[2020] JMSC Civ 47

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2015 HCV 02300

IN THE MATTER of an award made on the 15th day of May 2014 by the Commissioner of Lands under and pursuant to Section 11 of the LAND ACQUISITION ACT.

AND

IN THE MATTER of a reference to the Court by the Commissioner of Lands under and pursuant to Section 17 of the LAND ACQUISITION ACT.

AND

IN THE MATTER of all that parcel of land part of Lot 1 of CROSS PEN in the parish of Saint Catherine containing by estimation 8,650.88 square meters and being part of the land comprised in Certificate of Title registered at Volume 1406 Folio 456 of the Register Book of Titles in the names of Cecille Rochester and Vioris Clarke.

BETWEEN	**COMMISSIONER OF LANDS**	**CLAIMANT**
AND	**CECILLE ROCHESTER**	**1ST DEFENDANT**
AND	**VIORIS CLARKE**	**2ND DEFENDANT**

IN OPEN COURT

Ms. Tamara Dickens instructed by the Director of State Proceedings for The Claimant

Ms Carol Davis for the Defendants.

Compulsory Acquisition of land under the Land Acquisition Act - Whether the Offer of Compensation is Adequate - Determination of the True Market Value of the acquired land - Actual loss of Earnings - Whether there should be compensation for injurious affection.

HEARD: 12th & 13th June, 2019, 1st & 19th July, 2019, 25th October, 2019 and 13th March, 2020.

THOMAS, J. (Sitting with Assessors Gordon Langford and Clinton Cunningham)

Introduction

[1] In these proceedings the Commissioner of Lands has filed a Fixed Date Claim Form seeking the Courts determination on the amount of compensation payable to the Defendants, as a result of the compulsory acquisition of lands by the Crown for public purposes pursuant to the Land Acquisition Act (The Act).

[2] On or about April 24th, 2013, a declaration was made by the Honourable Minister Mr. Robert Pickersgill pursuant to section 5(1) of the Act and published in the Jamaica Gazette Extraordinary, also dated April 24th, 2013, No. 16C, that a parcel of land, part of Lot 1 Cross Pen in the parish Saint Catherine, containing, by estimation, 8,650.88 square meters and being part of the land comprised in the Certificate of Title registered at Volume 1406 and Folio 456 of the Register Book of Titles (herein referred to as "the acquired land") was needed for public purpose namely the construction of Highway 2000 Phase 2a. Sometime in the year 2013, the Commissioner of Lands caused the said parcel of land to be inspected and valued by chartered land surveyors and licensed real estate dealers.

[3] On or about the 23rd of December 2013, the Commissioner caused a notice pursuant to section 9 of the Act, to be issued and served on the Defendants, who are the registered proprietors of the Acquired Lands. The notice indicated the Government's intention to acquire the said lands. and invited the Defendants to make claims for compensation. They were invited to attend at an enquiry to address the Commissioner on matters of compensation for the Acquired Land. On January 20th, 2014, the Commissioner held an enquiry for the purpose of arriving at the appropriate compensation for the Acquired Land in accordance with provisions of Section 11 of the Act. The Defendants were present at that enquiry.

[4] The Commissioner of Lands made an offer of compensation to the Defendants in the sum of Four Million Three Hundred and Forty-Six Thousand Eight Hundred and Thirteen Dollars and Ten Cents ($4,346,813.10). The Defendants objected to this offer on several grounds and requested that the matter be referred to the court for determination thereby giving rise to the instant claim.

[5] On or about January 30, 2014, the Claimant was directed by the Honourable Mr. Robert Pickersgill the Minister of Water, Land, Environment and Climate Change, to take possession of the land.

[6] The matter is referred for the court by virtue of Section 17 of the Act. The Commissioner who is the Claimant in this matter seeks a determination by the court, of the amount of compensation payable to the Defendants, Cecille Rochester and Vioris Clarke for the Acquired Land.

The Defence and Counter Claim

[7] The Defendants dispute the amount awarded by the Claimant stating that it does not adequately compensate them for their loss. They do not accept that the award made by the Claimant is "reasonable, fair and proper and represents adequate compensation in all the circumstances, for the Acquired Land in keeping with the provisions of the Act". They say that the market value of the land area taken by the Claimant is $6,800,000.

[8] They further aver that prior to the acquisition of the land they had obtained a subdivision approval for the said land of which they intended to develop and sell lots, and due to the acquisition, the subdivision is no longer viable. They claim compensation for loss of earnings from the subdivision in the sum of $9,000,000. Additionally, they aver that:

> Prior to the acquisition the land was being utilized for the purpose of operating a quarry. As a result of the take, they are no longer able to operate the quarry. They also claim compensation for loss of earnings from the quarry operation in the sum of $29,000,000. Their total claim with respect to the acquisition is $44,800,000.

[9] They also contend that the Claimants have not done all that is required to subdivide the Acquired Land (from the remaining land owned by the Defendants) pursuant to the Act Therefore, their counterclaim also includes rectification of the title registered at Volume 1406 Folio 456 to reflect the removal of the acquired land by the Claimant.

[10] These proceedings commenced with the reading and explanation of the provisions of Section 14 and Section 24 of the Act to assessors as required by the Act and in order for them appreciate their role and function in these proceeding.

The Issue

[11] No issue has been taken in terms of procedure relating to the acquisition of the land in question. The issue surrounds the adequacy of the compensation offered by the commissioner.

The Applicable Law

[12] The relevant provision of the law that I find applicable to the matters in issue is Section 14 of the Act. The Section reads:

"(1) In determining the amount of compensation to be awarded for land acquired under this Act:

(i) the following and no other matters shall be taken into consideration-

(a) the market value at the date of the service of the notice under subsection (3) of section 9;

(b) any increase in the value of the other land of any person interested likely to accrue from the use to which the land acquired will be put;

(c) the damage, if any, sustained by any person interested at the time of the taking possession of the land by the Commissioner by reason of the acquisition injuriously affecting the actual earnings of such person;

(d) the reasonable expenses, if any, incidental to any change of residence or place of business of any person interested which is necessary in consequence of the acquisition.

(ii) The following matters shall not be taken into consideration-

(a) the degree of urgency which has led to the acquisition;

(b) any disinclination of the person interested to part with the land acquired;

(c) any damage sustained by the person interested which, if caused by a private person, would not be a good cause of action;

(d) any damage which is likely to be caused to the land acquired after the date of the publication of the declaration under section 5 by or in consequence of the use to which it has been put;

(e) any increase to the value of the land acquired which is likely to accrue from the use to which it will be put

(f) any outlay additions or improvements to the land acquired, which was incurred after the date of the publication of the notice under section 5, unless such additions or improvements were necessary for the maintenance of any building in a proper state of repair;

(g) the fact that the land has been compulsorily acquired;

(h) whether or not compensation is to be paid in whole or in part by the issue of land bonds in accordance with the provisions of the Land Bonds Ac

(2) For the purposes of sub-paragraph (a) of paragraph (i) of subsection (1)-

(a) ***if the market value of land has been increased by means of any improvement made by the owner or his predecessor in interest within two years immediately preceding the service of the notice under subsection (3) of section 9, such increase shall be disregarded unless it be proved that the improvement was made bona fide and not in contemplation of proceedings for the land being taken under this Act****;*

(b) when the value of land is increased by reason of the use thereof or of any premises thereon in a manner which could be restrained by any court or is contrary to law or is detrimental to the health of the inmates of the premises or to the public health, the amount of that increase shall not be taken into account.

(c) in determining the market value, regard shall be had to any subsisting valuation of the unimproved value of the land pursuant to the Land Valuation Act and all assessments and returns acquiesced in or made in that behalf".

Whether the Compensation for Market Value of the Land is adequate

The Evidence of the Claimant

[13] The evidence of The Commissioner of Lands Ms. Elizabeth Steer is that the acquired land, (that is the area of take) was 8650.88 square meters. This was not challenged by the Defendants. She states that she caused the land to be valued by Breakenridge and Associates. That first valuation report was based on the area of take being determined as 8159.68 square meters. The area was valued at $2,500,000. Ms. Stair further states that the report did not factor in a subdivision approval that was granted for the entire land comprised in the title. In light of that factor a further report was generated by Breakenridge and Associates which adjusted the value to $4,100,000. A further survey plan was prepared by Llewlyn I. Allen and Associates dated the 21st January 2013 to facilitate the extraction of the area of take from the land. The area of take was finally determined to be 8650.88 square meters. She was also further guided by the Land Valuation Report prepared by Hyacinth Picart dated May 28th, 2014.

