SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CIVIL APPEAL No. 13 of 1991

BETWEEN:

WINDWARD PROPERTIES LIMITED

Appellant

and

THE GOVERNMENT OF SAINT VINCENT AND THE GRENADINES

Respondent

Before:
The Rt. Hon. Sir Vincent Floissac - Chief Justice
The Honourable Mr. C.M.Dennis Byron - Justice of Appeal
The Honourable Dr. Nicholas J.O.Liverpool - Justice of Appeal

Appearances:
Mr. Othniel R. Sylvester Q.C. and Mr. Marc Williams for the Appellant
Mr. Karl Hudson-Phillips Q.C. and Mr. Carlyle Dougan for the Respondent

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1993: July 20, 21, 22, 23;
December 6

JUDGMENT

SIR VINCENT FLOISSAC, C.J.

This appeal relates to the amount of compensation payable for the compulsory acquisition of an estate known as Orange Hill Estate situate in the Parish of Charlotte in the island of Saint Vincent. It is an appeal against an award of compensation in the sum of EC$4.7 million with interest thereon at the rate of 5% per annum from 1st May 1985 to date of payment. The award was made by the majority of a Board of Assessment appointed under the Act (the Land Acquisition Act No.22 of 1946 of Saint Vincent and the Grenadines and amendments thereto) and was filed in the High Court on 8th November 1991. The Board comprised Miss Justice Monica Joseph (the Chairman), Mr. C. Ashton Piper (the appellant's nominee) and Mr. Bertram E. Commissong (the respondent's nominee).

The Estate (the Orange Hill Estate) is approximately 28 miles from the capital city of Kingstown and is situated on the slopes of La Soufriere mountain at the crest of which is the crater of the

"La Soufriere" Volcano. The estate measures 3118 acres more or less in extent. It is a composite estate comprising five parcels of land respectively known as (1) the Tourama Estate (which measures 531 acres more or less and includes the so-called lot No. 19) (2) the Waterloo Estate (which measures 770 acres more or less and was cultivated in bananas and on which there was a banana boxing plant) (3) the Rabaca or Rabacca Estate (which measures 600 acres more or less and on which there is a small airstrip) (4) the Orange Hill Estate (which measures 716 acres more or less and which accommodated the agro-processing plant, tobacco barns, the button factory, the copra drying house and other amenities of the Estate) and (5) the so-called lot No.14 (which measures 500 acres more or less).

The Estate was previously owned by Orange Hill Estates Limited (the former owner) which was a private company owned by the Barnard family. But on 25th February 1985, the former owner sold the Estate to the appellant for US$1.6 million (EC$4.32 million). Thereafter, the Estate was compulsorily acquired for a public purpose expressed to be "the provision of public housing and the improvement of agricultural production." The compulsory acquisition was accomplished by two publications of a declaration to that effect in two ordinary issues of the Gazette. The first publication was on 9th April 1985 and the second publication was on 30th April 1985 whereupon the Estate vested absolutely in the Crown as provided by section 3(3) of the Act.

Relying on a valuation by Mr. Summerville McGregor Cremona-Simmons (the appellant's valuer), the appellant claimed compensation in the sum of EC$29,495,500.00 calculated as follows:

			$
(1)	Land (including road system)		
	(a) Rabacca	690,000	
	(b) Lot 14	6,050,000	
	(c) Waterloo	4,860,000	
	(d) Orange Hill	2,310,000	
	(e) Tourama	4,900,000	
	(f) North of Tourama	3,390,500	
	Total	22,200,500	

	Discount for sale as a *unum quid* - 40%	8,880,200	
	Unum quid value	13,320,300	
(2)	Trees and standing crops		9,594,860
(3)	Buildings		
	(a) Residential	1,435,000	
	(b) Industrial	1,000,000	
	Total	2,435,000	2,435,000
(4)	Waterworks		500,000
(5)	Water rights		250,000
(6)	Rabacca Mines		1,252,000
(7)	Airstrip		171,000
(8)	Agro-industry Plant-equipment		350,000
(9)	Stock in storeroom		65,100
(10)	Crops in stock		34,240
(11)	Damages sustained by virtue of contractual obligations		
	(a) Management contract	856,000	
	(b) Purchase/contract	667,000	
	Total	1,523,000	1,523,000
	Total compensation		29,495,500

Having regard to the actual price paid by the appellant for the Estate, the majority of the Board made the award of $4.7 million - being the amount which the authorised officer offered the appellant by way of compensation for the compulsory acquisition of the Estate.

Accordingly, the questions which we are required to answer are (1) the basic rules which govern the assessment and award of compensation for the compulsory acquisition of land in Saint Vincent and the Grenadines (2) whether the actual price paid and received under the actual sale of the Estate by the former owner to the appellant on 25th February 1985 constituted evidence of the open market value of the Estate at the relevant time (3) whether the valuation by the appellant's valuer was realistic, reliable and convincing to such an extent that it may be said to have falsified the actual price as evidence of the open market value of the Estate at the relevant time and (4) whether the appellant is entitled to compensation for disturbance as a result of the compulsory acquisition.

(1) The basic rules

Section 19 of the Act provides that:

> "Subject to the provisions of this Act, the following rules shall apply to the assessment and award of compensation by a Board for the compulsory acquisition of land:
>
> (a) the value of the land shall, subject as hereinafter provided, be taken to be the amount which the land, if sold in the open market by a willing seller, might have been expected to have realised at a date twelve months prior to the date of the second publication in the Gazette of the declaration under section 3:
>
> Provided that this rule shall not affect the assessment of compensation for any damage sustained by the person interested by reason of severance, or by reason of the acquisition injuriously affecting his other property or his earnings, or for disturbance, or any other matter not directly based on the value of the land;
>
> (b) the special suitability or adaptability of the land for any purpose shall not be taken into account if that purpose is a purpose to which the land could be applied only in pursuance of statutory powers, or for which there is no market apart from the special needs of a particular purchaser or the requirements of any Government department;
>
> (c) ....
>
> (d) ....
>
> (e) ...."

Section 19 expresses or implies that the assessment of compensation for the compulsory acquisition of land is based on the value of the land to the owner thereof. Section 19(a) expresses or implies that the components of the value of the land are (1) the open market value of the land (i.e. the amount which the land might have been expected to have realised if sold in the open market by a willing seller) at the prescribed date for valuation of the land (2) the amount (if any) of the disturbance (i.e. the loss or damage other than the open market value of the land) suffered or sustainable by the owner of the land as a direct result of the compulsory acquisition of the land and (3) in the case of the severance of the land from land retained by the owner, the amount of the damage to or depreciation or injurious affection (if any) of the retained land as a result of such severance or as a result of the use to which the compulsorily acquired land will be put.

Section 19(a) of the Act provides that the open market value to be ascertained is the open market value of the land at a date twelve months prior to the date of the second publication in the Gazette of the declaration of acquisition of the land. However, section 6(1) of the Constitution of Saint Vincent and the Grenadines provides that:

> "No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except for a public purpose and except where provision is made by a law applicable to that taking of possession or acquisition for the payment, within a reasonable time, of adequate compensation."

The probabilities are that the landowner whose land has been compulsorily acquired will be denied his constitutional right to adequate compensation if, as required by section 19(a) of the Act, the open market value of the land is deemed to be the value at a date twelve months prior to the date of the second publication of the declaration of acquisition. For this reason, section 19(a) of the Act is inconsistent with section 6(1) of the Constitution and would have been constitutionally invalid but for paragraph 2(1) of the Transitional Provisions contained in Schedule 2 of the Saint Vincent Constitution Order 1979 No. 916. Paragraph 2(1) provides that:

> "The existing laws shall, as from the commencement of the Constitution, be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution and the Supreme Court Order."

We must therefore obey the command in paragraph 2(1) of the Transitional Provisions and construe section 19(a) of the Act so as to bring it into conformity with section 6(1) of the Constitution. This means that the words "at a date twelve months prior to the date of the second publication in the Gazette of the declaration under section 3" appearing in section 19(a) of the Act must be construed to mean "at the date of the compulsory acquisition".

Since no question of severance arises in this case, we are here concerned only with the open market value of the Estate and with disturbance (if any) as a result of the compulsory acquisition. We are therefore required to ascertain the open market value of the Estate on 30th April 1985 (the date of the compulsory acquisition) or the market value of the Estate to the appellant who was the owner on that date and to assess the loss (if any) suffered or sustainable by the appellant by reason of disturbance. The market value so ascertained and the loss by disturbance together constitute the value of the land to the appellant and the basis of the compensation to which the appellant is entitled.

(2) The actual price

The crucial question for determination in this appeal is whether the actual price of US$1.6 million which the appellant paid the former owner for the Estate on 25th February 1985 constitutes evidence (if not the best evidence) of the market value of the Estate at the prescribed or relevant time (30th April 1985).

In **Vyricherla Narayana Gajapatiraju v The Revenue Divisional Officer, Vizapatam** (1939) A.C. 302, *Lord Romer* (delivering the opinion of the Privy Council) said at 312 & 313:

> "There is not in general any market for land in the sense in which one speaks of a market for shares or a market for sugar or any like commodity. The value of any such article at any particular time can readily be ascertained by the prices being obtained for similar articles in the market. In the case of land, its value in general can also be measured by a consideration of the prices that have been obtained in the past for land of similar quality and in similar positions, and this is what must be meant in general by 'the market value' in s.23. But sometimes it happens that the land to be valued possesses some unusual, and it may be, unique features, as regards its position or its potentialities. In such a case the arbitrator in determining its value will have no market value to guide him, and he will have to ascertain as best he may from the materials before him, what a willing vendor might reasonably expect to obtain from a willing purchaser, for the land in that particular position and with those particular potentialities."

In **Melwood Units Ltd v Main Roads Comr.** (1979) A.C. 246 where there was evidence of an actual sale of north land which was adjacent to a compulsorily acquired strip of land, *Lord Russell* (delivering the opinion of the Privy Council) said at 433:

> "David Jones Ltd. in June 1966 bought the 25 acres of north land for an average price of approximately $40,000 an acre.

> This purchase appears to their Lordships to be a highly relevant piece of evidence for the evaluation of compensation in this case when it is considered in the context of the assumed findings of fact already mentioned."

Later *Lord Russell* said (at p.436):

> "Now it is plain that in assessing values for the purpose of compensation for resumption on compulsory acquisition a tribunal is not required to close its mind to transactions subsequent to the date of resumption: they may well be relevant or of assistance to a greater or lesser degree, and in the instant case the figure paid by David Jones Ltd. was the only figure available at the date of assessment of the value of adjacent land to a person wishing to develop the land for its 'highest and best use.' Why then did the Land appeal Court reject any consideration of this transaction in their evaluation?"

These two decisions of the Privy Council confirm the principle that the open market value of compulsorily acquired land may be measured by reference to actual prices paid or obtained for comparable land where those prices were paid or obtained a reasonable time before, during or a reasonable time after the compulsory acquisition. Analagous to that principle and operating a *fortiori* is the principle (for which no authority should be necessary) that the open market value of compulsorily acquired land may be measured by reference to the actual price paid or obtained for that land itself when that price was paid or obtained a reasonable time before, during or a reasonable time after the compulsory acquisition. Such actual price is generally presumed to be the open market value of the land with all its "unusual, and it may be, unique features, as regards its position or its potentialities". It is only when there is no such actual price or no such "market value to guide" the arbitrator that it becomes necessary to resort to a hypothetical or notional sale and thereupon to invoke prices paid or obtained for comparable land and other ways and means of ascertaining the market value of the compulsorily acquired land at such a hypothetical or notional sale.

In fact, counsel for the appellant virtually so conceded when he submitted as follows:

> "If the Conveyance of the 21st February 1985 was the completion of a sale by a willing seller (which is denied) then it would be valuable and even compelling evidence of the open market value of the estates at the relevant date. On the other hand if the transaction was not a sale on the open market by a willing seller (which is Windward's contention) it cannot in all logic constitute any probative value as to the

open market value of the land."

The appellant has therefore sought to dismiss the actual sale of the Estate by the former owner to the appellant and the actual price paid or obtained at that actual sale and has sought to do so on the ground that the actual sale was not a sale in the open market by a willing seller. The rule underlying counsel's submission is that an actual price paid or obtained under an actual sale of compulsorily acquired land or of comparable land cannot be relied upon as evidence of the open market value of the compulsorily acquired land unless the actual sale is fully investigated and it is proved that the actual sale was a sale in the open market by a willing seller. If any such rigid rule exists, it would apply not only to the actual sale of the Estate by the former owner to the appellant and to the actual price paid or obtained thereunder but also to the various sales and to the alleged comparable prices upon which the appellant and its valuer have so heavily relied to prove the open market value of the Estate.

