EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANGUILLA

AXAHCVAP2016/0003

BETWEEN

[1] ESTATE OF DAME BERNICE LAKE QC (DECEASED)
[2] CONCH BAY DEVELOPMENT LIMITED

Appellants

and

THE ATTORNEY GENERAL OF ANGUILLA

Respondent

Before:

The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mr. Paul Webster, QC	Justice of Appeal [Ag.]

Appearances:

Mr. Kendrickson Kentish, with him Mr. Kerith Kentish, instructed by Ms. Joyce Kentish & Associates, for the Appellants

Mr. Guy Roots QC, with him Mr. Ivor Greene, Senior Crown Counsel and Ms. Sherma Blaize for the Respondent

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2016: December 13;
2018: December 11.

Civil Appeal – Compulsory Acquisition of Land – Land Acquisition Act – Compensation for compulsory acquisition – Compensation for injurious affection – Fusion and amalgamation of land – Stand-alone method of land valuation – Before and after method of land valuation – Highest and best use of land – Interest on compensation for compulsory acquisition and injurious affection

On 28th November 2003, the Government of Anguilla compulsorily acquired a portion of land owned by the now-deceased Dame Bernice Lake QC (hereafter "Dame Bernice"). The portion of land acquired from Dame Bernice was part of a parcel of land owned by her comprising approximately 110 acres (hereafter "parcel 100"). Parcel 100 was separated by a road from another 260 acres of land owned by Dame Bernice's family (hereafter "parcel 126"). Following the acquisition, Dame Bernice entered into negotiations with the

Government to determine the quantum of compensation to be paid to her for the compulsorily acquired land and for the diminution in value (referred to in the cases as 'injurious affection') of the remainder of parcel 100. Dame Bernice also sought compensation for the injurious affection of her family's land contained in parcel 126 on the basis that the entire 370 acres of land contained in parcels 100 and 126 were treated by her family as a single portion of land to be developed together. It was determined that the Government only required 10 out of the 26 acres of land acquired from Dame Bernice and so, by an agreement dated 28th March 2008, the Government re-vested 16 of the 26 acres back to Dame Bernice. Dame Bernice died in 2011 and negotiations were continued by her estate and members of her family. When the negotiations between the parties broke down, the dispute was submitted to a Board of Assessment (hereafter "the Board"), in accordance with section 10 of the Land Acquisition Act, to settle the quantum of compensation payable to the Estate of Dame Bernice Lake and to a company called Conch Bay Development Limited, to which most of the remainder of parcel 100 and parcel 126 had been conveyed by Dame Bernice and her family. The Board, having heard the evidence of experts on both sides, awarded compensation to the Estate of Dame Bernice Lake for the 10 acres of land acquired from her, for the injurious affection of the remainder of her land, and for the period during which she was dispossessed of the 16 acres of land which was later re-vested to her. The Board also awarded interest on the awards of compensation from the date of acquisition to the date of the re-vesting of the 16 acres of land, awarded costs to the Estate of Dame Bernice Lake to be paid by the Government, made no order of compensation in favour of Conch Bay Development Limited and ordered that, as between Conch Bay Development Limited and the Government, each party was to bear its owns costs.

Dissatisfied with the quantum of compensation awarded, the awards of interest and with the fact that Conch Bay Development Limited was awarded no compensation, the Estate of Dame Bernice Lake and Conch Bay Development Limited appealed the decision of the Board.

The issues for determination before this Court were: (1) whether the two parcels of land, numbered 100 and 126, together constituted a fused parcel of land under the ownership and control of one family unit; (2) whether the 10 acres of land acquired by the Government were to be assessed on a stand-alone basis or as part of a larger portion of land from which they were derived and, if the latter, what method of valuation should be used to assess the value of the acquired land; (3) whether the highest and best use of the 10 acres acquired by the Government was residential development or high-end tourism development; (4) whether the Estate of Dame Bernice Lake ought to be awarded compensation for injurious affection and, if so, in what amount; (5) whether compensation ought to be awarded for the 16 acres of land held by the Government which were later re-vested to Dame Bernice and, if so, in what amount; (6) whether Conch Bay Development Limited is entitled to any compensation from the Government and to costs in the proceedings; and (7) the period of time from and to which interest should be awarded.

Held: Allowing the appeal in part and making an award of costs to the Estate of Dame Bernice Lake, that:

1. There was ample evidence before the Board on which it could find that parcel 100 and parcel 126 were not fused or amalgamated. The fact that the two parcels of land were not contiguous and that they were not at the material time owned by the same person, was more than sufficient to justify the finding by the Board that parcels 100 and 126 were not fused or amalgamated. The Board therefore did not err in finding that parcels 100 and 126 were in fact two separate and distinct parcels of land owned by different members of the Lake family.

   Mon Tresor and Mon Desert Limited v Ministry of Housing and Lands and another [2008] UKPC 31 followed. Section 18(2) of the Land Acquisition Act R.S.A. c. L10 considered.

2. Section 18(2) of the Land Acquisition Act requires that the valuation of the acquired land be undertaken on the basis of the open market value of the land at the time of its acquisition, and not at an earlier or later time. Section 18(2) cannot be construed to mean that in undertaking the valuation, no regard should be had to the fact that the acquired land is but a severed part of a larger piece of land, from which larger piece it acquired its value. The valuer's task therefore is to assess the open market value of the land at the material time, keeping in view that the acquired land is a severed portion of a larger piece of land from which larger piece it derives its value. Accordingly, the Board was wrong to apply the stand-alone method of valuation of the acquired land and ought instead to have applied the 'before and after' method of valuation.

   Hamilton v Minister of Lands [2012] NZLVT 2 applied; Abbey Homesteads Group Ltd v Secretary of State for Transport [1982] 2 EGLR 198 considered; Roads and Traffic Authority of New South Wales v JL & MM Muir Properties Pty Ltd [2005] NSWCA 460 applied.

3. The highest and best use of land is the most profitable use to which land could be put that is legally permissible, physically possible and financially feasible. Although there are parts of parcel 100 which are proximate to the airport runway, there are also parts of it which are coastal lands and it cannot be seriously disputed that the land was suitable for high-end tourism development in addition to local residential development. The highest and best use therefore of parcel 100 is mixed residential and high-end tourism development. Marrying the two valuations produced by the parties' valuation experts, the likely offspring is US$657,500 per acre of land. Applying this averaged valuation to the 110 acres of land contained in parcel 100, the 'before' valuation is US$72,325,000, the after valuation (ignoring provision for injurious affection) is US$65,750,000, and the valuation of the 10 acres acquired by the Government is US$6,575,000.

   Attorney General v HMB Holdings Ltd [2014] UKPC 5 considered.

4. Compensation ought to be awarded to the Estate of Dame Bernice Lake for the dispossession of Dame Bernice of the 16 acres of land acquired from her in

November 2003 and re-vested to her in March 2008. Applying the only formula presented to and accepted by the Board for valuation of the 16 acres of land, it would be valued at US$10,520,000; the rental value calculated at 5% of the market value for 3 years and 5.75% for 1 year and 4 months would be US$2,384,533.33, which is the amount payable to the Estate of Dame Bernice Lake for the temporary dispossession of Dame Bernice of the 16 acres.

5. Compensation for injurious affection only arises when a piece of land is compulsorily acquired from a larger portion of land and the acquired land is intended to be or is actually used for a scheme or project which adversely affects the value of the remainder of the land. On the facts of the present case, the Estate of Dame Bernice Lake is entitled to be compensated for the injurious affection of the 100 acres of land retained by Dame Bernice after the acquisition of 10 acres by the Government which, according to the expert evidence accepted by the Board, is to the extent of 50% of 20 acres and 25% of 22 acres. On the re-assessed value of the affected land, 20 acres is valued at US$13,150,000, and so 50% of that value is US$6,575,000; 22 acres is valued at US$14,465,000, and so 25% of that value is US$3,616,250. The total amount payable, therefore, to the Estate of Dame Bernice Lake for injurious affection of the 100 acres of land retained by her, is US$10,191,250.

   Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands [1947] AC 565 applied; Roads and Traffic Authority of New South Wales v JL & MM Muir Properties Pty Limited [2005] NSWCA 460 considered.

6. Conch Bay Development Limited did not, at any material time, own any land which was in whole or in part acquired by the Government of Anguilla. The company is not therefore entitled to be compensated in addition to or instead of the Estate of Dame Bernice Lake for the land acquired by the Government. Conch Bay Development Limited may only be entitled to compensation from the Government for the injurious affection of parcel 126 if a claim is made by the company under section 23 of the Land Acquisition Act.

   Section 23 of the Land Acquisition Act R.S.A. c. L10 considered.

7. The end date of 28th March 2008 is appropriate for the interest awarded with respect to the re-vested 16 acres of land, because it was re-vested on that date. There is however no connection between that date (28th March 2008) and the compensation payable for the acquisition of the 10 acres severed from parcel 100 and the injurious affection of the remainder of parcel 100. The Board erred, therefore, when it made the interest award that it did with respect to the compensation awards for the land acquired from Dame Bernice and the injurious affection of the remainder of her land. The period of time from and to which interest should be awarded is from 28th November 2003 to 28th March 2008 on the compensation payable for Dame Bernice's dispossession of 16 acres of her land during that period, and from 28th November 2003 to 8th April 2016 (when

the Board rendered its decision) on the compensation for the compulsory acquisition and injurious affection of her land.

JUDGMENT

[1] MICHEL JA: Anguilla is a small island in the northern Leeward Islands with a population of just under 15,000 people and an area of just over 35 square miles. It is a self-governing British Overseas Territory whose economy is based almost entirely on tourism. Anguilla's brand of tourism is centred mainly on high-end beach resorts. With such a small land space and a reputation for high-end properties, it is not surprising that Anguillans are very passionate about their land, particularly land with potential for tourism development.

[2] In an effort to attract international flights into Anguilla, the Government of Anguilla decided in 2001 to expand the island's sole airport. In order to do this, it was necessary to acquire lands in the vicinity of the airport to extend the runway. One of the landowners who owned land in the immediate vicinity of the airport and whose land the Government found it necessary to acquire was the island's most distinguished and accomplished lawyer, the now-deceased Dame Bernice Lake QC (hereafter "Dame Bernice").

[3] Dame Bernice was the owner of a parcel of land registered as Parcel Number 100 in Block 78913 B in the South East Registration Section comprising approximately 110 acres (hereafter "parcel 100") and which land was separated by a road from another 260 acres of land owned by her family and registered as Parcel Number 126 in Block 79013 B in the South East Registration Section (hereafter "parcel 126").[1] According to the appellants, the two parcels of land, together comprising approximately 370 acres,[2] were treated by the Lake family as a single holding and referred to as the 'Forest Estate'.

[1] Parcel 126 is sometimes said to contain 260 acres and at other times 261 acres. I will refer in the course of this judgment to 260 acres, which is the acreage referred to in the decision of the Board.
[2] The combined area of the two parcels of land is sometimes said to contain 360 acres and at other times 370 acres. I will refer in the course of this judgment to 370 acres, which is the sum of 110 acres and 260 acres.

[4] After protracted negotiations between the Government and Dame Bernice from 2001 to 2003, the negotiations broke down and the Government proceeded to survey and dismember a portion of 26 acres from parcel 100 and to compulsorily acquire it in November 2003 by two declarations published in the Gazette, in accordance with section 2 of the Land Acquisition Act[3] of Anguilla (hereafter "the Act"). There ensued a further round of negotiations between the Government and Dame Bernice, this time about the quantum of the compensation to be paid to her for the land compulsorily acquired from her and for the diminution in value (referred to in the cases as 'injurious affection') of the remainder of parcel 100 owned by her. Dame Bernice also sought compensation for the diminution in value or injurious affection of her family's land contained in parcel 126 on the basis that the entire 370 acres of land contained in parcels 100 and 126 were treated by her family as a single portion of land to be developed together and the value of the whole was diminished or injuriously affected by the severance of part of the whole.

[5] Five years on, in 2008 the further round of negotiations between Dame Bernice and her family on the one hand and the Government of Anguilla on the other hand were still ongoing. The parties had by then determined that the Government only required 10 out of the 26 acres of land acquired from Dame Bernice and so, by an agreement between them dated 28th March 2008, the Government re-vested 16 of the 26 acres back to Dame Bernice. By the same agreement, the Government paid over to Dame Bernice the sum of US$3,000,000 as an interim payment until the quantum of compensation was finally determined, whereupon the Government would pay to Dame Bernice, or she to them, the difference between the amount determined and the interim payment made.

[6] Dame Bernice died in 2011, with the dispute still unresolved, and the negotiations with the Government were continued by representatives of her estate and with other members of her family. By 2014, the negotiations had broken down again and the dispute was submitted to a Board of Assessment, in accordance with section 10 of the

[3] Revised Statutes of Anguilla, CAP L10.

Act, to settle the quantum of compensation payable to the Estate of Dame Bernice Lake and to a company called Conch Bay Development Limited, to which all but 18 acres of the remainder of parcel 100 and parcel 126 had been conveyed by Dame Bernice and her family.

[7] By virtue of section 11 of the Act, the Governor in Council caused a Board of Assessment (hereafter "the Board") to be appointed under the chairmanship of Sir Clare Roberts, QC (an acting Judge of the High Court of the Eastern Caribbean Supreme Court) and comprising also Ms. Elizabeth Stair as the nominee of the Government and Mr. Clarvis Joseph as the nominee of the landowners. The Board received expert reports from Mr. Carlyle Glean, who was the appellants' valuation expert, and from Mr. Edward Childs, who was the respondent's valuation expert. Assessment hearings were held on 7th, 8th and 9th of July 2014 and 10th and 11th of November 2014, in the course of which, evidence was given by the parties' experts and by their other witnesses – Mr. George Lake for the appellants, and Messrs Vincent Proctor, Leslie Jason Hodge and Gifford Connor for the respondent. On 8th April 2016, the Board handed down its decision, which was signed by Sir Clare and Ms. Stair, but not by Mr. Joseph. The absence of the signature of Mr. Joseph does not however affect the validity of the Board's decision because, in accordance with section 16(2) of the Act, 'the decision of the majority of the Board with respect to the compensation to be paid shall be deemed to be the decision of the Board'.

[8] The award of the Board was as follows:

(1) Compensation to the Estate of Dame Bernice Lake QC for 10 acres acquired - US$500,000;

(2) Compensation to the Estate of Dame Bernice Lake QC for injurious affection - US$550,000;

(3) Interest of 9% on (1) and (2) from 28th November 2003 - 28th March 2008;

(4) Compensation to the Estate of Dame Bernice Lake QC for the re-vested 16 acres - US$210,000;

(5) Interest of 9% on (4) from 28th November 2003 to 28th March 2008;

(6) Costs to the Estate of Dame Bernice Lake QC to be paid by the Government, such costs to be taxed by the Registrar of the High Court;

(7) As between Conch Bay Development Limited and the Government, each party to bear its own costs.

The appeal

[9] The Estate of Dame Bernice Lake and Conch Bay Development Limited. (hereafter "the appellants"), being dissatisfied with the Board's award, appealed against the decision of the Board on 18 grounds of appeal. The statement of the grounds of appeal takes up 6 pages of text, which must be read along with the preceding 2 pages containing the findings of the Board which are being appealed. I find it unnecessary to reproduce here the 8 pages of text which together contain the grounds of appeal.

[10] The 18 grounds of appeal framed by the appellants are, in the main, criticisms of findings of fact made by the Board, although some of them are referred to in the notice of appeal as findings of law. The grounds of appeal are also intermingled in a manner that makes it difficult to deal with each separately. I will therefore endeavour to extract the essence of the grounds of appeal and frame the issues to be determined in this appeal.

