MONTSERRAT

IN THE COURT OF APPEAL

CIVIL APPEAL NOS.2 AND 3 OF 2000

BETWEEN:

BLAKES ESTATES LIMITED

Appellant

and

THE GOVERNMENT OF MONTSERRAT

Respondent

Before:

The Hon. Sir Dennis Byron — Chief Justice
The Hon. Mr. Albert Redhead — Justice of Appeal
The Hon. Mr. Ephraim Georges — Justice of Appeal [Ag.]

Appearances:

Mr. Elliot D. Mottley Q.C. [of the Barbados Bar]
with Mr. George Kirnon for the Appellant
Mr. Martin Edwards [of the English Bar] for the Respondent

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2002: September 23;
2003: March 31.

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JUDGMENT

[1] **GEORGES, J.A. [AG.]**: This consolidated appeal relates to the amount payable for the compulsory acquisition of certain lands in the Parish of St John by the Government of Montserrat which were formerly owned by the Appellant. Two separate acquisitions were made. The relevant date in respect of the first acquisition is 24th December 1997 and relates to an area comprising 92.4 acres called Lookout One. The second acquisition in respect of Lookout Two which consists of 102.4 acres occurred on 30th December 1998.

[2] The appeal is against an award of compensation in the sum of $5,908,100.in respect of both acquisitions with interest at the rate of 5% per annum from the

respective dates of acquisition to date of payment. The award in respect of Lookout One is $3,846,700 and in respect of Lookout Two $2,059,400 making a grand total of $5,906,100 to which was added a further $2,000 for injurious affection. The Appellant was awarded 65% of its costs.

[3] The award was made by the majority of a Board of Assessment appointed under the Land Acquisition Act Chapter 231 of the Laws of Montserrat [the Ordinance] comprising Mr. Justice Adrian Saunders Chairman Mr. Fred Campbell [the Appellant's nominee [and Mr. Rex McKay SC [the Respondent's nominee].

[4] The original claim made by the Appellants for Lookout One was $19,471,320 for the land and $13,068,000 for disturbance to the adjacent land - Lookout Two. Subsequent to the claim for Lookout One Government acquired Lookout Two whereupon the Appellant revised its claims in respect of Lookout One to $14,850,000 and requested $15,300,000 for Lookout Two. The [Respondent] Government in turn made a formal offer of $3,300,000 for Lookout One and $1.5 million for Lookout Two pursuant to section 13 of the Ordinance.

[5] Section 19 of the Ordinance stipulates that the land should be valued on the basis of its market value twelve months prior to the date when the land vested in the Crown. Before the proceedings began however, the Respondent conceded that it was content for the purposes of the assessment to assess the value of both locations by reference to the relevant dates of acquisition instead of one year earlier both sides agreeing that the value would be the same at either date. The parties further agreed to consolidate the assessments for compensation at a single hearing in respect of the two acquisitions.

[6] Before turning to the issues in this appeal it is I think apt to give by way of background a brief description of the lands acquired and the reason for their acquisition. For this will in turn assist in judging how fairly the Board discharged its

function of assessing, awarding and apportioning compensation in accordance with the provisions of the Ordinance.

[7] In its Award dated 7th November 2000 the majority [Justice Saunders and Mr. Rex McKay SC] describe Lookout itself as "undoubtedly a place of breathtaking beauty." The land, located at the northeastern part of Montserrat afford a sweeping view of the Caribbean Sea and the outlines of Antigua. Cool and refreshing breezes constantly pass over the sites.

[8] Mr. Martin Van Oppen a Valuation expert following an inspection in August 1997 described Lookout One thus:

> ",,,,,,,,,the site comprised an area of rough undulating grazing land with steeper scrub-covered slopes. Cat and Brimms ghauts form natural boundaries to the south-east and northern sides of the site. The soil appeared thin and was part-covered with scrub trees bare rock and strewn with boulders. There were signs of the presence of goats but (apart from some cattle referred to below) no other agricultural or forestry activity appeared to have been carried out on the site for many years. A small herd of cattle which I was given to understand had recently been evacuated from the volcanic danger zone in the south were grazing the site and at the time of inspection a post and barbed wire fence was being erected to contain them. There were no services within the site. Water and electricity was available at the road running alongside the extreme southern boundary and a connection had been made to the newly acquired school site. Apart from a rough tract to the school site, there were no internal roads or tracks suitable for vehicular use."

