

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

SAINT CHRISTOPHER AND NEVIS

SKBHCVAP2020/0024

BETWEEN:

THE ATTORNEY GENERAL OF SAINT CHRISTOPHER AND NEVIS

Appellant

and

[1] CARMEL BERNADETTE AGNES MCGILL

[2] LASZLO STEPHEN SIEGMUND

Respondents

Before:

The Hon. Mr. Mario Michel

Justice of Appeal

The Hon. Mde. Gertel Thom

Justice of Appeal

The Hon. Mr. Gerard St. C. Farara

Justice of Appeal [Ag.]

Appearances:

Mr. Douglas Mendes SC, with him Ms. Rivi Lake, for the Appellant

Mr. E. Anthony Ross QC, with him Ms. Katrina Marciniak, for the Respondents

2021: July 16;
November 24.

Civil appeal – Right to protection from the compulsory acquisition of private property by Government except for a public purpose – Section 8(1) of the Constitution – Damages for breach of constitutional right to protection from compulsory acquisition – Requirement to notify landowners of the compulsory acquisition of their property by Government – Sections 4 and 7(3) of the Land Acquisition Act - Whether the failure by the Government to notify the landowners of the compulsory acquisition of their property constituted a breach of their constitutional right – Whether an award of damages ought to have been made to the landowners for the failure of the Government to notify them of the compulsory acquisition of their property - Delay in payment of compensation for the compulsory acquisition of private property by the Government - Prejudgment interest on awards of damages – Whether the respondents were entitled to an award of damages in addition to interest on the compensation payable by the Government for the delayed payment of compensation for the compulsory acquisition of the respondents’ property - Vindictory damages – Whether the

trial judge erred in the exercise of her discretion in awarding vindictory damages to the respondents - Whether the award of vindictory damages was excessive

The respondents were the owners of 3.79 acres of land located in St. Kitts which was compulsorily acquired by the Government of St. Kitts on 8th November 2007 by a Declaration made under the Land Acquisition Act. The respondents were not notified of the Government's intention to acquire the land or of its actual acquisition of the land; they only became aware of the acquisition in February 2008 when the first respondent was told so by a third party. After 5 years of unproductive exchanges of correspondence between the respondents and various Government officials, the respondents filed a claim against the Government on 14th February 2013 seeking multiple reliefs, including declarations, damages and costs.

By a consent order made on 1st July 2016, the court declared that the respondents' right to protection from the deprivation of their property, guaranteed by section 8 of the Constitution, had been infringed by the compulsory acquisition of their land without prior notice to them, without them having an opportunity to be heard prior to the acquisition and without prompt payment of compensation to them. The Government was also ordered to pay the market value of the property to the respondents which was to be assessed by the High Court. It was also provided in the consent order that damages for breach of the constitutional right (as per the consent order of 1st July 2016) would be assessed by the High Court. By a subsequent consent order made on 18th March 2018, the court assessed the market value of the land as at November 2016 and ordered the Government to pay to the respondents the assessed value of the land, together with interest from the date of the judgment.

Following a hearing conducted by the court in March 2018, the court made an order on 14th November 2018 awarding the respondents \$150,000.00 for the failure of the Government to notify them of the acquisition of their land, \$75,000.00 for the delay in payment of compensation to them, and \$175,000.00 as vindictory damages. The Government appealed against the awards made by the court on the ground that the judge erred in law in that she awarded damages to the respondents that were based upon an incorrect application of the relevant legal principles, resulting in awards which were excessively high.

Held: allowing the appeal to the extent that the award of damages of \$150,000.00 for the failure of the Government to notify the respondents of the acquisition of their land is set aside; the award of damages of \$75,000.00 for the delay in payment of compensation by the Government to the respondents is set aside; the award of \$175,000.00 as vindictory damages is set aside and replaced by an award of EC\$45,000.00; and awarding prescribed costs to be paid by the respondents to the Government in the amount of \$44,250.00 for the proceedings in the High Court and \$29,500.00 for the proceedings in the Court of Appeal; that:

1. Section 8(1) of the Constitution guarantees the right to protection from compulsory acquisition by the Government of a person's property, other than for a public purpose. There is no provision in the Constitution, however, which requires the Government to notify a landowner of the intention to acquire his property for a public purpose or of the fact of it having been acquired. The

requirement for notification of the landowner by the Government resides not in the Constitution, but in the Land Acquisition Act, by virtue of which the Government is required to notify the respondents of the acquisition of their land. Even so, the failure of the Government to do so does not constitute a breach of the Constitution for which damages would be awarded. There was also no evidence of loss to the respondents over and above the compensation to be paid to them for the acquisition of their land, and so there was no basis for the award of damages made by the learned judge for the Government's failure to notify the respondents of the acquisition.

Section 8(1) of the **Constitution of Saint Christopher and Nevis**, Cap. 1.01, Revised Laws of Saint Christopher and Nevis 2009 applied; Sections 4 and 7(3) of the **Land Acquisition Act**, Cap. 10.08, Revised Laws of Saint Christopher and Nevis 2002 applied.

2. A delay in the payment of an amount due to a person is compensated by a payment of interest to him on the amount due from the date when it was due to him to the date of judgment. Unless the party to whom money was owed suffered some special damage, or damages over and above that which is naturally occasioned by a delay in payment by one party of money due to another, then an award of interest is sufficient to redress the delay in payment. In this case, there was no evidence of compensable loss occasioned to the respondents by the fact that, but for a small prepayment made by the Government, the amount payable to the respondents had not been paid by the date of the judgment in the court below. The delay in payment between acquisition of the property in 2007 and assessment of its market value as of November 2016, was remedied by the application of a November 2016 value for the property, and not a November 2007 value, whilst the delay in payment from November 2016 to the date of judgment was remedied by the award of interest at 5% per annum from November 2016 until the judgement date of 18th March 2018. Consequently, the respondents were entitled to no more than interest on the compensation payable to them and no award of damages for the delay ought to have been made.

