JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 115/2004

BEFORE: **THE HON. MR. JUSTICE COOKE, J.A.**
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MRS. JUSTICE McCALLA, J.A.

BETWEEN:	**THE COMMISSIONER OF LANDS**	**APPELLANT**
AND:	**WORMAN LIMITED**	**RESPONDENT**

Patrick Foster, Deputy Solicitor General and Miss Thalia Francis instructed by the Director of State Proceedings for the Appellant.

Maurice Manning and Miss Sherry-Ann McGregor instructed by Nunes, Scholefield, Deleon & Co. for the Respondent.

January 22, 23, and April 27, 2007

COOKE, J.A.

1. The Land Acquisition Act (the Act) lays down the statutory regime which governs the process whereby the Government is enabled to compulsorily acquire land. The relevant land in this case is part of 67 Constant Spring Road. This land was the property of Worman Limited, the respondent. The provisions of the Act were faithfully followed, leading to the issue of the compensation which the respondent should receive consequent on the acquisition of 803.352 square meters of its land. As efforts at negotiations by private treaty pursuant to

section 8 (1) of the Act, failed, the Commissioner of Lands, as is mandated by sections 9 and 11 of the Act, held an enquiry to determine the sum which should be awarded to Worman Limited as compensation. On the 25th February 2002 the Commissioner made an award of $4,323,664.00. Worman Limited was dissatisfied with this award. It invoked section 17 of the Act which on its written application required the Commissioner to refer the issue to the Supreme Court for the determination of the amount of compensation to be paid. This was done. The Court made an award of $6,487,125.00. The Commissioner has appealed, claiming that this sum is excessive. The respondents have filed a counter notice of appeal contending that the award by the Court was insufficient.

2. In resolving the issue as to the quantum of compensation to be awarded to Worman Limited, the statutory regime stipulates that assessors have a role. The relevant sections of the Act pertaining to this role are set out below.

Section 20 states:

> "If the objection is in regard to the amount of the compensation and the award of the Commissioner is not less than two thousand dollars, the Court shall appoint two assessors for the purpose of aiding the Court in determining the objection. Such assessors may also be appointed in any other case in which the Court considers it desirable to make such appointment. Every person so appointed shall attend and serve as an assessor unless excused by a Judge."

Section 21 is as follows:

> "If an assessor dies or becomes incapable of acting or is excused by a Judge, some other person shall be appointed in his stead."

Section 24 (4) provides that:

> "The provisions of this section and of section 14 shall be read and explained to the assessors (if any) by the Judge before they give their opinions as to the amount of compensation to be awarded."

Section 14 sets out the factors which should be taken into consideration and those which should not be, in the determination of the quantum of compensation.

Section 25 stipulates that:

> "The opinion of each assessor shall be given orally and shall be recorded in writing by the Judge."

Section 26 (1) and (2) provides as follows:

> "1. In case of a difference of opinion between the Judge and the assessors or either of them upon a question of law or practice or usage having the force of law the opinion of the Judge shall prevail.
>
> 2. In case of a difference of opinion between the Judge and both of the assessors as to the amount of compensation or as to the amount of any item thereof the decision of the Judge shall prevail."

Then there is section 27 which sets out that:

> "Every assessor shall receive such fee not exceeding twenty dollars as the Judge shall direct for each day upon which he shall sit as an assessor or upon which he shall be engaged in inspecting the land the subject

> of the proceedings. Such fee shall be deemed to be costs in the proceedings." (emphasis mine)

Finally there is section 28 which requires that every award be in writing signed by the Judge "and the assessor or assessors (if any) concurring therein".

3. In this case in accordance with section 20 of the Act the judgment of the learned trial judge revealed that:

> "On the 30th of April, 2004, two assessors were appointed by the court, namely Mr. Mervyn Down of the firm of D.C. Tavares and Finson Realty Company Limited in relation to the determination of the market value of the land and the firm of KPMG Peat Marwick and Partners in relation to the claim for loss of earning."

At the hearing Mervyn Down and Paul Cole who represented KPMG Peat Marwick and Partners were apparently put up as witnesses and examined by counsel from the contending parties. The learned trial judge appears to have treated Mervin Down whom she had appointed as one of the assessors, as an expert witness. It is recorded in her judgment thus:

> "In answer to questions put by Mr. Manning for the Respondent Company, Mr. Down expressed an opinion that the offer that should have been made to the Respondent Company should have been $880 per square foot with adjustments to take into account the location and the condition of the property. He provided no further details as to where this adjustment would take that figure and in all the circumstances I am of the view that his earlier recommendation contained in his written report is the award which should be made in this instance. I find his report to be well researched and his analysis sound. Unlike the report from Allison Pitter and

> Company, which had all the appearance of preliminary observations with conclusions based on incorrect assumptions, Mr. Down provides the factors considered and the bases for his recommendation and I accordingly agree that the award which should be made to the Respondent Company as the market value, in May 2001, for the 803.352 square metres [8,649.5 square feet] of land situated at 67 Constant Spring Road is J$6,487,125.00."

