

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN MISCELLANEOUS

CLAIM NO. M102/ 2002

IN THE MATTER OF Section 17
of the Land Acquisition Act.

A N D

IN THE MATTER OF an award
of the Commissioner of Lands in
relation to Lands known as 67
Constant Spring Road

BETWEEN THE COMMISSIONER OF LANDS APPLICANT
AND WORMAN LIMITED RESPONDENT

Mrs. Nicole Foster-Pusey and Miss Kathryn Denbow for the
Applicant, instructed by the Director of State Proceedings;
Miss Sherry-Ann McGregor and Mr. Maurice Manning for
the Respondent, instructed by Messrs. Nunes, Scholefield,
DeLeon & Co.

Heard: July 22; August 9 and November 26, 2004.

N. E. McINTOSH, J.

This is a reference to the Court from the Commissioner of Lands arising from an objection by the Respondent Company to an award made by the Commissioner for a portion of the Company's lands situated at 67 Constant Spring Road which was made the subject of a compulsory acquisition order

under and by virtue of the provisions of Section 5 of the Land Acquisition Act (hereinafter referred to as 'the Act').

Brief History

The affidavit of the Commissioner of Lands ('the Commissioner'), sworn to on the 26th of August, 2002 and accompanying the referral, indicates that on May 25, 2000 the Minister of Land and Environment ('the Minister') declared that part of the land known as 67 Constant Spring Road, in the parish of St. Andrew, to be likely to be needed for a public purpose, 'namely, for the development of a second bridge to span the Sandy Gully and the widening of Constant Spring Road' to relieve the traffic congestion along the said road. The declaration was by virtue of section 3(1) of the Act and the Notice was published in the Jamaica Gazette on the 8th of June, 2000.

Then, on the 9th of March, 2001 (some nine months after the first notice), the Minister declared that the land was indeed needed for the public purpose stated in the previous notice and this second notice was published in the Jamaica Gazette on April 26, 2001. The Commissioner was then directed to take proceedings for the acquisition of the land (see Section 6).

By virtue of Section 8 of the Act the Commissioner was required to cause the land to be valued and to enter into negotiations with the interested persons for the purchase of the land by private treaty. However, there is no indication that the land was then valued and no agreement was reached by private treaty.

The Commissioner thereafter proceeded to acquire the land pursuant to Section 9 of the Act. This section required the Commissioner to cause notices to be posted 'on or near the land to be acquired', stating that claims for compensation for all interests therein may be made to her.

On May 22, 2001, the Commissioner caused a notice to be served on the Respondent Company, requiring the company to attend a hearing on the 18th of June and 'to state the nature of their interest and the amount and particulars of their claim for compensation for such interest'. Accordingly, on June 18, 2001 the Commissioner held an enquiry 'into the value of the lands and the interest of the Respondent Company, Worman Limited. That hearing was adjourned to allow the National Works Agency (the Agency

which was to undertake the development works), to acquire a valuation report for the land from Allison Pitter and Co. or some other reputable Commissioned Valuation Surveyor and for Worman Limited to provide a figure for its claim for total compensation.

At the resumed hearing, Mr. Derrick Mahfood, Managing Director of the Respondent Company, submitted a Statement of Claim, a Schedule of Claim and a report from a Quantity Surveyor in support of the Company's claim to compensation of \$45, 206, 968.00. I note here that the loss of revenue in the schedule related to rental income only.

A valuation report was obtained from Allison Pitter and Company which described the subject land as 'a strip of land of 814 square metres, adjoining the bridge across the Sandy Gully and including a six metre reservation for road improvement in accordance with developmental approval granted by the Town Planning Department in March, 1972. It stated that the land is the subject of several breaches of the approval and that its effective access from Constant Spring Road was restricted given the physical position of the bridge and high volume of traffic as well as a lack of visibility given the road level and boundary configurations.

