ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 22 OF 2004

BETWEEN

THE ATTORNEY GENERAL OF
ANTIGUA AND BARBUDA

Appellant

and

THE ESTATE OF CYRIL THOMAS BUFTON
LONA EILEEN BUFTON

Respondent

Before:

The Hon. Mr. Michael Gordon QC	Justice of Appeal
The Hon. Mr. Denys Barrow, SC	Justice of Appeal
The Hon. Mr. Hugh Rawlins	Justice of Appeal

Appearances

Ms. Bridget Nelson and Mrs. Carla Brookes Harris for the Appellant
Mr. Alfred James for the Respondent

2005: November 28, 29;
2006: February 6.

JUDGMENT

[1] BARROW, J.A.: The appellant ("the Government") challenged each of the six heads of compensation that the judge awarded to the respondents ("the Buftons") for the compulsory acquisition of their land and personalty as well as for breach of their constitutional rights. The constitutional rights invoked were those provided by section 9 of the Antigua and Barbuda Constitution Order, that no property of any description shall be compulsorily taken possession of except upon the payment of fair compensation within a reasonable time.

[2] The Buftons hailed from Wales and came to Antigua and Barbuda from Zambia. They came in 1965 to manage farm operations on Guiana Island, which comprises 447 acres and is situate to the north east of Antigua. They were employed, for the purpose, by Guiana Island Farms Ltd. ("the company"), which then owned the island. It appears that the employment of Mr. Bufton by the company terminated around 1976. It is common ground that the Government appointed Mr. Bufton its Wildlife Conservation Officer for Guiana Island in 1983. The Buftons dwelt on the island until December 1997 when they were forcibly removed. The Government had compulsorily acquired the entire island on 21st August 1997.

[3] During their time on the island, the judge found, the Buftons "accomplished a remarkable job of establishing a wildlife sanctuary". At the time of the acquisition the Buftons had a sizeable animal population comprising sheep, deer, West Indian Tree Whistling Ducks and guinea fowl. In addition the island was home to rare forms of wildlife like mocking birds. The judge also found that in 1984 one of the principals in the company gave all the animals on the island to the Buftons.

[4] Five acres of the island had been leased by the company to the Buftons for 99 years at a peppercorn rent. At the time of the acquisition, the lease had 77 years to run. The company had also contracted to purchase a bungalow for the Buftons on termination of their employment or on the sale of the island.

[5] After the compulsory acquisition the legislature passed the Cyril Thomas Bufton and the Lona Eileen Bufton (Resettlement and Maintenance) Act 1997[1] (the Resettlement Act) that mandated that the Cabinet shall provide the Buftons with 5 acres of land and a 2 bedroom house, that there shall be paid out of the Consolidated Fund to the Buftons a monthly stipend of $1,700.00 dollars and that the Buftons shall be provided with a vehicle. It was provided that the Act shall remain in force until the Government has made final payment of compensation in relation to Guiana Island. The judge found that the Buftons refused to occupy the

[1] No. 16 of 1997, commencing 29th January 1998.

house[2] that the Government provided but apparently that the Government had also provided the Buftons with temporary living accommodation including utilities, a vehicle and a monthly stipend of $1,200.00 since the passing of the Resettlement Act.[3] .

[6] The judge awarded compensation under the following heads to the Buftons;

Compensation for 5 acres of leasehold	$800,000.00
Compensation for loss of animals	$120,000.00
Compensation for loss of contractual Rights to bungalow	$500,000.00
Compensation for loss of personalty	$150,000.00
Compensation for total loss of way Of life and inconvenience	$200,000.00
Compensation for breach of Constitutional rights	$250,000.00
Fee paid for valuation	$ 4,000.00

	$2,024,000.00

The value of the land

[7] Two valuers testified for the Government and one testified for the Buftons. The Government's Chief Lands Officer testified that similar agricultural land - the 5 acres were being used for agricultural purposes at the time - was readily available on the mainland of Antigua for as little as $30.00 per acre per year and that, therefore, the residual value of the Bufton's land was in the region of $11,500.00. The Government's Chief Evaluation Officer testified that using an 'internationally recognized formula' he calculated a value of $93,525.00 (as at March 2004) based

[2] See paragraph [28] of the judgment in Antigua and Barbuda Claim No ANU 278 of 2000, delivered April 20th, 2004.
[3] See paragraph [18] of the judgment.

on comparable agricultural land on the mainland, which rented at $1,500.00 per acre per annum. The valuer who testified for the Buftons valued the leasehold (as at late 2003) at $1,550,000.00. He stated that he valued the land not as agricultural land but as land fit for development for the tourism industry.

