

THE EASTERN CARIBBEAN SUPREME COURT
COMMONWEALTH OF DOMINICA

IN THE COURT OF APPEAL

HCVAP 2008/009

BETWEEN:

ATTORNEY GENERAL OF THE COMMONWEALTH OF DOMINICA

Appellant

and

JACQUELINE THEODORE

Respondent

Before:

The Hon. Sir Hugh Rawlins
The Hon. Mr. Don Mitchell
The Hon. Mde. Louise Blenman

Chief Justice
Justice of Appeal [Ag.]
Justice of Appeal [Ag.]

Appearances:

Mr. Levi Peter, Attorney-General, with him, Ms. Tameka Hyacinth
for the Appellant
Mr. Lennox Lawrence, with him, Mr. Ronald Charles for the Respondent

2011: November 8;
2012: April 30.

Civil appeal – Compulsory acquisition of land – Lands seized by Government of Dominica for purpose of constructing road – Timber extracted from seized lands sold as lumber on local market – Land Acquisition Act, Chap. 53.02 – Compensation awarded in accordance with provisions of Land Acquisition Act – Whether compensation awarded by Board of Assessment fair

In 1977, the Government of the Commonwealth of Dominica ("the Government") seized heavily forested lands belonging to deceased Mr. Ferdinand Theodore for the purpose of constructing a road. These lands eventually became registered in the name of the respondent, in her capacity as Personal Representative of the Estate of the deceased. No compensation was paid by the Government for the seized lands, nor did they offer to pay any. Island Timbers Company Limited

("Island Timbers") was authorised by the Government to construct the road on the land, which was to provide access to government land for the extraction of timber and to accommodate cultivation by farmers. A considerable amount of timber was extracted from Mr. Theodore's land by Island Timbers while the road was being constructed. This was sold as lumber on the local market. The land was damaged by both the road construction and the clearing of trees. The area which was cut for the road suffered soil erosion and soil slippage and, in addition to the forest trees which were cut, damage was also caused to some other crops on the land.

The respondent filed a Constitutional Motion in which she prayed, inter alia, for an order that section 9 of the Roads Ordinance¹ was unconstitutional and that the Government had no power to enter and take the lands without her permission for the construction of a road. On 2nd April 1998, the High Court ruled that the taking of possession or acquisition of the land was not in accordance with the law which authorised such, namely, the Land Acquisition Act.² The Court further ruled that the respondent was entitled to compensation. The Court of Appeal later affirmed this judgment of the lower court and dismissed the Government's appeal. Pursuant to the judgment of the Court of Appeal, a Board of Assessment ("the Board") was established to determine the compensation payable to the respondent. The Board held that a total of \$3,512,056.00 should be awarded to the respondent, this sum comprising compensation for road construction (rehabilitation), crop destruction, protection of land from slippage and the extracted timber. The State, dissatisfied with the decision of the Board, appealed to this court, challenging in particular the compensation awarded to the respondent for the timber extracted from the seized lands, for road construction and rehabilitation, and for protection of the land from slippage.

Held: allowing the appeal, substituting the award of the Board in the sum of \$3,512,056.00 with an award of \$1,569,050.00 and making no order as to costs in the appeal, that:

1. The measure of compensation to be awarded for the felled trees should be calculated by reference to the use to which the trees were reasonably capable of being put in the future, that is, being sold by the board foot, rather than by reference to the value of the standing trees. The Board utilised the correct approach in determining the amount of compensation to be awarded to the respondent under this head.

Raja Vyricherla Narayana Gajapatiraju v The Revenue Divisional Officer, Vizagapatam [1939] A.C. 302 applied.

2. There is no reason to vary the findings of fact made or inferences drawn by the Board in determining the amount of compensation which was to be awarded to the respondent for the extracted timber, since there is no indication that the primary facts were misapprehended, or that incorrect inferences were drawn. The decision of the Board to award the respondent the sum of \$1,377,600.00 for the extracted timber, which was based upon the calculations of expert Mr. Fingal, cannot be impugned.

¹ Cap. 179, Revised Laws of Dominica 1961.

² Chap. 53.02, Revised Laws of Dominica 1990.

Benmax v Austin Motor Co. Ltd. [1955] A.C. 370 applied.

