ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

HCVAP 2010/007

BETWEEN:

HMB HOLDINGS LIMITED

Appellant

and

[1] THE ATTORNEY GENERAL OF ANTIGUA AND BARBUDA
[2] DAVID MATTHIAS

Respondents

Before:

The Hon. Mde. Janice M. Pereira	Justice of Appeal
The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mr. Mario Michel	Justice of Appeal [Ag.]

Appearances:

Mr. John Carrington and Ms. Stacy Richards-Anjo for the Appellants
Hon. Justin L. Simon, QC, Attorney General, for the Respondents

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2011: September 21, 22;
December 5.

Civil appeal – Compulsory acquisition of land – Land Acquisition Act, Cap. 233, Revised Laws of Antigua and Barbuda 1992 – Assessment of value of property acquired by the Government of Antigua and Barbuda – Methods used in valuing property to award compensation – Sales comparison approach – Residual value approach – Most appropriate method for valuing the property – Whether the property was a "greenfield site" – Whether the majority of the Board of Assessment was correct in rejecting the residual value method of assessment – If the sales comparison approach was the proper method to use in the circumstances, whether the majority of the Board failed to weigh properly the evidence of the value of comparable properties and therefore reached incorrect conclusions in relation thereto

The appellant, HMB Holdings Limited ("HMB"), owned property comprising some 108.17 acres of land and including 1,800 feet of beach frontage ("the Property"). HMB operated a 100-room hotel with a 9-hole golf course on the Property, until Hurricane Luis struck in 1995 causing extensive damage to it. The Property was never reinstated.

In July 2007, the Government of Antigua and Barbuda, acting under the Land Acquisition Act[1] ("the Act"), compulsorily acquired and took possession of the Property. However, it was not until June 2008 that a Board of Assessment under the Act ("the Board") was established for the purpose of assessing the amount of compensation to be paid to HMB following the Government's acquisition, in pursuance of HMB's constitutional right to compensation. The Board comprised three members: Justice David C. Harris, as Chairman; Victor J. Michael ("Member Michael"), a successful businessman and substantial property owner; and Joyce A. Kentish ("Member Kentish"), a practising lawyer. Member Michael was nominated by the Government and Member Kentish was nominated by HMB.

In assessing the amount of compensation to be awarded to HMB, the Chairman and Member Michael used the sales comparison approach, while Member Kentish used the residual value approach. The Chairman arrived at a valuation of US$26,616,998.00 and Member Michael, at a valuation of US$21,025,000.00. Member Kentish however, arrived at a valuation of US$60,000,000.00, which was also the valuation arrived at by HMB's expert. Pursuant to section 17(2) of the Act, the Board's award was taken as the mean of the Chairman's award and the one closest to his, which was in this case, that of Member Michael. The award of the Board was therefore US$23,820,999.00 ("the Award"). The Board awarded interest at the rate of 10.25% as from July 2007, that being the agreed date of possession, and costs were awarded to HMB. HMB however, was dissatisfied with the valuation placed on the Property, and appealed.

Held: allowing the appeal and substituting the award of $45,499,102.09 in place of the award of $23,820,999.00 made by the Board, and ordering that the respondents pay to HMB on this appeal two-thirds of the costs as assessed by the master in respect of the proceedings before the Board, that:

1. The criticisms of Member Michael are well founded, as, in the exercise of his discretion, he took into account irrelevant considerations, seemingly relied on his own personal knowledge and acted contrary to the principles of natural justice and the rules of evidence. In so doing, he committed grave errors of principle. As such, reliability cannot be placed on his award given the flawed basis on which it is grounded.

   Raja Vyricherla Narayana Gajapatiraju v The Revenue Divisional Officer, Vizagapatam [1939] A.C. 302 (P.C.) cited.

2. Assessing the Property's potentialities for future subdivision (which would include having regard to a notional or hypothetical subdivision) is quite different from embarking on an assessment on the basis that it had already been subdivided and all approvals obtained, or, in essence, as if its potentialities had already been realized. The Master Plan containing the specificities as provided to the company that prepared HMB's expert valuation report, coupled with their understanding that it was approved, was clearly the key basis for treating the Property as an existing

[1] Cap. 233, Revised Laws of Antigua and Barbuda 1992.

development and utilizing the residual method. The Master Plan not having received planning approvals proceeded on an erroneous basis leading to a flawed result with too many variables.

Blakes Estate Limited v The Government of Montserrat [2005] UKPC 46 distinguished.

3. Notwithstanding the Chairman may have held an erroneous view as regards certain matters, he gave due consideration to the real question of deciding which competing method (on the evidence before him) was best suited for the valuation of the Property. He rejected the residual value method for good reason. Were the Court required to exercise its discretion afresh it would also reject the residual method in the circumstances of this case, given the grave danger it poses by inviting the risk of "compensating a party as if unrealized possibilities were in fact, realized possibilities."

   Maori Trustee v Ministry of Works [1958] 3 All E.R. 336 applied.

4. It is undesirable to seek to compare sales of smaller parcels with the sale of a large tract of land. The Emerald Cove property represented the only true comparable and ought to have been treated as such rather than taking into account the smaller properties contained in the Deloitte report. This could only lead to an unrealistic result and discount of the potentialities of the Property for the kind of development which is envisaged by both sides. In this respect, the Chairman fell into error in his application of the sales comparison approach.

   Blakes Estate Limited v The Government of Montserrat [2005] UKPC 46 cited.

