GRAND COURT CAYMAN ISLANDS

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE 426 OF 2011

ATTORNEY GENERAL'S CHAMBERS (SGO) MAR 19 2012 CAYMAN ISLANDS

IN THE MATTER OF THE ROADS LAW (2005 REVISION)

AND IN THE MATTER OF THE LAND ACQUISITION LAW

BETWEEN **THE NATIONAL ROADS AUTHORITY ACTING BY THE DIRECTOR OF LANDS AND SURVEY** **APPELLANT/RESPONDENT**

AND **ABSHIRE BODDEN**

AND **GENE THOMPSON AND ALFONSOWRIGHT (The executors of the Estate of Harold Bodden, deceased)** **RESPONDENTS/APPLICANTS**

IN CHAMBERS
THE 26TH DAY OF JANUARY 2012
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE

APPEARANCES: **Ms. Dawn Lewis of the Attorney General's Chambers for the NRA (with her Mr. Uche Obi for the Lands & Survey Department)**

Ms. Kate McClymont of Broadhurst LLC for the Respondents (with some of the beneficiaries of the estate of Harold Bodden, deceased)

RULING

1. On 29th September 2011, the Roads Assessment Committee ("RAC") reported its decision by which it awarded compensation to the Respondents (then claimants) in the amount of $342,886.15.

2. This award was made under the Roads Law in respect of some 3.313 acres of the Respondents' land compulsorily acquired by the National Roads Authority ("the

NRA") and for loss of value to the remainder (some 23.69 acres). This loss of value was regarded as due to the severance of that portion acquired and to the injurious affection that was found likely to arise to the remainder once the proposed new highway for which the land was acquired became a reality. The injurious affection was found likely to arise from noise, vibration, smell, pollution and artificial light disturbance affecting the land.

3. Included in the award was $7,318.15 in respect of a secondary smaller parcel of land, referred to as Property B as the issue of injurious affection related to that smaller parcel. Compensation for the land taken from this parcel had been earlier settled by negotiation with the NRA prior to the hearing before the RAC.

4. The NRA having filed its appeal within the time allowed by paragraphs 8(1) of the Second Schedule to the Roads Law (that is: 21 days); it now brings two summonses for interlocutory orders pending the hearing of the appeal.

5. The first summons dated 18th October 2011 seeks orders that:

   (i) the NRA be granted a stay of the award of the RAC by which it directed that compensation in the amount of $342,886.15 be paid to the Respondent and by which it granted the Respondents' costs of the RAC proceedings to be assessed or agreed; pending the determination of the NRA's appeal;

   (ii) the costs of this summons be in the cause of the Appeal.

6. The NRA's second summons dated 24th October 2011 seeks orders that:

   (i) pursuant to Order 15 Rule 6(2) of the Grand Court Rules, the executors of the estate of Harold Bodden, deceased – being Gene Thompson and Alfonso Wright – be added as the second and third respondents to the NRA's appeal in

their capacity as proprietors of the second smaller parcel of land referred to as Property B;

(ii) pursuant to Order 20 Rule 5(1) of the Grand Court Rules, the Notice of Appeal filed herein be amended to reflect the amendments in red in the draft Amended Notice of Appeal exhibited in the Affidavit in support of this summons;

(iii) the costs of this summons be in the Cause.

7. I will address the provisions of the NRA's summonses in turn.

8. In so doing, I will also address the provisions of the Respondents' cross-summons (filed on 6th January 2012), seeking an order for the immediate payment of its award and the associated costs.

