20 *Roads Authority.*

21

22

Decision

23 This is a claim for compensation made by Garden of Reflections (Cayman
24 Islands) Ltd. ("the Claimant") formerly Heaven's Gate Ltd. for
25 compensation pursuant to section 8 of the Roads Law (2005 Revision). On

1 November 14, 2006, ("the Declared Day"), a section 3 Declaration was
2 published in the Cayman Islands Gazette (Issue No. 23/2006) declaring
3 that the National Roads Authority ("the Acquiring Authority") intended to
4 compulsorily acquire from the Claimant 0.83 acres of land situated at
5 Block 23C Parcel 44 in the Prospect District of Grand Cayman in order to
6 construct the Red Bay section of the East West Arterial Highway according
7 to Boundary Plan No. 493 [1/1]. The planned road works were
8 subsequently performed. Compensation was claimed in some of
9 \$1,697,000.00 in respect of the market value of the acquired land and
10 \$114,000.00 by way of compensation for the injurious effect the
11 expropriation had on the remainder of the original parcel.

12

13 **The Law**

14 There is no dispute that the right to compensation for expropriated land is
15 conferred by section 8 of the Roads Law (2005 Revision). Further, the
16 assessment and payment of compensation is provided for in the second
17 schedule ("Schedule 2") of the said law. Section 8 of the said law provides
18 as follows:

19

20 8. (1) Any person having an interest in any portion of land to which a
21 declaration under section 3 relates or which has been taken by the
22 Governor under this law and who has suffered a net loss by reason
23 thereof, may make a claim within the time limited by, and otherwise
24 in accordance with, this Law, and compensation for that loss shall,
25 subject to this Law, be payable by the Roads Authority to the
26 person making the claim (hereinafter referred to as "the claimant").

27 (2) For the purposes of this Law, the claimant does not qualify for
28 compensation as having suffered a net loss unless, at the time of

1 disposition of such portion of land under this Law, any damage
2 attributable to-

3 (a) loss of any standing crop or trees on the portion of land;

4 (b) the severance of such portion of land from the claimant's
5 other land;

6 (c) the injurious effect on the claimant's other land of the
7 dispossession of such portion of land; and

8 (d) the loss of such portion of land, assessed at its market
9 value,

10 exceeds the value of the advantage to the claimant gained by the
11 presence of the new or improved road adjacent to his land.

12 (3) Subject to subsection (4), a claimant does not qualify for
13 compensation if his interest in the portion of land to which his claim
14 relates was acquired after the declared day.

15 (4) Subsection (3) does not apply to any interest acquired by
16 inheritance, whether as a direct bequest or an appropriation
17 towards satisfaction of a legacy or other share in the estate of a
18 deceased person.

19

20 Section 6 of Schedule 2 of the said law provides:

21 6. (1) In determining the amount of compensation to be awarded in
22 respect of any portion of land under this Law, Committee shall take
23 into consideration-

24 (a) the market value of the land at the declared day;

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

4 (c) any damage sustained by the claimant at the time of
5 taking possession of the land, by reason of the severing of
6 such land from his other land;

7 (d) any damage sustained by the claimant at the time of the
8 taking of the portion of land, by reason of the dispossession
9 injuriously affecting his other property, movable or
10 immovable, in any other manner, or his earnings;

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

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

17 (g) any increase in the value of the claimant's interests –

18 i. in any remaining portion of the land in respect of
19 which the claim is made; and

20 ii. in other land contiguous or adjacent to (whether
21 or not actually touching) and a land mentioned in
22 subparagraph (i) to which the claimant was
23 entitled in the same capacity on the declared day;
24 and

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

1 (2) In determining the amount of compensation to be awarded in
2 respect of any portion of land under this Law, the Committee shall
3 not take into consideration –

4 (a) the fact that the action taken is compulsory;

5 (b) the degree of urgency which led to the action taken;

6 (c) any disinclination on the part of the claimant to part with
7 land taken;

8 (d) any damage sustained by the claimant which, if caused by
9 a private person, would not render such person liable to the
10 suit;

11 (e) any damage which is likely to be caused to the portion of
12 land after declared day or in consequence of the use to which
13 it will be put;

14 (f) any increase to the value of the portion of land likely to
15 accrue from the use to which it will be put after
16 dispossession;

17 (g) any outlay or improvements on, or disposal of, the portion
18 of land commenced, made or effected without the sanction of
19 the Roads Authority after the declared day; or

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

25 (3) In assessing the value of any interest in respect of which the
26 claim is made, it shall be assumed-

1 (a) the planning permission would be granted in respect of
2 the land in which the interest subsists (" the relevant land")
3 for a use which conforms with the planning use outline in the
4 development plan for that location and for which it is
5 reasonable to assume that planning permission would have
6 been granted;

7 (b) where an order has been made under section 15 of the
8 Development and Planning Law (2005 Revision) in respect of
9 the relevant land or any part thereof, requiring the removal of
10 any building or the discontinuance of any use, that planning
11 permission would not be granted in respect of the relevant
12 land or any part thereof for the rebuilding of that building or
13 the resumption of that use; and

14 (c) that planning permission would not be granted in respect
15 of the relevant land or any part thereof for any development
16 other than such development as is mentioned in paragraph
17 (a); and if planning permission has been granted for such
18 other development it shall be assumed that the planning
19 permission has not been granted in so far as it relates to the
20 development that has not been carried out.

21 (4) Where, upon a claim being made, the Assessment Committee is
22 satisfied that the portion of contiguous land remaining to the
23 claimant is less than one-half acre, and considers that the amount
24 due to the claimant in respect of sub-subparagraphs (a), (c) and (d)
25 of subparagraph (1) exceeds or is likely to exceed the market value
26 of the whole portion (being the portion taken or to be taken,
27 together with the land remaining to the claimant), the Assessment
28 Committee shall signify this to the Roads Authority, which may then
29 proceed to acquire the whole portion and pay therefor

1 compensation calculated in accordance with this paragraph, with the
2 exception of sub-subparagraphs (c) and (d) of subparagraph (1).

3
4 **The Evidence for the Claimant**

5 The Claimant Mr. Dale Rex Crighton tendered his evidence by affidavit
6 and live testimony.

7

8 He asserted that at the time of the acquisition, the entire original parcel
9 of land was unique in Grand Cayman because it was the only land therein
10 which was owned privately and which was zoned for Institutional
11 Development. It was the site of the only privately owned cemetery and
12 the acquired land came from this.

13

14 In his affidavit dated the December 5, 2012, Dale Crighton stated that he
15 and Rex Crighton had conceived of the idea of the private cemetery in
16 1993. He stated that the opportunity appealed to him because at the time
17 the number of available spaces within the public cemeteries in Grand
18 Cayman was limited and there was no crematorium facility on the island.
19 The site selected was considered ideal due to its location and elevation.

20

21 Planning permission was sought in 1996. The Central Planning Authority
22 ("CPA") granted permission for the construction of the cemetery but
23 imposed additional conditions consequent on this permission. There was a
24 requirement for the construction of bathroom facilities and more
25 extensive car parking than the Claimant considered necessary for the
26 cemetery. The Claimant concluded that the CPA required him to provide
27 these additional facilities so as to service both the private cemetery and a
28 nearby government cemetery.

1

2 The quantum of infrastructure became an integral part of the Claim.

3

4 Expert evidence was presented on behalf of the Claimant through the
5 testimony of Mr. Richard Howard Jones, a chartered quantity surveyor
6 and a Fellow of the Royal Institution of Chartered Surveyors. He testified
7 and was cross-examined about the content of his "Valuation Report
8 Compensation Claim" document dated 30 November 2012 concerning the
9 property in issue.

10

11 In his report Mr. Jones outlined that the private cemetery was designed
12 with paved roads and parking, bathrooms and landscaping works. The
13 plan involved a two phase scheme with a total of 1789 plots. The work
14 done on Phase 1 of the development comprised site preparation and
15 infrastructure works. The infrastructure works involved concrete block
16 work boundary and retaining walls to the extent of the Phase 1 area,
17 asphalt paved entrance and access roads and car parking areas, site
18 drainage, roadside boundary concrete sidewalk, bathroom block, storage
19 and pump room and landscaping works.