Bloomquist v The Attorney General of the Commonwealth of Dominica (1987) 35 WIR 162 applied; **The Attorney General of Antigua and Barbuda v The Estate of Cyril Thomas Bufton et al** [2006] ECSCJ No. 12 (delivered 6th February 2006) followed; **Alphonso and others v Deodat Ramnath** (1997) 56 WIR 183 followed; **Andrey Adamovsky et al v Andriy Malitskiy et al** [2017] ECSCJ No. 12 (delivered 3rd February 2017) followed; **Steadroy Matthews v Garna O'Neal** [2018] ECSCJ No. 5 (delivered 16th January 2018) followed.

3. An award of vindictory damages is intended to mark the wrong to the affected party rather than to compensate for the consequences of the wrong. The award is usually made in public law cases where there is a breach of a party's constitutional right. Despite the Government's failure to notify the respondents of the acquisition of their land, there was no breach of their constitutional right to protection from compulsory acquisition of their land. However, in the court below

the Government consented to an order that the respondents' right to protection from the deprivation of their property had been infringed and that damages for this breach should be assessed by the High Court. Consequently, the making of the award of vindictory damages was upheld, and the trial judge's exercise of discretion to make the award was not disturbed.

Dufour and others v Helenair Corporation Limited and others (1996) 52 WIR 188 followed; **The Attorney General of Antigua and Barbuda v The Estate of Cyril Thomas Bufton et al** [2006] ECSCJ No. 12 (delivered 6th February 2006) distinguished.

4. As to the quantum of vindictory damages, the general rule is that similar damage must receive a similar award of damages. However, consistency in awards of damages should not necessarily result in an identical amount as that previously ordered by the same court, but rather in an equivalent amount. The determination of an equivalent amount, however, is not to be made arbitrarily by the judge. A better approach would be for the court to take judicial notice of the fact that the Eastern Caribbean Central Bank is the authority on the value of the Eastern Caribbean dollar and to source from that body the upgraded value in EC dollars of an earlier award in the same currency. Having regard to all of the circumstances in this case, and the parties' consent to an award of damages to be made to the respondents, an award of damages in the sum of \$45,000.00 (located midway between the 2018 upgraded award of \$15,000.00 in the **Bufton** case and the 2019 award of \$75,000.00 in the **Econo Parts** case) was determined to be an appropriate award to be made to the respondents by way of vindictory damages.

The Attorney General of Antigua and Barbuda v The Estate of Cyril Thomas Bufton et al [2006] ECSCJ No. 12 (delivered 6th February 2006) distinguished; **Econo Parts Ltd v Comptroller of Customs and Excise; Mr. Parts Ltd v Comptroller of Customs and Excise** (2019) 96 WIR 321 distinguished.

JUDGMENT

- [1] **MICHEL JA:** This is an appeal against a judgment of a High Court judge in which the learned judge awarded damages to the respondents, which awards were challenged on appeal, both as to the justification for and the quantum of the awards.

Background

- [2] The respondents, Carmel Bernadette Agnes McGill and Laszlo Stephen Siegmund, were the owners of 3.79 acres of land located at Southeast Peninsula, Ballast Bay,

Salt Pond Estate, St. George, St. Kitts. The land was compulsorily acquired by the Government of the Federation of Saint Christopher and Nevis (hereafter “the Government”). The acquisition of the land was effected by Declaration No. 42 of 2007 made by the Government under the **Land Acquisition Act**,¹ (hereafter “the Act”) on 8th November 2007. The respondents were not notified by the Government of its intention to acquire the land or even of its actual acquisition of the land. The respondents only became aware of the acquisition of the land on 14th February 2008, when the first respondent was informed of this and provided with a copy of the Declaration of Acquisition by Dr. Goldgar, who was the majority shareholder of the company from which the respondents had purchased the land.

[3] After being notified of the acquisition of their land, the respondents initiated and maintained a steady stream of correspondence with different agencies and officers of the Government. This included letters to and from the Attorney General, the Minister of Tourism and the Comptroller of Inland Revenue, written by the respondents or by lawyers acting on their behalf, seeking either the return of their land on the basis that it was unintentionally or unlawfully acquired, or compensation for its acquisition. After almost 5 years of unproductive exchanges between the respondents and their lawyers on the one hand, and agencies and officials of the Government on the other hand, on 1st February 2013, the respondents filed a claim against the Attorney General, as the representative of the Government, seeking multiple reliefs, including declarations, damages and costs. On 12th April 2013, the Attorney General filed a defence to the claim, joining issue with a number of the averments made by the respondents and denying that the respondents were entitled to the reliefs claimed.

[4] On 30th June 2016, the parties entered into a consent order which was made an order of the court on 1st July 2016. By that order, the court made a declaration that the respondents’ right to protection from the deprivation of their property guaranteed

¹ Cap.10.08, Revised Laws of Saint Christopher and Nevis 2002.

to them by section 8 of the **Constitution of Saint Christopher and Nevis**² (hereafter “the Constitution”) had been infringed by the compulsory acquisition of their land by the Government, without any prior notice to them, without giving them an opportunity to be heard prior to the acquisition, and without prompt payment of compensation to them. The court also ordered that damages for breach of their aforesaid right would be assessed by the High Court. Additionally, the Government was ordered to promptly pay the market value of the land to the respondents, which market value was to be assessed by the High Court. In assessing the market value of the land, it was ordered that the High Court would determine the date on which the market value was to be assessed.