Significantly, no such rigid rule has been indicated either in **Vyricherla's Case** or in **Melwood Units' Case.** In the latter case, *Lord Russell merely postulated* "an arm's length sale" when he said (at p.437):

> "But taking for example the resumed land there does not seem any justification for ignoring a value of the immediately adjacent north land at an arm's length sale in June 1966 of well over $31,000 per acre above inflated residential use value and deciding upon a comparable figure only nine months earlier of about $1,000 per acre."

It is my opinion that expediency demands that an actual sale of compulsorily acquired land or of land comparable therewith should be presumed to be a sale in the open market by a willing seller and that the onus should be on the person who asserts otherwise to rebut that presumption. The onus was therefore on the appellant to prove that the sale to the appellant was not a sale in the open market by a willing seller.

The appellant alleged that the former owner was not a willing seller because the former owner was forced to sell the Estate as a result of financial pressures. According to The Concise Oxford Dictionary (Seventh Edition), "willing" means "disposed to consent or undertake (to do....)". The questions therefore arise as to whether the former owner consented to the sale of the Estate and as to whether the financial pressures inclined or disinclined the former owner to consent to the sale.

In **Inland Revenue Commissioners v Clay and Buchanan** (1914) 3 K.B. 466, *Cozens-Hardy M.R.* said (at 473):

> "I am disposed to think that a willing seller is a person who is a free agent and cannot be required by virtue of compulsory powers to sell, and that Mrs. Buchanan was a willing seller when, in 1910, she voluntarily agreed to accept 1000*l*."

Swinfen Eady L.J. said (at 476):

> "A sale by a willing seller is distinguished from a sale which is made by reason of compulsory powers, where the vendor frequently obtains an addition to the price by reason of being under compulsion to sell. It does not mean a sale by a person willing to sell his property without reserve for any price he can obtain. Mrs. Buchanan was a willing seller when she accepted 1000*l*. The fact that she was persuaded or induced to agree voluntarily to sell at that price did not make her any the less a willing seller. There was no evidence of any compulsion; there was friendly bargaining, some discussion, some higgling about price, and then an agreement come to. This is the normal course of most private contract sales. She was none the less a willing seller because she had not previously put the property into the hands of an agent for sale. She was willing to sell at a price, she was offered a price, less than the maximum which the intending purchasers were willing to give, and she took it."

Pickford L.J. said (at 478):

> ".... I think a willing seller means one who is prepared to sell, provided a fair price is obtained under all the circumstances of the case. I do not think it means only a seller who is prepared to sell at any price and on any terms, and who is actually at the time wishing to sell. In other words, I do not think it means an anxious seller."

According to **Halsbury's Laws of England** (Fourth Edition) Vol. 8, paragraph 287:

> "'Willing seller' does not mean a person willing to sell without reserve for any price that he can obtain, but one who is willing to sell, making the most in the circumstances of his property; what is the most, in the circumstances, which he can make of his property cannot be determined without consideration of the circumstances and, in particular, cannot be ascertained while excluding the known wants of a probable purchaser."

The Chairman of the Board of Assessment (speaking on behalf of the majority of the Board) stated:

> "It seems to me that there was not that desperation on the part of the former owners to part with Orange Hill Estates."

Continuing to express the findings of the majority of the Board, the Chairman said:

> "It seems that the former owners were willing sellers in all the circumstances of the case. Those circumstances being, according to Martin Barnard, that the stresses of carrying the estate were enormous: the coconut mite had started to bite and the banks were reluctant to cash their cheques. There was difficulty in obtaining funds to pay their workers.
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> The evidence, again from Martin Barnard, was that the negotiations vacillated backwards and forwards, and Mr. Simmons said that a sale of property takes some time - three months, six months to conclude. So there was a 'higgling' a bargaining and an agreed price was arrived at. It did not seem to be a question where the claimants said to the former owners 'this is the price I am prepared to pay. Take it or leave it'. There was a negotiated price handled by attorneys, who, presumably, looked after the interests of their respective clients.
>
> I think this is what Pickford L.J. meant when he said that a willing seller means one who is prepared to sell, provided a fair price is obtained <u>under all the circumstances of the case</u>. (My emphasis)."

Accordingly, the majority of the Board decided that the former owner was a willing seller. The majority evidently considered that the financial difficulties of an owner of land generate an inclination (rather than a disinclination) to consent to the sale of the land and that active participation in negotiations was evidence of willingness to sell.

The willingness of a seller to sell his land and the state of mind (the inclination to consent to the sale, the desire to sell and the voluntariness of the sale) which such willingness imports are questions of fact and inferences from facts. To the extent to which the Board's decision was based on the credibility of witnesses, judicial prudence dictates that we should respect it. To the extent to which the decision was the result of inferences, the inferences were not induced by errors of law and the inferences were not unreasonable, unjustifiable or unsupportable. For these reasons, I would affirm the Board's decision that the former owner was a willing seller.

The appellant also alleged that the sale by the former owner to the appellant was not a sale in the open market. On this point, reference was also made to **I.R.C. v Clay and Buchanan.** There, *Cozens-Hardy M.R.* said (at pages 471 & 472):

> "'Open market' includes a sale by auction, but it is not confined to that. It would include property publicly announced in the usual way by insertion in the lists of house agents. But it does not necessarily involve the idea of a sale without reserve."

Swinfen Eady L.J. said (at p 475):

> "A value, ascertained by reference to the amount obtainable in an open market, shows an intention to include every possible purchaser. The market is to be the open market, as distinguished from an offer to a limited class only, such as the members of the family. The market is not necessarily an auction sale. The section means such amount as the land might be expected to realize if offered under conditions enabling every person desirous of purchasing to come in and make an offer, and if proper steps were taken to advertise the property and let all likely purchasers know that the land is in the market for sale."

Pickford L.J. said (at p 478):

> "I think that 'sold in the open market' means sold in such a way that any one wishing to purchase was able to do so, e.g., by auction or by putting the house into the hands of an agent to sell, ..."

In **Priestman Collieries Ld v Northern District Valuation Board** (1950) 2 K.B. 398 at 407, *Morris J.* said:

> "It was further contended that the phrase 'open market' pre-supposed and contemplated a market in which a seller could expect to receive the highest unlimited price which resulted from the free competition of all potential buyers.
>
> In the opinion of the court, the phrase 'open market' in s.13, sub-s.4 of the Act does not contemplate a purely hypothetical market which is to be regarded as exempt from any restrictions imposed by law. The section does not postulate conditions wholly divorced from reality. The directed inquiry in effect is: 'what would the sale of the unit have realized 'on January 1, 1947?' In pursuing that inquiry it must be assumed that on that date the seller was willing to sell and that the buyer was willing to buy; any notion of a compulsory sale must be ignored. The seller must be deemed to have done as well as a willing seller would reasonably have been expected to do on January 1, 1947. But that does not mean that he should be regarded as a person not bound by the law. It must be assumed that he would deal on the market on January 1, 1947, subject to the law of the land. Any restriction or limitation imposed on him by law or imposed on a willing buyer must be recognized and taken into account. The sale to be regarded for the purposes of s.13, sub-s.4 must be a notional one, but a notional sale in the market in which and subject to the conditions under which willing buyers and sellers could legitimately have operated on January 1, 1947. It is enjoined by s.13, sub-s 5 that regard should be had 'to all relevant circumstances'. What is contemplated, therefore, is a sale that might have taken place in the actual market on the prescribed date - *rebus sic stantibus.*"

These judicial dicta indicate that in reference to land, the term "sale in the open market" is a relative term - relative to the circumstances of the sale and the market. Those circumstances include the location, size and apparent value of the land, the legal restrict-ions imposed on the purchase of the land and the range of potential buyers. A sale is a sale in the open market if in those circumstances, there was appropriate and sufficient publication of the proposed sale and the owner evinced an intention to sell and in fact sold the land at the best price obtainable therefor at the time of the sale.

The circumstances of the sale of and market for the Estate was described by the Chairman of the Board in these words:

> "I am of the view that I should not import wholesale from English authorities, the criteria for determining open market, but rather that I should keep in mind the local situation, and adapt the principles from the English authorities to the situation in the St.Vincent and the Grenadines community, bearing in mind that persons in this community would not necessarily follow the procedure of more sophisticated communities like the United Kingdom when properties are offered for sale on the open market.
>
> 'Advertise' means to make known generally, and is not confined to advertisement in a newspaper, but includes any mode which brings something to the attention of members of the public. To borrow *Cozens-Hardy M.R.*'s words, 'I can see no ground for excluding from consideration' the local situation, where a matter can be well known without it ever appearing in a newspaper. This is the reality of the situation which cannot and should not be ignored.
>
> I shall now look at the evidence led on behalf of the authorised Officer to see whether this sale can be regarded as an open market sale.
>
> Hugh Stewart said that he was aware that Orange Hill Estate was for sale before 1984, 1983, 1982 but it was beyond his reach. Was he of a particular category of persons having special knowledge of the availability for sale of Orange Hill Estates? I think not.
>
> Between 1977 and 1981 he was Fruit Quality Officer with Geest International, working in the Windward Islands. Between 1981 and 1985 when he left Geest he became a full time farmer. So as a farmer he became aware that the estate was for sale.
>
> Under cross-examination another farmer, Julian Boyea said he knew from about 'March, April 1984' that the Barnards wanted to sell the whole estate. From Martin Barnard, witness for the claimant under cross-examination came this answer: 'They found us', in reply to the question 'How did you find a purchaser eventually?'.
>
> This answer, in my view, indicates clearly that any person desirous of purchasing could make an offer, and satisfies the test in the case of **Inland Revenue Commissioners v Clay** (supra.) I am satisfied that the sale of Orange Hill Estates was on the open market.
>
> Further, there is a suggestion coming from Martin Barnard under cross-examination that although the claimants are a

Vincentian Company, the 'true' purchasers are from outside. Here is the evidence:

Q. Were you relieved that the place was sold outside?

A. I would say a mixture of both....

I would interpret this to mean that he was saying that persons from outside had purchased the property.

It seems therefore that the knowledge that the estate was for sale went beyond the shores of St.Vincent to a benevolent organisation in Denmark known as Faelleseje, as the evidence of the claimants is that that organisation lent them money to purchase the estate.

I infer from this bit of evidence that negotiations between Faelleseje and the claimants must have taken place well in advance of the purchase, because the claimants would have had to know where the funding was coming from to purchase the estate.

This opinion seems to be supported by the evidence of Martin Barnard who said that the negotiations vacillated backwards and forwards.

To support what I have said above, I advert to Counsel for Claimants' opening address when he said:

> 'Indeed for some time prior to 1985 when this estate was purchased, it was made known to the then present Government and the past Government, that the owners were in financial difficulties and wanted to sell even though they have had the estate for so long in their family, they did not want to part with it.'

So Members of two governments knew that the former owners wanted to sell, and on 15th January 1985, a typewritten letter was addressed to Mr. Cyril Barnard, Governing Director of the former owners, informing him of Government's interest. It follows that, in addition to politicians both past and present, members of the civil service who served those governments would also have had that information. Would not this go towards establishing that the market knew of the sale of the property acquired.?

This knowledge by a cross section of the community, farmers, politicians and civil servants would result in the sale being effectively advertised in the Vincentian community without any need for formal advertisement in a newspaper or the use of brokers or agents. Again, in the context of this community, the answer to the question posed earlier as to whether the conditions of open market existed could only be an affirmative one.

Using my jury knowledge of the community, this information by the cross section of the community referred to above would not have been kept 'locked in their breasts', but would have spread throughout the community and would have been 'the talk' of the community for weeks until some other interesting topic surfaced."

Having regard to the circumstances described by the Chairman, the majority of the Board concluded that the sale of the Estate by the former owner to the appellant on the 25th February 1985 for the actual price of U.S.$1.6 million was a sale in the open market by a willing seller. I agree with that conclusion. Having regard to the circum-stances of the Estate, the sale and the market, there was sufficient evidence to indicate that all persons who were willing and able to purchase the Estate knew that the Estate was in the market for sale.