[8] The judge regarded as more realistic the valuation based on user in the tourism industry. She referred to the fact that the Bufton's valuer was not dependent on the Government for his livelihood and so had no interest to serve.[4] She regarded his qualifications as very impressive and so too the quality of his evidence and his demeanour. The judge reminded herself that valuation is not an exact science, that wide differences between valuations do not necessarily render them inaccurate and that it is the duty of the court to assess the weight of the opinions based on the appropriate factors. The judge said that for those reasons she preferred the evidence of the Bufton's valuer. She converted the figure the valuer gave to a value of $800,000.00 as at 1996, to comply with the statutory requirement that compensation is to be awarded based on a value one year before the date of the acquisition.[5] The judge awarded interest on the sums she awarded as compensation, although she did not state that she was awarding interest for the delay in payment of compensation.

[9] Counsel for the Government did not challenge the valuation of the land based on its suitability for use in the tourism industry. However, counsel argued that the judge was wrong to accept a determination of market value based on the sales comparison approach because this is an incorrect method of valuation under the Land Acquisition Act[6] ("the Act"). Counsel cited no authority for that proposition. I can find nothing in the Act that supports it. The relevant provision of the Act is section 19 which states:

---

[4] The judge apparently discounted the fact that a valuer who charges a fee for his valuation that is a based on a percentage of the value at which he arrives must have an interest to serve since he earns a higher sum on a higher land value. The point was put to the valuer in cross- examination.
[5] See s19 of the Land Acquisition Act, Cap. 233.
[6] Cap. 233.

> "19. Subject to the provisions of this Act, 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 … 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.
>
> "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."

[10] Since there are various approaches for determining market value of land[7] and since lands vary greatly in character and features, it is hardly surprising that the Act did not legislate (and could not have legislated) which method was appropriate or more appropriate for determining the value of random and widely differing parcels of land.

[11] The sales comparison approach is clearly an acceptable method and may readily be used where comparisons are available. This is implicit in the decision of Lord Romer in Sri Raja v Revenue Officer[8], when he said:[9]

> "It is perhaps desirable in this connection to say something about this expression "the market price." There is not in general any market for land, in the sense in which one speaks of a market for shares, or a market for sugar, or any like commodity. The value of any such article at any particular time can readily be ascertained by ascertaining the prices being obtained for similar articles in the market. In the case of land, its value in general can also be measured by a consideration of the prices that have been obtained in the past for land of similar quality and in similar positions, and this is what must be meant in general by the market value …"

It was also recognized as a primary method in Blakes Estate Limited v The Government of the Colony of Montserrat[10] which was the award of a land

[7] The Bufton's valuer identified three approaches to value: the Cost Approach, the Income Approach and the Sales Comparison Approach.
[8] [1939] 2 All ER 317.
[9] at 321 E.
[10] November 7th 2000

compensation tribunal that counsel for the Government placed before us. In that case the tribunal decided to use the residual value method of valuation but stated that it would not ignore comparisons of land transactions in Montserrat during the relevant period.[11]

[12] A more recent validation of the sales comparison approach was expressed by the Privy Council in Windward Properties Ltd. v Government of St Vincent and the Grenadines[12] as follows:

> "in order to arrive at the price likely to be obtained on a notional sale … a valuer normally undertakes a study of sales of comparable land. The value of any such comparison depends on the selected sales also having taken place under the same market conditions"

[13] In principle, therefore, there was nothing wrong with the sales comparison approach as a method of valuation. The arguments that counsel for the Government advanced on the appeal were really an attempt to persuade this court that the judge should have deducted the cost of developing the land for its use in the tourism industry to arrive at its market value. To this end counsel produced material to show how this analysis ought to have been conducted. A description of this method is found in the award in the Blakes Estate Case:

> "This method 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 realisation from the sale of the sections therein. From the resulting sum is deducted such expenses as the infrastructure costs, professional fees, finance charges and such other allowances as well as the expenses related to the acquisition."[13]

In the Blakes Estate case the claimant's valuer testified to the price per square foot that undeveloped land could fetch if it were subdivided and sold but he excluded from his calculation the cost of subdividing the land because, he testified, the practice had become established in Montserrat of selling land "net per square foot." The tribunal refused to accept that any purchaser of land in the notional subdivision would pay the stated price per square foot net of the cost of

[11] Paragraph 15 of the Decision of the Board
[12] (1995) 47 WIR 189
[13] At paragraph 16 of the award.

development and noted that the valuer had accepted in cross-examination that in a development of the scale contemplated it would be normal to expect services to be put in. The tribunal chose to rely, instead, on a price per square foot after deducting the costs of subdividing.

