Michaelmas Term
[2016] UKPC 34
Privy Council Appeal No 0012 of 2016

JUDGMENT

Arawak Homes Limited (Appellant) *v* The Attorney General and another (Respondents) (Bahamas)

From the Court of Appeal of the Commonwealth of the Bahamas

before

Lord Neuberger
Lord Kerr
Lord Clarke
Lord Carnwath
Lord Hughes

JUDGMENT GIVEN ON

21 November 2016

Heard on 12 October 2016

Appellant	*Respondents*
Thomas Roe QC Neville L Smith QC Sharlyn R Smith Tavares K Laroda (Instructed by Axiom Stone Solicitors)	James Guthrie QC Rowan Pennington-Benton (Instructed by Charles Russell Speechlys LLP)

LORD CARNWATH:

BACKGROUND

1. This appeal concerns a claim by Arawak Homes Ltd ("Arawak") for compensation in respect of three tracts of land compulsorily acquired by the government between 1995 and 2001 under the Acquisition of Land Act ("the Act"). The land is in the Pinewood Gardens area of Nassau. It is part of the former "Pinewood Gardens Subdivision", laid out in 1972 by its original developer Pinewood Gardens Ltd. In 1983 Arawak acquired some 3,000 numbered lots and two other tracts of land on the estate. Competing claims have been made to parts of the land but generally without success (see for example the judgment of the Board in *Dean v Arawak Homes Ltd (The Bahamas)* [2014] UKPC 24, in which some of the background is discussed.).

2. The main provisions of the Act were described in the Board's judgment in *Bethel v Attorney General of the Commonwealth of the Bahamas* [2013] UKPC 31. As explained there, the starting point for acquisition for public purposes is the publication of a notice of intending acquisition in the Gazette under section 6, following which title may be acquired by notice of appropriation under section 18. Compensation, in default of agreement, is to be determined by the Supreme Court on an application by the promoters or any person interested (section 15), and is to be assessed in accordance with principles set out in sections 28ff. Where land has been acquired by notice of appropriation under section 18, interest runs at 5% from the date of the notice until payment (section 18(1) proviso). Article 27 of the Constitution requires provision for the making of "prompt and adequate compensation". It will be necessary to look at some of the provisions in more detail in connection with the specific grounds of appeal.

3. Formal notices were served as follows:

i) By a declaration of intending acquisition under section 6 dated 10 March 1995, the Minister of Education and Training gave notice that some 13 acres were needed for use as a public school. By notice under section 18 dated 27 April 1995, it was declared that 10.766 acres had been appropriated ("the first school site"). This site was used to build the Cleveland Eneas School. 6.213 acres of this land was zoned for commercial development.

ii) By declaration under section 6 dated 30 March 1999, notice was given that the land described, some 84 acres, was needed for public purposes including

for construction of a school, housing and public roads. By notice under section 18 dated 25 June 1999, it was declared that the 84 acres had been appropriated for those purposes. Following a court challenge by Arawak, an amended section 18 notice was issued dated 3 May 2001, purporting to limit the acquisition to 13.246 acres ("the second school site"). The Sadie Curtis School was built on this site. Issues have been raised as to the validity and practical effect of the amended notice.

iii) A notice under section 6 dated 30 November 1999 stated the intention to acquire a strip of land (coloured in pink on a plan attached to the notice) to build a highway; the acreage was not stated. An amending notice, dated 3 May 2001, was more specific, listing the relevant plots by number in a schedule to the notice, amounting to "16 acres or thereabouts" ("the highway land"). Although no notice of appropriation is before us, the case proceeded before the judge on the basis that this land also was validly acquired under section 18 at or about the same time for what became the Charles W Saunders Highway.

4. Arawak issued proceedings in the Supreme Court in 2004 under section 15 as interested persons seeking compensation for compulsory acquisition of land within the Pinewood Gardens Subdivision. The claim came before Adderley J in 2011. He gave judgment on 14 November 2012, awarding $4,400,310, which he directed to be paid to the Treasurer under section 16 of the Act pending proof of individual claims before the court (para 74).

5. Arawak appealed to the Court of Appeal which delivered judgment on 22 December 2014. It upheld the judge's assessment in respect of the first school site, subject to some minor adjustments, but set aside the award in respect of the other claims, remitting them to the Supreme Court.

The issues

6. The issues raised by the grounds of appeal can be conveniently considered under four main heads:

(1) Valuation

i) The judge assessed the compensation for the lots zoned for residential development in a manner which took no proper account of their value to Arawak as land suitable for residential development (as shown by evidence of profitability of Arawak's own sales);

ii) He assessed the compensation for the 6.213 acre site zoned for commercial development by reference to an untested assertion that it was prone to flooding, ignoring Arawak's evidence to the contrary;

(2) The "offshoots"

iii) The judge erred in rejecting the claim for compensation for 193 further lots taken for the construction of "offshoots" of the highway;

iv) The Court of Appeal erred in failing to determine this claim on its merits, and in deciding instead to set aside the judge's award in respect of the second group of acquisitions and remit them for rehearing;

(3) Payment to the Treasurer

v) The judge erred in failing to rule on Arawak's title to the expropriated property but instead ordering the money to be paid to the Treasurer;

(4) Costs

vi) The judge had no proper reason for depriving Arawak of 30% of its costs.