JUDGMENT

[1] **PEREIRA, J.A:** The appellant ("HMB") owned property comprising some 108.17 acres of land including 1,800 feet of beach frontage ("the Property"). This beach has been variously described as the best beach in the world and as one of Antigua's best beaches.[2] HMB operated thereon the Half Moon Bay Hotel comprising 100 rooms as well as a 9-hole golf course until Hurricane Luis struck in 1995, causing extensive damage (beyond repair) to the Property. It was not reinstated. The Government of Antigua and Barbuda[3] compulsorily acquired and took possession of the Property in July 2007, acting under the **Land Acquisition**

[2] See Government of Antigua and Barbuda's press release dated 20th August 2007 – Record of Appeal Bundle II, Section III, Tab 5, pp. 129-131.
[3] Here represented by the Attorney General, the first named respondent, and Mr. David Matthias, Land Authorised Officer, the second named respondent.

Act[4] ("the Act"). However, it was not until June 2008 that a Board of Assessment under the Act ("the Board") was established for the purpose of assessing the amount of compensation to be paid to HMB following Government's acquisition, in pursuance of HMB's constitutional right to compensation. The symbol '$' in this judgment shall denote the currency of the United States.

[2] The Board heard evidence in relation to the assessment in July 2009 and delivered its decision on 5th January 2010. The three members of the Board (Justice David C. Harris, as Chairman; Victor J. Michael ("Member Michael"), a successful businessman and substantial property owner, nominated by Government; and Joyce A. Kentish ("Member Kentish"), a practising lawyer, nominated by HMB) each arrived at different awards in respect of the value of the Property. The Chairman, using the sales comparison approach arrived at a value of $26,616,998.00; Member Michael, seemingly using the same approach, but taking into account wholly different considerations (to which I will revert), arrived at a value of $21,025,000.00; and Member Kentish, using the residual value approach, arrived at a value of $60,000,000.00 (being the valuation arrived at by HMB's expert). Accordingly, pursuant to section 17(2) of the Act, the Board's award was taken as the mean between the award of the Chairman and the award of the Member closest to that of the Chairman. The award of the Board was therefore $23,820,999.00 ("the Award'). The Board also awarded interest at the rate of 10.25% as from July 2007, being the date on which all members of the Board agreed as the date of possession, and costs[5] to HMB. HMB, being dissatisfied with the valuation placed on the Property, has appealed. There is no appeal in respect of the date stated by the Board as being the date of possession for the purposes of assessment, the rate of interest to be applied, or in respect of the costs orders made. Further, there is no counter notice by the respondents.

[4] Cap. 233, Revised Laws of Antigua and Barbuda 1992.
[5] Those costs are being assessed by the master.

HMB's complaints on Appeal

[3] HMB's Notice of Appeal set out five main grounds of appeal which then contain various sub-grounds. However, Mr. Carrington, counsel for HMB, has quite succinctly in his skeleton submissions and at the hearing, set out the main issues arising for this court's determination. They are as follows:

(a) Whether the award by Member Michael is so replete with errors of principle that it should be disregarded in toto (ground (i)).

(b) Whether the majority of the Board was correct in rejecting the residual value method of assessment (ground (ii)).

(c) If the sales comparison approach was the proper method in the circumstances, whether the majority of the Board failed to weigh properly the evidence of the value of comparable properties and thereby reached incorrect conclusions in relation thereto (Grounds (iii)-(v)).

The evidence before the Board

[4] Three expert valuation reports featured significantly before the Board – two on behalf of the Government (those of Property Consulting Services ("PCS") and Deloitte) and the other prepared by CB Richard Ellis ("CBRE") on behalf of HMB. PCS and Deloitte used the sales comparison approach whereas CBRE used the residual value approach. The experts giving evidence before the Board were Mr. Watson from Deloitte and Mr. Kerr from CBRE. No representative from PCS gave evidence before the Board.

[5] PCS valued the Property at $ 23,056,550.00. It used, among their comparable properties in Antigua, a property called Emerald Cove which comprised some 150 acres (including waterfront and beachfront in close proximity to the Property)

which carried an appraised value in 2004 of $46,000,000.00.[6] PCS, at page 7 of its report, went on to say this:

> "Emerald Cove can be considered one of the best comparables given its close proximity to the subject site, and excellent beachfront. On this basis we place a value of $215,000 per acre on the subject site. Subtracting the costs to demolish and remove the damaged structures from the site, estimated at US$200,000, the final value of the subject property is US$23,056,550."

Appended to this report was Government's Press Release dated 20th August 2007, which stated in general terms Government's vision for the development of the Property, as transforming it into "a unique tourism resort" and sought developers/investors with the capability of developing "a first-class resort community, to include at least one 5-star hotel, high-end villa or condominium residences and a first -class golf course".

[6] PCS, stated in essence that in conducting an appraisal of land, two accepted methods are utilized: (1) the residual value approach; and (2) the sales comparison approach. After describing the residual value approach, PCS stated this:[7]

> "PCS has not utilized the residual value approach in determining the value of the subject property due to lack of information about a future development scheme on which to base the calculation."