The Valuer expressed the view that the proposed road works would operate to increase the value of the remaining land as it would improve upon the restricted access and indeed even provide an additional approach to the business enterprise on the 'remaining land'. There was to be 'a bridge to add another two lanes to the road to facilitate traffic leaving the business Complex to proceed south on Constant Spring Road and a safer entry for traffic entering north by constructing a median and a turning lane. All of this could render the property more desirable and could cause an increase in the value of the remainder 'of no less than 15%'. It was stated however that this would require 'an appraisal before the acquisition'. Such an increased value would operate to reduce the amount of compensation and would 'require further examination.

On the issue of loss of income the Valuer felt that such a claim could not be justified as a direct consequence of the acquisition. It was his understanding that buildings on the said land were developed in breach of developmental approval and accordingly illegal. A claim for compensation **in those circumstances** was therefore felt to be inappropriate. However, temporary

loss of earnings was considered a likelihood at some point in the execution of the works where access to the business complex may be restricted .

The Commissioner stated that in determining the compensation to be awarded she considered the market value of the lands at the date of service of the Section 9 Notice, (though no information was provided as to how that value was arrived at), took into account the documents submitted by Worman Limited and the valuation report submitted by Allison Pitter and Company. She stated that she also considered whether there was damage sustained by Worman Limited at the time of taking possession of the lands by reason of the acquisition which injuriously affected the actual earnings of Worman Limited.

As required by the statute, the Commissioner determined that the true area of land to be acquired was 803.352 square metres and on the 25th of February, 2002 awarded the sum of \$4,323,664.00 as compensation for the lands. She further stated that the amount of compensation was determined on the basis that it represents the market value of the land at the date of the service of the notice under Section 9 of the Act and that no award was made for loss of actual earnings as there was no evidence to substantiate a claim that those earnings were injuriously affected by the acquisition of the lands.

The Objection

The Respondent was dissatisfied with this award and objected on the grounds that:

- i) the market value of the land is greater than that stated in the award
- ii) there was no consideration for compensation for injury to its business and the potential loss of earnings as a result of the acquisition.

Having received the Respondent's objection, the Commissioner then referred the matter for the determination of the court in accordance with the provisions of Section 17 of the Act.

The Jurisdiction of the Court

Section 20 of the Act states, in so far as is relevant here, that:

“If the objection is in regard to the amount of 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....”

and the Act further provides for the enquiry to be in open court.

The rules as to the amount of compensation are to be found in Section 24 which states as follows:

“ 24 – (1) Where the applicant has made a claim to compensation pursuant to any notice under Section 9, the amount awarded to him by the Court shall not exceed the amount so claimed or be less than the amount awarded by the Commissioner under section 11.

(2) Where the applicant has refused to make such claim or has omitted, for any reason which the Judge may consider insufficient, to make such claim, the amount awarded by the Court may be less than, but shall in no case exceed, the amount awarded by the Commissioner

(3) Where the applicant has omitted, for any reason which the Judge may consider sufficient, to make such claim, the amount awarded to him by the Court, may be less than or may exceed the amount awarded by the Commissioner.

(3) 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 provides guidance to the Commissioner and to the Court for the determination of compensation. It states as follows:

14. – (1) 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.**

The section goes on to state in **subparagraph (ii)** matters which shall not be taken into consideration, including at **14(ii)(c)** **“any damage sustained by the person interested which, if caused by a private person, would not be a good cause of action”**. This was highlighted in these proceedings on behalf of the applicant as it was submitted that any damage sustained was as a result of the road works undertaken after the acquisition and were of the nature that would not be recoverable against a private individual.

Paragraph (2)(c) must also be specially mentioned as it 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”.**

By virtue of **Section 26**, 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 and in case of a difference of opinion as to the amount of compensation or as to the amount of any item thereof, the decision of the Judge shall prevail

Finally, for the purposes of this enquiry, **Section 28** provides for the award to be in writing, signed by the Judge and the assessor or assessors (if any) concurring therein and shall specify—

- (a) the amount awarded under paragraph (a) of subsection (1) of section 14;**
- (b) the amount, (if any) deducted under paragraph (b) of subsection (1) of section 14;**
- (c) the amount (if any) respectively awarded under paragraphs (c) and (d) of subsection (1) of section 14 and**
- (d) the grounds upon which such amounts were awarded or deducted.**

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 earnings.