(1) Valuation

Principles

7. Section 28 sets out in paragraphs (a) and (b) respectively matters to be taken, and not to be taken, into consideration in determining compensation. Of the former the relevant matters for present purposes are (a)(i) "the market value of the selected land" at the date of declaration of intending acquisition under section 6; (a)(ii) any damage sustained "by reason of severing such land from other land of the persons interested"; and (a)(iii) any damage sustained by the persons interested by reason of the acquisition "injuriously affecting other property belonging to him whether real or personal in any other manner or his actual earnings". The distinction between the paragraphs is given added significance by section 29, under which a further award is to be made of 10% of the market value under paragraph (a)(i).

8. As under many common law systems, these provisions reflect principles derived from the Land Clauses Consolidation Act 1845 (8 & 9 Vict, c 18) and subsequent case-law. However, care must be taken in applying cases decided under the 1845 Act, or indeed under other statutory codes derived from it (such as the English Land Compensation Act 1961). Section 28 is relatively prescriptive in form, and spells out in perhaps more than usual detail the components of the assessment, positive and negative. Thus paragraphs (a)(ii) and (iii) can be seen as reflecting the familiar heads of claim for severance, injurious affection, and loss of business profits. Although those heads were well-established in the cases long before this Act, and although those cases may be of assistance by way of analogy, primary attention must be given to the words of the section itself.

9. Mr Roe QC, who appeared for Arawak on this appeal, has put some emphasis on the concept of "value to the owner", which became an established principle under the 1845 Act, and is still regarded as an underlying principle in the modern law (see eg *Transport for London v Spirerose Ltd* [2009] UKHL 44, [2009] 1 WLR 1797, paras 89-93 per Lord Collins). There is a useful discussion of the development and significance of the concept in Barnes *The Law of Compulsory Purchase and Compensation* (2014), para 3.10. He explains how it is reflected in the law under the Land Compensation Act 1961: on the one hand in the rules (statutory or common law) requiring disregard of increases or decreases in value attributable to the purpose of acquisition, and on the other in the right to claim for "disturbance", such as lost business profits. The expression "value to the owner" as such does not appear in section 28, but the principles can be seen in its detailed provisions. Thus section 28(a) lays down "market value" as the basic rule, but then makes specific provision for other forms of damage to the owner; conversely section 28(b) excludes various factors which are irrelevant to the value to the owner, such as for example (para (i)) urgency of acquisition and (para (v)) increases in value from the use to which the land is to be put when acquired. Thus, while the concept of value to the owner may be reflected in the Act, this should not be allowed to divert attention from the components of the statutory scheme.

The components of the claim

10. In final submissions for Arawak the claim under section 28 included the following elements:

i) The first school site: (a) 20 lots at $29,127 per lot (b) 6.213 acres (shopping centre) at $12.50 per sq ft;

ii) The second school site: 103 lots at $29,127 per lot;

iii) Land required for the Charles W Saunders Highway: 121 lots at $29,127 per lot;

iv) Land used by the promoters as "off-shoots" from the Charles W Saunders Highway: 193 lots at $29,127 per lot.

11. Apart from the land for the shopping centre, for which commercial value was claimed, all the other land was valued at residential value as explained below.

Residential land

The evidence

12. The judge accepted Arawak's case that the residential land should be valued by reference to the value of unserviced lots with consent for immediate residential development (paras 65-66). The evidence on value included the following:

i) For Arawak Mr Wilshire Bethell, a government approved appraiser, valued the residential lots at $22,000 per lot without services. Arawak also relied on evidence of their Chairman, Mr Franklyn Wilson, supported by a report from their auditors, Deloitte & Touche, which was said to show the profitability in practice of their business model. This was used to support a claim for $7,127 per lot (referred to by Mr Wilson as "minimum earnings"), as an addition to their valuer's figure of $22,000 for an unserviced lot, giving the total of $29,127 per lot included in their final claim (see para 10 above).

ii) For the government evidence was given by Mr Richard Hardy, Acting Deputy Director of Lands and Surveys. He adopted figures for serviced lots of $18,000 in 1995 and $20,000 in 1999. This was supported by lists of recorded sales by Arawak to various purchasers; between 1993 and 1996 ("most in the $10,000-$18,000 range", in the judge's words) and between 1996 and 1999 ("most in the $18,000 - $20,000 range"). Using the residual valuation method, Mr Hardy deducted figures for infrastructure and other costs to arrive at figures treated by the judge (para 67) as equivalent to $4,500 to $7,800 for unserviced land.