3. A claimant is not entitled to receive more than fair compensation: a person is entitled to compensation for losses fairly attributable to the taking of his land, but not to any greater amount. The Board erred in taking into consideration the fact that the respondent was likely to use the road constructed on her land when it awarded her compensation for road construction (rehabilitation) rather than that required to reforest the land. The Board should have addressed its mind to the measure of damages which would have put the respondent back in the position that she was before her forested land was affected.

Director of Buildings and Lands v Shun Fung Ironworks Ltd. [1995] 1 All E.R. 846 applied.

JUDGMENT

- [1] **BLENMAN J.A. [AG.]:** The Government of the Commonwealth of Dominica ("the Government") in the year 1977 seized heavily forested lands belonging to Ferdinand Theodore, then deceased, for the purpose of constructing a road. The Government paid no compensation for the deprivation of the property, nor did they offer to pay. The Government authorised Island Timbers Company Limited ("Island Timbers") to enter upon the seized lands to construct a road to provide access to government land for the extraction of timber and to accommodate cultivation by farmers. During the process of constructing the road, Island Timbers cut down and extracted a considerable amount of timber from Mr. Theodore's land and sold the same as lumber on the local market. The land was damaged by both the road construction and the clearing of trees from the surrounding lands. Island Timbers, having cut the trees from the land, cut them up into boards and sold the processed lumber to members of the public. The area which was cut for the road suffered soil erosion and soil slippage, and, in addition to the forest trees which were cut, damage was also caused to some crops.
- [2] Eventually the lands became registered in the name of Mrs. Jacqueline Theodore in her capacity as the Personal Representative of the Estate of Mr. Theodore.

- [3] Mrs Theodore, as personal representative of Mr Theodore filed a Constitutional Motion Claim No. 415 of 1997 praying, *inter alia*, for an order that section 9 of the **Roads Ordinance**³ was unconstitutional and that the Government of Dominica had no power to enter and take the lands without her permission for the construction of a road.
- [4] On 2nd April 1998, the High Court ruled that the taking of possession or acquisition of the land was not in accordance with the law authorising the taking of possession or acquisition, namely, the **Land Acquisition Act**.⁴ The Court further ruled that Mrs. Theodore was entitled to be compensation and that the compensation should be determined in accordance with the provisions of the **Land Acquisition Act**, with costs to be taxed if not agreed. The Court of Appeal affirmed the judgment of the High Court and dismissed the appeal of the Government of Dominica.⁵
- [5] It appears as though, even after the decision was rendered by the Court of Appeal in the Constitutional Motion, Island Timbers continued to extract timber from the land.
- [6] Pursuant to the judgment of the Court of Appeal, a Board of Assessment ("the Board") was established to determine the compensation payable to Mrs. Theodore. Section 11(2) of the **Land Acquisition Act** provides that:
- "A board of assessment shall have full power to assess, award and apportion compensation in such cases, in accordance with the provisions of this Act."
- [7] The Chairman of the Board was barrister Mr. Lewis Hunte, QC; the other members were Mr. Severin McKenzie who is an architect and Mr. Stephen Isidore. Apparently, Mr. Isidore, though having taken part in the deliberations of the Board, did not render any assistance to the other members of the Board in arriving at a decision. Accordingly, the decision of the Board was rendered by the Chairman and Mr. Severin.

³ Cap. 179, Revised Laws of Dominica 1961.

⁴ Chap. 53.02, Revised Laws of Dominica 1990.

⁵ In *Attorney-General of Dominica v Theodore (Jacqueline)* (1999) 57 WIR 129.

- [8] The road works on the property were eventually abandoned and Government never completed its acquisition of the land for the construction of the road.
- [9] Mrs. Theodore provided evidence to the Board, that even after it had been established, Island Timbers continued to cut trees from the land. It was only in 2001 when she caused a fence to be erected on the land thereby preventing them from accessing the land that they discontinued the extraction of timber.
- [10] During the hearing before the Board, Mrs. Theodore, Mr. Clement Fingal and Mr. Petronald Green provided evidence in support of Mrs. Theodore's claim. For the State, Mr. Anthony Toussaint prepared a report and also testified.
- [11] In assessing the appropriate compensation to award Mrs. Theodore, the Board was presented with two different sets of assessments: one from Mr. Clement Fingal who is a licensed surveyor and a registered general engineer (who at that time had been valuing properties for in excess of forty-four years) and the other from Mr. Anthony Toussaint who is a licensed surveyor and certified valuer, at that time of seven year's experience. He was also the Authorized Officer appointed under the **Land Acquisition Act**. In his report, the Chairman of the Board indicated that Mr. Fingal was supportive of the view that timber trees had value when they are cultivated for sale. However, Mr. Toussaint's view is that no account is to be taken of the value of timber trees unless they are cultivated for sale. In relation to the two competing positions, the Chairman said:⁶

