



[2013] JMSC Civ. 110

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA  
CIVIL DIVISION  
CLAIM NO. 2010 HCV 0591**

**IN THE MATTER OF** an award made on the 15<sup>th</sup> day of January 2009 by the Commissioner of Lands under section 11 of the Land Acquisition Act

**AND**

**IN THE MATTER OF** a reference to the Supreme Court by the Commissioner of Lands under section 17 of the Lands Acquisition Act

**AND**

**IN THE MATTER OF** all that parcel of land and premises containing by survey 10,354.9674 sq meters and being part of the land comprised in Certificate of Title registered at volume 577 folio 3 of the Register Book of Titles in the name Thomas Lazarus Anderson.

**BETWEEN                      THE COMMISSIONER OF LANDS                      CLAIMANT  
AND                              THOMAS LAZURUS ANDERSON                      DEFENDANT**

**Ms. Tamara Dickens instructed by the Director of State Proceedings: for the Claimant.**

**Ms. Roxann Mars instructed by Knight, Junior & Samuels: for the Defendant**

**Mervyn Down instructed by DC Tavares & Finson, Kenneth A. Allison in care of Allison Pitter & Company(Assessors).**

**CORAM: G. FRASER, J (Ag.)**

**(IN COURT NO. 12)**

**HEARD ON: 18 & 19<sup>th</sup> April; 16<sup>th</sup> May and 18<sup>th</sup>, 30<sup>th</sup> & 31<sup>ST</sup> July  
2013**

**FACTS**

[1] The claimant, the Commissioner of Lands has pursuant to the provisions of sections 17 and 18 of the Land Acquisition Act; referred this matter to the Court because of objections raised by the Defendant as to the price offered to him by the Government when they compulsorily acquired his land. This is land comprised in Certificate of title registered at volume 577 folio 3 of the Registered Book of Title; being part of Wydah in the parish of Portland. Accordingly the claimant initiated this action by way of Fixed Date Claim Form filed on the 12<sup>th</sup> February 2010. In support of the claim the Commissioner of Lands relied on her own affidavit evidence as also the evidence of Mr. Peter Baker. There is no issue taken by the Defence as to the methodology and procedure followed by the Commissioner in the acquisition of the land.

[2] The Claimant alleges that the Government of Jamaica is seeking to acquire a part of the said land for use for a public purpose namely; for the rehabilitation and improvement of the coastal highway linking the town of Ocho Rios in the parish of St. Ann to the town of Port Antonio in the parish of Portland. The Commissioner of Lands caused an evaluation to be done by Mr. Peter Baker on 15<sup>th</sup> July 2008 (exhibit 1H); in contemplation of the acquisition of the subject property and an offer of \$ 650,000 was made to the Defendant for the said land, comprising some 10,354.964 square metres. In arriving at the above value the Commissioner relies on the said valuation of Mr. Baker, who is a chartered valuation surveyor.

[3] The Defendant; who is the registered proprietor of the subject land; avers that the award of \$650,000 determined by the Commissioner of Lands as a sum to compensate him for lands seized is insufficient. That the Defendant having

suffered loss as a result of land seized pursuant to a declaration by the Minister on 8<sup>th</sup> May 2008 is not being properly compensated as the sum offered is not the true market value of the subject land and the sum of \$650,000 ought to be increased by the Court. The Defendant is further averring that pursuant to a valuation done by Mr. Wilbert Cain his property is worth \$19,000,000

[4] The sole issue identified for the Court's determination is the fair price of the land; whether the \$650,000 offered by the Government versus the \$19,000,000 being demanded by Mr. Anderson. Compensation in financial form is at the heart of this compulsory acquisition; I bear in mind that compensation is meant to repay the Defendant for his losses, and should be based on principles of equity and equivalence. The principle of equivalence demands that affected owners such as Mr. Anderson should be neither enriched nor impoverished as a result of the compulsory acquisition. To this end the Legislators have formulated a regime whereby disputed claims can be ventilated by the Court. The guiding factors that a Court should observe in matters of dispute as to compensation, arising under the Land Acquisition Act are set out in section 14 (1) of the said Statute as follows:  
"In determining the amount of compensation to be awarded for land acquired under this Act-