[7] Deloitte valued the Property at $22,715,000.00. They stated[8] that the Property comprised a former disused beachfront hotel and 9-hole golf course with two parcels of undeveloped land, and opined that with the excellent beach frontage and a gently sloping site providing views across Half Moon Bay, the Property "is suitable for a hotel/resort development and golf course". They made value comparisons but in respect of properties the bulk of which were of considerably smaller sizes. Their properties comparison did not however include Emerald Cove. Deloitte also described the various methods to land valuation. With respect to the sales comparison approach, they said that this approach "is most commonly

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[6] See PCS Valuation Report – Record of Appeal Bundle II, Section III, Tab 3.
[7] At p. 5 of their Valuation Report – Record of Appeal Bundle II, Section III, Tab 3.
[8] At p. 16 of their Valuation Report – Record of Appeal Bundle II, Section III, Tab 4.

used for land and residential property valuations where there is generally plenty of comparable evidence. It can however be used for all other types of property if the evidence is available."

[8] At page 22 of their report under the heading '**Selected Method of Valuation**', Deloitte stated as follows:

> "In arriving at our opinion of the most appropriate method of valuation for the subject property we have had regard to the fact that, although the property contains a dilapidated disused hotel and golf course, we are of the opinion that this is beyond economic repair and that any prospective purchaser would consider the overall property for its redevelopment potential; we do not consider the existing structures as adding any value. In fact the cost of demolishing the existing structures and removing the debris off site would be considered a negative factor when compared with a Greenfield site.[9]
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> "In this regard, we are of the opinion that the comparable method of valuation is the most appropriate method of valuation whereby the sales of similar hotel/resort development sites are analysed and adjustments made in order to reflect differences between the comparables and the subject property."

[9] CBRE valued the Property at $60,000,000.00. This was based on the residual value method. Mr. Kerr, in his witness statement,[10] in reference to the valuations of PCS and Deloitte, had this to say:[11]

> "Both valuations submitted by the Defendants proceed on the basis that the Property is vacant "greenfield" land and ignore the existing developments, such as the existing sub-division community with independently owned single-family homes with ocean views in place as well as the existing approvals for the hotel with 276 rooms, a 9 hole golf course, a health spa facility and supporting amenities, 95 high-end villas and 46 estate lots."

[10] The CBRE report stated:[12]

> "The Development Master Plan consists of a 276-room 5-Star Resort/Hotel; 95 high-end villas; 46 estate lots; 9-hole golf course and supporting amenities."

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[9] The experts explain that a Greenfield site means bare land – in essence, in its virgin state.
[10] See Record of Appeal Bundle III, Tab 4.
[11] At para. 12.
[12] See Record of Appeal Bundle II, Tab 19, p. 7.

It also opined that the Highest and Best Use of the Property is "as a high end beach resort, residential and golf community." Mr. Kerr, who prepared the CBRE report, in his evidence before the Board,[13] said that at the time of the appraisals he was under the impression that the plans from which he worked had been approved or submitted for approval. He also stated that he used the residual value approach as "it was determined the site was not a vacant green field site-raw, land but an existing subdivision with existing residences with existing road way system and supporting infrastructure. ... Further to that we were presented with the master plan development program which outlined the existing lots and residences for further development of the property. Based on those factors, we deemed the property to be an existing development with potential for further development and not a green field site."

As it turned out, villas that were treated as being part of the Property by CBRE were not in fact part of the Property and not in fact owned by HMB at all.

[11] At the hearing before the Board, Mr. Kerr, in cross examination,[14] stated as follows:

> "I can't recall specifically if I was told to what authority this plan was submitted. But I would assume it was the local planning Commission. My valuation preceded [sic] on the basis of that Master Plan, [h]owever, the expansion aspect of the Master Plan remains consistent with what was approved previously and what was proposed by the Government for the property.
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> "Looking at [p.] 59 what had been approved before was [a] 100 room hotel. 276 room hotel represented an expansion; 46 estate lots – a subdivision of the lands. My understanding is that there had been an approval of the 46 lot subdivision. ... The lots were identified to me along with the existing residences which I understand were part of the existing sub division."

[12] It is the common position of the experts that the best use of the Property or its potentialities is for a high-end resort/hotel development. It is also common ground

[13] See Record of Appeal Supplementary Bundle, pp. 10-11.
[14] See p. 17 of Notes of Evidence for Justice D.C. Harris – Record of Appeal Supplementary Bundle.

that real property valuation is not a precise science and that using different methodologies may yield differing values in respect of the same property. But what also became clear in respect of the valuation exercise, is that the experts did not work from common resource material. The experts engaged by Government were not aware of the Master Plan to which CBRE had access and utilized for its report. CBRE was working from a very specific Master Plan which it assumed had governmental approval when in fact it had not.

The criticisms in respect of Member Michael

[13] HMB says that Member Michael made three main errors in principle:

(i) He arbitrarily discounted the Deloitte 2008 valuation of the Property to the date of possession (i.e. to July 2007) by reference to the interest rate of 10.25%[15] there being no evidence adduced that:

(a) there was a difference in value of the Property between 2007 and 2008; and

(b) applying the interest rate on the land values to come up with a value in 2007 provided a proper or justifiable basis for so doing;

(ii) He sought opinions from sources wholly outside of the Board proceedings and which sources therefore remained unknown and thus the inability to test those opinions in breach of the rules of evidence and the principles of natural justice;

(iii) He had regard to what the Property may fetch upon a sale by public auction, in clear disregard for the statutory basis on which compensation is to be assessed under the Act.[16] Indeed, as counsel for HMB submits, there was no evidence of the forced sale value of the Property. In **Raja Vyricherla Narayana Gajapatiraju v The Revenue**

[15] Record of Appeal Bundle I, p. 40 (Tab 1).

[16] See s. 19 of the Land Acquisition Act supra note 4.

