



[2020] JMSC Civ 151

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2016 HCV 01087

IN THE MATTER of an award made on the 13th August 2015 by the Commissioner of Lands under section 11 of Land Acquisition Act

AND

IN THE MATTER of a reference to the Supreme Court by Commissioner of Lands Under section 17 of the Land Acquisition Act

AND

IN THE MATTER of all that parcel of land part of Lot 1 CAYMANAS ESTATE in the parish of Saint Catherine being part of lands comprised in Certificate of Title registered at Volume 1448 Folio 200 of the Register Book of Title and being owned by FERRYLAND HOLDINGS LIMITED

BETWEEN

THE COMMISSIONER OF LANDS

CLAIMANT

AND

FERRYLAND HOLDINGS LIMITED

DEFENDANT

CONSOLIDATED WITH:

CLAIM NO. 2016 HCV 01088

IN THE MATTER of an award made on the 13th day of August 2015 by the Commissioner of Lands under section 11 of Land Acquisition Act

AND

IN THE MATTER of a reference to the Supreme Court by Commissioner of Lands Under section 17 of the Land Acquisition Act

AND

IN THE MATTER of all that parcel of land part of Lot 3 CAYMANAS ESTATE in the parish of Saint Catherine being part of lands comprised in Certificate of Title registered at Volume 1448 Folio 202 of the Register Book of Title and being owned by CAYMANAS HOLDINGS INCORPORATED

BETWEEN

THE COMMISSIONER OF LANDS

CLAIMANT

AND

CAYMANAS HOLDINGS INCORPORATED

DEFENDANT

CONSOLIDATED WITH

CLAIM NO. 2016 HCV 01089

IN THE MATTER of an award made on the 7th day of September 2015 by the Commissioner of Lands under section 11 of Land Acquisition Act

AND

IN THE MATTER of a reference to the Supreme Court by Commissioner of Lands Under section 17 of the Land Acquisition Act

AND

IN THE MATTER of all that parcel of land part of Lot 2 CAYMANAS ESTATE in the parish of Saint Catherine being part of lands comprised in Certificate of Title registered at Volume 1448 Folio 201 of the Register Book of Title and being owned by GEOMAC HOLDINGS LIMITED

BETWEEN

THE COMMISSIONER OF LANDS

CLAIMANT

AND

GEOMAC HOLDINGS LIMITED

DEFENDANT

CONSOLIDATED WITH

CLAIM NO. 2016 HCV 01090

IN THE MATTER of an award made on the 13th day of August 2014 by the Commissioner of Lands under section 11 of Land Acquisition Act

AND

IN THE MATTER of a reference to the Supreme Court by Commissioner of Lands Under section 17 of the Land Acquisition Act

AND

IN THE MATTER of all that parcel of land part of Lot 5 CAYMANAS ESTATE in the parish of Saint Catherine being part of lands comprised in Certificate of Title registered at Volume 1445 Folio 804 of the Register Book of Title and being owned by CAYMANAS ESTATE LIMITED

BETWEEN

THE COMMISSIONER OF LANDS

CLAIMANT

AND

CAYMANAS ESTATE LIMITED

DEFENDANT

Ms Althea Jarrett and Ms Donna Dodd instructed by the Director of State Proceedings for the Claimant

Mr Michael Hylton QC, Ms Melissa McLeod and Mr Kent Gammon instructed by Hylton Powell, Attorneys-at-Law for the 1st and 2nd Defendants

Mr Michael Hylton QC, Ms Melissa McLeod and Mr Yakum Fitz-Henley instructed by Hylton Powell, Attorneys-at-Law for the 3rd and 4th Defendants

**Compulsory land acquisition – Compensation awards – Payment of assessors -
Land valuation – Reference by the Commissioner of Lands – Land Acquisition
Act**

Heard: 13th, 14th of January and 10th July 2020

CORAM: KISSOCK LAING J (PRESIDING)

MR CLINTON CUNNINGHAM ASSESSOR

MR MERVYN DOWN ASSESSOR

INTRODUCTION

- [1] The Government of Jamaica, by way of notifications and declarations published in the Jamaica Gazette, indicated that various registered parcels of land or portions thereof, situated in the parish of Saint Catherine were for a public purpose, namely the construction of Highway 2000 Phase 2A (referred to herein together as “the Properties”). In pursuance of the acquisition of the Properties, the Commissioner of Lands (“the Commissioner”) entered into negotiations with the Defendants to acquire the Properties by way of private treaty agreements. Those negotiations were unfruitful. There having been no agreement for the state to acquire the Properties by private treaty, the Commissioner caused a notice to be published inviting the Defendants to make claims for compensation. Following this process, an enquiry was held by the Commissioner and subsequent to this, the Commissioner made an award to the each of the Defendants which was rejected on several bases. The Defendants requested that the matter be referred to the Supreme Court for compensation to be determined by the Court. This award and reasons therefor, is as a result of the hearing held pursuant to the reference by the Commissioner under section 17 of the Land Acquisition Act, by four Fixed Date Claim Forms filed on the 11th March, 2016.
- [2] The Claimant in each claim, the Commissioner, is a corporation sole established and existing under and by virtue of the Crown Property (Vesting) Act.

- [3] The Defendants in the respective claims are the registered proprietors of the Properties which have been acquired by the state. The “area of take” to which reference is made hereunder, relates to the actual area of the land which has been acquired.
- [4] The Court is empowered to hear these claims by virtue of section 17(1) of the Land Acquisition Act (hereinafter called “the Act”) where it stipulates that:

“any person interested who is dissatisfied with any award may, by written application to the Commissioner, require that the matter be referred by the Commissioner for the determination of the Court, whether his objection be to the survey, the amount of the compensation, the persons to whom it is payable, or the apportionment of the compensation among the persons interested”

THE CLAIMS

- [5] The Claims before the Court are as follows:

(1) Claim 2016 HCV 01087: The Commissioner of Lands v Ferryland Holdings Limited. This claim concerns all that parcel of land part of Lot 1 Caymanas Estate, St Catherine. The land has a total area of 3,8909 hectares by survey however, the area of take is 1.1885 hectares /2.9368 acres (“Lot 1”). On the 13th of August 2015, the Commissioner made an award pursuant to section 11 of the Act in the amount of \$26, 700,000.00.

(2) Claim 2016 HCV 01089: The Commissioner of Lands v Geomac Holdings Limited. This claim concerns all that parcel of land part of Lot 2 Caymanas Estates, St Catherine. The land has a total area of 2.0719 hectares/5.12 acres (“Lot 2”) the entirety of which comprises the area of take. On the 7th September, 2015 the Commissioner made an award pursuant to section 11 of the Act in the amount of \$41, 000,000.00.

(3) Claim 2016 HCV 01088: The Commissioner of Lands v Caymanas Holdings Incorporated. This claim concerns all that parcel of land part of Lot 3 Caymanas Estates, St Catherine. The land has a total area of 2.1764 hectares or 5.378 acres

by survey and the area of take comprises that entire portion of land ("Lot 3"). On the 13th August, 2015 the Commissioner made an award pursuant to section 11 of the Act in the amount of \$40, 000,000.00.

(4) Claim 2016 HCV 01090: The Commissioner of Lands v Caymanas Estate Limited. This claim concerns all that parcel of land part of Lot 5, Caymanas Estates, St Catherine. The land has a total area of 102.3364 hectares and the area of take is 5.4521 hectares ("Lot 5"). On the 13th August, 2015 the Commissioner made an award pursuant to section 11 of the Act in the amount of \$100,300,000.00.