13. The government also relied on a valuation report in respect of the first school land by Mr James Newbold, a government appointed assessor, prepared for Arawak in September 1995. It described the land as part of the Arawak development project which had produced "thousands of medium priced single family houses" over the last 10-12

years with "values ranging from $55,000 to $65,000". It noted that the area was "densely populated" and that an "adverse feature" was flooding during heavy rains. He indicated that the 10.7 acre site could be divided into 70 lots, which "could be sold" as family units at $18,000. He arrived at a value per acre by deducting "infrastructure cost of $10,000 per lot".

14. The report had been sent to the Prime Minister's office under cover of a letter dated 25 September 1995 from the company's then President, Mr Bismark Coakley, who described it as an "independent valuation". In response to a government offer of $34,000 per acre, Mr Coakley proposed $64,000 as -

> "a more fair consideration … based on our present selling price of $18,000 per lot and our ability to bring infrastructure to those lots at an average of just less than $10,000 per lot."

The judge noted a suggestion in evidence by Mr Wilson that this proposal may have been "at an undervalue to appease the government", then said to be "executing considerable pressure" on the company; but he observed that "Mr Newbold's report does not mention any reduction in valuation for this possibility" (para 50).

15. The judge (para 67) concluded that "on the evidence of comparative prices" the market prices in 1999 were in line with the $18,000 per lot taken by both Mr Newbold and Mr Hardy, and accordingly preferred their valuation to that of Mr Bethell. Having noted that Mr Hardy's residual analysis produced a lower figure than that of Mr Newbold for undeveloped lots, he preferred the latter's assessment of $8,000 per lot. That was the figure he took as the market value of unserviced residential land in all three acquisitions.

Criticisms of the residual valuation

16. It is convenient to deal at this stage with Mr Roe's criticisms of this part of the judgment, before turning to the more complex issue of loss of earnings. He submits in summary that the judge's approach, following the evidence of Mr Hardy and Mr Newbold, was illogical and unprincipled in the absence of evidence of a market in "lots-with-infrastructure unconnected with the market in houses". A residual approach, he submits, should reflect "economic reality" in which a lot with a house might be sold for a gross profit of some $51,000, less infrastructure costs of $10,000.

17. The Board can see no basis for criticising the judge's reasoning on this aspect. He was clearly entitled to prefer the general approach of Mr Hardy and Mr Newbold, even though the latter had not been called as a witness, particularly as the latter's

valuation had been prepared for Arawak itself. He was also entitled to reject Mr Wilson's attempt to explain away those figures, which was difficult to reconcile with their unqualified adoption in 1995 by the company's then President Mr Coakley. It was clear also that Mr Newbold had in mind the distinction between developed and undeveloped land. He gave $18,000 as the figure at which "each lot as a single family unit can be sold". That can be contrasted with the figure of $55-65,000 which he had earlier given as the value of a completed single family house. Similarly, Mr Coakley referred to $18,000 as "our average selling price". Whatever the precise state of the market in undeveloped plots, the judge was entitled to regard those figures as sufficiently reliable to support his assessment.

18. The Court of Appeal went perhaps too far in saying that Arawak "cannot now complain" of the figures put forward on their behalf in 1995 (para 38). There was no estoppel or procedural bar to prevent Arawak presenting, as it did, expert evidence to show that the 1995 figures had been too low. The judge properly took that into account, but he was not bound to accept it. His reasoning on this issue shows no error of law or principle.

Lost earnings

Basis of the claim in the courts below

19. Turning to the claim for lost earnings, it is necessary to look with some care at how this issue was presented and dealt with, both in submissions and in the judgments. At the end of the argument the judge seems to have been left in some uncertainty as to its precise basis in law. It was the subject of one of the questions put by him to the parties after the hearing. Question 3 was: "is the addition of the profit per lot to the sale price per lot double counting?" In rejecting that suggestion, Arawak relied on section 28(a)(iii). It noted that section 28 provided for account to be taken of both the market value of the land and (in Arawak's words) "any loss of actual earnings which the compulsory acquisition precipitated". The claim accordingly was for the market value of each lot at $22,000 -

> "plus the loss of its actual earnings (profit) which (Arawak) has lost as a result of the acquisition preventing it from using the lot in its business of selling house and lot packages …"

The auditors' report, it was said, showed $7,127 as the minimum earnings or profit for each lot "when used in the package sold by (Arawak)". That figure was claimed under section 28(a)(iii), and was "distinct from and in addition to" market value under (a)(i).

20. In view of that response, it is not clear why in his introduction (para 17), the judge noted as Arawak's contention that "in calculating *the market value* of the land" past profitability was to be taken into account (emphasis added). However, his later reasoning shows that he understood the emphasis to be on loss of earnings under (a)(iii) rather than value of the land under (a)(i). Thus having noted Mr Wilson's evidence on this point, he observed "in passing" that the court rejected the argument that there is "a special value to each lot" where a developer is in the business of selling lot and house packages (para 56). He continued by stating that the figure of $7,127 had been introduced in Mr Wilson's evidence -

> "ostensibly for the purpose of claiming profits on top of the market value of the lots under section 28(a)(iii)."