[14] In essence Ms. Stairs' evidence is that in determining the market value of the area of take she relied on the final valuation of Breakenridge and Associates. However,

she further adjusted that figure upwards to $4, 346,813.10 in light of the survey by Llewelyn l Allen and Associates determining the final measurement of the area of take to be 8650.88 square meters and not 8159.68 square meters.

[15] On cross examination Ms. Stair agrees that the existence of the subdivision approval would increase the value of the land. She agrees that the valuation done by Ms. Picart made no reference to the subdivision approval and that the valuation report of Ms. Picart was 1.2 million dollars higher than the 1st Breakenridge report. She agrees that the valuation of Ms. Breakenridge is low compared to that of Ms Picart.

The Evidence of the Valuation Surveyors

[16] Two valuation reports were provided by Ms Breakenridge on behalf of the Claimant. This includes an initial report and an addendum. In the first report dated the 9th of August 2013 the market value she ascribed to the area of take was $2,500,000. She states that the inspection was conducted on July 23, 2013. Related market research was completed in October 2013. In amplification of the report in her evidence in chief she states that the October 2013 valuation is reflected in the addendum of October 2013. In that report she took into consideration the subdivision approval. The prices of the lots were determined by evidence of similar properties with adjustments. If there were no comparable lots in the same area, lot prices in other areas are adjusted to match the subject. The cost of doing the subdivision, road, water etc. were also taken into consideration.

[17] She gives a description of the area in which the acquired land is located. She states that:

> The roads are asphalted but are badly in need of repairs. Commute is by route taxi which appears to be limited. The subdivision of Cross Pen began in the late 1950s. It has low population and very little development has taken place in the community. Most of the general developments comprise of “Dispersed Owner Built Farm Houses”. A small lower-middle income

> subdivision called Royal Meadows is located in the area and other lower income residential holdings are scattered throughout the subdivision. Most of the parcels of land are vacant and underdeveloped and covered with natural vegetation.

[18] She points out that:

> The community is in the proximity of Spanish Town from which most of the urban facilities can be accessed as there are little or no facilities within the neighbourhood. The community lacks mainstay and has remained underdeveloped so residents who are not involved in agriculture, use it as a dormitory and commute to work outside the area.

[19] She also opines that during the early stages of Highway 2000 there was renewed hope for the locality but on her March 2017 visit, that is post high way construction, the area appeared dormant with little or no development which is expected to continue for some time.

[20] It is her evidence that at the time of inspection in July 2013 she relied on the report provided by Llewelyn Allen as at July 23rd, 2013, which described the land as 2.02 acres or .816 hectares. She describes the land as being fairly level throughout but had gentle up ward rise to the north east. She spoke to the fact that subsequent to her valuation in July 2013 she was advised that the area of take formed part of a proposed subdivision. Based on the proposed subdivision she found that 16 residential lots would fall in the area of take.

[21] She clearly outlines her research in terms of market demand. She states that:

> The demand for residential and agricultural holding is very minimal due to its remoteness and the general negative outlook of the nearby communities of Tredegar Park and Gravel Heights. Few residential subdivisions started and some have been abandoned because of lack of demand.

She then identified a specific subdivision. That is Royal Meadows. She opines that “the lack of economic activities within the community paralysed the advancement, small population, low demand for lots or housing and the general appearance of underdevelopment make the prospect for the area look bleak”.

[22] She further indicates that the construction of the highway has had no positive impact on the area. The roads lack maintenance and have deteriorated which will further stifle any potential development. If the property were offered on bona fide terms the expected demand is low, based on the factors she examined and guided by prices expected and realized for properties in this and comparable neighbourhoods.

[23] She also provided a list of comparable lots and their sales prices. These are approximately eight (8) properties, some larger in size than the acquired land and some smaller. She described the areas in which they are located in terms of development and the prices at which they were sold.

[24] On cross examination she states that she was not in the position to answer whether it would be very difficult for the Defendants to sell 1A without a registered title. She said it was possible that Cross Pen being three (3) miles from Spanish Town could be used as a dormitory for persons from Spanish Town. She was not informed of the subdivision at the date of the first inspection. Lot 1B is to be owned by the Commissioner of Lands.

[25] She agrees that in order to have a right of way over someone’s land the owner of that land would have to be consulted (by the persons creating the right of way), to give that right of way. Lot 1A was owned by the Defendant. She agrees that there is something of a right of way over Lot 1A. She was not aware of any consultation about the right of way. She agrees that the road vantage from the survey shows that there is no right away over lot 1B. However, she responds, that it was not necessary as the highway goes across the land.

[26] Ms. Picart's valuation report was prepared June 17th 2013 and was tendered into evidence. She ascribed a market value of 3.7 million dollars to the area of take. She describes the geographical location of the land as follows: "The subject property is located approximately 2 km north of St. Jago, South of Tredegar Park Housing Scheme and on the right side of the Main Road leading to Simon".

[27] Mr. Thwaites' report is dated February 3rd, 2014. The inspection was as at January, 10th, 2014. The report does not ascribe a market value to the area of take. In his report Mr. Thwaites indicates that the "Property is subject to an approved subdivision into 20 saleable lots". He describes an area that cannot be sold. However, that portion that he says cannot be sold is not attributed to the acquisition but to the topography of the land.

[28] He went on to describe the locality as "a little known area where land use comprises mostly of vacant agricultural land with dispersed low income settlement, in Content, Simon and Tredegar Park. A small lower middle income subdivision called Royal Meadows is near the subject property but the area is generally a low income population. The area comprises of generally gentle to undulating topography with fertile limestone hill sides which, apart from the subject which is being mined, are of little or no utility".

[29] In terms of economic activities he provided the following information: "Although recently there has been expressions of interest in the subdivision of Pinnacle Pen which adjoins the subject, there is little meaningful economic activity, causing residents to commute to Spanish Town for jobs and other needs. Unlike on the western side of the River where widespread residential development has occurred such as Avon Park, Eltham and Ensome City, the area has been overlooked and remains underdeveloped "

[30] However, he expresses the view that he foresees "temporary economic gains for residents as a result of work part of the Highway". In terms of market profile, he states**, "**In spite of the proximity to Spanish Town the location is isolated, demand

base is low, limited to low income occupiers or the random incoming interest in agricultural land. The demand base is low and supply of land seems relatively abundant".

[31] Mr. Thwaites says that in looking at the value he has found that, the subdivision in its entirety, provided for 20 Lots, 18 residential lots and 2 commercial lots and the other for reserved road and open space. He found that 15 lots were affected by the acquisition. He established from market investigations a mean (otherwise called an average) lot value of 3 million dollars. He multiplied three (3) million dollars by fifteen, then he subtracted a developmental cost of approximately 1.2 million dollars per lot.

[32] Mr. Thwaites indicates that he made a further adjustment for a present value adjustment which guided the opinion of the value which were then used to calculate the value of compensation. He states that the area of take is given as 8,159.68 square meters. That is 2.02 acres. He further indicates that 2.24 acres to the north is of no utility due to its slope and that a total useable area of 2.0 acres remains.

[33] In his report under the heading "Loss of Earning from the subdivision" Mr. Thwaites states that the "the current market value of the land is $10,400,000. and the profits to be earned from the subdivision is$ 9,000,000. Two (2) acres of land with utility will remain after the take". This is valued at $3,600,000. He arrived at a net loss of $15,800,000 due to the acquisition.

[34] On cross examination he agrees that his report does not ascribe a market value to the area of take and that his report is for the entire property including the area of take. He agrees that the entirety of Lot 1 consists of different topography. That is, part slope and part flatter. He states that he was not aware at the time of the preparation that his report was to assist the court.