"There is a substantial difference between the experts when the cost of timber trees was considered. Mr Fingal was of the view that timber trees have value whether or not they are cultivated for sale. Mr Toussaint's view is that no account is taken for the value of timber trees unless they are cultivated for sale. I had to find a way of resolving this difference and, in doing so, I had regard to the facts before the Board, namely, that a number of trees were felled and removed by the Defendant's employees while the road was being cut and that these trees were sold by the Defendant as timber."

⁶ At para. 20 of the Decision of the Board of Assessors.

[12] In those circumstances, the Board determined that Mrs. Theodore was entitled to the following compensation:

(1)	Road Construction (rehabilitation)	\$1,599,569.00
(2)	Crop destruction	
(a)	250 coconut trees @ \$500 each	12,500.00
(b)	30 grapefruit trees @ \$300 each	9,000.00
(c)	Protection of land from slippage	513,890.00
(d)	Value of timber extracted	1,377,600.00

The total awarded by the Board in compensation was the sum of \$3,512,056.00, together with interest at 5% from the date of the first convening of the Board of Assessment.

[13] The State was aggrieved, and has appealed to the Court of Appeal challenging some of the findings of the Board of Assessment. Of importance, they challenge the compensation for the value of the timber extracted, for the road construction and rehabilitation, and for protection of the land from slippage.

[14] There seems to be no quarrel over the award for crop destruction. There is no appeal with respect to the rate of interest that is to be applied, or in respect to the cost order. Mrs. Theodore has not cross-appealed, but at the hearing her counsel suggested that the Court should increase the amount of compensation from the sum of \$3,512,056.00 to the sum of \$5,448,852.00 on the basis that the area of land that had been deforested had been underestimated, and therefore compensation was not given for the entire area of land that was affected. However, since there was no cross-appeal the court cannot venture to increase the award on the basis of an oral submission.

[15] The Grounds of Appeal are as follows:

- (a) The Board of Assessment erred in law and or misdirected itself when it concluded that the State sold timber from the felled trees on Mrs. Theodore's land in that it

failed to give due consideration to the fact that the State did not own Island Timbers but asked Island Timbers to go onto the land to construct a road and that the timber extracted and sold from the land was sold only by Island Timbers.

- (b) That the Board of Assessment erred in law and or misdirected itself when it rejected the proposal that compensation should be calculated by reference to the value of the land in that it failed to give due consideration to the fact that the order of the Court was that the provisions of the **Land Acquisition Act** should be applied to determine the quantum of compensation the respondent was entitled to under that law and as such the value of the land had to be considered as the basis of compensation.
- (c) That the Board of Assessment erred in law and or misdirected itself when it concluded that the respondent should be compensated for the value of the timber extracted and that, that value was \$1,377,600.00 in that:
 - (i) there was no factual or legal basis for that finding;
 - (ii) it failed to have due regard to or properly consider that the correct measure of compensation was the value of the land as it existed with the uncut timber on it;
 - (iii) alternatively, it failed to properly consider and have due regard to the fact that the value of the timber extracted cannot be calculated merely by reference to the price at which finished lumber is sold in a hardware store, and that one would have to take into account the cost of production;
 - (iv) it failed to properly consider and have due regard to the fact that the figure stated by Mr. Fingal of the total board foot he calculated as having been extracted from the Theodores' lands, namely 328,000 board feet, was shown to be erroneous when one examined the method he used to calculate the board feet;

(v) it failed to have regard to the fact that the amount claimed under this head was totally unsupported by the evidence.