A person who decides to sell his property as a means of solving his financial problems would generally ensure that he gets the best price for the property. The evidence is that the former owner negotiated towards that end. In my opinion, the actual price of US$1.6 million constitutes evidence (if not the best evidence) of the open market value of the Estate at the prescribed or relevant date (30th April 1985) unless it can be shown that that actual price was falsified or dis-credited by the valuation of the appellant's valuer.

(3) The Valuation by Cremona-Simmons (The appellant's valuer)

There is a difference of EC$25.175 million between the actual price of US$1.6 million (EC$4.32 million) paid by the appellant for the Estate and the hypothetical or notional market price of EC$29.495 million stated in the valuation by the appellant's valuer. The difference is so great and so incredible that either the actual price is false or the valuation is misconceived. Since the appellant and its counsel insist that the actual price is genuine, the difference invites critical exam-ination of the valuation. This I will now attempt to do.

Firstly, the appellant's valuer valued the Estate as six separate and distinct properties. As authority for so doing, a neutral statement in **Ellesmere (Earl) v Inland Revenue Commissioners** (1918) 2 K.B. 735 was relied on. There, *Sankey J* said (at p 740):

> "I can readily conceive cases in which a sale of the whole property in one lot would realize the true market price, but I can equally imagine cases in which it would not. Here the referee held that because the property was of a miscellaneous character and not lying in a ring fence the price paid by the single purchaser was not the true value. I think he was entitled so to hold, and that the contention as to misdirection fails."

Applying *Sankey J's* dictum to the circumstances of the Estate, the Chairman of the Board of Assessment (speaking on behalf of the majority of the Board) said:

> "The history of this acquired property, coming from Martin Barnard, was that in 1907 the former owners acquired five estates which were amalgamated into one company, Orange Hill Estates Limited. All the estates were operated as one unit, and they were sold as one unit to the claimants.

The acquired property was not of a miscellaneous character. The areas of the estates are contiguous. The crops are similar, namely, bananas, coconuts, fruit trees, and the estate was admin-istered as an integrated whole.

The banana boxing shed was on one estate but agro industry factories were on one estate and were fed by produce from the other estates (**Earl of Ellsmere Case**).

As I understand the claimants claim, the arguments were that the estates could have been sold separately and therefore the prices at which they should be assessed by the Board should be the prices obtainable for the six separate estates.

With regard to this limb, there is no evidence that, at the relevant time, there was a market for the sale of five or six separate estates of the sizes given earlier. Indeed, the evidence points to the contrary: that "plantation type" farming was on the decline. Mr. Hadley succeeded in convincing his family to sell some of the land at Union Estate and Mt.William Estate and between May and December sold five hundred acres in parcels ranging from five to ten acres with one twenty acre parcel.

Hugh Steward said that people have moved away from plantation type agriculture.

The second limb of the argument was that the estates could have been parcelled out in small lots in the same way Victor Hadley said he parcelled and sold portions of Union Estate and Mt.William Estate.

In any event, Martin Barnard's evidence was:

> 'But I would say this that there were other avenues which were open to us. There was, for example, selling land at high prices, which we had observed had taken place in St.Vincent with friends of ours and business acquaintances and so on. In which case you kept yourself the heart of the estate, if I could put it that way, and you could probably have come out of it a very wealthy man. It would, however, have taken a long time, and you must appreciate the age of my father, and he was not prepared to wait any longer. We could only assume that what had happened or other people's experiences would have been our experience also. We had done and I had been involved to a limited extent in looking at the sale of lands of other estates in St.Vincent. Several of them had been cut up and sold at reasonably high prices. If one looked at it on paper it would have been difficult for you to have convinced me, I would not have come out of it a very wealthy man. But as I say it would have taken time. It is difficult to say, it depends so much on how many fellows in England had money they were prepared to invest in St.Vincent.'

It seems to me that what Martin Barnard was saying is that at the time of the sale to the claimants there was no market for the number of lots that would be obtainable from the large area of the land owned by the former owners.

It is to be kept in mind that the land sold by Mr. Hadley is south of the Rabacca River and that according to Hugh Steward's evidence, which I accept, the biggest constraint to accessibility to Orange Hill Estate is the Rabacca Dry River, the behavioural pattern of which I have referred to earlier.

No doubt many persons would have bought lots, but to sell a sizeable number of the lots, the former owners would have had to wait and that they were not prepared to do, or I should say, the governing director was not prepared to do.

The principle in the **Earl of Ellsmere** case (above) is that if an owner sells in such circumstance the price he obtains may not be the best possible obtainable, but the case also establishes that what is the best possible price is mainly a question of fact.

To determine this, the factual position at the time of the sale to the claimants must be examined.

At the time of the sale of the property there was no market in that area of the island, that is, north of the Rabacca

River, for the number of lots that would be available for sale from the several estates.

There were people in the area who were eager for land in small lots but they did not have ready cash and payment for the land would have had to be by instalments over a period of time. Martin Barnard considered that no reliance could be placed on Vincentians living abroad investing their savings in St.Vincent.

At the time of the sale to the claimants the factual situation just outlined was such that the former owners were offered and accepted the best possible price obtainable - that of sale as a single unit with all the trees, crops, buildings and erections, sand and stone thereon."

Mr. Piper expressed a different opinion. He said:

"The evidence before us shows clearly that there was a limited market for large estates in St.Vincent due to financial constraints and that smaller parcels of land would be more easily sold than such a large estate as the acquired property. Therefore, to my mind, applying the principle laid down in the **Ellesmere** Case, if their sale as five separate estates would have fetched better prices than sale as a *unum quid*, then that is how they should be valued. But the point which is made here is that each of the estates although contiguous had a separate and distinct identity; there is no evidence that their operation and management as one estate over the years extinguished that separate identity, and therefore I am of the view that each could have been offered for sale as an individual estate and not necessarily as a *unum quid* as they were."

Mr. Piper's dissenting opinion might have prevailed if there were sufficient indications that the five or six parcels of land could have been sold separately on the 30th April 1985 or on the 25th February 1985 at prices approximating to those stated in the valuation by the appellant's valuer. In that event, the former owner could have sold lot No.14, Waterloo or Tourama or any two of the five or six parcels at a price higher than that at which the former owner sold the Estate in its entirety. Why, then, did the former owner elect to sell the Estate as a *unum quid to a single purchaser for US$1.6 million (E.C.$4.32 million) if he could have sold the five or six parcels of the Estate to five or six different purchasers at an aggregate price of E.C.$29,972,500.00 shown as items 1 to 10 in the valuation of the appellant's valuer?* The answer is supplied by Martin Barnard who testified in effect that it would take some time to sell the parcels as separate units. This was another way of saying that the Estate could not have been sold as separate parcels on the 30th April 1985 or on the 25th February 1985. In those circumstances, there could be no justification for valuing the parcels separately. This is a case where the sale of the Estate as a *unum quid* was more likely to realise an immediate higher price than separate sales of the five or six parcels and where separate valuations of the several parcels were wholly inappropriate.

Secondly, the appellant's valuer purported to ascertain the market value of the Estate by reference to the prices paid for 14 pieces of land a few miles away from the Estate. The 14 pieces measured from 3,809 square feet to 10 acres more or less in extent and were sold between 30th September 1982 and 18th October 1985 at prices ranging from $3,993.00 per acre to 30 cents per square foot. Six of these pieces were dismemberments of the Mt. William Estate and the Union Estate formerly belonging to Hadley Enterprises Ltd and were sold at prices ranging from $6,000.00 to $15,000.00 per acre.

The merchantability of a lot of land measuring 3,809 square feet or ten acres or less cannot rightly be compared with the merchantability of a complex Estate measuring 3,118 acres, particularly when the evidence is that there is a rapidly diminishing demand for large Estates in Saint Vincent. The 14 pieces of land by reference to which the appellant's valuer valued the Estate were therefore not lands comparable with the Estate. Accordingly, the appellant's valuer erred when he valued the Estate by reference to the irrelevant prices paid for those 14 pieces of land. The result of the error was an erroneous total value of E.C.$22,200,500.00 which could not rationally be rectified by the appellant's valuer's arbitrary 40% discount.

Thirdly, the appellant's valuer valued the improvements to the Estate as independent units instead of valuing the composite Estate and for this purpose valuing the improvements (the trees and standing crops, the residential and industrial buildings and the airstrip) as appurtenances of and in relation to the Estate and to the relative extent to which those improvements enhanced the value of the Estate. He valued those improvements theoretically and not practically. He based the value of the trees and standing crops on the scheduled prices fixed by the Agricultural Department of Government for loss of crops and thereby arrived at a total value of E.C.$9,594,860.00. He valued the residential and industrial buildings on the basis of their sizes and appearances and by comparison with buildings of that quality elsewhere and thereby arrived at a total value of E.C.$2,435,000.00. And contrary to section 19(b) of the Act, he valued the airstrip at E.C.$171,000.00 as a result of capitalising an alleged rental from the Saint Vincent Banana Growers Association of $1000 per month with interest at seven per centum per annum.

With respect to the trees and crops, the appellant's valuer might have asked himself whether a prospective purchaser in the open market would pay a sum of money for a plantation merely because the value of the trees and crops of the plantation has been officially fixed at that sum. The answer is that normally, the purchaser would be concerned to know the net income (if any) derived or derivable from these trees and crops and whether and why the plantation has operated at a loss. Accordingly, any valuation of the plantation made by reference to the official value of the trees and crops and without taking into account the profit or loss therefrom should be rejected as being wholly unrealistic.

Further, the fallacy of the independent valuations of the improvements (particularly the buildings and the airstrip) is the assumption that these improvements have open market values independent of the land of which they are appurtenances and that those values are the same irrespective of the situation, nature, quality and ambience of the land to which they are attached. The appellant's valuer therefore erred in valuing these improvements or appurtenances in isolation. His duty was to ascertain what the Estate (with all its improvements, appurtenances and advantages) would have fetched in the open market having regard to the disadvantages for which the advantages compensate.

Fourthly, the appellant's valuer valued the so-called Rabacca mines (stone, aggregate, sand and gravel) at E.C.$1,252,000.00. This he did by capitalising net profits in perpetuity with interest at six per cent. He estimated the net profits at E.C.$75,124.00 per annum without the benefit of records of income and gave this unsatisfactory explanation:

> "I figured there was a value even though the owner may not have been collecting all the money, but if he put in Management, he would have its benefit to him. So in all fairness, I thought I should pick it up."

The appellant's valuer insisted that he valued the Rabacca mines on the basis of its actual (as distinct from its potential) use. But all indications are that he did not value the mines by reference to their actual use but purported to value the mines by reference to their poten-tiality or potential use by the appellant. This is evident from his own testimony. When asked under cross-examination whether he was attempting to measure the value of the possibilities, he replied as follows:

> "Not in all cases, this one here Rabacca mines is actually in use with that potentiality. It has materialised from the evidence I heard my colleague gave here, Mr. Glen Stewart of Stewart Engineering Ltd.
>
> Mr. Barnard's evidence was just to assist this board, but the property wasn't taken from Mr. Barnard, it was taken from another owner. When Mr. Barnard spoke, he was speaking about existing use of his estate of their management. We are speaking now of other people, a value to another person, not to Barnard. We use Barnard as a guide sort of reference, but when we are assessing for value to the owner, in this case it, value to another owner who had the skills and the money capital to invest. I would think it is quite different than if you are dealing with an owner who has no capacity, no capital entrepreneurship as against one who has, I think the property was taken away from the person who has the capabilities."

In either case - whether the appellant's valuer purported to value the Rabacca mines by reference to the actual use or the potential use thereof - he clearly exceeded his authority. He was required to value the land known as Rabacca mines and the extent to which the value of the actual or potential use of that land for the purpose of the mining business enhanced the value of the land. He was not required to value the mining business or to estimate the profits of the mining business as such. Admittedly, those profits could be taken into account in the ascertainment of the value of the use of the land known as Rabacca mines and the extent to which that value enhanced the value of the land. But those profits did not constitute a component of the value of the land. The appellant's valuer therefore erred when he capitalised the estimated profits from the mining business and added those capitalised profits to the value of the land known as Rabacca mines.

This type of error was explained in at least two decisions of the Privy Council. The first case is **Fraser's Case** to which I have already referred. There, Lord Buckmaster said (at pages 192 and 193):

> "The possibility of an added utility for any expropriated property due to existing possibilities of development is, subject to limits to which their Lordships will refer, a right and proper subject for consideration in ascertaining the compensation to be paid on expropriation. But in the method which was adopted by Mr. St.Laurent for arriving at what he regarded as the measure of this compensation he did not, in their Lordships' opinion, fix, as he was bound to do, the value of the immovable he was appointed to determine, but the value of another thing which was altogether outside his powers."