[5] By consent of the parties, on 18th March 2018, the court assessed the market value of the land at US\$1,086,250.00 (as at November 2016) and ordered that the Government pay to the respondents the amount of US\$1,024,375.00 on or before 28th March 2018, with interest at 5% per annum on the market value of US\$1,086,250.00 from November 2016 until the date of judgment. The difference between the assessed market value of US\$1,086,250.00 and the amount of US\$1,024,375.00 which the Government was ordered to pay is an amount of US\$61,875.00 which was credited to the Government as a part payment of the assessed value of the acquired land.

[6] This then left for the court’s determination, the quantum of damages to be paid to the respondents for breach of their right ‘infringed by the compulsorily acquisition [of their property] without any prior notice to them, without giving them an opportunity to be heard prior to the acquisition, and without prompt payment of compensation’.³

[7] After a hearing conducted on 1st, 19th and 26th March 2018, on 14th November 2018, the judge made an award of damages in the sum of \$150,000.00 for the failure of the Government to notify the respondents of the acquisition of their land and

² Cap. 1.01, Revised Laws of Saint Christopher and Nevis 2009.

³ Consent Order approved on 1st July 2016.

\$75,000.00 for the delayed payment of compensation. The judge did not make any award for the respondents not having been given an opportunity to be heard prior to the acquisition of their land, but she made an award of \$175,000.00 for vindictory damages. In making the award of vindictory damages, the learned judge stated that ‘both parties agree that the claimants are entitled to vindictory damages pursuant to the jurisdiction identified in **Attorney General of Trinidad and Tobago v Ramanoop**⁴, a decision of the Privy Council on appeal from the Court of Appeal of Trinidad and Tobago.

The Appeal

- [8] By notice of appeal filed on 27th December 2018, the Attorney General appealed against the orders made by the learned judge on 14th November 2018 on the ground that ‘[t]he Learned Trial Judge erred in law in that she awarded damages to the Respondents that were based upon incorrect application of relevant legal principles and which were excessively high’.

Failure to notify the respondents of the acquisition of their property

- [9] The Attorney General, as the appellant in the appeal, challenged the judge’s award of \$150,000.00 to the respondents for the failure by the Government to notify the respondents of the acquisition of their land. On this issue, the appellant contends that the learned judge neither gave reasons for making this award of \$150,000.00 to the respondents, nor pointed out any evidence of loss suffered by the respondents as a result of this failure. The appellant submits that by virtue of the respondents opting to enter into a consent order which was premised upon the acquisition of their land and the acceptance by them of compensation for the acquisition of the land, no additional loss can be attributable to the acquisition.
- [10] The appellant relies on the authorities of **Attorney General v M. M. Brokers Ltd**⁵ and **Mountain Housing Development Limited v The Attorney General of**

⁴ [2005] 2 WLR 1324.

⁵ (1996) 50 WIR 462.

Trinidad and Tobago⁶ in support of the submission that, in a case such as the present one, where the return of the property is not in issue, the proper measure of compensation is the value of the property. They submit that there is no other loss or injury suffered for which such an award could be justified.

- [11] The respondents submit, in response, that the appellant has provided no proper basis for setting aside the judge's order. Citing cases such as **Gairy v The Attorney General of Grenada**,⁷ **Noreen De Gale v The Attorney General**,⁸ **The Attorney General of Belize and others v Samuel Bruce**⁹ and **Gemma Bain-Thomas v The Attorney General of Grenada**,¹⁰ the respondents argue that the compulsory acquisition of property without so much as even the requisite notice, renders the acquisition void. They contend that any compulsory acquisition of property by the Government is prohibited by the Constitution unless it is done in accordance with the authorising law, and any such unconstitutional acquisition is null and void and of no consequence.
- [12] The respondents aver that if the judge's order of damages was to be set aside, then, it is incumbent on this Court to declare the acquisition null and void and revert the land to the respondents. This, they contend, would be the appropriate order in the circumstances.
- [13] There is no provision in the Constitution which requires the Government to notify a landowner of the intention to acquire his property for a public purpose or of the fact of it having been acquired. There are, however, provisions in the Act which speak to the issue of notification.

⁶ Trinidad and Tobago HCA No. 1070 of 1988 (delivered 31st December 1990).

⁷ [2001] UKPC 30.

⁸ GDAHCV2012/0373 (delivered 12th December 2013, unreported).

⁹ Civil appeal No. 32 of 2010, Belize Court of Appeal (delivered 30th March 2012, unreported).

¹⁰ [2017] ECSCJ No. 213 (delivered 22nd September 2017).

- [14] Section 4 of the Act makes provision for the Government to publish a notification in the official Gazette and to exhibit notices in suitable places in the locality in which the land is situated if it intends to acquire land for any public purpose and it is necessary to make a preliminary survey or other investigation of the land intended to be acquired. The section also provides that once these notices are published and exhibited, the Government's authorised officer may undertake several actions (stipulated in sections 4 to 6 of the Act) on or in relation to the land to be acquired.
- [15] Section 7 of the Act makes provision for the authorised officer to issue a notice of acquisition, as soon as may be after the land has been acquired, and to cause a copy of the notice to be served on every person who is known or believed to be entitled to compensation in respect of the acquisition.
- [16] By virtue of these provisions of the Act, the Government is required to publish a notification in the official Gazette and to exhibit notices in suitable places in the locality in which the land is situated if, among other reasons, it is necessary to make a preliminary survey or other investigation of the land which it intends to acquire. Presumably, if it is not necessary for the Government to make a preliminary survey or other investigation of the land which it intends to acquire, for instance, because it intends to acquire all the land in a particular locality for a public purpose, like the establishment of a five-star hotel resort, then no notification needs be published or no notices need be exhibited. Once the land has been acquired, though, the Government, through its authorised officer, must issue a notice of acquisition and cause a copy of the notice to be served on every person who is known or believed to be entitled to compensation in respect of the acquisition of the land. The requirement for notification of the landowner by Government of its intention to acquire his land, or of the fact of its compulsory acquisition, resides therefore not in the Constitution, but in the Act.
- [17] With respect to the compulsory acquisition of land by Government, the right which is constitutionally guaranteed is the right to protection from compulsory acquisition

of a person's property other than for a public purpose and with prompt payment of full compensation. This right is guaranteed by section 8(1) of the Constitution, which states:

"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 by or under the provisions of a law that prescribes the principles on which and the manner in which compensation therefor is to be determined and given."