20

21 Mr. Jones summarised the financial loss to the Claimant consequent on
22 the appropriation of a part of the land as follows:

- 23 1. there was a loss of value of the Phase 2 plots because the
24 appropriation of 0.83 acres of that land resulted in a reduction of
25 749 Phase 2 plots;
- 26 2. there was a diminution in the value of new roadside plots. A new
27 northerly boundary on a major arterial roadway was created and

1 the close proximity of the roadway had a negative impact on the
2 value of the newly created roadside plots;

3 3. the Claimant incurred professional fees through the engagement of
4 attorneys and surveyors.

5

6 Mr. Jones set out the basis for his estimate of the loss suffered by the
7 Claimant starting with information concerning the Claimant's sales
8 practices.

9

10 The various plots were sold on the basis of a tiered plot pricelist which is
11 based upon the location of the plot within the cemetery. After each plot is
12 sold an allowance of 10% of the sales price is placed in a "maintenance
13 account" to fund on-going maintenance of the facility. Between October
14 2000 to February 2012, 168 plots were sold. This figure can be reduced to
15 132 plots due to the deduction of 36 "family plots" which were purchased
16 for no consideration in October 2000. A total of 79 plots were sold (the
17 aforementioned 36 plots can be added to this figure) between October
18 2000 to November 2006; at which time the Boundary Plan, BP 493 was
19 gazetted.

20

21 Mr. Jones stated in his report, "the average discount from the list price for
22 plots sold in the year prior to and the year of the Gazette notice is as
23 follows: –

- | | | | |
|----|-----|--------------------|----------|
| 24 | i) | Plot sales in 2005 | 20.73% |
| 25 | ii) | Plot sales in 2006 | 27.73%". |

26

27 *The Calculation of Loss of Income by the Claimant's Expert*

1 In his report, Mr. Jones set out his calculations. He calculated the
2 potential sales income for the 749 plots which were lost from Phase 2. He
3 deducted a credit for the maintenance of the property and the estimated
4 cost to complete Phase 2. He also allowed a discount of 30% for the bulk
5 purchase of 749 plots. With reference to this discount he stated the
6 following.

7

8 "In arriving of my opinion of the appropriate level of discount for the bulk
9 purchase of such a large number of plots I have considered the difficulty
10 in replicating the cemetery including acquiring a suitable site, obtaining all
11 the necessary CPA and other approvals, overcoming possible objections
12 from neighbouring landowners etc. The appropriate level of discount for
13 the bulk purchase of such a large number of plots between a willing buyer
14 and a willing seller is the area of difficulty in this unique situation. In my
15 opinion the appropriate bulk discount would likely range between a
16 minimum of 20% and a maximum of 40% for a sale between a willing
17 buyer and a willing seller. In my opinion, a discount of 30% from list price
18 represents a fair and reasonable assessment."

19

20 Mr. Jones then set out his calculations using the separately priced plots as
21 a starting point.

22	"Green Plots	486 No. @CI \$3,749	1,822,014
23	Rose Plots	78 No. @CI \$4,124	321,672
24	Blue Plots	170 No. @CI\$4,499	764,735
25	Yellow Plots	15 No. @CI\$5,249	<u>78,735</u>
26			CI\$ 2,987,251
27	<u>Less Credit for perpetual maintenance on above plots@10%</u>		<u>(298,725)</u>
28			CI\$ 2,688,526
29	<i>Less Estimated Costs to Complete Phase 2:-</i>		

1	1) Imported filling - Allow 10,000 CY @CI\$20	(200,000)
2	2) 8" Block Walls - Allow 300 LF CI\$60	(18,000)
3	3) Surveyors Fees	(16,000)
4	4) Landscaping	(20,000)
5	5) Site Clearance Phase 2	(10,000)
6		<u>(264,000)</u>
7	TOTAL VALUE OF PLOTS TAKEN FOR BYPASS	CI\$2,424,526
8	<u>Less Discount for bulk purchase @30%</u>	<u>(727,358)</u>
9		TOTAL CI \$1,697,168
10		ROUNDED TO CI \$1,697,000"
11		

12 Mr. Jones then set out the basis for his opinion that cemetery plots would
13 decrease in value due to the close proximity of the new bypass road. In
14 his report he opined that the plots closest to the new bypass road would
15 suffer from greater traffic noise and a loss of tranquillity and privacy. He
16 went on to state the following.

17

18 "For the purposes of this calculation I have assumed that the new bypass
19 road will have a negative impact on the sales prices of all 110# cemetery
20 plots within a 20' 0' wide strip from the set back line. Accordingly I have
21 assumed a reduction in value of 25% from the regular sales prices of the
22 affected plots. This calculation may be shown as follows: -

23	"Green Plots 20 No. @CI\$ 937 decrease in value	18,740
24	Rose Plots 21 No. @CI\$1,031 decrease in value	21,651
25	Blue Plots 21 No. @CI\$1,125 decrease in value	23,625
26	Yellow Plots 48 No. @CI\$1,312 decrease in value	62,976
27		CI\$ 126,992
28	<u>Less Credit for Perpetual Maintenance on above plots@10%</u>	<u>(12,699)</u>

29

1 **TOTAL DECREASE IN VALUE DUE TO CLOSE**

2 **PROXIMITY OF NEW BYPASS ROAD TOTAL** **CI\$ 114,293**

3 **ROUNDED TO** **CI\$ 114,000"**

4

5 Mr. Jones, in conclusion, stated that in his opinion the value of the 749
6 cemetery plots lost on the land appropriated by Boundary Plan BP 493 is
7 CI \$1,697,000.00 as of the Declared Day. Additionally, in his opinion the
8 decrease in value of the 110 cemetery plots which are now in close
9 proximity to the new bypass road is in the region of CI \$114,000.00 as of
10 the said date. As such the total claim excluding professional fees incurred
11 is for CI \$1,811,000.

12

13 During cross-examination, when his methodology was challenged, Mr.
14 Jones conceded that he was not a Valuator. He explained that he was a
15 Quantity Surveyor with extensive experience in doing valuations on
16 property. When referred to the Claim for Compensation forms dated 6th
17 February 2007 and 26th September 2007 respectively, he acknowledged
18 that he had completed both and that the latter represented an
19 amendment to the first, due to mistakes which he had made. He agreed
20 that this need for an amendment suggested that he had not been familiar
21 with making claims for compensation when he had completed the first
22 form.

23

24 During cross-examination, Mr. Jones was insistent that the acquired
25 property should not be treated as undeveloped land. He was of the view
26 that expenditure made on the property should be factored into any
27 valuation. He stressed the Claimant's contention that infrastructure had
28 been put in place to service both Phase 1 and Phase 2 of the Cemetery.
29 Accordingly, the only things required for Phase 2 to be operational were

1 walls and fill. Reference was made to the plan to re-use fill from Phase 1
2 as time went by.

3

4 Mr. Jones agreed that he expected Phase 1 to be completely sold out
5 before sales were made of the plots in Phase 2. He conceded that this
6 would likely take several years.

7

8 Mr. Jones admitted that when preparing his Report, he had not read the
9 section of the Roads Law that governed the assessment of compensation.
10 He also had not considered what persons might have bid for the land in a
11 hypothetical sale.

12

13 Mr. Jones conceded that an examination of Comparable Sales would
14 provide best evidence for a valuation. He stated however that he was
15 unable to find any such comparisons because there were no sales of
16 cemeteries in the Cayman Islands. Referred to the valuation done by Mr.
17 Uche Obi, Mr. Jones stated that he did not consider it appropriate. He was
18 unable to agree that if his own valuation was rejected, this would be the
19 correct valuation.

20

21 Mr. Jones raised the issue of the Claimant being compensated for the
22 additional infrastructure which had been put into the cemetery. He raised
23 the hypothetical that the Claimant may have chosen not to proceed with
24 the project if he had to spend the same sum on Phase 1 alone. He found
25 it difficult to speculate on the cost of infrastructure for the retained land
26 only. Recalled to the witness stand concerning this issue, the Claimant
27 responded by stating that with a requirement for less infrastructure, he

1 would have put in less parking spaces. He theorized that he may have
2 been able to put in 300 more plots.