The second case is **Pastoral Finance Association Limited v The Minister** (1914) A.C.1083. There, Lord Moulton said (at pages 1088 and 1089):

> "That which the appellants were entitled to receive was compensation not for the business profits or savings which they expected to make from the use of the land, but for the value of the land to them. No doubt the suitability of the land for the purpose of their special business affected the value of the land to them, and the prospective savings and additional profits which it could be shewn would probably attend the use of the land in their business furnished material for estimating what was the real value of the land to them. But that is a very different thing from saying that they were entitled to have the capitalized value of these savings and additional profits added to the market value of the land in estimating their compensation. They were only entitled to have them taken into consideration so far as they might fairly be said to increase the value of the land. Probably the most practical form in which the matter can be put is that they were entitled to that which a prudent man in their position would have been willing to give for the land

> sooner than fail to obtain it. Now it is evident that no man would pay for land in addition to its market value the capitalized value of the savings and additional profits which he would hope to make by the use of it. He would no doubt reckon out these savings and additional profits as indicating the elements of the value of the land to him, and they would guide him in arriving at the price which he would be willing to pay for the land, but certainly if he were a business man that price would not be calculated by adding the capitalized savings and additional profits to the market value."

In the light of these authorities, the appellant's valuer clearly erred when he purported to value the land known as Rabacca mines by superimposing on or incorporating in the value of the land the capital-ised profits derived or derivable from the actual or potential use of the mines for the purpose of the mining business. He should have estim-ated the extent to which the value of the actual and potential use of the Rabacca mines enhanced the value of the Estate. In evaluating the potentiality or potential use of the mines, he should have valued it as an unrealised potentiality. In other words, he should have calcu-lated the value of the realised potentiality diminished by the cost of realisation and by the value of the degree of possibility of realisation by the appellant. Had he adopted that approach, he would have valued the Rabacca mines in a sum appreciably less than the sum of EC$1,252,000.00 which he calculated.

Fifthly, the appellant's valuer valued the waterworks and the water rights at $500,000.00 and $250,000.00 respectively. He based the value of the waterworks on its alleged cost price less depreciation and on its replacement value. He arrived at the value of the water rights by a system of apportionment and deferment. The Board of Assessment unani-mously and rightly rejected the valuation of the waterworks and water rights. Mr.Piper (the appellant's nominee on the Board) said:

> "Regarding the water works and water rights, the valuation of which appears at page 12 Schedule 3, is a replacement value of $500,000.00 for the former and $250,000.00 for the latter, making a total of $750,000.00, but I do not think this should be allowed because in the first place, the claimants have not reinstated nor do they plan to reinstate their water works elsewhere.
>
> Also, in any event, both the water works and water rights go towards the enhancement of the value of the buildings on

the acquired property and would necessarily have been taken into account in dealing with the claim under that heading. I disallow that item but hope to be able to say something about the water rights later under this heading."

What Mr. Piper said later was in reference to the vesting of the water rights in the former owner notwithstanding the Central Water and Sewerage Act No.6 of 1978 and the transfer of those rights to the appellant. He concluded as follows:

"I think therefore that the Barnard's right to the user of the body of water in the Rabacca River was transferred to the claimant in their sale of the watercourse of that river to them and by virtue of the Deed of Conveyance dated 25th February, 1985."

Sixthly, there is no indication that the appellant's valuer considered or took into account the disadvantages of the Estate. An apparent disadvantage is the Rabacca Dry River which was described by the Chairman in those words:

"The Rabacca Dry River runs from the Soufriere mountain through the Rabacca Estate to the sea. The course of this river as it nears the estuary is uncertain and unstable as it periodically changes course. The estuary of the river is approximately four hundred yards in width. It is known as the Dry River as it is mainly dry. The river runs below the surface of the river bed in layers of volcanic soil. However, this situation can change at almost a moment's notice. There is no bridge over this river.

The Board witnessed this phenomenon the day of the visit to Orange Hill Estates. The river bed was dry on the way to Orange Hill but on the return journey there was a heavy flow of water in the river bed, though not enough to prevent the passage of vehicles.

The evidence is that when the water table rises, the river floods, and persons remain on whichever side they happen to be until the river subsides..........."

The Chairman also said:

"It is to be kept in mind that the land sold by Mr. Hadley is south of the Rabacca River and that according to Hugh Stewart's evidence, which I accept, the biggest constraint to accessibility to Orange Hill Estate is the Rabacca Dry River, the behavourial pattern of which I have referred to earlier."

The Rabacca Dry River, the nature of the access to the Estate, the proximity of the Estate to a Volcano which erupted violently in 1812, 1902 and 1979 and the fact that the operation of the Estate as a plantation in the hands of experienced farmers resulted in a loss are factors which a prospective purchaser would certainly take into account in deciding what price to pay for the Estate notwithstanding its many favourable intrinsic qualities and features. The appellant's valuer should have attempted to measure the impact of those disadvantages on his calculation of the values of the various advantages which tend to enhance the value of the Estate.

For all of these reasons, I conclude that the valuation by the appellant's valuer was unrealistic, unreliable and unconvincing and was rightly rejected by the majority of the Board of Assessment. The result is that the best available evidence of the open market value of the Estate on 3rd April 1985 was the actual price paid and received under the actual sale of the Estate by the former owner to the appellant on 25th February 1985.

Even if the better opinion is that the sale by the former owner to the appellant was not a sale in the open market by a willing seller, the sale was nevertheless "an arm's length sale" by a seller whose intimate and peculiar knowledge of the Estate and empirical corporate wisdom qualified the seller to identify the best price realisable for the Estate in a sale in the open market by a willing seller. There was a high degree of probability that in view of the circumstances of the former owner and its reason for selling, the former owner would not be content to sell the Estate with all its attributes and sentimental value for an amount considerably less than its open market value. Indeed, it would be monstrous to suggest that the former owner virtually donated the Estate to a stranger by selling it to the latter for approximately one seventh of its open market value. The dictates of reality and commonsense should always prevail in the exercise of determining the outcome of a hypothetical sale in the open market. For this reason alone, the actual price paid by the appellant under an admittedly genuine sale must be adjudged to be better evidence of the open market value of the Estate than the theoretical price calculated in the grossly imperfect valuation by the appellant's valuer.

(4) Compensation for disturbance

There can be doubt that the owner of compulsorily acquired land is entitled to compensation for disturbance (if any). In the context of compulsory acquisition of land, the word "disturbance" is a technical term which connotes the loss or damage (other than the loss of the market value of the land) suffered by the owner as a direct result of the compulsory acquisition. The loss or damage must be a natural consequence of the compulsory acquisition and must not be too remote. The amount of the disturbance (loss or damage) is one of the three components of the value of the compulsorily acquired land to the owner. This was explained in **Hughes v Doncaster Metropolitan BC** (1991) 1 A.E.R.295. There, Lord Bridge (delivering the judgment of the House of Lords) said (at p 301):

> "Thus although compensation in respect of the market value of land acquired and compensation for disturbance must in practice be separately assessed, the courts have consistently adhered to the principle, both before and after the present rules were first introduced by the 1919 Act, that the two elements are inseparable parts of a single whole in that together they make up 'the value of the land' to the owner, which, unless he retains other land depreciated by severance or injurious affection, was the only compensation which the 1845 code awarded to him."

In the present case, the appellant claimed compensation for disturbance under four heads namely (1) loss of rental of the airstrip (2) loss of profits from the Rabacca mines (3) cost of replacing the waterworks and (4) cost of removing the appellant's equipment from the Estate. The Board of Assessment disallowed the first head of claim on the ground that no lease was proved. The Board disallowed the second head on the ground that it was not proved that at the time of the acquisition of the Estate, the appellant was carrying on the business of selling sand or other products from the Rabacca mines. With regard to the third head, the Board said:

> "The claim for cost of replacement would in a proper case be allowed as an item for disturbance if the cost was actually incurred and undertaken as the natural consequence of the acquisition. In this case, however, no such expenditure has been incurred and in the circumstances there has been no loss that falls within the ambit of disturbance. In any event, no details of the costs were given and Mr. Cremona-Simmons was very vague when cross-examined on this."

With regard to the fourth head, the Board said:

> "Ole Mengel testified that after the estate was taken over he personally paid $16,000 for removing the equipment from Orange Hill to Mt. Bentick and then to Richmond from where they were shipped to St.Lucia. He said that the company in that island took over the equipment and paid the expenses for moving them.
>
> It would appear therefore that the claimants did not incur any expense for moving equipment from the estate after dispossess-ion and are therefore not entitled to any compensation for this."

I do not concur with the Board's reasoning on this head of claim. In **Minister of Transport v Lee** (1965) 2 A.E.R. 986, Lord Denning M.R. said (at 989):

> "The owner is to receive the personal loss sustained by him by reason of being disturbed in his possession; that is, by reason of having to vacate the premises. This includes such items as the cost of moving his furniture, altering his curtains, and also the surveyor's fees on getting another house, see **Harvey v Crawley Development Corpn.**"

Similarly, the cost of removal of the appellant's equipment from the Estate is a legitimate head of claim for compensation for dis-turbance. The Board evidently believed that the cost alleged was in fact incurred. The fact that some person (other than the appellant) originally bore that cost is not a valid ground for rejecting the claim. Prima facie, the payer has a right to recover that cost from the appellant. The appellant's liability to indemnify the payer is there-fore a loss sustained or sustainable by the appellant as a direct and natural consequence of the compulsory acquisition and is recoverable as compensation for disturbance.

Further, in view of the temporal proximity between the appellant's purchase of the estate and the compulsory acquisition, the Stamp Duty, legal and conveyancing fees and other professional costs and expenses incurred by the appellant in the acquisition of the Estate must be regarded as forming part of the disturbance (loss or damage) suffered by the appellant as a direct result of the compulsory acquisition. The amount of that disturbance (loss or damage) is therefore an ingredient of the value of the Estate for which the appellant should be compensated.

According to section 22 of the Stamp (Amendment) Act No. 19 of 1975 (Cap. 195), the stamp duty payable on the conveyance of the Estate was 6% of the value of the Estate of which 3% was payable by the appellant. This means that the appellant must have paid EC$160,128.00 representing 3% of EC$5,337,600.00 which the tax officer considered to be the value of the Estate. That amount and the legal and conveyancing fees and other professional costs and expenses incurred in connection with the acquisition of the Estate should be recoverable by way of compensation for disturbance. In accordance with section 6(1) of the Constitution, I would award the sum of EC$500,000.00 as "adequate compensation" for that head of disturbance or loss.

I would accordingly allow the appeal but only in so far it relates to the compensation payable for disturbance. I would therefore increase the amount of the award of compensation by E.C.$516,000.00 from E.C.$4.7 million to E.C.$5,216,000.00. I would award interest on the increased amount of $5,216,000.00. at the rate of five per centum per annum from 1st May 1985 to date of payment. I would affirm the Board's award as to costs. I would also order the respondent to pay the appellant's costs of this appeal - such costs to be taxed if not agreed.

....
SIR VINCENT FLOISSAC
Chief Justice

BYRON, J. A.

I have read the decisions of Sir Vincent Floissac, C.J. and Dr. Liverpool J.A. and I think that it is unnecessary for me to indulge in a repetitious presentation of the facts, and the general issues. Instead I will content myself with a brief examination on the main areas of controversy that have arisen between these two judgments.

The Constitutional Point

Some controversy has arisen over the issue as to whether the court should construe the Land Acquisition Act so as to bring it into conformity with Section 6(1) of Constitution, because it was not raised by any of the parties to this liti-gation or by the Board of Assessment.

The Land Acquisition Act was an existing law at the commencement of the Constitution. Paragraph 2(1) Schedule 2 to the St.Vincent Constitution Order 1979 provides as follows:

> "The existing laws shall, as from the commencement of the constitution, be construed with such modifications, adaptions, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution and the Supreme Court Order."

A provision such as this in the 1967 Associated Statehood Constitution of St.Christopher-Nevis-Anguilla, was considered in the Privy Council decision in **Attorney-General of St.Christopher - Nevis-Anguilla v Reynolds** [1979] 3 All E.R. 129 and in clarify-ing its mandatory nature Lord Salmon said at p.136:

> "Their Lordships cannot, however, accept that the Constitution would have preserved the life of the 1959 Order in Council for any period if the Order in Council could not be construed under Section 103 of the Constitution so as to bring it into con-formity with the Constitution."