[9] And his description of Lockout Two after an inspection in November 1998 reads:

> "Lookout Two is located to the north-east of and contiguous to the Lookout One site. This parcel of land comprises an area of 102.47 acres or thereabouts. When inspected in November 1998 it was noted that this site comprised a somewhat similar terrain to that of the Lookout One site excepting that the land falls away gently to the ocean with a cliff forming its natural coastal boundary. Cat and Brimms ghauts form natural boundaries to the south-east and northern side of the site. This site contains a larger percentage of steep land than Lookout One. Access was via a recently constructed road put in by the acquiring body to service the Lookout One development. But for the acquiring body's adjacent development, this site must be considered somewhat remote from the main centres of population."

[10] Following the eruption of the Soufriere volcano in July 1995 the capital city Plymouth was completely devastated and smothered with volcanic ash. Approximately two thirds of the southern half of the island including the airport was rendered unsafe. Thousands were forced to flee their homes and abandon their possessions. Several hundreds emigrated to other lands. Those who remained had to be relocated resettled and rehabilitated in the safer north of the island. The task ahead was formidable and no doubt daunting. It is against that background that the Government of Montserrat embarked on its policy of land acquisition to implement its reconstruction and developmental programme for Montserrations who remained. Some of the Lookout lands by virtue of their location/configuration distinctly afforded that possibility.

[11] No fewer than twelve grounds of appeal were filed by the Appellant in its amended notice of appeal dated 19th March 2002 against the Board's award of compensation. Some are subsumed by others and can conveniently be dealt with together. The Respondent Government in a separate appeal [Civil Appeal No 3 of 2000] dated 19th December 2000 lodged three grounds of appeal in what in effect is a "cross appeal" which was consolidated with the main appeal [Civil Appeal No 2 of 2000] by order of the Court dated 12th October 2001.

[12] The fundamental question in my view which falls to be determined in this appeal is whether the basic rules which govern the assessment and award of compensation for the compulsory acquisition of land in Montserrat were followed by the Board. A subsidiary issue is whether the Appellant is entitled to compensation for disturbance [injurious affection] as a result of the compulsory acquisition.

[13] Section 19(a) of the Ordinance provides that:

> "Subject to the provisions of this Ordinance, the following rules shall apply to the assessment and award of compensation by a Board for the compulsory acquisition of land –

> "(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 realized at a date twelve months prior to the date of the second publication in the Gazette of the declaration under section 3."

[14] For Lookout One that date would normally have been 24th December 1996 and in the case of Lookout Two 30th December 1997. However by letter dated 21st July 1999 the Attorney General proposed that the lands should be assessed as at the date of acquisition [as vesting in the Crown] of each property and this was agreed to by the Appellant by letter dated 6th October 1999. The operative dates would therefore by 24th December 1997 and 30th December 1998 instead of twelve months prior.

[15] Ground 1 of the appeal stems from this and alleges that the Board erred in law misconstruing its statutory function when it decided to value the land by reference to a date different from the date in which the property vested in the Crown.

[16] There clearly is something wrong with the wording of that ground since the Board did value the lands as at the dates on which the properties vested in the Crown i.e. at the date of the second publication of the declaration in the Gazette in each case. The trust of learned Queen's Counsel's argument was that the Board erred in law in construing its statutory function when it decided to value the land by reference to the date on which the property vested in the Crown.

[17] Mr. Mottley contended that it was well established that as a creature of statute the Board was obliged by law to act within the four of the authority/power conferred on it by Parliament and that section 19 of the Ordinance specifically enjoined the Board to apply a fixed standard for the determination of compensation that standard being "the value of the land … if sold in the open market by a willing seller at a date twelve months prior to the date of the second publication … under section 3."