3

4 With respect to the effect of the roadway on the cemetery Mr. Jones
5 testified that a four way highway would cause more noise than would a
6 two way road. Additionally, while currently there was no loss of privacy
7 due to the new roadway, this would be a factor once Phase 2 was
8 developed.

9

10 **The Evidence for the Acquiring Authority**

11 Mr. Bentley Vaughan, a Chartered Engineer by profession and Engineering
12 Manager with the Department of Environment Health, testified on behalf
13 of the Respondent with reference to his Report dated October 17, 2013.
14 He stated therein that the purpose of the report was to "explain the
15 advice that" (he) "would have given to a prospective purchaser of the
16 land with regard to the likely rate at which burial plots could have been
17 sold and the cost of constructing the necessary vaults."

18

19 Mr. Vaughan commented that in the Cayman Islands the local populace
20 preferred to be buried in the district in which they were born or had lived
21 for a significant period of time. He was of the opinion that this approach
22 would dictate that the majority of persons who may be buried in a district
23 cemetery would be mainly from the district in which the cemetery is
24 located.

25

26 He also stated that there is no law in the Cayman Islands requiring vaults
27 to be constructed for the disposal of the dead. However the current
28 accepted practice for internment is in sealed vaults. He stated that the

1 Department of Environmental Health had developed standards for the
2 construction of vaults for the internment of the dead. He stated that the
3 average cost of constructing adult vaults in the 2005–2006 financial year
4 was \$1280.00 per vault. However, adult vaults were sold for \$1200.00
5 and there are no fees charged for the maintenance of the vaults.

6

7 Having explained his methodology and with reference to statistics and
8 tables, Mr. Vaughan concluded that the average sell rate of vaults per
9 thousand of population for each year was, for the 1993-1999 period, 2.2;
10 and for the 2000-2006 period it was 2.3. He stated that there was no
11 statistical difference.

12

13 During cross-examination, Mr. Vaughan testified that decisions about
14 where persons wished to be buried involved other relevant factors such as
15 the district in which they were married. He indicated that it was a
16 question of choice. He also testified that there is a difference between
17 public cemeteries and the private cemetery and that for individuals, it was
18 a matter of aesthetics.

19

20 The main witness for the Acquiring Authority was Mr. Uche Obi, the Senior
21 Valuation Officer of the Valuation and Estates Office ("VEO") of the Lands
22 & Survey Department. In his affidavit dated 14th February 2014, Mr. Obi
23 explained that the VEO acts as agent to the Acquiring Authority under a
24 Service Level Agreement and is responsible for the settlement of all
25 compensation claims under the Roads Law (2005 Revision). Mr. Obi made
26 reference to the Expert Report dated 14th February 2013 which he
27 prepared on the instruction of the National Roads Authority ("NRA"). The
28 said report contains Mr. Obi's opinion of the compensation due to the
29 Claimant in respect of the property which had been compulsorily acquired.

1

2 *Calculation of Compensation by the Respondent's Expert*

3 Mr. Obi explained that based on the statutory definition of "market value"
4 he considered that the land taken, must be valued as though it was a
5 separate parcel of land offered for sale by a hypothetical willing seller
6 regardless of whether it was a part of a larger parcel of land owned by the
7 Claimant. Further, the land must be valued in its actual condition at the
8 time of expropriation or the Declared Day, with all its existing advantages
9 and possibilities. Reference was made to comments made by the
10 Honourable Mr. Justice Quin in **Concept Ltd v National Roads**
11 **Authority [2009] CILR 629.**

12

13 According to Mr. Obi, on the Declared Day the appropriated land had the
14 following features:

- 15 1. Condition – undeveloped and uncleared;
- 16 2. Size – 0.83 acres (36,155 square feet);
- 17 3. Shape – almost rectangular;
- 18 4. Road frontage – 290 feet;
- 19 5. Zoning – Institutional;
- 20 6. Elevation – 2 feet at the western boundary gradually rising to 7 feet at
21 the eastern boundary.

22

23 Throughout his explanation of his methodology, Mr. Obi relied greatly on
24 his comment that land zoned as Institutional was usually permitted for
25 the use of things such as hospitals, police stations, fire stations, prisons
26 and for religious, educational and recreational facilities. He stressed that

1 these examples were rarely "operated as commercial activities and land
2 for such uses is usually acquired at the prevailing zone rate prior to
3 application being made for the change of use."

4

5 Mr. Obi also stressed that on the Declared Day no funds had been
6 invested in developing Phase 2, except for the change of use planning
7 application for the entire site.

8

9 According to Mr. Obi any prospective purchaser in deciding how much to
10 pay for the appropriated land would be guided by:

11 (a) what he can use it for;

12 (b) the cost of acquiring alternative parcels of land.

13

14 It was Mr. Obi's analysis that between October 2000 and November 2006
15 cemetery plots held by the Claimant Company had been sold at a rate of
16 13 per year. Also, between May 2007 and February 2012 plots were sold
17 at a rate of the 11 per year. This according to Mr. Obi suggested a decline
18 in the absorption rate after the Declared Day. He concluded that if the
19 absorption rate prior to the Declared Day continued, it would take a
20 period of 51 years for the remaining 667 plots in Phase 1 to be sold. This
21 implied that any revenue for the affected plots in Phase 2 would not be
22 received until 2057 when all the plots in Phase 1 had been sold. Mr. Obi
23 considered that Phase 2 at Heaven's Gate was effectively "a proposed
24 future development" which was unlikely to commence and bring any
25 investment return for quite some time.

26

1 He opined that "the slow and very low rate of return" meant that the
2 development of a cemetery was not likely to be the highest and best use
3 of the land taken. Mr. Obi also commented that it was unusual for land
4 which was zoned Residential to be acquired in the private sector and
5 rezoned Institutional, concluding that if Institutional parcels had a higher
6 value there would be greater demand by land owners to have their
7 parcels so rezoned.

8

9 Mr. Obi referred to the case of **Maori Trustee v Ministry of Works**
10 **(1959) AC 1** as an example of a case where; because a proposed
11 subdivision had not yet taken place on the compulsorily acquired land, it
12 was held that the open market value of the land could not reflect a
13 subdivision. He also referred to the *Concept case* wherein it was remarked
14 that there was no reason for compensation to be awarded for an
15 investment which had not yet been made or for the risk to which the
16 claimant had not been exposed. Mr. Obi concluded that based on these
17 authorities; future expected profits from cemetery vaults should be
18 ignored.

19

20 Mr. Obi criticised the residual method of valuation utilised by the
21 Claimant's expert Mr. Jones. This he stated was arrived at by estimating
22 the amount which might have been achieved by the sale of the proposed
23 plots affected by the scheme in Phase 2 with deductions made for
24 associated costs. Mr. Obi considered this method to be incorrect because
25 it was based on the premise that 749 plots had been acquired rather than
26 0.83 acres of undeveloped land zoned Institutional with planning
27 permission to develop a cemetery. Additionally the assessment was based
28 on various assumptions concerning the selling price of each unit, the
29 absorption rate and construction costs and these were not based on

1 empirical data. He stated that the residual method of valuation should
2 only be used in the absence of a more reliable method.

3

4 According to Mr. Obi he utilised the Comparable Sales Method of valuation
5 because it was widely accepted as the most appropriate basis of
6 assessing, the market value of land taken and any injurious affection. He
7 stated that this method was directly based on the market forces of
8 demand and supply and on comparing the property to be valued with
9 similar properties which have been sold. He stated that the price achieved
10 on similar properties would be adjusted to allow for any differences
11 between the respective properties. These adjustments reflected
12 "differences in location, access, physical state (size, shape, elevation and
13 condition), planning zone, use, tenure, and time."

14

15 In his report, Mr. Obi referred once again to the uses of land permitted in
16 the Institutional planning zone and stated that these related to
17 infrastructure most usually provided by the Government as a service to
18 the public and included cemeteries. He reiterated that Institutional zoning
19 had very limited application in the private sector and stated that rarely
20 were there transactions of parcels within that zone other than by the
21 Government. Mr. Obi referred to his experience in acquiring land for
22 Institutional use and stated that usually the land was not zoned
23 Institutional and that the price paid was based on the prevailing land
24 values in the vicinity.

