Privy Council Appeal No. 46 of 1994

Windward Properties Limited *Appellant*

v.

The Government of Saint Vincent and the Grenadines *Respondent*

FROM

THE COURT OF APPEAL OF SAINT VINCENT AND THE GRENADINES

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, Delivered the 11th January 1996

Present at the hearing:-

Lord Goff of Chieveley
Lord Nicholls of Birkenhead
Lord Steyn
Lord Hoffmann
Sir Michael Hardie Boys

*[Delivered by **Sir Michael Hardie Boys**]*

This appeal concerns the amount of compensation properly payable to the appellant, Windward Properties Limited ("Windward") upon the compulsory acquisition of its land known as the Orange Hill Estate on the island of St. Vincent.

Background

For a great many years, the Estate had been owned by Orange Hill Estates Limited ("Orange Hill"), a company in which the shares were held by members of the Barnard family. The Estate has an area of some 3118 acres and consists of six contiguous blocks, each of between 500 and 800 acres. Orange Hill used the land primarily for growing coconuts, but it was a diversified business, embracing a range of horticultural and agricultural activities. There were a number of buildings on the land, used for residential, processing and manufacturing purposes. There was a small airstrip, and a river bed provided an ample supply of gravel.

On 25th February 1985 Orange Hill agreed to sell the Estate to Windward for US$2.1 million, apportioned as to $1.6 million (or EC$4.32 million) to realty and as to $0.5 million to personalty.

On 19th March 1985 preliminary notification of the Government's interest in acquiring the land for a public purpose was gazetted. This was followed on 9th April and 30th April by publication in the Gazette of the prescribed notices respectively of intention to acquire and of acquisition. On 21st June 1985 Windward submitted its claim for compensation. It was for a total of EC$22,463,060, made up of separate claims for land, buildings, standing crops and trees, stock, plant and equipment and "damages sustained by virtue of breach of contractual obligations". In March 1986, the Government responded with an unconditional offer of EC$4.7 million. On 23rd February 1987 Windward amended its claim, increasing it to EC$29,495,500, the lower of two valuations prepared, on different bases, by a qualified valuer, Mr. S.M. Cremona-Simmons. (His higher valuation, based on the Estate's potential for development, was of over EC$49 million).

The parties being unable to reach agreement, a Board of Assessment was appointed to assess the compensation. By a majority, it awarded EC$4.7 million together with interest and costs. Windward appealed to the Court of Appeal, and was successful to the extent that it was awarded a further EC$516,000 for "disturbance". This too was a majority decision, one member of the Court being of the opinion that the matter should be referred back to the Board of Assessment. By leave of the Court of Appeal, Windward has now appealed to Her Majesty in Council. At the hearing before their Lordships' Board Mr. Hudson-Phillips sought and was granted leave to cross-appeal against the Court of Appeal's award of the additional EC$516,000, and against its confirmation of the costs order made by the Board of Assessment.

Provision for the compulsory acquisition of land in St. Vincent is to be found in its Land Acquisition Act 1946. Section 19 sets out a number of rules concerning the assessment and award of compensation. The rule relevant to this case is in sub-section (a) and is as follows:-

> "(a) The value of the land shall, subject as hereinafter provided, be taken to be the amount which the land, if sold in the open market by a willing seller, might have been expected to have realised at a date twelve months prior to the date of the second publication in the Gazette of the declaration under section 3:
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> Provided that this rule shall not affect the assessment of compensation for any damage sustained by the person

interested by reason of severance, or by reason of the acquisition injuriously affecting his other property or his earnings, or for disturbance, or any other matter not directly based on the value of the land."

The proper date for the valuation

The Board of Assessment considered that it was required to value the Estate as at 30th April 1984, twelve months before the date of the second publication in the Gazette. The majority of the Court of Appeal took a different view. Because backdating could well disadvantage the land owner, the majority saw backdating to be an infringement of the right to adequate compensation conferred by section 6(1) of the Constitution of St. Vincent and the Grenadines; and it would in consequence have held section 19(a) invalid, were it not for paragraph 2(1) of the Transitional Provisions that are contained in the Second Schedule to that Constitution. Paragraph 2(1) declares that existing laws are to be construed in a way that brings them into conformity with the Constitution. The majority of the Court of Appeal accordingly construed the words "at a date twelve months prior to the date of the second publication in the Gazette of the declaration under section 3" to mean "at the date of the compulsory acquisition". The third member of the Court preferred to leave the point open for further argument.