- [18] In the present case, no issue has been taken about the public purpose for which the land was acquired, that being for the development of a five-star hotel resort, and the issue of the promptitude of payment of compensation will be addressed under a different head.
- [19] This then raises the question of why an award of damages was made to the respondents for an alleged breach of the Constitution by the failure of the Government to give prior notification to the respondents that their land would be compulsorily acquired or to give subsequent notification to them that their land had been compulsorily acquired, when in fact there are no such constitutionally protected rights.
- [20] In her judgment, the learned judge did not address 'the why' of the compensation question, but only 'the how much'. She stated (at paragraph 48 of her judgment) that neither side has suggested a monetary award for the Government's failure to notify the respondents of the acquisition of their land. She stated also that the respondents' case is that the failure to notify them of the acquisition of their land should be redressed by a declaration that the acquisition is void. The judge, however, declined to make such a declaration and her decision not to do so has not been appealed. The appellant did not, in fact, propose any amount for an award of damages to the respondents for the failure to notify them of the acquisition of their land but only challenged the making of such an award.

[21] The judge arrived at her award by deciding that she should not make an order declaring the acquisition of the land to be void and of no effect and that she proposed instead to make a monetary award of \$150,000.00, with absolutely no indication as to why a monetary award should be made and, if so, then in what amount. It may be useful to quote verbatim the words used by the learned judge. At paragraph 51 of her judgment, the judge stated:

“In the circumstances, I have to refuse to declare the acquisition of the land to be void and of no effect. Instead, I propose to make a monetary award of EC\$150,000.00 for failure to give relevant notice.”

That was the full extent of the learned judge’s treatment with the issue of whether and, if yes, in what amount an award of damages should be made for the failure by the Government to notify the respondents of the acquisition of their land.

[22] In submissions in support of the appeal, the appellant argues that the judge gave no reason for awarding \$150,000.00 to the respondents for failure by the Government to give notice of the acquisition to them, and she did not point to any evidence of loss suffered by the respondents by reason of such failure. Accordingly, the appellant argues, there was no basis for any award of damages to the respondents for the failure to give notice to them and the judge was wrong in law to make the award.

[23] In their skeleton argument, the respondents did not point this Court to any basis for the making of a monetary award for failure to give notice to them of the acquisition of their land nor any basis for the amount awarded. The respondents’ only argument is that the appellant breached their right to protection from the deprivation of their property and instead of declaring the acquisition void, the judge made an award of \$150,000.00 to the respondents and that this award should be maintained.

[24] It is clear from section 7(3) of the Act that the onus is on the Government to ensure that the notice was served as required, and it has been conceded by the appellant that the Government did not give notice to the respondents of its acquisition of their land. There is no dispute on this. The lack of notification to a landowner of the intention to acquire his property, or of the fact of its acquisition, can and has resulted

in several cases in the invalidation of a compulsory acquisition of land by Government. The judge, in this case, declined to invalidate the acquisition. The parties had, by a consent order entered into by them on 30th June 2016, agreed that the High Court would assess the market value of the respondents' land and that the appellant would promptly pay the assessed market value to the respondents. By a subsequent consent order entered into on 18th March 2018, the parties agreed to the market value of the land and the amount to be paid to the respondents, together with interest from an agreed date. By the time the learned judge made her order on 14th November 2018, there was no longer any issue of invalidating the acquisition and returning the land to the respondents. Barring any evidence of loss to the respondents over and above the compensation to be paid to them for the acquisition of their land, there does not appear to be any basis on which the court ought to have made an award of damages to the respondents for the failure by the Government to notify them of the acquisition of their land. The award of \$150,000.00 made to the respondents 'for the failure to notify [them] of the acquisition of their land' is accordingly set aside.

- [25] Before addressing the next issue, I feel obliged to say that the failure by the Government to give notice to a landowner of the intention to acquire, or of the fact of having acquired, his property, even for a public purpose, however laudable that purpose might be, is quite unsatisfactory. There is a certain sanctity attached to a person's property that should endow it with a degree of inviolability which ought to temper the approach by Government to its compulsory acquisition. Government should not lightly therefore compulsorily acquire a person's property, effectively for the enjoyment of others, without even a notification to the person either of the intention to acquire his property or of the fact of its acquisition. A landowner should not find out in conversation with someone that he is no longer the owner of land for which he might have had his own plans, but that he is entitled instead to its value in monetary terms to be assessed by a disinterested party.

[26] This sentiment does not, however, convert into an award of damages, which is intended to compensate for loss suffered by the person affected. There being no compensable loss occasioned to the respondents by the failure to notify them of the intention to acquire their land, which is required neither by the Constitution nor by the applicable legislation, or loss occasioned to them by the failure to notify them that their land had been acquired, which is a requirement of the Act, but not of the Constitution, the respondents are not entitled to any separate award of damages as a result of this unfortunate omission by the relevant Government agency.