(d) The Board of Assessment erred in law and or misdirected itself when it concluded that compensation to the respondent should be calculated by reference to road rehabilitation, namely constructing a paved road on the property and slope stabilisation in that:

- (i) there was no factual or legal basis for that finding;
- (ii) it failed to properly give consideration to the value of the land prior to entry by the appellants on it;
- (iii) it failed to have due regard to the measure of compensation payable under the **Land Acquisition Act**;
- (iv) alternatively, it failed to properly consider that the appropriate measure of compensation should be to return the land as close as possible to its original state which would require reforestation;
- (v) the Board placed undue reliance on the evidence of Mr. Fingal.

[16] At the case management conducted by the Court of Appeal, the Court had ordered the appointment of an independent valuer, Mr. Vincent Robinson, to produce and file a Report. Mr. Robinson has provided his report to the court.

ISSUES

[17] The issues that arise for the Court to resolve are as follows:

- (a) whether the Board used the wrong measure of compensation;
- (b) whether the Board acted properly in determining that Mrs. Theodore has to be compensated for the rehabilitation of the road as distinct from reforestation;

- (c) whether the Board was correct in determining that Mrs. Theodore should be compensated for the cost of protecting from slippage the land which was cut for Government by Island Timbers.

THE LEGISLATION

- [18] The relevant section of the **Land Acquisition Act** sets out the approach to be adopted in determining the measure of compensation and what heads of compensation are to be allowed. The section reads:

“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, subject as hereinafter provided, be taken to be the amount which the land, in its condition at the time of acquisition, if sold in the open market by a willing seller, might have been expected to have realised at a date twelve months prior to the date of the second publication in the *Gazette* of the declaration under section 3; but 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;”

- [19] During the hearing before this Court and in the face of his very helpful written submissions, it came apparent that the learned Attorney General was no longer vigorously pursuing the first ground of appeal. This was quite commendable and it obviates the need for me to address this ground.

- [20] The learned Attorney General Mr. Levi Peter in his oral submissions before the Court indicated that he was not taking issue with some of the awards made by the Board. However, he was taking issue with the awards made by the Board in relation to compensation for road rehabilitation, protection of land from slippage and the value of the timber extracted. The Attorney General maintained that Mrs. Theodore was only entitled

to the level of compensation that would put her in the same position as she would have been in had Island Timbers not cut the road into her land and extracted timber therefrom.

[21] Further, the Attorney General argued that the Board, in awarding Mrs. Theodore the sum of \$1,599,569.00 for road construction (rehabilitation), clearly went wrong. He submitted that similarly, the Board ought not to have awarded her any sum whatsoever to protect the land from slippage. In addition the Attorney General submitted that in any event the award of \$513,890.00 under this head was exorbitant.

[22] The Attorney General submitted that the Board should not have given Mrs. Theodore an award which represented the value of the timber. Rather, the appropriate award that the Board ought to have made was a sum which represents the value of the standing trees. Alternatively, the Attorney General submitted that it was unreasonable for the Board to accept as correct the figure of \$1,377,600.00 as provided by Mr. Fingal to be the cost of the timber that was extracted, since based on Mr. Fingal's own evidence, he had miscalculated.

[23] Of greater significance, the Attorney General submitted that the Board, in making the award in relation to the timber that was extracted, granted Mrs. Theodore a windfall.

[24] For his part, learned counsel Mr. Lawrence on behalf of Mrs. Theodore submitted that the Board under-compensated Mrs. Theodore for the losses that she has suffered as a consequence of the unlawful acts. He submitted that there was an additional five acres of land which was damaged by Island Timbers and for which Mrs. Theodore received no compensation. He therefore urged the Court to substantially increase the award granted by the Board so as to compensate Mrs. Theodore adequately.

