IN THE CARIBBEAN COURT OF JUSTICE
APPELLATE JURISDICTION

ON APPEAL FROM THE COURT OF APPEAL OF BELIZE

CCJ Appeal No BZCV2023/005
BZ Civil Appeal No 18 of 2021

BETWEEN

ATTORNEY GENERAL OF BELIZE
MINISTRY OF NATURAL RESOURCES **APPELLANTS**

AND

PRIMROSE GABOUREL **RESPONDENT**

Before: **Mr Justice Saunders, President**
Mr Justice Anderson
Mme Justice Rajnauth-Lee
Mr Justice Barrow
Mr Justice Jamadar

Date of Judgment: **26 June 2024**

Appearances

Ms Samantha Matute, Assistant Solicitor General for the Appellants

Mr Godfrey P Smith SC, Mr Hector D Guerra and Mr Mikhail Arguelles for the Respondent

Land – Acquisition – Compensation – Assessment – Valuation – Market value – Expert evidence – Damages – Appellants compulsorily acquired land belonging to Respondent – Respondent filed constitutional action claiming damages – Award of compensation for land compulsorily acquired and for losses suffered from not being able to use property to develop commercial residences and from lost landfill – Assessment of quantum of damages – Choice between rival valuations – Court of Appeal remitted assessment of compensation for fair market value of land and for compensation to Respondent for inability to develop land to judge below – Whether Board of Assessment ought to have been appointed – Civil Procedure Rules 2005 – Land Acquisition (Public Purposes) Act, CAP 184.

SUMMARY

On 3 February 2007, the Government of Belize compulsorily acquired land of the Respondent. On 13 December 2019, the Respondent filed a Fixed Date Claim Form seeking damages for breach of her right not to be unlawfully deprived of property under the Belize Constitution, interest under the Land Acquisition (Public Purposes) Act, special damages for loss of opportunity for a planned development of the property, for loss of landfill and for legal fees to restore rights over the property since 2006. Arana J ordered that the Respondent was to be paid full and fair compensation for the land, inclusive of interest, expenses and costs and for the losses suffered from not being able to utilise the property to develop commercial residences and from lost landfill. The parties were initially referred to mediation for assessment of the quantum of damages, but this was unsuccessful, and the assessment proceeded before James J in the High Court.

The Respondent only became aware of the compulsory acquisition of the land in 2019. The Respondent had done nothing on the land because of an injunction obtained against her by the Government's Department of the Environment as the owner and occupier of the land. The injunction was not discharged until 2016 and the Respondent then commenced filling the land.

This Court observed that this litigation history makes it appear that the parties were operating at cross purposes. The Ministry of Natural Resources appeared to have regarded itself as legal owner of the land but, it appears, took no part in the litigation. On the contrary, the Department of the Environment was proceeding in court on the premise that the Respondent was owner and occupier, and on the third part, the Respondent was clearly bent on proceeding with the development of land that she 'knew' she owned. This seems to explain why, firstly, a claim for compensation took so long to be made and, secondly, the Minister's failure to appoint a Board of Assessment, because the making of a claim for compensation is what triggers the duty on the Minister to appoint a Board.

The assessment of compensation proceeded before the High Court, and that largely was a matter of considering the rival valuations of the land put forward by the parties. The court also considered, as required by the second limb of the order for payment of compensation,

the valuation of the Respondent's claim of loss arising from the inability to develop the acquired land. James J rejected the Respondent's valuation and accepted the Appellants' which valued the land at BZD1,050,000. He also rejected the development value and, in its place, awarded BZD150,000 as nominal damages, which he considered fair and reasonable in the circumstances. He also awarded BZD300,000 for lost landfill and interest from the date of acquisition to the date of judgment and post-judgment interest and costs to the owner.

The Respondent appealed to the Court of Appeal and the majority decision of the Court of Appeal methodically deconstructed the reasons stated by James J for rejecting the Respondent's land valuation and accepting the Appellants' valuation. The Court of Appeal sent both the land value and the development value back for assessment in the High Court.

The two leading grounds of the Appellants' appeal to this Court are to the effect that the Court of Appeal was wrong to accept the Respondent's valuation because it proceeded on a faulty premise and considered irrelevant material and, further, the Court of Appeal was wrong to remit the valuation. The Appellants also asked this Court to restore the decision of the High Court.

This Court distinguished the present case from its recent judgment in *Belmopan Land Development Corp Ltd v Attorney General of Belize.* In this case, it was necessary to appreciate that there was a presumptive acceptance that there had been lost development value and the quantum and nature of the loss were to be determined on the assessment. Only by the High Court decision on the assessment was it made clear that the acquisition took effect on 3 February 2007. Therefore, what the Respondent may have recovered as compensation for the compulsory acquisition of her land was confined to its value at the date of the acquisition.

Citing *Belmopan,* this Court stated that the courts below overlooked that the development potential of land and its significance to the value of the land, is a standard and inescapable part of any credible land valuation. The Respondent's valuation gave full and detailed consideration to the existence and value of the development potential of the land including

reference to the loss of opportunity to develop the land by the Government of Belize obtaining the injunction against the Respondent. The Appellants' valuation did not include the development value or potential as a factor. James J recognised this and made a separate, nominal award for loss of development value.

This Court observed that the Court of Appeal, although indicating that there was not sufficient evidence before it, did not say what information was lacking. Therefore, if there is to be a remission it will not be for some flaw that the court identified. Instead, any flaw in the Respondent's valuation would have to be as stated in the criticisms by the Government of Belize of that valuation which are that (1) the Respondent's valuer used the residual method of valuation; (2) the Respondent's valuer relied for a comparator on an outlier; and (3) in any case that comparator, parcel 4633, was developed land rather than undeveloped land. Upon examining these criticisms, this Court held that none of them even partially succeeded, and the Respondent's valuation was not to be discounted for any of the reasons offered by the Government of Belize as it provided acceptable evidence of the necessary information.

On the choice between the experts, this Court considered the number of comparable parcels of land and held that despite the speculation by James J to exclude it as a comparator, parcel 4633 was the most appropriate comparator for arriving at the value of the acquired land. This Court found the Respondent's valuation to be credible and the Appellants' valuation to be unreliable. This did not mean its total rejection; this Court reminded itself that it is often not a pure choice between one valuation or the other.

Further, this Court emphasised the seriousness of the duty of an expert. The Appellants' valuer was found to have breached his duty due to his refusal to state in his valuation the annual increase in the value of the acquired land because he was instructed not to include it. He also must have deliberately omitted reference to parcel 4633 as a comparator when he was creating his table of comparables, due to disadvantages to his side. Additionally, the failure to appoint a Board of Assessment to determine the value of the acquired land was regrettable. This Court observed that when the present claim for compensation was referred

to mediation, that was the proverbial golden opportunity for both sides, each professing the desire for the appointment of a Board of Assessment, to have agreed upon that course.

In a concurring opinion, Anderson J highlighted that the establishment of a Board of Assessment in conjunction with the work of the authorised officer is integral to the process of the compulsory acquisition of land. An unpaid landowner whose land has been acquired in circumstances such as the present case is not really entitled to seek 'damages.' That remedy may be appropriate where the constitutional and legislative procedures for the acquisition have not been followed. What the landowner in the position of the Respondent is entitled to is to have the law followed by the establishment of the Assessment Board. 'Damages' is not the same as finding the value of the land. And the process for arriving at damages for breach of a constitutional right is separate and distinct from the process of arriving at the value of land compulsorily acquired. As a rule, therefore, the appropriate remedy for a constitutional action for damages for compulsorily acquired land should be mandamus to the Minister to appoint a Board of Assessment.