- [6] Upon the claims coming for first hearing on the Fixed Date Claim Form on 25th November, 2016 before His Lordship Mr Justice David Fraser, all the four claims were ordered to be heard together.
- [7] By way of Ex-parte Notice of Application for Court Orders filed on the 24th of October, 2017, and 14th September, 2017 in relation to Claim No 2016 HCV 01088 and 2016 HCV 01089 2016 respectively, the Commissioner applied for an order for payment of money under protest, which was granted.
- [8] By way of Notice of Application for Court Orders filed on 28th November, 2017 the Defendants in the Claim No HCV 01088 and Claim No HCV 01089 applied to the Court for an order to receive payment under protest which was also granted.
- [9] Because of the similarity of the issues in the claims, in an effort to prevent unnecessary repetition, Counsel have in their conduct of the hearing, quite helpfully, addressed the evidence common to all claims without reference to any particular claim save where this was absolutely necessary. I will adopt the same approach in my analysis of the issues.

THE PROCESS OF ACQUIRING LAND UNDER THE LAND ACQUISITION ACT

- [10]** The law that governs the acquisition of land can be found in the Act which outlines the specific procedure that is to be followed by the Government of Jamaica in acquiring land.
- [11]** Pursuant to section 3 of the Act, there must be a publication of a notification in the Gazette whenever it appears to the Minister that land in any locality is likely to be needed for any public purpose. After which, the Commissioner must cause a public notice of the substance of such notification to be disseminated at convenient points in the locality of the land.
- [12]** Pursuant to section 5 of the Act, the Minister must make a declaration in the Gazette if the purpose of the acquisition of the property is for public purpose. Whenever any land is declared to be taken for public purpose, the Minister shall direct the Commissioner to take proceedings for the acquisition of land. The Commissioner is required to cause the land to be surveyed and valued and negotiate the purchase of the land by a private treaty under section 8 of the Act. Where there is a failure to acquire the land by a private treaty section 9 is invoked. This section provides that the Commissioner is then required to post notices at convenient points on or near the land to be acquired. Also, the section requires that notice must be served on any occupier of the land, as well as any person who is known or believed to have interest in the property. Notices under this section are to be served by registered post on the relevant persons who are residing outside the parish without an agent.
- [13]** Section 9 of the Act also mandates that claims for compensation for all interest in the land should be made to the Commissioner. Under section 9 (2) the notice must state the particulars of the land and shall require all persons interested to appear personally or by an agent before the Commissioner at a time and place to be specified in such notice, such time not being earlier than twenty-one days after the date of publication of the notice, and to state the nature of their respective interests

in the land and the amount and particulars of their claims to compensation for such interests and their objections, if any, to the survey.

- [14] Under the provisions of section 11 (1) of the Act, the Commissioner is entitled to hold enquiries and makes awards in respect of lands.

SUMMARY OF THE CLAIMANT'S CASE IN RESPECT OF THE FOUR CLAIMS

- [15] The case for the Claimant leading up to the reference to the Court is succinctly laid out in the several Affidavits of the Commissioner, Elizabeth Stair.

- [16] By way of Notification issued pursuant to section 3(1) of the Land Acquisition Act and published in the Jamaica Gazette ("the Gazette") dated 12th December, 2012 and 13th December, 2013 the Minister of Water, Land, Environment and Climate Change ("the Minister") gave notice that the Properties were likely to be needed for a public purpose, namely, for the construction of Highway 2000 Phase 2A.

- [17] On the 23rd December, 2012 and 23rd December, 2013 a declaration was made pursuant to section 5 (1) of the Act, that the Properties were needed for a public purpose, namely, the construction of Highway 2000 Phase 2A. Copies of the Gazette published on the 23rd December, 2012 and 23rd December, 2013 were exhibited.

- [18] The Commissioner was directed by the Minister pursuant to section 6 of the Act to take proceedings for the acquisition of the Properties. The Commissioner caused the Properties to be valued. Thereafter the Commissioner entered into negotiations to acquire the land by private treaty. These negotiations were however unfruitful.

- [19] There having been no agreement by private treaty for purchase of the Properties, the Commissioner caused a Notice pursuant to section 9 of the Act to be published on 15th December, 2014 indicating the intention of the Government of Jamaica to acquire the said land. The Notice bore the name of the Defendants and invited claims for compensation for persons with an interest in the Properties. The Notice also invited such persons to attend before the Commissioner on the 12th January,

2015 at an enquiry either personally or by an agent, to state the nature of their interest in the said land, as well as the amount and particulars of their claim to compensation. Copies of the Notice sent to the Defendant were exhibited.

- [20] There is no issue joined between the parties as to the sequence of events and the hearings which led to the respective awards and it is therefore unnecessary to address this area in any greater detail.

The valuation of Ms Hyacinth Picart

- [21] Ms Hyacinth Picart is a Chartered Valuation Surveyor currently employed by the Land Valuation Division of the National Land Agency and has worked with the Land Valuation Department since 1994. She is the Deputy Commissioner of Land Valuations in charge of the South East Region with responsibility for the parishes of Kingston, St Andrew, St Catherine and St Thomas. She is a holder of a Bachelor of Science Degree in Estate Management from the University of Reading and a member of the Royal Institution of Chartered Surveyors. It is her valuation upon which the Commissioner relied in reaching the respective awards.

- [22] Ms Picart conducted a valuation of the Properties to determine the current market value. She asserted that in arriving at the market value she acted in accordance with section 14 of the Act.

- [23] Ms Picart relied on the definition of 'market value' as agreed by the Royal Institution of Chartered Surveyors and the International Valuation Standard (2013) which is:

“ The estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently and without compulsion ”

- [24] Ms Picart stated that the definition of market value makes implicit, the assumptions of the Highest and Best Use. The definition of the Highest and Best Use (HABU)

as agreed by “Royal institution of Chartered Surveyors’ and the International Valuation Standards (2013) is:

“The most probable use of a property which is physically possible, appropriately justified, legally permissible, financially feasible, and which results in the highest value”

- [25]** Ms Picart indicated that an investigation of the planning considerations relating to the Properties revealed that they are located in an area that is not zoned for any particular use under the Town and Country Planning (St Catherine Coast) Provisional Development Order, 1964. She stated that an investigation of the relevant Certificates of Titles, revealed the approved use of the Properties to be industrial. She concluded that based on the approved and prevailing use of the properties and adjoining lots, the HABU of the Properties was deemed to be as industrial lands and this was taken into consideration in arriving at the market value of the Properties.
- [26]** In arriving at the market value of the Properties, the Direct Sales Comparison Approach or Market Approach of valuation was utilized by Ms Picart. She confirmed that this method is dependent upon the availability of sales data as near as possible to the valuation date, of other lots of land which are located in close proximity to the Properties, are similar in terms of size, gradient, soil type and land use. Because of these similarities, comparisons and therefore adjustments can be made.
- [27]** Ms Picart indicated that in relation to the kennel on Lot 1 the cost approach was used. This approach consists of estimating the depreciated replacement costs of the building adding it to the value of the land.
- [28]** The transactional evidence relied on for determination of the market value of the Properties is identical and as indicated in her affidavits as follows:
- a. *The transactional evidence relied on in the determination of the market value of the subject property are of industrial type unimproved properties sold in 2011/2012 directly south of and adjoining the subject property, and sold for prices ranging from a*

high of \$6.53 million per acre (rounded) to a low of \$5.37 million per acre (rounded).