[35] He does not agree that it was important for a valuation report of this nature to provide an analysis of how a mean lot value of 3 million dollars was arrived at. He

states that he utilized the developmental approach and admits that he has not provided any comparable sales value.

[36] Further, he agrees that he provided a mean lot value of a figure of $3,000,000 in spite of the low demand and supply of abundant land. He admits that the true purpose of his assignment was to assist in providing a value to the claim for damages for the persons who were injuriously affected by the high speed toll road through the property and not to determine the market value for the area of take.

[37] He assumes, based on his assessment of Ms. Breakenridge's valuation of 4.1million dollars, that it took into account the value of improvement attributable to the approval for subdivision for the land. His assumption is based on the difference in value of the land stated in her August 9, 2013 report which gave a value of 2.5 million dollars and the value given in the addendum report dated, October 7, 2013 in which the valuation was given as 4.1 million dollars; a difference of 1.6 million.

[38] Furthermore, he notes that Ms. Breakenridge's report identifies 16 lots as being affected by the area of take and this then attributes an increase in value of $100,000 per lot for the subdivision approval. He opines, that this is an understated value. On re-examination by counsel for the Defendants he states that the market value of the area of take is 8.3 million dollars.

Submissions

[39] Ms. Dickens submits on behalf of the Claimant that:

"(i) Ms Breakenridges' evidence remains unshaken and un-contradicted. There are no discrepancies or inconsistencies arising but was reinforced on cross examination.

(ii) The four factors listed in section 14 are exclusive and the court cannot look beyond these factors. Section 14 (1) (a) provides that it is the market value of the land at the date of service of the section 9 notice that should be taken into account. "*The amount that a willing*

*buyer would pay a willing seller on the open market where some choice exist*s". The date of service of the notice is December 30th 2013. The court should not look at the current market value of the land. The Defendants have submitted no report that speaks to the market value of the acquired land or the area of take at the relevant time.

(iii) The report of Mr. David Thwaites is concerned with a compensation claim and not with the market value of the acquired land or the area of take. Mr. Thwaites agreed on cross examination that his report does not ascribe a market value to the area of take. On Mr. Thwaites' own admission his report should not be relied on.

[40] She further submits that:

The report of Ms Breakenridge was specifically and expressly prepared to assess the market value of the acquired land or the area of take for the relevant period. It should be given significant weight and preferred over that of Mr. Thwaites, in that it provides evidence of comparable sales data, to substantiate how the market value of the area of take was arrived at. It is objectively assessable, can be measured and can be analysed. The report of Mr. Thwaites is devoid of comparable sales Data.

[41] She expresses the view that:

"Mr. Thwaites' value of the area of take as 8.3 million dollars is plucking figures out of the air. It is inconsistent with his evidence in his report. He is not a credible witness and his report cannot be relied on. He notes that the current market value of the land is $10,400,000 and that two acres of the land with utility remains which he values at $3,600,000. When this is subtracted from $10,400,00 the balance is $6,800,000. In their defence and counter claim the Defendants are claiming $6,800,000.00. Mr. Thwaites describes the entire land as

25,000 square feet. As a percentage of the 25,000 square feet the area of take would value$ 3 394,426.88The report of the independent valuators Ms. Breakenridge and that of Ms. Picart advance congruent market values to the area of take. Both considered and made reference to the subdivision approval".

On Behalf of the Defendants

[42] Ms Carol Davis submits on behalf of the Defendants that:

"(i) In accordance with the Act the amount of compensation permitted with respect to the value of the land acquired is the market value at the date of the service of the Notice under of section 9 of the Act. The notice was served on the 8th April, 2013. Under section 2 of the Act, "land" is defined as including "benefits *to arise out of land and things attached to the earth…."*

(ii) It is undisputed that in determining the market value consideration must be given to the intended use of the said land prior to acquisition. In the instant case the market value of the acquired land must be determined bearing in mind that the Defendant had acquired a subdivision approval for 20 lots on the Defendant's land, and 16 of the 20 lots were included in the land acquired by the Government.

(iii) The area of land to be valued is the area of take, the size is 8,650.89sq metres. In her report Ms. Norma Breakenridge estimates the value of this land as $4,100,000. Both experts agree that in assessing the value of the acquired land it is necessary to take into consideration that the Defendants had obtained a subdivision approval from the St. Catherine Parish Council for the development of 20 lots on the said land. In accordance with Ms. Breakenridge, 15 of the 20 lots would fall into the area of take. In her valuation of the

acquired lot dated August 2013, Mrs. Breakenridge estimates the market value of the said land at $2,500,000.

(iv) In the valuation of the said land by Ms. Hyacinth Picart which was prepared at the request of the Claimant for the Commissioner of Land Valuations the value of the said land was given as $3,700,000. Mr. Thwaites in his evidence gave the value of the land at $10,400,000. However, in cross examination he admitted that this was the value of the entire land at Volume 1406 Volume 456. Mr. Thwaites further proceeded to value the profits from the subdivision separately from the market value of the land in the sum of $15,800,000. However, in cross examination Mr. Thwaites indicated that his estimate of the value of the acquired land taking into consideration that there was subdivision approval (for 16 of the lots included in the take) was $8,300,000.

(v) The value of the take bearing in mind that subdivision approval had been given and 16 lots were included in the take is the $8,300,000 as stated by Mr. Thwaites is the most reasonable.

(vi) In her report, Ms. Breakenridge states that her instructions were to prepare an assessment of the “market value of the subject property”. In her assessment of the market value, she states that “we are of the opinion .... that the unencumbered fee simple estate and interest in the premises as at October 2013 would have commanded a market value of $4,100,000”. Although in her report she refers to the fact of the subdivision, there is no reference in Mrs. Breakenridge’s report as to how she estimates the sum to be added to the market value of the fee simple value to arrive at the value including its developmental value pursuant to the subdivision approval.

(vii) Mr. Thwaites in his report at paragraph 3.7 does give evidence of the methodology that he uses at arriving at the per unit value of the developed lots, discounted for the cost of infrastructure. This methodology is to be preferred."

The Assessors' Opinions

[43] The following is the verbatim record of the assessors' opinion on the issues**.**

"*1. OWNER/PROPERTY: The subject property, Lot no. 1, part of Cross Pen, St Catherine is owned as per the Title as Cecille Rochester and Vioris Clarke the first and second Defendants*

2. INSTRUCTIONS: We have been requested by the Supreme Court of Jamaica to provide an Assessors Opinion on the findings of the court during the hearing.

3. REGISTRATION: The property in question, Lot 1 part of Cross Pen St. Catherine, is registered at the Titles Office of Jamaica under Volume 1406 Folio 456, with a land area of 2.53 hectares (6.25 Acres). The area of Take was surveyed to be 2.1 acres (0.865 hectares).

4. INSPECTION DATE: The property was inspected 27th June 2019.

5. CASE SUMMARY: Cecille Rochester and Vioris Clarke were the owners of the subject land at the time of the claim. Approval had been given by the local Planning Authority for a residential subdivision of the land. A total of 20 house lots were to be created on the land, with an access road centrally located in the property running from the parochial road to the rear of the site. However, Lot 1 is located at the foot of what is a steep hillside rising from an altitude of approximately 180 feet to 380 feet at the rear of the land. The terrain of the front 2/3rds of Lot 1 was suitable for house construction on the small lots, however, the rear 1/3 was unsuitable for the creation of lots on which homes would be built due to the slope and type of land.

The solution was to quarry the hillside by removing large boulders thus reducing the slope. A quarry Licence is needed for this type of work. The Licence was granted to the landowner for the purpose of substantially levelling the land in order that the development could proceed. The licence did not prevent the boulders once removed being sold. Once the hillside excavation was completed the licence would have run its course as the development of the road into the scheme and the "lotting out" could take Place.