For the reasons given above, the appeal was dismissed. The decision of the Court of Appeal to order a remission to the High Court of the assessment of compensation was set aside and the Respondent was awarded compensation in the sum of BZD4,545,325 with interest from 3 February 2007 at the rate of 6 per cent per annum until the date of this judgment and thereafter at the statutory judgment rate of 6 per cent per annum. The sum of BZD300,000 as reimbursement for landfill, which was excluded from the valuation, was also awarded to the Respondent. Prescribed costs in the High Court, costs in the Court of Appeal and standard costs in this Court were awarded to the Respondent. The payment by the Government of Belize to account and the appropriate deduction was ordered to be made from the sums recoverable by the Respondent.

Cases referred to:

Belmopan Land Development Corp Ltd v A-G of Belize [2022] CCJ 1 AJ (BZ), BZ 2022 CCJ 1 (CARILAW); *Blake Estates Ltd v Montserrat* [2005] UKPC 46, (2005) 67 WIR 83 (MS); *Chen v Ng* [2017] UKPC 27, [2017] 5 LRC 462 (VG); *Gabourel v A-G of Belize* (BZ SC, 7 July 2021); *Gabourel v A-G of Belize* (BZ CA, 17 June 2022); *Goold v Commonwealth of Australia* (1993) 114 ALR 135; *Holiday Lands Ltd v A-G of Belize* (BZ

CA, 27 March 2003); *Josephine Gabriel and Co Ltd v Dominica Brewery and Beverages Ltd* DM 2007 CA 5 (CARILAW), (2 July 2007); *Lindo v A-G of Belize* BZ 2011 SC 50 (CARILAW), (18 October 2011); *Little, Re* [1957] 9 DLR (2d) 296; *Melwood Units Pty Ltd v Commissioner of Main Roads* (1979) 1 All ER 161; *Minister of Natural Resources v Castillo* BZ 1981 CA 12 (CARILAW), (5 June 1981); *Minister of Natural Resources v Holiday Lands Ltd* BZ 2004 CA 17 (CARILAW), (15 October 2006); *Mon Tresor and Mon Desert Ltd v Ministry of Housing and Lands* [2008] UKPC 31, [2008] 3 EGLR 13; *Myers v Milton Keynes Development Corp* [1974] 2 All ER 1096; *R v Frost* [1931] Ex C R 176; *San Jose Farmers' Coop Ltd v A-G of Belize* BZ 1991 CA 12 (CARILAW), (25 September 1991); *Spencer v Commonwealth of Australia* (1907) 14 ALR 253.

Legislation referred to:

Belize – Belize Constitution Act, CAP 4, Environmental Protection Act, CAP 328, Land Acquisition (Public Purposes) Act, CAP 184, Supreme Court of Judicature Act, CAP 91, Supreme Court (Civil Procedure) Rules 2005.

JUDGMENT

Reasons for Judgment:

BARROW J:

Introduction

[1] This appeal concerns the compensation to be paid to the Respondent, Ms Primrose Gabourel ('the owner'), for the compulsory acquisition of her land on 3 February 2007 by the Government of Belize ('GOB'). The named Appellants designated by that acronym are the Attorney General of Belize and Minister of Natural Resources.

[2] On 13 December 2019, the owner filed a Fixed Date Claim Form seeking damages variously for the breach of her right under s 17 of the Belize Constitution not to be unlawfully deprived of property, under s 22 of the Land Acquisition (Public Purposes) Act, CAP 184 ('the LAA') for interest and, under no statutory aegis, for special damages for loss of opportunity for a planned development of the property, for loss of landfill and for legal fees to restore rights over the property since 2006. On 28 February 2020, judgment on admission was granted by Arana J and the specific orders made with no statutory reference were:

> 1. That the Claimant is to be paid fair and full compensation for the land being Registration Section: Caribbean Shores/Belize: Parcel 4670 compulsorily acquired by the Defendants, inclusive of interest, expenses and costs.
>
> 2. That the Claimant is paid fair and full compensation for the losses suffered from not being able to utilize the property to develop commercial residences and from lost landfill being rock and clay.

The order also specified that the assessment of the quantum of damages was to be done by the court and the court initially referred the assessment to mediation, but this was unsuccessful, and the assessment ended up before James J in the High Court.

The Land Acquired

[3] The land that was compulsorily acquired on 3 February 2007, parcel 4670 in the Caribbean Shores area, Belize City, contained 1.35 acres. The acquisition was made pursuant to the LAA; the notices required to effect the acquisition were duly published, whereupon, as the High Court found, against which there has been no appeal, the land was vested in the State. The pertinent legislative provisions are, firstly, s 3(4) of the LAA which states that upon the second publication in the *Gazette* of a declaration of the acquisition, the land shall vest absolutely in the State. Secondly, there are ss 11 and 12 of the LAA which state that claims for compensation for the acquisition are to be submitted for determination by a Board of Assessment and that the Minister shall appoint such a board as soon as it becomes necessary.

[4] According to the owner in her affidavit in support of her claim, it was not until the year 2019 that she became aware that her land had been compulsorily acquired. In response to the owner's claim of ignorance, the Commissioner stated the measures as prescribed by law that GOB took to inform her of the acquisition and deposed to sending to the owner (at addresses she did not dispute) by registered post, notification letters, exhibited to his affidavit, of the intention to acquire (dated 4 October 2006) and later of the actual acquisition (dated 15 June 2007).

[5] Interestingly, during the period October 2006 and February 2019, the owner stated she did nothing on the land because a claim was brought against her for proceeding with an undertaking, project, programme[1] or activity without signing an environmental compliance plan. The proceedings were brought by the Department of the Environment ('DOE'), a department of the GOB, against Ms Gabourel as the 'owner' and 'occupier' of the land and an injunction was obtained against her on an application filed in October 2006, in Claim No 531 of 2006. She claimed this prevented her from filling her land and that the injunction was not discharged until sometime after she filed a Defence in that claim in August 2016. After this discharge she commenced filling.

[6] This litigation history makes it appear that the parties were operating at cross purposes, with the Ministry of Natural Resources regarding itself as legal owner of the land but, it appears, taking no part in (and, perhaps unaware of?) the litigation, while, contrarily, the DOE was proceeding in court on the premise that the owner was owner and occupier and, on the third part, was the owner bent on proceeding with the development of land that she 'knew' she owned. This would explain why the owner's claim for compensation took so long to be made. It also explains the Minister's failure to appoint a Board of Assessment, because the making of a claim for compensation is what triggers the duty on the Minister to appoint.[2] And, further, it explains why the owner was claiming in the High Court proceedings that her land

[1] The language comes from the Environmental Protection Act, CAP 328 s 20(1).
[2] Land Acquisition (Public Purposes) Act, CAP 184 ('LAA'), s 11.

had not *lawfully*[3] been compulsorily acquired but also claiming compensation for its wrongful acquisition, as well as damages for preventing her from developing her land.

[7] No Board of Assessment was appointed, although as late as 6 December 2019, the week before the date of the Fixed Date Claim Form, the Attorney-at-law for the owner wrote the Minister demanding the appointment of a Board and as late as February 2020 the Commissioner of Lands was advocating the appointment of a Board and declaring that the Minister would appoint one with alacrity. This Court observes that when the present claim for compensation was referred to mediation that was the proverbial golden opportunity for both sides, each recently professing the desire for the appointment of a Board of Assessment, to have agreed upon that course. They did not agree to do so which leaves the conclusion that the parties had ceased to desire the appointment of a Board, and no one has said why.

A Matter of Valuation

[8] Absent the appointment of a Board, the assessment of compensation proceeded before the High Court, and that largely was a matter of considering the rival valuations put forward by the respective parties regarding the value of the land. The court also considered, as required by the second limb of the Order for payment of compensation, the valuation of the owner's claim of loss arising from the inability to develop the acquired land by erecting commercial residences on it. This latter valuation, of what may be called the development value, was treated in the High Court as of no lesser importance than the land valuation and, indeed, the amount of compensation the owner claimed for it was greater than the amount claimed for the land value. The complete rejection of the claim as advanced by the owner determined the scope of the award made by the High Court and significantly influenced the overall disposition of the appeal by the Court of Appeal. The valuations are now summarised.