- b. Transactional evidence dated September 6, 2011 showed another property selling for \$7,748,100 per acre. This property is located on the Mandela Highway between the Registrar General's Department and the Ashtrom batching plant - the RGD site being used for Government purpose and the Ashtrom site in industrial use.*
- c. That the evidence were adjusted upwardly to account for the difference in time between the transaction date and the Valuation Date, and adjusted negatively for the location and poor access to the subject property.*
- d. That only one of the lots purchased circa 2012 used in support of my valuation was developed (with a cement batching plant) and used for economic purpose, and this suggested that the location was not as in demand as others such as Cookson Pen Portmore in the parish of St. Catherine which is considered an emerging industrial zone and Spanish Town Road in the parish of St. Andrew which is a well established industrial district.*

[29] Ms Picart analysed the relevant data and her conclusions as to the market value of each of the Lots comprising the Properties formed the basis of the Commissioner's awards. Reference has already been made to these amounts but they are repeated hereunder for convenience as follows:

Lot 1 - \$26,700,000.00. The area of take comprises of 1.1885 hectares.

Lot 2 - \$41,000,000.00. The area of take comprises of 2.0719 hectares.

Lot 3 - \$40,000,000.00. The area of take comprises 2.1764 hectares.

Lot 5 - \$100,300,000.00. The area of take comprises 5.521 hectares.

Ms Picart's evidence by way of comments on the Langford Valuation

The case of the various Defendants was grounded to a large extent on the valuations done by Mr Gordon Langford, a chartered surveyor. It is convenient at this juncture to reproduce Mr Langford's comparable sales as contained in his assessment of compensation exhibited to his Affidavit filed 18th September 2018, on which Ms Picart commented during her examination in chief.

No	Date	Buyer/Comments	Location	Land size (acres)	Vol-Fol	Price paid \$mil	Price per acre \$mil
1	2010	Hydel	Land and building	6.50	1125-272	\$168.70 mil	\$21.34 mil
2	2012	Commercial Lot	Lot 1 Cookson Pen	1.87	1454-445	\$41.40 mil	\$22.16 mil
3	2012	Commercial Lot	Lot 3 Cookson Pen	1.31	1453-447	\$30.00 mil	\$22.85 mil
4	2013	Hardware Importer	6 Ashenheim Rd	3.32	1289-713	\$140.00 mil	\$42.17 mil
5	2013	Vacant land	475 Spanish Town Rd	4.21	954-286	\$180.00 mil	\$42.73 mil
6	2014	Lot 3 Bumper Hall	Land with old building	4.22	1461-422	\$179.00 mil	\$42.42 mil

Comparables:

Details: No. 1) Hydel: The sale was for three Titles, which included buildings. After allowing for the building value this shows a land value of \$21.34 million per acre.

No.2 & 3) Lots 1 and 3 Cookson Pen. These are vacant lots in Greater Portmore – opposite the Portmore Country Club. These would be equivalent to the Caymanas Lots as they are close to the edge.

No. 4) Ashenheim Road: This was an open vacant property, acquired at arm's length from a trucking company by a company who has built a large warehouse for sales and distribution

No. 5) Lot 475 Spanish Town Road: This property is vacant and in the Nase Pen area with frontage onto Spanish Town Road

No.6) Lot 3 Bumper Hall: This is back land, without a frontage on Marcus Garvey Drive with an old warehouse. The land formed part of the Wallenford Coffee Company but was acquired by another coffee company in a strongly contested negotiation.

[30] Ms Picart criticised the fact that Mr Langford included the Newport West area as relevant to the market under consideration. In her opinion Newport West is an older market and an older industrial area catering to port or near-port activities due to

the proximity of the Kingston Harbour which is a very important transshipment point in the Caribbean. She stated that Caymanas is way outside the Newport West environs and would not attract the same level of demand or the same level of prices.

- [31]** Ms Picart also opined that the Portmore area is a different market and criticised its use. She stated that Portmore was conceptualized to provide housing for the spill over from Kingston and St Andrew and that as a result there are very few unimproved vacant lots for other developments of a commercial /industrial nature and because of this scarcity, investors will pay a higher price for land in Portmore than in other areas such as Lawrence Tavern (St. Andrew) or Glengoffe (St. Catherine).
- [32]** Ms Picart took issue with a number of the comparables used by Mr Langford. As it relates to Comparable 1, the Hydel Property, (which was not disputed to be an educational institution), she noted that the titles reveal that the subject area which is a six and a half acre piece of land, was acquired in two separate transactions on two different dates, one for a consideration of \$68,000,000.00 and the other for approximately \$100,000.00. Ms Picart's evidence was that it is not the usual practice to combine two transactions and analyse them as one, since they properly should have been treated as two individual, separate sales and analysed as such.
- [33]** Ms Picart also raised a concern as it relates to the buildings on the Hydel Property and the fact that Mr Langford in his report accounted for the buildings' value. She stated that this is an issue for valuers because it is difficult to treat a property as unimproved where it has substantial buildings in use on the property. She opined that an adjustment has to be made for the value of the buildings and it is difficult to determine the appropriate adjustment factor. For this reason, and also for the reason related to the combining of the 2 transactions, she did not consider this to be a good comparable.

- [34]** In relation to Mr Langford's comparables 2 and 3, which are Lot 1 and Lot 3 Cookson Pen, Ms Picart stated that they are commercial properties in Portmore, an area in which there are limited available unimproved lots for commercial development (as she had previously explained and which is noted earlier in these reasons). Furthermore, whereas these lots are commercial Ms Picart reiterated that the Properties are industrial.
- [35]** In relation to Mr Langford's comparable 4, a hardware importer at 6 Ashenheim Rd, Ms Picart indicated that the address is actually 6B East Ashenheim Road and that the correct registration of titles volume number is 1281 not 1289 as stated by Mr Langford. She noted that the conversion from United States Dollars to Jamaican Dollars would have resulted in a figure of approximately J\$91,000,000.00 (Counsel for the Claimant subsequently suggested to Mr Langford that the figure of J\$88,000,000.00 was the correct figure – but not much turn on this), as opposed to the J\$140,000,000.00 asserted by Mr Langford. Furthermore, Ms Picart opined that this property forms part of the near-port lands due to their proximity to the Kingston Harbour and as a consequence would be in a different market from the area of the Caymanas lands where the Properties are located. Furthermore, she stated that the Ashenheim lot, being one of only two vacant lots in that vicinity, would be influenced by this scarcity and this would usually lead to an increase in the price it could command.
- [36]** In relation to Mr Langford's Comparable No 5, the property located at 475 Spanish Town Road, Ms Picart indicated that, a fact not disclosed in his report, was that this property of 4.21 acres brings to a total of approximately 54 acres, the area of land now owned by J Wray and Nephew Limited in that location. In her opinion, there would be a premium attached to the acquisition and amalgamation of this 4.21 acres into such a huge area by a single owner.
- [37]** In respect of Mr Langford's comparable No 6, Ms Picart said that although Mr Langford describes the building thereon as old, which it indeed was, it was by no means derelict and is in fact an old warehouse comprising approximately 60,000

square feet. She conceded that she was unaware of the strongly contested negotiations allegedly accompanying its acquisition by a coffee company from Wallenford Coffee Company, to which Mr Langford referred.