Divisional Officer, Vizagapatam,[17] a case dealing with compensation payable on a compulsory land acquisition in which it was urged that in order to ascertain the value, the arbitrator should hold an imaginary auction, the Privy Council roundly rejected this approach and concluded in essence, that an auction would be an entire waste of the arbitrator's imagination, but rather, the value should be the sum which the arbitrator estimates a willing purchaser will pay and not what a purchaser will pay under compulsion.

[14] The learned Attorney General (in my view rightly and admirably) has not sought to defend Member Michael's errors. Rather, he focuses his argument primarily in defending the valuation method accepted by the Chairman and in urging why the residual method was not appropriate. In my view, the criticisms of Member Michael are well founded as, clearly in the exercise of his discretion, he took into account irrelevant considerations, relied, it seems, on his own personal knowledge and clearly acted contrary to the principles of natural justice and the rules of evidence. In so doing, he committed grave errors of principle. As such, reliability cannot be placed on his award given the flawed basis on which it is grounded.

The rejection by the majority of the Board of the Residual Value method

[15] HMB says that the Chairman rejected the residual value method for the wrong reasons, and thus he erred in principle. Subject to what has been said above, Member Michael stated that he had to decide whether to accept the market comparison method or the residual method. He concluded that the market comparison method was best suited for the purpose. He rejected the residual method holding that "there are too many variables and too high a risk in this particular case to accept the Residual Method as the better choice."[18]

[17] [1939] A.C. 302 (P.C.).
[18] See Member Michael's Report – Record of Appeal Bundle I, p. 41 (Tab 1).

[16] With respect to the Chairman, a number of criticisms were levelled at him:

(a) Firstly, in paragraph 32 of his opinion,[19] after setting out his understanding of the sales comparison approach and the residual value approach, he said this:

> "…having regard to the provisions in section 19 of the Act, I am not entirely sure of the applicability of parts of the Residual method, to the valuation under the Act."

HMB says this amounted to an error in principle as, in essence, he failed to consider whether, in principle, the residual value methodology was open to him. Counsel for HMB relies on the case of **Blakes Estate Limited v The Government of Montserrat**[20] in which the Privy Council stated thus:[21]

> "It was not disputed ... that the residual method was an appropriate one to adopt for valuation of the subject lands."

The learned Attorney General readily accepts that for the purposes of valuation, either of the two methods of valuation may be used. What he says however, is that the choice of methodology depends on the nature of the land and the future developmental opportunity for the land. I am satisfied that both approaches were open to the Chairman as acceptable approaches and that what he was required to consider was which of the two approaches was more appropriate. At the heart of the contest here, as it was before the Board, is the question as to which methodology is most appropriate for valuing the Property.

(b) Secondly, HMB says that the Chairman, in construing the words "highest and best use" used by CBRE in its report to mean something more or higher than "fair market value", was in error. At paragraph 36, the Chairman had this to say:[22]

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[19] Record of Appeal Bundle I, p.20 (Tab 1).
[20] [2005] UKPC 46.
[21] At para. 7.
[22] Record of Appeal Bundle I, p. 21 (Tab 1).

> "A very important pillar of CBRE valuation is considering the "highest and best use" of the property. This approach in identifying the most profitable use to which the land can be put is not in my view necessarily consistent with arriving at a fair market value, but rather with the highest possible market value in a theoretically constructed future world."

It is accepted by both sides that using the terminology "highest and best use" is consistent with and, in essence, is equivalent to arriving at the fair market value. It is not disputed that valuers are entitled to take into account the potentialities of the land. I agree that the view expressed by the Chairman as set out above is erroneous.

(c) Thirdly, HMB says that the Chairman[23] appears to use the fact that what was depicted on the Master Plan was not what was in fact on the ground as a basis rejecting the residual value method. In my view however, the Chairman at that point was setting out the basis on which he considered that the Property was to be treated as a "green field site". This is a matter squarely in issue here as this is an important factor in determining the appropriate methodology for valuation of the Property.

(d) Fourthly, HMB, in essence, says that the Chairman's adverse comments on the Instructions given by HMB to CBRE in turn impacted adversely in his consideration of their report. Whereas some features in HMB's letter of instructions to CBRE are questionable, it has not been shown that CBRE acted otherwise than in accordance with established and internationally accepted standards and principles applicable to property valuation.

[17] At paragraphs 47 and 48 of his Opinion, the Chairman sought to address the inadequacy of the residual approach to the valuation of the Property. The criticism levelled in this regard, is that he took into account considerations of his own not borne out by the evidence. Specifically, at paragraph 48 however, he concluded

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[23] At para. 39.

that the "uncertainty of this [multi-layered] appraisal – Residual approach" was not suitable for the purpose. His reasons were primarily concerned with speculative components required in respect of construction costs, and for projected sales and the allowances to be made for each component. He accepted[24] the evidence of Mr. Watson of Deloitte that the multi-dimensional nature of the residual approach serves to create more avenues for default, and that a 10% movement in the value of any one of the input components can result in as high as a 90% movement in the residual value.

[18] At paragraph 51, the Chairman had regard to what Mr. Kerr said before the Board – "that if there are no entitlements[25] and no subdivisions available, one would have to use the Sales Comparable approach as the valuation method." He then said:

> "There is no dispute that the development plan on which CBRE rested its appraisal, was not an approved plan."

At paragraph 52, the Chairman accepted that an approved plan need not be in place for adopting the residual method, having regard to the cases **Maori Trustee v Ministry of Works**[26] and **Blakes Estate** but considered based on the views he had earlier expressed and also the fact that Mr. Kerr had accepted that in the absence of an approved subdivision and known 'entitlements' in this case would justify as the preferred valuation method; the sales comparison approach.