During the course of the life of the Quarry licence, the part of Lot 1 referred to as Section 1B (running across the centre of the land) was acquired by the Commissioner of Lands for the continuation of the construction of the North- South Highway across the island. Access to the land being quarried to the north was provided after the highway construction by an underpass under the highway. However, for whatever reason, the Defendant crossed the boundary of Lot and entered the adjacent land (similar in characteristics to the rear of the subject land), and began mining on the land. This land, registered at Volume 1258 Folio 331, was owned by ***The Gibraltar Trust*** *and comprised some 474 acres. Over time sections had been sold, but mainly in the higher reaches of the land where it was less steep.*

In court under oath Mrs Rochester stated that her mining operations took place only within the Lot 1 boundary. Photographic evidence from Google Earth shows that during the period of the Licence and after, mining was not only taking place on Lot 1 but on approximately 6 acres of the adjacent land. Contracts for supply and sale of quarry material presented in Court (other than Boulders as per the licence) appear to support the photographs showing quarry material other than boulders coming from the adjacent land. In other words, the contractual commitment the contracts would not be possible to supply from just a couple acres of Lot 1 land.

6. We are of the opinion that the offer by the Commissioner of lands is fair and should stand. The calculation of the value of the land in the take as calculated by Ms. Breakenridge fairly establishes value on the basis that reflects the fact that the land has approval for a small residential development. The calculation of the value of the land within the take should stand.

By implication and deduction from his report, the value attributed to the area of take by Mr. Thwaites is high considering the market in that area of St. Catherine at the time.

The claim for future potential losses due to the land being acquired cannot be considered by the Court as under the Land Acquisition Act, and with substantial case law, compensation cannot be made to the Defendant for profits that may have been made post the acquisition of take by the Commissioner of Lands. The reason for this ruling is evident in that the court would have no way of knowing if the claim for loss of profits or other income is correct as the Defendant was mining from areas outside the licenced areas. In this case, photographic evidence conducted in the due diligence period by the writers shows that the area actually being quarried was some 8 acres in total – much larger an area than the area approved on Lot 1 and the adjacent land.

Loss of profits claimed of this illegal quarry work would therefore at any rate be incorrect as the Defendants did not identify revenue from the top section of Lot 1 as separate from the revenue obtained from the land on which was being trespassed (The Gibraltar Trust land). The quarry work is termed illegal as the Defendant did not have a licence to carry out general stone mining on the adjacent property. All other issues as introduced by the Defendant are irrelevant to the matter.

7. ***Summary: Market Value of the land taken***

I. The valuation of the loss has to be based on the land as it existed on the valuation date. Therefore, at the date of valuation, it was not subdivided and there were no actual sales contracts, although there was approval for subdivision

II. The residual method of valuation is generally unreliable (although see below) due to the fact that a change in one of the input can have a disproportionate increase on the output. ***(Essex Incorporated Congregational Union v. Colchester Borough Council (1982).***

III. The most reliable method is the comparable sales based on sales evidence of similar properties ***Windward Properties LTD v. Govt of Saint Vincent and the Grenadines.***

IV. Both valuations are based on the residual method (referred to as the development approach in the closing submission) which in the absence of comparable transactions is acceptable.

Injurious affection

The law is not clear on injurious affection as it does not mention that it relates to loss in value of the retained land **(see Duke of Buccleuch v. Metropolitan Board of Works (1872).** This forms the basis of the law in the UK and several other jurisdictions, therefore, we have adopted this as the meaning of the term.

Therefore, to be entitled to compensation for this item, the Defendants should have shown that the scheme will have an adverse impact on the market value of the retained land and not the loss of earnings from the quarry and the sub-division. Also, market value of the land includes an element of profit. Therefore, Defendants are not entitled to compensation for loss of anticipated profit ***Ryde International plc v. London regional Transport (2004)*** **Gordon Langford MRICS. Clinton Cunningham MRICS"**

Discussion

[44] I accept the evidence of Ms. Stair that the area of take is 2.2 acres. There is no challenge to her evidence in this regard. In assessing the evidence of the valuators, I find that the Picart Report does not provide sufficient details of the basis on which the market value of the acquired land was arrived at. In the section described as "Legal Particulars" and the subsection described as "Zoning" Ms. Picart states that "Approval *has been (granted) for Commercial and Business to the front and residential to the back*" It is not clear whether this is in reference to the subdivision approval. However, she has provided no information regarding development nor activities in relation to other properties in the surrounding area. Consequently, I take the view that I cannot place reliance on the sum determined in the Picart's report as the market value of the acquired land.

[45] I observe that, Ms. Breakenridge and Mr Thwaites employed the development approach in their valuations. Additionally, both are consistent in their description of the area, in that "it is underdeveloped, land is abundant and demand is low".

[46] However, I find that Ms Breakenridge's approach appears to be more logical and market driven in light of the details she provides and the basis on which she arrived at a final figure for the market value of the area of take. In her first report the market value she ascribed to the area of take was $2,500,000. She did explain that at the date of first inspection she was not aware of the subdivision approval. However, I note that an increase in value of 1.6 million dollars was placed on the area of take after she became aware of the subdivision approval. I do not consider this increase to be slight or minimal.

[47] Additionally, whereas Mr. Thwaites' focus appears to be profit oriented Ms. Breakenridge's focus was more geared towards the actual market value at the time of the service of the section 9 notice. In that report she took into consideration, the subdivision approval, the prices of similar properties with adjustments where there

were no comparable lots in the same area. "Lot prices in other areas were adjusted to match the subject, the cost of doing the subdivision, road, water etc."

[48] I find that Ms. Breakenridge gives a more vivid description of the locality. She gives a description of roads as being asphalted but in need of repairs. She provides useful information that the subdivision of the area began as early as the late 1950s, yet the population remains low and there has been very little development.

[49] I note that she provides further clarity as regards to the success, or lack thereof of other subdivisions in the area which, in my view should be one of the key factors in determining the market value of the area of take. I make reference to her evidence that: "Few residential subdivisions started, some have been abandoned because of lack of demand".

[50] I also take note of the fact that she makes reference to a specific subdivision in the area. That is Royal Meadows. Her evidence is that it is a small lower-middle income subdivision. I pay particular attention to the fact that she states that "the lack of economic activities within the community paralysed the advancement, small population, low demand for lots or housing and the general appearance of underdevelopment make the prospect for the area look bleak"

[51] I also note that her valuation was not confined to the demand for residential holdings but she also evaluated the demand for agricultural holdings which she also describes as, "very minimal due to its remoteness and the general negative outlook of the nearby communities of Tredegar Park and Gravel Heights", and that "most of the parcels of land are vacant and underdeveloped and covered with natural vegetation ".

[52] I also take into consideration her evidence that "the community lacks mainstay and has remained underdeveloped so residents who are not involved in agriculture use it as a dormitory and commute to work outside the area". All of this evidence has not been challenged

[53] Despite the fact that, in accordance with the provisions of the Act, the market value must be based on the value at the time of the service of the Section 9 notice, I do not disregard her unchallenged evidence that on her March 2017 visit, her observations were that, "construction of the highway has had no positive impact on the area", and that the area "still appears dormant with little or no development which is expected to continue for some time".

[54] However, I will hasten to mention that this evidence is important only in so as far as it lends credence to Ms Breakenirge's earlier projections, with regards to the prospect for development and the value placed on the subdivision as at the date of the service of the section 9 notice.

[55] I also take note of the list that she has provided as it relates to comparable lots and their sales prices. For example, a property in Bybrook which is approximately twice the size of the area of take on July 22, 2013 was sold for, 4.5 million dollars. A property in Naseberry Grove Spanish Town, approximately half the area of take, in an area she described as 'a more developed area' was sold for 1.8 million dollars in February 2013. In light of all this evidence it is my view that Ms. Breakenridge has clearly outlined her research in terms of market demand. This is what would be expected in terms of the actual market value at the relevant date.

[56] On my examination of Mr. Thwaites' valuation, I find it unreliable for the undermentioned reason:

> His report does not provide a market value for the area of take. His valuation appears to be concerned with the projected, potential or future profit that the Defendants hoped to realize in the proposed subdivision. That is, if the Defendants were successful in selling lots in the future subdivision. This becomes patently clear in light of paragraph 3.7 of his report where he states, "that our investigation of lot sales in similar subdivisions revealed sufficient data to establish a mean value of 3 million per lot. We are furnished with quantity

surveyor provided infrastructure cost of approximately 1,200,000 per lot”**.**

[57] However, I must take into consideration the fact that what the Defendants had was a subdivision approval. The subdivision had not yet occurred and could no longer occur. Additionally, there is no evidence that any of these lots intended to be created by the subdivision would have been sold in light of Mr. Thwaites’ own evidence that land was abundant and the demand in the area was low.