The Cross examination of Ms Picart

- [38]** Ms Picart was questioned in respect of her valuation of Lot 5, where she had stated in her 2015 valuation that the HABU is accommodation, whereas in her 2017 affidavit she indicated that it was deemed to be industrial. She explained that accommodation is a category of land use which refers to land that is left over or which was not included in a previous approval. Accordingly, one of the things that the valuer does, is to look at the previous land use and approvals and make a valuation in a similar vein. She explained that if you look at all the valuations together it is apparent that all the values are in the same ball-park which suggests that the same use analysis was utilized which was for industrial use/values. She said the analysis was based on industrial use although “termed” accommodation as the parent title did not then reflect that industrial use. She acknowledged that she has become more precise in her wording where the use of the word accommodation is concerned and now uses the term accommodation for a specified use for example accommodation for industrial purpose.
- [39]** Mr Hylton QC sought to identify and have Ms Picart respond in relation to the reasons for the differences between her valuation and that of Mr Langford. Counsel suggested the first reason as being the fact that Mr Langford considered some commercial and industrial comparables, whereas Ms Picart only considered purely commercial.
- [40]** It was suggested to Ms Picart that industrial usage is a type of commercial usage, a subset of and not an entirely different usage. She vehemently disagreed and stated that in her view, industrial, commercial, residential and agricultural were four different uses with four different prices. Ms Picart admitted that her analysis also considered residential demand in what she described as a general market for

Caymanas land and that she looked at everything. She was not prepared to accept the suggestion that in any event, commercial use would be a better comparable to industrial than residential and stated that the market would indicate whether the prices are similar or not.

- [41]** Ms Picart was unable to confirm whether the comparables used by Mr Langford were within 4-5 miles of the Properties in Caymanas, but agreed that scarcity would lead persons to search for alternatives in what she said was labelled “the substitution effect”. She went on to say that when she did her valuation of the subject lands considering the HABU as industrial, she considered that there was a scarcity of such lands in Newport West and Portmore.
- [42]** In relation to the existence of the Buildings on the Hydel Property and the ability of Mr Langford to have properly taken it in to account, she was asked whether at paragraph 17 of her affidavit filed 10 January 2017, she disaggregated the building and the land in her treatment of Lot 1, the property valued at \$26,700,00 by ascribing a value to the kennel of \$4,719,975. She explained that what she did was to ascribe a replacement cost. There was additional exchange between Counsel and Ms Picart on this issue which was not particularly helpful to the Court. What was clear from Ms Picart’s answer to the Court is that although it may be difficult it is not impossible to ascribe a value to a building on a property or a cost/value to demolish and remove it.
- [43]** Ms Picart reluctantly agreed that the change of use from agricultural to industrial by the designation orders would have resulted in a higher value of the Caymanas properties.
- [44]** Mr Hylton suggested to Ms Picart that a second reason for the difference in the values as determined by her and those of Mr Langford was the fact that the sale prices which she used were not accurate because they had been negotiated prior to the change of use effected by the designation orders. In response she indicated that she used the figures that were noted on the certificates of title. These

certificates reflected the date the transfers were recorded and she said she was unable to say the date that the transaction might have been negotiated because that information would not have been on the certificates.

- [45] Mr Hylton suggested to Ms Picart that the third reason for the difference between the reports was the fact that she based her analysis on information that only one lot in the subdivision had been developed and was being used for economic purposes. Counsel referred her to page 49 paragraph 5.2 of her Report and valuation on Lot 1 (Ferryland) which he says was repeated in other reports, and which reads:

5.2 Market Demand: Although the small industrial subdivision existed circa 2009, only one owner has developed and uses his lot for economic purposes

- [46] She admitted that a part of Lot 5 was leased to Digicel as a communications centre but said that lot 5 is not included in the small industrial subdivision to which she refers in her valuation reports. This reference, she said was only to Lots 1-4. It should be noted that Lot 4 does not form a part of the Properties in respect of which these claims have been made but was used for purposes of sales comparison. She also indicated that at her 2014 valuation date the title to Lot 5 did not disclose that another portion of Lot 5 had been leased to China Harbour.

- [47] Mr Hylton also directed Ms Picart to paragraph 22 of her 2017 affidavit in which she averred as follows:

That only one of the lots purchased circa 2012 used in support of my valuation was developed (with a cement batching plant) and used for economic purpose, and this suggested that the location was not as in demand as others such as Cookson Pen Portmore in the parish of St. Catherine which is considered an emerging industrial zone and Spanish Town Road in the parish of St. Andrew which is a well-established industrial district.

- [48] Counsel highlighted to her the fact that in her 2015 report, she had indicated that the reason for only one owner of the small industrial subdivision having developed

and using his lot for economic purposes was uncertainty and that she offered the following explanation:

...The construction of the Highway brings an amount of uncertainty which will surely cause developers/investors to wait out the construction phase before finalizing their investment options in the area. The Urban Development Corporation's 2008 master plan for their Caymanas owned lands should in the long run, fuel multi-use investment, effectively changing the face of Caymanas.

Having regard to this statement in her report, Counsel suggested to Ms Picart that the lack of development to which she referred in paragraph 22 of her affidavit had nothing to do with a lack of demand as she had indicated, but Ms Picart did not agree with that suggestion.

[49] Mr Hylton suggested that the fourth reason for the difference was the fact that Ms Picart made her conclusions based on the present use of the Properties, instead of their potential use and connected to that was the fact that she did not take into account factors such as the planned logistics hub. It is perhaps best to set out her response to this suggestion which explained her approach as follows:

I looked at the recently splintered titles. They were splintered in 2011. They spoke to industrial use or industrial purpose. I also looked at the Urban Development Corporation (UDC) land use map that accompanied the gazette and I compared the 2008 [] map to the updated 2012 map both of which have the lands designated industrial. So together with the recent change of use, the lands were in my opinion industrial in nature and as it is not required to include future use, I gave a current value of the approved use.

[50] When the Court enquired of Ms Picart whether she had specifically factored in the proposed logistics hub, her response was to the effect that there are always these plans but she “*..did not consider that there would be a change of use tomorrow*”

[51] The fifth reason suggested by Mr Hylton had to do with Ms Picart's valuation of Lot 1 and her treatment of the kennels which had to be relocated. She admitted that she ascribed a value for the demolition but said that she did not take into account the cost of relocating the kennels. She expressly stated in her exceptions to the

Report in respect of Lot 1 at paragraph 5.5 that the valuation does not include the cost of removal of chattels and /or the cost of relocation and anchoring.

[52] Ms Picart was also cross examined as to her treatment of the fact that the area of take of Lot 1 ran through the middle of the Lot. She said that she took the splitting of Lot 1 into account and valued the entire area of the property including the small part to the east but that her valuation did not take in to account the diminution in value of the land to the west, that is, the remainder of Lot 1.

THE DEFENDANTS' CASE

[53] The case for the Defendants rests substantially on the evidence of Mr Langford and on his valuation of the Properties. Mr Langford, like Ms Picart, also utilised the sales comparison approach to the valuation of the Properties. Ms Picart's comments on the comparables which he used have been addressed earlier in these reasons.

[54] Mr Langford's conclusion as to the valuation of the Properties as stated in his report is as follows:

VALUATION: We are of the opinion that, taking into account the relevant (audited) sales of other commercial land within a 4 – 5 mile (6.4 – 8.0 km) radius from the subject property that the Market Value for compensation purposes of the properties is J\$20 million per acre or:

<i>Caymanas Lots</i>	<i>Area Ac</i>	<i>Vol-Fol</i>	<i>Valuation</i>
<i>Lot 1</i>	<i>9.10</i>	<i>1448-200</i>	<i>\$182,000,000</i>
<i>Lot 2</i>	<i>5.12</i>	<i>1448-201</i>	<i>\$102,400,000</i>
<i>Lot 3</i>	<i>5.38</i>	<i>1448-202</i>	<i>\$107,600,000</i>
<i>Lot 4</i>	<i>5.08</i>	<i>1448-203</i>	<i>\$101,600,000</i>
<i>Lot 5</i>	<i>12.89</i>	<i>1445-804</i>	<i>\$257,800,000</i>

[55] It should be noted that Lot 4 is not included in the Properties under review.