[3] Emphasis added.

The Gardiner Land Valuation

[9] The land valuation upon which the owner relied was done by Mr Clinton Gardiner, who deposed to practising valuation for over 43 years and having been the former Commissioner of Lands and Surveys of the GOB. His valuation comprised a valuation report dated 21 February 2019, a revaluation report dated 11 December 2019 and an affidavit sworn 4 March 2021 deposing to the valuation and containing a number of exhibits. This witness arrived at a value as of 21 February 2019 of BZD8,503,500 in his revaluation, which has been much overlooked, he arrived at a value as of 2006 of BZD4,545,325.

The Castillo Land Valuation

[10] The land valuation upon which the GOB relied was done by Mr Herman Castillo, who stated that he was the Chief Valuer in the Lands and Surveys Department of the GOB. His valuation comprised a valuation report dated 28 February 2020 and a valuation report dated 4 March 2021. The witness arrived at a value as of the latter date of BZD1,085,000.

The Lopez Development Valuation

[11] The valuation of the lost development value upon which the owner relied was done by Mr Francisco Lopez, who deposed to his experience in the preparation of business plans for project developments. His valuation was contained in an affidavit sworn on 5 March 2021 and based on a project proposal he prepared in 2006. The witness deposed that the valuation of the lost development value over a 10-year period was BZD12,855,700.

Decision of the High Court

[12] The essence of the decision of the High Court was to reject the land valuation given by Mr Gardiner and accept that given by Mr Castillo of BZD1,050,000. The judge also rejected the loss of development value given by Mr Lopez and in its place awarded BZD150,000 as nominal damages, which he considered fair and

reasonable in the circumstances. Also, in satisfaction of the order for payment of compensation for this loss, the court awarded the sum of BZD300,000 for lost landfill. It also awarded interest from the date of the acquisition to the date of judgment and post judgment interest and costs to the owner.

Decision of the Court of Appeal

[13] The majority decision of the Court of Appeal, authored by Foster JA, methodically deconstructed the reasons stated by the High Court for rejecting Gardiner's land valuation and accepting instead the Castillo valuation and sent both the land value and the development value back for assessment in the High Court. The two leading grounds of the GOB's appeal to this Court are to the effect that the Court of Appeal was wrong to accept the Gardiner valuation because it proceeded on a faulty premise and considered irrelevant material, and wrong to remit the valuation, and the GOB asks for this Court to restore the decision of the High Court. It appears that the claimed faulty premise of the Gardiner valuation was that it took into consideration a comparable parcel that was an outlier in price when there were other comparable properties whose sales prices should have been used.

Land Value

[14] Mr Gardiner's valuation had compared 12 comparable parcels of land in the Caribbean Shores area of Belize City and relied heavily on the price of BZD3,050,000 stated in the registered transfer of land form as the consideration paid in 2008[4] for parcel 4633, which is near the opposite end of the same street and is less than one-third the size of the owner's parcel 4670. All three reasons given by the trial judge for rejecting Gardiner's figure were by way of rejecting the value of parcel 4633, which the judge discounted as an outlier for which 'an inflated price' could have been stated.

[4] There was no issue between the parties to the use of a price paid on the sale of a parcel over a year after the compulsory acquisition as this is considered permissible in the authorities as in *Minister of Natural Resources v Holiday Lands Ltd* BZ 2004 CA 17 (CARILAW), (15 October 2006); *Re Little* [1957] 9 DLR (2d) 296; *Melwood Units Pty Ltd Commissioner of Main Roads* (1979) 1 All ER 161 at 162.

[15] Foster JA made the following analysis, which deserves full reproduction:[5]

> [6] The learned trial judge referred to the valuation of Ms. Gabourel's expert on a 'comparable parcel 4633 as an 'outlier'. He stated that it was 10 times the average price per square yard of others highlighted by the Claimant. He further stated that average price of the property produced by the defendant which was $2,155 per square yard which was more in keeping with the properties in the area. Unfortunately, James, J left it at that.
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> The evidence revealed that … [GOB's] valuers put forward parcels for a comparative analysis which were nowhere near the subject parcel and were not waterfront parcels. There was no evidence, as far as can be gleaned from the judgment or the record that the stated purchase price of the parcel was false, or as commented by the learned trial judge in the court below 'what happened if it was money laundering or something? I don't know'. There was nothing in the trial below to reason that the sale and purchase price of the parcel 4633 was not genuine.
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> Mr. Gardiner in cross examination had given evidence that parcel 4633 was the nearest to the subject parcel, only 30 minutes away. The most reliable property is the nearest to the subject. The judge did not take this into consideration but simply dismissed this crucial piece of uncontroverted evidence, without more, as being an 'outlier'. It is my view, that this evidence of the price of a similar parcel of land, closest to the subject parcel and on the waterfront as well, was and is relevant evidence to assist the valuer in coming to a fair valuation of the subject parcel. The learned trial judge erroneously stated that *"... this price (parcel 4633) could be an outlier and inflated price rather than a true comparable to the subject property".*
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> The evidence in this case was that Block 16 parcel 4633, Registration Section: Caribbean Shores, the nearest comparable parcel had sold in 2008 for $3,050,000.00. The [acquired] land was approximately 3.4 times … [the] size of … parcel [4633], which is why the subject parcel was valued in 2021 at $8,503,529.00. In my respectful view the consideration of parcel 4633 did not amount to the expert proceeding on a faulty premise or that he took into account irrelevant material, or reached a conclusion on a mistaken view of the facts or the law. Indeed, there was no evidence to suggest, even remotely, that the purchase price for parcel 4633 was fraudulent or erroneous, fictitious or unreliable. Because it was purchased in 2008 for sum higher than other properties had been sold in the past is, in my view, not a reason to discard it, unless it fell within one of the categories enunciated by Saunders, PCCJ. in *Belmopan*.[6] The learned trial judge highlighted his possible reasons for not accepting the valuation of parcel

[5] *Gabourel v A-G of Belize* (BZ CA, 17 June 2022) (paragraph breaks have been added).
[6] *Belmopan Land Development Corp Ltd v A-G of Belize* [2022] CCJ 1 AJ (BZ), BZ 2022 CCJ 1 (CARILAW).

> 4633. It was not correct, without more to have discarded the comparable parcel which he seemed to do based on speculation and conjecture as to why the price was higher than others in the area.

[16] It will be helpful at a later stage when this Court comes to do its own consideration on the valuations including, crucially, lost development value, to refer to the further observations of Foster JA, who supported his reasons for accepting the Gardiner valuation of the land value by continuing[7]:

> [7] The evidence of Mr. Gardener [sic], in explaining the high price in his valuation stated at paragraph 22 of his valuation, *"All other things being equal values will be driven up when there is competition for a scarce resource. In the case of the subject parcel this is the only remaining parcel in the neighbourhood. This location is in an area of high value properties coupled with scarcity makes this a very valuable property"*. The leaned [sic] trial judge did not consider this evidence which I consider to be material.
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> [8] In the learned trail [sic] judges' deliberations at paragraph 11.2 he took issue with the comments made by the valuer at paragraphs 17-23 of his valuation and considered that he took irrelevant things into consideration. Mr. Gardiner stated in his valuation report –
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> > "17. Government policy promoted housing in Belize in the nineties. Available government land in and around Belize City was mangrove and wetland. In order to achieve its objective a massive landfill program was undertaken. Landfill material from inland was taken to Belize City. The land folio and other maps of the neighbourhood show what became of the trend. None of the properties who benefitted from the extended foreshore have had any difficulty in developing their property."
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> [9] By the early 2000's seacoast lands on the north side of Belize City were allowed to be reclaimed. This resulted in new waterfront properties being created. This new waterfront displaced the original waterfront. …

Development Value

[17] In relation to compensation for lost development value, the Court of Appeal upheld the High Court decision to reject the evidence of the valuer of the lost development value. This decision had left the High Court, as the court perceived it, with no

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[7] *Gabourel* (n 5).

evidence of valuation of the lost development value in the face of a judgment order awarding compensation for the same. Hence, as it appears, the decision to award BZD150,000 as nominal damages.