He accepted that this might have been applicable had there been evidence of existing contracts which were aborted by the acquisition, "thereby adversely affecting (Arawak's) actual earnings at the notice date". But it had no application when "there was no evidence of pending profits at the time". Having quoted an extract from the judgment of Lord Moulton in *Pastoral Finance Association Ltd v The Minister* [1914] AC 1083, 1088, he concluded:

> "No sufficient evidence of prospective additional profits were shown in this case as the report was based on the Bethel Report which the court has not accepted." (para 58)

(As Mr Roe says, the reference to his prior rejection of the Bethel report is difficult to understand, both because it was not until later in the judgment (para 67) that it was rejected, and more importantly because it was not in any event the basis of Arawak's profitability figures, as the judge had made clear earlier in the paragraph. However, in the Board's view, that apparent slip does not detract from the essential reasoning.)

21. In the Court of Appeal the arguments for the appellant on this issue were summarised at paras 24 to 29 and 49 to 50. Here the emphasis seems to have shifted back to the value of the land under (a)(i). There was no reference in either passage to section 28(a)(iii). It seems that at this stage Arawak were relying principally on the *Pastoral Finance* case to support the proposition that -

> "the appellant was entitled to that figure per lot which a prudent man in the position of the appellant would have been willing to pay for the lot."

The court was invited to set aside the judge's disallowance of this element and -

> "[to] assess the value of the lots in the appellant's hand; this assessment to be guided by the evidence of the profit which the appellant could have made on each lot if the lot were not compulsorily acquired by the respondent thus precluding the appellant from using the lots to profit its business." (Court of Appeal paras 49-50)

Conversely the court noted the submission for the government that -

> "loss of profits on development of a building site is not a subject of compensation. The profitability of the land has already been reflected in the market value of the land." (relying on *Ryde International Plc v London Regional Transport* [2004] EWCA Civ 232; [2004] 2 EGLR 1)

22. Having referred to the terms of section 28 and to the judgment of Lord Moulton in *Pastoral Finance* the President concluded:

> "55. The *Pastoral Finance Case* predates the Acquisition of Land Act. Nowhere in the Act is there a provision stipulating that an assessing court must consider when determining the proper compensation to be awarded to a claimant the special value of the land to them. The owner of acquired land is entitled to the market value of the land.
>
> 56. Indeed, if the appellant had put into evidence, either before this court or the court below, concluded contracts of sale between itself and a third party indicating the agreed price for the sale of the land in question, then an argument could be made that the price contained in the contract for sale was evidence of the market value of the land and the appellant should be compensated thusly.
>
> 57. Alternatively, the appellant could make, what would be a strong case, that as a result of the severance of the land it has lost the opportunity to make the profit it would have realized as a result of the contract for sale. Neither of these scenarios or arguments were made in the present case. In light of this the decision of the learned trial judge as it relates to loss of profits is affirmed."

The arguments before the Board

23. Before the Board, as in the Court of Appeal, Arawak's case, as the Board understands it, is again founded on (a)(i), rather than (a)(iii). It is convenient to take it from Mr Roe's written submission. It is said that the court had been asked to reflect "the opportunity for profit in the land" by adding to Mr Bethell's estimate of market value an extra element "based on profits made historically". This was said to be a valid approach because -

> "… the values ascribed to lots by Mr Bethell were not themselves based on free-standing valuations made in a supposed market for lots simpliciter: they were based on his recollection of valuations, 'a large percentage [of which were] ... for the purpose of either development and/or purchase'. So it was appropriate to add something, as part of calculating the true value of the lots to the appellant, to reflect the use to which the lots were suitable to be put; the appellant was *not* seeking to have more than the true market price; …
>
> Nor was it correct to characterise the appellant as 'claiming profits on top of the market value' (para 58): the judge ought to have held to his earlier, correct, understanding that the appellant was seeking to establish the true market price of a lot …"

The Board's view

24. The short answer to this ground of appeal is that the judge cannot properly be criticised for failing to accept a line of argument which the appellants chose not to pursue before him. Such criticism is particularly inappropriate, given the opportunity which he gave after the hearing for Arawak to clarify its case in response to specific questions. The present submission that Arawak was not "claiming profits on top of market value" is directly contradicted by its own answer to the judge that it was seeking the market value of each lot at $22,000 "plus the loss of its actual earnings …", and that this was "distinct from and in addition to" market value under (a)(i). Thus the additional element of the claim was based unequivocally on section 28 (a)(iii), not (a)(i). Mr Roe has not attempted to undermine the judge's reasons for rejecting the claim under (a)(iii) (other than the mistaken, but immaterial, reference to Mr Bethell's report). In those circumstances this ground of appeal is doomed to fail.

25. Although that is enough to dispose of this aspect of the case, it may be helpful to add a brief comment on the case as now formulated by Mr Roe. For the reasons already touched upon, the Board agrees with the Court of Appeal that care is needed in placing

reliance on cases such as *Pastoral Finance*, decided without reference to a specific code such as section 28. A similar point has been made in the English Court of Appeal with reference to the rules introduced by the Acquisition of Land Act 1919 (reproduced in Land Compensation Act 1961 section 5): *Ryde International plc v London Regional Transport* [2004] EWCA Civ 232 para 26 per Carnwath LJ, where the court cited with approval a passage in Cripps *Compulsory Acquisition of Land*, 10th ed (1962), para 4-236:

> "Loss of profits on development of a building site is not a subject of compensation. The profitability of the land has already been reflected in the market value of the land."