[11] The first issue is whether the two parcels of land, numbered 100 and 126, together constituted 'a fused parcel of land under the ownership and control of one family unit'. The second issue is whether the 10 acres of land acquired by the Government were to be assessed on a stand-alone basis or as part of a larger portion of land from which it was derived and, if the latter, what method of valuation should be used to assess the value of the acquired land. The third issue is whether the highest and

best use of the 10 acres acquired by Government was residential development or coastal land development. The fourth issue is whether the appellants ought to be awarded compensation for injurious affection and, if so, in what amount. The fifth issue is whether compensation ought to be awarded for the 16 acres of land held by the Government from November 2003 to March 2008 and, if so, in what amount. The sixth issue is whether the second appellant is entitled to any compensation from the respondent and to costs in the proceedings. The seventh issue is the period of time from and to which interest should be awarded.

Were parcels 100 and 126 fused

[12] As to the first issue to be determined in this appeal, the Board found that parcels 100 and 126 did not constitute a fused parcel of land and that at the material time the two parcels had not been amalgamated to form the whole or larger parcel.

[13] The appellants contend that this finding by the Board is unreasonable, plainly wrong and against the weight of the evidence, including the evidence of the witnesses for both the appellants and the respondent. They contend that the Board's finding is contrary to the 2001 Atkins Report which treated the two parcels of land as one and that it is also contrary to the principle of aggregation as defined in the International Valuation Standards (IVS). They contend that the respondent's valuation expert, Mr. Childs, violated and/or breached and/or ignored the Land Compensation Manual (LCM) in his report and as a result his evidence on valuation is to be discounted completely.

[14] In response to this challenge of the Board's decision, the respondent contends that the Board considered and rejected the appellants' argument that the land compulsorily acquired must be valued as though it was part of a larger area of 370 acres and that the Board's factual findings were rational and in accordance with the evidence. The respondent also contends that the appellants' reference to Mr. Childs' evidence is not a complete or fair representation of what he said and that his report and his answers in cross examination made clear that he understood it to be

his duty to value the 10 acres in accordance with section 18(2) of the Act. The respondent also contends that there is nothing in the Atkins Report which supports the appellants' contention that the land acquired should be valued as though it were part of a larger parcel, and that the appellants have misunderstood the status and contents of the three publications to which they made frequent references, namely, 'the Land Compensation Manual', 'the International Valuation Standards' and 'the RICS Valuation – Professional Standards', none of which have the legal status or the applicability to the facts of this case as may have been contended for by the appellants. The respondent further contends that even if the Board had accepted the appellants' submission that the 10 acres were part of a larger parcel of 370 acres, by virtue of section 18(2) of the Act it would not have been correct to value the 10 acres as part of the larger parcel.

[15] The finding by the Board that parcels 100 and 126 were not fused or amalgamated to form a single parcel of land was a factual finding made by the Board. In terms of the treatment of such findings by an appellate court on an appeal from a decision of a Board of Assessment, it was held by the Judicial Committee of the Privy Council in the case of Mon Tresor and Mon Desert Limited v Ministry of Housing and Lands and another,[4] that:

> "Such appeals are governed by the principles laid down by the House of Lords in Benmax v Austin Motor Co Ltd [1955] AC 370, [1955] 1 All ER 326, 72 RPC 39. 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."

[4] [2008] UKPC 31.

[16] There was ample evidence before the Board on the basis of which it could make the finding that it did that parcel 100 and parcel 126 were not fused or amalgamated. The heavy reliance placed by the appellants on the fact that the two parcels of land were collectively referred to as 'Forest Estate' and were known to be owned by the Lake family is not justified and does not in any event have any probative value in establishing fusion or amalgamation. The fact is that there are several tracts of land referred to collectively as a named estate (for instance, Cap Estate in Saint Lucia) which consist of separate parcels of land contiguous with each other, originally under common ownership but which may now have separate owners, which would not be considered as being fused or amalgamated. The fact that in the present case the two parcels of land are not in fact contiguous (because they are separated by a public road) and that they were not at the material time owned by the same person (even if the owners are blood relatives of each other) was more than sufficient to justify the finding by the Board that parcels 100 and 126 were not fused or amalgamated. Indeed, the fact that they may previously have been under the common ownership of Dame Bernice's father, George Edwardo Lake, or some other ancestor, and are now separately owned by Dame Bernice in respect of parcel 100 and by various members of the Lake family, including Dame Bernice, in respect of parcel 126 would indicate that the two parcels of land have been disjoined, if they had previously been joined to each other, and were not therefore fused or amalgamated at any material time.

[17] The respondent's submission that, based on section 18(2) of the Act, the Board could not in any event value the 10 acres as part of a larger parcel containing 370 acres was never specifically addressed by the Board in its decision. Section 18(2) as amended by the judgment of the Court of Appeal in Attorney General of Anguilla and others v Bernice Lake and others[5] reads as follows:

> "The value of the land shall, subject as hereinafter provided, be taken to be the amount which the land, in its condition at the material time, might be expected to realise if sold at that time in the open market by a willing seller."

[5] Civil Appeal No. 4 of 2004 (delivered 4th April 2005, unreported)

Whether this means that in assessing the value of the acquired land, the Board must not take cognizance of the larger parcel of land from which it was severed in order to create the acquired portion, is certainly open to some debate. I am prepared to postpone this debate, however, to the next issue for consideration and to treat the issue of fusion or amalgamation as being resolved by the factual findings made by the Board that parcels 100 and 126 were not fused or amalgamated.

[18] In the circumstances, I affirm the Board's decision that parcels 100 and 126, being two separate parcels of land separated from each other by a public road and being owned by different members of the Lake family (although Dame Bernice was the sole owner of one parcel and an owner in common with other family members of the other parcel) were not fused or amalgamated. My response therefore to the question posed as the first issue to be determined by this appeal is that the two parcels of land numbered 100 and 126 did not constitute a fused parcel of land under the ownership and control of one family unit and were in fact two separate and distinct parcels of land owned by different members of the Lake family.

Should the acquired land be assessed on a stand-alone basis

[19] As to the second issue, the Board found that the 10 acres acquired by the Government were to be assessed on a stand-alone basis and not as part of the larger portion of land from which they were severed.

[20] The appellants submit that this finding by the Board was unreasonable and against the weight of the evidence, including the evidence of the witnesses for both the appellants and the respondent. They contend that it goes against the Atkins Report which speaks to a comprehensive development of all the land. They contend that the Board should have found that the respondent's expert, Mr. Childs, was not permitted under the IVS or the RICS principles and standards to value the 10 acres on a stand-alone basis and should have rejected his report in its entirety. They contend that Board did not have regard to the case of Hamilton v Minister of Lands,[6] where the Land Valuation

[6] [2012] NZLVT 2.

Tribunal of New Zealand held that "the Tribunal is satisfied that the correct approach is to determine the value of the property on the 'before and after' basis valued to its highest and best use".

[21] The appellants submit that the approach taken by the Tribunal in Hamilton is the approach that was used by Mr. Glean in his evaluation and that Mr. Childs acted in violation of the valuation standards and principles when he failed to undertake a valuation of the larger parcel before acquisition in order to determine the unit value of the lands acquired. They contend that Mr. Glean's procedures and methodologies were in compliance with the Atkins Report and the IVS and the RICS standards and as such this was the only expert report, valuation or evidence that the Board could have relied on, and that his valuations should have guided the assessment outcome. They contend too that the stand-alone method that Mr. Childs applied in his valuation is also contrary to the evidence of the witnesses in relation to the principle of aggregation.