It must be conceded that the provisions of section 24(4) were not met inasmuch as that section as well as section 14 were not read to the assessors and explained by the court before they gave their opinions on the amount of compensation to be awarded. In my view only section 14 (i)(a), (b) and (c) and 24(1) were relevant to this enquiry and it was abundantly clear to the court that the assessors had acquainted themselves with the statute before embarking upon the assignment and had a good understanding of its provisions especially in relation to section 14.

Both submitted their opinion in writing and attended in open court where questions were directed to them concerning aspects of their opinions. Clarifications, where necessary, were sought by the parties. Their reports

were quite detailed and covered several pages so no other note was made by the court save for their answers given in open court which included their recommendations concerning the actual sums to be awarded. Both reports form a part of the record of these proceedings.

Assessment of Market Value

The opinion of Mr. Down related to the market value in about May 2000 to March of 2001 which, in my view, sufficed for the purposes of the statute as the date of service of the section 9 notice was May 2001. After carrying out a thorough investigation as to suitable comparable sales of lands in certain sections of the parish (all of which is set out in his report), he determined market values for the period on two bases – one being evidence of comparable sales/ registered transfers and the other being evidence of documented offers/awards. The rate for the former was assessed at J\$750 per square foot, which for 803,352 square metres or 8,649.5 square feet of land, would amount to a market value of J\$6, 487,125.00 while the rate for the latter was assessed at \$880 per square foot, amounting to a market value of J\$7,611,560.00.

When questioned in open court he said that as a valuer he would have to recommend the former value of J\$6,487,125.00 as that can be justified by actual sales transfers as opposed to the latter position where only offers were involved and only the written agreements were seen as opposed to actual registered transfers. He was able to justify his approach in determining the market value as he did, showing that regard was had to the location, the utility and the higher value attracted by the land, being road frontage land. He agreed that smaller areas of land attract higher values but size was not the only consideration here and he indicated that in one case where a comparison was made with land at 80 Constant Spring Road which was smaller than 67 Constant Spring Road, the value in the case of number 67 would be higher as it was developed land as opposed to the vacant land at number 80.

His assessment was on an open market basis and it was unaffected by any road reservation. In this instance there was an area of the Respondent's land which was the subject of a reservation for road development – a much larger portion than the portion actually acquired. Mr. Down was not aware of this but he indicated that that information would have had no effect on his assessment because even if there was such a reservation the land was still in

the possession of the owner and, if he was selling it, he would be entitled to expect an open market value.

He said based on his understanding of the requirements of the statute it was not a case of a premium price for a slither of land but instead, the market value was to be based on comparable rates for land at the relevant time. As far as the requirements of section 14(ii)(c) is concerned he stated that at the time of the acquisition the Land Valuation Department had not assessed the value of those lands since the early nineties. Therefore they would not be current or relevant. Mr. Down's assertion was not challenged and indeed it is noted that the Commissioner would appear not to have had regard to this aspect of the requirements when arriving at her award and that information would certainly have been available to her.

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.

The acquisition of land by the Government of Jamaica, pursuant to the Land Acquisition Act, is done in stages. Hence the reference by Mr. Mahfood in his affidavit evidence to 'the acquisition process'. The notice which is first issued clearly sets out the purpose of the acquisition so that the tenants of the Respondent Company would be in a position to react to the proposed acquisition from the very outset and those are the indications from the Respondent supported by correspondence from several of its tenants.