[14] In the instant case counsel wished, similarly, to have deducted from the figure at which the judge arrived the cost of making the land suitable for use in the tourism industry. That raises the question: who says that the incidence of the cost of development was not reflected in the price at which the valuer arrived? If the comparisons that the valuer did were with other lands that were sold in an undeveloped state then the valuation at which he arrived was the price for undeveloped land. If so there can be no justification for deducting the cost of development from the notional price of the subject land because that notional price already reflected the premise that the cost of development was to be borne by the purchaser. Because the valuer was arriving at the value of undeveloped land by the process of comparison of land sales it seems reasonable to accept the assumption that he was comparing like with like; that the sales that he was comparing were sales of undeveloped land. If this was not so it was the obligation of the Government to have suggested the contrary in the court below; the record does not indicate that this was ever attempted.

[15] That observation points to the difficulty of challenging the valuation on appeal when the Government failed to raise in the court below any challenge to the correctness of the exercise that the Bufton's valuer conducted. It is only now being implied that the Bufton's valuation failed to deduct the development cost from the value of the land at which the valuer arrived but there is no evidence to suggest that this needed to be done. Accordingly, I would reject the Government's challenge to the amount awarded as compensation for the value of the five-acre leasehold parcel.

Loss of animals

[16] The judge found that the Bufton's had tamed 150 fallow deer, 200 West Indian Tree Whistling Ducks and 100 Persian Dorset Horn Sheep and thus acquired an interest in them for which they must be compensated.

[17] The Government's challenge to this award is on the basis that there was no evidence that the animals belonged to the Buftons. It is the fact, as the Government urged, that Mrs. Bufton testified in re-examination that they were paid to look after the animals, first by the company that owned the island and then by the Government. She testified that the Government appointed Mr. Bufton its Wildlife Conservation Officer for the island and paid him a stipend. There was considerable force in the Government's argument that the fact that the Buftons were being paid to look after the animals meant they were looking after the animals on behalf of those who paid them to do so and not in their own interest. This was clear evidence, in the submission of the Government, that the Buftons never acted as nor claimed to be the owners of the animals.

[18] The weakness in the Government's submission is that, contrary to its submission, there was specific evidence that the animals belonged to the Buftons. The evidence of Mrs. Bufton was that the surviving wife of the 'owner' of the company gave the animals to the Buftons some years after the death of her husband. Correspondence from the Buftons' lawyer stated that it was in fact the wife who owned the animals. The judge accepted the evidence of Mrs. Bufton that the animals had been given to them. This was an express finding of fact. It is not a finding that can be reversed by reference to one of a number of possible inferences that may be drawn from the fact that the Government appointed Mr. Bufton its Wildlife Conservation Officer. As opposed to the inference that the Government paid Mr. Bufton to look after animals that the Government owned there was the other possible inference that it suited the Government to pay Mr. Bufton to enable him to look after his own animals; for example to promote the

national eco-tourism product or to comply with international treaty obligations in relation to wildlife. The inference for which the Government argued cannot be drawn because a contrary inference is equally possible and, in any case, that inference cannot prevail over specific evidence to the contrary. Accordingly, I would disallow this ground of appeal and uphold the award of compensation of $120,000.00 under this head.

Loss of contractual rights to bungalow

[19] It was a term of the agreement dated August 1970 under which Mr. Bufton was employed that the company would purchase for him a bungalow of a certain description upon the sale of the island or the termination of his employment. In the agreement itself no value was placed on the bungalow that was to be provided but in correspondence in 1978 between Mr. Bufton's then lawyers and the lawyers for the company a value of approximately $135,000.00 was asserted. There is nothing that shows how the judge arrived at the figure of $500,000.00 that she awarded.

[20] Also, it is not clear on what basis the judge decided that the Government should compensate the Buftons for their failure to obtain a bungalow from the company. Included in the record of appeal was a writ of summons dated 8 June 1977 by which the Buftons claimed against the company specific performance of its obligation to purchase the bungalow for them. Documents subsequent to that date indicate that the claim was referred to arbitration and a letter dated 6 August 1986 from the Buftons' lawyers to the Registrar of Joint Stock Companies, who was proposing to strike the company off the register, indicated that no award had yet been made.