[58] Additionally, the Defendants have not furnished this court with any evidence of contracts for sale of any of these lots. Furthermore, Mr. Thwaites agrees that his report does not ascribe a market value to the area of take and that, that was not his focus in the preparation of his report. Additionally, despite admitting that the entirety of Lot 1 consists of different topography, part slope and part flatter, his report provides a mean value, without any indication that the difference in topography factored in his valuation of these lots. That is, he provides no distinction in value depending on the topography.

[59] I am cognizant of the fact that on re-examination Mr. Thwaites placed a market value on the area of take at 8.3 million dollars. However, this in fact does not accord with the value stated in the particulars of the counterclaim of the Defendants.

[60] Additionally, I examine this evidence against the background that, at paragraph 3.8 of his report he speaks of a portion of the land that lacks utility due to the “slope of the land”. He further states that when “this is combined with the severed portion of .96 acres, it leaves a totally unusable area of 2.20 acres. It is clear from this evidence that his valuation of $10,400,000 relates to the entire parcel of land.

[61] There is no denial on his evidence that it was approximately one third of the entire portion of land that fell in the area of take. Therefore, the logical inference, as submitted by Ms. Dickens, is that on Mr. Thwaites’ own evidence the area of take would be approximately 1/3 of $10,400,000 which equates to $3,466,666.67.

[62] Additionally, I take note of the fact that he states that only two (2) acres of land with utility would remain. He gives a value of this remaining usable area as 3.6 million dollars. Bearing in mind that the area of take is approximately the same size, (that is 2.2 acres) he has provided no explanation as to the reason why he would place more than twice the value on the area of take that is approximately the same size as that remaining portion of the same land.

[63] Therefore I share the view of the assessors, that in all the circumstances, the valuation of Mr. Thwaites in terms of the market value of the land is too high. Consequently, I also share the views of the Ms. Dickens and the Assessors that the valuation of Mr. Thwaites cannot be relied on for the true market value of the land as at the relevant date of acquisition. Inevitably, I am in agreement with the assessors that the Breakenridge report offers a more reliable assessment of the market value of the land. Accordingly, I find that the market value of the acquired land at the time of the service of the section 9 notice was $4,346,813.10.

Whether any sums should be awarded for Injurious Affection

[64] The Defendants contend that the compensation did not adequately address losses from the subdivision arising from the acquisition. They also contend that they should be compensated for loss of earnings from a quarry business which they allege that they operated on the land.

The Law

[65] Section 14 (1) (c) of the Act clearly indicates that the basis on which an award should be made under this head is on “the court being satisfied on proof, of damage sustained by the Defendants, at the time of taking possession of the Land by the Commissioner by reason of the acquisition, injuriously affecting the actual earnings of the Defendant”

Submissions

[66] Ms. Dickens submits that:

> The Claim must be in relation to "Actual, existing in fact, real, existing current" earnings. The subdivision approval does not represent loss of earning but would impact the market value of the land. The Defendant have failed to prove or establish any loss of earnings from the subdivision at the time of taking. That is January 2014. They have put forward no sales agreement that would have been extant at January 2014.

[67] In relation to the quarry, she submits that:

> (i) The licences were granted for the sole purpose of site clearance. Mr. Rochester agrees that as at April 2013 she knew that subdivision was no longer possible. Therefore, there was no further need for her to utilize the licence after that period.
>
> (ii) The figures put forward by Mr. Thwaites are for loss of future earnings from 2014 to 2016. Loss of future earnings is not covered under section 14. The receipts and contracts on which Ms. Rochester relies do not prove loss of actual earnings.

[68] Ms Davis submits that:

> "The wording of Section *14 of the Act* is unique to Jamaica. There has to date been no judicial interpretation of this section of the Act. The interpretation of the statute is therefore a matter to be determined by this Honourable Court".

[69] She suggest that the court should apply the plain and ordinary meaning of the words in interpreting the section. She further suggests that in doing so the court would have to proceed in three (3) stages in interpreting the plain and ordinary

meaning of Section .14 and in particular Section 14 (c). She outlines these stages as follows:

i. "Firstly, the Court is to determine the amount of compensation to be awarded.

ii. Secondly in order to determine the amount of compensation, the Court must, assess "*The damage if any caused to or sustained by a person interested*" Although in the instant case, the "damage sustained" is not directly related to the acquired land, the Defendants would still be entitled to compensation if they can bring themselves with the remaining section of 14.3 of the Act.

iii. T**hirdly** the Court must determine if the "damage sustained" was by reason of the acquisition *injuriously affecting the actual earnings of such person".*

[70] She further submits that:

(i) The amount of compensation to be awarded is not the actual earnings lost. That would be absurd - because there would be no "actual earnings" after the acquisition if the earning has already been lost as a result of the acquisition. What must be determined is whether the acquisition "injuriously affected" the earnings.

(ii) The word "*injuriously* "does not mean "wrongfully" affected. It means 'hurtfully" or "damnously" affected. To entitle the parties interested to compensation, the injury or hurt must be such as could not lawfully be inflicted except by the powers of the Act". (She refers to the case of **McCarthy *v Metropolitan Board of Works*** *L.R 8 CP 208* (referred to in Stroud's Judicial Dictionary of Words and Phrases 7th Edition p1350)

(iii) The Defendants as interested persons would be entitled to compensation if they can show that the acquisition had "hurtfully

affected" their actual earnings. In order words, once the Defendants show that their earnings have been affected by the acquisition, then it is for the Court to determine the quantum of amount of compensation in accordance with the damage caused to them.

(iv) The Commissioner took possession of the acquired land on the 24th of January, 2014. The evidence of Ms. Rochester was that she became aware that the land was being acquired in April 2013. She had a quarry license that was issued on 19th July 2013 for 1 year. In their Defence to Counterclaim, the Claimant pleaded that the Defendants can operate a quarry on the remaining land provided that the relevant legal steps are taken. There was never any allegation in the pleadings that the mining operations of the Claimant was illegal. Further the Commissioner of Mines himself gave evidence, and at no time did he allege that the Claimants were operating illegally. The actual earnings of the Claimant as a result of the mining operations were completely above board.

(v) Ms. Rochester further gave evidence of the fact that she had in the relevant period obtained a number of contracts and did supply materials from the land to Midac Equipment Limited, China Harbour, National Works Agency and Phils Hardware. Even the addendum report of Ms. Breakenridge confirmed the existence of a "marl quarry,"

(vi) The evidence shows that the Defendants were receiving actual earnings prior to the Acquisition of the take, and that these earnings were "injuriously affected" by reason of the acquisition because they could no longer pursuing mining on Lot 1C of the affected land. The evidence shows that the Quarry License issued to the Defendant was for the purpose of site preparation, in that the Defendant had satisfied the authorities affected that she was engaged in a subdivision for 20

lots on the land which had been granted by the St. Catherine Parish Council. The acquisition in the take removed 16 of the 20 lots permitted in the sub-division approval. By reason of the acquisition the sub-division could no longer be proceeded with.

(vii) There is no evidence of any actual earnings from the subdivision, since the site preparation activities had not reached to a point where lots had begun to be sold. In the circumstances although the Defendants lost substantial potential earnings from the sale of the developed lots, most unfortunately they cannot be awarded compensation for this loss because on the wording of s.14(c) of the Act, compensation for injurious affection can only be awarded where their actual earnings have been injuriously affected.

(viii) However that the Defendants are entitled to be compensated for loss of their mining rights under their quarry license. The Defendants have shown that they suffered loss of actual earning as a result of the acquisition. It is now for this Court to assess the amount of that loss. The only evidence before the Court as to the quantification of loss for the Defendant's mining loss is that of Mr. David Thwaites. Mr. Thwaites opines that reasonable mining production will continue for 2 years. Assessing the loss for 2 years is more than reasonable, as but for the acquisition, the Defendants would have continued to level the land for the purpose of site preparation for the subdivision, and would therefore have removed all of the ore from the mining site.