This decision was recently considered and applied by this Court in a Judgment delivered on 22nd November 1993 in **Beause-jour Estates Ltd v Attorney-General of Grenada** Civil Appeal No.11A of 1988 in relation to an identical provision in the 1973 Independence Constitution of Grenada. There we affirmed the decision in the **Grand Anse Estates Ltd v The Governor-General of Grenada et al**, Grenada Civil Appeal No.3 of 1976 and reasserted our judicial obligations to obey the Constitution and to construe existing laws with "such modifications, adaptions, qualifications and exceptions as may be necessary to bring it into conformity with" the Constitution.

In that case Sir Vincent Floissac, C.J. stated:

> "**Reynolds case** thus exemplifies the fundamental difference between ordinary statutory interpretation and constitutional construction (i.e. construction decreed by a "Westminis-

terial" Constitution for the purpose of saving or validating existing laws which were in force immediately before the Constitution). In the case of ordinary statutory interpretation of existing laws, we are concerned with the intention of the legislature or Parliament which enacted those laws. In the case of constitutional construction of existing laws, we are con-cerned with the common intention of Her Majesty in Council and of the Parliament which requested the Constitution. Because of this fundamental difference between the ordinary statutory interpretation and the constitutional construction of the words of an existing law, it is possible under the constitutional construction of the words of an existing law to ascribe to those words a meaning which they could not be held to bear under their statutory interpretation. That is why their Lordships in **Reynolds case** had no difficulty in construing the 1959 Order and the 1967 Regulations with such generosity."

In my view, paragraph 2(1) of Schedule 2 of the St.Vincent Constitution directs the method by which laws existing at the commencement of the Constitution are to be construed. It does more than confer a power, it imposes a duty on the Court to construe existing legislation so as to bring it into conformity with the Constitution. A court could not therefore be justified in ignoring the fundamental rights protected by the Constitution when interpreting or construing existing legislation, merely because the point was not raised in argument.

The Date of Assessment

Provisions appearing in the Land Acquisition Act before us have already been construed to bring them into conformity with the provisions in the Grenada Constitution for the protection of the fundamental right against compulsory deprivation of property without full compensation in the **Grand Anse case**.

In that case St.Bernard J.A. reasoned that the provision in Section 19 of the Land Acquisition Ordinance "which places a limitation on the value of the land acquired to a value of twelve months prior to the date of acquisition is as it stands, an infringement of a fundamental right to full compensation enshrined in Section 6(1) of the Constitution Order and there-fore that provision in the Ordinance on the face of it, is ultra vires to that extent".

The court acting in accordance with the mandate in the transitional provisions, in identical terms to paragraph 2(1) above construed Section 19 of the Ordinance so as to declare that:

> "the appellant is entitled to an order that the compensation must be assessed on the market value of the land at the date of acquisition."

It is true that in the Grenada Constitution Section 6(1) protects the right to "full compensation", while in St.Vincent, Section 6(1) protects the right to "adequate compensation". In my view, however, the reasoning applies equally to the St.Vincent Constitution because, even if there is a difference between "full compensation" and "adequate compensation" (which I do not suggest), any increase in value over a twelve month period could adversely affect the adequacy of the compensation if the assessing authority was precluded from awarding the value of the property at the date of its acquisition but was required to award its value of twelve months earlier.

That case, therefore, is decided authority that in the context of this case we are required to ascertain the open market value of the estate on 30th April 1985 (the date of the compulsory acquisition). I agree with the views expressed by Sir Vincent Floissac, C.J. in this regard.

The Rate of Interest

For the sake of completeness on this point I would also like to point out that the Board of Assessment awarded interest at the statutory rate of 5% per centum per annum from the date of the acquisition to the date of payment as prescribed by Section 21 of the Act.

In the Grand Anse case St.Bernard J.A. reasoned that such a statutory provision, which prescribed a rigid and fixed rate of interest, without allowing for adjustment in cases where the person whose land was expropriated suffered loss in excess of that rate of interest was repugnant to and in conflict with the constitutional right to full compensation. The court also construed Section 21 to make it conform to the constitution and declared that the entitlement to interest was to be at:

> "such rate as would compensate him for any loss occasioned by him from the date of the acquisition".

In my judgment the Act in St.Vincent should be construed in the same manner.

In this case, the appellant has not challenged the award of interest at the rate of 5% per annum and no attempt has been made to show that it was inadequate to compensate him for the loss occasioned by the acquisition. It would seem, therefore, that on the facts of this case we must assume that the rate of interest awarded was adequate.

Actual vs Notional Sale

The test for the ascertainment of the value is a statutory one and it is set out in Section 19 as being:

> "the amount which the land, if sold in the open market by a willing seller, might have been expected to have realised......."

The plethora of decided cases to which we were referred demonstrated that it is unusual for the property compulsory acquired to have been recently purchased by the owner from whom it was expropriated. In fact, neither counsel's nor our own researches revealed any other case where the property compulsorily acquired had been purchased immediately preceding the acquisition. It is, of course, therefore easily understandable that all of the judicial tests for assessment were based on the necessity to deduce what price a sale might have been expected to realise if it had taken place.

The judgments of my learned brothers have examined in some detail judicial expositions on the manner of assessing of the value of the land. Sir Vincent Floissac, C.J. concluded that in this case the open market value may be measured by reference to the actual price obtained for the land, as it is only when there is no such actual price that it becomes necessary to resort to a hypothetical or notional sale. Liverpool J.A. concluded that it is essential to deduce the value from proper expert evidence of which the actual price is only one item of evidence.

It seems to me that an application of the ordinary rules of statutory construction must result in the conclusion that if it was proven that the property acquired was sold on the open market by a willing seller, the amount which the land fetched in that sale is its value as defined by Section 19 (at least as at the date of the sale and in this case we are unanimously agreed that there was no evidence from which it could have been concluded that there was any variation in value in the two month period between 25th February

1985 when the appellant purchased the property and 30th April 1985 when it was acquired).

Open Market; Willing Seller

The main challenge in cases where there is an actual sale is to determine whether the sale was an open market sale by a willing seller, and the appellant took up this challenge before us.

The law is well settled as to what constitutes an open market sale by a willing seller. My learned brothers have set out the legal principles with reference to the decided cases and I need not re-examine them. I would like, however, to emphasise that the open market value is not a segmented value, it is the price that a willing vendor might reasonably expect to obtain from a willing purchaser for the land in its particular position and with its particular potentialities. **See Lord Romer in Raja's case.** If one determines the open market value and then adds to it the value of potentialities, the resulting value would be more than the market value. The open market value includes the potentialities of the land as these are factors that would normally influence the price which the parties would be willing to pay and receive, respectively.

I was also persuaded by, if not bound to follow, Lord Romer's criticisms of the value of simulating a sale to deter-mine the usefulness of land with its potentialities when he opined:

> "The truth of the matter is that the value of the potentiality must be ascertained by the arbitrator on such materials as are available to him and without indulging in feats of the imagination."

The majority opinion of the Board of Assessment expressed by its Chairman Joseph J. dealt in painstaking detail with the evidence of the sale. It was abundantly clear that the vendors had been attempting to sell the property for several years. They wanted to sell because they considered it the best way to solve financial pressures they were experiencing. The Board found that they were willing sellers. The appellants had no particular connection with the vendors and the sale was professionally negotiated. It was an arm's length transaction and a bona fide and genuine sale. The evidence persuaded the Board that the price paid was the best price the vendors could have obtained for the land at the time. In the circumstances a finding of fact was made that it was an open market sale by a willing seller.

It seems to me that the only conclusion which is consistent with the evidence and legal principle is that the price which the appellants paid for the land in an open market sale to a willing seller was the open market value of the land. I agree with the reasoning and conclusions of Sir Vincent Floissac, C.J. in approving and affirming this finding of the Board of Assessment.

Potentialities

I have been unable to support the view of Liverpool J.A. that there should be an additional or separate valuation of, and award for, the potentialities of the Water-works and Rabbacca Mines. I agreed with criticisms of the evidence of Mr. Cremona-Simmons made by Sir Vincent Floissac, C.J. with which Liverpool J.A. agrees. It seemed, therefore, inappropriate to use his evidence as a basis for ascertaining any values, particularly when the necessity to impose an arbitrary discount to accommodate its unreliability was apparent.

Liverpool J.A. placed reliance on the valuation of the Respondent's valuer Dr. Caldera who valued the expropriated property at $4,800,000.00 as an "inefficient estate" subject to the comment that Dr. Caldera "completely overlooked the potential value of the Rabbacca Mines and of the Water-works". It was this criticism which seemed largely responsible for his assigning the value of $4,800,000.00 to the land and making a separate assessment of the potential value of the Water-works and Rabbacca Mines. I have formed the view that by using the term "inefficient estate" Dr. Caldera was implying that he was valuing not only the real and other assets but also the commercial uses to which they were put, and his omission to place a special value on the Water-works and Rabbacca Mines, is more consistent with the view that they were included in the valuation.

However, the most important reason for my view is the fact that I have accepted that the actual sale provided the best evidence of the open market value of the expropriated property which included these potentialities.

It is not without significance that Dr. Caldera's valuation was about $400,000.00 less than the sale price including the personalty and about $100,000.00 more than the value assigned to the realty by the parties to the sale. [only the realty was compulsorily acquired]. This fact tends to commend Dr. Caldera and suggest that he is competent as a valuer. My opinion finds support from Swinfen Eady L.J. in Clay's case at p.888 when he said:

> "The price actually realised by a sale is not necessarily the price which it might have been expected to realise. But if the valuer be

competent and has taken proper pains in the matter there ought to be little difference between the two figures."

Disturbance

Section 19 of the Act and the decided cases all clearly demonstrate that for the compensation payable to the dispossess-ed owner to be adequate it must include compensation for the disturbance which flows directly from the compulsory nature of the acquisition. I agree with the awards of $516,000.00 under this head for the reasons given by Sir Vincent Floissac, C.J.

I therefore concur in the award of EC$5,216,000.00 with interest at 5% per annum from 1st May 1985 to date of payment. I also agree that the Board's award as to costs be affirmed. I also order that the respondent do pay the appellant's costs of the appeal, to be taxed if not agreed.

C.M. DENNIS BYRON
Justice of Appeal

LIVERPOOL, J.A.

This appeal is concerned with the question of what is the proper sum to be awarded to the appellant by way of compensation in respect of the compulsory acquisition by the respondent of certain lands (the Orange Hill estate) previously owned by the appellant. A majority of the Board of Assessment awarded com- pensation in the sum of E.C. $4,700,000.00, with interest at the rate of 5% per annum from 1st May, 1985 to the date of payment. The Chairman awarded costs to the appellant to be taxed, but excluded therefrom the costs connected with the preparation and giving of evidence of Glenford Stewart, a Civil/Structural Engineer.

The Orange Hill estate consists of a number of separate estates which were owned and being worked by the Barnard family for many years until it was sold to the appellant company in 1985. At the time of the sale the previous owners were experiencing severe financial difficulties. The Board found that they had been lacking in funds for some years, and had reached the stage where they were unable to meet their labourers' wage bill. They owed the banks, who were withholding credit to them, and they owed government tax arrears. They were unable to meet the costs of improved farming, which would in turn improve their production and therefore their financial position.

The circumstances in which the land was acquired are as follows: Early in January, 1985 the respondent wrote to the former owners indicating an interest in purchasing the estate. The Board found that there was no evidence that a reply was sent to the respondent. On 25 February, 1985 the former owners conveyed the estate to the appellant for US $2.1 million; as to US $1.6 million for the realty, and US $.5 million for the personalty. The deed was registered on 22 March, 1985 after the tax officer had increased the value for the realty to E.C. $5,337,600.00 million. The appellant took possession of the estate on 1st May, 1985. The required notices of compulsory acquisition were published, and on 30 April, 1985 the land vested absolutely in the respondent. The appellant maintained a claim for EC $29,495,500.00, but the authorised officer offered the sum of EC $4,700,000.00 as compensation. The matter was referred to a Board of Assessment which made the award referred to earlier, hence this appeal.

When the Board met it had three reports before it. One report was compiled by the appellant's valuer, the second report (described as a management survey) was prepared by an expert from the Organisation of American States (OAS), Dr. Winston Caldeira, and the third report was prepared by the authorised officer. Under the provisions of section 13 of the Land Acquisition Act, the authorised officer is under a duty to forward to the Board a report which states his opinion and his reasons on the following matters:

(a) what is a fair and proper description of the land acquired, including particulars of any building, trees or standing crops thereon;

(b) the approximate acreage of the land;

(c) the value of the land, for the purposes of compensation under the Act; and

(d) the amount of provisional compensation which should be paid for the land, including any damage payable in respect of entry into possession.