Stay of Execution

9. Ms. McClymont in her written submissions helpfully summarised the decision of this Court in ***Quentin and Westphal v Phillips Petroleum Co. et al [1997] CILR Note 4***. This decision deals with the principles governing the grant of a stay of execution of a judgment as follows:

a. The Court is under a duty to ensure that an appellant's right of appeal is not rendered nugatory by the dissipation of the sum awarded being paid to a plaintiff in the meantime. However to prevent a frivolous appeal being mounted so as to frustrate payment of an award, the Court it must be satisfied, before ordering a stay of execution of a judgment, that the appellant has a real prospect of success on appeal (***Linotype-Hell Fin. Ltd. v. Baker [1992] 4 ALL E.R. 887*** applied);

b. It follows that an unsuccessful party, who applies for a stay of execution of a judgment against him pending his appeal, must show good reason for depriving the successful party of the fruits of his judgment pending the proposed appeal (***Winchester Cigarette Machinery Ltd. V. Payne (No. 2), [1993] T.L.R. 647***, observations of Ralph Gibson, L.J. applied).

c. If the successful party at the first instance would be unable to conduct his business or fund legal representation at the appeal as the result of being deprived of the proceeds of his judgment in the meantime but has other assets against which the judgment could be enforced if the appellant were to succeed on appeal, the Court may refuse to order a stay.

The rationale here is that if the appeal succeeds, the appellant would be able to recover the judgment sum paid out in the meantime if needs be, from the other assets.

10. The foregoing principles were adopted and condensed even further in ***In the Matters of Sunshine Car Rental and Mobile Mechanics [2004-05] CILR Note 8*** by Sanderson J. holding that the test is two-fold: that when considering whether to grant a stay of execution of a judgment pending appeal the Court must:-

a. consider whether the appeal has a realistic prospect of success (which will usually not involve an examination in detail of the merits of the case); and

b. bear in mind that, if possible, the successful litigant should not be deprived of the fruits of his judgment without good cause.

11. Together those two decisions of this Court (which consider earlier decisions of the English Courts relied upon now before me by Ms. Lewis for the NRA) settle the basis

upon which I should decide on the NRA's application for a stay of execution of the RAC's decision, pending its appeal.

12. As presented by the competing arguments, the real issue to be resolved by me is whether, if paid now to the Respondents, the sum of the award will be recoverable for reimbursement to the NRA if it is successful in its appeal.

13. In this regard, the NRA points to the Respondents' urgent need for cash, the very reason given by the Respondents (by way of the affidavit of Mrs. Heather Bodden, a beneficiary of the Estate of Harold Bodden) why the payment of the award to the Respondents is needed urgently. She explains that the Estate is impecunious (although it has valuable assets in land holdings) and so is unable to continue funding the litigation without access to funds which should be regarded by the Court as its funds.

14. The concern of the NRA, says Ms. Lewis, is that if the funds are paid now to the Estate, they would be dissipated (either for the meeting of legal costs or to satisfy beneficiary entitlements) and so would not be available for repayment to the NRA upon its appeal, if successful. And, as the case law shows, a stay will, indeed, be granted where there is a real risk, to avoid dissipation of the proceeds of an award: ***Mark Frederick Cooper v Elisabeth Reid*** ***2000 WL 664491.***

15. In turn and in response to this concern, the Respondents point to the large land holdings of the Estate as proof of its ability to repay the NRA in the event the NRA is successful in its appeal.

16. There would thus be no risk, says Ms. McClymont, of the NRA's appeal being rendered nugatory by the irrecoverable dissipation of the award – the ultimate concern identified in the case law to justify the grant of a stay.

17. To address the Respondents' declared need for funds, I raised the issue of costs as it seemed to me that the Respondents would, in any event, be entitled to their costs of the proceedings before the RAC. This was on the basis that their land having been compulsorily acquired, they would at the very least, have been entitled to have the RAC decide the question of their compensation, whatever views the NRA itself might have held about that issue and whatever offers the NRA may have made to avoid the RAC proceedings. Thus, the costs of the RAC proceeding should, it immediately appeared, be payable to the Respondents in any event. The RAC had indeed already so decided.

18. Ms. Lewis does not disagree with this in principle. She acknowledged that the Respondents would be entitled to their costs of the proceedings before the RAC but subject, she says, to taxation on the standard basis and to the NRA being reimbursed those costs if the NRA ultimately succeeds on appeal. This, she says, is on the basis that the NRA's position has always been that the Respondents were entitled to a nil award, the value of their land having been enhanced, not injuriously affected, by the highway constructed across it by the NRA. If the RAC's award is set aside totally, so should the award of costs to the Respondents. I will return to address this issue of costs.