[18] The result of the Court of Appeal upholding the decision to reject the evidence of the valuer, Mr Francisco Lopez, meant that they similarly were left with no evidence on the development value, according to their appreciation of the evidence. Rather than upholding the High Court award of substantial 'nominal' damages for lost development value, the Court of Appeal decided to remit this issue along with the issue of the land valuation to the first instance court. The weight the Court of Appeal placed on the need for a proper determination of the compensation due to the owner for lost development value appears from the exposition it gave at [28]. After reminding itself of the focus of Saunders P in *Belmopan* that the court must award a fair financial equivalence to owners for their land and, therefore, fair market value the court decided the determination of an appropriate amount should still be undertaken rather than making only the nominal amount awarded by the trial judge. It was therefore of the view that it would be best to remit both matters to the court below for further evidence to be taken to arrive at a fair market value of the land acquired.

[19] This Court's recent decision in *Belmopan Land Development Corp Ltd v Attorney General of Belize*[8] was much relied on both by the Court of Appeal and counsel and its facts need accurately to be stated and the distinction between that case and the present case needs to be drawn. In that case, the GOB had commenced in the year 2002 the compulsory acquisition of 202 acres of land by publishing in the *Gazette*, in accordance with the LAA, a notice of intention to acquire but failed to publish a second notice even though it took possession. Subsequently the GOB took possession of a further 1192 acres and published no notice in relation to it. The company was content to accept the GOB as the owner of the lands as of 1 January 2014 and transfer title to them and accept payment of the fair market value for both

[8] *Belmopan* (n 6).

parcels. It is fundamental to appreciate that there was never a completion of the prescribed process for the compulsory acquisition, as provided by the LAA. Therefore, the GOB had been unlawfully in occupation of the company's lands. Failing agreement on compensation for the expropriation of its lands, the company brought a constitutional claim for damages and judgment for damages to be assessed was entered in November 2017. The judgments in the CCJ were clear that it was a constitutional claim before the courts but that in place of this '… An action in tort might perfectly suffice,'[9] meaning that the company could have insisted that it remained the owner and brought a claim to recover possession and for damages for trespass.

[20] The majority in *Belmopan* decided to remit the case to the High Court for further evidence to be taken because the valuation report on which the High Court chose to rely was flawed in vital respects. First, that valuation was based on hearsay evidence as to the purpose for which the lands were acquired. Second, the report did not produce a fair market value of the land but, by relying on the residual method of valuation, provided overly generous compensation to the owner by attributing to every square foot of the expropriated land a value consistent with the value of commercial land in the city of Belmopan. This was found to be irrational because it paid no regard for such land as would be lost due to roads, drainage, utilities and the like in bringing the land to the state of readiness to be sold at commercial values. In addition, the bald concept of city expansion, without more, could not justify all the land being valued as commercial property.

Compensation for Lost Development Value

[21] As regards the decision by the Court of Appeal in this case to remit the assessment to obtain evidence to determine fair compensation for lost development value, it is necessary to appreciate the compass of the judgment order starting with the fact that it was made without a trial and there was no determination of the loss or damage, rather than a presumptive acceptance that there had been such loss which,

[9] ibid at [14].

properly, both sides accepted as appropriate. The nature and quantum of that loss were left to be determined on the assessment. Hence, the judgment was to be understood as awarding damages for losses suffered, *if any*, or *as may be proved*.[10] A judgment awarding damages to be assessed does not determine or predetermine the nature or extent of a loss that has been suffered nor does it determine what loss is recoverable. Those are matters to be determined by the judicial process of an assessment of damages.

[22] In this case, the claim in the High Court for loss of development value advanced the hypothetical loss of rental income from two hypothetical tower residences that hypothetically would have been constructed in a hypothetically successful and profitable development project. It helps to remember that the owner, however mistakenly, was maintaining up until judgment in the High Court that the acquisition was a nullity which left her still the owner and maintaining also that, in any event, the acquisition did not occur until the year 2019 when the GOB got itself registered as legal owner. This was a misconception which the trial judge had to correct, hence the claim as generously advanced by the owner for compensation from being kept from developing her land was not as adventurous as it appeared at first sight. As stated, it was only by the High Court decision on the assessment that it was made clear that the acquisition took effect on 3 February 2007. It followed from this reality that what the owner may recover as compensation for the compulsory acquisition of her land was confined to its value at the date of the acquisition, as stated in s 19(a) of the LAA.

[23] The seminal principle was fully addressed in *Belmopan* (at [11], [46] and [110]) that compensation is paid for the fair market value of the land at the date of the acquisition. This is the sum that a willing purchaser would pay to a willing seller on the open market at that date. A cogent example of why the law does not allow an owner to recover as compensation the hypothetical income from a hypothetical development that an owner believes may occur somewhere in the future is provided

[10] Emphasis added.

in this very case. As seen at [5] above the DOE, pursuant to a written law[11], prohibited the owner, (as owner, as they supposed), from undertaking the development of the land. That prohibition would last for 13 years. The market value of the land at the date of the acquisition, which is when the same is to be determined, could hardly have been anywhere in the region fondly imagined by the owner and her development expert many years later, when the GOB had long since acquired it. A review of Mr Gardiner's valuation, exhibit 'D' to the owner's affidavit in support of her fixed date claim, shows that parcel 4670 was mostly submarine land which, as Mr Gardiner deposed, needed landfill six feet deep and cost BZD300,000 to fill to 85 per cent . Any sensible businessperson, considering in 2006 the purchase of the land, would have known that it would be problematic to get a permit from the DOE to destroy a jealously protected mangrove, known to be crucial to coastal protection and as fish spawning habitat, so that a person could create a lot from the seabed, upon which to build, since the very purpose of the environmental protection legislation was to prevent or control this.

Development Value as Part of Land Value

[24] The courts below overlooked that the development potential of land and, therefore, its significance to the value of the land is a standard and inescapable part of any credible land valuation. In *Belmopan*, Saunders P stated at [46] that 'Land should be valued on its existing use value and all the potentialities and advantages which it possesses.' Thus, 'if it was used as agricultural land, but was dead-ripe for the building of houses, the compensation was increased accordingly.''[12] Anderson J similarly observed at [111], citing earlier Commonwealth authority, that a valuation that depended upon future developments could be considered because the value of land to an owner 'though often called prospective, may even be a very present one …'[13]

[11] Environmental Protection Act (n 1).
[12] *Myers v Milton Keynes Development Corp* [1974] 2 All ER 1096 at 1100 (Lord Denning).
[13] *Spencer v Commonwealth of Australia* (1907) 14 ALR 253 at 259.

[25] To his credibility, in several instances Mr Gardiner specifically averted to the development value or potential of this land. Thus, the advertence in his affidavit of value to the Residual (or Development) Method of valuation is used when a property has potential for development or redevelopment. He stated that people who purchase residential properties that they believe could be made more valuable if money were spent on improvements and modernisation use this method. This was a consideration that he repeated in the context of a proprietor's rights and reasonable expectations of their land. He considered other possible uses for the property that included sand mining as well as water sports. Then he devoted the section of his report reproduced at [15] above to what he called the Residual Method by looking at the development history of nearby properties to arrive at the value of the developed property. It is ironical that what the trial judge rejected as irrelevant material was of the utmost relevance to the central issue of lost development value and provided the courts below with the evidence of the potential for development, commonly accepted in both courts as a substantial factor in the valuation of the owner's loss. As will be further addressed below, this is the very evidence that – misconceived to be lacking – caused the trial judge to award nominal damages and, to a considerable degree, led the Court of Appeal to remit the assessment to obtain it.