(See also *D M'Ewing & Sons Ltd v Renfrewshire County Council* 1960 SC 53. An illuminating discussion of the authorities is found in Barnes *op cit* para 4.63ff, under the heading "Land value and business profits".)

26. In the Board's view the same principle applies to the assessment of market value under section 28(a)(i). Absent special circumstances, the potential profitability of land for development is a normal element of its value to a purchaser, and thus of its market value. There was no reason to think that Mr Bethell or the other valuers had left that factor out of account of their assessments of market value, nor any reason to support an increase in the market value so assessed by reference to factors peculiar to Arawak's business model.

Commercial land

27. The land acquired for the first school site included 6.213 acres of commercial land, which the judge assessed at $64,000 per acre, for the reasons given in his judgment (para 68):

> "68. To this must be added a value for the 6.213 acres Shopping Centre commercial property adjacent to the Cleveland Eneas School site. lt is noted here that since 1 acre is 43,560 square feet a market value of $12.50 per square foot, as provided by Mr Bethel, translates into $544,500.00 per acre. This appears to the court to be an unrealistically high acreage price for land known to have a flooding problem, even commercial, in the middle of a low cost housing subdivision 17 and a half years ago. The court therefore rejects this valuation. Indeed the court rejects Mr Bethel's total appraisal as overly optimistic. This leaves the evidence on this point of Mr Hardy which recommended $40,000.00 per acre, or the general value communicated by the

> plaintiff to the government of [$64,000.00] or that by Mr Newbold of $52,000 per acre. I prefer the value of the commercial property as [$64,000] per acre submitted to the government by Mr Coakley in his letter dated 25 September 1995. This yields a market price for the 6.213 acres of commercial property at $397,632.00 in 1999."
>
> (The figure of $64,000 has been inserted in square brackets as an agreed correction for the figure of $69,000 given in the judgment.)

28. The Court of Appeal upheld this valuation, rejecting criticisms that there was no credible evidence of flooding in this area, and that the figure submitted by Mr Coakley in 1995 was "suggested when a gun was to his head" (paras 44-45). The same points are made before the Board, as part of a more general complaint that they gave insufficient reasons for rejecting Mr Bethell's evidence, which had not been discredited in cross-examination. On the issue of flooding, reliance is placed on the evidence of Mr Wilson that any such problem was limited to a different part of Pinewood Gardens.

29. In the Board's view these criticisms do not provide a basis for upsetting the judge's conclusion. Flooding had been referred to in Mr Newbold's 1995 report. Even accepting some uncertainty whether this affected the commercial land, it was only one of the elements in the judge's overall assessment. He was entitled to prefer the evidence of the other valuers to that of Mr Bethell, which was not only out of line with the figure regarded by Arawak itself as reasonable in 1995, but apparently unsupported by market evidence of any kind.

(2) The offshoots

30. This ground of appeal relates to Arawak's claim that, in addition to land taken for the highway itself, some 193 lots belonging to them had been used as "off-shoots", or (in Mr Roe's words) "built on, or across, for the purpose of providing roads connecting to the highway". It is said that the judge gave no sound reasons for dismissing this claim.

31. The claim in that form emerged very late in the proceedings. There had been a reference in an earlier affidavit of Mr Wilson (14 June 2006) to the need to create cul-de-sacs on roads truncated by the new highway, which were said to have affected at least 41 other lots. In a later affidavit (27 January 2011) he referred more specifically to a claim under sections 28(a)(ii) and (iii), in respect of 25 other lots in the Pinewood Gardens Subdivision which could not be used for houses because they were required for "turning bays for the roads which cannot empty into the Charles W Saunders Highway".

32. The first detailed formulation of the claim for 193 additional lots seems to have come in the final written submissions for Arawak dated 5 October 2012, but the legal and factual basis of the claim remained obscure. There was a reference to a meeting between Mr Stafford Coakley for Arawak and Mr Bynoe, Director of Lands and Surveys, arranged with the judge's permission during the course of the evidence, to identify the parcels used by the government, following production by Mr Bynoe of a "photo plan" of the area. Mr Bynoe was said by Arawak to have admitted that there was "a network of roads in the Pinewood Gardens Subdivision connecting to the Charles W Saunders Highway". The following passage referred to the promoters having taken possession of several lots before they decided that they were not going to use the whole area of the original 84 acres covered by the original appropriation notice of 25 June 1999, and also to some of Arawak's lots being "severed" by land used for the road. There followed a list of 193 numbered lots, identified as -

> "The total number of the lots the fee simple in which became vested in the promoters by virtue of section 18 of the Act and other lots which have been used for the roads linking up to the Charles W Saunders Highway."