19. It must be recognized that the NRA's wholesale challenge to the decision of the RAC also gives rise says Ms. McClymont, to a question of jurisdiction to hear the NRA's appeal which, as framed, is clearly one going to the merits of the RAC's decision.

20. Ms. McClymont frames the question of jurisdiction by reference to paragraph 8 of the Second Schedule of the Roads Law which gives the right of appeal against a decision of the RAC in these terms:

> *"(1) The Roads Authority or any person interested in the portion of land or having a right over such land, who is aggrieved by an award of the Committee under this Law may, within twenty-one days of the date of the award or such longer period as the Grand Court may for good cause allow, appeal to the Grand Court on the ground that –*
>
> *(a) The extent of the interest or right in the portion of the land has been wrongly determined; or*
>
> *(b) The Committee has erred in a matter of law.*
>
> *(2) Proceedings under subparagraph (1) may be regulated by rules of court.*
>
> *(3) On the hearing of an appeal brought under this paragraph, the Grand Court may make such order (including an order for costs) as it thinks fit."*

21. Ms. McClymont's argument is that the reference, in paragraph 8 (1) (a) above to "*The extent of the right of the interest in the portion of the land having been wrongly determined*", is a reference, not to the merits or quantum of the award given by the RAC, but only to the competing interests in land as may be claimed amongst

themselves, by different putative claimants of interests in the portion of land which may be the subject of the claim for compensation. In other words, there is jurisdiction in the court to entertain an appeal only where there is a dispute as to their standing to make a claim, as between those persons claiming to have an interest in the portion of land acquired. Only when such a dispute arises, can the jurisdiction of this court exist to entertain an appeal.

22. This is not an argument that I could accept. It depends on a construction of the Law that would, in my view, make an absurdity of the right of appeal because that right could never include a challenge to the substance of the RAC's decision granting or refusing an award, however plainly unfair or disproportionate the decision may be. It is a construction that would admit only of a challenge to the RAC's determination of the allocation – as between fractional owners of the portion of land acquired or injuriously affected – of the sum of an award, whatever that sum might be.

23. Such a narrow view of paragraph 8 (1) (a) must plainly be wrong for a number of specific reasons.

24. First, it would mean that there could be no right of appeal where there is only one claimant. That would be so because then there would be, on the construction propounded, no issue as to "*the extent of the interest or right in the portion of land*".

25. Second, there appears no obvious reason of policy why the Legislature would intend that the RAC be involved with determining the extent of disparate interests or rights of claimants in a portion of land which is the subject of a claim. Such interests would ordinarily have been a settled matter of title as already determined under the Registered Land Law. Indeed, that was the case with the land involved here.

26. Third, the NRA, on the construction being propounded, would itself have no standing to appeal except on a point of law - the alternative ground for appeal provided by paragraph 8 (1) (b) of the Second Schedule. This would be so because the NRA would have no standing to dispute the allocation of the disparate interests or rights in the portion of land, as that dispute would arise exclusively as amongst the claimants themselves.

27. Fourth, despite the plain words of the statute expressly giving a right of appeal to the NRA or any other person "who is aggrieved" by an award, the NRA would have no right of appeal on matters of quantum of an award in the ordinary case, as such a matter would not ordinarily be an issue arising as an error of law but as one of factual assessment.

28. Fifth, the construction being propounded by Ms. McClymont would run counter to paragraph 8(3) of the Second Schedule to the Roads Law which provides that upon hearing an appeal, the Grand Court may make such order (including as to costs) "as it thinks fit". This last is a provision that can make sense only in the context of an appeal where the issues determined below are again at large before the appellate court.

29. For the foregoing reasons, in my view the words "*the extent of the interests or rights in the portion of land*" as they appear in paragraph 8 (1) (a) imply a right of appeal, for determinations including as to whether the value of the interests or rights, has been accurately and properly assessed by the RAC.

30. This construction of the words giving the right of appeal under the Roads Law is in keeping with the approach already taken by this Court in ***Concept Limited v National***

***Roads Authority* 2009 CILR 629.** This is notwithstanding that in that case, the question of the extent of the jurisdiction to hear an appeal and the extent of the right of appeal itself, had not been specifically argued.