[18] The relevant period for valuation purposes Mr. Mottley declared was therefore the date twelve months prior to the date when the lands vested in the Crown and not the vesting date as had in fact occurred.

[19] In support of that argument reference was made to the Privy Council decision in **Windward Properties Ltd and Government of Saint Vincent and the Grenadines** [1996] 1 WLR 279 where it was held that "the estate had to be valued as at a date 12 months prior to the acquisition by the Government". That principle was earlier demonstrated in the Privy Council decisions of **Maori Trustee v Ministry of Works** [1958] 3 ALL ER337 and **Carlton Heights Ltd v Ministry of Works** [1963] NZLR 973 learned Counsel pointed out and exemplified in **Anisminle v Foreign Compensation** [1969] 2AC 147 and **Essex Inc Congregational Church Union v Essex county Council** [1963] AC 808 at 828.

[20] Mr. Martin Counsel for the Respondent however submitted that whilst it was not disputed that the Board took as the valuation date a date other than that stipulated by section 19(a) this must be viewed in the context that the Appellant had agreed and accepted in writing Government's proposal before commencement of the proceedings to treat as the relevant date the date of vesting of the properties in the Crown rather than the date of twelve months prior to the acquisition and both sides had further agreed that the values between the two dates "would have been much the same at either date". So that in legal terms the difference certainly no one was prejudiced thereby is of no real significance.

[21] Learned Counsel further pointed out that contrary to the Appellant's assertion in its Written Brief that notwithstanding the mandatory provisions of section 19 the Board had in its wisdom decided to set them aside and proceed on the basis of some concession and/or consent by the parties to apply a standard different from that imposed by law; the fact of the matter was that the Board did not in its wisdom follow that course of action but rather was specifically requested by the Appellant to do so.

[22] In light of all the circumstances I am persuaded by and accept the submissions of Mr. Edwards. I am fully satisfied that the Board's assessment proceeded on the basis which it did with the concurrence of all concerned and without objection by anyone. It was accepted by both sides that the values between the two dates would have been very much the same either was so that no one was prejudiced. There was in my view no misconstruction of the statute by the Board as to its jurisdiction of statutory function as Mr. Mottley contended. When as here a fact is admitted by a party no evidence needs to be adduced to support or prove it especially when that fact is agreed between the parties. It is therefore my considered view that it would be otiose to say the least to set aside the award in all the circumstances on that ground. Ground 1 of the appeal accordingly fails.

[23] Ground 2 states that the Board erred in law when it made a valuation of the lands on the basis of no valued evidence. Here the Appellant contends that the Board erred in law when it sought to assess market value by reference only to legal principles in the absence of facts within the contemplation of the Ordinance.

[24] That assertion cannot in my view be correct when the Board at paragraphs 14 and 15 of its decision clearly states that in arriving at its Award it reminded itself of Lord Romer's injunction in **Sri Raja v Revenue Officer** [1939] A.E.R 317 at 322 that:

> "No one can suppose, in the case of land which is certain, or even likely, to be used in the immediate or reasonably near future for building purposes, but which at the valuation date is waste land, or is being used for agricultural purposes, that the owner, however willing a vendor, will be content to sell the land for its value as waste or agricultural land, as the case may be. It is plain that in ascertaining its value the possibility of its being used for building purposes would have to be taken into account. It is equally plain, however, that the land must not be valued as though it had already been built upon, a proposition that is embodied in section 24 (5) of the Act and is sometimes expressed by saying that it is the possibilities of the land, and not its realized possibilities, that must be taken into consideration."

[25] And paragraph 15 states that:

> "Ultimately, the Board concluded that it should rely on the residual method of valuation as the basis for arriving at the market value of the lands acquired. In doing so, the Board has not ignored comparisons of land transactions in Montserrat during the relevant period."

That last sentence is particularly instructive in this context.