[22] In response to the stand-alone assessment issue, the respondent submits that the Board's finding that the 10 acres acquired by Government could be assessed on a stand-alone basis was correct and that it is on this basis that compensation should be addressed is in accordance with section 18(2) of the Act, which required that the 10 acres acquired by Government be valued on a stand-alone basis. The respondent hinged this argument on the following words contained in the section - 'the amount which the land, in its condition at the material time, might be expected to realise', on the basis of which the respondent submitted that it would not have been lawful to assess the value of the 10 acres on any other basis and, in particular, it would not have been lawful to assess its value as part of the larger parcel. The respondent submits that there is nothing in either the IVS or the RICS valuation standards which justifies a departure from section 18(2) of the Act and that the New Zealand case of Hamilton does not support the appellants' contention because the tribunal in that case was not called upon to determine whether the 'before and after' approach was correct in that jurisdiction. The respondent instead relies on the English case of Abbey

Homesteads Group Ltd v Secretary of State for Transport[7] in support of the view that the 'before and after' approach is wrong in law and that the value of land should be assessed separately from the diminution in value of the retained land.

[23] There is no dispute that 'the material time' refers to the date of the second publication of the notice of acquisition in the Gazette. There is no dispute that the date of that publication is 28th November 2003 which, by law, is the date of acquisition of the 10 acres. There is also no dispute that at that date the 10 acres acquired was part of the 26 acres of land acquired in November 2003, but that by agreement dated 28th March 2008 the parties agreed to the return of 16 of the 26 acres to Dame Bernice and to proceed with the assessment of compensation 'on the basis that the acquisition of the 10 acres of land is substituted for the acquisition of the 26 acres of the said land'. If therefore one abides by the interpretation given by the respondent to section 18(2) of the Act it would mean that, in the valuation of the 10 acres of land acquired by the Government from Dame Bernice, no account will be taken of the fact that those 10 acres were severed by Government from a 110 acre parcel of land and that its value as part of the 110 acre parcel may have been greater in price per acre than would be the case if assessed as a stand-alone 10 acre parcel of land.

[24] I have two major problems with this line of argument. The first is that the parties made submissions and the Board adjudicated on the question of whether the 10 acres acquired by the Government should be treated as being derived from a larger parcel combining parcels 100 and 126 or whether the fusion or amalgamation argument should be rejected and the 10 acres treated as being derived only from parcel 100. The Board resolved this issue in the respondent's favour by determining that the 10 acres were derived from a larger parcel of 110 acres and not from the combined parcels together containing 370 acres, and in paragraph 18 of this judgment I upheld the Board's finding on this issue.

[7] (1982) 263 EG 983.

[25] My second problem with this line of argument is that the finding by the Board that the 10 acres acquired should be valued on a stand-alone basis makes nonsense of the fusion and amalgamation principles, or at least disapplies them to Anguilla or to any other country which has a provision equivalent to section 18(2) of the Act, because whether derived from a single parcel of land or from two or more fused or amalgamated parcels, the valuation of the acquired portion of land would proceed on the basis of the amount which it will fetch on the open market at the moment when it was formally acquired, irrespective of whether it was an entire parcel of land at the time of the first publication serving notice of an intention to acquire it or was severed from a larger parcel at the time of the second publication serving notice of its acquisition.

[26] This could not have been the legislative intent when section 18(2) of the Act was enacted into law by the Parliament of Anguilla. In my view, the legislative intent is very clear, that in the valuation of compulsorily-acquired land for the purpose of compensation, the valuer should not be influenced by conditions which did not exist at the time of the acquisition of the land. So that, for instance, if post-acquisition the value of the land was to plummet because of a change of use of the property located next to it, this ought to have no impact on the assessed value of the land on the date of acquisition. The construction which I give to section 18(2), therefore, is that it requires that the valuation of the acquired land be undertaken on the basis of the open market value of the land at the time of its acquisition, and not at an earlier or later time. Section 18(2) cannot, in my view, be construed to mean that in undertaking the valuation no regard should be had to the fact that the acquired land is but a severed part of a larger piece of land, from which larger piece it acquired its value.

[27] The Board made the finding at paragraph 74 of its decision, correctly in my view, that the 10 acres that were acquired were part of a larger parcel of land owned by Dame Bernice, which larger parcel is parcel 100, rather than the combined parcels 100 and 126. The Board then made the finding at paragraph 82 of its decision, incorrectly in my view, that compensation should be assessed on the footing that the 10 acres

would be assessed on a stand-alone basis, that is, with no regard to the fact that it was a part of a larger parcel of land from which it was severed by the Government for the purpose of acquiring it.

[28] The question then becomes - if the stand-alone method is not to be applied, what method ought therefore to be used in assessing the value of the acquired land?

[29] The valuer's task, as I see it, is to assess the open market value of the land at the material time, keeping in view that the acquired land is a severed portion of a larger piece of land from which larger piece it derives its value. This will, in my view, be achieved in this case by the application of the 'before and after' method of land valuation.

The before and after method of valuation

[30] I have not been able to find cases from our Court, or even from the larger jurisdictional space of the Commonwealth Caribbean, applying or disapplying the 'before and after' method of valuation of land, but the method has been used elsewhere in the Commonwealth to assess the compensation to be paid by Government to a landowner for land compulsorily acquired from him by the Government. A good starting point in looking at this method of valuation is the New Zealand case of Hamilton v Minister of Lands, which was referred to by both sides in their submissions before this Court.

[31] In Hamilton, the Land Valuation Tribunal of New Zealand had to determine the quantum of compensation to be paid to property owners for the property acquired from them by the Government for a public purpose. The Tribunal concluded its analysis of the claims and submissions of both sides to the dispute with the following statement of principle (quoted in part earlier from the submission of the appellants):

> "Having considered the valuation evidence presented by the valuers the Tribunal is satisfied that the correct approach is to determine the value of this property on the 'before and after' basis valued to its highest and best use he [sic] reflecting its potential for possible comprehensive redevelopment."

[32] I will return in due course to the dispute over the 'highest and best use', but I am dealing at this juncture only with the 'before and after' method.

[33] In their submissions on appeal, the appellants relied on the Hamilton case as an authority for their contention that their valuation expert, Mr. Carlyle Glean, was correct in using the 'before and after' method in his valuation of the acquired land and that the respondent's valuation expert, Mr. Edward Childs, was wrong to have used the stand-alone method.

[34] In their submissions in response, the respondent argues that, because both parties to the dispute in Hamilton agreed on the use of the 'before and after' method, the Tribunal was not called upon to determine whether that method was correct, and that in Abbey Homesteads Group Ltd the Lands Tribunal in England held that the 'before and after' approach is wrong in law and that the value of land should be assessed separately from the diminution in value of the retained land.

[35] The respondent may be correct in its submission that the Land Valuation Tribunal in the Hamilton case was not called upon to determine whether the 'before and after' approach was the correct one to be used for the valuation of acquired lands, because the parties had agreed to that approach. But the Tribunal did not just use the 'before and after' approach on the basis that the parties had agreed to its use. Instead, the Tribunal proceeded to make a clear statement that it was 'satisfied that the correct approach is to determine the value of the property on the before and after basis'. The respondent may also be correct in its submission that adverse comment was made in the Abbey Homesteads Group Ltd case in England about the correctness of the 'before and after' approach to land valuation, but it should be noted that this was a decision also made by a land tribunal and it preceded the decision of the New Zealand Tribunal by thirty years. More significantly, though, the respondent in its submissions misstated the actual words used by the Tribunal in Abbey Homesteads Group Ltd and may have, no doubt unintentionally, misrepresented the position of the English Tribunal. What the Tribunal did say in the course of its decision is that an examination

of certain provisions of the UK Acquisition of Land (Assessment of Compensation) Act 1919, and observations made *per curiam* in the English Court of Appeal in the case of Hoveringham Gravels v Chiltern District Council[8] 'all lead to the conclusion that land acquired must be valued for the purposes of compensation separately from other land retained by the owner'. The Tribunal went on to say that: 'It follows that in the present case, Mr. Westoby's valuation 2 and the district valuer's valuation are based on a wrong principle.'