The difference is of no significance in the present case, for it is common ground that the value of the Estate would have been much the same at either date. But their Lordships were invited to deal with the point, as it could be of importance in other cases.

As counsel pointed out, the Court of Appeal did not have its attention drawn to paragraph 11 of the Transitional Provisions in the Second Schedule which states:-

"11. Nothing in section 6 of the Constitution shall affect the operation of any law in force immediately before 27th October 1969 or any law made on or after that date that alters a law in force immediately before that date and that does not -

(a) add to the kinds of property that may be taken possession of or the rights over and interests in property that may be acquired;

(b) make the conditions governing entitlement to compensation or the amount thereof less favourable to any person owning or having an interest in the property; or

(c) deprive any person of any such right as is mentioned in subsection (2) of that section."

In their Lordships' view, the two categories of law which are excluded by this paragraph from the effect of section 6 of the Constitution are first, any law in force immediately before 27th October 1969 (when the Constitution became operative), and secondly any subsequent amendment that does not do any of the things described in sub-paragraphs (a), (b) and (c). The Land Acquisition Act is within the first category and consequently is not affected by section 6 of the Constitution. Accordingly section 19(a) is to be applied as it stands.

The valuation

The Government's offer to Windward of EC$4.7 million was made by its authorised officer, Mr. Williams. Upon the appointment of the Board of Assessment, it was Mr. Williams' duty, under section 13 of the Land Acquisition Act, to furnish a report to the Board about a number of matters, including his opinion of the value of the land for compensation purposes. Mr. Williams was not a valuer and his report made it clear that his opinion that the value was the $4.7 million he had offered was based on two factors. The first was the price which Windward had paid for the Estate. The second was a management survey by an adviser to the Government, Dr. W. Caldeira, a consultant from the Organisation of American States. Dr. Caldeira had not undertaken a valuation for compensation purposes, but he had estimated the value of the Estate on its earning capacity "as an inefficient estate" at EC$4.8 million. Mr. Williams did not explain how he arrived at EC$4.7 million, other than to observe that he was satisfied that the Estate was "an inefficiently run estate and any value offered must be based on the current state of the property".

There is nothing to prevent an authorised officer from obtaining the assistance of a valuer, but Dr. Caldeira was not a valuer. Hence the report to the Board was not in conformity with section 13. Mr. Barnes, who with Mr. Sylvester presented the appellant's case most thoroughly, did not contend that this vitiated the Board's conclusion. Rather, he submitted that if their Lordships concluded that for other reasons the case should go back to the Board, then a fresh report, conforming with the statute, should be provided. At this point, their Lordships simply note that the Board was well aware of the deficiencies, observing that it found Mr. Williams' report, and the evidence Dr. Caldeira gave before it, to be of only very limited use.

The Board's award, and the decision of the majority of the Court of Appeal upholding it, were both founded on the conclusion that the price Windward had paid for the realty was the

best available evidence of its value. The appellant's contention that this had not been a sale in the open market by a willing seller was rejected. The same contention was the principal ground advanced in support of the appeal before their Lordships' Board.

What the statute requires is that compensation be assessed on the basis of a notional sale at the prescribed date, following an adequate testing of the market. The expressions "open market" and "willing seller" indicate the two factors, not always readily separable, that are necessary before it can be said that the market has been adequately tested. The concepts underlying the two expressions have been explained by the Court on many occasions: see for example *Inland Revenue Commissioners v. Clay* [1914] 3 K.B. 466, *Maori Trustee v. Ministry of Works* [1959] A.C. 1 and, most recently, *Gray v. Inland Revenue Commissioners* [1994] S.T.C. 360.

In order to arrive at the price likely to be obtained on a notional sale under these conditions, a valuer normally undertakes a study of sales of comparable land. The validity of any such comparison depends on the selected sales also having taken place under the same market conditions. Obviously a recent sale of the subject land itself will be highly relevant, and, particularly in the absence of evidence of other relevant sales, is likely to be the best evidence of its value: provided always that it was a sale in the open market by a willing seller.