[26] Mr Gardiner deducted from the developed value the cost of landfill. Then he used the sale price of the comparable parcel 4633, which worked out to a price of BZD1900 per square yard. The owner's property was 3.4 times the size of the comparator and he used a conservative figure of BZD1500 per square yard as the value for parcel 4670 and after deducting the developer's profit and also loan interest for the price of the landfill he arrived at the stated figure of BZD8,503,529 as the value in 2019.

[27] Mr Gardiner, therefore, gave full and detailed consideration to the existence and value of the development potential of the land, including referring to the loss of opportunity to develop the land by the GOB obtaining the injunction against the

owner. Notably, there was no suggestion in his valuation that he factored into his consideration the specific hypothetical development asserted by the owner or any particular development or type of development as opposed to the general potential for development he identified.

[28] In contrast, among its deficiencies, Mr Castillo's valuation egregiously did *not* include the development value or potential as a factor; he made no mention of or even hinted at it.[14] It seems clear that the judge, when he chose to rely on Mr Castillo's valuation, which he subjected to not the slightest review far less analysis, recognised that the Castillo valuation did not compensate the owner for development value. It was because of this lack that the judge made a separate, nominal award for loss of development value.

[29] At a minimum, it is the case that there is no need for the assessment of compensation for the compulsory taking of land to make a separate award of compensation for loss of development value, rather than to make such an award as a part of the award of compensation for the value of the land. The ability of the assessing court to do so is, of course, dependent on whether the experts so provide in the valuation, and it is clearly their duty to do so. Mr Smith SC, who did not appear at first instance, helpfully accepted that this global award was the award to which the owner is entitled and that compensation for development value would be included in an award if this Court were to accept the Gardiner valuation. Hence, in the owner's case, there is no need for any remission to ensure that the owner is fairly compensated for loss of development value. In GOB's case, there should be no remission to obtain evidence of the lost development value, but the award of nominal damages should be upheld. Thus, neither side seeks remission.

Remission of the Land Valuation

[30] In view of the foregoing, the question arises whether there still should be a remission of the land valuation because of the Court of Appeal's finding that the valuations before the court were not adequate. The court stated at [26] that from its

[14] Emphasis added.

assessment of the evidence it did not consider that there was sufficient material before it:

> … to carry out a [proper] valuation of the appropriated land and to assess [the owner's] inability to develop the property. The information given by both experts as to the comparable properties, 5 on one side and 12 on the other [does] not provide the sufficient information to allow [this court] to carry out a fair valuation exercise.

[31] With respect, the conclusion of the Court of Appeal that the evidence before it did not provide the court with sufficient information is difficult to understand because there was no indication from the court of what - or that - any information was lacking. The lack of information surely could not be the lack of comparable properties in view of the court's express reference to there being 17 comparables. In *Holiday Lands Ltd v Attorney General*[15], because of the large size of the parcel involved, there was no sale of a comparable property for reference and the Court of Appeal of Belize was clear that did not stop a valuation being done; here, there were 17 comparables. It is indicative that the criticism by the GOB of the Gardiner valuation was as to the valuation method and the comparator on which it relied, with no suggestion of insufficiency of information.

[32] An examination of the two valuations to decide on the sufficiency of information they provided reprises the appreciation of the close examination the Court of Appeal conducted of Mr Gardiner's valuation of the land value and that they said nothing to lead to the view that this valuation was lacking. Therefore, if there is to be a remission it will not be for some flaw that the court identified. Instead, any flaw in the Gardiner valuation would have to be as stated in the criticisms by the GOB of that valuation which are that (1) he used the residual method of valuation; (2) he relied for a comparator on an outlier; and (3) in any case that comparator, parcel 4633, was developed land rather than undeveloped land. These criticisms are now considered in turn.

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[15] (BZ CA, 27 March 2003).

The Residual Method

[33] The trial judge stated that the most appropriate method in the circumstances is the comparable method and not the residual method as comparable sales were available. It is to be deduced that one of the reasons why he was rejecting Mr Gardiner's valuation was for using the residual method. Certainly, it is the criticism by counsel for the GOB that Mr Gardiner used this method. But it is a faint criticism because, while Mr Gardiner referred to this method several times in his report, it is the fact that his valuation was based heavily on the price paid for a comparable parcel of land, parcel 4633, and for which the trial judge repeatedly criticised and rejected it. It was the case simply that Mr Gardiner relied on one aspect used in the residual method for the limited purpose of arriving at the value to place on the development potential of the land.

[34] The case of *Mon Tresor and Mon Desert Ltd v Ministry of Housing and Lands*[16] clarifies when it is unacceptable to rely on the residual method, which is when there are figures from the sales of other comparable properties that can guide an assessment of the market value.[17] As that case decided, the spot value with the addition of the value of the hope for its future development prospect by which that element increases its value on the market is the value to be awarded. In this case, while Mr Gardiner said he was using the residual method there can be no real doubt that what he was referring to as the residual method was no more than his advertence to the development prospects for the land, referred to in the authorities[18] as the hope value. Foster JA recognised as much at [16], when he observed that although he called it a residual valuation, Mr Gardiner valued the land on the basis of the comparable method 'by stating the price of the highest parcel of land, being the last one available, sold in 2008, 30 minutes away from subject parcel, and similar in location, both parcels being on the waterfront and being similar except as to size.' In sum, Mr Gardiner's reliance on the residual method, to the extent that he did, was to the benefit rather than the detriment of the valuation.

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[16] [2008] UKPC 31, [2008] 3 EGLR 13.
[17] ibid at [7].
[18] ibid. *Blake Estates Ltd v Montserrat* [2005] UKPC 46, (2005) 67 WIR 83 (MS).

Parcel 4633 was an Outlier

[35] The Court of Appeal relied on solid reasoning to overrule the finding of the trial judge that parcel 4633 could not be relied on as a comparator because it was an outlier. Counsel sought to overcome that decision by arguing that it was a matter of witness credibility involved in the judge rejecting Mr Gardiner because he preferred the evidence of Mr Castillo and that, as stated by the Privy Council in *Chen v Ng*[19], an appellate court ought only to interfere with a trial judge's assessment of witness evidence *if it cannot be reasonably justified or explained*.[20] That attempt by counsel does not succeed because this was hardly a case of assessment of the evidence of a witness; it was an unfortunate case of the judge refusing, on the basis of pure speculation, as it appeared, to accept as authentic the unchallenged evidence from the national lands registry of the price stated as the consideration paid for the purchase of the comparable parcel.

[36] What exercised the judge was, in his words at [11], that parcel 4633 was 'an outlier in price to the other properties. The average price per square yard for 4633 was over 10 times the average square yard price of the others highlighted by the Claimant. The average [price per] square yards [sic] of the property [sic] produced by … [GOB] which was BZD155 per square yards [sic] was more in line with the majority of properties in that area.' The judge then proceeded to simply banish parcel 4633 from any consideration, refusing to acknowledge that the price per square yard when it was sold in 2008 was BZD1900 for that parcel and Mr Gardiner valued the acquired land, in 2019, at a lower price per square yard of BZD1500 in that year. The judge completely overlooked that Mr Gardiner, in his revaluation of the land as of 2006, valued the acquired land at a price that equated to BZD695.64 per square yard.