(ix) The Subdivision Approval permitted site preparation for 5 years. Even though the Quarry License was only for 1 year. On the balance of probability, the licenses would have been renewed in order for the objective of site preparation for the subdivision to be completed. Before granting the Quarry License a number of Government

Agencies including NWA and NEPA had to be consulted, and none objected to the Defendant's activities pursuant to the license.

(x) It is probable that the Quarry License would have been renewed if required to complete the site preparation for the subdivision. Therefore, but for the acquisition of the said land, the mining activities of the Defendant would have continued for 2 years and likely more.

(xi) The Claimants presented no evidence with respect to its estimates of loss as a result of the acquisition injuriously affecting the Defendant's actual earnings. In the absence of competing evidence from the Claimant's, the evidence of the Defendant's expert as to the quantification of the injurious affection occasioned by the Acquisition should be accepted.

The Opinion of the Assessors

Injurious Affection

[71] The law is not clear on injurious affection as it does not mention that it relates to loss in value of the retained land (see ***Duke of Buccleuch v. Metropolitan Board of Works*** (1872)). This forms the basis of the law in the UK and several other jurisdictions, therefore, we have adopted this as the meaning of the term. Therefore, to be entitled to compensation for this item, the Defendants should have shown that the scheme of the retained land and not the loss of earnings from the quarry and sub-division.

Also, market value of the land includes an element of profit. Therefore, Defendants are not entitled to compensation for loss of anticipated profit ***Ryde International pls v. London Regional Transport*** **(2004).**

Discussion

[72] In light of the provisions of section 14.1(c) of the Act it is clear that in order for the Defendants to succeed in an award under this head two basic elements which must be present, must coalesce. These are "injurious affection" and "actual earning". Therefore, it must first be determined, what needs to be established in relation to the elements of injurious affection. Then I must go further to determine whether the injurious affection is to the actual earning of the Defendants. As outlined by both counsel the Act does not provide a definition for either of these terms. Neither is there any authority in this Jurisdiction which provides any guidance in this regard. In seeking to arrive at a working definition for these terms I will therefore examine cases and legislation from other Jurisdictions on the issue.

[73] I note the authority cited by counsel Ms. Davis that is ***McCarthy v Metropolitan Board of Works*** *L.R 8 CP 208* (referred to in Stroud's Judicial Dictionary of Words and Phrases 7th Edition p1350) (B) In that case the court stated that:

> *The word "injuriously "does not mean "wrongfully" affected. What is done is rightful under the powers of the Act. It means 'hurtfully" or "damnously" affected. As where we say of a man that he fell and injured his leg, we do not mean that his leg was wronged, but that it was hurt. We mean that he fell, and his leg was injuriously (that is to say) hurtfully affected. At the same time, I am clearly of opinion that to entitle the parties interested to compensation, the injury or hurt must be such as could not lawfully be inflicted except by the powers of the Act".*

[74] Section 63 of the ***Land Causes Consolidation Act 1845*** of the UK provided that in estimating the compensation for land acquired by a statutory body "regard should be had not only to the land acquired but also to damage if any to be sustained by the owner of land by reason of the severing of the land taken from the other lands of such owners, or otherwise injuriously affecting such other land. The case of ***Argyle Motors Limited v Birkenhead Corpn*** 1975 A.C 99 determined that the basis of compensation for injurious affection is "the diminution in value of the retained land".

[75] The aforementioned provision has been replaced with Section 10 of the ***Compulsory Purchase Act 1965*** of the UK which provides that:

> *"(1) If any person claims compensation in respect of any land, or any interest in land, which has been taken for or injuriously affected by the execution of the works, and for which the acquiring authority have not made satisfaction under the provisions of this Act, or of the special Act, any dispute arising in relation to the compensation shall be referred to and determined by the Lands Tribunal.*
>
> *(2) This section shall be construed as affording in all cases a right to compensation for injurious affection to land which is the same as the right which section 68 of the Lands Clauses Consolidation Act 1845 has been construed as affording in cases where the amount claimed exceeds fifty pounds."*

[76] In the House of Lords case of **Wildtree Hotels Limited and Others v. London Borough of Harrow, HL 2000,** action was brought under the ***Compulsory Purchase Act 1965*** for compensation inter alia for injurious affection. Lord Hoffman in his judgment at paragraph 2.2 sought to provide a definition for the term. He states that:

> *“The term "injuriously affected" connotes "injuria," that is to say, damage which would have been wrongful but for the protection afforded by statutory powers”.*

[77] At paragraph 2.4 he went on to say that:

> *“Compensation is payable only for damage to the plaintiff's land or interest in land. He is not entitled to any compensation for loss caused to him in a personal capacity. This rule also provides scope for a great deal of argument about whether, for example, interference*

with the utility of the land for the purpose of carrying on a business is damage to the land or a personal loss by the proprietor of the business. On this point the authorities also reveal divergent opinions".

[78] And further at paragraph 7 he states that:

"What the decision of this House in ***Argyle Motors (Birkenhead) Ltd. v. Birkenhead Corporation*** *[1975] A.C. 99 establishes is that one cannot make a claim for loss of profit as such. Non constat that the interference which caused such loss of profit, which may have been attributable to the special nature of the business, has had the same or indeed any effect upon the open market letting value of the premises. But there is nothing in authority or logic to say that the letting value of the premises cannot be affected by an interference which makes it less convenient to conduct the kind of business for which they would otherwise have been suitable. A plaintiff who can prove such a reduction in value, for whatever period, is entitled to compensation. So in the Court of Appeal in* ***Argyle Motors (Birkenhead) Ltd. v. Birkenhead Corporation*** *[1975] A.C. 99, 114 Buckley L.J. said that although no claim could be made for loss of profits:*

To avoid confusion, however, we add that this does not mean that, if injury to a business can be shown to have occasioned a diminution in the value of the land where the business is carried on, compensation cannot be recovered for that injurious affection of the land."

[79] He continued:

"*In the House of Lords Lord Wilberforce also said, at pp. 130-131, that "if [the appellants] can prove that a loss of profitability affects the*

value of their interest in the land they can recover compensation for this loss of value." There is no reason to suppose that Lord Wilberforce was thinking only of capital values"

[80] The Ontario legislature has made provision for compensation by a statutory authority to the owner of land for loss or damage caused by injurious affection (See Section 21 of The Expropriation Act. R.S.O. 1990)

[81] Section 1 of the Ontario ***Expropriations Act provides*** a definition for injurious affection. It states:

"injurious affection" means,

(a) where a statutory authority acquires part of the land of an owner,

(i) the reduction in market value thereby caused to the remaining land of the owner by the acquisition or by the construction of the works thereon or by the use of the works thereon or any combination of them, and

(ii) such personal and business damages, resulting from the construction or use, or both, of the works as the statutory authority would be liable for if the construction or use were not under the authority of a statute,

(b) where the statutory authority does not acquire part of the land of an owner,

(i) such reduction in the market value of the land of the owner, and

(ii) such personal and business damages, resulting from the construction and not the use of the works by the statutory authority, as the statutory authority would be liable for if the construction were not under the authority of a statute, and for the purposes of this clause, part of the lands of an owner shall be deemed to have been

> *acquired where the owner from whom lands are acquired retains lands contiguous to those acquired or retains lands of which the use is enhanced by unified ownership with those acquired;"*

[82] The Court of appeal of the Eastern Caribbean Islands, in the *case of* ***Estate of Dame Bernice Lake Q.C. (Deceased) et al v The Attorney General of Anguilla*** AXAHCVAP 2016/0003 defines "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 derive*d" (See paragraph 58).

[83] However the court in that case was careful to point out that "*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 (See paragraph of 58 that judgment).

[84] As a corollary, I must highlight the fact that there is a marked distinction between the Jamaican legislation and those of the other jurisdictions that I have so far reviewed. That is, whereas there is no mention of actual earning in these legislations, in the Jamaican Legislation, the legislators have seen it fit to link compensation for injurious affection to the actual earnings of the land owner.