[25] In support of their respective positions, both learned counsel referred the Court to several authorities, including the Privy Council opinion in the Mauritius appeal of **Mon Tresor and**

Mon Desert Limited v Ministry of Housing and Lands and Another.⁷ In this case one of the matters the Judicial Committee of the Privy Council had to determine was whether assessment of compensation should be determined according to: (a) the residual value method; or (b) the comparison method of valuation. At paragraph 2, Lord Scott of Foscote and Lord Carswell, in giving the majority opinion, stated that:

"2. It was not in dispute that the appeal from the Board of Assessment to the Supreme Court under section 24 of the Land Acquisition Act was a full appeal on both fact and law, as is the further appeal to the Privy Council. Such appeals are governed by the principles laid down by the House of Lords in *Benmax v Austin Motor Co Ltd* [1955] AC 370. An appellate tribunal ought to be slow to reject a finding of specific fact by a lower court or tribunal, especially one founded on the credibility or bearing of a witness. It can, however, form an independent opinion on the inferences to be drawn from or evaluation to be made of specific or primary facts so found, though it will naturally attach importance to the judgment of the trial judge or tribunal. On an appeal from a specialist tribunal such as the Board of Assessment the Supreme Court or the Privy Council should ordinarily be slow to reject its findings on matters of pure valuation, but if it considers that the tribunal has misapprehended material facts or that the primary facts established do not lead correctly to the inferences which it has drawn from them, it can and should reverse the decision of the tribunal."

[26] At paragraph 7 of the opinion, both Lord Scott and Lord Carswell stated that the following propositions maybe deduced from the authorities:

- "(a) The value of an interest in land compulsorily acquired is the amount which that interest, if sold on the open market by a willing seller, might be expected to realise at the date of first publication of the statutory notice. This familiar principle is given statutory form in Mauritius by section 19(3) of the Land Acquisition Act.
- (b) In assessing this value the best evidence is comparison with figures from other sales of comparable property.
- (c) The land acquired must be valued not merely by reference to the use to which it is being put at the time at which its value has to be determined, but also by reference to the uses to which it is reasonably capable of being put in the future: *Gajapatiraju v The Revenue Divisional Officer, Vizagapatam* [1939] AC 302.
- (d) The use for which the land is being acquired must be disregarded in making this assessment: *Pointe Gourde Quarrying and Transport Co Ltd v*

⁷ [2008] UKPC 31.

Sub-Intendent of Crown Lands [1947] AC 565; *Waters v Welsh Development Agency* [2004] UKHL 19, [2004] 1 WLR 1304.

- (e) Where there are no comparable sales resort may be had to the residual value method. This should be reserved for exceptional cases and will not be applied where the open market value is otherwise ascertainable by such assessments as a spot valuation: *Cripps on Compulsory Acquisition of Land*, 11th ed (1962), para 4-200. As the Lands Tribunal stated in *Perkins v Middlesex CC* (1951) 2 P & CR 42:

' ... a spot valuation based upon experiences of the market is more likely to be right than calculations which depend upon many assumptions and forecasts.'

- (f) A spot valuation can take into account the existence and amount of hope value. Its assessment depends upon an amalgam of factors, the likelihood (ranging from complete certainty to a very slight possibility) of the requisite planning permission being granted, the demand for the suggested development, the time which such development would take and the projected costs. The resulting figure represents the premium over existing use value which a developer may be thought willing to pay in order to acquire the land in the hope of turning it to profitable account."

[27] Applying the above principles in the present case, I am not of the opinion that the value of the compensation for the loss of the trees should be the value of the uncut standing trees, but that the measure of compensation should be by reference to the use to which the trees were reasonably capable of being put in the future, i.e., to be sold by the board foot. I therefore accept that the Board utilised the correct approach in its assessment of the measure of compensation for the loss of the trees to which Mrs. Theodore is entitled. I have no basis upon which to conclude that the Board erred in arriving at the conclusion that Mrs. Theodore was entitled to be compensated based on the value of the timber calculated in accordance with the amount of board feet that was obtainable from the trees that were cut as distinct from the value of the standing trees.

[28] In my respectful view, in the circumstances that obtained, the Board quite properly accepted the evidence of Mr. Fingal in preference to that of Mr. Toussaint on this point.

[29] Further, since the land was not acquired, it seems to me that in determining what is the proper measure of compensation, the only basis on which the Board could have awarded

compensation to Mrs. Theodore was for any disturbance or any other matter not directly based on the value of the land. These were the two areas the Board ought to have utilised in determining what was adequate compensation. Even assuming that the Board did not specifically address its mind to the relevant legal principles, exercising my discretion as I am entitled to do and applying the principles enunciated in **Mon Tresor**, I am of the view that the Board quite correctly utilised the cost of the board feet as distinct from the cost of the individual trees in determining the level of compensation.