Mr Langford's viva voce evidence

- [56] Mr Langford was of the view that commercial properties would be covered by the term light industrial as used in the legend of the land use plan and so he did consider commercial properties in his analysis. In his view, light industries would include manufacturing using the installation of machinery to accommodate fabrication of some sort and even external machinery such as a cement batching plant but could also include offices. He explained that he did find it surprising that the term commercial was not used on the land use map because all of the non-residential uses are commercial.
- [57] He noted that his assessment of value of the Properties at \$20,000,000 per acre is adjusted to reflect the fact that they are not as centrally located as the comparable located at Spanish Town Road for example which is better connected to the Port and accordingly has a higher price than those lots of lands in Portmore.
- [58] During cross examination, Mr Langford did not agree that industrial use and commercial use are distinct terms for purposes of valuing land and forcefully contended that industrial use is a subset of commercial use. He was also cross examined in relation to his assertion in respect of the initial purchase prices for Lots 1-4, that is, that the sales of these Lots were actually negotiated around 2-3 years earlier when the owner, Caymanas Estates, was in the process of applying for a change of use from agricultural to commercial. However, he did not accept the suggestion posed to him that at the time the sales were negotiated the Urban Development Corporation Development Plans for that subdivision were well known.
- [59] Mr Langford asserted in his report that these sales of Lots 1-4 did not conform to the Royal Institute of Chartered Surveyors as to market value, because the true market value was not paid for these lands. His explanation was that this occurred because the Vendor wanted to get buyers into a virgin site and so developed a price that seemed low to the buyers to allow them to seed the developments. He

maintained that the prices as listed on the Certificates of Title were therefore discounted.

- [60]** Mr Langford was unable to confirm the source of his information in relation to the Hydel Property but admitted it was not the certificates of title. He asserted that in 2008 to 2010 the titles would not have been reliable evidence of sales because in the cases of large sales, the titles hardly ever recorded the true and correct price.
- [61]** In relation to his comparable number 4, the Ashenheim Road Property, when asked about the conversion rate he used in order to arrive at the figure he stated of \$140,000,000.00, he indicated that he recalls the exchange rate at that time to have been US\$1 to JA\$100.
- [62]** In relation to the Spanish Town Road Property, Mr Langford could not recall whether he had seen the relevant certificate of title and said that he thought he got the information from the National Land Agency database which did not reveal the owner of the property. He admitted that when one is valuing a property it is important to see the certificate of title but in this case he was not valuing the property but was merely using it as a comparable. He admitted that it would have been useful to know that the purchaser J Wray & Nephew Limited was to amalgamate its existing freehold in this area, but this would not necessarily mean that it would pay above, (or below), the market value. He eventually conceded that the purchaser might pay a premium but maintained that an examination of the Certificate of Title would not show if the purchaser had over paid or underpaid.
- [63]** In relation to the Bumper Hall Property which he had used as a comparable, Mr Langford admitted that he could not remember whether he had seen the certificate of title for that property but assumed that he did. He accepted that it was located eight miles from the Properties which are the subject of these claims and thus, outside his 4-5 mile radius, but said that the price was heavily adjusted by him bearing that in mind. He did not accept the suggestion that the warehouse located

on the land was in good shape at the relevant time but accepted that it is located in a well established industrial area.

LAW AND ANALYSIS

The Picart Valuations

- [64]** The Challenge to Ms Picart's Valuation is on two main bases. Firstly, that they fail to take into account the HABU of the Properties and secondly, that they rely on inappropriate sales comparisons.
- [65]** As it relates to comparable sales, save for the previous sales of the Properties themselves, Ms Picart has relied on only two other transactions. The first is a property on the Mandela Highway between the Registrar General's Department and the Ashtröm batching plant registered at Volume 1301 Folio 498 of the Register Book of Titles, which shows the purchaser to be Singer Jamaica Limited. The area is 6.5 acres or 2.632 Hectares and the purchase price was \$50,362,650.00, on the transaction date 6th November 2011. The price was therefore \$7,748,100.00 per acre or \$19,147,840.50 per hectare.
- [66]** The second is Lot 4, registered at volume 1448 Folio 203 of the Register Book of Titles which states the purchaser to be Columbus Communications Jamaica Limited. The area of which is 5.08 acres or 2.0564 hectares. The transaction date was 11th April 2012 and the purchase price was \$35,200,000.00 which was \$6,929,133.86 per acre or \$17,117,292.40 per hectare. The Defendants have not challenged the appropriateness of these properties as comparables.
- [67]** The Defendants have taken issue with the analysis of Ms Picart in respect of the use of the prices at which the Properties under review were previously purchased and have criticised her valuations for failing to properly take account of the potential use to which they may be put in the future.

Were the prices at which the Properties were sold an accurate reflection of their true market value at the time of the sale?

A. *Were the contracting parties aware of the intended plans for the Caymanas area?*

[68] The Properties are encompassed in and subject to The Caymanas Area Designation Order Notice, 2009 issued pursuant to the provisions of section 14 of the Urban Development Corporation Act (the "Designation Order"). The notice was dated 17th March 2009 and published in the 23rd March 2009 Extraordinary Gazette.

[69] By order dated 2nd June 2011, approving Development Plan Caymanas Designated Area 2011 (the "Plan Approval Order"), the Prime Minister and Minister of Planning & Development the Honourable Bruce Golding indicated that the [Urban Development] Corporation had prepared a Plan of Development for the Caymanas area which was designated on the 17th March 2009 ("the Development Plan"). There having been no objections to the Development Plan prepared by the UDC, it was approved. The order was dated the 2nd day of June 2011 and published in the 2nd June 2011 Extraordinary Gazette.

[70] The effect of the Development Plan was to, *inter alia*, change the approved use of the area in which the Properties were located from agricultural to industrial. This is a factor which has implications for the value of the Properties as will become apparent later in this decision.

[71] It is common ground that the change of use from agricultural to industrial is a factor which would have led to an increase in the value of the Properties. If the transacting parties were aware of this change or likely change, then it is likely that this would have led to an increase in the price paid for the Properties.

[72] Three of the Properties were transferred in July/August 2011. The Development Plan was approved by Order dated 2nd June 2011. Mr Hylton submitted that on a balance of probabilities the parties would not have known about the Development Plan.

[73] Ms Jarrett submitted that, to the contrary, the evidence points to the parties having been aware of the Development Plan. She relied on the sequence of events which resulted in the Development Plan. Sections 14(1) and (2) of the Urban Development Corporation Act (the “UDC Act”) provides as follows:

14.-(1) If the Minister is satisfied, after consultation with any local authority which appears to him to be concerned, that it is expedient in the national interest that any area of land should be developed by the Corporation as an urban area, he may make an order designating that area for the purposes of this Act.”

14(2) The provisions of the Second Schedule shall have effect with respect to the procedure to be followed in relation to an order to be made under this section.

[74] The Second Schedule of the UDC Act, as far as material, provides as follows:

Provisions as to orders under section 14

1. Where the Minister proposes to make an order under section 14 of this Act, he shall prepare a draft of the order, describing the area to be designated by the order by reference to a plan, either with or without descriptive matter (which, in the case of any discrepancy with the plan, shall prevail except in so far as may be otherwise provided by the draft order) together with such statement as the Minister considers necessary for indicating the size and general character of the area as aforesaid.