Compensation was claimed for the "appropriation" of the land comprising the 193 lots, at the same rate per lot as the other residential land.

33. The judge disallowed the whole of this claim (paras 59-62). A "careful review" of Mr Bynoe's map showed that -

> "the vast majority of the 193 lots have been built on with many of the buildings straddling across property boundaries and in some cases across road reservations of the Pinewood Gardens Subdivision plan while situated within proper boundaries on the overlaid Nassau Village Subdivision plan …"

He had no evidence that the promoter was responsible for these buildings, which appeared to be "an issue between the claimant and the persons who have possession of those lots". He continued:

> "60. This confirms Mr Bynoe's evidence that from his physical inspection what appeared on the ground as a result of the conflicting plans between Pinewood Gardens Subdivision and Nassau Village Subdivisions made it virtually impossible for Arawak Homes to continue its proposed development without necessary modifications. He also stated that these modifications particularly as to possible road truncations were not relevant to or

> caused by the insertion of the road corridor or the schools on the acquired land.
>
> 61. Lastly, but by no means least the promoter in effect nevertheless compensated the claimant for severance by agreeing to pay for the whole lot wherever only part of a lot was in fact acquired."

34. In the Court of Appeal (paras 58-62) matters seem to have taken a turn unexpected by either party. The President summarised Arawak's contention, as she understood it, that -

> "a Notice of Possession properly Gazetted cannot be amended by a subsequent Notice of Possession; as such it is entitled to be compensated for the appropriation of 84 acres."

Thus, rightly or wrongly, it was seen as an argument, not merely in support of the claim for the 193 numbered lots, but for compensation for the whole area of 84 acres included in the original 1999 notice of appropriation. The judgment noted the government's objection that this point had not taken in the court below, but that in any event it should not prevent consideration of the areas agreed to have been taken for the school and the highway, while the question of law was determined by the court below. The judgment continued:

> "60. We would wholeheartedly agree with the arguments put forward by the appellant on this matter if the purported 2001 acquisition of the 29.246 acres (13.246 + 16 acres) could be entirely subsumed within the 84 acres acquired in 1999. However, upon a closer analysis and comparison of the acquired lots described in the schedule attached to the 1999 Notice of Possession and the schedule attached to the 200l Notice of Possession it would appear that they are comprised of different lots of land.
>
> 61. As demonstrated by section 28(a)(i) of the Acquisition of Land Act, the market value of the acquired land is determined at the date of the Gazetted declaration. A determination therefore is needed of the validity and the effect in law of the 1999 and 2001 declarations. It is only after a conclusion on the same, that the market value of the appropriated land can therefore be properly assessed …"

Accordingly the court decided "reluctantly" that it must set aside the judge's assessment of the "purported 1999 and 2001 acquisition" and send the matter back for re-hearing. So far as the claim for "severance" of the 193 lots was based on the same acquisition, the court considered it "unnecessary to make a finding on that issue" (para 62).

35. Before the Board Mr Roe challenges the judge's reasons for rejecting the claim for the 193 lots. They had been included in the land covered by the original June 1999 notice of appropriation possession, and Arawak's contention as to their use as off-shoots was not contradicted by the government in its closing submissions. In the Court of Appeal their argument had not been that they should be compensated for the whole of the 84 acres covered by the 1999 notice, but that the government could not escape paying for the 193 lots which had been used. Given the agreement as to the acquisition of the second school site and the main highway land, and as to the appropriate valuation dates, there was no need to remit those aspects for reconsideration. The court was wrong in any event to do so without reference to the parties.

36. For the government Mr Guthrie QC submits that this claim had not been raised in the pleadings or evidence before the hearing; and even then it was not clearly explained nor supported by evidence. Understandably the government had filed no evidence in response, nor been given an opportunity to do so. In any event a claim for acquisition of land outside the areas of the amended notices was not before the court, and no arguments had been advanced before the judge as to their invalidity. Given the court's finding that the land in the amended notices did not fall squarely within the scope of the original notices, the court was required or entitled to remit the matter. The claimants could not fairly complain of the delay which was attributable to their own failure to set out their case before the judge.

The Board's view

37. The Board regrets the confusion still surrounding this issue even at this stage. Mr Roe refers to his client's constitutional right to prompt compensation. But here any delay is due largely to his client's failure to identify the claim until very late in the proceedings, and thereafter the lack of precision or consistency in its formulation. Even the final submissions to the judge left it unclear how far it was presented as a claim for market value of selected land (under section 28(a)(i)), or simply for severance or injurious affection to retained land (under (a)(ii) or (iii)).