The Board considered that the authorised officer adopted the findings of the management survey and especially the following extract, in making an offer of EC $4.7 million to the claimants;

"(c) Valuation based on earning capacity of assets value as an inefficient estate $4.8 million."

The report by the appellant's valuer assessed compensation at EC $29,495,500.00. The learned Chief Justice has dealt thoroughly and adequately in his judgment both with the method adopted and the contents of this report, and I agree with his observations thereon in so far as the appellant's valuer placed a separate value on the land and on the standing trees and crops and buildings and for the reasons stated by him, I too would reject the amount placed by that report as the value of the land.

Dr. Winston Caldeira's report (management survey) was prepared at the request of the Government with the following terms of reference:

"1. Undertake a Management Survey of the Orange Hill Estate.

2. Evaluate all ongoing economic activities to determine their present financial position, viability and work.

3. Conduct interviews with relevant authorised personnel concerned with management. Production accounting and marketing; examine pertinent records and analyse production data to ascertain:-

   a. Physical assets: total acreage utilized; total acreage unutilized; buildings, their condition and value; farm machinery and equipment, their condition and value (tractors, ploughs, sprayers, etc.) All other equipment and machinery, motor vehicles (cars, trucks, vans, etc): Stocks on hand, materials and spare parts, fertilizers, agro-chemicals, fencing in place, other physical assets.

   b. Production units, their management and financial status; crops: tree crops, root crops, vegetables, other crops; livestock; agro-industry and other production activities."

He was assisted by local consultants. They used three methods for determining the value of the estate. Based on the comparative method, using supply and demand as the basic criteria, they estimated the value of the estate at EC $9.1 million if it was divided into fourteen blocks and sold commercially. The cost assessment method of valuation did not find favour with the consultants because they regarded the information which was available to them to be insufficient, and partly incorrect. For example they indicated that the net book value of fixed assets at December 1984 was only EC $2,098,074, a sum which they considered to be too low to reflect the true value of the estate. The consultants also used a method of valuation based on the earning capacity of the estate and concluded that its value as an inefficient estate was EC $4.8 million; but its value in the form of a land settlement scheme for small scale efficient farming was

EC $7.1 million.

The consultants concluded that ".....the value of the Orange Hill assets is $4.7 to $5.3 million if exploited as an ongoing estate with marginal investments, or $7.1 to $9.1 million if exploited in a land settlement scheme for small farmer holdings with centralised facilities with an industrial investment programme".

The authorised officer in his report described the land acquired and adopted the following particulars of buildings and crops which were contained in Dr. Caldeira's report:

> "On the land were six dwelling houses used by the Management of Orange Hill, twenty-seven cottages used to house workers, seventeen commercial buildings and various equipment and machinery. Main crops were bananas 85 acres; coconuts 1728 acres, and grapefruits and limes 55 acres, in addition, passion fruit and mangoes were found."

He summarised the three valuation methods adopted by the consultants and concluded -

> "I was satisfied that the Orange Hill Estates was an inefficiently run estate and any value offered must be based on the current state of the property, hence, I offered the amount of EC $4.7 million as total compensation."

The authorised officer did not indicate what factors he took into account in arriving at this figure.

The Board considered that the expression "inefficient" could not relate to the management of the estate at the time of acquisition, because of the activities which were being carried out thereon by the appellant, and concluded that the report of the authorised officer was of limited help. Since the authorised officer's report was based on Dr. Caldeira's management survey, the Board examined Dr. Caldeira's report and made the following findings in respect thereof:

> "Also in his report, Dr. Caldeira stated that '.......no information was requested from Windward Properties Limited'. He confirmed that in his evidence before the Board. He also stated that the plans which the new owners had for the estate acquired would be an important factor in arriving at the value of the estate. As it is, his conclusions as to value were arrived at without this information. He acknowledged that improved management would enhance the assets of the estate, and that he had in fact found changes in the performance of the estate on his two subsequent visits there, especially the 1991 visit when under Rabacca Farms management, there was more production of root crops and bananas, and improved fertilization, *inter alia*. It follows therefore, that equally good results might have followed from improved management by the claimants.
>
> The only consultant on whose report Dr. Caldeira relied

in compiling his report, who gave evidence before the Board was Miss E. Mc Intosh. No evidence was led through this witness as to the agro-industry.

Again, the Board has not had the advantage of the evidence of Mr. Abrams as to the buildings or of Mr. Johnson as to the field sampling and evaluations of coconut standings.

Dr. Caldeira also stated that in arriving at his value of the estate in his report he did not take into consideration the value of the Rabacca aggregate, the air strip, the water rights or works and kola nuts. The reason ..... value, but the evidence of Martin Barnard, the former manager of the estate was that there was some scheme for the marketing of kola nuts in the coco cola industry.

Dr. Caldeira admitted having seen about eighty acres of kola nuts.

I think that the presence of these 80 acres of kola nuts on the estate required some investigation within the context of Dr. Caldeira's terms of reference. The claimants claim is in respect of 112 acres of that crop.

Another aspect of Dr. Caldeira's report which I must advert to is the question of the figures on which he evaluated the profits of the estate based on the price of bananas and those of the acreage of the estate, both of which were wrong. In the case of the profits on bananas, he applied a selling price of seventeen cents per pound instead of the correct price of thirty-one cents per pound.

However it seems to me that he was under pressure to complete his assignment within a time frame which was very tight and that factor inevitably led to its natural consequences. Perhaps it was inadvisable for him to have later attempted to arrive at a valuation for purposes of compensation when he had earlier been inhibited and constrained in collecting necessary data at the time.

In the light of the foregoing, I do not consider the report to be of more than very limited use in the task of assessing compensation.

The Board, however, found that Dr. Caldeira's report when read with his oral testimony and that of Mr. Hugh Stewart and Mr. Victor Hadley helped to an understanding of the particular and generally with respect to large and medium size plantations in St. Vincent and the Grenadines.

Mr. Commissiong is of the view that this understanding assisted him in coming to the conclusion concerning the price to be paid to the claimants for the property taken."

Rules for the assessment of compensation

Section 19 of the Land Acquisition Act contains the rules by which the Board was to be guided in arriving at the price to be paid to the appellant. This section provides that the value of the land is to be taken to be the amount which, if sold in the open market by a willing seller, might have been expected to realise at a date twelve months prior to the second publication in the Gazette (in this case 12 months prior to 30 April, 1985). In addition, compensation is to be assessed for severance, injurious affection to the earnings of other property of the owner, disturbance, and any other matter which is not directly based on the value of the land. Under this last head the owner is permitted to claim for legal and other expenses incurred in preparing and submitting his claim.

Since the appellant retained no other land in the area, the questions of severance or injurious affection did not arise. The Chairman, in the exercise of her discretion awarded costs to the appellant excluding that connected with the preparation and evidence of the civil engineer, Mr. Glenford Stewart. I would uphold this award. The claim which was eventually left by the appellant to the Board for determination was for EC $29,495,500.00. The evidence of Mr. Stewart was in support of a document which had been submitted to the Board and headed "**ASSESSMENT OF POTENTIALS**" which sought to assess the potential value of the estate at EC $47,214,770.00. This claim was withdrawn during the hearing before the Board; and consequently the Chairman was quite right in her decision to exclude it from consideration for purposes of costs.

The assessment of the value of the land, however, (including buildings and crops) evoked considerable argument not least because of the very wide difference in amounts placed on the value of the land. The Board had in evidence before it six different figures which pertained to the value placed on the land. These were (1) EC $29 million which was the claim put forward by the appellant; (2) EC $9.2 million was the value at which the previous owners had assessed the estate as at October, 1981 for the purposes of securing further financing from their bankers (this figure contained, however, the sum of E.C.$825,000.00, being the value of one yacht and certain other properties situated in Kingstown the capital of the island); (3) US $2.1 million which was the consideration actually paid; (4) EC $5,337,600.00 being the figure at which the estate was assessed for the purposes of stamp duty; (5) EC $4.8 million was the figure suggested by Dr. Caldeira in his management survey; and (6) EC $4.7 million, the sum offered by the authorised officer.

<u>**Sale on the open market**</u>

Generally where land is being acquired compulsorily, it cannot be said that there is a sale in the open market in the sense that it must be shown that everyone who was desirous of purchasing had an opportunity to do so. What happens is that the valuer simulates a sale, and using his expertise determines what price the land would fetch if it had actually been put on the open market.

In **Priestman Collieries Ltd. v Northern District Valuation Board (1950) 2 K.B. 399**, Morris J. (as he then was) at page 407 described the phrase "open market" thus -

> "It was further contended that the phrase 'open market' presupposed and contemplated a market in which a seller could expect to receive the highest unlimited price which resulted from the free competition of all potential buyers. In the opinion of the court........the section does not postulate conditions wholly divorced from reality. The directed inquiry in effect is 'what would the sale of the [land] have realised on [the date]. In pursuing that inquiry it must be assumed that on that date the seller was willing to sell and that the buyer was willing to buy; any notion of a compulsory sale must be ignored. When it is said that regard should be had to all relevant circumstances, what is contemplated.....is a sale that might have taken place in the actual market on the prescribed date - rebus sic stantibus'."

The reason for simulating a sale on the open market is to arrive at the market value of the land for the purposes of compensation, and in this regard the observations of Lord Romer at page 312 in **Raja v The Revenue Divisional Officer (1939) A.C. 302** are instructive. He stated -

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

The Board applied the dicta of Cozens-Hardy M.R. and Swinfen Eady L.J. in **Inland Revenue Commissioners v Clay (1914) 3 K.B. 466** to the facts which they found to exist in St. Vincent in 1984 and 1985 and came to the conclusion that the sale of the Orange Hill Estates by the Barnard family was on the open market. They found that in fact open market conditions existed at the time the sale took place in the context of "the open market" in St. Vincent. This evidence of an actual sale which must always be taken into account in arriving at the value of the land for purposes of compensation will be dealt with later. Suffice it to state at this stage that the report of the authorised officer did not contain the type of material which would have assisted the Board in arriving at a level of compensation in keeping with their duty under the provisions of section 19. There is also no evidence that the authorised officer himself took any account of the provisions of that section.

The willing seller

A considerable amount of argument was addressed to the Board as to whether the Barnard family were willing sellers. This argument took place against the decision in the well-known case of **Inland Revenue Commissioners v Clay (1914) 3 K.B. 466.** Although a note to that case states that the principle laid down therein does not apply to valuations for the purpose of assessing compensation on compulsory purchase, those principles were widely canvassed by both parties and applied by the Board. It may be useful to examine the facts of the case, bearing in mind the observations of the Court of Appeal in **Trocette Property Co. v. Greater London County Council (1974) 28 P. & C.R. 408** where it was said (at page 416) that a willing seller is - "...... a hypothetical character. There is no justification for attaching to him, so as to increase or reduce the assessment of compensation, any special characteristics. He is to be assumed to be willing to sell at the best price which he can reasonably get in the open market".

The headnote of Clay's case reads in part as follows:

> "The value of the fee simple of a certain dwelling-house and garden, if purchased by an ordinary individual and used as a private dwelling-house, was £750 and no more. Owing to the fact that the property was situate near a certain institution, the trustees of which were desirous of extending their premises, and that the property was well adapted for the special purposes for which the institution required it, the trustees were willing to pay £1,000 for it, and it was purchased by them at that figure. On appeal against valuations of the property, under the Act, at £1,000.
>
> **Held:** The valuations should be affirmed because the value of a property if sold in the "open market" by a "willing seller," might be ascertained with reference to the fact that a price in excess of what the property might otherwise have realised had been paid by one particular purchaser owing to special circumstances."