25

26 Mr. Obi referred to transactions involving two parcels located close to the
27 acquired land.

28

1 Block 23C Parcel 197, located along Shamrock Road with an area of
2 0.6691 acres, was zoned Institutional and was acquired in April 2003 at a
3 price per square foot of \$7.13. It was developed into a private pre-school
4 "the Achievement Centre". Mr. Obi commented that the market value of
5 the property reflected its unique location for the purpose intended,
6 because it was close to Red Bay Primary School. Block 25B Parcel 225,
7 located approximately 1300 feet east of the first parcel, with an area of
8 0.8648 acres, was zoned Neighbourhood Commercial and was acquired in
9 June 2004 at a price per square foot of \$6.93.

10

11 Mr. Obi concluded that both sales demonstrated that regardless of zoning,
12 parcels located along Shamrock Road sold at a rate per square foot of
13 approximately \$7.00.

14

15 The following quote is taken directly from Mr. Obi's reports following his
16 reference to the above two sales.

17 *"The subject parcel was previously zoned Low Density Residential (LDR)*
18 *and the adjoining undeveloped parcels remain zoned LDR. Consequently,*
19 *in my opinion it is fair and reasonable to assume that a market value for*
20 *the Heaven's Gate cemetery land should, as a maximum, be equivalent to*
21 *that of the neighbouring LDR parcels, but certainly no more. Therefore, I*
22 *have adopted sales of parcels zoned LDR for my comparison purposes and*
23 *made a nominal downward adjustment for the difference in zoning.*

24 *Market demand to buy a cemetery will in my opinion be far less than for*
25 *LDR land where units can be subdivided and sold off within a short term*
26 *of years, as opposed to the uncertainty of waiting many tens of years for*
27 *a return on a cemetery investment."*

28

1 Mr. Obi then commented in his report about five parcels of land sold
2 between 2006-2007, all located within the Red Bay/Prospect area and all
3 zoned LDR.

4

5 Mr. Obi commented that in what was known as a "quantum discount", it
6 was usually the case that larger parcels of land attracted a lower price per
7 square foot compared to smaller prices. He also commented that LDR
8 land has a wider use than land zoned Institutional and as such was of
9 superior value to the acquired land. After comparing the five parcels of
10 land Mr. Obi concluded as follow.

11 *"The comparable evidence suggests the following trend: -*

12 *a) Parcels with an area of circa 0.25 acres sold for between CI\$5 to*
13 *CI\$6 per square foot.*

14 *b) Parcels with an area of circa 0.50 acres sold for approximately*
15 *CI\$4 per square foot.*

16 *c) A parcel with an area of circa 1 acre sold for approximately CI\$3*
17 *per square foot."*

18

19 Mr. Obi then assigned a value of \$3.50 per square foot for the
20 appropriated land and based on that rate expressed the opinion that its
21 market value was CI \$127,000.00.

22

23 Mr. Obi maintained this conclusion by reference to previous compensation
24 settlements. He discussed two other parcels of land located along
25 Shamrock Road for which compensation was settled at the rates of
26 CI\$4.00 and CI\$5.00 in 2008 and 2010 respectively. Both were zoned
27 LDR and deemed superior to the instant acquisition.

28

1 *Injurious Affection*

2 Mr. Obi stated that the claim for injurious affection referred to the
3 detrimental effect upon the retained land as a result of the construction
4 and subsequent use of the scheme. The measure of loss was a reduction
5 in value of the retained land at the time of acquisition.

6

7 Mr. Obi conceded that in certain circumstances, a reduction in the market
8 value of the retained land could occur as a result of an increase in noise,
9 dust, loss of privacy and amenity. He stated that the increase had to be
10 significant in order to have an effect on the value of the property.

11

12 Mr. Obi expressed the view that it was factually inaccurate to describe this
13 land which was as yet undeveloped as 110 cemetery plots. He stated that
14 his research on sales evidence of land parcels directly affected by the
15 scheme before and after the construction of the road did not support the
16 view that the road had had any adverse effect on property values. He
17 claimed that previously landlocked parcels or those with inferior access;
18 had become developable due to the provision of improved access.

19

20 Expressing the opinion that the character of the location has not changed
21 significantly because the parcel of land had always been close to a
22 highway, Mr. Obi concluded that the retained land has not been reduced
23 in market value due to injurious affection arising from the scheme.

24

25 During his testimony, Mr. Obi maintained his position as stated in his
26 affidavit and report. He conceded during cross-examination that he was
27 unable to state if the Claimant had complied with the conditions laid down
28 for planning approval with respect to drainage and sanitation or the

1 driveway specifications. He stated that the property had a sidewalk and
2 restrooms. Mr. Obi testified that due to the changes in the road, that
3 which had previously been a two lane road was now a four lane road with
4 a roundabout. He stated however that he had not conducted any studies
5 as it related to dust and noise levels.

6

7 Prior to reviewing the submissions of Counsel, it is useful to refer to the
8 facts and decisions made in two cases cited by both sides.

9

10 The following were the facts in the *Maori Trustee case*.

11 "On September 15, 1952 (the specified date) the Crown, under the Public
12 Works Act, 1928, of New Zealand, compulsorily acquired 91 acres of
13 Maori land, part of an area of 242 acres in respect of which there was at
14 the date of taking no more than a paper plan of a proposed subdivision
15 into lots, and if the approval of the plan had been received from the
16 appropriate Minister and subdivision had in fact been carried out by the
17 provision of roads, drainage and other facilities, some of the lots could
18 have been sold immediately for residential or industrial purposes and the
19 balance sold in lots from time to time over a period of years. On the
20 specified date, however, there were in fact no subdivided lots, no roads or
21 drainage, etc.- the land had still to be developed for subsequent
22 occupation is building a land.

23

24 The Privy Council held as follows:

25 "that the Maori Land Court, in assessing compensation for the land taken,
26 most of value it in its state at the time of taking, and under section
27 29(1)(b) of the Finance Act (No. 3), 1944, of New Zealand, that value
28 was to be assessed at "the amount which the land if sold in the open

1 market by a willing seller on the specified date might be expected to
2 realize." The land must be valued for what it in fact was on the specified
3 date – a tract of land capable of subdivision into building allotments and
4 being sold subsequently in that form, but there must be excluded from
5 the court's contemplation retention by the claimant, and an assessment of
6 what in his hands it would yield if subdivided. To give a claimant
7 compensation on the basis that there were subdivisions of the land, when,
8 in fact, there were not, would be to give him compensation for unrealized
9 possibilities as if they were realized possibilities."

10

11 It was further held:

12 "The court must contemplate the sale of the land as a whole unless it
13 appeared that the necessary legal consents to a sub-divisional plan had
14 been given, and a survey on the ground at the specified date would have
15 disclosed that the land or some part of it was in fact so far subdivided
16 that the subdivided parts could at that date have been immediately sold
17 and title given to individual purchasers, in which case the parts so
18 subdivided might be separately valued for the purpose of arriving at the
19 total amount of compensation.

20 If the land had to be valued as a whole, the court, in assessing the
21 potentialities, might take into account the suitability of the land for
22 subdivision, the prospective yield from a subdivision, the costs of effecting
23 such a subdivision, and the likelihood that a purchaser acquiring the land
24 with that object would allow some margin for unforeseen costs,
25 contingencies and profit for himself."

26

27 The following is the headnote taken from **Concept Ltd v National Roads**
28 **Authority [2009] CILR 629.**

1 “The appellant challenged the Road Assessment Committee’s
2 valuation of part of its land that had been compulsorily acquired and it
3 also sought compensation for severance and costs.

4 The appellant owned land part of which was compulsorily acquired
5 by the National Roads Authority to enable the construction of a road. The
6 appellant pursued compensation for the value of its land in accordance
7 with s.9 of the Roads Law (2005 Revision). Negotiations between the
8 appellant and the Director of Lands and Survey took place, but as a value
9 could not be agreed (the appellant was offered approximately CI \$70,000
10 and CI \$110,000 but valued the land at over US \$650,000), the claim was
11 referred to the Roads Assessment Committee. The Roads Assessment
12 Committee awarded the appellant nearly CI \$180,000 for the property but
13 did not award any sum for severance damages because no details had
14 been provided to establish such claim. The Roads Assessment Committee
15 exercised its discretion to make no award as to costs, even though the
16 appellant had been successful in increasing the valuations it had been
17 previously offered, because of its “exaggerated claim”.