[19] In earlier paragraphs,[27] the Chairman dealt extensively with the decisions in **Maori** and **Blakes Estate**. At paragraph 40, he had this say:

> "The claimant has relied substantially on the cases of Blakes Estate Ltd v The Government of Montserrat ... and ... Maori ... in support of the proposition that the Residual method of appraisal is applicable even where there is no approved development plan. This is in fact so in the appropriate circumstances. However, ... the Privy Council, in the Maori case were at pains to distinguish between the subject property's *unrealized possibilities* and *realized possibilities* at the time of the acquisition and the error in law, in compensating a party as if unrealized

[24] At para. 49.
[25] Mr. Kerr explained that by "entitlements" he meant the existing approvals for a hotel of 276 rooms, a 9-hole golf course, a health spa facility and supporting amenities, 95 high-end villas and 46 estate lots.
[26] [1959] A.C. 1; [1958] 3 All E.R. 336.
[27] Paras. 40-45.

> possibilities were in fact, realized possibilities. ... In the Maori case, the Privy Council identified three (3) material factors for the compensation tribunal to consider in that case. First, the consent of the relevant Minister had to be obtained; second, what effectively amounted to planning approval had to be obtained, and thirdly, none of the subdivisions and roads and other facilities were actually on the ground."

[20] The Chairman, still speaking of the **Maori** decision, continued in part at paragraph 42 thus:

> "... their Lordships found that it would have been an erroneous application of the law to have awarded compensation on the assumption that the subdivisions (and in our case, the villas, Hotel and other facilities set out in the "master plan") could have been sold to purchasers on the date of acquisition. They found that it was erroneous *"... for the reason that there were in fact no subdivisions, and that to give the claimant compensation on the basis that there were, would be to give him compensation for unrealized possibilities as if they were realized possibilities"* In the ***Turner case***, Dixon C.J. is quoted by his Lordship as stating, on the facts of that case: *"... the only sale that could be considered is a sale of the land as it was at the date of the resumption, that is "unsubdivided" [sic], but having the clear potentiality that it was fit for subdivision."* There is no dispute in the HMB matter that the subject lands have the clear potentiality for resort development and subdivision and that at the date of the acquisition the subject property was not ready for sale in accordance with the 'Master plan'. The subject lands have possibilities; unrealized possibilities and/or prospects, at the time of acquisition."

[21] At paragraphs 43 and 44, the Chairman went on to consider various factors such as (i) the fact that the Master or development plan had not been approved; (ii) none of the buildings, lots, roads, infrastructure were constructed; and (iii) the fact that by the time the plan had gone through all planning and other regulatory approvals, many facets of the plan could be affected such as the number of hotel rooms, condos, individual homes and lots and uses, which he concluded could have a significant influence on the estimated revenues, development costs, profits "and ultimately the calculation of the residual value of the land."

[22] Placing to one side the criticisms levelled at the Chairman as set out in paragraph 15 above, and having regard to the other paragraphs of his Opinion to which I have referred, the criticism that the Chairman rejected the residual method for the

wrong reasons, is not justified. It is clear from the foregoing paragraphs that the Chairman clearly addressed his mind to the question whether, the residual method, as distinct from the sales comparison method, was more appropriate. He did not reject the residual method because he considered it as being inapplicable as a matter of law. Rather, whilst accepting it as a perfectly proper and acceptable method of valuation, he rejected it having concluded, for the reasons he gave, that the residual method was not the most appropriate method in the circumstances of this case. By so doing I do not understand the Chairman to be saying that there must be in place an approved subdivision or development plan. Rather, what I understand the Chairman to be saying and guarding against, is precisely what the Privy Council exhorted avoidance of in the **Maori** case – that is, the error of awarding compensation for "unrealized possibilities as if they were realized possibilities."(My emphasis)

[23] When you then place the criticisms into the mix, and assuming they were justified, can it be said that his views on those matters so coloured his consideration of the residual method as to unduly influence his rejection of it? When an objective analysis is undertaken of his treatment of this approach in its totality, although the Chairman in the course of so doing may have made comments which, if taken in isolation may be considered as unwarranted, when viewed in the round, I do not consider that those incursions so obscured his approach in considering whether the residual method was not the most appropriate method. He was entitled to take into account the fact that the Master Plan on which CBRE relied (and assumed was approved) had not in fact been approved. Based on the evidence of Mr. Kerr, as well as Mr. Watson, his conclusion in treating the Property as "green field" also cannot be faulted.

[24] It has clearly been shown that the residual method is "component specific". CBRE used this method based on a Master Plan presented to them which was quite

specific and one which they believed to have been approved by the relevant governmental authorities. Mr. Kerr, in evidence, said:[28]

> "In the absence of the master plan provided to me, I could not have arrived at the gross sell out value of 390 million dollars. In the absence of the specific master plan I could not have arrived at the figure of cost of … construction of 1240 million dollars. I was never shown any development approval for the master plan. I was given the impression that the development plan was submitted for approval in respect of the expansion. I now know following the submission of my valuation that this is not so."

Mr. Kerr also had this to say:[29]

> "In the absent [sic] of a development plan, if it is a greenfield site the appropriate method is the sales comparative approach if within the same market there is not a comparable property with the same entitlements which has not been sold. If there are no entitlements or sub divisions you will use the sales comparable approach. If there is a dilapidated damaged beyond repair, worthless building, I would consider the property green field land. Yes the cost of removing that structure will have to be taken into consideration. Yes, I saw the structure that was on the site. Yes, I agree it was worthless damage beyond repair."