Furthermore, I am unable to agree with the Attorneys for the Applicant that in these circumstances there can be a separation of the road works

undertaken and the acquisition process. As part of that process negotiations took place which were clearly intended to address the potential damage which was likely to be sustained by the Respondent Company by reason of the acquisition and the purpose for it. In one instance at least the Company was informed that there was a change of decision regarding the right turn – that was no longer to be provided. As I understand the position there is clearly a problem with entry and exit as a result of boundary configurations and other factors which were affected by the acquisition and even if there were difficulties before (as indicated in the Allison Pitter and Company report) the situation would seem to have worsened. While some tenants might have been prepared to deal with the position as it stood before several were not prepared to deal with the proposed alteration to that position.

In my view therefore there is no question that the Respondent Company has sustained damage by reason of the acquisition injuriously affecting its actual earnings, that is, its rental income and I am in agreement with both assessors that an award should be made for that damage.

Assessment of Loss of Earnings

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. The Managing Director of the Respondent Company has stated that the loss being claimed concerns large shops only and, in this regard, the assessor's indication that prior to the acquisition there was a rapid turnover in occupancy of the small shops, is duly noted. Therefore any award should be confined to income from the large shops and I should add here that I am in agreement with the period of review and assessment as being reasonable in all the circumstances.

I am entirely in agreement with the Applicant's Attorneys as to the method to be used in computing this award. Accordingly, the figures given in Appendix 111 a, b and c under Expected Income, based on 94% occupancy prior to January, 2002 is to be subtracted from a figure based on 80% occupancy, in order to arrive at the assessed 14% loss of rental income.

For the years ending January 2003 and January 2004 at the rate of 100% occupancy the rental income was found to be \$11, 281,735.20. At 94% occupancy, (which is what it was found to be before the

acquisition/development work), the income was \$10,604,831.09, each year. Therefore, at 80% occupancy, the income would have been \$9,025,388.16 for each year and that would result in a loss in rental income of \$1,579,442.93 for each year. For the four months remaining in the period under review, ending in May, 2004, the rental at 100% occupancy was found to be \$3,760,578.40. At 94% occupancy it was found to be \$3,534,943.70 and at 80% it would have been \$3,008,462.72, making the loss for that period \$526,480.98. The total of those sums amounts to \$3,685,366.84 and represents the award for loss of rental income.

The assessor went on to determine a sum for loss of maintenance income. However, in my view, this is not a factor for consideration. All the indications were that the claim related to loss of rental income and that to my mind, is the actual earnings of the Respondent Company. Maintenance fees cannot justifiably be regarded as actual earnings as those fees are for a specific purpose and is not intended to augment the rental income. In any event, the financial statements submitted by the Respondent Company clearly show that there was always a substantial shortfall in the maintenance fees and the company would therefore be in no different position, where maintenance costs were concerned, by reason of the acquisition.

No deduction is to be made from the award by virtue of section 14(1)(b). There is, in my view, no likelihood of an increase in the value of the land remaining in the possession of the Company resulting from the use to which the land acquired will be, or more accurately, has been put, since the passage of time and certain developments have allowed for a better assessment of that position. Mr. Down had said that there was no indication at the time of the assessment that there was any increase in value and with increased traffic and high speed travel on that stretch of road the value might actually decrease as the property may be less attractive to both tenants and patrons. However, he added that he would not disagree with Allison Pitter and Company that an increase may be likely in time. Reviewing the position as it now stands that likelihood ought not to be considered in this assessment.

In accordance with the requirements of section 28 of the Act I therefore set out hereunder the result of this referral, for the reasons given above:

- (a) under paragraph (a) of subsection (1) of section 14 the sum awarded as the market value for the 803.352 square metres of land

subject of the notice under Section 9(3) of the Act is
\$6,487,125.00;

- (b) there is to be no deduction under paragraph (b) of subsection (1) of section 14;
- (c) the amount awarded under paragraph (c) is \$3, 685, 366.84.

The costs attendant upon the appointment of the assessors is to be borne by the Applicant and the Respondent is awarded interest both on the Commissioner's original award and on the excess of this award over that award, at the rate of 5%, in accordance with the provisions of sections 30 and 36 of the Act.

The costs of these proceedings are the Respondent's and they are to be taxed if not agreed.

W. J. ...
Judge.