Delay in payment of compensation

[27] The appellant challenged the award of \$75,000.00 made to the respondents for the delay in payment of compensation. This I take to mean that the appellant had delayed in the payment of compensation to the respondents for the acquisition of their land, for which delay an award of \$75,000.00 was made to the respondents. In making the award, the learned judge referred to section 8(2)(b) of the Constitution as providing for prompt payment of compensation for the compulsory acquisition of a person's property. The judge then referred to the case of **The Attorney General of Antigua and Barbuda v The Estate of Cyril Thomas Bufton et al**,¹¹ where this Court considered whether an award of \$250,000.00 made by the trial judge for compensation for breach of the respondents' constitutional rights was justified.

[28] The appellant submits that the Government cannot be accused of failing to make prompt payment until it knows what amount it is required to pay, being the assessed value of the property. It is at this point, the appellant contends, that time begins to run. The appellant relied on the pronouncements of Mohammed J in the case of **De Gale v Attorney General** to buttress this position. At paragraph 26 of her judgment, Mohammed J stated:

“In my judgment, in seeking to find a delicate balance between the individual's rights and the Respondent's duty to act in the public's interest, the framers of the Constitution allowed the Respondent to acquire an individual's property for use in the public interest but at the same time

¹¹ [2006] ECSCJ No. 12 (delivered 6th February 2006).

included this provision to protect the individual's rights to ensure full compensation. The 'prompt payment' must be taken in the context of when the full compensation which is to be paid has been assessed. Therefore, if full compensation has been determined (either by the Court, agreement between the parties or otherwise) it is only then that sum must be paid immediately.”

[29] The appellant contends that, in the present case, on 18th March 2018, the parties agreed on the value of the property as at November 2016 and in so doing, compromised their respective legal positions as to the date on which the value was to be assessed and whether the property was to be valued taking into account a restrictive covenant. The appellant argues that there was no complaint of delay in payment and in fact, the Government had already made payments towards the agreed value. The appellant maintains that in the circumstances of this case, the respondents incurred no loss due to late payment. Having acknowledged that the property was acquired in 2007, the appellant submits that on the assumption that the respondents were out of pocket since then – then in accordance with this Court’s ruling in **Buften** - the respondents would have been entitled to interest on either the sum of US\$425,000.00 or US\$910,000.00,¹² those being the alternate values of the property in 2007. However, they contend that if the property was to be valued as at November 2016, the respondents could only claim to be out of pocket from November 2016 and would only be entitled to interest on either US\$875,000.00 or US\$1,575,000.00¹³ as from that date.

[30] The appellant submits that in this case, the parties agreed to the payment of US\$1,086,250.00, plus interest at 5% per annum from November 2016. In so doing, the respondents got the benefit of an increase in the value of their property by reference to its value at a later date. Accordingly, it could not be said that the respondents were out of pocket at any date earlier than November 2016 and it could not be said that the respondents had suffered any loss as a result of late payment,

¹² Depending on whether or not there is a valid restrictive covenant affecting the land.

¹³ Depending on whether or not there is a valid restrictive covenant affecting the land.

having been awarded interest on the assessed value of the land from the date of the assessment¹⁴ to the date of the judgment.

- [31] The appellant posits that to the extent that the judge awarded \$75,000.00 as damages for loss suffered for delayed payment and purported to be following Barrow JA in **Buften** in doing so, she erred in failing to appreciate that the award of \$10,000.00 in **Buften** was for vindictory damages. The appellant also complains that the judge gave no reasoned basis for concluding that the value of \$10,000.00 in 2006 was \$75,000.00 in 2018, and that she clearly erred in so concluding.
- [32] The respondents, in response, contend that the judge made no error in law in the exercise of her discretion in awarding them \$75,000.00 for the delay in payment of compensation. They say that this is fitting when one considers the delay of 10 years, the unlawful acquisition which was completed in 2007 and the 'nearly decade long campaign to exhaust the respondents' financial resources and mental health in order to bully them into accepting an unreasonably low settlement (from 2010 to 2018)'. They therefore urge this Court to uphold the judge's decision in this regard.
- [33] In the judgment of the Privy Council in **Bloomquist v The Attorney General of the Commonwealth of Dominica**,¹⁵ Lord Mackay of Clashfern held that where there was a delay in payment of compensation for the compulsory acquisition of a parcel of land, the landowner's only remedy for such delay is an order for interest payable at the rate outlined in the Land Acquisition Ordinance of the Commonwealth of Dominica on the assessed compensation from the date of acquisition to the date of payment.

¹⁴ What is significant is not the date on which the value of the land was assessed, but the value of the land at the date of the assessment, which is US \$875,000.00 or US \$1,575,000.00 as at November 2016. The parties agreed to treat the sum of US \$1,086,250.00 as the compensation due to the respondents (as of November 2016) for the compulsory acquisition of their land.

¹⁵ (1987) 35 WIR 162.

[34] Similarly, in **Buften**, this Court made it abundantly clear that delay in the payment of compensation is remedied by the award of interest on the amount payable from the date when payment should have been made to the date of judgment. In paragraph 40 of the judgment, Barrow JA stated:

“Would not an award of interest have been adequate compensation for the delay in payment? Beyond the aspects of injury that the Buftons suffered in consequence of the compulsory acquisition, such as disturbance, loss of animals, loss of personal items and loss of their way of life, and for which compensation has been awarded or not awarded, the only injury that the Buftons suffered was simply that they were kept out of their money. There was no suggestion that there was any consequential loss that they suffered because of the delay. The established remedy for being kept out of money is an award of interest. In the instant case the judge awarded interest on the compensation for the value of the land at the rate of 4% per annum from 17th December 1997 (the date the Buftons were removed from the island) and there has been no challenge to that award or that rate. I do not see that the Buftons are entitled to more.”