[37] It might have prevented the judicial resort to speculation if the judge had given proper attention to a number of things beginning with the peculiar characteristics

[19] [2017] UKPC 27, [2017] 5 LRC 462 (VG).
[20] ibid at [50] (counsel's emphasis).

of the acquired land, highlighted by the Court of Appeal at [6] including proximity, similarity of geographical features, size and scarcity. It might have assisted if the judge had considered Mr Gardiner's revaluation of the acquired land as having a value in 2006 of BZD4.5 million and, therefore, a price per square yard of BZD695.64. It does not require a close review of the judge's decision to realise that the judge simply gave no consideration to and made no mention whatever of the features of the acquired land or anything about it except the valuation given of it. In short, what the judge did was to dismiss the evidence of Mr Gardiner on a basis 'that cannot be reasonably justified or explained', to borrow the language from *Chen v Ng*. He did so because the Gardiner valuation was based on comparison with a parcel that was sold for 'an outlier price' and he decided, based on not a scintilla of evidence, that this outlier price should be treated as false. It was an untenable decision.

Parcel 4633 was Developed Land

[38] This contention by the GOB went further than the trial judge went, who went only so far as to decide at [11] 4. that 'there was no proper evidence that parcel 4633 was undeveloped at the time or evidence why this property is so much higher than all the other properties around.' That finding was wholly wrong in view of Mr Gardiner's oral testimony that the parcel was undeveloped in 2008, his exhibiting a Google image of parcel 4633 showing undeveloped land, his answer in cross-examination, and the absence of any challenge to him in cross-examination that his image was false or that he was lying.

[39] Counsel relied before this Court on the evidence of Mr Castillo who answered in cross-examination that parcel 4633 was developed land at the time of its purchase. However, the trial judge similarly made no mention of this evidence and therefore it was not the case that the appellate court was bound by a finding of fact that the judge reached a choice between the evidence of opposing witnesses. The Court of Appeal readily accepted Mr Gardiner's evidence on the matter and, as indicated, this course was fully open to them. For counsel to now argue that Mr Castillo's was

the more credible evidence has to be very much a matter of showing from the nature of the evidence that was before the court why Mr Castillo's statement that parcel 4633 was developed was to be believed.

[40] There are serious inherent misgivings about Mr Castillo's valuation report which did not once mention parcel 4633 which was an obvious comparator, located at the other end of Seashore Drive from the acquired land and, as the maps show, was one of the very few other parcels on the seaward side of the street, bordering the sea. When challenged as to why he did not at least refer to this parcel he answered that he did not consider it was one of the best comparables in the area. When asked why he did not include the yearly increase in the value of the land upon doing his second valuation a year after the first, he said that his boss, the Commissioner of Lands (to whom he addressed his valuation report), told him not to include it. As submitted by counsel for the owner, this is flatly contrary to the duty imposed on an expert by r 32.4(3) of the Civil Procedure Rules ('CPR') to include reference to all material facts even if they could detract from his concluded view. Another disturbing feature of Mr Castillo's valuation is that in the face of Mr Gardiner's Google image showing parcel 4633 as undeveloped land, Mr Castillo produced nothing to show that it was developed land in 2008 when it was sold. He did not point to any evidence whatsoever as to the state of parcel 4633 at the time it was sold. In this regard, it is remarkable that Mr Castillo could testify off the cuff from the witness stand in 2020 to the state of the parcel more than 10 years earlier with nothing to indicate why or how he would know or could bring to mind the development state of the land at that date. This is even more so when he could not even state the distance of parcel 4633 from the acquired land.

[41] None of the GOB's criticisms even partially succeeds and Mr Gardiner's evidence is not to be discounted for any of the reasons offered by the GOB – it provided acceptable evidence of the necessary information.

Choice Between Experts

[42] Neither the High Court nor the Court of Appeal offered any review of Mr Castillo's valuation with the trial judge stating only that he agreed 'there are some inconsistencies' with the evidence of that witness but that the evidence had not been rendered unreliable.[21] The Court of Appeal said nothing. Therefore, this Court had assistance only from the submissions of Mr Smith SC who began in this regard by referring to the failure of the judge to take into account the absence from the Castillo valuation of any mention of the 'hope value' or 'development value' of the property, which is a core principle of land valuation, (as discussed above). Counsel submitted that where the valuer does not have regard to basic valuation principles a court's acceptance of such a valuation amounts to an error of law and cannot stand and cited *Belmopan* at [11] and [69].

[43] Counsel continued that the GOB's valuation was faulty because though the valuation stated that it relied on proper comparators yet, under cross-examination, Mr Castillo conceded that (i) one of the five parcels he compared was not along the sea at all and could not be said to be similar to the subject property; (ii) three other parcels he compared were not in the vicinity of the subject property; (iii) he ought to have known or found out the distance of those three parcels from the subject property compared to the distance of parcel 4633 from the subject property; (iv) he never measured how far away from the subject property were the properties he relied upon as comparators; and (v) he could not agree that parcel 4633 was closer in proximity to the subject property than the parcels he relied upon because he was not 'sure about the distance'.

[44] Mr Castillo's valuation was also faulty, counsel submitted, because he stated under cross-examination that land appreciates. Yet, when asked how it was that the value he placed on parcel 4670 was exactly the same in his two valuations that were a year apart he replied: 'the instructions were not to put a present value.' The GOB did not respond to these criticisms.

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[21] *Gabourel v A-G of Belize* (BZ SC, 7 July 2021) at [12].

[45] In *Belmopan* this Court endorsed the approval by the Belize Court of Appeal in *Holiday Lands Ltd v Attorney General*[22] of the approach to multiple, divergent valuations adopted in *R v Frost*[23] and also in *Goold v Commonwealth of Australia.*[24] In the first case, there were five valuations on one side and four on the other and in the second case, there were two valuations on one side and one on the other. In the one case, the judge chose between the evidence of the optimist and the pessimist by being guided by the reasons supporting each witness' views, bearing in mind the soundness of the same and the balance of probabilities. In the other, the judge carried out a detailed exercise to determine which if any of the allegedly comparable properties bore a sufficient relationship to the subject land and gave his reasons for refusing to treat some properties as being properly comparable. The judge considered advantages and disadvantages which the subject land had relative to the high value and the low value properties, he gave percentage discounts and additions and arrived at a market value for the subject property.

[46] The way forward in the present appeal is, as revealed by that review, much simpler as there are only two valuations from which to choose and the range of comparables is limited to a small geographic area within a distinct and discrete city neighbourhood, Buttonwood Bay. While 17 comparables were offered by the two valuers it is clear from the analysis done by the Court of Appeal and by counsel, and guided by the selection offered by the valuers and as is objectively discernible by perusing readily understood maps and images, that the most nearly comparable property was parcel 4633. The features that made this parcel and the acquired land most comparable have already been stated being principally that they were on the same city street, Seashore Drive, and were two of perhaps no more than five parcels on the water's edge, the number of which was extremely unlikely to increase due to coastal and environmental protection imperatives. In an economic and practical sense, these parcels were special. Despite the unfortunate resort to speculation by

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[22] *Holiday Lands Ltd* (n 15).
[23] [1931] Ex C R 176.
[24] (1993) 114 ALR 135.

the trial judge to exclude it as a comparator, it was the inescapable conclusion that parcel 4633 was the most appropriate comparator for arriving at the value of the acquired land.

[47] The valuation by Mr Gardiner has emerged as credible and not marred by any of the factors that affected the valuation in *Belmopan.* The valuation by Mr Castillo has been shown to be unreliable. This does not mean its total rejection; the Court has reminded itself that it is often not a pure choice between one valuation or the other. In this case, Mr Castillo's valuation has served as a helpful reference point, mostly for the table of comparators he provided. This has helped the Court in considering how much of Mr Gardiner's valuation it should accept. Mr Castillo's testimony also had the potential to reduce the value of parcel 4633 as a comparator if the Court had accepted as credible his evidence that that parcel was developed land when it was sold for the price it fetched in 2008. That evidence, of course, was not accepted. In the end, after the close scrutiny to which it was subjected, the credibility of the Gardiner valuation was unshaken and there was no reason to modify it or accept only a percentage of the value it assessed.