[26] Mr. Mottley went on to submit that the Board disabled itself from making the appropriate findings of fact because of the misconstruction of its jurisdiction. Any 'facts' found outside the period stipulated by the Ordinance would not be 'facts' for the purposes of determining a market value of the Lookout lands he further submitted. In other words the Board did not have before it any factual evidence upon which to base an award.

[27] I respectfully disagree firstly because as stated earlier I am satisfied that there was no misconstruction of its statutory function re jurisdiction by the Board thus disabling it from making the appropriate findings of fact. Evidence on comparable values at the relevant periods was before the Board and was supplied by both sides from the same source, namely the Land Registry which provided identical data.

[28] Having seen and heard the witnesses on both sides the Board preferred the evidence of the Respondents' witnesses in particular the testimony of the highly qualified and experienced valuation expert Martin Van Oppen and Bertram Burke whose testimony commended itself to the Board as objective and fair. On the totality of the evidence it cannot be said that the Board did not have any factual evidence upon which to base an award.

[29] By way of illustration reference need only be made to paragraphs 42 and 43 of the Board's decision to show that the converse is in fact the case. Paragraph 42 states that:

> "The witness who testified for the Respondent on the values that ought to be placed in the land was Mr. Martin Van Oppen. This witness is a Fellow of the Royal Institution of Chartered Surveyors. His evidence was given in a clear and succinct manner and, as stated before, his valuation was largely premised upon the residual method of valuation."

[30] And paragraph 43 continues thus:

> "The Board accepted Mr. Vann Oppen's methodology. To a great extent, his figures were also supported by a fair examination of comparable land transactions that have taken place in Montserrat for residential and commercial lots. However where there was a difference between Mr. Van Oppen and Mr. Burke, in the figures presented for land values, a majority on the Board felt it safer to rely on Mr. Burke's figures. We naturally expect that Mr. Burke would have a more intimate knowledge of what obtains on the ground in practice."

[31] Ground 2 like Ground 1 on which it is premised is in my view without merit.

[32] Ground 8 states that the Board failed to adhere to the correct principles of applying the residual method of valuation in disregarding the evidence that land described as very steep and agricultural land could be put to residential and other uses as was the practice in Montserrat. Additionally the Board failed to have regard to comparable prices on the open market in its assessment of the land described as very steep and agricultural land.

[33] Mr. Mottley's argument here was that on the assumption that the residual method of valuation was the correct basis of valuation the Board failed to properly apply it to the lands described as agricultural land and steep agricultural land.

[34] The residual method of valuation requires one to ascertain the net value of the lands by first engaging in a hypothetical sub-division of the land and then to calculate the gross sum capable of realization from the sale of the sections therein. From the resulting sum is deducted such expenses as the infrastructure costs, professional fees, finance charges and other such allowances as well aw the expenses related to the acquisition.

[35] Learned Queen's Counsel pointed out that the residual method stipulates that regard is to be had to the best use to which lands of that type could be put in the future. Mr. Burke's valuation on which the Board relied allocated over 35 acres to steep and agricultural land.. He however conceded that lands with a gradient of 1-1.15-1-1.4 which he had allocated to agricultural land were suitable for split level housing. Indeed it was further pointed out that it was standard practice in Montserrat to build houses on very steep slopes and some of the finest homes were mostly steep in gradient. Notwithstanding the Board's reliance on Mr. Burke's allocation it still failed Mr. Mottley complained to make the necessary adjustment in the allocation to reflect the potential use of such lands in accordance with the residual method on which it relied.

[36] There clearly is merit in that argument and ground 8 accordingly succeeds. And I am reinforced in my view by the conclusion of the Board at paragraphs 44 and 45 of its decision which with respect I think is erroneous. Paragraph 44 reads:

> "In relation to agricultural and very steep land, the Board accepted the values placed on these by Mr. Van Oppen. He had calculated the former at $2,600 per acre or 0.06 cents per square foot and the latter at, for Lookout 1, the sum of 0.03 cents per square foot and for lookout 2, an amount on 0.02 cents per square foot. He explained that in respect of the very steep land he could find no comparable sales. For the very steep land what he therefore did was to capitalize the rental figures for agricultural land used by the Inland Revenue Department for collecting land taxes."