[36] This holding by the Lands Tribunal in England did no more than to say that on the very complex and intricate facts of the particular assessment exercise before the Tribunal in that case, the 'before and after' approach used by a valuer to value together both 'land acquired' and 'other land retained by the owner' was wrong and that, for the purpose of assessing compensation, acquired land should be valued separately from other land retained by the former owner of the acquired land. And it is to be noted that the 'other land retained by the owner' does not necessarily mean land from which the acquired portion was severed but may include adjoining or neighbouring land in common ownership with the land acquired.

[37] I accept and adopt the statement of principle by the Land Valuation Tribunal in New Zealand in Hamilton and would approve and apply it in the valuation of acquired land severed from an existing piece, portion or parcel of land.

[38] Although neither the parties nor the Board of Assessment in the instant case made mention of it, the 'before and after' method of valuation had also been given expression by the Court of Appeal in New South Wales, Australia in the case of Roads and Traffic Authority of New South Wales v JL & MM Muir Properties Pty Ltd,[9] where Tobias JA stated:

> "It is often the case that when only part of a dispossessed owner's land is compulsorily acquired, a 'before' and 'after' valuation exercise of the whole of that owner's land is conducted. In other words, the market value of the

[8] (1977) 35 P & C R 295
[9] [2005] NSWCA 460.

> land before acquisition is determined (including the acquired land) as is its value after acquisition (excluding the acquired land). In this way the difference between the two values determines not only the market value of the acquired land but also captures any injurious affection to the retained land by reason of the acquisition for the public purpose. This approach will also, in an appropriate case, capture any loss due to severance of the dispossessed owner's land by that acquisition."

[39] In the absence of any local or regional authorities on the choice of a method of valuation to be employed in the valuation of a portion of land acquired by Government from a larger piece of privately-owned land, I regard the two Commonwealth cases of Hamilton v Minister of Lands, decided in New Zealand in 2012, and Roads and Traffic Authority of New South Wales v JL & MM Muir Properties Pty Ltd, decided in Australia in 2005, as sufficient to fill the gap and to validate the use by the appellants' valuation expert, Mr. Glean, of the 'before and after' method of valuation of the 10 acres of land acquired by the Government of Anguilla from Dame Bernice.

[40] I take the view therefore that the Board was wrong in applying the stand-alone method of valuation of the acquired land used by the respondent's expert, Mr. Childs, and ought instead to have applied the 'before and after' method of valuation used by the appellants' expert, Mr. Glean. My response, therefore, to the two-part question posed as the second issue to be determined in this appeal is that the 10 acres of land acquired by Government were to be assessed as part of the larger portion of land from which they were derived and the method of valuation which should be used to value the 10 acres is the 'before and after' method of valuation.

Highest and best use

[41] As to the third issue, the Board found that the highest and best use of the 10 acres of land acquired by the Government was residential development (as stated by the respondent's expert, Mr. Childs) and not coastal land development (as stated by the appellants' expert, Mr. Glean).

[42] The appellants contend that this finding is unreasonable and against the weight of the evidence. They contend that it is not buttressed by any critical examination of the

evidence of the appellants' expert, Mr. Carlyle Glean, concerning the physical characteristics of the land and that the highest and best use of the acquired land was coastal land development consistent with the National Land Use Policy of Anguilla and the 9 factors for determining highest and best use. They contend that it is not buttressed by any critical examination of the Atkins Report which supports the evidence of Mr. Glean concerning the physical characteristics of the land and which found that the highest and best use of the acquired land was the same as the highest and best use found by Mr. Glean, and which corresponds with the evidence of George Lake as to the type and scope of the Lake family project and actual sales that occurred within the project.

[43] The appellants argue that the Board was wrong in commenting that it 'stretches common sense' to hold the highest and best use of the 10 acres of acquired land was that of coastal lands. The appellants contend that it was never suggested to the Board that the 10 acres were coastal lands; what was stated by the appellants in their submissions to the Board was that the 10 acres were part of a larger parcel that had as its significant characteristics – coastal area, beach front area and notable hills. They contend that Mr. Glean described and gave analysis of highest and best use and, based on this, he concluded that the lands before acquisition had a highest and best use of a five-star luxury resort and that the 10 acres had the same highest and best use. They contend that the Board's 'stretches common sense' comment should disqualify their decision since they took into consideration what they consider to be common sense as opposed to relying on the LCM, the IVS, case law and statutes in coming to their decision. This, the appellants contend, contravenes the principles set out in the case of Attorney General v HMB Holdings Ltd[10] and coincides with comments made by Board Member, Ms. Stair, at the end of Mr. Glean's evidence, when she said that she did not know what to do with his valuation.

[44] In their submissions in response, the respondent contends that the Board's 'stretches common sense' comment and conclusion were amply supported by the evidence.

[10] [2014] UKPC 5.

They contend that the appellants' criticisms of the conclusion flow from the appellants' erroneous contention that the 10 acres should have been valued as part of the 370 acres. The respondent contends also that the Board recognised (correctly) that by valuing the 10 acres as part of the 370 acres and by applying the same price per acre uniformly to each of the 370 acres derived from sales transactions of coastal lands, the appellants' expert was implicitly valuing the 10 acres as having the same characteristics as coastal lands. The respondent further contends that the Board was entitled to use common sense to assist in determining whether or not to accept Mr. Glean's expert opinion that the 10 acres were coastal lands, especially having regard to the proximity of the airport and the distance from the coast. The respondent contends too that Ms. Stair's comment that she did not know what to do with Mr. Glean's valuation was in the context of her pointing out to Mr. Glean that what had to be valued was the 10 acres acquired, whereas Mr. Glean continued to insist that the 10 acres should be valued as part of the entire 370 acres.

[45] Dealing first with the appellants' challenge to the decision of the Board based on the 'stretch[ing] common sense' comment, I find it to be 'much ado about nothing'. The Board was simply pointing out by this comment that the appellants' attempt to value 10 acres of land in proximity to the airport and a distance away from the coast as coastal lands by treating it as part of a larger parcel containing coastal lands and applying the same price per acre uniformly to each of the 370 acres was not credible. The Board also pointed out in the very same sentence (at the beginning of paragraph 77 of its decision) that the appellants' position was not consistent with the facts before the Board.

[46] The appellants' attempt to call in aid the decision of the Privy Council in Attorney General v HMB Holdings Ltd. does not avail them. There is nothing in the judgment of the Privy Council in HMB Holdings Ltd. which would vitiate the decision of the Board because it referred to an argument advanced by the appellants as 'stretch[ing] common sense'. Yes, the Privy Council did say, at paragraph 12 of its judgment,[11]

[11] Referred to in error in the appellants' submissions as page 12, instead of paragraph 12.

that 'the valuation process requires the application of a valuer's expertise to [a suggested value], to adjust and assess as appropriate, before they can yield a valuation of the subject site', but this does not mean that – faced with competing expert valuations – the Board cannot refer to an approach taken by one of the experts in arriving at his suggested value as 'stretch[ing] common sense'.

[47] Relegating the Board's 'stretch[ing] common sense' comment to no more than a choice of words (probably not the most elegant one) in making a determination which the Board was entitled to make, the real issue arising from paragraph 77 of the Board's decision is whether the Board was correct in concluding its analysis made from paragraph 77 down to paragraph 82 with a finding that the highest and best use of the acquired land was 'residential development consistent with the transition zones operating at the airport'.

[48] Both sides are agreed that the valuation of the acquired land must be based on the highest and best use of the land. They disagreed however on the method of valuation to be used, that is, whether it should be a stand-alone method or a 'before and after' method. I have resolved this aspect of the dispute in favour of the appellants and concluded that the appropriate method of valuing a portion of land severed from a larger portion for the purpose of acquiring the severed portion is the 'before and after' method. The parties had also disagreed on the size of the larger portion from which the acquired portion was severed. I resolved this aspect of the dispute in favour of the respondents and concluded that the larger portion is parcel 100 comprising 110 acres and not the combination of parcels 100 and 126 comprising 370 acres. What remains disputed is the application of the highest and best use formula to the 110 acres from which the 10 acres were severed.