**(i) The following and no other matters shall be taken into consideration-**

- (a) the market value at the date of the service of the notice under subsection (3) of section 9;
- (b) any increase in the value of the other land of any person interested likely to accrue from the use to which the land acquired will be put;
- (c) the damage, if any, sustained by any person interested at the time of the taking possession of the land by the Commissioner by reason of the acquisition injuriously affecting the actual earnings of such person;
- (d) the reasonable expenses, if any, incidental

to any change of residence or place of business  
of any person interested which is necessary in  
consequence of the acquisition.

### **MARKET VALUE AT DATE OF NOTICE**

[5] I perceive that it is mainly sub-paragraph (a) that is the pivotal issue of concern in this hearing and which this Court is required to determine. Market value is the basis of compensation; one would therefore expect that the legislation should clearly state what is understood by market value. Alas and alack the Land Acquisition Act does not define the meaning of market value, but does ensure that an assessment made under the regime of the Statute does not include changes in the value of the property arising from the process of compulsory acquisition. Assessing the market value of a land parcel is not always simple; a common approach is to define market value by the “willing buyer, willing seller” model, i.e. the amount which a willing buyer would pay a willing seller on the open market where some choice exists. A variety of complex factors must often be considered, particularly where the value of land is usually affected by regulations that classify land according to permissible uses such as residential, agricultural, commercial or industrial. The highest value permissible use (the “hope” value) will determine the value of the land in the market; thus compensation laws allow for compensation on the basis of the more valuable use as the person could have used the land in such a manner if compulsory acquisition had not occurred. In such cases, there are specific provisions for dealing with the assumptions to be made about development permissions for a more valuable use than the existing use. Particular care, should however be taken in the consideration of evidence to avoid situations where the owner and others collude to falsely drive up the price of land.

[6] The market value at the date of notice is what I am therefore to determine. The date of service of the section 9(3) notice is indicated to be 22<sup>nd</sup> July 2008 as evidence by exhibit 1E. Mr. Anderson said he only knew of the Government’s interest in 2009; I do not find him to have been forthright as to when the notice was given, he firstly denied that any notice was given by the Government in 2008;

then he said he knew nothing of the Government's interest until 2009 when his brother told him about something on a tree to which he did not object. Mr. Anderson tried to underscore his ignorance as to the notice and intentions of the Government when he testified that

***"I did not know whether a road was going there, not the reason I put up buildings in 2006. In 2009, 2010 I heard about the four (4) acres in 2011 I knew about the 2.5 acres. This was in 2009 I learnt about the government's interest in the four (4) acres; I learnt about their interest also in 2009 concerning the 2.5 acres".***

Mr. Anderson has prevaricated so much on this issue that I am hard pressed to reject his evidence in this regard. I also note in particular that the Defendant had made no objection to the exhibit IC being tendered into evidence and I therefore accept the evidence of exhibit IC and I accordingly find as a matter of fact that the date of notice is the 22<sup>nd</sup> July 2008.

[7] Counsel Miss Mars on the Defendant's behalf urged this Court to have regard to the valuation of Mr. Wilbert Cain among other things in determining the market value. It is to be noted however that Mr. Cain's valuation was undertaken in 2011, almost three (3) years after the section 9 notice was gazetted on 22<sup>nd</sup> July 2008 (Exhibit 1E). The question is, in November 2011 at time of Mr. Cain's valuation was the land in its same state? If not then the value assessed by Mr. Cain would not be in compliance with section 14 (1) (i) (a). In his evidence Mr. Cain said "I valued the property at \$19,000,000 as at November 2011. When I inspected the property in 2011 I saw two (2) buildings, I saw coconut trees and timber trees and shrubs. The inspection was of the area I went to; that is 10,354.9 sq M (2.5acres). I inspected then did my valuation. I was guided as follows:

1. What it was zoned for
2. What it was being used for
3. Comparison evidence (sales evidence)
4. Location.

The property, the 2.5 acres in 2011 was being used I saw a restaurant and an office on the 2.5 acres”.