The Act

[25] The relevant provision of the Act setting out the basis on which assessment of compensation is to be made is section 19. It states as follows:

> "Subject to the provisions of this Act, the following rules shall apply to the assessment and award of compensation by a Board for the compulsory acquisition of land–
>
> *(a)* the value of the land shall, subject as hereinafter provided, be taken to be the amount which the land, if sold in the open market by a willing seller, might have been expected to have realized at a date twelve months prior to the date of the second publication in the *Gazette* of the declaration under section 3:
>
> Provided that this rule shall not affect the assessment of compensation for any damage sustained by the person interested by reason of severance, or by reason of the acquisition injuriously affecting his other property or his earnings, or for disturbance, or any other matter not directly based on the value of the land;

[28] See Record Appeal Supplementary Bundle, p. 19 at para. 246.
[29] At para. 258.

(*b*) the special suitability or adaptability of the land for any purpose shall not be taken into account if that purpose is a purpose to which the land could be applied only in pursuance of statutory powers, or for which there is no market apart from the special needs of a particular purchaser or the requirements of any Government department;

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

(*d*) where land is, and but for the compulsory acquisition would continue to be, devoted to a purpose of such a nature that there is no general demand or market for land for that purpose, the compensation may, if the Board is satisfied that reinstatement in some other place is *bona fide* intended, be assessed on the basis of the reasonable cost of equivalent reinstatement;

(*e*) no allowance shall be made on account of–

(i) the acquisition being compulsory or the degree of urgency or necessity which has led to the acquisition;

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

(iii) any damage sustained by the person interested which, if caused by a private person, would not render such person liable to an action;

(iv) any damage, not being in the nature of deprivation of or interference with an easement, servitude or legal right, which, after the time of awarding compensation, is likely to be caused by or in consequence of the use to which the land acquired will be put:

Provided that nothing herein shall prejudice any claim under this Act for damage subsequently sustained in consequence of the use to which the land acquired is put;

(v) any increase to the value of the land acquired likely to accrue from the use to which the land acquired will be put;

(vi) any outlay or improvement of such land which has been made, commenced or effected within twelve months before the publication of the declaration under section 3, with the intention of enhancing the compensation to be awarded therefor in the event of such land being acquired for public purposes."

[26] It appears settled that these principles of compensation encompass the two basic methods of valuation under consideration here, namely, the sales comparison approach and the residual value approach. In **Blakes Estate Limited v The Government of the Colony of Montserrat**,[30] the Board concluded that it should adopt the residual method of valuation as the basis for valuing the lands known as "Lookout" on the island of Montserrat, having observed that the parties were, in essence, in agreement on that method. The Board also stated that in so doing it had not ignored comparisons of land transactions during the relevant period. The Board then described this method as requiring "one to ascertain the net value of the lands by first engaging in a hypothetical sub-division of the land and then to calculate the gross sum capable of realisation from the sale of the sections therein. From the resulting sum is deducted such expenses as the infrastructure costs, professional fees, finance charges and other such allowances as well as the expenses related to the acquisition".[31]

The Privy Council, on appeal,[32] relying on Cripps, **Compulsory Acquisition of Land**,[33] had this to say:

> "...it is stated that the residual method will not be applied where the open market value is otherwise ascertainable. ... It was not disputed on appeal before their Lordships that the residual method was an appropriate one to adopt for valuation of the subject lands."

This is very much unlike the case here. In this case it is very much a contest (as alluded to by the Chairman[34]) between two competing methods – the sales comparison approach vis-a-vis the residual value approach.

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[30] Award of the Board of Assessment – see Tab 7 of the Appellant's Authorities Bundle.
[31] See para. 16.
[32] At para. 7.
[33] 11th Ed. (1962).

[27] The Privy Council, in a more recent decision, stated unequivocally the principles to be applied when assessing land compulsorily acquired in applying provisions akin to section 19 of the Act. In **Mon Tresor and Mon Desert Limited v Ministry of Housing and Lands and Board of Assessment**[35] Lord Scott of Foscote and Lord Carswell, delivering the joint majority opinion of the Board, stated thus:[36]

> "In our opinion the following propositions may be deduced from the authorities:
>
> (a) The value of an interest in land compulsorily acquired is the amount which that interest, if sold on the open market by a willing seller, might be expected to realise at the date of first publication of the statutory notice. This familiar principle is given statutory form in Mauritius by section 19(3) of the Land Acquisition Act.
>
> (b) In assessing this value the best evidence is comparison with figures from other sales of comparable property.
>
> (c) The land acquired must be valued not merely by reference to the use to which it is being put at the time at which its value has to be determined, but also by reference to the uses to which it is reasonably capable of being put in the future: **Gajapatiraju v The Revenue Divisional Officer, Vizagapatam** [1939] AC 302.
>
> (d) The use for which the land is being acquired must be disregarded in making this assessment: **Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands** [1947] AC 565; **Waters v Welsh Development Agency** [2004] UKHL 19, [2004] 1 WLR 1304.
>
> (e) Where there are no comparable sales resort may be had to the residual value method. This should be reserved for exceptional cases and will not be applied where the open market value is otherwise ascertainable by such assessments as a spot valuation: Cripps on Compulsory Acquisition of Land, 11th ed (1962), para 4-200. As the Lands Tribunal stated in **Perkins v Middlesex CC** (1951) 2 P & CR 42:
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> > " … a spot valuation based upon experiences of the market is more likely to be right than calculations which depend upon many assumptions and forecasts." "

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[34] At para. 45 of his Opinion.