A close examination of this case reveals that there was evidence of valuation of the properties with which the price paid by the Trustees of the Nursing Home could have been compared. The district valuer gave a practical valuation, there was an appeal to a referee before whom further evidence was called as a result of which the valuation was increased. The matter was then taken by way of petition before Scrutton, J. when a considerable body of evidence was reheard. The learned Judge, having examined the evidence and the price actually paid by the trustees upheld the referee's valuation. A further Appeal to the Court of Appeal was dismissed. In his judgment Pickford, L.J. said (at page 890) -

> "I do not think that the effect of the needs of a probable purchaser can be confined to the amount of the one bid which will take the offer above the bare dwelling-house value. The effect on the market of such a probable purchaser is a matter to be estimated by the referee. I agree with SCRUTTON, J., that he is not bound to take the actual figure given, and should not do so arbitrarily, but should consider all the circumstances and estimate what he considers the value in the

"open market." Here he has done so, and has come to the conclusion that under all the circumstances the amount this house might be expected to realise in the "open market" would be £1,000 - an amount, it is to be noticed, less than the trustees were in fact willing to give if compelled. I do not see that he has applied any wrong principle, and I do not see my way to say that he and SCRUTTON, J., who also had evidence before him and came to the same conclusion, were wrong."

This case underscores the need for proper expert evidence to be placed before the body whose duty it is to assess compensation in order that it may arrive at the correct value of the property concerned.

Might have been expected to have realised

Here again the learning in Clay's case proves to be useful despite the fact that the phrase used in the legislation applied in that case was "might be expected to realise". The wording is unavoidably different because whereas the law in St. Vincent and the Grenadines requires that the valuation ought to be conducted as if a sale had taken place twelve months previously; generally the law in England speaks to the present, where the matter has not escaped controversy as to whether the value should be determined at the time the notice was served or on the date on which the acquiring authority entered into possession.

In Clay's case Swinfen Eady L.J. (at page 888) stated -

"In order to arrive at the amount which land might be "expected to realise" all these matters ought to be taken into consideration. "Expected" refers to the expectation of properly qualified persons who have taken pains to inform themselves of all the particulars ascertainable about the property and its capabilities, the demand for it and the likely buyers. The price actually realised by a sale is not necessarily the price which it might have been expected to realise. But if the valuer be competent and has taken proper pains in the matter there ought to be little difference between the two figures."

Keith Davies in the second edition of his book **"Law of Compulsory Purchase and Compensation" states (at pages 108-109) -**

"The assessment of compensation, as a detailed process, is a matter for valuers and not for lawyers. It is thus a question of fact, but expert fact needing to be proved by the testimony of expert witnesses who, in this context, must be valuers. A valuer's status is not in itself a matter for a court; but status may well affect the credibility of a particular valuer's evidence in any particular case, in the eyes of lawyers as well as of other valuers. On the other hand there are other factors which may carry more weight in a particular case, such as an individual's professional experience, or the internal consistency or lack of it in an individual's evidence. The tribunal which will normally need to make assessments of this kind is the Lands Tribunal, which must apply the law as well as adjudicate questions of ordinary and expert fact, whether the sitting member of the Tribunal is a lawyer or a valuer.

But the assessment of value of land for the purposes of compensation must always conform with the legal rules governing this matter in addition to being carried out with reasonable technical competence. Ignorance of the law excuses no-one who breaks it, layman as well as lawyer, so the valuer needs to be aware of the relevant legal rules as well as the relevant rules of valuation. Nevertheless, in respect of the law, valuers and other laymen will defer to the advice of lawyers and the decisions of the Lands Tribunal will be subject to review by the Court of Appeal and the House of Lords for decision."

In the instant case neither the OAS expert nor the authorised officer conducted a valuation which conformed to the legal rules governing the assessment of compensation. The only evidence of a valuation for purposes of compensation was adduced by the appellant. The respondent concentrated on and in large measure succeeded in, attacking the methods used by the appellant's valuer. The learned Chief Justice has examined those methods and their results and has concluded that the figure of $29,495,500.00 arrived at does not represent the value of the land at the relevant date, and I agree with his reasons for rejecting the valuation undertaken by the appellant's valuer in so far as it pertains to the land, trees and crops and buildings. But this does not take this court any closer to a satisfactory solution of this intractable problem, for we are then left with no professional valuation of the property for the purposes of s.19 of the Act with which to compare the price actually paid by the appellant. The authorised officer as he is required to do under the Land Acquisition Act failed to submit a report which provided sufficient information to enable the Board to arrive at a decision; and I agree with the Board's conclusion that this report was of limited help.

The Board quite rightly held that the authorised officer need not personally undertake the functions which he is enjoined to perform under the Act; but it is axiomatic that both the authorised officer and any experts which may enlist to his aid must perform their functions bearing in mind the requirements of the Act. So that although there was nothing wrong in principle in adopting the finding of an OAS expert in arriving at a valuation of the land, that finding should have been based on a valuation which was undertaken for the purposes of compensation consequent on a compulsory purchase of land. Dr. Caldeira's evidence was that he was instructed by the OAS not to address his mind to compensation. The Board also found that he overlooked the evidence of 80 acres (or 112 acres claimed by the appellant) of Kola Nuts; and used an incorrect selling price (17 cents instead of 30 cents) in assessing the bananas. He also completely overlooked the potential value of the Rabacca Mines and of the Waterworks. The Board concluded that his report was of very limited use. I would conclude that if this Court must come to a conclusion based on the limited evidence of valuation at its disposal, Dr. Calderia's report could be a starting point from which a proper assessment of the value of the land could be made.

Twelve months prior to the date of the second publication

The rules for the assessment of compensation state that the value of the land is to be taken to be the amount which it might have been expected to realise at a date twelve months prior to the date of the second publication. Bearing in mind that certain preliminary steps have to be taken by the authorised officer before he embarks on a valuation of the land acquired, the actual valuation will necessarily take place long after the date fixed by the Act.

In my view this is a task which the valuer must undertake as best he can. Having valued the land in accordance with the principles contained in the Act, he must then simulate a sale as at the date mentioned in the Act. It is quite obvious that no valuation would have been conducted as at that date, since invariably no one may have had the slightest indication that the land would have subsequently been required and be acquired for public purposes. Consequently, the requirement for assessing compensation at that early date seems to be an attempt to preclude the type of speculation in the price of land which occurs in jurisdictions where this limitation does not apply. Pickford L.J. in Clay's case summed up the practice very graphically (at page 890) -

> "It is not uncommon that where a person or public body is known to be very anxious to purchase a piece of property speculators will run the price up on the chance of buying it at a price to which the person or body is not prepared at that moment to go, and hoping that their needs will eventually oblige them to buy from the speculator at a profit."

The Land Acquisition Act became law in 1947 (Ordinance No. 22 of 1946 which came into force on 15 January, 1947), at a time when property values, because of the cessation of hostilities after the end of the second World War had a tendency to rise steeply. In order to ensure that the public interest was properly served, the Act initially provided that the value of the land was to be taken to be that which it might have been expected to have realised on the 31st day of March, 1939, with the addition thereto of such percentage of the sum so ascertained as may from time to time be prescribed by the Governor in Council; and that date remained until the Act was amended in 1951 when the period of twelve months was substituted therefor. (See Land Accquisition (Amendment) Ordinance, 1951; No. 8 of 1951 which came into force on 24 April, 1951).

It would seem to me therefore that unless evidence is adduced to show either that property values fluctuated sharply during this twelve month period or that the owner of the land on learning of the possibility of acquisition spent large sums of money with the intention of increasing the value of the land; its value at the date of acquisition may safely be assumed to represent its value at the earlier date. In this case the evidence reveals that the estate was deteriorating, and consequently it may well have been more valuable twelve months before acquisition. I would, however, in this case accept a valuation assessed at the date of acquisition as the value twelve months earlier in the absence of evidence that there was substantial depreciation of the estate between those two periods.

The provisions of s.19(a) of the Land Acquisition Act state that the value of the land shall be taken to be the amount which, if sold in the open market by a willing seller, it might have been expected to have realised at a date twelve months prior to the date of the second publication of the declaration in the Gazette. The learned Chief Justice has found that this provision is inconsistent with section 6(1) of the Constitution which states that there must be payment of adequate compensation within a reasonable time of land which has been compulsorily acquired. He therefore applied paragraph 2(1) of the Transitional Provisions of the Constitution and construed s.19(a) to mean that compensation must be assessed "at the date of the compulsory acquisition".

Learned Justice of Appeal the Honourable C.M. Dennis Byron has examined section 21 of the Land Acquisition Act which states that in awarding compensation, the Board may add thereto interest at the rate of five per cent per annum calculated from the date of entry into possession of the land acquired until the date of payment of the compensation; and he has found that this provision is unconstitutional in that it does not provide for "adequate" compensation.

He also applied paragraph 2(1) of the Transitional Provisions of the Constitution and construed the provision to mean that interest must be payable at such rate as would adequately compensate for any loss occasioned from the date of acquisition.

In **Grand Anse Estates v Governor-General 1 OECS Law Reports** this Court after full argument had found that the payment of "full" compensation as mandated by the Grenada Constitution was not met if compensation was assessed at the value of the land twelve months prior to the date of acquisition, and also if the rate of interest payable was fixed at five per cent per annum. St. Bernard J.A. who delivered the leading judgment expressed himself thus -

> "The problem lies in the provision fixing the value of the land at a date twelve months prior to the date of the second publication in the Gazette. The date of the second publication in the Gazette is the date the land vests absolutely in the Crown and the owner is deprived of all his rights and privileges. Full compensation must mean a just equivalent of the land at the time of acquisition plus any loss incurred by such acquisition plus adequate interest to the date of payment. There could be cases in which the value of the land twelve months before acquisition would amount to adequate compensation. Similarly, I can conceive of cases where within twelve months the value of land in certain areas may increase to a large extent. Counsel for the respondent submitted that the mere fact that the value of the land is to be taken twelve months prior to the acquisition does not mean that full compensation will not be given. He stated that land prices do not fluctuate and that the proviso to the section makes provision for the compensation to be adequate. It seems to me that land prices do fluctuate and that the proviso to this section only enacts what the owner would be entitled to if given full compensation without those provisions being enacted. The provision as to the amount of compensation being limited to a date twelve months prior to the date of acquisition may be to ensure that owners of land do not enhance the value of their land with the intention of increasing the compensation. Sub-paragraph (vi) of paragraph (e) of the proviso was certainly enacted for this purpose."

He then quoted from the judgment of Shah J. in State of Madras v Mudaliar (1965) A.I.R. S.C. 190 which was cited in Volume II of "Fundamental Rights and Constitutional Remedies" by V.G. Ramchandran at page 466, and continued -

> "I am of the view that the provision in section 19 of the Land Acquisition Ordinance which places a limitation on the value of the land acquired to a value twelve months prior to the date of acquisition is, as it stands, an infringement of a fundamental right to full compensation enshrined in section 6(1) of the Constutution Order and therefore that provision in the Ordinance, on the face of it, is *ultra vires* to that extent.
>
> The Land Acquisition Ordinance, however, is an existing law within the provisions of sub-paragraph (1) of paragraph 1 of Schedule 2 to the Constitution Order and therefore the provision in section 19(a) relating to the market value of the land twelve months prior to the date of acquisition must be construed from the commencement of the Constitution with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the Constitution. It appears that the intention of these provisions is to secure the continuance of the validity of an existing law in so far as is possible. In order to construe section 19(a) and to bring it into conformity with section 6(1) of the constitution then the

compensation to which the appellant would be entitled must be compensation assessed on the market value of the land at the date of acquisition. Although I say that the appellant's rights have been infringed, I am of the view that because of the Transitional Provisions set out in Schedule 2 to the Order the acquisition is not null and void but the appellant is entitled to an order that the compensation must be assessed on the market value of the land at the date of acquisition.

Section 21 also places a limitation in respect of the interest to be awarded the owner by the Board. The rate of interest is fixed at five per centum. Counsel for the respondent submitted that this should have been raised in the lower court and that it was for the appellant to show that it did not amount to full compensation. In my view since there is that limitation in the section it was for the respondent to show that five per centum was full compensation. In my opinion the interest payable must be an interest at a rate applicable to give the expropriated owner a just equivalent of his loss at the time of the expropriation and not a rigid and fixed rate whatever his loss may be. The Board of Assessment's hands are tied in this matter and whatever the loss of the owner it cannot award any interest at a higher rate. It would have been different if the provision empowered the Board to fix five per centum or such other rate as would compensate the owner for the loss occasioned by the acquisition. I am of the opinion that this section imposes a fetter or limitation on the Board, whatever the evidence may be, and is repugnant to, and in conflict with, section 6(1) of the Constitution Order, 1973. I would treat this section in the same manner as section 19(a) and construe it in such a way as to make it conform with the provisions of section 6(1) of the Constitutional Order and order that the appellant is entitled to interest on the sum assessed as the full value of the land at such a rate as would compensate him for any loss occasioned by him from the date of the acquisition. These sections ought to be amended accordingly."