2. The Minister shall, before making an order, publish in the Gazette and at intervals of not less than seven nor more than ten days in three issues of a daily newspaper printed and circulating in Jamaica a notice -

(a) stating that the draft of an order under section 14 of this Act has been prepared by the Minister and is about to be considered by him:

(b) describing the area to be designated by the order;

(c) naming a place within the said area or as near thereto as may be convenient where a copy of the draft order (including any plan or descriptive matter annexed thereto) and of the statement required by paragraph 1 may be inspected on such hours as may be specific in the notice;

(d) specifying the time (not being less than twenty-eight days after the publication of the notice in the Gazette) within which, and the manner in which, objections to the draft order may be made,

and shall, not later than the date on which the notice is published in the Gazette, serve a like notice on any local authority which appears to him to be concerned with the order.

- [75] Ms Jarret submitted that having regard to the fact that the Designation Order was made on 17th March 2009 it was “inconceivable” that the contracting parties were not aware of it in 2011/2012.
- [76] The difficulty with this issue is that there is no clear evidence as to the date when the transactions were negotiated. The evidence of Mr Langford is that they were negotiated 2-3 years before the transfers but as he admitted to Ms Jarret in cross examination, this still potentially places those negotiations at or before the Designation Order.
- [77] Another fact on which the Claimant relied to support her assertion of knowledge of the Designation Order on the part of the contracting parties to the initial sale of the Properties, is the sale price of approximately \$5 million per acre. The evidence of Ms Picart in re-examination was that agricultural land does not obtain that price “*nowhere in Jamaica*”. There was no evidence before the Court to suggest that her assertion in this regard was not correct. The fact that the Properties were designated agricultural lands at the time the sales were negotiated, however, is not in issue.
- [78] Having regard to the absence of any special factors which would have led to the price per acre which was in fact paid for the Properties on the initial sale, and considering the likely timing of the negotiations in relation to the Designation Notice, I find that on a balance of probabilities the contracting parties were aware of the likely change of use from agricultural to industrial within a relatively short period of time and that being reasonable commercial men driven by the profit motive, they took this into account in the price which was negotiated.
- [79] This does not necessarily mean however that the price accurately reflected the true market price of the Properties. Mr Langford did not offer the source of knowledge in respect of his assertion that those lots were offered at a discount to

early purchasers. The fact that the Properties were sold at prices above what they would have obtained if the use was not being changed to industrial does not, *ipso facto* negate the possibility that there was also a discount to encourage other purchasers who would be attracted by the fact that they were not going into virgin territory. The possibility of this having occurred is quite reasonable in transactions between commercial persons in such circumstance and although Mr Langford did not disclose the source of his knowledge, I accept this evidence on this point on a balance of probabilities.

[80] Having regard to these conclusions, I find that the initial prices paid for the Properties were their true market prices.

B. *Did Ms Picart sufficiently consider future use*

[81] In three of the Picart Valuations it was stated that the HABU is industrial and in respect of one property it was stated that the HABU is “accommodation land”. Ms Picart explained that accommodation land is a land use which refers to land that was left over or which was not included in a previous approval. She explained that what the valuer does is to examine the prevailing land use and approvals and value such property along similar lines. Having regard to her explanation, the distinction did not appear to have much practical effect and it is safe to treat the accommodation land as having been assessed by Ms Picart on the basis that the HABU was industrial for purposes of her valuation.

[82] It was submitted by Mr Hylton that the Picart Valuations give very little or no consideration to the industrial use or potential for industrial use of the properties. I do not agree that Ms Picart gave no consideration to the fact that the Properties were designated for industrial use. Her evidence, which I accept in this regard, supports her repeated assertion that she did. However, the question is reasonably raised as to whether she did so sufficiently. Closely tied to this issue is her firmly held opinion that commercial and industrial uses are separate and distinct and also, that industrial use is not a subset of commercial use as the Defendants

argued. The effect of her opinion is that she did not consider the commercial properties used by Mr Langford as suitable comparables and she did not utilize any commercial properties in her analysis.

Are commercial Properties appropriate comparables?

[83] Ms Jarrett sought to justify Ms Picart's approach of not including commercial properties by reference to The Town and Country Planning (St. Catherine Area) Provisional Development Order, 2017 which in the Fifth Schedule, Appendix 1, provides the following definitions:

"commercial development" means development for the provision or supply of goods or service by wholesale or retail; but does not include a warehouse;

"industry" means one in which the use carried on involves or is incidental to the making of any article or part of any article of the altering, repairing, ornamenting, finishing, cleaning, washing, packing, canning, or breaking-up or demolition of any article or the extraction or processing of minerals:

"industry-light" means an industry in which the process is such that it is suitable for location adjacent to or in close proximity to residential development although not necessarily within the area itself;

[84] Mr Hylton referred to The Town and Country Planning (St Catherine Coast) Provisional Development Order, 1964 and the statement of intended relation of uses to the zones shown in the development area. A wide range of commercial operations such as shops, offices, warehouses, petrol filling stations are indicated in the order as being considered normally permitted within the commercial area. This Counsel submitted weakened the argument advanced by Ms Jarrett in favour of the application of the narrow construction of commercial use to be applied to the 2017 Order. Counsel submitted that it tended to support Mr Langford's opinion that although no reference was made to commercial use in the Development Plan, it was to be understood that a wide range of commercial activities would be permitted in the area. This would also extend to activities which could not be classified as light industry.

- [85] Mr Hylton also sought to rely on authorities such as Real Estate Finance: Law, Regulation & Practice, which at chapter 9 paragraph 9.21 refers to the main commercial property sectors of retail, offices and industrial properties.
- [86] Ms Jarrett argued that the Court should be cautious in its use of references and authorities from outside our jurisdiction because of the specific statutory regime contemplated in Jamaica.
- [87] I accept Mr Hylton's submissions on this point. There is insufficient evidence before the Court to convince me on a balance of probabilities that the Development Plan in its designation of "Industrial" did not contemplate the area being utilised by a wider group of commercial users. This in the Court's view would clearly not include every conceivable commercial use.
- [88] The Assessors share Mr Langford's opinion of a wider range of commercial activities that would be permitted in the Caymanas Area, than those strictly classified as industrial and are of the view that this would affect the demand and consequently the value of Properties. Therefore, the Assessors are of the view that the Picart Valuations, having not taken the correct approach in relation to the possible variety of commercial user, was deficient and by failing to use commercial sales as comparables arrived at values which underrepresented the true market value of the Properties.

Possible future developments, in particular the specific example of a logistics hub

- [89] Mr Hylton also argued that Ms Picart did not have any regard to the increased demand for commercial properties which may have resulted from factors such as the planned logistics hub in the area.
- [90] Ms Picart's position was that she is not required to include future use and she gave a current value based on the newly approved industrial use. When the Court enquired of her as to why she did not consider the planned logistics hub a factor,

she indicated some degree of scepticism in her response that there are always plans and she “*did not consider that there would be a change of use tomorrow*”.

- [91] Mr Hylton submitted that Ms Picart’s analysis in this regard runs counter to the definition of HABU. Learned Queen’s Counsel relied on the case of **Burke v Commissioner of Valuations** 24 JLR 368 in support of his submissions that a proper valuation must take into account its possibilities and not just its realised possibilities. In **Burke** (supra) at page 376-376 Rowe P commenting on **Lucas v Chesterfield Gas and Water Board** [1909] 1 K.B. 16 stated as follows:

Lucas v Chesterfield Gas and Water Board [1909] 1 K.B. 16 proceeded on the basis that the land in question had a special adaptability for the construction of a reservoir and that this special quality ought to be taken into consideration in the assessment of compensation. The Court reiterated the principle that the test is of the possibilities and not the realized possibilities. In that case there was no power in the owner of the land to have developed it into a reservoir and the land could be sold for that purpose to only a very limited number of purchasers who had parliamentary power to construct a reservoir, yet having regard to the state of readiness of the land for the purpose of a reservoir, Vaughan Williams, L.J. concluded:

“It may be that the adaptability of the land for the purpose of enlarging the reservoir was so unique that he will give a value little less than that which he would give if dealing with the realized possibility.”