18 On appeal, the appellant submitted that (a) the Roads Assessment
19 Committee had wrongly valued its land by treating the acquired land as a
20 separate parcel of land rather than determining its value from that of the
21 whole parcel of land of which it formed part; and (b) it had failed to apply
22 the principle that a landowner was entitled to be put in the same position
23 as if the land had not been taken from it and should therefore have
24 considered compensation sustained by way of severance of the land from
25 that retained, even though it had not been explicitly claimed. The
26 appellant sought US \$435,640 for the value of the land and US \$585,000
27 for damage sustained by severance. The appellant also contended that
28 the Committee’s findings as to costs should be set aside.

29 The respondent submitted in reply that (a) the Roads Assessment
30 Committee had been correct to value the land as a distinct parcel; (b) the

1 Committee was not entitled to investigate and assess compensation for
2 other damage on its own motion; (c) nevertheless, the claim for
3 severance compensation was flawed; and (d) the Committee was justified
4 in not awarding the appellant its costs.

5 **Held,** awarding increased compensation for market value and the
6 recovery of costs, but refusing the claim for severance compensation:

7 (1) In accordance with the provisions of the Roads Law, when
8 valuing land compulsorily acquired for the purposes of para. 6 (1) (a) of
9 the Second Schedule, the Roads Assessment Committee would assume
10 that the appellant was a "willing seller" and determine the market value
11 of the subject land as a separate and distinct parcel and not as part of the
12 owner's larger holding. The value of the retained land must be ignored
13 and therefore the market value of the subject land was determined at
14 approximately CI \$200,000"

15 (2) Paragraph 6 (1) of the Second Schedule of the Roads Law made
16 it clear that the Committee should investigate of its own motion the other
17 heads of claim and, where appropriate, assess any damage the claimant
18 suffered in the compulsory acquisition. This was necessary because there
19 would be many claimants without legal representation who would need to
20 be protected in the interests of justice. The objective would be to put the
21 appellant, so far as money could do so, into the same position as if its
22 land had not been taken from it, so that it would receive no more or no
23 less than the loss it had sustained. Severance compensation would be
24 given where the loss of the part of land compulsorily acquired depreciated
25 the value of that retained (or for example if the future development of the
26 land was restricted). Here there was no evidence that the value of the
27 retained land had been reduced by the acquisition or its potential for
28 future development affected and no compensation would therefore be
29 awarded for severance"

1 “(3) A departure from the usual costs order would only be justified
2 when the claimant’s conduct had led to an obvious and substantial
3 escalation in costs over and above those it was reasonable to incur in
4 vindication of its right to compensation. There was no evidence that the
5 appellant had acted in an improper manner which had led to a “waste of
6 substantial time and expense” – its claim had been *bona fide* and
7 achieved a substantial increase on the initial offer from the Director of
8 Lands and Survey – and therefore, in the light of its ultimately successful
9 application, it would be entitled to its costs of the proceedings before the
10 Roads Assessment Committee”.

11

12 **Submissions on behalf of the Claimant**

13 Counsel for the Claimant challenged whether Mr. Obi’s evidence should be
14 accepted as expert evidence. It was submitted that based on the role that
15 Mr. Obi had played in these proceedings, he could not be considered
16 independent. He had served the notice of affection on behalf of the NRA.
17 Further, he was employed by the Department of Lands & Survey as
18 Senior Valuation Officer and that department is an agent of the NRA. It
19 was argued that his evidence about value could not be seen as an
20 independent product, and further that it was influenced by his employer’s
21 role as agent to the NRA.

22

23 Counsel for the Claimant made reference to the unique nature of the
24 property in question. It was land that was zoned Institutional but it was in
25 private hands. It was pointed out that the number of such parcels which
26 were privately held is very limited. It was also submitted that with regard
27 to private individuals “there are very rarely transactions of parcels within
28 this class”. Additionally, the land had planning permission for use as a
29 cemetery and was a part of a larger development in which private burial

1 plots were sold to members of the public. It was submitted that this
2 property was distinct from both a public cemetery and small private
3 cemetery designed for particular families.

4

5 During submissions, Counsel stressed that at the time of acquisition, the
6 land had benefited from substantial infrastructure works that had been
7 carried out for the benefit of the cemetery as a whole; that is both Phase
8 1 and Phase 2. It was submitted that the ingress and egress points, the
9 parking lot, the driveway and drainage and buildings all benefited both
10 phases. Prior to use as burial space, the land had to be filled and this was
11 done for Phase 1 however, the same fill also benefited Phase 2. Excavated
12 fill from Phase 1 was set aside and preserved for the purposes of filling
13 Phase 2. Consequently it was argued, Phase 2 was an integral part of the
14 whole development.

15

16 It was submitted on behalf of the Claimant that the Committee had an
17 inquisitorial duty under the said Law pursuant to Section 7(5) and
18 paragraph 6(1) of Schedule 2. This duty was to enquire into and
19 determine the extent of the loss caused to the Claimant by the
20 expropriation of the acquired land. Reference is made to the judgment of
21 the Honourable Mr. Justice Quin in **Concept Ltd v National Roads**
22 **Authority [2009] CILR 629** wherein he stated:

23 *"para. 6(1) of the Second Schedule of the Roads Law makes it quite clear*
24 *that the court should, of its own motion, investigate the other heads of*
25 *claim and, where appropriate, assess compensation if any damage has*
26 *been sustained by a Claimant in a compulsory acquisition".*

27

28 The Honourable Judge stated additionally:

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

8

9 Counsel for the Claimant argued that the Committee had to take into
10 account the market value of the land on the Declared Day as well as any
11 injurious effect on the remainder of the original parcel or earnings. In
12 schedule 2 "market value" is defined as "the amount which the land if
13 sold on the open market by a willing seller might be expected to realise".
14 Reference was made to an extract from the Privy Council case of **Minister**
15 **for Public Works v Thistlethwayte [1954] AC 745** at page 491:

16

17 *"It must not be forgotten that it is the value of the land to the owner that*
18 *has to be ascertained and that the willing seller and purchaser is merely a*
19 *useful and conventional method of arriving at a basic figure to which must*
20 *be added in appropriate cases further sums for disturbance, severance*
21 *special value to the owner and the like".*

22

23 Counsel challenged the position taken by Mr. Obi that based on the
24 *Concept case* the land that is valued is the acquired land and the land
25 retained should be ignored. It was argued that what adjoins a piece of
26 land could fundamentally affect its value and as such the land had to be
27 valued taking into account all of its existing advantages and all its
28 possibilities. It was submitted that the correct approach was the one
29 taken by Mr. Jones.

1

2 It was submitted by the Claimant that the NRA used a fundamentally
3 flawed approach and arrived at an artificially low valuation.

4

5 It was accepted by the Claimant that where appropriate, a Comparables
6 Sales approach would normally yield the most reliable valuation. While
7 this is the approach that Mr. Obi claimed to use, Counsel for the Claimant
8 challenged the fact that Mr. Obi used neither another private cemetery
9 nor another cemetery as a basis of valuation.

10

11 Mr. Obi's approach was challenged in that having acknowledged that
12 similar areas of land, also zoned Institutional had been selling for \$7.00
13 per square foot; he rejected that basis of assessment. Due to the original
14 parcel having been previously zoned Low Density Residential ("LDR"), and
15 using that as a starting point, he then claimed that the land was inferior
16 in value terms to other areas zoned LDR and gave an assessment of
17 \$3.50 per square foot. This approach was rejected as an attempt to
18 ascribe the lowest possible value to the land.

19

20 Counsel for the Claimant referred to several passages in **Vyricherla**
21 **Narayana Gajapatiraju v The Revenue Divisional Officer**
22 **Vizagapatam [1939] A.C. 302 (Privy Council)**, referred to as "the
23 Indian case"; for support.