In respect of the assessment of loss of earnings the learned trial judge said inter alia.

> "This aspect of the matter was dealt with by KPMG Peat Marwick and Partners who submitted a detailed analysis of occupancy levels of shops in the Company's business complex and rental income shops of all sizes."

4. When this appeal came up for hearing on the 23rd January 2007, the Court expressed its concern to the contending parties, that the hearing in the Court below was not in harmony with the statutory role assigned to assessors by the Act. It was our view that it did not seem that the assessors aided the Court in the manner in which the Act mandated – which was to sit with the learned judge and, with the benefit of their particular expertise, to assist the judge to evaluate the proffered evidence and at the conclusion of the hearing to give their opinion orally, which the judge is obliged to record in writing. [S25 of the Act.] The role of the assessors was to aid in adjudication – not to give evidence. The Court brought to the attention of the parties the decision of the House of Lords in **Richardson v.**

Redpath Brown & Co. Ltd. [1944] 1 All ER 110. This case concerned the role of a medical assessor. At p. 113 Viscount Simon L.C. at par E – H said:

> "E My Lords, I am aware that, if your Lordships accept the view which I have presented in this opinion, the House will be condemning a practice which we are told has of recent years become almost universal in county courts when dealing with workmen's compensation cases involving a medical question. We are told that in such cases it is quite common for the medical assessor to make an examination of the workman and to report his opinion to the arbitrator. But to treat a medical assessor, or indeed any assessor, as though he were an unsworn witness in the special confidence of
> F the arbitrator whose testimony cannot be challenged by cross-examination and perhaps cannot be even fully appreciated by the parties until judgment is given, is to misunderstand what the true functions of an assessor are. He is an expert available for the arbitrator to consult if the arbitrator requires assistance in understanding the effect and meaning of technical evidence. He may, in proper cases, suggest to the arbitrator questions which the arbitrator himself might put to an expert witness with a view to testing the witness's view or to making plain his meaning. The
> G arbitrator may consult him in case of need as to the proper technical inferences to be drawn from proved facts, or to the extent of the difference between apparently contradictory conclusions in the expert field. In **Hall v. British Oil and Cake Mills** (1930) Digest Supp.; 23 B.W.C.C. 529, SCRUTTON, L.J., in several passages of his judgment, treats a medical assessor's answers to the judge's inquiries as "evidence," and even speaks without objection of a medical assessor or a nautical assessor giving "evidence of facts." But I cannot agree that this is within the scope

> H of an assessor's legitimate contribution, LORD LOREBURN'S judgment in **Woods v. Thomas Wilson, Sons & Co., Ltd.** (1915), 8 B.W.C.C. 288; 34 Digest 274, 2323; 84 L.J.K.B. 1067; 113 L.T. 243. at p. 292, puts the medical assessor's functions as high as they can properly be put. LORD PARMOOR in that case, at p. 311, aptly defines the medical assessor's function as being:
> ... not to supply evidence but to help the judge or arbitrator to understand medical evidence."

Under the Act the assessors are entitled to inspect the land in question. However, this inspection is for the purpose of evaluating the evidence which will ultimately result in the opinions which they will give to the judge.

5. The disquiet of the Court having been communicated to the parties the hearing was adjourned to the next day so that counsel could give consideration to the concern of the Court. When the matter resumed Mr. Foster readily and candidly advised the Court that he could in no way dispel the Court's concern. The appellant helpfully supplied the case of **Ahmed v. Governing Body of the University of Oxford and Another** [2002] EWCA Civ 1907. This case supports the view of the Court. Mr. Manning, perhaps, moved by the considerations of the time and expense, which had already been expended, submitted that although the statutory regime was not followed, the assessors did provide the assistance contemplated by the Act. Therefore, despite the fact that there was not observance of the statutory regime this should not be regarded "as fatal". We rejected this submission. The Act sets out how the determination

of the issue of compensation is to be achieved. Any determination which is not in accordance with the fundamental provisions of the Act is no determination at all. It would be disastrous for any court to be allowed to ignore an imperative mode of adjudication prescribed by statute. In its reach for certainty the law cannot tolerate a digression which wrenches the stipulated process from its statutory course.

HARRISON, J.A.

I agree.

McCALLA, J.A.

I too agree.

COOKE, J.A.

ORDER

The order of the Court below is set aside. Matter is remitted to the Supreme Court for a proper adjudication in accordance with the provisions of the Land Acquisition Act. There will be no order as to costs in the Court below. There will be no order as to costs in this Court.