38. The novel argument advanced in the Court of Appeal understandably created some difficulty for the court. It not only represented a reversal of the basis on which the case had proceeded for the previous decade, but seems to have been unsupported by any serious analysis of its legal and practical implications. However, in the Board's view, the Court of Appeal were wrong to see Arawak's reliance on the original notice of

appropriation under section 18 as necessarily raising issues about the basis of the claims already accepted by the judge under section 15. Section 15 provides a means of determining the value of "selected land", defined as "any land required for a public purpose" (section 2). Selected land may be acquired by private agreement or compulsory purchase (section 7). There is nothing in section 15 to tie it to a particular notice of appropriation under section 18. Whatever the legal effect of the revised section 18 notices, the proceedings under section 15 had proceeded on the basis that the second school site and the highways land were required for public purposes, and were selected land within the meaning of the section. There was no reason for the court of its own motion to question the validity or scope of the proceedings. It is true, as the Court of Appeal noted, that the definition of market value is tied by section 28(a)(i) to the date of the section 6 notice of intention to acquire. However, this was of no practical concern in the absence of any live issue about the valuation date.

39. Accordingly, the claim for the additional 193 lots should have been considered by the Court of Appeal on its merits. Had they done so, there would have been a strong case for upholding the judge's rejection of the claim on the simple basis that it had been neither adequately pleaded nor proved. The evidence of physical appropriation seems to have been limited to an alleged admission by Mr Bynoe that there was "a network of roads" connecting with the main highway, but the judge found no evidence that the promoter was responsible for whatever development had taken place on this land. No doubt for this reason, in the Court of Appeal Arawak attempted to shift the emphasis to the alleged legal effect of the original notices of appropriation. But it failed to explain how this position could be reconciled with its own legal objections taken to those notices at the time, and its acceptance of revised notices in substitution. Whatever the effect in legal theory of a section 18 notice, it is difficult to see any practical reason why the area to which it relates should not be reduced or modified with the agreement or acquiescence of those affected, as appears to have happened in this case. There may have been more merit in a claim for severance or injurious affection, along the lines suggested by Mr Wilson in his 2011 affidavit. The judge thought that Arawak had been sufficiently compensated for severance by the government's agreement to pay for whole lots when only parts were acquired. But this did not deal with any claim for severance arising from the "truncation" of roads on the estate or provision of turning circles, as described by Mr Wilson. However, the relationship of such a claim to the later claim for 193 lots was left wholly obscure.

40. However, notwithstanding the apparent weaknesses of this part of the claim, in view of the course adopted by the Court of Appeal the Board sees no alternative but to accept that the merits of this part of Arawak's claim must be remitted for further consideration by the Supreme Court. Mr Guthrie does not resist that course. It is hoped that, in the light of this judgment, Arawak with its advisers will give serious consideration to the basis of any such claim, and ensure that the claim and the supporting evidence and legal arguments are clearly identified before the matter returns to court. The Board has taken account of a post-hearing note from the appellants which

indicates that the figure of 193 lots contains some duplication, and should be reduced in any event to 165. This matter also can be addressed by the Supreme Court.

(3) Payment to the treasurer

41. Early in his judgment (para 5), the judge recorded an agreement at a Case Management hearing "at which some of the other claimants were present" that the proceedings would be "for the assessment of the value of the property only", leaving the sum found due to be paid into "an escrow fund … at the disposal of the court" pending determination of the various interests. At the end of his judgment, having determined the amount of the "award", he directed payment to "the Treasurer" in the following terms:

> "I order pursuant to section 16 and 17 of the Act that the sum be paid to the Treasurer who shall forthwith establish an interest bearing escrow account with an established commercial bank in New Providence into which the funds will be deposited. The funds will remain so deposited subject to the order, control, and disposition of the court until applied by the court to satisfy the awards to persons interested who prove their claims to the satisfaction of the court, or as may be agreed between all persons interested." (para 74)

Mr Roe submits that this was wrong in principle: first, because he should first have resolved any outstanding issues of title, and secondly because in any event he adopted an inappropriate procedure.

42. The first point was taken before the Court of Appeal. In rejecting it, the President noted that there was nothing in section 15 of the Act itself which required the court to determine title, or deal with anything other than assessment (para 18). But in any event the parties had agreed that the only matter to be determined was the assessment of value (para 19). The judge's statement to this effect was supported by an extract from the transcript for 2 February 2011. There the judge had referred, apparently without dissent, to a hearing on 7 April 2010, attended by counsel for parties to another action (1665 of 2001) one being First Creations Holdings Ltd, at which -

> "we decided that these hearings would be an assessment and that those two parties would be heard in action number 1665 of 2001 to determine whether they had any claim …"

The President commented:

> "21. It is overtly clear that the question of which parties were the true owners of the acquired land was not, on agreement, before the learned trial judge. In any event, as mentioned earlier, such a determination cannot be completed by a trial judge pursuant to a section 15 originating summons."

43. Mr Roe submits that as matter of principle, where there are competing claims, the question of entitlement should be decided before determining the amount. He supports this proposition by reference to a number of older English authorities, and more specifically to what he said to be implicit in section 15(3) of the Acquisition of Land Act itself. Further, although there had been a number of competing claims, most had been resolved by the time of the judge's consideration. The only apparently active claim (that of First Creations Holdings Ltd) related to a relatively limited part of the highway land. In relation to the exchange on 7 April 2010, he says that counsel on his side of the Bahamian Bar have no recollection of it and notes that it was not reflected in the order of that date. However, as I understand it, he does not suggest that the judge's account of that hearing was challenged before the Court of Appeal.