- [92] Mr Hylton also relied on the Privy Council judgment of **Mon Tresor and Mon Desert Limited v Ministry of Housing and Lands and another** 2008 UKPC 31 where the Court in its majority opinion at paragraph 7(c) stated that:

*(c)The land acquired must be valued not merely by reference to the use to which it is being put at the time at which its value has to be determined, but also by reference to the uses to which it is reasonably capable of being put in the future **Gajapatiraju v The Revenue Divisional Officer; Vizagapatam** [1939] AC 302.*

- [93] The Court fully recognises and appreciates this principle, however, the Court has only had passing references to the planned logistics hub reasonably near to the Properties and there is not sufficient evidence before the Court that this is a reasonably likely possibility, especially in the short or medium term. The question

then is, whether in light of the available information of a possible logistic hub (and the possibility of an increased demand for properties in that area, having particular regard to the scarcity of land in Newport West and Portmore), Ms Picart should have considered this possibility as an important factor.

[94] It is the Court's opinion, which is shared by the Assessors, that the lack of any details regarding the logistics hub in Court suggests that there is a reasonable level of uncertainty surrounding whether a logistics hub may materialise. Accordingly, investors are not likely to factor in the possibility of the development of a logistics hub close to the Properties as a major consideration when approaching an investment by way of purchase in the Properties. The possibility of a logistics hub is therefore not a factor which will affect the price of the Properties and consequently it ought not to have been given any additional consideration or weight by Ms Picart.

[95] Ms Picart has considered the use of the Properties for commercial purposes. There are a range of diverse commercial uses for which the Properties are capable of being put. Uses related specifically to a logistics hub and/or its support services or functions are of course a possibility, but would be a specialised and discrete category of commercial use. I find that Ms Picart was not required to make a valuation based on the possibility of these specific logistics hub related uses, especially given the absence of any evidence or more detailed information in respect of the possibility of such a hub.

Omission of the Leases of portions of Lot 5

[96] Mr Langford could not give any clear evidence and could not recall the source on which his assertion that part of lot 5 was leased to Digicel as a communications centre was based. He also asserted that another portion of Lot 5 had been leased to China Harbour but admitted that it was not disclosed on the Title. This is no fault of Ms Picart, because it ought to have been. However, I accept the evidence that there were such leases and this is a consideration which would have been material

to Ms Picart's valuation of the Properties given her statement that only one lot of the small subdivision had been put to commercial use. The leases provide supportive evidence of the demand for land in the area in which the Properties are located. I arrive at this conclusion notwithstanding her explanation that Lot 5 is not included in the small industrial subdivision to which she referred, that subdivision being confined to Lots 1-4 only. Accordingly, I find that the omission of the existence of the leases is a weakness in the Picart Valuations which resulted in a market value of the Properties being assessed at a lower figure than the actual figure. The omission of Lot 5 as a comparable is understandable given its size and the fact that it remains a part of the larger landholding of the original vendor.

The Court's conclusion in respect of the Picart Valuations

- [97] The Court in consultation with the Assessors, finds that there is an overreliance in the Picart valuations on the initial purchase prices of the Properties. The use of only two other comparables has lessened the weight which the Court can place on the final valuation figures for the Properties arrived at by Ms Picart.
- [98] The Court appreciates that the property located at Central Village Volume 1301 Folio 498 is very a good comparable, given its location, however the Court has to guard against the danger of placing undue weight on this one property because of its location and similarity.

The Court's assessment of the Langford Valuations

- [99] The Court has found that commercial properties such as those considered by Mr Langford are appropriate comparables for purposes of determining appropriate values for the Properties. However, the comparables used by Mr Langford are not ideal, having regard to factors such as the distance from the Properties. I appreciate the point made by Mr Landford in his evidence that it is not often that one finds perfect or ideal comparables which are similar in all material particulars and therein lies the importance of the adjustments which have to be made. The Court must however be equally cognisant of the fact that the need for application

of multiple adjustments weakens the weight which the Court can place on an adjusted value as compared with that arrived at by looking at very similar property.

[100] The Hydel Property for example demonstrates the danger which may arise from multiple adjustments and in particular having to disaggregate the value of the land and the existing buildings in order to arrive at a value of the land only for use as a comparable. The Court accepts the evidence of Ms Picart in relation to her criticisms of the use of the Hydel Property and the Court finds that it is not a sufficiently similar property to the Properties and does not amount to a good comparable. However, this finding is not significant in altering Mr Langford's opinion of value because in any event the Hydel Property at \$21.34 million per acre is the lowest price of the comparables used by Mr Langford and would not positively skew his result.

Comparing the Picart Valuations and the Langford valuations

[101] The Picart valuations range from a high of approximately \$22,465,292.40 per hectare (\$9,091,528.19 per acre) for the area of take of Lot 1 (1,1885 hectares /2.9368 hectares), to a low of approximately \$18,396581.10 per hectare (\$7,444,833.63 per acre for the area of take of Lot 5 (5,4521 hectares/ 13.4724 acres). This was influenced by what I have found to be an overreliance on the initial purchase prices for the Properties. I have previously made reference to the fact that one of the two other comparables used by Ms Picart has an area of 6.5 acres or 2.632 hectares and the purchase price was \$50,362,650.00. The purchase price was therefore \$7,748,100.00 per acre or \$19,147,840.50 per hectare. The other comparable Lot 4 which is 5.08 acres or 2.0564 hectares was sold for \$35,200,000.00 which was \$6,929,133.86 per acre or \$17,117,292.40 per hectare. Although the transaction involving Lot 4 was on 11th April 2012 and subsequent to the transactions involving Lots, 1, 2, 3 and 5, the price of Lot 4, being in the same vicinity of the Properties was consistent with the prices of Lots 1,2,3 and 5. I am of the opinion, and my view is shared by the Assessors, that, having regard to the low number of comparables other than the previous

purchases of the Properties, the valuations of the Properties by Ms Picart were lower than their true market value.

[102] On the other hand, the comparables used by Mr Langford ought to have been more heavily discounted. The Hydel property was inappropriate and I have addressed that previously. Appropriate adjustments ought to have been made to the other comparables to take account for location and the type and use of various properties. The values arrived at by Mr Langford were based on his valuation of approximately \$20 million per acre (\$49,420,000.00 per hectare).

The CD Alexander Valuations

[103] I acknowledge that the maker of these valuations was not subject to the crucible of cross examination but I do not accept the submissions of Mrs Jarrett that this would provide a basis for its exclusion. The valuations are evidence before the Court to which the Court can attach such weight as it thinks it deserves. However, the Court accepts that very little weight can be attached to these valuations having regard to the fact that the maker was not tested by the kind of cross examination that Ms Picart and Mr Langford faced and there was not the detailed analysis of the CD Alexander valuations.

[104] CD Alexander is undeniably a well experienced valuator. Its valuations serve a limited purpose but the Court finds that they are more consistent with and do support the market value of Mr Langford as opposed to that of Ms Picart.