The Result

[48] For the reasons given above, the appeal by the GOB must be dismissed. However, the decision of the Court of Appeal to order a remission to the High Court of the assessment of compensation is set aside and there is awarded compensation to the owner in the sum of BZD4,545,325 with interest from 3 February 2007 at the rate of 6 per cent per annum until the date of this judgment and thereafter at the statutory judgment rate of 6 per cent per annum. The sum of BZD300,000 as reimbursement for landfill, which was excluded from the valuation, is also awarded to the owner.[25] Prescribed costs in the High Court, costs in the Court of Appeal and standard costs in this Court are awarded to the owner. We are told that there has been a payment

[25] The GOB is, perhaps, to be commended for not taking the objection that the owner by her own mistake chose to fill land that she had ceased to own since 2007. This may be no more than fair as the GOB has gotten the full benefit of the landfill, whether they desired it or not. In any case, the judgment on admissions (see [2] above) specifically ordered that compensation should be paid for this loss.

by the GOB to account and the appropriate deduction must be made from the sums recoverable by the owner.

Concluding Observations

[49] Before leaving this appeal, the Court is driven to make some observations. Counsel needs to be reminded, and there should be no need for it, that the duty of an expert is to the court and not the party who instructed them, as stated in r 32.3 and 32.4(3) of the CPR. The observations made in the case of *Josephine Gabriel and Co Ltd v Dominica Brewery and Beverages Ltd*[26] demonstrates how seriously the duty must be taken with the Court of Appeal warning that it would have been entirely appropriate, because proportionate to the scale of the violations, for the judge to refuse to receive the evidence of both expert witnesses. In the instant case there were flagrant violations of the rule. The first of Mr Gardiner's valuation reports may escape criticism because it was written for the use of the instructing party and, as it indicated, was not intended to be used in court. The second valuation and the revaluation can make no such claim and must be criticised for failing, as expressly required by rr 32.12 and 32.13(a) and (b) of the CPR, to state that the expert was aware that his duty was to the court and not the party instructing him and had complied with that duty.

[50] The valuation reports by Mr Castillo suffered the same flaws, but these were egregious. Not only did he fail to acknowledge that his duty was to the court, as mentioned, but he stated that he flatly breached that duty by refusing to state in his valuation report the annual increase in the value of the acquired land because he was told not to include it. Even worse, he must have deliberately omitted reference to parcel 4633 as a comparator when he was creating his table of comparables, no doubt from the same motivation of excluding from his report all that was

[26] DM 2007 CA 5 (CARILAW), (2 July 2007).

disadvantageous to ‘his side’, as he must have accepted it to be from his instructions to exclude other matters.

[51] This was wholly unacceptable conduct and, unfortunately it seems there is need to remind the High Court of their duty to enforce this Rule and impose the necessary sanctions to ensure observance. If firm action is needed, then the courts must not shrink from that course. Of course, it is far more desirable that the courts case manage these matters where expert evidence is to be given by reminding counsel of their duty to ensure that clients and witnesses are fully apprised and prepared to comply. Counsel must be told that they should not file experts’ reports that violate the Rules.

[52] A second observation to make is on the failure to appoint a Board of Assessment to determine the value of the acquired land, which is much to be regretted. On the facts of this case, that failure was due to ignorance for which neither side is to blame since the owner, unaware of the fact of the compulsory acquisition, made no claim for compensation and the Minister, in the absence of any claim, had no basis for appointing a board to determine a non-existent claim. However, it would still have been of great benefit to have had a board appointed as late as shortly after 28 February 2020 when judgment had been entered and the assessment was sent to mediation.

[53] Among the considerable benefits of determination of compensation by a Board of Assessment are that it is the Constitutionally ordained method, for which the LAA sets out the applicable principles and procedure, to provide for payment of compensation to a person whose property has been compulsorily acquired. It is, therefore, a process specifically designed to arrive at the valuation of an owner’s loss. It is, very importantly, a determination to be made by experts or specialists as opposed solely to a regular lay person even if they are a judge. Further, the owner is, equally with GOB, given the right to select one of the two persons to be members of the Board along with a judge, who is to be the third member. This gives the owner a direct part in the ‘ownership’ of the deciding body; the owner is participating by

their nominee in the process of deciding compensation. Consistent with these features, the Board of Assessment in making its determination as a specialist tribunal acts with the advantage of experience as persons more familiar with the relevant areas of law and valuation as compared to a regular judicial officer sitting alone.

ANDERSON J:

Introduction

[54] This appeal concerns the compensation payable to the appellant for the expropriation of her property without payment of fair compensation contrary to s 17 of the Constitution of Belize. I am grateful to Barrow J for setting out the factual and procedural background to the case. I concur with his judgment and only wish to support and emphasise the second point of his concluding observations pertaining to the establishment of a Board of Assessment.

Board of Assessment

[55] It is good to commence the examination of the place of a Board of Assessment by recalling the cardinal principle enunciated by the Court of Appeal of Belize in *Holiday Lands Ltd v Attorney General*[27] that, 'The assessment of compensation, as a detailed process, is a matter for valuers and not for lawyers.' The most crucial legislative provisions regarding the role of a Board of Assessment in determining compensation, are those in the LAA where ss 11 and 12(1) read as follows:

> 11.-(1) All questions and claims relating to the payment of compensation under this Act and to the apportionment of such compensation shall, except as is provided in section 18 of this Act, be submitted to a Board of Assessment to be appointed in each case in accordance with section 12 of this Act.
>
> (2) A Board of Assessment shall have full power to assess, award and apportion compensation in such cases, in accordance with this Act.

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[27] *Holiday Lands Ltd* (n 15) at [11].

> 12.-(1) As soon as it becomes necessary to do so the Minister shall cause a Board of Assessment, hereinafter referred to as "a Board" or "the Board", to be appointed.

[56] In this Court's recent decision in *Belmopan Land Development Corp Ltd v Attorney General of Belize,*[28] I sought to place these statutory provisions in the wider constitutional context of the principles governing the compulsory acquisition of land in Belize:

> [96] The Constitution guarantees to every person in Belize protection from deprivation of property. Subject to exceptions, which do not apply in this case, 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 by or under a law which makes certain prescribed provisions. These provisions include the principles for determination of reasonable compensation. Determination and payment of compensation must be within a reasonable time. The Constitution also requires the granting of access to the courts for the purpose of determining whether the acquisition was a public purpose.
>
> [97] The Land Acquisition (Public Purposes) Act … contains these constitutionally mandated provisions. It is worthwhile noting four key provisions of the statutory regime. Section 3 makes provision for compulsory acquisition of land. Part III provides for the Appointment and Powers of a Board of Assessment with s 11 requiring that all questions and claims relating to the payment of compensation be submitted to the Board of Assessment. Section 12 provides for the appointment of the Board. Part V contains detailed rules for the assessment of compensation.
>
> [98] What emerges from these provisions is that the constitutionally ordained regime for the compulsory acquisition of land is embodied in the Act. Expropriation of land in accordance with the Act is constitutional and lawful, and the applicable compensation is assessed by the Board on the statutory bases outlined in the Act. It is this statutory regime that is normally engaged in the cases on compulsory expropriation of land: *Holiday Lands Ltd v Attorney General* … Numerous cases from other Caribbean jurisdictions have also concerned the compensation payable upon lawful expropriation of property: see, eg, *Estate of Dame Bernice Lake v Attorney General of Anguilla*; *Montoute v Attorney General of St Lucia*; *Commissioner of Lands v Rochester*. (footnotes omitted)

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[28] *Belmopan* (n 6) at [96]-[98].