44. Before the Board, Mr Guthrie accepts that the Supreme Court had jurisdiction to determine title, even if not pursuant to a section 15 summons as such. But, as he explains, this would have involved notice to other parties:

> "If title was to be determined alongside the assessment of value, then it seems likely that the court would have adopted the procedure, or something like it, set out in the Quieting Titles Act. Section 6 of that Act requires, upon the filing of an application for determination of title under section 3, the court to direct that notice of the application, with particulars of the land being claimed, to be published in one or more newspapers within or without (as appropriate) The Bahamas."

In the absence of any proposal before him to depart from the position as agreed in 2010, the judge was entitled (if not bound, in the absence of the other parties) to proceed as he did.

45. The Board sees no basis to question the decision of the Court of Appeal on this point, there being no evidence to undermine the concurrent finding as to what was decided at the case management hearing on 7 April 2010. It would no doubt have been open to Arawak (on notice to the other interested parties) to invite the judge to revisit that decision, and to deal with the question of title by a suitable procedure, such as that suggested by Mr Guthrie. With hindsight there might have been advantages in that being done. Furthermore, if as Arawak now suggests, the land subject to dispute had become

relatively limited, there seems no reason why an application could not have been made for payment to them of compensation in respect of any areas unaffected by the dispute. However, no such applications were made. In those circumstances, the judge cannot be criticised for proceeding as he did.

46. Mr Roe also criticises the machinery adopted by the judge for giving effect to his order, by means of section 16 of the Act. Although the judge had earlier mentioned the case management decision that the sum found due was to be paid into "an escrow fund to be at the disposal of the court", he did not mention any discussion of the procedure or in particular the use of section 16.

47. The introduction to section 16 indicates the general nature of the issues with which it is concerned:

> "With respect to the purchase money or compensation coming to parties having limited interests, or prevented from treating, or not making title, or being absent from The Bahamas, or who cannot be found, or neglecting or refusing to furnish particulars of their right or interest as required by this Act within two months from the period of the value of the same being arrived at under this Act, or refusing to appear before the magistrate or the court as the case may be, or refusing to execute any proper contract or conveyance for the sale thereof within the said two months the following provisions shall have effect …"

As Mr Roe submits, this section appears designed to cover the same ground as a group of sections in the Lands Clauses Consolidation Act 1845, particularly sections 69 and 76, concerned with the treatment of "the purchase money or compensation coming to parties having limited interests, or prevented from treating, or not making title …" They have since been replaced in England and Wales by Compulsory Purchase Act 1965 section 9 and Schedule 1. Like those provisions, section 16 is at least principally concerned with cases where those interested in land cannot be found, or are unable or unwilling for some other reason to deal with the authority. Mr Roe questioned its use in a case where the only outstanding issue was the determination of competing claims already before the court.

48. For the government Mr Guthrie does not place particular reliance on section 16 as such, but submits that the court's general case management powers enabled it to direct payment to the Treasurer or into court pending determination of interests in the award. Mr Roe raised a question as to the effect of different forms of such order on the running of interest (at 5% per annum) under section 18(1). However, he was unable to

say how this would compare with interest payable on the same money in the hands of the Treasurer, or on payment into court.

49. The Board sees force in Mr Roe's criticisms of the use of section 16 in the present context, although this issue has not been discussed in detail. However, it sees no reason to criticise the judge's objectives. How these objectives could best be achieved under Bahamian law and practice is best left to the local courts. Since the case is in any event to be remitted to the Supreme Court, the court will also be able to hear submissions as to how to deal with the outstanding claims, what if any payments can be made to Arawak in the interim (see para 45 above), and how and on what terms (as to interest or otherwise) the money is to be held in the interim.

(4) Costs

50. The last issue can be dealt with shortly. The judge ordered that the costs otherwise payable to Arawak be reduced by 30% to reflect the inclusion of documents and affidavits relating to title, rendered unnecessary by the 2010 case management decision limiting the hearing to valuation. The Court of Appeal upheld this as a valid exercise of the court's discretion as to costs. Before the Board, Mr Roe questions the judge's characterisation of the extent of the increase in documentation, and submits in any event that most of the evidence had been submitted following an earlier case management order (20 April 2006) which required evidence of title to be filed. It is not clear whether the latter point was raised before the Court of Appeal. But in any event this issue, being essentially one for the discretion of the trial judge, is not one on which the Board would regard it as appropriate to interfere at this level, in the absence of any alleged error of principle.

Conclusion

51. For the reasons given above, the Board concludes that the order of the Court of Appeal remitting the matter to the Supreme Court should be varied so as only to direct consideration to the matters indicated in paras 40 and 49 of this judgment for the reasons there given; but that save to that extent the appeal should be dismissed, and will humbly advise Her Majesty accordingly. The Board directs the parties to lodge any submissions on costs within 21 days after this judgment is handed down.