[35] Barrow JA further said that:

“However, as the Government did not challenge the entitlement to an award of damages under this head, and specifically because the matter was not argued, I consider that it would be wrong for me to disallow such an award. I confine myself, instead, to the matter of quantum.”

[36] Barrow JA concluded his treatment of this issue by reducing the award of \$250,000.00 made by the High Court to an award of \$10,000.00. In doing so, he said:

“... the award of \$250,000 as constitutional damages is inordinately high. For the limited purpose that such an award should serve in this case, that is to vindicate the Constitution, and guided by the awards made in the **Jorsingh** case, as representing the lower end of the range, and the **Fuller** case, as representing the higher end of the scale, I consider the sum of \$10,000 to be an appropriate award of constitutional damages.”

[37] It is therefore apparent that what the Court was saying in **Buften** is that the remedy for delay in payment of compensation is the award of interest on the amount ordered to be paid by way of compensation for the acquisition of the property. The Court also took the position that if an award of damages is to be made for the constitutional breach over and above the amount payable by way of compensation for the property

acquired and over and above an award of damages for any actual loss suffered, then it would be an award of vindictory damages, which award the Court determined in 2006 should be \$10,000.00.

[38] Like Barrow JA in **Buften**, I take the view that, unless it can be shown that the respondents in this case suffered some special damage or damages over and above that which is naturally occasioned by a delay in payment by one party of money due to the other party, then an award of interest commencing from the date when the amount becomes payable by the first party to the second party is sufficient to redress the delay in payment. In the present case, there was no evidence of any compensable loss occasioned to the respondents by the fact that, but for a relatively small prepayment made to the respondents by the appellant, the amount payable to the respondents had not been paid by the date of the judgment in the court below. In the circumstances, the parties, having agreed to apply a November 2016 value of the property and not a November 2007 value, the delay in payment between acquisition in November 2007 and assessment as of November 2016 is remedied by the application of the November 2016 value of the land, whilst the delay in payment from November 2016 to the date of judgment is remedied by the payment of interest at 5% per annum, as ordered by the learned judge, from November 2016 to the date of judgment in March 2018. Of course, any delay in payment after judgment will be remedied by the statutorily mandated post-judgment interest rate of 5% from the date of judgment to the date of payment of the amount ordered by the judgment.

[39] It is to be noted that the issue of the justification for making and the jurisdiction to make awards of pre-judgment interest on awards of damages had remained in a somewhat unsettled state in this Court for some time, with some judges applying, some distinguishing, and others avoiding the dicta of Singh JA in **Alphonso and Others v Deodat Ramnath**¹⁶ on the award of pre-judgment interest. The issue has, I believe, been settled by subsequent judgments of this Court, including in the cases

¹⁶ (1997) 56 WIR 183.

of **Andrey Adamovsky et al v Andriy Malitskiy et al**¹⁷ and **Steadroy Matthews v Garna O'Neal**¹⁸ where I affirmed the judgment of Singh JA in **Alphonso v Ramnath** and confirmed the justification for making and the jurisdiction to make such awards.

[40] The pronouncement which I made in **Adamovsky v Malitskiy**, and which I repeated in **Matthews v O'Neal**, is apposite to the present case. I said then and reaffirm now:

“It cannot be disputed that a party wrongfully deprived by another of money to which the first party is entitled ought to be compensated for his loss, not just by an award to him of the sum of money to which he was entitled, but so too by an award of the time value of the money from the date of its appropriation to the date on which it is ordered to be paid to him. This latter award is what is referred to as an award of pre-judgment interest.”

From this can be deduced a general principle, applicable in this case, that delay in payment of an amount due to a person is to be compensated by a payment of interest to him on the amount due from the date when it was due to him to the date of judgment.

[41] For the delay in payment to the respondents of the compensation assessed to be due to them for the compulsory acquisition of their land, the respondents are therefore entitled to no more than interest on the compensation payable to them from the assessment date in November 2016 to the judgment date in March 2018 at the statutory interest rate on judgments of 5%, which rate was used by the learned judge with no objection by either side. The award of \$75,000.00 made to the respondents for delay in payment of the compensation to them is accordingly set aside.

Vindictory damages

[42] This leads right on to the last of the awards made by the learned judge which were challenged by the appellant, that is, the award of \$175,000.00 for vindictory damages.

¹⁷ [2017] ECSCJ No. 12 (delivered 3rd February 2017).

¹⁸ [2018] ECSCJ No. 5 (delivered 16th January 2018).

[43] An award of vindictory damages is intended to mark the wrong to the affected party rather than to compensate him for the consequences of the wrong. Such an award would usually be made in public law cases where there is a breach of the claimant's constitutional right. In a case such as the present, where the issue is the compulsory acquisition of private land by Government for a public purpose, an award of vindictory damages may be made in addition to the award of compensation for the value of the land acquired in order to vindicate any constitutional right which has been violated. I have, however, found that there was no violation of the respondents' constitutional rights on the facts of this case, but there was an apparent failure by the Government to comply with the statutory requirement to issue a notice of acquisition of the respondents' land and to cause a copy of the notice to be served on the respondents. As unsatisfactory as this failure is, bordering virtually on being contemptuous, it is still not a constitutional breach and does not therefore demand an award of vindictory damages, especially having regard to the fact that no loss was actually suffered by the respondents as a result of the Government's failure to comply with the relevant statutory provision. Indeed, it should be noted that, never mind the 11 years which elapsed between the compulsory acquisition of the respondents' land by Declaration No. 42 of 2007 dated 8th November 2007, and the judgment under appeal dated 14th November 2018 where the various awards of damages (the subject of this appeal) were made by the learned judge, the period between the actual acquisition of the land on 8th November 2007 and the respondents becoming aware of the acquisition of their land on 14th February 2008 was just over 3 months.