The appellants say that the sale to them was not by a willing seller because Orange Hill was under severe financial pressure, and it was not an open market sale because the property was not put in the hands of agents and was not advertised. The evidence concerning the circumstances of the sale was sparse indeed. Mr. Martin Barnard, the managing director and son of the governing director, explained that Orange Hill had been losing money, was having trouble with its bank, and there were various creditors. These problems were not new. They had existed for several years but had been becoming worse: "We felt it was a matter of time before we fell on our knees". There were other solutions, including a sale in smaller blocks, but Mr. Barnard Senior was not prepared to wait the time that would take. The attitude seems to be summed up in these words of Mr. Martin Barnard:-

> "We felt at that stage that it would be wise to pass it on to someone else who perhaps would have the necessary monies with which to develop it the way it should be developed."

How the "someone else", in the form of Windward, was found, was not explained.

Windward is owned by Danish interests. It was incorporated in order to be the purchaser, in a manner that avoided the restrictions on land holding by foreigners in St. Vincent. The sale was brought about by Orange Hill's solicitor. Negotiations took some little time. No doubt regard was had in the course of them to a letter Orange Hill had received from the Minister for Trade, Industry and Agriculture dated 15th January 1985. In that letter, the Minister, understanding that the property was for sale, had expressed the Government's interest in it, and invited early discussions. It must have been obvious that the Government intended to develop the Estate and had the resources to do so, but Orange Hill did not respond to the invitation. Instead, within six weeks it finalised the sale to Windward.

In these circumstances, the majority of the Board of Assessment concluded that though Orange Hill was under pressure, the pressure was not such as to constrain it to accept less than a fair price, and further that despite the lack of advertising, the local community being as it was the fact that the Estate was for sale must have been common knowledge, available to anyone interested in investing in real estate on the island. The sale to Windward demonstrated that that was so. These findings of fact were upheld in the Court of Appeal, and their Lordships have been shown no reason to depart from them.

In the Court of Appeal it was said that where a sale of the subject or comparable land is relied on as evidence of value, there should be a presumption that the sale was in the open market by a willing seller; and further that there should be an onus on he who asserts otherwise to rebut the presumption. Their Lordships would prefer not to speak in terms of onus and presumption, but rather to say that in the absence of acceptable evidence to the contrary, a tribunal or court is entitled to infer that the transaction was entered into at arm's length in the normal course of the market. The transaction then becomes evidence of value, to be weighed along with such other evidence as there may be.

In this case, there was the evidence of Mr. Cremona-Simmons. He had put a separate value on each of the six blocks making up the Estate, and had then discounted the total by 40% to arrive at an "*unum quid* value". The separate values were obtained by comparison with the prices paid for 14 relatively small parcels of bare land, some distance from Orange Hill, which had been sold over a three year period from September 1982. These parcels were of differing areas, and Mr. Cremona-Simmons calculated values per acre for the various qualities of land in the parcels, and then

applied those values to each of the six Orange Hill blocks separately, adding to the resulting figure his valuation of improvements, crops and other income earning features which were not present on the land with which he made his comparison.

The majority of the Board of Assessment and all three members of the Court of Appeal rejected this approach. Their principal reason was that the comparison was invalid. There was a rapidly diminishing market for large estates in the island, so that it was not appropriate to value the Estate as if its six blocks were sold separately; and simply to apply to these large blocks the same price per unit of area that had been estimated for small blocks elsewhere was unrealistic, and was not rendered any less so by an "*unum quid*" discount which was entirely arbitrary. Further, land is to be valued as a composite whole, that is inclusive of improvements, and with the earning potential of individual aspects reflected in the whole. The aggregate of each aspect valued separately is likely to be equally unrealistic.

Their Lordships agree with this reasoning and are satisfied that Mr. Cremona-Simmons' valuation was rightly rejected. That being so, the price actually paid by Windward became the only solid evidence of value and was rightly accepted.

The award for disturbance

The award of EC$516,000 made by the Court of Appeal comprised two items, EC$500,000 as an allowance for the stamp duty, legal costs and other expenses incurred by Windward in the purchase, and EC$16,000 being the cost of removing certain equipment from the Estate after the Government took possession.