[37] And paragraph 45 states that:

> "Counsel for the Claimant criticized this approach. It was submitted that no consideration should be given to those Inland Revenue rental figures because the Valuation Officer may not have considered the possible future use of the land and must have therefore placed too low a value on the lands for tax purposes. Bearing in mind the fact that the Inland Revenue's figure is now being applied only to the least valuable of the lands at Lookout, the possible future use of which will not vary, the Board could not agree with this criticism."

[38] It is therefore my considered view that the matter ought to be remitted to the Board for reassessment in relation to agricultural and very steep land at lookout One and Lookout Two respectively.

[39] I turn now to Ground 9 of the appeal which alleges that the Board erred in its application of the residual method of valuation in that it incorrectly used undeveloped land prices as the basis of its valuation, in consequence of which the net assessed value of the land was grossly below the rates at which land was currently sold on the open market.

[40] The gravamen of the Appellant's complaint under this head is that the Board treated the results produced by the residual method of valuation as being synonymous with market price without seeking to determine whether the results obtained fairly and comparatively reflected market value. There was a failure by the Board to compare results produced by the residual method with actual sales of comparable land sold and bought in the open market by willing parties. As a result the Board applied valuations bearing no relationship with similar transactions Mr. Mottley declared.

[41] It was alleged for example that Mr. Burke's valuation of $3.75 per square foot for developed land was just 25 cents above the $3.50 paid at the time for undeveloped land under the net to square foot method of valuation which the Board rejected.

[42] The novel concept of "net per square foot" method of valuation postulated by Mr. Haynes-Smith on behalf of the Appellants was in my view rightly rejected by the Board for reasons cogently set out at paragraphs 23 and 24 of its decision. The Appellant's idea was that the lands should be valued at developed price with little or no allowance being made for infrastructural costs. That would clearly be unrealistic. As the Board aptly put it:

> "…the Claimant apparently set out to convince the Board that we should ascribe a value to the land that was based upon the optimum realizable value of its potentials without seeking to make any deductions for the realization of these potentials". "The approach of the Claimant's witnesses " the Board concluded "vested heavily upon the notion that as a result of the volcanic activity land in Montserrat was currently being sold "net per square foot".

In my respectful opinion a yardstick such as that would be wholly inapplicable to the lookout lands having regard to all the circumstances. And that view is reinforced by paragraph 25 of the Board decision which I wholeheartedly adopt and which states that:

> "In a development of the magnitude of Lookout, it is extremely difficult to envisage that the concept of "net per square foot" can be applied thereto. Mr.. Haynes-Smith, when pressed, was constrained to agree that in a development of this size it would be normal to expect services to be put in."

[43] Grand 7 which is premised on the net to square foot method of valuation inevitably fails since that method has been rejected. The complaint is that the Board erred … …by wrongly deducting from the assessment survey and other fees normally borne by the purchaser gives no indication of what other fees referred to. Further the argument in the Appellant's Written Brief that the Board ought not to have considered whether the selling of land at net per square foot was in breach of the Planning Laws cannot hold since it runs counter to the provisions of section 19© of the Ordinance which provides that any increase in the value of land which is contrary to law shall not be taken into account.

[44] Grounds 4, 5 and 10 can conveniently be dealt with together. They largely hinge on the Board's acceptance of the testimony of Mr. Burke in preference to that of Messrs Ryan and Haynes who were no experts. The Board was entitled from the reasons cogently stated in its decision why it preferred the one to the others and with justification I venture to add. There is no need to elaborate. The assessment of witnesses and the evaluation of their evidence are matters for the Board who have had the supreme advantage of seeing and hearing them and a court of

review should be reluctant to interfere with its findings generally unless they are perverse or manifestly wrong. Those three grounds accordingly fail.