31. In the ***Concept*** case, the specific question of the nature of the appeal proceedings was however argued. It was submitted before Quin J that an appeal under the Roads Law involved no rehearing of the matter and was confined as a matter of procedure by Grand Court Rules ("GCR") Order 55 Rule 1.3, as read with paragraph 8 of the Second Schedule to the Roads Law, only to appeals on points of law.

32. For the similar basis of her argument as deployed before me, Ms. McClymont relied on two cases in particular: ***Seven Mile Beach Resort v Planning Appeals Tribunal et al 1997 CILR 400*** and ***Cortina International Ltd. v Planning Appeals Tribunal et al 2000 CILR 360.*** These two cases explain that the GCR, in laying down the procedure for appeals, cannot expand upon the ambit of appeal granted by statute. Accordingly, where the GCR and the statute appear to conflict on such matters, the statute prevails.

However, concluding as I do that there is no conflict between GCR O 55 and the Second Schedule of the Roads Law either as to substance or procedure; I also conclude that these two cases do not apply here.

33. Consistent with my finding that the right of appeal is not confined only to a matter of law (or to the determination only of interests or rights in the portion of land acquired as narrowly argued) I find, as a matter of procedure, that the appeal is one that allows for a rehearing de novo on the merits of the RAC's decision. In this way, I find

myself in agreement with Quin J where he said in ***Concept v NRA*** (above) (at paragraph 16):

> ***"...based on the provisions of GCR Order 55 and the decision of the Grand Court in Ford v Immigration Appeals Tribunal 2007 CILR 258, I found that this court is exercising both an original and appellate jurisdiction and therefore this appeal can be conducted as a rehearing de novo in which I am exercising an original, and at the same time, an appellate jurisdiction."***

34. This view of the wide ambit of the appeal procedure is in keeping with the ambit of the jurisdiction which I conclude exists to hear appeals on the merits of the RAC awards generally, as well as on matters of law.

35. I would add this limitation only: it is in relation to the procedure by way of rehearing de novo, that the appeal must be confined to those matters identified in paragraph 8 of the Second Schedule as explained above.

36. It follows and I so conclude, that the NRA has standing to challenge the factual merits, as well as the legality, of the RAC's decision, by way of this appeal. And, in so doing, as a matter of procedure, the NRA would be entitled, as was decided also in the ***Concept*** case (above), to adduce new evidence, if relevant to the outcome.

37. Against the background of the foregoing findings, I think I need only further state in deciding on the question of whether to grant a stay that, having considered the NRA's grounds of appeal, I consider that they show some real prospect of success (see ***Quintin and Westphal v Phillips Petroleum Co. et al*** and ***In the matter of Sunshine Car Rentals*** (both above)).

38. I also find that there would be a real risk of dissipation if the award were ordered to be paid now and so a risk of the appeal being rendered nugatory if it succeeds. I so find notwithstanding that the Respondents hold other valuable real estate against which the NRA could secure and recover the sum of the award. This finding is justified because, from the case law discussed above, it is also clear that there is a "balance of advantage" or "balance of convenience" test to be applied. This will include considerations as to whether, if a stay were not imposed, a successful appellant would have to contemplate involved or protracted litigation before it might be able to recover an award already paid.

39. Given the state of affairs here, where the Respondents, represent an estate which is admittedly "cash strapped" if not totally impecunious, the NRA can reasonably be heard to say that it apprehends being put in the position of having to contemplate involved litigation to recover the payments, if it ultimately succeeds on its appeal.

40. Such considerations do not, however, absolve the Court from having to weigh in the same balance the Respondents' concerns about being kept out of their money in the meantime, and especially as that might affect their ability to contest the appeal.

41. It was for these reasons that it had immediately occurred to me that the solution – the striking of the balance of convenience or advantage – would lay in recognising the Respondents' entitlement, already accrued, to the costs of the proceedings before the RAC.