[49] As happened when I was dealing with the 'before and after' method of valuation, I have not been able to find cases from our courts in the region on the application of the highest and best use formula in assessing compensation for compulsorily acquired land. A reading of cases in the Commonwealth outside of the Caribbean, and from

publications referenced in some of the cases and sourced from internet searches, suggest that the highest and best use of a portion of land is the use of the property which is most profitable to its owner and which use is legally permissible, physically possible and financially feasible.

[50] Having regard to the prior determination that the 10 acres of land must be assessed as part of parcel 100 from which it was severed, it follows that the highest and best use formula must be applied to parcel 100 in its before condition (containing 110 acres) and in its after condition (containing 100 acres). The question then becomes what is the most profitable use to which the land could be put that is legally permissible, physically possible and financially feasible.

[51] Once it is accepted that the land being valued is the entire parcel 100 as it was before a portion of it was compulsorily acquired and that, although there are parts of the land which are proximate to the airport runway, there are also parts of it which are coastal lands, I do not believe that it could be seriously disputed that the land was suitable for tourism development, including high-end tourism development, and not just local residential development. The highest and best use therefore of parcel 100 is mixed residential and high-end tourism development. The task of valuing the land though remains.

[52] It has not been disputed that the 110 acres of land from which the acquired land was severed contained both coastal lands and land near the airport runway. The appellants' expert valued the land using land sales of coastal lands as his comparables on the basis that the 370 acres which he treated the 10 acres as being part of were coastal lands suitable for five-star hotel development and with the same value for the land from the coastline to the airport runway extension. The respondent's valuation expert on the other hand valued the land using land sales of residential lands as his comparables on the basis that the 10 acres of land standing on their own could at best be used for local residential development.

[53] As it stands, this Court does not have before it any values for lands with the mixed characteristics of coastal lands suitable for five-star hotel development and lands bordering or proximate to the runway of the island's lone airport, which lands are at best suitable for local residential development. Had a decade and a half not elapsed between the acquisition of the land and the assessment of its value, I would have been minded to remit the matter to a Board of Assessment to commission a valuation by an agreed expert on what the likely value of parcel 100 was before and after the severance of the 10 acres from it. But, given the passage of time and the significant changes in the economic situation in Anguilla between 'then and now', we may end up with a very speculative assessment of the value of the highest and best use of the acquired land determined in accordance with the 'before and after' method of assessment. The valuations that we now have from the two hardly-independent valuation experts may be the best that is available to do the assessment that the Board ought to have done of the highest and best use of 10 acres of land forming part of a 110 acre parcel of land from which parcel the 10 acres were severed.

[54] In my search for the fairest and most appropriate way to undertake the re-assessment of the compensation payable to Dame Bernice for the compulsory acquisition of the 10 acres of land from her by the Government of Anguilla, I thought it best to marry the two valuations (from Messrs Glean and Childs) and then adopt their resulting progeny as the legitimate assessment of the value of the acquired land.

[55] I will accept the comparables used by Mr. Glean as being representative of the value of that part of parcel 100 near the coast and the comparables used by Mr. Childs as representative of the value of that part of parcel 100 near the runway. As one moves away from the coast and towards the runway, the land lessens in value, moving away from Mr. Glean's valuation towards Mr. Child's valuation, and vice versa. To use the phrase criticised by the appellants, it would be 'stretch[ing] common sense' to attempt to equate the value of a part of the land close to the airport runway to the value of a part of it alongside the beach. The absurdity of such an equation can be manifested by a simple scenario. If one takes two fairly large contiguous parcels of land, one

bordered on the non-contiguous side by a beach and the other by a slum, the parcel of land by the beach may be valued at $500 per square foot, whilst the parcel by the slum may be valued at $5 per square foot. If land takes its value from its most valuable side, then the owner of the land on the beach side need merely acquire the land from the owner of the land on the slum side and adjoin it to his existing land, which immediately transforms the $5 per square foot land into $500 per square foot in keeping with the value of its most valuable side.

[56] Returning to the marriage of the two valuations of parcel 100 from which the 10 acres were severed, one being US$5,000 per acre of local residential land and the other being US$1,310,000 per acre of coastal lands, their likely offspring is US$657,500 per acre of land of mixed characteristics suitable for both five-star hotel development and local residential development. Applying this averaged valuation to the 110 acres of land which parcel 100 contained, the resulting before valuation is US$72,325,000, the after valuation (ignoring provision for injurious affection) is US$65,750,000, and the valuation of the 10 acres acquired by Government is US$6,575,000. I will therefore, respond to the question posed as the third issue for consideration in this appeal by stating that the highest and best use of parcel 100 is mixed residential and high-end tourism development.

Injurious affection

[57] The fourth issue to be determined in this appeal is whether an award should be made for injurious affection of the remaining land of the landowner, that is, the portion of Dame Bernice's land not acquired by Government and, if so, in what amount. The Board did make an award of US$550,000 for injurious affection of the remaining 100 acres of parcel 100 after the severance of the 10 acres. The appellants appealed against this award on the basis of the insufficiency of the amount awarded, the extent of the injurious affection accepted by the Board and the fact that no award was made for injurious affection of parcel 126.

[58] Injurious affection has been variously defined, but the problem with most of the definitions (as far as their application to Anguilla is concerned) is that they are based on specific legislative provisions which do not exist in Anguilla. Freed from its legislative constriction and fitted into the context of the case at bar, I would define injurious affection as the diminution in the value of the remaining land of a landowner resulting from the compulsory acquisition of a portion of the land from which the remainder was derived.

[59] There are cases in which it has been opined that no compensation should be paid for injurious affection where compensation to the landowner has been determined on the 'before and after' method of assessment, because the diminution in the value of the remaining land would have been factored into the after acquisition valuation of the affected land. When one factors in, however, the fact that it is provided in applicable legislation, including the Anguilla Act, in accordance with the interpretation I have accorded to section 18(2) of the Act, that in the valuation of the land no account should be taken of conditions which did not exist at the date of the compulsory acquisition, it means that the adverse effect on the value of the affected land arising from the purpose for which the land was acquired would not be compensated. Indeed, this is given clear expression in what has come to be known as the '*Pointe Gourde* principle', derived from the case of Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands.[12] In that case out of Trinidad and Tobago, the Privy Council held that in valuing compulsorily acquired land there must be disregarded any increase or decrease in its value which is due to the scheme for which the land was acquired.

[60] What all of this amounts to is that compensation for injurious affection only arises when a piece of land is compulsorily acquired from a larger portion of a person's land and the acquired land is intended to be or is actually used for a scheme or project which adversely affects the value of the remainder of the person's land. On the facts of the present case, the Estate of Dame Bernice Lake is entitled to be compensated

[12] [1947] AC 565.

for any diminution in the value of the 100 acres of land retained by Dame Bernice after the acquisition of 10 acres by the Government. This compensation, over and above the value of the land acquired, is compensation for injurious affection.

[61] Before delving into the quantum of the compensation which should be awarded for injurious affection in this case, reference should be made to the Australian case of Roads and Traffic Authority of New South Wales v JL & MM Muir Properties Pty Limited which casts doubt on whether compensation should be awarded for injurious affection when compensation has been awarded for the land acquired in accordance with the 'before and after' method of valuing acquired property. In giving judgment in the New South Wales Court of Appeal, Tobias JA stated:

> "It is often the case that when only part of a dispossessed owner's land is compulsorily acquired, a '*before'* and '*after'* valuation exercise of the whole of the owner's land is conducted. In other words, the market value of the land before acquisition is determined (including the acquired land) as is its value after acquisition (excluding the acquired land). In this way the difference between the two values determines not only the market value of the acquired land but also captures any injurious affection to the retained land by reason of the acquisition for the public purpose."