[21] This material shows that as long ago as 1977 Mr. Bufton was claiming that the company had breached its obligation to provide him with a bungalow. However, in her judgment the judge stated[14]

> "the acquisition deprived them of their contractual rights to have a bungalow on the island. They doubtless cannot recover from their employer for breach of contract but they are not precluded from recovering from the Government for that loss. See the proviso to section 19(a). I also bear in mind that the Government's self-imposed obligation will cease when compensation is paid and they will have to find a home. Therefore, I award them $500,000.00 in respect of this loss as representing the costs of a bungalow as claimed …"

The acquisition occurred in 1997. It is impossible to see how that event could have deprived them of their contractual rights to have a bungalow when it is clear that the Buftons had claimed, twenty years before, that it was the employer's breach of its agreement that deprived them of their bungalow. It seems clear that the judge misdirected herself in finding that the Government's acquisition could have caused the Buftons to lose their contractual rights to a bungalow and I would set aside the award of $500,000.00 under this head.

Loss of personalty

[22] Mrs. Bufton produced a long list of the items of personalty that she lost when they were removed from the island. The Government challenges the sum of $150,000.00 that the judge awarded because no value was given for even a single item, not even by way of claim far less by way of testimony. The figure was simply plucked out of the air, the Government argued, and it is the fact that there is no explanation of how the judge arrived at the figure she awarded. It is fundamentally the duty of a claimant to produce evidence of loss or damage and it is entirely unacceptable for a claimant or counsel to put a court in a position where it has to pluck a figure out of the air in an attempt to avoid the hard decision to give nought for the loss of items of property that must have some value.

[14] At paragraph [23].

[23] The failure of a claimant or counsel to provide evidence of value does not mean, however, as counsel for the Government seemed to think, that the court is inescapably driven to refuse to award any amount for an undoubted loss. It is a matter on which the Privy Council pronounced in Carlton Greer v Alston's Engineering Sales and Services Ltd.[15] In that case the owner of a back hoe experienced mechanical problems and he took it to the sellers for repair. When the sellers were finished with repairs the owner refused to pay until he test-drove the equipment and the purchasers refused to allow him to test-drive it until he paid. In a claim for detinue the owner failed to provide evidence of the amount of his loss. The Privy Council upheld the decision of the Court of Appeal that nominal damages could be awarded in the circumstances. It was decided that nominal damages, in this context, did not mean small damages but meant damages that were substantial provided they were not out of scale.[16]

[24] Informed by that learning I consider it was both permissible and just for the judge to have made an award of nominal compensation. Such an award, however, needed to have been not out of scale and it is impossible to say for this award that it was not out of scale since it is not known by reference to what scale the judge made the award. I would, therefore, set aside the award that the judge made and substitute an award that is justifiable on the scale of common experience. Because it was the duty of the claimant to produce evidence of value it seems on principle just that the doubts which must attend the effort at arriving at a nominal figure must be resolved against the Buftons, who failed in their duty to prove, and in favour of the Government, which should not suffer any disadvantage by the other party's failure.

[25] The award that I would make would consider that the claim was for approximately 150 items. The judge described the Buftons as two elderly persons and it seems more likely than not that the items that they possessed would have been old rather

[15] Privy Council Appeal No. 61 of 2001, from Trinidad and Tobago, judgment delivered 19th June 2003.
[16] At paragraphs 7 to 9.

than new. In this regard, it is noted that they came to Guiana Island from Zambia in 1965 and would likely have brought some of the items with them; this is confirmed by the claim for '1 set reloading kit' described as a 'souvenir from grandparents'. The specification in the list of items of '1 blue gent's hat (trill by (sic) type new)' is the single reference to any item as new and at least suggests that none of the other items was new. Further, there is not the slightest indication of what items were working and not working but it is likely that items in need of repair would not have simply been thrown out but kept for possible future use. Also, the Buftons were the only human inhabitants of the island that was a wildlife sanctuary and this gives a sense that modern devices and conspicuous consumption were not part of their lives. I would, therefore, classify the items as likelier to have been found in a rural yard sale rather than in stores.