24 At page 312:

25 *"The compensation must be determined, therefore, by reference to the*
26 *price which a willing vendor might reasonably expect to obtain from a*
27 *willing purchaser. The disinclination of the vendor to part with his land*

1 and the urgent necessity of the purchaser to buy must alike be
2 disregarded. Neither must be considered as acting under compulsion."

3

4 A further extract from page 312 of that case is as follows:

5 "In the case of land, its value in general can also be measured by a
6 consideration of the prices that have been obtained in the past for land of
7 similar quality and in similar positions, and this is what must be meant in
8 general by "the market value" in s. 23. But sometimes it happens that
9 land to be valued possesses some unusual, and it may be, unique
10 features, as regards its position or its potentialities. In such a case the
11 arbitrator in determining its value will have no market value to guide him
12 and he will have to ascertain as best he may from the materials before
13 him, what willing vendor might reasonably expect to obtain from a willing
14 purchaser, for the land in that particular position and with all those
15 particular potentialities. For it has been established by numerous
16 authorities that the land is not to be valued merely by reference to the
17 use to which it is being put at the time at which its value has to be
18 determined.....but also by reference to the uses to which it is reasonably
19 capable of being put in the future. No authority indeed is required for this
20 proposition."

21 With reference to the foregoing passages, the Claimant submitted that
22 the approach of Mr. Obi was inaccurate in that:

- 23 1. He used the lowest possible value for the land based on the
24 assumption that the Claimant was compelled to sell the land as the
25 lowest possible grade of land; and
- 26 2. His valuation took no account of the potentialities of the land that
27 was acquired to be used as a cemetery.

28

1 It was argued that the correct approach was to assess as best as one
2 could, what a willing vendor made reasonably expect to obtain for the
3 land with all its potentialities for use as a cemetery.

4

5 At page 314 of *the Indian case*, it was stated:

6 *"In the case, however, of land possessing potentialities of such an*
7 *unusual nature that the arbitrator has not similar cases to guide him, the*
8 *value of the land must be determined in some other way. In such a case,*
9 *moreover, there will, in all probability be only a very limited number of*
10 *persons capable of turning the potentialities of the land to account."*

11

12 It was held in that case that an *"owner is entitled to, and the Valuing*
13 *Officer must, ascertain the value of the potentialities, even when the only*
14 *possible purchaser of the potentialities is the authority purchasing under*
15 *powers enabling compulsory acquisition"*.

16

17 Counsel for the Claimant submitted that Mr. Obi used the case of **Maori**
18 **Trustee v Ministry of Works [1959] AC 1** as authority for the
19 proposition that if it is necessary to subdivide a property and such
20 subdivision has not commenced, then the potential of the land that can be
21 achieved by subdivision should be left out of account. This view was
22 challenged. It was submitted on behalf of the Claimant that *the Maori*
23 *Trustee case* stood for "nothing more than in some cases looking at the
24 value of subdivisions is not appropriate on the facts of the case." The
25 Claimant sought to distinguish its position from the facts of that case.

26

1 It was submitted by Counsel that in the *Maori Trustee case*, the Privy
2 Council had found three material factors which the compensation tribunal
3 had to have in view. The Claimant summarised these as follows:

4 " (1) the consent of the Minister of Maori Affairs had to be given to any
5 sale of the land in question by the Maori Trustee;

6 (2) the plan could not be carried into execution without the consent of
7 the Minister of Maori Affairs, or his delegate, who might have
8 required material modifications to be made to the plan or might
9 have rejected it altogether and required a fresh plan to be
10 submitted; and

11 (3) there were in fact no subdivided lots as shown on the plan (no
12 roads, fences, access, drainage or other facilities) so it was still land
13 that had to be developed for subsequent occupation as building
14 land."

15

16 It was submitted that the Claimant: had obtained the permission of the
17 Planning Department to develop its cemetery; had acted on that
18 permission (including completion of the necessary infrastructure works)
19 and at the time of the expropriation had been actively engaged in
20 marketing and selling cemetery plots.

21 It was also submitted that the following should be taken into account on
22 behalf of the Claimant.

23 1. The Claimant had sought to subdivide the original parcel into the
24 numerous cemetery plots reflected in its approved plan so as to be
25 able to convey absolute title to the plots to purchasers. The
26 Claimant had accepted the response from Lands & Survey that it
27 was not possible as a matter of law to subdivide land into plot-sized
28 parcels.

- 1 2. While the Claimant was unable to convey absolute title to individual
2 cemetery plots it was capable of granting a purchaser the perpetual
3 an exclusive right of burial in whatever plot was contracted for.
- 4 3. The Claimant had carried out the very infrastructure works ("roads,
5 fences, access, drainage or other facilities") which constituted the
6 land as being developed rather than undeveloped.

7

8 It was argued that in the instant case there were no obstacles to
9 subdivision and the fact that there had been no creation of separate
10 cadastral lots was irrelevant.

11

12 Counsel for the Claimant submitted that Mr. Obi's approach was to
13 assume that the Claimant could not find a buyer of land with potential to
14 be used as burial plots and therefore would not sell the land as burial
15 plots at all. It was argued that this approach would turn the Claimant into
16 a forced seller and as such would ignore the requirement under the law
17 that both a willing seller and buyer must be assumed. This, it was argued
18 unfairly deprived the Claimant of the benefit of the value which the land
19 had as cemetery plots. It was submitted that the valuation should be
20 done on the basis of cemetery plots and it was to be assumed that there
21 was a willing buyer of cemetery plots even if the only buyer that could be
22 assumed is the Cayman Islands Government.

23

24 Counsel for the Claimant submitted that the Comparable Sales approach
25 was not appropriate since there was no comparable land available. He
26 urged the Committee to accept the calculations prepared by Mr. Jones as
27 the only appropriate alternative.

28

1 It was also submitted on behalf of the Claimant that there were reasons
2 to reject Mr. Obi's denial that the road scheme had had any injurious
3 effect on the property that remained in the Claimant's hands.

4

5 It was submitted that Mr. Obi had not put the Claimant in a position to
6 assess his research on the impact of the road on individual parcels of land
7 directly affected by the scheme; leading to the conclusion that the road
8 had not had an adverse effect on property values. The Claimant was not
9 in a position to test the validity of this conclusion. Further it was argued
10 that such a conclusion was a general one about the aggregate effect of
11 the scheme on all types of plots of land. Consequently, it did not address
12 the particular impact of the scheme on this particular plot of land.

13

14 With respect to Mr. Obi's submission that the road had enhanced property
15 values by improving access; it was argued that the cemetery already had
16 a quiet access. It did not need and could not use the new road and
17 roundabout as access. It was argued that in the absence of evidence that
18 the new road improved access generally and in a way that was beneficial
19 in value terms; the premise for the conclusion was incorrect.

20

21 The final submission by Mr. Obi was that the retained land had always
22 been by a road and as such the new scheme did not change this. This
23 submission was denied and it was alleged that the particular plots were a
24 considerable distance from the road and additionally, the land had never
25 been adjacent to a four way highway and large gyratory.

26

27

28

1 **Submissions on behalf of the Acquiring Authority**

2 The Acquiring Authority was the National Roads Authority ("the NRA") and
3 it was submitted on its behalf that the Roads Assessment Committee
4 should accept the conclusions in the Report prepared by Mr. Uche Obi.

5

6 It was submitted that the value of the Claimant's loss could not be
7 measured as if all 749 plots have been sold all at once on the Declared
8 Day. It was contended that according to the evidence; between 2000 and
9 2012 an average of 13 plots were sold per year. Further, it was not in
10 dispute that the Claimant had planned to complete sales in Phase 1 prior
11 to embarking on sales in Phase 2. It was submitted that even if the rate
12 of sales increased, it would take a very long time to complete sales in
13 Phase 1. Thereafter sales in Phase 2 would not be completed all at once.

14

15 It was conceded that due to the compulsory acquisition the Claimant had
16 lost the ability to expand the cemetery into Phase 2. However it was
17 argued that if the Claimant was paid that which he asked, it would far
18 exceed his loss.

19

20 It was submitted that the land taken was undeveloped scrub with the
21 potential to serve as an extension to the existing cemetery. it was
22 submitted that as it was lying adjacent to the existing cemetery,
23 consideration should be given to whether the owner of the existing
24 cemetery would have been one of the hypothetical bidders for the land. It
25 was argued that since the existing owner already had the infrastructure
26 provided in Phase 1, an extension into Phase 2 was logical.