[62] Tobias JA also stated that:

> "In proceeding according to that approach there has never been any doubt that the *Pointe Gourde* principle is applied in the '*before'* valuation exercise. In other words, the '*before'* value is determined on the basis of disregarding any decrease in the value of the land arising out of the purpose of the compulsory acquisition and any steps in the scheme leading to that acquisition. It is only in the '*after'* value that any decrease by reason of the proposed implementation of the public purpose for which the resumed land was compulsorily acquired is taken into account."

[63] The apparent tension between an award of compensation for a portion of land severed from a larger piece of land on the 'before and after' method of valuation and an award of compensation for injurious affection of the retained portion of the land is resolved by the manner in which the 'before and after' method of valuation and the *Pointe Gourde* principle are applied. If the *Pointe Gourde* principle is applied only to the 'before' assessment, and the 'after' assessment factors in the diminution in the value of the retained land, then there is no room for compensation for injurious affection of the

retained land. But, if the *Pointe Gourde* principle is applied to the entire 'before and after' valuation of the subject land and/or the 'after' valuation does not take into account any decrease in the valuation of the subject land directly arising from the use of the land for the purpose for which it was acquired, then compensation should be awarded for injurious affection in addition to the compensation awarded for the acquired land valued on the basis of the 'before and after' method of valuation.

[64] In the case at bar, I have used the 'before and after' method of valuation and I have applied the *Pointe Gourde* principle, the application of which I believe is in any event mandated by section 18(2) of the Act. This then reinforces the conclusion I arrived at in paragraph 60 of this judgment, that compensation is payable to the Estate of Dame Bernice Lake for injurious affection to the remaining 100 acres of parcel 100 after the severance of the 10-acre portion of parcel 100 acquired by the Government. I return then to the determination of the quantum of the compensation payable to the Estate of Dame Bernice Lake for injurious affection of the retained land.

[65] The parties appear to have agreed that 42 acres out of the remaining 100 acres of parcel 100 will be injuriously affected by the overall scheme for which the land was acquired, that is, the extension of the runway of the former Wallblake Airport, now renamed the Clayton J. Lloyd International Airport. Where the parties disagree though is on the extent of the injurious affection and on the quantum of the compensation payable therefore.

[66] The appellants claim that 42 acres out of the remaining 100 acres of parcel 100 were no longer usable as building land or, as it was put by the appellants' expert, Mr. Glean, they were 'completely no build'; whilst the respondent's expert, Mr. Childs, claimed that 20 of the 42 acres had lost 50% of their value as a result of the extension of the runway and 22 acres had lost 25% of their value. After its review of the evidence led by the parties and, in particular, the evidence of Mr. Glean and Mr. Childs, the Board concluded that, in respect of the evidence of Mr. Glean, '[w]e are not convinced that the evidence before the Board supports the position taken by Mr. Glean on injurious

affection' and, in respect of the evidence of Mr. Childs, that '[t]he Board finds the evidence of Mr. Childs more credible and reliable'. This was a factual finding made by the Board on the evidence before it, and I can find no basis for this Court to overrule it.

[67] In terms of the actual amount of the compensation to be paid for injurious affection of the 42 acres of land, the amount assessed by the Board was based on its assessment of the value of the land contained in parcel 100, which value was itself based on an erroneous application of the stand-alone method of valuation, leading to an incorrect assessment of highest and best use. On the re-assessed value of the affected land, 20 acres is valued at US$13,150,000, and so 50% of that value is US$6,575,000; 22 acres is valued at US$14,465,000, and so 25% of that value is US$3,616,250. The total amount payable, therefore, to the Estate of Dame Bernice Lake for injurious affection of the 100 acres of land retained by her is US$10,191,250 (US$6,575,000 + US$3,616,250).

[68] The Board decided that no compensation is payable to Dame Bernice for injurious affection of any land contained in parcel 126, because she was not the owner of parcel 126 at any material time and no part of parcel 126 was acquired by the Government so as to qualify it for compensation for injurious affection. I find that this decision of the Board is unimpeachable.

[69] My response to the question posed as the fourth issue to be determined in this appeal is that the Estate of Dame Bernice Lake must be compensated for injurious affection of the portion of parcel 100 not acquired by the Government and that the amount payable to the estate by way of compensation for injurious affection is US$10,191,250.

Compensation for the 16 acres returned by Government

[70] As to the fifth issue to be determined, in terms of compensation for the acquisition by the Government of the other 16 acres of land (26 less 10) and their retention of it for 4 years and 4 months, between 28th November 2003 (when it was acquired by the Government) and 28th March 2008 (when it was returned to Dame Bernice) the Board

made an award of compensation to Dame Bernice in the sum of $210,000. The Board based its assessment on the report of the respondent's valuation expert, Mr. Childs, in which he assessed compensation by using a rental value of the land equivalent to 5% of its market value for a 3 year period, with a 15% increase in the rental after the third year of the lease. Using the value of $50,000 per acre, which he had assessed as the value of the land acquired, he then took 5% of the land value for each of 3 years and then 5.75% (a 15% increase) of its value for 2 years. Thus it was he arrived at his $210,000 assessment.

[71] The formula used for assessing the value of the 16 acres of returned land appears to me to be somewhat generous to Dame Bernice; it will pay off the full value of the land in well under 20 years; but it was proposed by the Government's valuation expert and no alternative formula was proposed by the appellant's valuation expert, who appeared to be satisfied that the loss occasioned by Dame Bernice's near 5 year dispossession of the 16 acres of land will be picked up in the compensation award for injurious affection, which will not exclude the 16 acres returned. This notwithstanding, I will apply the only formula presented to the Board, and which formula was accepted by the Board, for valuation of the temporary dispossession of Dame Bernice of 16 acres of her land for 4 years and 4 months.

[72] The value of 16 acres of the subject land is US$10,520,000; the rental value calculated at 5% of the market value, is $526,000; 3 years rental at that rate is US$1,578,000; the rental value calculated at 5.75% of the market value, is US$604,900; 1 year and 4 months rental at that rate is US$806,533.33. The compensation payable by Government for the 4 years and 4 months dispossession of Dame Bernice of the 16 acres of land is US$2,384,533.33.

[73] My response to the question posed as the fifth issue for determination in this appeal is that compensation ought to be awarded to the Estate of Dame Bernice Lake for having been dispossessed for 4 years and 4 months of 16 acres of her land and that the amount payable to the Estate in this regard is US$2,384,533.33.

Compensation to second appellant

[74] As to issue number 6, in paragraph 119 of its decision the Board found that no compensation was payable to the second appellant, Conch Bay Development Limited, because it had not shown how its land was affected by the acquisition of the 10 acres of land and, at the date of the acquisition, the second appellant did not own any land and was not even in existence, having been formed in May 2008 as a special purpose investment vehicle to which most of the remainder of 'Forest Estate' was transferred by its owners.

[75] This finding by the Board was challenged by the appellants, although with hardly any fervour; the appellants merely stating (at paragraph 2.11 of their skeleton arguments) that the second appellant is the owner of lands in parcel 100 and parcel 120[13] and that the appellants rely on the rules as they relate to aggregation and the evidence supporting it.

[76] This submission or statement by the appellants in their skeleton arguments challenging the Board's finding, does nothing to counter the finding made by the Board that no compensation is payable to the second appellant for acquisition of land by Government from Dame Bernice. The fact is that the second appellant did not at any material time own any land which was in whole or in part acquired by the Government of Anguilla and, indeed, the company did not even exist at the time of the acquisition of the land or the claim for compensation for its acquisition. By the time Conch Bay Development Limited was established, Dame Bernice had already entered into an agreement with the Government towards settlement of the compensation issue and a payment of US$3,000,000.00 had already been made to Dame Bernice towards payment of the compensation for the land acquired. That at some time thereafter Dame Bernice transferred all or part of the remainder of her land in parcel 100 to the second appellant, might give a right to the second appellant to claim from the Estate of Dame Bernice Lake a share in the compensation received from the Government, but does not entitle the second appellant to be compensated by the Government in

[13] Probably referring to parcel 126.

addition to or instead of the Estate of Dame Bernice Lake for the land acquired by the Government from Dame Bernice.