[44] The appellant opposed the making of any award of vindictory damages. Relying on the judgment of the Privy Council in the case of **Alphie Subiah v The Attorney General of Trinidad and Tobago**,¹⁹ the appellant contended that an award of vindictory damages is justified when there is a breach of a constitutional right and the court considers that the award of compensation made by the court does not

¹⁹ [2008] UKPC 47.

provide adequate redress to the claimant and an additional award is required to vindicate the claimant's constitutional right. The appellant submitted that the respondents received an enhanced compensation award of US\$1,086,250.00, plus interest, which was sufficient to compensate them for their loss, and no additional award was necessary.

[45] The appellant further submits that this is not an appropriate case for an award of vindicatory damages, because there was no actual breach of the respondents' constitutional rights, nor was there any reprehensible conduct by the Government which was egregious enough to warrant a monetary award in addition to the agreed declaration. The appellant says too that the respondents were never in occupation of, or had use of, the land and did not suffer the nature of distress, inconvenience and personal and property losses as the claimants did in **Bufon**.

[46] In response to the appellant's submissions on the award of vindicatory damages, the respondents contend that the appellant conceded that they (the respondents) were entitled to vindicatory damages, and they referred this Court to the appellant's submissions for trial dated 20th February 2017 where this concession was made. The respondents describe the Government's conduct in this case as 'high handed, malicious, oppressive, arbitrary and unconstitutional, as well as calculated in order that the Government make a profit to the detriment of the Respondents...'. They contend that they have had to incur transportation, accommodation, and legal expenses from 2008 until present and will continue to do so until this matter is resolved.

[47] The respondents state that, as the award of vindicatory damages was discretionary, this Court should be guided by the dicta of Sir Vincent Floissac in **Dufour and Others v Helenair Corporation Limited and Others**.²⁰ They say that there has been no error in principle on the part of the learned judge in the exercise of her

²⁰ (1996) 52 WIR 188.

discretion to award vindictory damages and that her decision to do so was not in excess of the generous ambit within which reasonable disagreement is possible.

[48] In **Buften**, Barrow JA took the view that although no loss was occasioned to the Buftons from any constitutional breach by Government in the process of the compulsory acquisition of their land, he would nonetheless make an award of vindictory damages to the Buftons based on the fact that there was a violation of their constitutional rights, and based too on the fact that Government did not challenge the Buftons' entitlement to an award of vindictory damages.

[49] In the present case, there was no violation of the respondents' constitutional rights, and although there was a failure by the Government to comply with section 7 of the Act, to the disadvantage of the respondents, this does not attract an award of damages. The appellant, however, had consented in the court below to an order that the respondents' right to deprivation of their property had been infringed and that damages for breach of this right should be assessed by the High Court.²¹ So that, although the appellant was not required, on the applicable facts and law in this case, to have consented to an order declaring that the respondents' constitutional right to protection from the deprivation of their property had been infringed and that damages should be awarded to the respondents for the breach of the said right, the fact is that the appellant did consent to the making of this order and the judge proceeded to make awards of damages against the background of the appellant's consent to the order. I note the position taken by Barrow JA in **Buften** that, in circumstances somewhat analogous to those in the present case, where the Government did not challenge the entitlement to an award of damages, but only challenged the quantum of the award, the only award of damages which ought to be made to the respondents is an award of vindictory damages. I will, in the circumstances, uphold the making of an award of vindictory damages by the learned judge in the court below, and so the exercise by her of the discretion to

²¹ See the consent order dated 30th June 2016 and approved by the court on 1st July 2016.

make the award, which the respondents deployed **Dufour v Helenair** in defence of, is not disturbed.

[50] As to the quantum of the award for vindictory damages, the appellant submits that it is a fundamental principle of fair assessment of damages that similar damage must receive a similar award of damages. Indeed, in delivering judgment in the Buftons' appeal, Barrow JA stated that:

“A basic principle of the law of damages is that similar damage must receive a similar award of damages otherwise awards are likely to be seen as arbitrary and, therefore, unjust: this is the reason why courts strive to be consistent in the awards that they make.”

[51] In written submissions in support of the appeal, the appellant compared the conduct of the Government in **Bufton** to the conduct of the Government in the present case and concluded that in the former, the conduct appears to have been much more egregious and so were the property and personal losses suffered by the victims, yet the appellant was only awarded \$10,000.00 for vindictory damages. The appellant also made reference to the consolidated cases of **Econo Parts Ltd v Comptroller of Customs and Excise and Mr. Parts Ltd v Comptroller of Customs and Excise**²² where this Court held that an award of vindictory damages ought to be made for the violation by a public officer of the constitutional right of the claimant to protection from deprivation of property and made an award of \$75,000.00 in circumstances in which the Court considered that there was a most deplorable abuse of power by the public officer. The appellant, however, contends that, on the facts of the present case, there was no deplorable abuse of power by a public officer and no justification therefore for an award within the range of the \$75,000.00 made by the Court in **Econo Parts**.

[52] In dealing with the issue of quantum in **Bufton**, after reviewing several awards made by courts in the region for breaches of constitutional rights, Barrow JA stated as follows:

²² (2019) 96 WIR 321.

“For the limited purpose that such an award should serve in this case, that is to vindicate the Constitution, and guided by the awards made in the **Jorsingh** case, as representing the lower end of the range, and the **Fuller** case, as representing the higher end of the scale, I consider the sum of \$10,000.00 to be an appropriate award of constitutional damages.”

That was in 2006.