[85] Therefore, in relation to the pronouncement of Lord Hoffman in the case of ***Wildtree Hotels Limited and Others v. London Borough of Harrow*** **(supra),** regarding whether injurious affection extends to the utility of the land, it is my view that a proper construction of S.14C of the Act indicate that it does**.** In essence it is my view that compensation for injurious affection arising from the state acquisition of private owners' lands in this jurisdiction is not limited to loss in value of the remaining land arising from the acquisition, but also loss arising from the normal utility of the Land

[86] Nevertheless, the Act specifies that it is 'actual' and not simply 'earnings' that should be affected. Therefore, I do not share the view of Counsel Ms. Davis that

once the Defendants show that their earnings have been affected by the acquisition, then automatically, the court should then go on to determine amount of compensation. In essence, she is suggesting that damages should be paid simply for "loss of earnings". However, it is my view that the legislature was very purposeful when they inserted the term "actual earnings" in the legislation and not just the term "earnings". However, my determination of this issue is also contingent upon the meaning that I ascribe to the term "actual earnings".

[87] The Privy Council case of ***Arawak Homes Limited v The Attorney General and another*** [2016] UKPC 34, was a case that went before the Board from the Bahamas. Section 28 (a) of the **Acquisition *of Land Act*** of the Bahamas directs the court as to matters that are to be taken into consideration in arriving at the appropriate award for lands acquired by the state. Of particular interest is section 28 (a) (i) (ii) and (iii) which indicates:

> (i) "*the market value of the selected land at the date of declaration of intending acquisition under section 6;*
>
> *(ii) any damage sustained "by reason of severing such land from other land of the persons interested"; and*
>
> *(iii) any damage sustained by the persons interested by reason of the acquisition* "***injuriously affecting other property belonging to him whether real or personal in any other manner or his actual earnings***". (emphasis mine)

[88] In relation to the claim for injurious affection to loss of actual earnings for compulsory acquisition of the Appellant's land the Privy Council at paragraph 20 of the judgment, had this to say

> "*this might have been applicable had there been evidence of existing contracts which were aborted by the acquisition, "thereby adversely affecting (Arawak's) actual earnings at the notice date". But it had no*

application when "there was no evidence of pending profits at the time""

[89] Interestingly however, Section 14. 1 (i) (b) of the Jamaican legislation list as a factor for consideration in determining compensation,

" *any increase in the value of the other land of any person interested likely to accrue from the use to which the land acquired will be put*;"

However, there is no specific provision relating to the decrease in the value of the retained land as is implied in Section 28 (a) (ii) of the Bahamian legislation.

[90] Nonetheless I take the view that the fact that the legislature considered the fact of increase in the value of the retained land by virtue of the Acquisition a factor affecting the sum to be compensated, (clearly by way of a reduction) then any decrease in value to the retained land by virtue of the acquisition must be a factor relating to damages to actual earnings (that is damage occasioned by a reduction in the actual value of the retained land)

[91] Therefore, in my view the term "**actual earnings**" relate to current income or pending profit at the time of acquisition. Essentially I take the view that the term "injurious affection to actual earnings" relates to objectively, ascertainable, real losses affecting the land owner's interest in, the retained land and utility of the acquired land at the time of the acquisition. It does not relate to potential earnings. Consequently, I define the term "damage sustained by the acquisition injuriously affecting to actual earnings" as having two components. These are:

(i) Any diminution in the value of the retained land at the time of and due to the acquisition.

(ii) Loss of current income or pending profit, relating to the normal utility of the land as a result of the acquisition.

[92] Therefore in order for me to find that there is loss of actual earnings as a result of the acquisition the Defendants must establish that prior to the acquisition of the area of take there was in existence inflow of income from the use of acquired land, or from the retained land which was disrupted by the acquisition of the area of take .That is, that prior to the service of the Section 9 notice they were deriving an income from the use of the land which was interrupted by the acquisition, resulting in outstanding income not being realized. For example, a contract for a fix term which was not completed or one with an option to renew. This is in contrast to potential income where the Defendants had an expectation, that due to the capacity of the land, it could have provided them with some income or profit which would have materialized in the future whether, near or distant.

[93]] Essentially, while I agree with the assessors that one of the factors to be considered in relation to whether the acquisition has injuriously affected the actual earnings of the Defendants is whether the acquisition has occasioned a reduction in the value of the retained land, it is not limited to loss in the market value of the retained land. The important factor to be considered is whether any actual as opposed to potential loss has been occasioned by the acquisition.

[94] Clearly, there is no claim nor evidence by the Defendants that the acquisition has caused a reduction in the market value of the retained land. Had this been established then it would have been sufficient basis for an award for injurious affection. However, the Defendants are also entitled to an award for injurious affection where it is established that the acquisition resulted in loss of actual earning from the normal use of the land.

The important factors to be considered in this regard are:

(i) First of all, the actual earnings of the Defendants and

(ii) Whether by virtue of the acquisition the Defendants have been so displaced resulting in a net decrease of their actual earnings.

[95] The Defendants, having failed to produce any evidence of existing contracts for sale of any lot in the subdivision which were aborted by the acquisition, I find that they have failed to establish any injurious affection to actual earnings in this regard. That is, the subdivision approval without more is not an indication of actual earnings. In the case of ***Arawak Homes Limited v The Attorney General and another (supra)*** the appeal concerned a claim by Arawak Homes Ltd ("Arawak") for compensation in respect of three tracts of land compulsorily acquired by the government of the Bahamas between 1995 and 2001 under the ***Acquisition of Land Act*** ("the Act"). The land is in the Pinewood Gardens area of Nassau. It is part of the former "Pinewood Gardens Subdivision", laid out in 1972 by its original developer Pinewood Gardens Ltd. In 1983 Arawak acquired some 3,000 numbered lots and two other tracts of land on the estate.

[96] The Appellants were not satisfied with the award for compensation. They argued that "The judge assessed the compensation for the lots zoned for residential development in a manner which took no proper account of their value to Arawak as land suitable for residential development (as shown by evidence of profitability of Arawak's own sales);"At paragraph 8 of the Judgment Lord Carnwath, in delivering the judgment of the court, cautioned judges, to take care in relying on case law decided under the English ***Land Clauses Consolidation Act of 1845*** and other statutory code derived from it. He further stated that

> "and *although those cases may be of assistance by way of analogy, primary attention must be given to the words of the section itself*"

[97] At Paragraph 21, he noted:

"It seems that at this stage Arawak were relying principally on the ***Pastoral Finance*** *case to support the proposition that - "the appellant was entitled to that figure per lot which a prudent man in the position of the appellant would have been willing to pay for the lot".*

[98] However the Privy Council accepted this reasoning of the court of appeal that:

"*Conversely the court noted the submission for the government that - "loss of profits on development of a building site is not a subject of compensation. The profitability of the land has already been reflected in the market value of the land." (relying on* ***Ryde International Plc v London Regional Transport*** *[2004] EWCA Civ 232; [2004] 2 EGLR 1) 22. Having referred to the terms of section 28 and to the judgment of Lord Moulton in* ***Pastoral Finance the President*** *concluded: The* ***Pastoral Finance*** *Case predates the Acquisition of Land Act. Nowhere in the Act is there a provision stipulating that an assessing court must consider when determining the proper compensation to be awarded to a claimant the special value of the land to them. The owner of acquired land is entitled to the market value of the land*".

Whether Actual Earnings/Pending Profits were Disrupted/Diminished by the acquisition

[99] Ms. Breakenridge's evidence is that she did not consider the question of injurious affection. The reasons she proffers are:

(i) At the time of her valuation the mining licence for the quarry had expired. That licence was to take up large boulders and so although there may be substantial deposit in sight, the license only permitted removal of boulders up to the level of the surrounding land.

(ii) There was no sign post that a quarry was being operated.

[100] Mr. Thompson, Commissioner of Mines states that the application for the quarry was made on March 11th 2011. The first licence was issued on September 29th 2011 for 1 year. "Only boulders obtained from the site preparation exercise should be disposed of". The "usual tenure of a Quarry licence for commercial purposes is a minimum of 3 years, but the average licence is granted for 5 years".