[77] The position of the second appellant with respect to its claim for injurious affection is no different. It is certainly the case that they could not be entitled to compensation for injurious affection of any part of parcel 100 because, as stated in the preceding paragraph, they were not owners of parcel 100 or any part of it at any material time.

[78] With respect to parcel 126, the second appellant may only be entitled to compensation from the Government for injurious affection of its land if a claim is made by the second appellant under section 23 of the Act for injurious affection resulting from the erection or construction by the Government on compulsorily acquired land of any works in respect of which the land was compulsorily acquired.

[79] Section 23 of the Act reads as follows:

> "A person interested in any land which, without any portion thereof being compulsorily acquired, has been injuriously affected by the erection or construction on land compulsorily acquired of any works in respect of which the land was acquired, shall be entitled to compensation in respect of such injurious affection, but compensation shall not be payable under this section in respect of any injurious affection which, if caused by a private person, would not render such person liable to an action."

In this case, the assessment undertaken by the Board did not involve any claim by the second appellant for compensation under section 23 of the Act, nor was there any such claim before this Court.

[80] My response to the question posed as the sixth issue for consideration in this appeal is that, with respect to the claim before this Court, the second appellant is not entitled to any compensation from the respondent. The second appellant, having been unsuccessful in its claims both here and in the proceedings before the Board, is also not entitled to any costs.

Publications and reports

[81] Before going on to address the issue of the interest to be paid to the Estate of Dame Bernice Lake on the awards of compensation payable to the estate, I think it is necessary for me to mention the fact that in their notice of appeal and submissions on appeal, the appellants made several references to the International Valuation Standards (IVS), the Land Compensation Manual (LCM) and the RICS Valuation Standards. The appellants averred and in some cases Mr. Childs conceded that he had not used, followed or applied the methods and approaches recommended in these industry publications. The appellants' position is that this suffices to discredit and effectively invalidate Mr. Childs' report and evidence. Mr. Childs' position, on the other hand, was essentially that none of these publications binds a valuer as to the methods or approaches to be adopted by him in undertaking valuations and that it all depends on the facts and circumstances of the particular case. The respondent's overall perspective on these 3 publications, as expressed by them in response to the appellants' submissions on fusion of parcels 100 and 126, is that the appellants misunderstood the status and contents of the publications, none of which have the legal status or the applicability to the facts of this case as may be contended for by the appellants.

[82] Having heard the conflicting evidence of Mr. Glean and Mr. Childs on this issue and the overall position and perspective of the parties, the Board preferred the evidence of Mr. Childs and the perspective of the respondent and treated accordingly with the contents of the publications. I can find no basis to fault the Board for doing so.

[83] I should also mention here, as evidently was the position of the Board, that I do not consider that the references back and forth to the Atkins Report assisted in the determination of the issues which had to be addressed and resolved in this case.

Interest on the compensation awards

[84] On the issue of interest on the award of compensation, the Board awarded interest to the Estate of Dame Bernice Lake of 9% per annum on the compensation payable for

the 10 acres acquired from Dame Bernice and for injurious affection to the remainder of parcel 100 at the rate of 9% per annum from 28th November 2003 to 28th March 2008. The Board also awarded interest to the Estate of Dame Bernice Lake at the same rate and for the same period for the compensation payable for the re-vested 16 acres of land originally acquired from Dame Bernice. The appellants did not challenge and indeed could have no issue with the award of interest on the compensation to be paid with respect to the 16 acres of land from 28th November 2003 (when the land was compulsorily acquired) to 28th March 2008 (when the 16 acres were re-vested). They however challenged the award of interest from 28th November 2003 to 28th March 2008 on the compensation payable for the acquisition of the 10 acres of Dame Bernice's land and the injurious affection of the remainder of her land.

[85] The Board, in its 48 page decision, gave no reason for having an end date for the interest awarded on the compensation payable for the acquisition of the 10 acres or the injurious affection of the remainder which is different from the date of the judgment. The end date of 28th March 2008 is appropriate for the interest awarded with respect to the re-vested land, because it was re-vested on that date. There is, however, no connection between that date (28th March 2008) and the compensation payable for the acquisition of the 10 acres severed from parcel 100 and the injurious affection of the remainder of parcel 100. The Board clearly erred when it made the interest award that it did with respect to the compensation awards for the land acquired from Dame Bernice and the injurious affection of the remainder of her land. With respect to issue number seven therefore, the period of time from and to which interest should be awarded is from 28th November 2003 to 28th March 2008 on the compensation payable for Dame Bernice's dispossession of 16 acres of her land during that period, and from 28th November 2003 to 8th April 2016 (when the Board rendered its decision) on the compensation for the compulsory acquisition and injurious affection of her land.

Conclusion

[86] Arising from the determinations which I made on the seven issues identified in paragraph 11 of this judgment for determination in this appeal, I make the following orders:

(1) The award made by the Board of Assessment at paragraph (1) of its order for compensation of US$500,000 to the Estate of Dame Bernice Lake for the 10 acres acquired is set aside and substituted with an award of US$6,575,000 to be paid by the Government of Anguilla to the Estate of Dame Bernice Lake as compensation for the 10 acres of land compulsorily acquired from Dame Bernice by the Government.

(2) The award made by the Board of Assessment at paragraph (2) of its order for compensation of US$550,000 to the Estate of Dame Bernice Lake for injurious affection is set aside and substituted with an award of US$10,191,250 to be paid by the Government of Anguilla to the Estate of Dame Bernice Lake for injurious affection.

(3) The award made by the Board of Assessment at paragraph (3) of its order for interest of 9% from 28th November 2003 to 28th March 2008 on its awards of compensation for the 10 acres acquired and for injurious affection is set aside and substituted with an order that interest be paid to the Estate of Dame Bernice Lake on the awards of compensation for the 10 acres of land acquired from Dame Bernice and for injurious affection at the rate of 9% per annum from 28th November 2003 to the date of the decision of the Board on 8th April 2016.

(4) The award made by the Board of Assessment at paragraph (4) of its order for compensation of US$210,000 for the re-vested 16 acres is set aside and substituted with an award of US$2,384,533.33 to be paid by the Government of Anguilla to the Estate of Dame Bernice

Lake for compensation for the dispossession of Dame Bernice of 16 acres of land from 28th November 2003 to 28th March 2008.

(5) The awards made by the Board of Assessment at paragraphs (5), (6) and (7) of its order are affirmed.

[87] Having regard to the significant difference between the conduct of proceedings before a Board of Assessment for adjudication of a dispute concerning the valuation of compulsorily acquired land and normal proceedings in the High Court, I believe it would be unfair to the respondent to make the usual order of costs to the successful appellant of two-thirds of the amount awarded in the court below. I will accordingly order that costs on this appeal shall be paid by the respondent to the first appellant, and that in assessing the costs to be paid by the respondent to the first appellant for the proceedings before the Board of Assessment, the Registrar of the High Court shall also assess the costs to be paid by the respondent to the first appellant on this appeal, which costs shall not exceed two-thirds of the costs assessed for the proceedings before the Board of Assessment. As was ordered by the Board of Assessment, the second appellant and the respondent shall bear their own costs as between them. In the assessment of the costs of the first appellant, however, both here and in the proceedings before the Board, no account shall be taken of costs incurred in relation to the claim and the appeal by the second appellant.

[88] I extend the Court's thanks to counsel on both sides for their assistance to the Court in the conduct of the appeal and my own apologies to counsel and to the parties for the significant delay in the delivery of this judgment.

I concur.
Louise Esther Blenman
Justice of Appeal

I concur.
Paul Webster, QC
Justice of Appeal [Ag.]

By the Court

Chief Registrar