[30] I now address the ancillary issue, that is, even assuming the proper principles were applied, whether the mathematical calculations that were proffered by Mr. Fingal and accepted by the Board were correct. Mr. Peter pointed out that Mr. Fingal had stated that the value of the timber that was extracted was \$1,377,600.00.

[31] In **Mon Tresor** the principles that govern appeals on fact and law as set out in **Benmax v Austin Motor Co. Ltd.**⁸ were restated by the Privy Council⁹ as follows:

“An appellate tribunal ought to be slow to reject a finding of specific fact by a lower court or tribunal, especially one founded on the credibility or bearing of a witness. It can, however, form an independent opinion on the inferences to be drawn from or evaluation to be made of specific or primary facts so found, though it will naturally attach importance to the judgment of the trial judge or tribunal. On an appeal from a specialist tribunal such as the Board of Assessment the Supreme Court or the Privy Council should ordinarily be slow to reject its findings on matters of pure valuation, but if it considers that the tribunal has misapprehended material facts or that the primary facts established do not lead correctly to the inferences which it has drawn from them, it can and should reverse the decision of the tribunal.”

[32] Applying those helpful principles in this case, I am not persuaded that Mr. Fingal erred in his calculations which were ultimately accepted by the Board and neither I am of the view that his calculations are so erroneous that the decision of the Board which relied on his

⁸ [1955] A.C. 370.

⁹ At para. 2 of the judgment.

calculations can be impugned. In passing, it is worth stating that the award suggested by the court-appointed expert Mr. Robinson for the value of the timber is close to Mr. Fingal's recommendation, the latter which the Board accepted. Having reviewed the evidence adduced before the Board and the findings and conclusions of the Board I am not of the opinion that I should vary the findings of fact and inferences that were drawn by the Board since there is no indication that the Board has misapprehended either the primary facts or drawn incorrect inferences. For what it is worth, it bears stating that the Board has awarded Mrs. Theodore that sum of \$1,377,600.00 as compensation for the timber extracted whereas for his part the court-appointed expert recommends an award in the sum of \$1,323,000.00.

- [33] The final issue to be decided is whether the Board erred in awarding Mrs. Theodore compensation for road construction (rehabilitation) rather than awarding her compensation for reforestation. In its report, the Board having considered whether the appropriate method of compensation was a sum that was necessary to rehabilitate the road as distinct from the sum that was required to reforest the land concluded that the appropriate compensation in this case was the sum that represented the cost of road construction. In coming to this conclusion, the Board took into consideration the fact that Mrs. Theodore was likely to use the road and felt that, the approach which they had taken was fair. I am of the view that the Board clearly applied the wrong legal principles and therefore arrived at an erroneous conclusion. The Board should have addressed its mind to what was the appropriate measure of damages to which Mrs. Theodore was entitled in order to put her back in the position in which she was before her forested land was affected. The public purse should not be burdened with the cost of construction and maintenance of a private road wrongfully built on private land. The landowner has been deprived of forested land and the Government should pay to return the land to the condition it was in.

[34] Mrs. Theodore was entitled to receive fair and adequate compensation and nothing more. To award her the sum which represents the cost of constructing a road is to unjustly enrich her.

[35] The pronouncement of Lord Nicholls of Birkenhead in the Privy Council opinion in **Director of Buildings and Lands v Shun Fung Ironworks Ltd.**¹⁰ is instructive. He reviewed the statutory provisions that addressed the compensation for acquisition of property and said:

“The purpose of these provisions in Hong Kong and England is to provide fair compensation for a claimant whose land has been compulsorily taken from him. This is sometimes described as the principle of equivalence. No allowance is to be made because the resumption or acquisition was compulsory; and land is to be valued at the price it might be expected to realise if sold by a willing seller, not an unwilling seller. But subject to these qualifications, a claimant is entitled to be compensated fairly and fully for his loss. Conversely, and built into the concept of fair compensation, is the corollary that a claimant is not entitled to receive more than fair compensation: a person is entitled to compensation for losses fairly attributable to the taking of his land, but not to any greater amount. It is ultimately by this touchstone, with its two facets, that all claims for compensation succeed or fail.”