[35] [2008] UKPC 31.

[36] At para. 7.

[28] In **Maori**, where the matter involved compulsory acquisition of a tract of land comprising some 91 out of a total some 242 acres and in respect of which a paper plan of the proposed sub-division existed but which had not been subdivided in fact, on the question whether the 91 acres should be valued on the assumption that they were available for sale in subdivided lots or on the basis of the sale of the 91 acres as a whole, the Privy Council held:[37]

> "(i) compensation for the ninety-one acres should be assessed on the basis of the sale of the land as a whole, unless at the specified date (a) ministerial consent to the sub-divisional plan had been obtained and (b) the subdivided parts were sufficiently apparent on survey of the ground to have enabled their immediate sale;
> …
>
> (ii) in assessing compensation for the ninety-one acres as a whole the land should be valued with its potentiality of being subsequently subdivided; thus the task of assessing compensation would include estimating how far the land was ripe at the specified date for sub-divisional development and how soon it would in fact have been fully developed. …"

[29] It may fairly be said that both decisions referred to above concerned not the rightness of the choice of valuation approaches, but rather, whether the approach adopted (the residual method) had been correctly applied. They are clearly support for the proposition that, in assessing compensation for a large tract of land such as this, its potentiality of being subdivided must be factored into the assessment. This was called in **Blakes Estate**, the "hope value". In my view however, taking into account the "hope value" or assessing its potentialities for future subdivision (which would include having regard to a notional or hypothetical subdivision) is quite a different thing than embarking, as here, on an assessment on the basis that the Property had already been subdivided and all approvals obtained or, in essence, as if its potentialities had already been realized when this (unbeknownst to CBRE) was clearly not the case. The Master Plan containing the specificities as provided to CBRE coupled with their understanding that it was

[37] See Maori Trustee v Ministry of Works [1958] 3 All E.R. 336.

approved was clearly the key basis for treating the Property as an existing development and utilizing the residual method. I do not agree with counsel for HMB that the lack of approvals may be considered to be factored in by CBRE by virtue of the large (20%) discount adjustment. The learned Attorney General contended that one cannot proceed on a Master Plan which has not received planning approvals – there are just too many variables. I agree.

Was the fair market value of the Property otherwise ascertainable?

[30] In **Blakes Estate** the Privy Council stated:[38]

> "It was not in dispute that the residual method was an appropriate method of valuation, **since all the comparisons were with transactions concerning much smaller portions of land**." (My emphasis).

The Chairman here, having rejected the residual method, then turned to look at the sales comparisons referred to in the expert reports including those listed by CBRE and noted generally, that none of the properties listed by CBRE under the section "market overview" or anywhere else in the report were identified as being "without planning approval"[39] At paragraph 60, the Chairman had this to say:

> "... with respect to the comparables used in the PCS report, I have this to say[:] for my part I have seen comparables in the report that in my view, find a rightful place in the calculations of the value."

From this it seems to me that the Chairman held the view that the fair market value of the Property was otherwise ascertainable which, in keeping with the statement by Cripps[40] as referred to by the Privy Council in **Blakes Estate**, would give credence to preferring the sales comparison approach over the residual value method.

[31] From all that I have said above, it has no doubt become clear that, notwithstanding the Chairman may have held an erroneous view as regards certain matters as addressed above, I am fully satisfied that he gave due consideration to the real question of deciding which competing method (on the evidence before him) was

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[38] At para. 15.
[39] See para. 57 of the Chairman's Opinion.
[40] Compulsory Acquistion of Land, 11th Ed. (1962).

best suited for the valuation of the Property. All in all, he rejected the residual value method for good reason. Were I required, based on those infractions (if they can be so called), to exercise my discretion afresh I, also, would reject the residual method in the circumstances of this case given the grave danger it poses by inviting the risk of "compensating a party as if unrealized possibilities were in fact, realized possibilities."

[32] In respect of the residual method, the Privy Council in **de Maroussem v Mauritius Revenue Authority**,[41] though accepting it as a proper method of valuation, had this to say:[42]

> "As for the residual method of valuation, one of the main reasons why that has been regarded generally as less appropriate than the "comparables" method is that it usually requires even more speculation about future events than the latter method. If one is to use the residual method to ascertain what a willing vendor and a willing purchaser would have agreed as the price of a piece of land at a given date, assuming that the land has development potential, one has to make an estimate of many things. One needs an estimate of gross receipts after sale or development, plus some estimate of the timing of those receipts. One needs estimates of the cost of the project, whether it be a project of sale or of development, together with an estimated allowance for developer's profit and for any tax payable on the project itself. Then the residual figure may indicate the value of the land in the open market prior to the start of the project. But it is readily apparent that such an exercise is fraught with uncertainties. Hence the method is one which has tended to be used when the use of the land being valued is one for which open market comparables are simply not available, such as a public use for which there is no open market. That was not the situation in the present case, where comparable transactions did exist, albeit requiring a range of adjustments."

Did the Chairman nonetheless err in his application of the sales comparison approach?