42. An immediate payment of those costs by the NRA now would certainly alleviate the Respondents, concerns about funding the appeal, while avoiding the NRA's concerns

about dissipation of the proceeds of the larger sum of the award if paid pending the appeal.

43. There would remain, however, the question whether the Respondents' costs should be paid on the standard or indemnity basis. There were arguments heard over this issue as well.

44. In keeping with the principle of "equivalence", a successful claimant on a compulsory acquisition claim is entitled to be placed financially as closely as possible to the position in which he would be, had his property not been compulsorily acquired. Where as an incident of the acquisition, he has had to incur costs and expenses in prosecuting his claim, the principle of equivalence must be reflected also in an award to cover his actual reasonable costs and expenses.

45. It would follow that, barring conduct on his part resulting in an unreasonable escalation of the costs and expenses; he is entitled to have them repaid on the indemnity basis.

46. There is no suggestion by the NRA that the Respondents have behaved, in that sense, unreasonably, resulting in the escalation of costs and expense.

47. In exercise of its powers under paragraph 2 (6) of the Second Schedule of the Roads Law, the RAC did award the Respondents' costs to be assessed if not agreed. However, the RAC had not delivered of itself a decision on the further submissions made on behalf of the Respondents on 13th October 2011, that an assessment should be on the full indemnity basis.

48. Those full and careful submissions by Ms. McClymont now repeated before me, contain what I regard as an accurate summary of the law on this point. They rely

primarily on the case **of** ***Purfleet Farms Ltd. v Secretary of State for Transport, Local Government and the Regions [2002] EWCA Civ. 1430.*** This is a case authority already considered and applied in this Court by Quin J **in** ***Concept v National Roads Authority*** (above); on the question of the incidence of costs in these types of cases.

49. I accept Ms. McClymont's submissions as set out below.

> *"THE LAW*
>
> *The jurisdiction to award costs in the context of a claim for compensation from the compulsory acquisition of land under the Roads Law lies in section 2(6) of the Second Schedule which states that:*
>
> > ***The [Roads Assessment] Committee may order that the costs of any proceedings incurred by any party shall be paid by any other party and may tax or settle the amount of any costs to be paid under such order or direct in what manner they are to be taxed.***
>
> *No further indication on how costs are to be attributed between the parties is given in Cayman Islands Legislation, although there is a significant body of case law on this point.*
>
> *The leading decision on award of costs in claims for compensation arising from compulsory purchase was given by the English Court of Appeal in Purfleet Farms Ltd. v Secretary of State for Transport, Local Government and the Regions [2002] EWCA Civ. 1430. The decision of the majority was delivered by Lord Justice Potter who said at paragraph 29 that:*
>
> > ***"[T]he proper approach of the tribunal for (award of) the costs of a successful claimant (ie a claimant who is awarded more than the amount of an unconditional offer by the Respondent) should be that he is entitled to his costs incurred in the proceedings in the absence of some "special reason" to the contrary. Whether such special reason exists in any given case is a matter for the judgment of the Lands Tribunal."***

The Claimants were awarded more than was offered to them by the Respondents in relation to both Property A and Property B, they are therefore the successful party and, as a starting point, are entitled to payment of all their costs.

Lord Justice Potter acknowledged in his decision in Purfleet Farms that the starting point in land compensation cases must be that a claimant is awarded all of his costs, was a departure from the general rule of litigation. He recorded his reasons for this departure as follows:

> ***a. The principle of "equivalence", which is accepted as a cornerstone of all compulsory purchase compensation cases, determines that the claimant has the "right to be put, so far as money can do it, in the same position as if his land had not been taken from him." (Horn v Sunderland Corporation [1941] 2 K.B. 26). Were a claimant not awarded all of his costs, he would not be put in the same position as if his land had not been taken from him;***
>
> ***b. A person whose interest in land is under threat of compulsory acquisition is in an unenviable position. He is compelled either to accede to the acquisition or to take the steps provided by the legislation to oppose it. If the order is confirmed he has no option but to comply with it and to have the amount of compensation determined either by agreement, if he can secure it or if not, by a reference to the tribunal within the statutory framework which is laid down for that purpose. In these respects it appears to me that he is in a different position from that of the ordinary litigant." (Per Lord Morison in Emslie & Simpson Ltd. v Aberdeen District Council (No 2 [1995] 35 RVR 159 as affirmed by Lord Justice Potter at para 24 of Purfleet Farms);"***