The first item had not been claimed by Windward, nor had any argument about it been addressed to the Court of Appeal. The Court of Appeal awarded it on its own initiative, and appears to have done so on the basis that that was necessary in order to give Windward "adequate compensation" in terms of section 6(1) of the Constitution. The observations their Lordships have made on the applicability of this section are not relevant here, for that section does not affect the proviso to section 19(a) of the Land Acquisition Act. Consistently with section 6, the proviso requires that adequate compensation be paid for the matters to which it refers.

But with all respect to the Court of Appeal, it was not entitled of its own motion to make an award which had not been sought and the justification for which had not been argued. Moreover, their Lordships cannot see how the costs of the

acquisition of the land can be classified as "disturbance". This word refers to costs incurred as a consequence of the compulsory acquisition, or to costs incurred to mitigate those consequences. In other words a causative connection is necessary: *Director of Buildings and Lands v. Shun Fung Ironworks Limited* [1995] 2 A.C. 111.

Here, the only connection was one of proximity of time. But that cannot be a factor. If the costs of acquisition are recoverable in this case, they must as a matter of logic be recoverable in every case. That cannot be so.

The claim for EC$16,000 had been made to the Board of Assessment but had been rejected because the cost of removal had been paid by the ultimate recipient of the equipment. The Court of Appeal differed from the Board on the basis that Windward was liable to indemnify the recipient. There was, however, no evidence to that effect and thus no basis for making the award.

The cross-appeal must therefore succeed in respect of these items.

Costs of the claim

Section 22 of the Land Acquisition Act provides for the payment of the costs incurred in connection with the claim for compensation. Subsections (1) and (2) are relevant to the present case and are as follows:-

> "22.(1) The authorised officer shall pay to the claimant the reasonable costs incurred by him in or about the preparation and submission of his claim, unless the chairman considers that the claimant has failed to put forward a proper claim within a reasonable time after the service of the notice under section 7 or that the claim put forward is grossly excessive or that he has been a party to some deceit or fraud in respect of his claim.
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> (2) Subject to the provisions of subsection (1), where an unconditional offer in writing of any amount as compensation has been made to any claimant by or on behalf of the authorised officer, and the sum awarded as compensation does not exceed the amount offered, the chairman shall, unless for special reasons he thinks it proper not to do so, order the claimant to bear his own costs and to pay the costs of the authorised officer so far as the costs of the authorised officer were incurred after the offer was made ..."

Despite the rather deceptive opening phrase of subsection (2), it is plain that the latter qualifies subsection (1). The Chairman did not, however, refer to it, despite the majority decision to award no more than the original offer. Instead, she dealt only with the application of subsection (1), concluding that as this was not in her opinion a grossly excessive claim, Windward's reasonable costs in or about the preparation and submission of the claim, as taxed by the Registrar of the Supreme Court, should be allowed.

Mr. Hudson-Phillips informed their Lordships that the Court of Appeal declined on procedural grounds to entertain his appeal against the Chairman's failure to act upon section 22(2), but as it transpired, the Court of Appeal's decision to increase the award made the point irrelevant. Their Lordships' conclusion that the Court of Appeal were wrong to increase the award revives the relevance of the point.

Under subsection (2), unless there are special reasons, the authorised officer is entitled to recover from the claimant his own costs, incurred after the order was made, and the claimant is to bear its own costs. There is no other qualification to the latter obligation, which must extend to costs incurred before receipt of the offer. The Board of Assessment has not considered whether special reasons exist, and the appellant is entitled to the opportunity of addressing it upon that issue. Therefore, while the Court of Appeal's confirmation of the Board's order as to costs must be set aside, along with the order itself, it is right that the matter be referred back to the Board.

Conclusion

For the reasons given, their Lordships will humbly advise Her Majesty as follows: the appeal should be dismissed; the cross-appeal should be allowed, and the award of EC$516,000 for disturbance, and the confirmation of the Board of Assessment's order as to costs should be set aside; the question of costs before the Board of Assessment should be referred back to it for further consideration; and the order of the Court of Appeal awarding the appellant the costs of the appeal should be set aside. The appellant must pay the respondent's costs in the Court of Appeal and before their Lordships' Board.