[33] HMB says that if it is found that the Chairman rightly rejected the residual value approach in favour of the sales comparison approach, he nonetheless erred in applying it. At paragraph 62, the Chairman considered the Deloitte report. He noted the various valuation dates as well as the fact that it had left out of their

[41] [2011] UKPC 30.
[42] At para. 34.

calculation what he termed "two relevant comparables[:] Weatherhills and Pearns Point". He also had this to say:

> "I note also, that the size lots used as comparables are much smaller than the subject lands. I accept however, that with the application of the requisite adjustment factors that this is perfectly permissible. ... I recognize this process of making steep allowances (although permissible) as a limitation in the Deloitte approach, but not one so as to render the Deloitte approach less credible than that of the CBRE Residual approach."

He said however that he "[attached] more weight" to the Deloitte report and "[accepted] the valuation of Deloitte for the year 2002."[43]

[34] Having considered the comparables in the PCS and Deloitte reports further, the Chairman then had this to say:[44]

> "The approach used by PCS does not adjust the value of any individual comparable, but appears to be satisfied with their historic purchase price. For my part, I am impressed with the Emerald Cove comparable and add it as the sixth (6) comparable to the Deloitte calculation at pp 25 of the report (...) **Emerald Cove approximates the size of HMB, is on the same side of the Island and was sold as a 'greenfield' parcel**. Emerald Cove was purchased in March 2004, some 3 years prior to the July 2007 assessment date. Deloitte having assessed the value of HMB increasing by 11.27% per annum from [2002] to 2007 and by extension, general mixed resort property market values in Antigua and Barbuda, I apply to the 2004 purchase price of Emerald Cove the same appreciation cumulatively over each of the three (3) years to 2007. **Taking the mean per acre price of the six comparables[45] – US$246,066.36 – and multiplying it with the 108.17 acres produces the value of US$26,616,998.00"** (My emphasis)

The five comparables in the table of the Deloitte report all comprised smaller parcels, the largest of them being 10.002 acres.

[35] HMB says that the Emerald Cove property was the one and only true comparable and that the Chairman erred in taking into account the Deloitte comparables which were much smaller parcels. It is common ground that the potentiality of the Property is for a mixed high-end development. It is not disputed therefore that

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[43] See para. 64 of the Chairman's Opinion.
[44] At para. 65 of his Opinion.

those smaller parcels could not by the limitation of their sizes carry out such a mixed development and accordingly could not be said to be true comparables. At this juncture it useful to be reminded of the statement made by the Privy Council in **Blakes Estate** already quoted and emphasised above:

> "It was not in dispute that the residual method was an appropriate method of valuation, **since all the comparisons were with transactions concerning much smaller portions of land**." (My emphasis).

I rely on the emphasised words as supporting the proposition that it is undesirable to seek to compare sales of smaller parcels with the sale of a large tract of land. In essence, it would be inappropriate to compare cherries to melons. Yet this is precisely what the Chairman did when he added Emerald Cove into the mix with the five much smaller properties used by Deloitte and arrived at a value for the Property based on the mean or average of those properties, notwithstanding his recognition of the fact that Emerald Cove provided by far, the closest comparative. Deloitte concluded that the Property although comprised in three parcels were to be considered as a whole (i.e. 108 .17 acres).

[36] The learned Attorney General, in the true spirit of fairness, conceded that Emerald Cove was not included by Deloitte but was included in the PCS report. He does not criticise the Chairman for taking Emerald Cove into account, but what he says, is that when one looks at the values for the Property arrived at by PCS and Deloitte, they are close comparisons.

[37] To my mind, the Emerald Cove property as set out in the PCS report, represented the only true comparable and ought to have been treated as such rather than taking into account the smaller properties contained in the Deloitte report. This, in my view, could only lead to an unrealistic result and discount of the potentialities of the Property for the kind of development which is envisaged by both sides. It is in this respect that the Chairman in my view fell into error. Emerald Cove comprised 150 acres inclusive of "excellent beachfront"[46] and fetched in March, 2004, $46,000,000. Based on my calculation this amounts to $306,666.66 per acre.

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[46] See p. 7 of PCS Report – Record of Appeal Bundle II, Section III. Tab 3.

Applying an 11.27% rate of increase per annum, as applied by the Chairman for the period between 2004 to 2007, adopting Deloitte's rate of increase,[47] would give a figure of $422,474.83 per acre as at 2007. Multiplying that by 108.17 (the total acreage of the Property) would give a value of $45,699,102.09 in respect of the Property. I consider however, that all three experts recognised and accepted that the current buildings on the Property were dilapidated and beyond repair. Deloitte said that they added a negative value. However, they provided no figures. Mr. Kerr said they were worthless and that the costs of removing them will have to be taken into consideration. PCS estimated the costs of demolition and removal at $200,000.00. In my view, the overall value should accordingly be discounted by this sum. The final figure representing the value of the Property as at the date of assessment would then be $45,499,102.09.

Conclusion

[38] Based on the foregoing, I would allow this appeal. In the exercise of my discretion and for the reasons given, I would consider that the sum of $45,499,102.09 represents the fair market value of the Property. Accordingly, I would substitute this award as to the value of the Property in place of the award of $23,820,999.00 made by the Board.

[47] See para. 64 of the Chairman's Opinion.

[39] The general rule is that costs follow the event, unless there is good reason to order otherwise. No reason for deviating from the general rule has been put forward in this appeal. The court has been told that the costs incurred before the Board have been placed before the master for assessment. I would accordingly order that the respondents pay to HMB on this appeal two thirds of the costs as assessed by the master in respect of the proceedings before the Board.

Janice M. Pereira
Justice of Appeal

I concur.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Mario Michel
Justice of Appeal [Ag.]