[57] Putting aside determination of small claims made by a Magistrate[29] a Board of Assessment is evidently central to the process of compulsory acquisition of land. The primary obligation of the Board is to determine the compensation payable but the carefully crafted procedure by which this is done is instructive. The LAA makes clear that 'all questions and claims relating to the payment of compensation' are to be submitted to a Board of Assessment appointed by the Minister and that the Board 'shall have full power to assess, award and apportion compensation in such cases, in accordance with this Act'. The Act specifies that the Board shall be constituted by the Chief Justice (or Judge nominated by the Chief Justice), a member appointed by the Minister, and a member nominated by the owner of the land 'to be acquired.' There are provisions for treating with situations where the landowner does not make a nomination.

[58] The 'authorised officer' appointed by the Minister must produce a Report for the Board. That Report shall contain specified items of information relating to the acquisition and must state the opinion of the authorised officer on other specified matters including:

> …
> (c) the value of the land, for the purposes of compensation under this Act;
>
> (d) the amount of provisional compensation which should be paid for the land, including any damage payable in respect of entry into possession…(footnote omitted)

[59] The Act specifies rules which may or may not be taken into consideration in assessing compensation. The Board shall hold a public inquiry and the procedure to be followed at the inquiry is legislated. At the conclusion of the inquiry the Board shall decide upon the claims for compensation and the decision is filed in the Supreme Court and the award may be enforced in the same manner as a judgment or order of the Supreme Court. An appeal shall lie to the Court of Appeal against the determination by the Board of any question of disputed compensation under

[29] Claims not exceeding BZD5,000. See the LAA (n 2), s 18.

this section in like manner as if such determination was given in the exercise of the jurisdiction of the Supreme Court under the Supreme Court of Judicature Act, CAP 91.[30]

[60] It is important to highlight that the establishment of the Board of Assessment in conjunction with the work of the authorised officer is integral to the process of the land 'to be acquired'. It is a part and parcel of that process. The importance of following the constitutional and legislatively structured approach to the determination of compensation for compulsorily acquired land has been emphasised time and again. As far back as 1981, it was stated by the Belize Court of Appeal in *Minister of Natural Resources v Castillo*[31] that:

> As the parties were unable to agree on the amount of compensation to be paid to Mr. Santiago Castillo, a Board of Assessment was appointed with full power to assess, award and apportion the amount of compensation to be paid as provided by sections 11 and 12 of the said Ordinance.[32]

[61] Both sides appealed against the award of the Board and the Court of Appeal went on to consider the principles and rules to be applied to the assessment and award of compensation by the Board.

[62] The case of *San Jose Farmers' Coop Society Ltd v Attorney General*[33] involved a constitutional claim made under s 17 of the Belize Constitution for fair compensation, not unlike the present appeal. Liverpool JA found that:

> Sections 11 to 17 which deal with the appointment and powers of the Board of Assessment contain clear and concise provisions for the prompt appointment of a Board which is to have the power to determine all questions and claims relating to the payment of compensation, the procedure to be followed, the nature of, the inquiry to be undertaken and the manner of arriving at its award. In my view the manner in which compensation is to be determined by Cap. 150 is not in violation of the provisions of the Constitution.

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[30] LAA (n 2) s 24.
[31] BZ 1981 CA 12 (CARILAW), (5 June 1981).
[32] ibid.
[33] BZ 1991 CA 12 (CARILAW), (25 September 1991).

[63] In the *Lindo v Attorney General*[34] case, Awich J noted that the Minister appoints a Board of Assessment under s 12 of the Act when it becomes necessary and that it 'becomes necessary when the authorised officer and the claimant cannot agree on compensation, that is, on a price.' The judge dismissed the Claimant's claim of agreed compensation and further stated that the Minister must appoint a Board of Assessment, and that the question of the correct compensation would be referred to the Board.

[64] I fear that the present matter went off the rails when the constitutional action for fair compensation under s 17 of the Constitution was transmuted into an order dated 28 February 2020, 'That the assessment of quantum of damages is referred to mediation. Should mediation prove unsuccessful the assessment is returned to case management pursuant to Rule 73.14(3) of the CPR.'

[65] Negotiations are mandated by the legislative arrangements. The authorised officer is required to enter negotiations with the landowner with a view to arriving at a mutually agreed sum for compensation. Where this is not successful, the regime contemplates establishment of a Board of Assessment. Too often, the Board is not established, and the dissatisfied landowner is virtually forced to bring a constitutional action for compensation. In fact, in adjudicating the constitutional claim, the court has before it the full plenitude of crafting an appropriate remedy which in this case would surely be mandamus to the Minister to constitute a Board of Assessment. It was exactly to this that Awich J alluded in *Lindo v Attorney General*[35]. It may be recalled that s 20(1) on the enforcement of the constitutional rights protective provisions is drafted in the widest possible terms. It provides that:

> 20.(1) If any person alleges that any of the provisions of sections 3 to 19 inclusive of this Constitution has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained

[34] BZ 2011 SC 50 (CARILAW), (18 October 2011).
[35] ibid.

person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the Supreme Court for redress.
(2) The Supreme Court shall have original jurisdiction –

> (a) to hear and determine any application made by any person in pursuance of subsection (1) of this section; and
>
> (b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) of this section, *and may make such declarations and orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 3 to 19* inclusive of this Constitution. (emphasis added)

[66] For completeness it should be underscored that an unpaid landowner whose land has been acquired in circumstances such as the present case is not really entitled to seek 'damages.' That remedy may be appropriate where the constitutional and legislative procedures for the acquisition have not been followed. What the landowner in the position of the present respondent is entitled to is to have the law followed by the establishment of the Assessment Board. 'Damages' is not the same as finding the value of the land. And the process for arriving at damages for breach of a constitutional right is separate and distinct from the process of arriving at the value of land compulsorily acquired.

Conclusion

[67] Except in the most exceptional of circumstances, examples of which do not come readily to mind, the constitutional and legislative procedures for determination of compensation payable for compulsorily acquired land must be followed. That process is part and parcel of the compulsory acquisition of the land. The courts should not be dragged or induced into determination of compensation based upon assessment of comparators provided by valuators outside the framework so carefully laid down in the LAA; an actuarial or valuation science in which most judges are not experts. That process of judicial determination also excludes the public involvement and transparency intended by way of the mandatory public

inquiry to be held by a Board of Assessment. Where a constitutional action is brought for payment of compensation of compulsorily acquired land the general rule must be that the court should require the appointment of a Board of Assessment as contemplated by the Constitution and the Land Acquisition (Public Purposes) Act.

Disposition

[68] For the reasons given above:

1. The appeal must be dismissed.

2. The decision of the Court of Appeal to order a remission to the High Court of the assessment of compensation is set aside.

3. Compensation is awarded to the owner in the sum of BZD4,545,325 with interest from 3 February 2007 at the rate of 6 per cent per annum until the date of this judgment and thereafter at the statutory judgment rate of 6 per cent per annum. The sum of BZD300,000 as reimbursement for landfill, which was excluded from the valuation, is also awarded to the owner.

4. Prescribed costs in the High Court, costs in the Court of Appeal and standard costs in this Court are awarded to the owner.

5. There has been a payment by the Appellants to account and the appropriate deduction must be made from the sums recoverable by the owner.

/s/ A Saunders

Mr Justice Saunders (President)

/s/ W Anderson

Mr Justice Anderson

/s/ M Rajnauth-Lee

Mme Justice Rajnauth-Lee

/s/ D Barrow

Mr Justice Barrow

/s/ P Jamadar

Mr Justice Jamadar