[8] I compare Mr. Cain’s evidence against that of Mr. Anderson as to the state of the land in 2008 versus 2011. Mr. Anderson had agreed with Crown Counsel that prior to the valuation done by Mr. Cain he had previously commissioned several others including two valuations done by Messers Miller and Philpotts in 2009 and that their reports respectively; did not indicate the presence of any buildings etc. Mr Anderson was however adamant that these two buildings were present on the property in 2006; and contrary to what Mr. Blake said there was a building there since the 1950s.

[9] The further evidence of Mr. Cain has caused me even more uncertainty as after being shown Exhibit 4A at page 10; the witness resiled from his statement that he had given consideration to the buildings because they were not in fact on the 2.5 acres. In any event the buildings seem not really to be on the subject property itself but on other land comprised in the same certificate of title and any account taken of them by Mr. Cain would be immaterial and irregular as it relates to true market value. The upshot of the combined evidence of Mr. Anderson and Mr. Cain in this regard to my mind; is that at the time Mr. Cain made his evaluation of the subject land, the state and user of the premises had drastically changed since the section 9 notice was given in 2008. If my assessment of this evidence is correct then the valuation done by Mr. Cain is not reliable and was not done in accordance with the dictates of the Statute.

[10] Another consideration which arises on Mr. Anderson’s evidence concerns the undertaking of four separate valuations done over a 3 years span. It is significant that the Defendant in support of his objection had relied on the valuation done by Mr. Keith Miller in 2008 and had indicated to the Commissioner of lands that the subject land was worth \$6,948,178.10. He has offered no reasons why he is suddenly demanding \$19,000,000 or indicated any happenings that would cause such a drastic increase in the price. In 2009 two further valuations carried out by licenced valuers Mr. Barry Wharman and Mr. Horace

Phillipotts and they had arrived at a value of \$12,750,000 and \$10,000,000 respectively. The Defendant has provided no explanation for the disparity in all four valuations presented on his case. This state of affairs does not inspire this court to accept with confidence the evidence offered by the Defendant in this regard and the Court is left to speculate as to the reliability of the valuations relied upon by the Defendant.

[11] Mr. Cain indicated that he is a licence valuator for many years since 1994 and in addition to his report that was tendered into evidence he was cross examined by counsel for the Crown. He has made certain admissions in cross examination as to the methodology utilized by him in arriving at the determined value of \$19,000,000. This includes his evidence that “the subject property would have escalated in price over 100% between the years 2009 – 2011, a period outside the consideration of the material date of 2008. The further short falls I have identified in Mr. Cain’s evidence includes the following:

1. He did not consult the Portland Development Order in assessing the value of the land. This is significant having regard to the definition of market value and the attendant issue of legally permissible utilization of the subject land at the material time in 2008.
2. The comparable method utilized
3. His assertion that the subject property comprised of mature fruit and timber trees
4. His assertion that there was a good and effective demand for the land as commercial and industrial investments.

It is to be noted that none of the features he described at 3 and 4 above were borne out by any evidence in this case. In light of all its short comings I do not accept Mr. Cain’s evidence as credible or reliable and I therefore reject it.

[12] I have also examined the evidence of Mr. Peter Baker who was the main witness called by the Commissioner of Lands. Mr. Baker indicated the factors he took into account in making his assessment and valuation and on the whole they appeared to be in keeping with the accepted practices of the trade but more

significantly he is the only witness who has offered evidence of a valuation done at the material period in 2008. He indicated the following factors that guided his valuation:

1. The principle of highest and best legally permissible use in keeping with the definition of market value
2. The Portland Development Order – zoning and designating the subject property as suitable for use as seaside park
3. Comparable sales
4. The provisions of section 14(2) (c) which provides that:

***“ in determining the market value, regard shall be had to any subsisting valuation of the unimproved value of the land pursuant to the Land Valuation Act and all assessments and returns acquiesced in or made in that behalf.”***

[13] Consequent to the above provision I have take into consideration the evidence that the consisted of twelve (12) acres as contained in Certificate of title volume 577 folio 3 was in March 2002 valued by the Land Valuations Department in the sum of \$375,000. This information is contained in exhibit 2D. This valuation report was not challenged by the Defendant and I accept it as being accurate. The undisputed facts in exhibit 2D is to the effect that the subject property would be worth but a fraction of the value of that \$375,000 in 2002. I have heard no evidence of improvements made to the land between 2002 – 2008 or any other reason that could cause a drastic increase in value, so much so that a mere 2.5 acres had increased to the value of \$19,000,000.

### **THE ASSESSORS OPINION**

[14] In accordance with section 20 of the Act, orders sought by the parties for two assessors, Mr Mervyn Down a licensed appraiser and Mr. Kenneth A. Allison chartered valuator and surveyors were granted. The objective of the orders is for the purpose of the assessors sitting with the Court, hearing the evidence and generally aiding the Court in the appreciation of technical evidence; so that the



court is better enabled in determining the objection and making an order reflecting the true market value of the subject property.

[15] The both Assessors have made site visits to the subject property and have analysed the three (3) valuation reports tendered by the Defendant as also the report relied upon by the Claimant as follows:

Mr. Barry Wahrman – April 2009

Mr. Horace Philpotts – April 2009

Mr. Wilbert Cain - November 2011

Mr. Peter Baker - July 2008

[12] The Valuation done by Mr. Wharman was rejected by the Assessors on the basis that:

- i. The valuation was done as at date 22<sup>nd</sup> April 2009 and not the relevant date of July 2008
- ii. The report gave no evidence of comparable sales data
- iii. The valuer stated that the land was suitable for development into tourist facility with shops, restaurants and hotel. This clearly is in disregard of the zoning laws
- iv. That there was good demand for land in the area that would have fetched the price of \$12,750,000.

[13] The Valuation done by Mr. Phillipotts was rejected by the Assessors on the basis that:

- i. The valuation was done as at date April 2009 and not the relevant date of July 2008
- ii. The report gave no evidence of comparable sales data
- iii. His assertion that the general area is a newly established residential and commercial area with restaurant, hotels etc. Is inaccurate and misleading
- iv. His description of the subject property regarding the road frontage is inaccurate

- v. He has not provided any evidence of comparable sales to support his opinion of a price of \$10,000,000.

[14] The Valuation done by Mr. Cain was rejected by them on the basis that:

- i. The valuation was done as at date November 2011 and not the relevant date of July 2008
- ii. In evidence Mr. Cain said he had taken account of the use to which the land was to be put as commercial user, contrary to section 14 (1) (ii) (e) of the Land Acquisition Act
- iii. He had not consulted the ***Town and Country Planning (Portland Coastal) Provisional Development Order, 1962***; which stated that the land was zoned as a seaside park.
- iv. The two sales comparisons he relied on for his opinion of value were concluded on June 8<sup>th</sup> 2009 being Snow Hill in Portland; and the other in Denbigh, Clarendon in July 13<sup>th</sup> 2010. Both sales occurred after the relevant date.
- v. He used a method of averaging the sales price that is unacceptable; namely averaging the sale price of an approximately 1.0 acre property in Denbigh, Clarendon with that of a 26.967 SQ. M site in Snow Hill, Portland as a comparable value to a 2.5 acre property in Whydah.
- vi. His value of \$19,000,000 is excessive.