[53] In the quest for consistency in awards of damages by the courts, it must be appreciated that consistency in awards should not necessarily result in an identical amount as that previously ordered by the same court, but rather in an equivalent amount.

[54] What then was the value in 2018 of EC\$10,000.00 in 2006? An answer to this question cannot be found in the arbitrary determination by a judge that ‘... I think \$10,000 when upgraded to today’s dollars, the sum of EC\$75,000.00 would be appropriate’. A better approach might be to take judicial notice of the fact that the Eastern Caribbean Central Bank is the recognized authority on the value of the Eastern Caribbean dollar and to source from that body what is the 2018 value of EC\$10,000.00 in 2006. According to a memorandum from the Eastern Caribbean Central Bank, ‘[a]n approximation of the 2018 value of EC\$10,000 in 2006, worked out to be \$12,361.9’. An award, therefore, of about \$15,000.00 in 2018 might be a fair and appropriate equivalent of an \$10,000.00 award in 2006.

[55] In the penultimate paragraph of the appellant’s written submissions in support of the appeal, it is stated as follows:

“Should the Court be of the opinion that a monetary award is appropriate as an additional award, the Attorney General respectfully submits that such an award ought to be on the lower end of the scale and proposes the figure of EC\$15,000.00.”

This appears to put the appellant exactly in the neighbourhood where a court might find a comparable award in 2018 for the 2006 award made by this Court in **Buften**. But there are two other factors to be considered before settling on a final figure; one is the fact that the property and personal losses suffered by the Buftons to which

the appellant referred in his submissions on appeal, were in fact the subject of separate awards, and the second, arising from the first, is that (unlike **Buften**) there are no other awards being made to the respondents in this case for violation of any rights, whether statutory or constitutional, because all the other awards made by the judge, apart from compensation for the land acquired, are being set aside.

- [56] In the circumstances, so as not to cheapen the vindication of a constitutional right, which in this case is to be treated as having been breached because of the specific agreement by both parties in the consent order made on 30th June 2016 to a declaration of breach and an award of damages, an award of vindicatory damages should be made to the respondents in an amount within the range of the \$15,000.00 equivalency of the 2018 upgraded award by this Court in **Buften**, and the 2019 vindicatory damages award of \$75,000.00 made by this Court in **Econo Parts**. I will accordingly make an award of \$45,000.00 to the respondents, pitched midway between the \$15,000.00 upgraded 2018 award in **Buften** and the 2019 award in **Econo Parts**, by way of vindicatory damages.

Costs

- [57] Having determined that the respondents suffered no loss arising from the failure by the appellant to notify them of the acquisition of their land, and so the award of \$150,000.00 made by the learned judge by way of damages for this failure must be set aside; having determined that the respondents suffered no loss as a result of the delay in payment of compensation to them for the acquisition of their land, other than what is compensated by way of interest on the award of compensation, and so the award of \$75,000.00 made by the learned judge as damages for delay in the payment of compensation to the respondents must be set aside; having determined that the award of \$175,000.00 for vindicatory damages was excessive and should be reduced to \$45,000.00; and having regard to the fact that the appellant opposed the awards for the failure to notify the respondents of the acquisition of their land and for the delay in payment of the compensation to them, and argued that if an award was to be made by way of vindicatory damages it should be in the amount of

\$15,000.00 and not \$175,000.00 as ordered by the judge; it is fair to say that the appellant has, for the most part, prevailed in the appeal and should be awarded costs, here and in the court below.

[58] Any hesitation which might have been felt to the making of a cost order in favour of the Government in a public law matter should be erased by the fact that a cost order was made against the Government in this very matter, which is likely to result in a substantially higher award to the respondents than that which they will be required to pay by virtue of this judgment.

[59] The costs to be paid by the respondents to the appellant shall be on a prescribed costs basis, calculated on the award made by the court of damages of \$400,000.00 for breach of the respondents' constitutional rights. From this amount should be deducted the sum of \$45,000.00, which is being awarded by this Court as vindictory damages. The costs in the court below shall therefore be \$44,250.00, representing the prescribed costs on a judgment for \$355,000.00, and \$29,500.00 in this Court, representing two-thirds of the amount awarded in the court below.

[60] I do not propose to deal at all with the costs awarded by the High Court in other aspects of this long-standing compensation claim, because they are not the subject matter of this appeal, which was filed and proceeded on the single ground that the learned judge erred in law, in that, she awarded damages to the respondents that were based upon an incorrect application of relevant legal principles and which awards were excessively high.

[61] I note the attempt by counsel for the respondents to carry with him into this appeal issues about the mode and manner of assessment of the costs awarded to the respondents in the substantive claim by a consent order made between the parties on 30th June 2016 and made an order of the court on 1st July 2016. But that consent order and its terms, except as they relate to the awards of damages made by the

learned judge, are not before this Court, and this Court will not be drawn into addressing them.

[62] By reason of the foregoing, I make the following orders:

(1) The appeal is allowed to the extent that:

(a) The award made by the learned judge of \$150,000.00 as damages for the failure of the appellant to notify the respondents of the acquisition of their land is set aside.

(b) The award made by the learned judge of \$75,000.00 as damages for the delay in payment of compensation by the appellant to the respondents is set aside.

(c) The award made by the learned judge of \$175,000.00 as vindicatory damages is set aside and replaced by an award of \$45,000.00 to be paid by the appellant to the respondents.

(2) Costs to the appellant, here and in the court below, in the amount of \$44,250.00 for costs in the High Court and \$29,500.00 for costs in the Court of Appeal.

I concur
Gertel Thom
Justice of Appeal

I concur
Gerard St. C. Farara
Justice of Appeal [Ag.]

By the Court

Chief Registrar