Lord Justice Potter continued at para. 26:

> ***"I am not satisfied that the position in cases of disputed compensation is the same as that which applies to litigation generally. It seems to me that the underlying principle in these cases in that the acquiring authority is liable to pay compensation to***

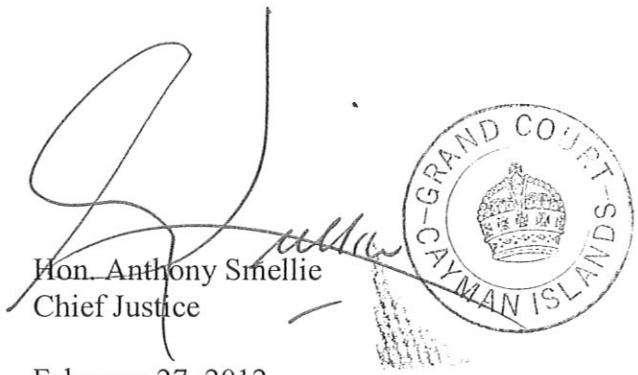
> ***the owner or occupier of the lands taken. The expenses of determining the amount of disputed compensation may be seen to be part of the reasonable and necessary expense which is attributable to the taking of the lands compulsorily by the acquiring authority. The principle which applies to litigation as applied by Lord President Robertson in Shepherd v Elliot and quoted by Maclaren on Expenses at p. 21 is that the costs of litigation should fall on him who caused it. The costs of determining the amount of the disputed compensation would seem, according to this principle, to fall on the acquiring authority without whose resort to the use of compulsory purchase powers there would have been no need for the owner or occupier to be compensated." (Lord Morison in Emslie & Simpson v Aberdeen District Council (No. 12)[1995] 35 RVR 159)."***
>
> *The RAC and the court may depart from awarding the Claimants all of their costs if there is a "special reason" to do so. It was held in Purfleet Farms that "a special reason for departing from the usual order for costs should only be found to exist in circumstances where the Tribunal could readily identify a situation in which the claimant's conduct of, or in relation to, the proceedings had led to an obvious and substantial escalation in the costs over and above". In Purfleet Farms, the Court of Appeal upheld the tribunal's decision to award the claimant only three quarters of its costs because it had sought two unnecessary adjournments while the claim was part heard, both of which led to an obvious and substantial escalation in the costs of hearing the claim.*
>
> *It is accepted by the NRA that the Respondent in this case at no point conducted themselves in an unreasonable manner and certainly behaved in no way that led to an obvious escalation of costs".*

50. Having accepted those submissions, I have considered the three schedules of costs claimed by the Respondents relating to the proceedings before the RAC. They include legal as well as professional expert fees for valuations and expert testimony, all amounting to $97,807.14. In the interest of saving the further time and expense involved in going to taxation, I record here that I would regard those fees as reasonable and as due to the Respondents.

51. I grant the NRA's application for a stay of the judgment of the RAC pending the determination of the NRA's appeal, on condition that the NRA pays, immediately, the Respondents' costs thus assessed. Thus, the Respondents' entitlement to their costs of the proceedings before the RAC and awarded in any event by the RAC; is actualized.

52. The Respondents have moreover, been entirely successful before me in their cross-summons which seeks, among other things, the payment of their costs from the proceedings below. I grant their order for costs of that aspect of their summons, in any event and on the indemnity basis. Otherwise, the costs of this application upon the NRA's summons for the stay will be in the cause, to await the outcome of the appeal.

53. The NRA's summons also seeks joinder of the executors of the estate of Harold Bodden in their capacity as proprietors of Property B. That application is refused. The NRA are directed to pay that aspect of the RAC's award forthwith in the amount of $7,318.15.



Hon. Anthony Smellie
Chief Justice

February 27, 2012