[26] It was a wide range of items and in ascribing a nominal value to each individual item there were many, such as items of stationery, for which the only thing to do was to value them at prices ranging from $1.00 to $5.00. Other items such as a cotton skirt, a floral dress, 3 pairs of shorts, 3 blouses, a pair of 'gent's slippers', and 2 gent's shirts could have been so threadbare and worn as to be worthless to anyone other than the owners and these attracted nominal values in the range of $10.00 to $30.00. Basic household items such as a vegetable rack, a tray, a soap magnet holder, egg trays, and a sieve attracted comparable values. Some items attracted values in the range of $150.00, such as a cutlass and knife in leather case, 36 clay pots – large and small - attracted a nominal value of $540.00 by averaging them out at $15.00 each, while an 'electrolux' fridge seemed capable of attracting a nominal value of $500.00. Other items such as 2 large (5 ton) hydraulic jacks and handlers also attracted awards in that region. There was no way around the probability that these were old and of low value. Using nominal values in those ranges the figure at which I arrived as compensation for the loss of the personal items is $11,522.00. There can be no denying that there was no evidential basis upon which nominal values were ascribed and so those ascribed represented only estimation and impression, relieved only broadly by the factors to

which reference was made in paragraphs [24] and [25] above. This process for arriving at value was purely the fault of the Buftons and/or their attorneys at law and was distinctly avoidable.

Loss of way of life and inconvenience

[27] Under this head the judge awarded $200,000.00.[17] The judge put her award on this footing:

> "There is no doubt that the Buftons were seriously disturbed by the acquisition and that their entire way of life disrupted and that there is little possibility of them being reinstated in a similar Eden and that they are entitled to compensation over and above the value of the lease itself. First, although they did not own it, the old Great House was their home from which they were evicted on the acquisition of the island. Guiana Island Farms could be considered as having given them a licence to occupy it which was not revoked and they were thus deprived of that licence and as a result of their home. … Therefore, I award them … $300,000.00 (sic) for the loss of their way of life and all the inconvenience of living for nigh on six years in temporary quarters."[18]

[28] The Government challenges the proposition that a claimant can recover a separate amount as compensation for inconvenience and argue that this is 'disturbance compensation' which is regarded as an integral, though separately assessed, part of purchase price compensation. The Government argued that the price of the land included the loss arising from the disturbance for which the judge separately compensated.

[29] Support for that view is found in Hughes v Doncaster Metropolitan Borough Council[19] in which the claimants had purchased a lot of land with buildings on it and the goodwill of the business, and had subsequently bought adjoining land for the purpose of expanding the business. The council acquired the land and buildings as well as the adjoining land. The claimants sought compensation for the

[17] This is the figure that the judge uses in summarizing the various awards that she made; see paragraph [30] of the judgment.
[18] Paragraph [23] of the judgment.
[19] [1991] 1 All ER 295

value of the land and buildings and disturbance to the business, which had to be closed down because the claimants were unable to find an alternative site. The relevant statute provided, that the requirement that the value of the land was to be taken to be the amount which a seller might obtain if it were to be sold in the open market, was not to affect the assessment of compensation for disturbance or any other matter not directly based on the value of the land. The Lands Tribunal decided that compensation for disturbance was not part of the 'value of the land' and awarded £551,160 of which £300,000 was compensation for loss of business.

[30] The House of Lords held in Hughes that although compensation in respect of the market value of the land compulsorily acquired and compensation for disturbance had in practice to be assessed separately, the two elements were inseparable and together they made up the 'value of the land' to the owner, which was the only compensation to which he was entitled. Accordingly the term 'value of the land' when used in the statute was to be interpreted as embracing both elements of compensation.

[31] Lord Bridge in delivering the judgment of the House said:[20]

> "It is well settled law that whatever compensation is payable to an owner on compulsory acquisition of his land in respect of disturbance is an element in assessing the value of the land to him, not a distinct head of compensation. This is because, under s 63 of the Land Clauses Consolidation Act 1845, the substance of which is now re-enacted by s 7 of the consolidating Compulsory Purchase Act 1965, 'the value of the land to be purchased by the acquiring authority' is the only head of compensation under which compensation for disturbance is capable of being accommodated. The other heads of compensation for which the section provides, severance and injurious affection, relate only to the depreciatory effect of the acquisition on other land retained by the owner. Judicial interpretation of the 1845 Act held that the value of the land meant its value to the owner, not its value to the acquiring authority: see *Stebbing v Metropolitan Board of Works* (1870) LR 6 QB 37. This value was to be assessed as including all the loss which the owner suffered in consequence of being dispossessed: see *Rickets v Metropolitan Rly Co* (1865) 34 LJQB 257."