27

1 Counsel for the NRA stressed that the existence of the infrastructure
2 would be taken into account by considering what the owner of the
3 existing cemetery would have offered to purchase the land. The
4 infrastructure was not on the land that was taken and it was argued that
5 it should not be taken directly into account in assessing the market value
6 of the land taken.

7

8 With respect to the submission that the amount of infrastructure, such as
9 the number of parking spaces, might have been less had Phase 1 been
10 the total development; it was submitted that there was no satisfactory
11 evidence on the point. Further it was submitted that even such evidence
12 concerning costs would have no bearing on the market value of the land
13 taken. It was submitted that such a claim could arguably have been
14 brought under a separate head for the costs incurred which have been
15 wasted.

16

17 Counsel for the NRA challenged the valuation by Mr. Jones being based on
18 the asking prices of the plots. It was argued that this could not stand
19 when taken in conjunction with his evidence that the sales of plots had
20 rarely been sold at the asking price. It was also submitted that his
21 deduction of 30% for a bulk purchase was spurious.

22

23 Counsel for the NRA conceded that in some circumstances a residual
24 valuation had to be used in the absence of other evidence. It was
25 submitted however that in this case the use of such a valuation was
26 unreliable. It was argued that where land is to be developed immediately
27 and without delay, the inputs such as sales prices and costs could be
28 ascertained with a degree of certainty. In this case, it was argued, an
29 attempt to project long into the future was guesswork and not valuation.

1

2 It was submitted on behalf of the Acquiring Authority that any attempt to
3 value the land as a cemetery, required the use of uncertain and
4 speculative figures and as such other bidders had to be considered for
5 other uses. It was argued that since the land had previously been zoned
6 Low Density Residential ("LDR"), it was reasonable to assume that
7 someone might bid for it on that basis. Counsel for the NRA commended
8 Mr. Obi's explanation concerning the value he had derived for the
9 property. In support of this, Counsel also referred to the response of Mr.
10 Jones during cross-examination that the rate of \$3.50 per square foot was
11 "not far away". Reference was also made to his comments that "the right
12 range" was \$3.50 to \$5.00 per square foot. Counsel for the NRA stated
13 that the two comparables referred to by Mr. Obi as being valued at \$7.00
14 per square foot, both fronted Shamrock Road and additionally, those
15 values reflected a commercial zoning. As such they should be
16 distinguished from the present case.

17

18 Counsel for the NRA responded to the Claimant's position that it was
19 legitimate, as a matter of law to value the land on the basis of a
20 subdivision into parts.

21

22 After summarising several cases on point, including *the Maori Trustees*
23 *case* and *the Concept case* Counsel for the NRA submitted that the legal
24 position in relation to subdivision was as quoted below.

25 1. "The starting point is that the land compulsorily acquired must be
26 valued as though it had been offered for sale on the open market by a
27 hypothetical willing seller, and *not* as part of the actual former owner's
28 holding."

1 2. "The fundamental rule is that the land compulsorily acquired must be
2 valued in its physical and legal condition as it was on the date of
3 acquisition. If any physical works, permissions or other steps would have
4 been required before the land could have been sold in parts, then it can
5 not be assumed that those works or steps had been taken or permissions
6 obtained. It would of course be legitimate to take into account the
7 potential for the land to be subdivided after the hypothetical sale."

8

9 Counsel for the NRA went on to conclude that infrastructure previously
10 installed on the retained land which may have been adequate to serve the
11 other phase which was to be created later on the land acquired was
12 irrelevant to the question whether the land may be valued as sold in
13 subdivided form. It was only legitimate to take into account the land's
14 potential to be developed in the future and used as a cemetery and that
15 planning permission had been granted to use it as a cemetery.

16

17 It was argued that even if the land had been fully laid out and developed
18 on the Declared Day, it could not be contemplated that the hypothetical
19 willing seller would have sold burial plots simultaneously to a multitude of
20 purchasers of individual burial plots.

21

22 It was submitted that based on the facts of this case, there was no
23 potential to subdivide this land into a cemetery, in the sense of the giving
24 title to parts of land. The current contractual arrangement as it relates to
25 Phase 1 is that purchasers of burial plots merely receive the grant of a
26 right to use the land for burial purposes in other words, a licence. The
27 freehold interest in the whole of Phase 1 is retained by the Claimant
28 company and this is used so as to fulfil the obligation to maintain the
29 whole area. It was submitted that the same would have applied to Phase

1 2. Any hypothetical purchaser would be aware that once the land was
2 developed for use as a cemetery he would not sell off subdivided plots as
3 would be done in a residential subdivision.

4

5 Counsel for the NRA challenged a written submission from the Claimant
6 wherein a challenge was made to a quote from Mr. Obi, relying on *the*
7 *Concept case*, about the importance of the retained land. Counsel clarified
8 that the NRA's position, in reliance on *the Concept case* was that the land
9 taken must be valued as if it was a separate parcel from the Claimant's
10 retained land and as though it had been offered for sale on the open
11 market by a willing seller.

12

13 Counsel further submitted that it was a legitimate exercise to imagine the
14 Claimant as one of the people in the open market who might have bid for
15 the land acquired. This is based on the proposition that since the land
16 acquired could have served as an extension to the cemetery already
17 created in Phase 1, this was a factor which should be taken into account.

18

19 Counsel for the NRA challenged the calculations made by Mr Jones in the
20 claim for injurious affection. It was submitted that the claim was based on
21 the assumption that the selling price of 110 burial plots in Phase 1 close
22 to the new road had been reduced by 25% due to noise and loss of
23 privacy. All these assumptions were refuted.

24

25 It was submitted that the evidence established that over the past 12
26 years, plots had been sold at substantial discounts from the asking list
27 price. It was further submitted that there was no evidence to support a
28 25% reduction. It was argued that cemeteries all over the island were

1 adjacent to busy roads and that traffic noise is not materially different
2 from the new road compared to the previous situation. It was also
3 suggested that there was evidence that pointed against any reduction. It
4 was submitted that in the Claimant's plan for the cemetery no price
5 reduction was shown for plots which were close to Shamrock Road. On
6 the basis of this it was argued that the Claimant clearly believed that
7 plots close to the road could be sold for the same amount as plots further
8 from the road.

9

10 Finally it was submitted that the 110 plots were not sold on the Declared
11 Day and that they still have not been sold and that at the present sales
12 rate it would be several years before they were. It was submitted that a
13 proper exercise would have been based on the 2006 value of the plots.
14 However this was difficult to ascertain because it could not be estimated
15 when they would have been sold.

16

17 Counsel for the NRA rejected the challenge made by the Claimant that Mr.
18 Obi was not an independent expert witness. It was submitted that based
19 on the authorities an expert witness may be an employee of the body for
20 which he is asked to give evidence.

21

22 It was submitted that Mr. Obi was highly qualified to give expert evidence
23 in relation to compensation for compulsory purchase. It was also
24 submitted that he had no conflict of interest in the matter. With reference
25 to any suggestion that there could be a potential conflict of interest by
26 virtue of his being employed by the Lands & Survey Department who act
27 as agents for the Acquiring Authority; it was submitted that Mr. Obi had
28 disclosed the relevant facts in his *curriculum vitae* and in his affidavit.

29

1 It was submitted additionally that while the list of his duties involved
2 giving advice to the NRA, negotiating with persons whose land had been
3 acquired and when necessary acting as expert in proceedings to
4 determine the amount of compensation; he was no less independent as
5 an expert than Mr. Jones, the Claimant's expert.

6

7 Finally it was argued there was no evidence adduced to suggest that Mr.
8 Obi's evidence was not independent and the Committee was asked to
9 reject the submission that little weight should be afforded to this
10 evidence.