[36] In the case of **Stewart John Pattle and Another v The Secretary of State for Transport**,¹¹ favour was found with the conclusion reached by the Law Commission that the Court of Appeal case of **Wrexham Maelor Borough Council v Macdougall & Others**¹² should be taken as authority for the proposition that in relation to a claim by a person with a compensatable interest, compensation under the second part of rule 6 (i.e., any other matter not directly based on the value of the land) is not limited to loss by occupiers; it is not limited to claims for costs or expenses; and it extends to any loss attributable to the compulsory acquisition, subject only to the ordinary principles of causation and remoteness.

¹⁰ [1995] 1 All E.R. 846 at 852b.

¹¹ [2009] UKUT 141 (LC) at para. 39.

¹² (1995) 69 P. & C.R. 109.

[37] In this case, Mrs. Theodore's land was heavily forested land. Island Timbers was authorised by the State to enter onto those lands and cut a road on it. The road was thereafter abandoned. It seems to me that since where she had trees before there is now a road, accordingly, in order to adequately and fairly compensate her, she should be paid for the value of those trees and the cost of reforestation of the land and any subsequent devaluing of the land if any, because only that can properly be regarded as her loss. I agree with the learned Attorney General that in awarding the cost of construction of an all-weather paved road and slope stabilisation, the Board erred.

[38] The Board accepted that the expert Mr. Fingal gave two alternatives to the restoration as near as possible to the original state of the land by use of an organised established road or reforestation. It stated¹³ that:

"In my view, the Claimant should only be compensated for re-forestation if she intends to close the road. If, however, she intends to pave it, as suggested in the evidence, compensation should only be awarded for road rehabilitation and slope protection."

It is clear that the Board was wrongly influenced in its decision by the irrelevant consideration in its decision of the use to which Mrs. Theodore now intends to put the land which she previously had made no use of, as opposed to compensating her for what she had in fact lost.

[39] I reiterate that I am not of the view that to construct a paved road on the land as opposed to reforesting it can amount to returning the land as close as possible to the state that it was in prior to entry thereon. The most appropriate and the only way to so return it is through reforestation. The learned Attorney General argued that the proper award that should be given to Mrs. Theodore for the reforestation of the land is the sum of \$95,790.00. However, Mr. Robinson has stated that the cost of restoring the land as far as possible to its original state and taking into account reforestation and slippage is \$169,950.00. It is noteworthy that neither party asked any question of the court-appointed

¹³ At para. 28 of the Decision of the Board of Assessors.

expert even though his report was submitted since July 2011. On this issue, having reviewed the factors which Mr. Robinson has taken into consideration in arriving at this figure, I find his recommendation very acceptable. Accordingly, I award Mrs. Theodore the sum of \$169,950.00 for reforestation.

[40] In view of the above, I would overrule the award of the Board in the sum of \$1,599,569.00 for road construction and \$513,890.00 for road slippage, and substitute the sum of \$169,950.00 for reforestation.

[41] The compensation payable to Mrs Theodore should therefore be:

Loss of timber	\$1,377,600.00
Cost of reforestation	\$169,950.00
Crop damage	<u>\$21,500.00</u>
Total:	<u>\$1,569,050.00</u>

COSTS

[42] The Court was told that the Board had ordered that the costs of the hearing before it were to be assessed by the Registrar or the Master, unless otherwise agreed. Mrs. Theodore has not filed a cross appeal against this Order. Accordingly, there is no basis on which I can vary this Order. I decline to do so.

[43] In relation to this appeal, there shall be no order as to costs.

CONCLUSION

[44] I would allow this appeal. For the reasons given above I consider that the sum of \$1,569,050.00 is a fair and just compensation to be awarded to Mrs. Jacqueline Theodore for the destruction of her crops, the value of the timber extracted from her land, and the

cost of reforestation of her land. Accordingly, I would substitute the award of the Board in the sum of \$3,512,056 and in its place award the sum of \$1,569,050.00.

[45] On the conclusion on the hearing of this appeal the Court directed both sides to file and serve further written submissions in relation to the acreage in dispute. Only Mrs. Theodore complied with this direction.

[46] I gratefully acknowledge the assistance from all learned counsel.

Louise Blenman
Justice of Appeal [Ag.]

Sir Hugh Rawlins
Chief Justice

Don Mitchell
Justice of Appeal [Ag.]