[20] at p. 299

The earlier case of Minister of Transport v Lee,[21] on which counsel for the Buftons relied as establishing an owner's right to compensation for disturbance, is to be read subject to the decision in the Hughes case.

[32] So far as it provides that compensation is payable for the 'value of the land' the 1845 Act and its successors are to the same effect as the provisions of the Act that is applicable to the instant case. Lord Bridge's review of the cases on this aspect clearly demonstrates that under the 1845 Act an owner is entitled to compensation for the market value of the land but is not entitled, separately and in addition to that value, to compensation for the loss of the actual business being conducted on the land at the time.[22] The Act, in the instant case, is therefore to be similarly construed: this means there must be no separate award of compensation for disturbance. It follows that the Buftons had no entitlement to any separate award of compensation for the disturbance or loss of their way of life. I would therefore set aside the award that the judge made under this head.

[33] Actually, although counsel did not advert to it, a more fundamental reason why the Buftons cannot recover compensation for disturbance for loss of their way of life in consequence of the compulsory acquisition is because the acquisition that supposedly disturbed their way of life was the acquisition of the rest of Guiana Island, which they did not own, and not the acquisition of their uninhabited 5 acre parcel. The old Great House that the Buftons occupied was not located on the Bufton's land but on land that belonged to the company. The loss of the benefit of what the judge regarded as the unrevoked licence by the company to occupy the old Great House was a consequence of the revocation of that licence by the new owner, the Government, when it evicted the Buftons from the island. The loss of the licence to occupy was not a consequence of the acquisition because it was perfectly open to the Government to leave the Buftons in occupation. Instead, the Government chose to revoke the licence. For that there can be no compensation.

[21] [1965] 2 All ER 986.
[22] See especially pages 300 to 301.

Compensation for breach of constitutional rights

[34] For the Government's failure to pay fair compensation within a reasonable time the judge awarded damages of $250,000.00 but gave no indication of how she arrived at the quantum. The Government did not challenge the Buftons' entitlement to an award of damages as redress for breach of their constitutional right but challenged the quantum.

[35] A basic principle of the law of damages is that similar damage must receive a similar award of damages otherwise awards are likely to be seen as arbitrary and, therefore, unjust: this is the reason why courts strive to be consistent in the awards that they make. For example, broadly speaking, in a personal injuries claim for general damages for the loss of a leg, an award will be made of a sum similar to that awarded in an earlier personal injuries case for the loss of a leg. If a range of awards becomes established then any award that departs significantly from that range without justification is liable to be treated as arbitrary. Principle also requires courts to make comparisons not only in respect of the type of injuries for which they award damages but also in respect of different types of damage for which they award damages. Thus, it has been stated that a court in awarding damages for libel must take account of the range of awards that is made for personal injuries so that a proper view is kept of the compensation that is appropriate for damage to reputation by comparison to the compensation that is considered appropriate for physical injury.[23]

[36] No case was cited to us in which there was an award of damages for breach of the constitutional right to be paid compensation within a reasonable time. However, counsel for the Government relied on Ramnarine Jorsingh v Attorney General[24]

[23] See Gatley on Libel And Slander, 9th ed., (1998) 9.5.
[24] (1998) 52 WIR 501

for guidance on the scale of the award of constitutional damages in a case of delay of a different kind. In that case the appellant claimed infringement of his constitutional rights by reason of the six and a half years delay by the Industrial Court in delivering its reserved judgment in the claim for damages for wrongful dismissal that the appellant had brought before that tribunal. (When the Industrial Court finally delivered its decision it awarded the appellant $3,000.00 damages.) On the constitutional claim brought before the High Court the Master assessed damages at $40,000.00 for distress and inconvenience caused by the delay. On appeal the Court of Appeal regarded that award as inordinately high and reduced the award to $20,000.00 on the basis that the award for distress and inconvenience caused by the undue prolongation of proceedings must bear some relationship to awards for wrongful deprivation of liberty or to awards at common law for personal injuries or for defamation.[25] De La Bastide CJ put the award which the claimant deserved in perspective by considering the award of damages of TT$25,000.00[26] in the case of Ramesh Lawrence Maharaj v Attorney General.[27] In that case a barrister was arrested in court by order of a judge, taken in his court attire through busy streets on foot to the police station, fingerprinted and incarcerated for a total of seven days and received that award for the deprivation of his liberty and the inconvenience and distress occasioned by his incarceration. The Chief Justice considered that the gravity of what the worker suffered by the delay in getting his judgment was exceeded by what the barrister underwent in Maharaj. The decision is helpful both for the principle that it states and the quantum that it indicates is appropriate for the delay it considered.