11

12 **Conclusion**

13 The Committee formed the view that Mr. Obi's links to the Acquiring
14 Authority by virtue of his employment by the Department of Lands &
15 Survey, who act as agents for the Acquiring Authority; as well as the role
16 that he played in these proceedings prior to testifying, did not serve as a
17 bar to his evidence being considered as that of an expert. He was
18 qualified to testify about matters and he had made full disclosure about
19 his background and the role that he played. It was not accepted that Mr.
20 Obi had any conflict of interest in the matter and the Committee
21 considered that he was just as independent a witness as was Mr. Jones,
22 the Claimant's expert.

23

24 It was concluded that the approach taken in the *Concept case* must be
25 followed. The market value of the acquired land would be valued as a
26 separate and distinct parcel and not as part of the owner's larger holding.
27 The value of the retained land would be ignored.

28

1 Having stated that, the land could not be viewed as merely undeveloped
2 land. It was in fact land held in private hands which was zoned
3 Institutional and which had planning permission for use as a cemetery.
4 The existence of the extra infrastructure on Phase 1 had no direct bearing
5 on the assessment of the market value of the acquired land. This existing
6 infrastructure was however relevant in considering the potential of the
7 acquired land to be developed in the future and used as a cemetery.

8

9 The difficulty with the residual approach to valuation as presented is that
10 even making an account for an adjustment, it is based on the conclusion
11 that the Claimant is entitled to be compensated as if he had sold all 749
12 lots on the Declared Day. The reality as to the actual state of the acquired
13 land on the Declared Day and the rate of sales for these private cemetery
14 plots militates against such a conclusion. In the instant case, the acquired
15 land will not be valued as if what was taken was 749 cemetery plots.

16

17 Mr. Obi rejected valuing the land as Institutional on the basis that this
18 zoning had limited application in the private sector. He recommended a
19 valuation based on the previous zoning as LDR.

20

21 Although he recommended a valuation of the acquired property as LDR,
22 Mr. Obi sought to make a distinction between the acquired land and other
23 parcels of LDR land located in close proximity.

24

25 While concluding that the market value of the acquired land should be
26 equivalent to the value of neighbouring LDR parcels he then opined that a
27 downward adjustment should be made for the difference in zoning, i.e.
28 Institutional, which was allegedly inferior.

1

2 Consequently, no value was being ascribed to the land as zoned with its
3 unique feature of being private land with planning permission for use as a
4 cemetery. Reference was made to its previous zoning and yet the land
5 was treated as being of inferior value because thereafter, it was treated
6 as being zoned both LDR and Institutional at the same time. This was
7 obvious by the adoption of sales of LDR parcels for comparison taken in
8 conjunction with the conclusion that there was a very low market demand
9 for the purchase of a cemetery.

10

11 The reasoning underlying this approach was somewhat flawed.

12 Mr. Obi distinguished two parcels of land located close to the acquired
13 land that he used for valuation. Although both were located in the vicinity
14 of Shamrock Road and were zoned differently, one being Institutional, he
15 concluded that regardless of zoning, property located along Shamrock
16 Road had been selling at a rate per square foot of approximately \$7.00. It
17 was submitted that this value could not be applied to the acquired land
18 because those properties were located along Shamrock Road and were
19 acquired for commercial purposes.

20

21 Mr. Obi then examined five parcels of land located within the Red
22 Bay/Prospect area which were all zoned LDR. On the basis of their values
23 and from analysing that larger parcels attracted lower prices; Mr. Obi
24 concluded that based on those rates, the value of \$3.50 per square foot
25 should be applied to the acquired land.

26

27 It is accepted that the Comparable Sales Method approach is the best
28 approach for valuation. It is also quite clear that the acquired property is

1 extremely unusual in that it is the only property held in private hands
2 which is zoned Institutional and which has planning permission for use as
3 a cemetery. No other such property could be located for comparison.

4

5 Since there is no land exactly like the land in question which can be used
6 for comparison, then the hybrid approach of reference to its previous
7 zoning taken in conjunction with its current zoning can be used. However
8 it is concluded that the commercial benefits of the property as a private
9 cemetery must be taken into consideration. As such, reference is made to
10 the values of the two parcels of land, including one zoned Institutional,
11 which were in nearby proximity to the acquired land, but which were
12 closer to Shamrock Road, as the best properties for comparison on the
13 available evidence.

14

15 Consequently a value of CI \$7.00 per square foot will be ascribed to the
16 acquired land. The size of the land was 0.83 acres or 36,155 square feet.
17 The assessed value of the acquired land is therefore CI \$253,085.00.

18

19 Infrastructure

20 It was accepted that the existing infrastructure on Phase 1 was more
21 extensive than that which was required to solely benefit that phase of the
22 cemetery. There was however no direct evidence concerning the
23 difference that there would have been in cost outlay, if less infrastructure
24 had been put in. While it is considered that the Claimant suffered a loss in
25 this area, there was no method of calculating what could perhaps have
26 been a viable claim.

27

28 Injurious Affection

1 The Committee accepted the submission made by Counsel for the
2 Claimant that what had to be examined was the particular impact, if any,
3 which the road scheme had on the Claimant's retained property.

4

5 It was accepted that prior to the building of the road, the private
6 cemetery already had a quiet access. As contended by Counsel for the
7 Claimant, there was no evidence that the new road brought generally
8 improved access.

9

10 Further, while the retained road had always been beside a road, the
11 Claimant's submission that there was a vast difference between a two
12 lane road and a four lane highway and roundabout is quite correct. It is
13 accepted that the level of increased noise and dust occasioned by the new
14 development to the retained land; will bring about a diminution in the
15 value of new roadside plots.

16

17 The essential point here stems from the unique aspect of the retained
18 land. It is a private cemetery with plots sold at prices which on the
19 evidence, far exceed the prices of plots sold by the Government in public
20 cemeteries. The latter are operated as a public service and not for profit.
21 The evidence has established that persons are drawn to this private
22 cemetery for aesthetic reasons. The exclusivity and ambience offered are
23 a part of the attraction. The loss of tranquillity in the "*Garden of*
24 *Reflections*" could lend some irony to the name but in any event; will
25 doubtless affect decisions to purchase plots.

26

27 The Claimant's submission that the 110 plots closest to the new road
28 scheme will be that which is particularly diminished in value is accepted.

1 While it is further accepted that at the present rate of progress; this part
2 of the retained land will not be developed as burial plots for several years;
3 the expert's estimation of a 25% reduction in value is accepted. The
4 calculation by Mr. Jones which is based on a 25% reduction is asking
5 price, less a further 10% reduction for perpetual maintenance is accepted.
6 The claim put forward for CI \$114,000.00 is accepted as being fair.

7

8 Costs

9 The Claimant sought Professional Fees as follows:

10 Attorneys Fees – US \$28,270.00;

11 Surveyor's Fees - \$15,825.00.

12

13 This claim refers to the period prior to the matter being referred to the
14 Committee. There was no dispute that Counsel for the NRA had not been
15 provided with the particulars of the claim for costs prior to the hearing.
16 Counsel for the Claimant explained that it was considered premature to
17 do so in written submissions.

18

19 It was submitted on behalf of the NRA that the quantum claimed was
20 excessive and far outside the range of tenable valuation opinion. It was
21 submitted that if the claim advanced on the advice of the Claimant's
22 professional advisors was fundamentally flawed, then the NRA should not
23 be required to reimburse the Claimant for all the fees incurred. The NRA
24 also challenged the basis of the legal fees exceeding the surveyor's fees.

25

26 A successful party is entitled to costs. The Claimant herein has not
27 succeeded in its claim concerning the market value of the acquired land.

1 However, the award made under that head is double that which had been
2 submitted by the NRA. Additionally, the Claimant has succeeded in its
3 claim for injurious affection.

4

5 Pre-hearing costs are awarded as claimed. The Claimant is also entitled to
6 costs for the hearing.

7

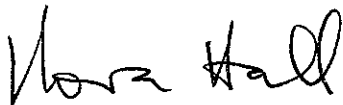
8 The final award is as follows:

- 9 1. CI \$253,085.00 as the assessed value of the acquired land;
- 10 2. CI \$114,000.00 for injurious affection;
- 11 3. Professional Fees in the sum of US \$28,270.00 (Attorney's Fees);
- 12 and CI \$15,825.00 (Surveyor's Fees).

13

14

15



16

Nova Hall

17 Chairman of the Roads Assessment Committee.

18 24th July 2014.