[45] Ground 11 states that:

> "The Board erred in that it indiscriminately charged infrastructural costs to the Claimant. Without restricting the generality of this ground the Board erred:
> (a) in not valuing 2 acres of land allocated by the witness Mr. Burke to road reserves, which allocation was necessary only for the benefit of another phase of subdivision unconnected with those being assessed.
> (b) In applying the infrastructural costs of the said reserve to the acquired lands; and
> (c) In charging the infrastructure associated with the school which was the subject of an earlier agreement under which the Respondent was responsible for the said infrastructure."

As stated earlier the Appellant conceded that infrastructure costs have to be deducted when valuing land. I accept that any infrastructure included for purposes other than for the direct benefit of the acquired property is an unfair charge against the valuation of the acquired property. Ground 11(a) accordingly succeeds as the Board evidently failed to make the necessary adjustment in respect of the two acres of land allocated to road reserves by Mr. Burke which was necessary only for the benefit of another phase of subdivision unconnected to the land being assessed.

[46] Similarly the infrastructure for the school site should not have been charged against the valuation. In light of the evidence this cost of infrastructure was wrongly charged against the valuation of the acquired lands and the appropriate adjustment should be made. Ground 11(c) accordingly succeeds. Ground 11 (b) is subsumed by Ground 11(a).

[47] That leaves for consideration Grounds 6 and 12. Ground 6 says that the Board erred when it used a tax-based assessment for the valuation of the land. That ground of appeal is in a sense subsumed by Ground 8 and for the reasons stated at paragraphs 35 to 38 I uphold this ground of appeal.

[48] Finally Ground 12 states that the Board erred in law when it reduced the Appellant's claim for injurious affection without providing any proper basis for so doing. It is primarily wrong to say that the Board reduced the Appellant's claim under this head without providing any proper basis for so doing for the Board reasons are fully and succinctly set out at paragraphs 51 of its decision and I see no good reason for interfering with the nominal figure awarded having regard to the circumstances. That ground therefore fails.

[49] The Respondent's cross-appeal lists there grounds, namely:

(1) The valuation of the Board of the commercial land at $10 per square foot was unreasonable and against the weight of the evidence.

(2) Having held that the award "falls woefully short of the amounts being claimed", and that had the Claimant been "more reasonable in its approach to this matter the litigation that ensued may never have been necessary" the Board wrongly awarded the Claimant 65% of its costs.

(3) The amount claimed by the Claimant was grossly excessive.

[50] As regards Ground 1 it would undoubtedly be true to say that there appears to be no basis on which the value of $10.00 per square foot in respect of commercial land was arrived at by the Board. I note that Mr. Fred Camphell in his dissenting award placed a value of $7.50 per square foot on the same quality of land. It is also noted there is appreciable more available commercial land in Lookout One than in Lookout Two. As a statutory tribunal it is felt that the Board is obliged to give adequate and cogent reasons for its decisions otherwise they may be viewed as being arbitrary and unfair and not in keeping with the provisions of section 19 of the Ordinance.

[51] For these reasons I would direct that that aspect of the valuation should be remitted to the Board for reassessment.

[52] With regard to Ground 2 of the Respondent's ground of appeal I find it difficult to accept that the Board awarded the Claimant [Appellant] 65% of its costs having held that its own award fell woefully short of the amounts claimed and that had the Claimant been more reasonable in its approach the litigation which ensued may have been unnecessary. For my part having regard to all the circumstances I would order that each party should bear its own costs.

[53] As I see it Ground 3 is in reality not a ground and does not warrant any consideration or comment.

[54] In the final analysis therefore the appeal is allowed in part in respect of Grounds 6,8 and 11 and it is ordered that the matter be remitted to the Board for reassessment of the land described as steep and agricultural land and making the necessary adjustments in respect of infrastructural costs which were wrongly charged to the acquired lands.

[55] As indicated the Respondent's cross-appeal is allowed and the matter is remitted to the Board for review of the value ascribed to commercial lands in respect of both properties. In all other respects the decision of the Board is affirmed save that each party is to bear its own costs.

Ephraim Georges
Justice of Appeal [Ag.]

I concur.

Sir Dennis Byron
Chief Justice

I concur.

Albert Redhead
Justice of Appeal