[37] The point was made in Fuller (Doris) v Attorney General[28] that an award of damages made against the state for breach of constitutional rights must not

[25] See p. 510 b.
[26] The Chief Justice, in this 1997 decision, noted that the award in the 1978 Maharaj decision of TT$25,000.00 was before the devaluation of the Trinidad and Tobago dollar to between one- half and one-third of its value at the time of the Jorsingh decision.
[27] unreported
[28] (1997) 56 WIR 337

amount to a windfall. In delivering one of the majority decisions in the Jamaican Court of Appeal, Patterson JA stated:[29]

> "Where an award of monetary compensation is appropriate, the crucial question must be what is a reasonable amount in the circumstances of the particular case. The infringement should be viewed in its true perspective, an infringement of the sacrosanct fundamental rights and freedoms of the individual and a breach of the supreme law of the land by the State itself. But that does not mean that the infringement should be blown out of all proportion to reality, nor does it mean that it should be trivialised. In like manner, the award should not be so large as to be a windfall, nor should it be so small as to be nugatory."

He thought that an award of J$1,000,000.00 (equivalent at the time to approximately US$26,000.00)[30] was an appropriate award of constitutional damages for inhuman and degrading treatment.

[38] The treatment in the **Fuller** case consisted of the police placing 18 men in a cell measuring 8 feet by 7 feet at 7:30 p.m. The men could not move even their hands freely. The cell was constructed of concrete walls and roofs; it had no windows; its door was made of metal sheets with holes for ventilation but the holes on the inner sheet and the outer sheet of metals were not aligned, so it was not possible to see into or out of the cell; there was no light in the cell and very poor ventilation. The cell was wet and extremely hot. The detainees were deprived of adequate food and water. They were let out briefly about 7:00 am the next day and also at 1:00 pm; they (together with a nineteenth man) were again locked up in the cell at 1:45 pm. They remained in the cell without food or water until 7:00 or 8:00 am on the following day. The police ignored their calls for relief. During the night three of the men died, including the deceased in respect of whom his mother, Doris Fuller, brought a claim. The cause of death was cardio-respiratory failure; the deceased received insufficient oxygen and an excess of carbon dioxide in the cell.

[29] at 402 g.
[30] Using an exchange rate of 37:1; for which, see the judgment of Downer JA at 367 b.

[39] Downer JA, who dissented and who would have awarded J$1,500,000.00[31] (equivalent at the time to approximately US$40,000.00) as exemplary or punitive damages for inhuman and degrading treatment, was conscious of the need to avoid duplication of the award made for the tort of false imprisonment.[32] That concern to avoid double compensation points to a troubling aspect of the award of constitutional damages in the instant case and that is the justification for such an award. In Fuller the need for such an award was fully canvassed and it was unanimously agreed that damages for the torts of false imprisonment and assault and battery were incapable of compensating the claimant for the inhuman and degrading treatment to which the deceased had been subjected and in respect of which redress was claimed.[33]

[40] In the instant, case the constitutional damages that the judge awarded were for the Government's deferring payment of compensation and causing distress and emotional travail to the Buftons. Would not an award of interest have been adequate compensation for the delay in payment? Beyond the aspects of injury that the Buftons suffered in consequence of the compulsory acquisition, such as disturbance, loss of animals, loss of personal items and loss of their way of life, and for which compensation has been awarded or not awarded, the only injury that the Buftons suffered was simply that they were kept out of their money. There was no suggestion that there was any consequential loss that they suffered because of the delay. The established remedy for being kept out of money is an award of interest. In the instant case the judge awarded interest on the compensation for the value of the land at the rate of 4% per annum from 17th December 1997 (the date the Buftons were removed from the island) and there has been no challenge to that award or that rate. I do not see that the Buftons are entitled to more. I do not see that the emotional consequences of being kept out of compensation money can justify an award of damages, whether under the constitution or generally. It is well settled in the law of contract that, save for specific exceptions,

[31] ibid.
[32] See p. 351 j.
[33] See per Downer JA at 366 c to j, per Patterson JA at 399j to 400 e and per Harrison JA at 415 e.

there can be no award for distress, frustration, anxiety, vexation and the like in compensating for breach of contract[34] and I see no reason why it should be otherwise in this particular case. However, as the Government did not challenge the entitlement to an award of damages under this head, and specifically because the matter was not argued, I consider that it would be wrong for me to disallow such an award. I confine my attention, instead, to the matter of quantum.