It is interesting to note that the 1967 Constitution of Saint Vincent did, like the present Grenada Constitution, provide for the payment of "full" compensation; but that the current (1981) constitution merely provides for "adequate" compensation. There seems to me therefore to be a case for hearing full argument on the matter before concluding either that adequate compensation means full compensation; or that interest at five per centum per annum does not amount to "adequate" compensation. Since neither of these two points was pleaded, raised or argued before this Court, I would prefer to reserve my views until they have been formally raised and properly argued.

The effect of a recent sale

The evidence reveals that in January, 1985 the respondent wrote to the Barnard family indicating an interest in purchasing the acquired lands. No reply was received. However, on 25 February, 1985 the Barnards conveyed the land to the appellant. It was strenuously argued for the respondent that the failure to reply was significant since it is inconceivable that the former owners would not at least have sought to enquire whether the respondent was minded to improve on the offer made by the appellant; and the fact that this was not done was clear evidence that the appellant sold at the best price which could be reasonably obtained in the circumstances.

The learned Chief Justice is of the view that an actual price is generally presumed to be the open market value of the land with all its "unusual, and it may be, unique features, as regards its position or its potentialities". And he continues "It is only when there is no such actual price or no such 'market value to guide' the arbitrator that it becomes necessary to resort to a hypothetical or notional sale and thereupon to invoke prices paid or obtained for comparable land and other ways and means of ascertaining the market value of the compulsorily acquired land at such a hypothetical or notional sale". And he concludes "It is my opinion that expediency demands that an actual sale of compulsorily acquired land or of land comparable therewith should be presumed to be a sale in the open market by a willing seller and that the onus should be on the person who asserts otherwise to rebut that presumption. The onus was therefore on the appellant to prove that the sale to the appellant was not a sale in the open market by a willing seller". I regret that I am unable to take this leap forward in light of the clear and unambiguous requirements of the Land Acquisition Act; and I would rather apply the provisions of the Land Acquisition Act than to resort to expediency in dealing with this very important matter.

Section 13 of the Act requires the authorised officer to forward to the Chairman of a Board of Assessment those documents and particulars which relate to the acquisition of the land, including a report in which he must state his opinion and the reasons for that opinion on each of the following matters, inter alia:

(a) what is a fair and proper description of the land acquired, including particulars of any building, trees or standing crops thereon;

(b) the approximate acreage of the land; and

(c) the value of the land for the purposes of compensation under the Act;

and in assessing the amount of compensation for the purpose of his report, the authorised officer is enjoined to have regard to the rules prescribed in the Act. He must also supply to the Board the detailed information stipulated before it may embark on a proper assessment and award of compensation under the provisions of the Act.

It is generally accepted that for purposes of assessment of compensation by a Board, an actual price, already paid in fact, is proper evidence to be taken into account in arriving at a figure for compensation; although such a price could probably be disregarded if for some reason it is unreliable, for example if it is not genuine but was arrived at in an illusive transaction. But that is all it is, evidence to be taken into account, not prima facie evidence as this expression is used in normal legal terminology; since there is no onus placed on the owner of property which has recently been purchased in an arm's length sale of rebutting any presumption that this is the value for purposes of assessing compensation if that property is compulsorily acquired shortly thereafter. In my view there is no such presumption in law. This view that a recent sale is evidence merely to be taken into account is supported by the case of **Melwood Units Pty. Ltd. v Commissioner of Main Roads (1979) A.C. 426** where Lord Russell of Killowen in delivering the judgment of their Lordships of the Privy council referred to the price paid in an actual recent sale as a purchase which ".....appears to their Lordships to be a highly relevant piece of evidence for the valuation of compensation in this case when it is considered in the contest of the assumed findings of fact already mentioned".

The authorised officer used Dr. Caldeira's report as the basis for his valuation. The Board found that Dr. Caldeira's report overlooked the evidence of 80 - 112 acres of Kola nuts and underestimated the selling price of bananas by forty-three per cent; and he also seemed to have overlooked completely the potential of the Rabacca Mines and the Waterworks. All of which were vital pieces of expert evidence which required consideration in arriving at an assessment of compensation.

Value to owner

In ascertaining the value of the land acquired a valuer must take into account the value to the person from whom the land was acquired. The valuer is required to give his professional advice on a likely figure just as he would in a free sale, bearing in mind that the"freedom" of the sale is notional and not actual.

The compensation which is payable to a person from whom property is compulsorily acquired is for the loss that he (not anyone else) has sustained. It is intended that he should be compensated to the extent of his loss and that loss is to be tested by what was the value of the land to him (the owner). The use of the expression "value to the owner" is here being used in contrast to the expression "value to the acquiring authority". The question has therefore always been, what is the value of the interest of the owner (or notional willing seller) in the property acquired, for he is also to be compensated for the deprivation of the power to use his property. (See Trent-Stoughton v The Barbados Water Supply Company, Limited (1893) A.C. 502).

In **Pastoral Finance Association, Limited v The Minister (1914) A.C. 1083**, Lord Moulton expressed that view very clearly when he said (at page 1088) -

> "The Judge in his summing-up said to the jury: 'Then you will consider what capital amount fairly represents those savings and those profits and you will <u>add</u> that to the amount that you consider fairly represents the market value of the land independently of these special questions'.
>
> Their Lordships are of opinion that this direction is seriously at fault. That which the appellants were entitled to receive was compensation not for the business profits or savings which they expected to make from the use of the land, but for <u>the value of the land to them</u>. No doubt the suitability of the land for the purpose of their special business affected <u>the value of the land to them</u>, and the prospective savings and additional profits which it could be shown would probably attend the use of the land in their business furnished material for estimating what was <u>the real value of the land to them</u>.
>
> But that is a very different thing from saying that they were entitled to have the capitalized value of these savings and additional profits <u>added</u> to the market value of the land in estimated their compensation."

And in **Fraser and Others v City of Fraserville (1917) A.C. 187**, Lord Buckmaster had this to say -

> "The substance of the dispute is connected with a subject which has not been unfruitful in litigation, namely, the determination of the exact principle upon which prospects and possibilities of future development ought to be taken into account in determining the price to be paid for property compulsorily acquired ....
> ....The real ground upon which the award is challenged ....is that the arbitrators have.......assessed the valuation on a totally wrong basis.
>
> Mr. St. Laurent (the valuer) decided the subject-matter into two heads (1) the value of the lands and the water power in the physical condition in which they were found at the date of the valuation, and (2) the value of the possibilities of development of those waterfalls by storing and regulating the waters through the medium of reservoirs.
> ....

....

> There is abundant evidence to support, that in truth the value which Mr. St. Laurent fixed was the value of the property to the person who was buying, and not to the person who was selling, and it was not this value which he was appointed to determine."

In **Raja Vyricherla Narayana Gajapatriroja v The Revenue Divisional Officer, Vizagapatam (1939) A.C. 302** the following is taken from the headnote:

> "Land compulsorily 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.
>
> Where the land has unusual features or potentialities, the valuing officer must ascertain as best he can from the materials before him the price a willing purchaser would pay for the land with those features or potentialities. The owner is entitled to, and the valuing officer must, ascertain the value of the potentialities, even when the only possible purchaser of the potentialities is the authority purchasing under powers enabling compulsory acquisition."

In that case Lord Romer (at page 321) quoted the following passage from the opinion of **Lord Buckmaster in Fraser v City of Fraserville (1917) A.C. 187 at page 194**:

> "The principles which regulate the fixing of compensation of lands compulsory acquired have been the subject of many decisions. .... and the substance of them is this: that the value to be ascertained is the value to the seller of the property in its actual condition at the time of the expropriation with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for which the property is compulsorily acquired....."

And in **Hughes v Doncaster Metropolitan Borough Council (1991) 1 All E.R. 295**, Lord Bridge of Harwich stressed (at page 300) that- "Judicial interpretation has held that the value of the land meant its value to the owner, not its value to the acquiring authority .... This value was to be assessed as including all the loss which the owner suffered in consequence of being dispossessed".

In the context of the present acquisition, the expression "value to the owner" where applicable, must therefore mean value to the appellant and not value to the acquiring authority.

Conclusion

Because of the failure of the authorised officer to assess the value properly, I am of the view that the matter should be sent back to the Board to be reheard. It is quite possible that this is the proper course to pursue. My brothers are of a different view. The considerations which should guide this Court would no doubt include the following factors - whether the Board may still exercise its office in the sense that they may now proceed to make a new award, or whether it no longer has any authority to act. These are points which have not been argued before this Court and I would hesitate to express an opinion on them without hearing argument.

If one must arrive at a decision on the expert and other evidence which was placed before the Board, and using that evidence as best I can bearing in mind the fact that the estate was deteriorating constantly, and that there was an actual sale of the same estate two months before acquisition, I would accept the following as representing the loss to the owner consequent on the acquisition.

1. **Value of land to owner**

I would accept the value placed by Dr. Caldeira on the land as an inefficient estate at E.C. $4.8 million; and to this I would add the potentialities of the waterworks and water rights, and the Rabacca Mines, together with the amounts mentioned under the head of disturbance. That in my view would represent the owner's loss consequent on the compulsory acquisition of the estate.

(a) **Waterworks and water rights**

Mr. Cremona-Simmons valued these at E.C. $750,000; as to E.C. $500,000 for the existing water supply at an estimated replacement cost; and E.C. $250,000 as a nominal claim for water rights.

Dr. Caldeira did not give a figure. In Trent-Stroughton v The Barbados Water Supply Company, Limited (1893) A.C. 502, certain streams of water had been abstracted from the appellant's property by a water company acting under the Water Supply Act, 1896 (Barbados), the Judicial Committee of the Privy Council held that the compensation due to the appellant included the value of his proprietary interest in the water, and was not limited to the amount of pecuniary benefits obtained by past user thereof in disregard of possible benefits in the future. In delivering the judgment of their Lordships, Lord Halsbury stated (at page 504) -

> "The Chief Justice directed the jury that the question was, not what was the value of the interest of the appellant in the streams, but whether he had sustained damage or loss by being deprived of their use, and that "the question was not as to the money value of the plaintiff's interest in the streams, ... but was whether the plaintiff had been using these streams in some way to his advantage, so that his being deprived of their use, from their being taken and abstracted

by the defendant company, worked damage and loss to him". Their Lordships are of opinion that the question was, what was the value of the interest of the appellant in the streams, it being conceded that in the exercise by the respondent of the powers conferred upon it by the Act, those streams had been abstracted, and that the appellant had been deprived of the power of exercising the rights which he had up to that time possessed in respect of them. That is damage or loss within the Act. Though he never had up to that time obtained one farthing for the use of the streams, and might never had made any use of them, nevertheless, the damage or loss which he sustained was, that he was deprived of the power of using the property which was his."

Based on the tendency by the appellant's valuer to over-valuethe assets, I would assess the waterworks and the water rights at E.C. $500,000.

(b) **Rabacca Mines**

Mr. Cremona-Simmons valued the mines at E.C.$1,252,000. I agree with the learned Chief Justice that had he adopted a different approach he would have valued the Rabacca Mines at appreciably less than that sum. I would therefore halve Mr. Cremona-Simmon's figure and award the sum of E.C. $626,000 under this head.

(c) **Disturbance**

For the reasons stated by the learned Chief Justice I would award the sum of E.C. $15,000.00 under this head for the removal of the appellant's equipment from the estate, and also any amounts paid as conveyancing fees and other legal and professional costs and expenses incurred in connection with the acquisition of the estate.

Learned Counsel for the respondent submitted that the tax Officer was of the view that the value of the land for stamp duty purposes was approximately E.C. $600,000 more than it was sold by the Barnards; and pointed out that no claim had been made, but the only possible loss which the appellant could have suffered would have been the additional amount which would have been paid in stamp duty.

The estate was conveyed to the appellant on 25 February, 1985 and on 30 April, 1985 barely two months later the land vested absolutely in the respondent. If the increase in value by the Tax Officer could form the basis of a claim for loss suffered, I am of the view that the entire amount of stamp duty paid could be so regarded. And although no claim was made, I would allow the sum paid as stamp duty and registration fees as a loss suffered by the appellant.

2. **Interest**

I would award interest to the appellant on the sums assessed and to be determined at the rate of five per cent per annum from 1st May, 1985 until the date of payment of compensation.

3. **Costs**

I would uphold the Chairman's award in respect of the costs before the Board, and would award costs to the appellant in this appeal, to be taxed.

N.J.O. LIVERPOOL,
Justice of Appeal