[101] He further states that:

> Ms. Rochester would have required the Quarry Licence in order to clear the subdivision. Rocks and stones are defined as Quarry Material. All applications for quarry licences for business purposes must include a quarry plan outlining among other things, how the quarry is to be operated in terms of safety, health engineering environmental best practices. A restoration/rehabilitation bond is required for all proposed quarry operations. Ms. Rochester was not required to submit these.

[102] I accept the evidence of Mr. Thompson that the licence was granted for limited purposes only. Mr. Thompson further testifies that:

> The second licence was granted on July 19, 2013 for one year for the disposal of boulders only, for site preparation. The unchallenged evidence of Ms Stair is that the Section 9 notice was served, on the 30th of December, 2013. Possession was taken of the land in January 2014. Therefore, the only permissible remaining quarry activity under the second licence was up until July 2014. That is for the period January to July 2014.

[103] On cross examination Ms. Rochester admits that by April, 2013 she knew that the subdivision was no longer possible. She agrees that she did not have a quarry licence after April 2013. She also agrees that by the time the Section 9 notice was served, she knew that subdivision was no longer possible. In light of this admission I would not have expected her to enter any new contract after the date of the service of the notice.

[104] Ms. Rochester has evidenced a contract with Midac dated the 25th of September 2012. In this contact the agreement was to sell boulders at $150, per ton. The time period for this contract was not included in the document. Ms Rochester indicates on cross examination that the period was until the mining material was depleted. However, it is clear on the evidence that at the time Ms. Rochester entered this contract with Midac, she knew that her 1st Quarry licence would have expired by

the 29th of that very month, that is four days after she entered into the contract with Midac.

[105] In fact, between September 29, 2012 and July 18, 2013 she could not have carried on any legitimate quarry activity. Therefore, the contract with Midac could only have legitimately lasted for four (4) days. She further admits that she entered into the quarry business because of the subdivision. She agrees that once she became aware that the subdivision was no longer possible, there was no need to continue the quarry business. She agrees that as at April 2013 she was aware that she could not continue in any contract with Midac.

[106] The evidence of Ms. Rochester is that the contract with Phils Hardware was signed on the 6th of February 2013 for three (3) months or until further advised. However, in light of the fact that at the time that she contracted with Phils the 1st quarry licence would have already expired on the 28th of September 2012, that contract could not have legally been entered into. Additionally, she accepts that the mining licence only permitted her to dispose of boulders, nevertheless she contracted to supply aggregates when she had no licence to validly contract with anyone to supply aggregates. The actual acquisition occurred in January 2014.

[107] Therefore in the event that there was any existing contract for disposal of boulders for the period July 2013 to July 2014 which had not yet been executed then the Defendants are entitled to damages for injurious affection to actual earning arising from the premature termination of any such contract. Despite the fact that Ms. Rochester has presented documents to the court for sale of quarry material there is nothing pointing to any outstanding contract for the aforementioned period.

[108] I also take note of the fact that she admits that by April 2013 she knew that subdivision would no longer be possible but she went ahead and collected the second licence because the commissioner called her and because pipelines were being run on her property and she needed to remove the boulders. Yet she

admitted this is not in her statement and it was never suggested to the Commissioner of Mines that it was they who approached her after April 2013.

[109] Further Mr. Thwaites admits that in determining the loss of earnings he was not provided with any sales agreement. He also testifies that he was not aware that the quarry licence was not issued for commercial or business purposes and that the $29,000,000 he found as loss of earning from the quarry related to the entire 25 square meter of the property. He also agrees that his calculation for loss of earnings in relation to the quarry extended beyond the life of the licence and that he presented a sum for the earnings in the future, not actual. His evidence is that the dominant use of the land was for the quarry.

[110] However, this contradicts the provision of the licence that the Defendants were only permitted to mine one hectare at a time and the evidence of Ms. Rochester that the intention was to subdivide.

[111] If there was an intention to use the land permanently, or for any extended period as a quarry, it means there was no intention to subdivide in the near future. If the intention was to subdivide, then there could have been no intention to operate the quarry, for any extended period. Mr. Thwaites states that the loss of earnings of $29,000,000 from the quarry, was for the next two years, from the date of his report. Yet he said that he was aware that in February 2014 Ms. Rochester had only 5 months remaining on the licence.

[112] In any event**,** it is clear from the evidence that the income that was being earned from the quarry activity was incidental to the subdivision being accomplished. The fact is, the licence was granted for the sole purpose of clearing the land for the subdivision. There was no general licence to use the land for the commercial purpose of operating a quarry. Therefore, I cannot subscribe to the view of Ms. Davis that I can determine that there was injurious affection on “the probability that the quarry license would have been renewed if required, to complete the site preparation for the subdivision, and the likelihood that the mining activities of the

Defendant would have continued for 2 years and likely more". I would essentially be venturing in the realm of speculation and I would me making a determination without any evidence of actual, but potential loss.

[113] Therefore I find that no loss has been established from the cessation of the quarry operations that could be considered as loss of current income or pending profit. This is especially in light of the fact that there is no evidence of any existing contract at the time of the service of the section 9 notice, from which the Defendants failed to benefit, due to the termination of such contracts, as a result of the acquisition.

[114] They have produced several documents. However, I find it unnecessary to refer to these documents in detail for the reasons hereinafter outlined. The Defendants have produced no evidence of any outstanding contract or standing orders for material, (boulders) from the quarry that has not been fulfilled.

[115] The contract with China Harbour Engineering Company was entered into on the 21st of January 2012. That contract was terminable on one day's notice. The Defendant would also have entered into that contract knowing that the mining licence would have expired on the 28th of September 2012. Therefore, despite the fact that no termination date was inserted in that contract it could not have been legitimately extended beyond the period that the Defendants were legally permitted to carry out mining activities.

[116] In order to qualify for compensation for injurious affection in relation to the quarry, the Defendants are required to produce evidence of contracts entered into between July 2013 and December 2013 that could not have been executed due to the acquisition, and consequential damages arising therefrom. For example, when I examine the contract with Midac, it was Midac itself that was responsible for the blasting and the extraction of the material. Therefore, evidence that there was an existing contract with them and the Defendant, effective the 19th of July 2013, and evidence that they blasted and extracted material that they were not able to remove between December 23rd 2013 and January 30th 2014 and for which the

Defendants did not receive payment, would have met the necessary requirement for compensation The Defendants have produced no such evidence.

[117] In the case of ***Arawak Homes Limited v The Attorney General and another (supra)***

At paragraph 57 of the Judgment his Lordship had this to say:

> *"Alternatively, the appellant could make, what would be a strong case, that as a result of the severance of the land it has lost the opportunity to make the profit it would have realized as a result of the contract for sale. Neither of these scenarios or arguments were made in the present case. In light of this the decision of the learned trial judge as it relates to loss of profits is affirmed."*

[118] Analogous to the circumstances in the ***Arawak*** case and as previously discussed, it is my view that the Defendants have put forward no evidence of any contract for sale with a third party indicating the agreed price for the sale of the lots in the subdivision, nor any lost opportunity for profit they would have realized as a result of the contract for sale, nor any outstanding, unexecuted contract with agreed price in relation to the quarry.

[119] In light of the foregoing discussion, I agree with the opinion of the assessors that the Defendants have not established that they are entitled to an award for injurious affection. Therefore, I make no award under this head.

Orders

In accordance with Section 28 of The Act I make the following Orders.:

(i) The award of $4,346,813.10 is deemed appropriate under Section 14(1)(a) for the Market value of the land. This sum having been already paid to the Defendants no interest is awarded.

(ii) No deduction is made under section 14(1) (b).

(iii) No award is made under Section 14(1)(c).

(iv) The Claimant is to take the necessary steps to cause rectification of the title registered at Volume 1406 Folio 456 to reflect the removal of the acquired land by the Claimant.

(v) Each Assessor is to be paid at the rate of:

$150,000.00 per day for 5.5 days - $825,000.00

(vi) The Assessors' fees are to be borne by the Defendants.

(vii) The parties are to bear their own cost.

Signed by: _____ _____

Gordon Langford **Clinton Cunningham**

_____

Andrea Thomas

Puisne Judge