[41] In Fuller it was recognized that the award of constitutional damages had two objects: to make the State aware of the measure of its responsibility and to recompense the victim of state action so that the victim knows that the State cares and acknowledges its responsibilities with regard to its obligations under the fundamental rights provisions.[35] In the instant, case the judge formed a strong and pervasive view that the State had treated the Buftons poorly. Thus, the judge commented, "the Government seems to have ignored the Buftons rights and appeared content to shirk its responsibilities by relying on the dubious Resettlement Act to effectively deprive them of their rights and such flagrant disregard of constitutional rights ought not to be condoned."[36] The judge declined to set off against the awards that she made the value of the benefits that the State had provided to the Buftons and gave as her justification that "[t]he Act itself provides that the benefits are to continue until compensation is paid and makes no provision for a set-off from any compensation received. The court is also mindful that if a set-off is allowed there is a real danger that this could be treated as a means of prolonging the issue and deferring final payment. The government is, therefore, not entitled to a set-off." The judge dismissed the Resettlement Act as dubious[37] and reminiscent of "the measures which the colonizers of the so-called new world must have taken to evict native peoples from their land to corral them in places of the colonizers' choice, all in the interests of the natives well-being of course." Nonetheless, the judge directed the Government, until they actually paid

[34] Watts v Morrow [1991] 1 WLR 1421, restating the law in Addis v Gramophone Co. [1909] A.C. 488.
[35] (1998) 56 WIR 337 at 374 a.
[36] Paragraph [26].
[37] At paragraph [26].

the compensation that she awarded, to continue paying the benefits for which the Act provided.

[42] It is apparent that the quantum of constitutional damages that the judge awarded reflected the views that she expressed of the Government's conduct: that "the Government succeeded under the guise of benevolence in deferring payment of compensation" and caused "a great deal of distress and emotional travail" to the Buftons.[38] The object of an award of constitutional damages in this case cannot be to punish the Government for its treatment of the Buftons; that would be the object of an award of exemplary damages and the judge expressly declined to make such an award.[39] If the punitive element is removed from the award of constitutional damages, if the element of disturbance compensation that is inseparably a part of the compensation for the value of the land is not to be duplicated, if the award of such compensation in the amount of $800,000.00 is borne in mind, if it is appreciated that the award of interest at 4% or $32,000.00 per annum amounts today to $256,000.00, if an award of constitutional damages is not to produce a windfall, if the passing of the Resettlement Act is accepted as a recognition by the Government of its obligation to compensate the Buftons, and if the provision and payments to the Buftons of the benefits under the Resettlement Act are recognized as compensation actually received by the Buftons, then the award of $250,000.00 as constitutional damages is inordinately high. For the limited purpose that such an award should serve in this case, that is to vindicate the Constitution, and guided by the awards made in the Jorsingh case, as representing the lower end of the range, and the Fuller case, as representing the higher end of the scale[40], I consider the sum of $10,000.00 to be an appropriate award of constitutional damages.

[38] At paragraph [27].
[39] See paragraph [26] of the judgment.

Summary of result

[43] In summary, I would uphold the award of $800,000.00 as compensation for the value of the land, the award of $120,000.00 as compensation for the loss of the animals, and the award of $4,000.00 as compensation for the fee paid for the valuation. I would substitute an award of $11,522.00 as compensation for loss of personalty and an award of $10,000.00 as compensation for breach of constitutional rights. I would set aside the awards made for compensation for the loss of contractual right to a home and for compensation for total loss of way of life and inconvenience. On my view the Government succeeds on the appeal in reducing the award by more than 50% but instead of determining the impact that this result should have on costs in this court I advert to the fact that the claim was brought as a constitutional motion and that rule 56.13(6) of the Civil Procedure Rules 2000 provides that the general rule is that no order for costs should be made against an applicant for an administrative order. I would, therefore, make no order as to costs on the appeal. The order for prescribed costs in the court below stands although the calculation will be on the reduced award. I would not disturb the award of interest, which will now attach to the awards as upheld or substituted.

Denys Barrow, SC
Justice of Appeal

I concur.

Michael Gordon, Q.C.
Justice of Appeal

I concur.

Hugh Rawlins
Justice of Appeal