Role of the Assessors

[105] Section 20 of the Act provides as follows:

If the objection is in regard to the amount of the compensation and the award of the Commissioner is not less than two thousand dollars, the Court shall appoint two assessors for the purpose of aiding the Court in determining the objection. Such assessors may also be appointed in any other case in which the Court considers it desirable to make such appointment. Every person so appointed shall attend and serve as an assessor unless excused by a Judge.

[106] In **The Commissioner of Lands v Worman Limited** SCCA No. 115/2004 the Court of Appeal confirmed that the role of the Assessors was to aid in the process of adjudication. At paragraph 4 of the judgment, Cooke J.A. indicated that the assessors were to aid the Court:

“...in the manner in which the Act mandated – which was to sit with the learned judge and, with the benefit of their particular expertise, to assist the judge to evaluate the proffered evidence and at the conclusion of the hearing to give their opinion orally, which the judge is obliged to record in writing. [S25 of the Act.] The role of the assessors was to aid in the adjudication – not to give evidence”

[107] The case of **The Commissioner of Lands v Worman Limited** (supra) also provides helpful guidance on the role of Assessors. The Court highlighted some of the important features of the Act in this regard including Section 24 (4) which provides that:

“The provisions of this section and of section 14 shall be read and explained to the assessors (if any) by the Judge before they give their opinions as to the amount of compensation to be awarded.”

[108] Another important provision the Court of Appeal highlighted was section 14 which sets out the factors which should be and which should not be taken into consideration in the determination of the quantum of compensation. I think that given the importance of this section, it should be set out in full as follow:

14 (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 or 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 Act.*

[109] I hereby confirm that section 14 and section 24 have been read and explained to the Assessors in compliance with section 24(4).

The approach to the assessment by the Court with the assistance of the Assessors

[110] Section 26 (1) and (2) of the Act provide as follows:

“1. *In case of a difference of opinion between the Judge and the assessors or either of them upon a question of law or practice or usage having the force of law the opinion of the Judge shall prevail.*

2. *In case of a difference of opinion between the Judge and both of the assessors as to the amount of compensation or as to the amount of any item thereof the decision of the Judge shall prevail.”*

[111] In this case there is no disagreement between the assessors and the Judge on any of the matters which I have found to be relevant in determining the respective market values for purposes of this assessment.

[112] We have reviewed the previous sales of the comparables used by Ms Picart of Lots 1, 2, and 3 and adjusted them upwards based on the Court's finding of fact that they were sold at discounted prices to early purchasers. We have also made an adjustment for the time of sale.

[113] We have examined each of the comparables used by Mr Langford and made appropriate discounts. The assessors and the Court agreed with many of the criticisms of the comparables identified by Ms Picart and we were of the view that appropriate discounts should be applied in respect of each of these comparables. By way of non-exhaustive examples, Mr Langford comparable 5 was adjusted significantly downward to account for the fact the purchase of the property by J Wray and Nephew Ltd. and was a consolidation of properties owned by that entity in the area. An adjustment was also made to take into account the location of the Ashenheim Road property being in a well-established historical commercial zone. The Cookson Pen Properties were also discounted based on their location.

Conclusion as to the appropriate value per acre

[114] Having considered all the comparables used by Ms Picart and Mr Langford (the Hydel Property being disregarded), the Court with the assistance of the Assessors concluded that the correct market value of the Properties at the appropriate time was \$14,000,000.00 per acre.

ASSESSORS' RENUMERATION

[115] The two Assessors have attended court for the hearing of the matter for the period of two days and have prepared their minds to the issues in this case and have

assisted the court in determining the appropriate compensation to be awarded in this case and as such they too must be compensated.

[116] The cost attended upon by the Assessors who have given their time was considered in the case of **The Commissioner of Lands v Homeway Foods Limited and Stephanie Muir** [2012] JMSC Civ 108 where it was opined by Madam Justice Lawrence–Beswick that ‘*fee not exceeding twenty dollars*’ may well have been regarded as an insult in 2012 and the learned Judge suggested an *ex gratia* payment.

[117] The issue was considered by my brother Mr Justice Evan Brown in the case of **The Commissioner of Lands v Clifford Armstrong et al** [2012] JMSC Civ 115 where he called on the need for urgent legislative action in this regard. In that case, the learned Judge in 2012 awarded a specific sum based on a daily rate of \$60,000.00 per day of what he considered to be reasonable in the circumstances as opposed to a recommending that an *ex gratia* payment be made. My Learned brother acknowledged that this was below the \$15,000.00 per hour then charged by assessors in their private capacity.

[118] I am of the view that the sum of \$200,000.00 represents fair remuneration for each Assessor for his service. This takes into account the time spent sitting and the time consulting with me in the assessment process. I share the doubt expressed by Justice Beswick in **Homeway Foods** (supra) as to whether the Court could properly make an order for a sum in excess of that provided for in the Act. Accordingly, I will strongly recommend that an *ex gratia sum* of be paid by the Claimant.

PAYMENT OF INTEREST

[119] It was submitted by Counsel for the Defendants that the Claimant should pay interest on the sum awarded. However, the parties have asked the Court to refrain from consideration of this issue it being a matter the parties are quite capable of

determining themselves. Accordingly, I will respectfully accede to Counsels' request.

CONCLUSION AND DISPOSITION

[120] The Court notes that in respect of Claim No HCV 01089 (Lot 2) and Claim No HCV 01088 (Lot 3), payments have already been made under protest which were accepted. These should be accounted for in the final payments and are to be deducted from the total award of the Court in respect of each of these two lots. For the avoidance of any doubt, the awards of compensation below are not in addition to the awards of the Commissioner but are wholly independent awards of total compensation arrived at after consultation between the Judge and the Assessors.

[121] Having examined the viva voce and documentary evidence presented during the hearing, the Assessors and I are agreed as to value to be attached to the Properties for purposes of these four references to the Court. In accordance with section 28 of the Act, the Court makes the following assessment of the total composite amount of compensation that each Defendant should receive and makes the following awards for each of the relevant Lots. There are no deductions under paragraph (b) of subsection 1 of section 14 of the Act, nor are there any amounts awarded under paragraphs (c) or (d) of subsection (1) of section 14 of the Act. There has also not been a specific award in respect of the relocation of the kennels because we were the view that there was insufficient evidence on which to properly make an assessment of what would be a fair sum.

AWARDS

1. The market value at the relevant date of service of the notice under subsection (3) of section 9 of the Land Acquisition Act in respect of the four claims that have been consolidated herein are as follows:

(1) Claim 2016 HCV 01087: The Commissioner of Lands v Ferryland Holdings Limited. All that parcel of land part of Lot 1, Caymanas Estate,

St Catherine, with an area of take of 1.1885 Hectares/2.9368 acres:
\$41,116,000.00

(2) Claim 2016 HCV 01089: The Commissioner of Lands v Geomac Holdings Limited. All that parcel of land part of Lot 2 Caymanas Estates, St Catherine, with an area of take of 2.0719 hectares/5.12 acres:
\$71,680,000.00

(3) Claim 2016 HCV 01088: The Commissioner of Lands v Caymanas Holdings Incorporated. All that parcel of land part of Lot 3 Caymanas Estates, St Catherine, with an area of take of 2.1764 hectares/5.38 acres:
\$75,320,000.00

(4) Claim 2016 HCV 01090: The Commissioner of Lands v Caymanas Estate Limited. concerns all that parcel of land part of Lot 5, Caymanas Estates, St Catherine, with an area of take of 5.4521 hectares/13.4724 acres: **\$180,460,000.00**

2. Costs are awarded to the Defendants to be taxed if not agreed.