[15] The Assessors spoke more favourable of Mr. Baker's valuation, particularly in relation to his description of the land and the area as also the fact that he had consulted the ***Portland Development Order*** and gave heed to the requirements of the ***Land acquisition Act***. They noted however that the comparables relied upon by Mr. Baker was in the main agricultural land whereas the subject property's classification as seaside park; is a higher classification. They also noted that Mr. Baker had not provided any sales data of lands on the north-coast main road. The sales comparison utilized by Mr. Baker was of land located in

1. Nunsuch

2. Fellowship,

3. Hermitage Farm

[16] The property at Hermitage Farm, the Assessors rated to be “the closest” and most favourable for comparable to the subject property. In their estimation it was relevant because this property had the following attributes:

- The location – being east of Hope Bay and close to the Somerset Falls
- Part of the property is wetlands with ponding/swamps to its western section
- Was less than half (½) mile from the North Coast Highway

[17] Mr. Baker’s valuation report was accepted in principle, save and except his opinion on the question of zoning. Whereas he noted that the subject property is zoned for use as Seaside Park his list of possible facilities that were permissible was not as fulsome as what is in fact allowed by the zoning order; which allowed for car parking; refreshment facilities; changing room and showers. The Assessors agreed that the downward assessment made by Mr. Baker was appropriate relative to the size of the subject property. They however indicate that a further adjustment upwards should have been made to account for the superior zoning classification of the subject property as also the fact that the subject property is in a better location and also because the sale of the Hermitage property occurred in 2007.

[18] Having regard to their observations as to the suitability of The Hermitage Farm sales comparison and the short comings noted the Assessors recalculated price after making adjustments upward in relation to:

- Time of sale
- Size
- Usage
- Location.

[19] Taking all the above observations into account the Assessors have both expressed the opinion that a reasonable Open Market Value of the subject property of 2.55 acres as at the date of valuation being 22<sup>nd</sup> July 2008 is in the amount of two million dollars (\$2,000,000).

[20] I Having appreciated the careful, astute and reasoned analysis that was employed by the two Assessors and having regard to the fact that there is no evidence led in this trial that could reasonably challenge their assessment. I am prepared to accept and act upon their advice. More importantly I have utilized a similar assessment of the witness' evidence and the opinion of the Assessors in all respect coincides with my own findings. I accordingly accept their advice and find that a fair market value of the subject property as at the date of the section 9(3) notice is \$2,000,000.

[21] In accordance with the requirements of section 28 of the Act I therefore set out here under the result of this referral, for the reasons given above.

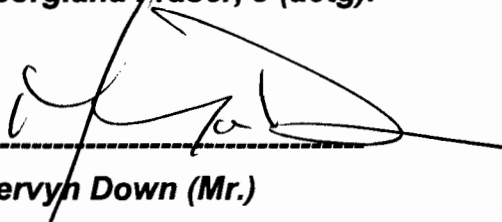
1. Pursuant to section 14 (1) (i) (a) of the Act; the sum of \$2,000,000 is awarded as market value for the 2.55 acres or 10,354.964 square metres. Being part of the land comprised in Certificate of title registered at volume 577 folio 3 of the Registered Book of Title; in the name of Thomas Lazarus Anderson. This also being land part of Whydah in the parish of Portland and subject of the section 9 (3) notice given on the 9<sup>th</sup> July 2008.
2. Pursuant to sections 30 and 36 the Claimant shall pay to the Defendant, interest at the rate of 5% per annum on the Commissioner's original award of \$650,000 and the sum of \$1,350,000, being the sum in excess of the original award. The said Interest is payable for period as from 30<sup>th</sup> July 2008 (date of possession) until date of payment of such excess.

3. The costs attendant upon the appointment of the assessors is to be borne by the Claimant. Such payment to be made for a period of hours to be submitted by the Assessors. I further recommend that they be paid at a rate of \$18,000 per hour being a percentage of the actual fee they could have earned had they been engaged in private enterprise of a similar nature.
4. Each party to stand their own legal costs.

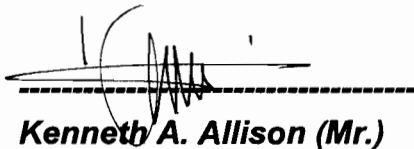
**PER:**



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**Georgiana Fraser, J (actg).**



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**Mervyn Down (Mr.)**



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**Kenneth A. Allison (Mr.)**

