

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Division

2021
CLE/GEN/00549

IN THE MATTER OF the Constitution of The Commonwealth of The Bahamas
(the constitution).

AND

IN THE MATTER OF The Acquisition of Land Act Chapter 252 Statute Laws of
The Bahamas *(the Act)*

AND

IN THE MATTER OF the all that piece parcel or lot of land designated as Lot No.
C in the Subdivision called and known as Nairn Close off Cowpen Road situate in
the South-Western District of the Island of New Providence in the
Commonwealth of The Bahamas. The subject of the conveyance between
Cleotha Louise Nairn Myers and Sandra Nairn Johnson, as Vendors, and
Laclevia Danica Colebrooke, as Purchaser, which conveyance is Recorded in
Volume 9570 at Pages 226 to 230 *(the acquired land.)*

BETWEEN

LECLEVIA DANICA COLEBROOKE

Plaintiff

AND

THE ATTORNEY GENERAL OF THE BAHAMAS

Defendant

Before: **The Honorable Madam Justice J. Denise Lewis-Johnson**

Appearances: Ryan Brown for the Plaintiff
Kendria Smith with Kingsley Smith for the Defendant

Hearing Date: 6 July 2022; 8 July 2022; 5 August 2022; 12 December 2022; 17
February 2023

Civil - Land - Land Acquisition Act - Mortgagor - Land compulsorily acquired -

Compensation awarded pursuant to land being compulsory acquired- Obligation on the Promoter to award prompt and adequate payment – Whether failure to award payment results in a Constitutional breach - Damages - Acquisition of Land Act Ch.252

JUDGEMENT

1. This action raises issues regarding a landowner's right to compensation where their land was compulsorily acquired by the Government for public purposes.
2. By an Originating Summons filed 21 May 2021 Leclevia Danica Colebrooke ("the Plaintiff") seeks the following relief against the Defendant:
 - a. **A Declaration that the Plaintiff was at all material times and remains at the date hereof entitled to be compensated for the acquired land captioned herein above, and that the Defendant having taken possession of the acquired land pursuant to its "New Providence Road Improvement Project" is obligated to compensate the Plaintiff at its own expense. The Defendant compulsorily acquired the land, on which the Plaintiff intended to build her home along with an income earning unit, for the purposes of building thereon a road, referred to and identified by the Defendant as "Road Corridor 12";**
 - b. **A Declaration that the Defendant's refusal of the Plaintiff's right to utilize and enjoy the acquired land the subject hereof without prompt, reasonable, or any compensation is unlawful and contrary to the provisions of the Act and Article 27 of the Constitution;**
 - c. **A Declaration that the Defendant's conduct complained of herein insofar as it represents a refusal of the Plaintiff's right to enjoy her land or be compensated for the subject hereof constitutes a wrongful and continuing act of trespass and/or nuisance;**
 - d. **A Declaration that the Defendant having acquired the Plaintiff's land pursuant to its purported compulsorily acquisition further to its road improvement project by failing, inter alia, to pay prompt, proper, or any adequate compensation is contrary to the provisions of the Act and in breach of Article 27 of the Constitution;**
 - e. **A Declaration that Section 50 of the Act cannot operate so as to validate a contravention of the provisions of Article 27 of the Constitution which mandates that compensation be paid by the Defendant upon the compulsory acquisition of land as a result thereof and entrenches an individual's right to seek the same;**

- f. **An Order that the Defendant do forthwith pay to the Plaintiff the fair market value of the subject land pursuant to and in accordance with the Act and Constitution;**
 - g. **Statutory compensation pursuant to the Act;**
 - h. **Damages for loss of revenue; cost of alternative housing and consequential loss;**
 - i. **Damages for loss of use;**
 - j. **Costs; and**
 - k. **Such further or other relief as to the Court may seem just.**
3. The Originating Summons is supported by an Affidavit of the Plaintiff filed 30 June 2021, a Supplemental Affidavit of the Plaintiff filed 17 January 2022 and a Second Supplemental Affidavit of the Plaintiff filed 2 March 2022.
 4. The Defendant filed the Witness statement of Kingsley Smith on 31 January 2022.
 5. On 3 February 2022 the Defendant filed a Notice to cross-examine Mr. Wellington Woods, B.A., I.B.A; CRA ("Mr. Woods"). Mr. Woods was the only witness called at trial.

Parties Background Facts

6. In October 2005, the Plaintiff entered into an agreement with Sandra Nairn Johnson and Cleotha Nairn Myers ("the Vendors") to purchase **ALL THAT** piece parcel or lot of land being identified as Lot No. C situate in Nairn Close in the western District of New Providence, one of the Islands of The Commonwealth of The Bahamas.
7. The property is situated on the Southern side of Cowpen Road, approximately 1,500 feet west of Baillou Hill Road which said land is bounded Northwardly by a 30 feet wide road of reservation and running thereon 52.17 feet, Eastwardly by lot "B" and running thereon 100 feet, Southwardly by Lot 17 which is said to be the property of Wilbert Dean and running thereon 52.17 feet, Westwardly by Lot "G" and running thereon 100 feet.
8. The purchase price of the acquired land was \$36,000.00. The Plaintiff and the Vendors closed on the sale in January 2006.

9. At all material times the acquired land was zoned as a residential, multi-family lot, comprising of 5,199 SQ. FT.
10. On 21 August 2007, the Plaintiff submitted a building permit application to the Ministry of Works and Transport and was issued the application number 108177. However, the plans were never approved.
11. Craig G. Delancy, sent a letter to the Plaintiff dated 5 June 2008 stating that the property may be the subject of a proposed corridor extension from Carmichael Road to Cowpen Road. The letter, in part, reads:

“Reference is made to your building permit application No. 108177 submitted 21st August, 2007.

Please be advised that during the review of your application the Ministry of Works & Transport Execution Unit has indicated that your proposed building and property falls within the surveyed area, where the proposed corridor extension form Carmichael Road to Cowpen Road.

However, the acquisition of the potentially affected properties will not be determined until the completion of the final designs.

The Project execution Unit has indicated the final road design and Right-of-way would not be determined until mid-year 2009. As a result we are unable to process your building application at this time.

In the event of an earlier completion date on the road design, you will be contacted as to whether your property has been cleared of the intended Right-of-Way...”

12. By Declaration of Intended Acquisition dated 3 November 2008 and published in the Extraordinary Gazette on 21 January 2009 the Minister responsible for Acquisition and Disposition of Lands gave Notice of his intention to acquire certain land for Public Purposes, namely for Construction of Public roads and for uses related thereto. The Notice was amended on 16 November 2010. A Notice of Possession was executed on 21 February 2011.
13. On 24 May 2011 Khader Alikhan of the Ministry of Works and Transport wrote to Deyane Russell, the Plaintiff's previous Counsel, confirming that the Government possessed the subject land by publishing the “Notice of Possession” on 23

November 2010. The letter also describes the process to obtaining compensation. It reads in part:

“Please be advised that The Government of The Commonwealth of The Bahamas is endeavoring to complete the proposed road works to facilitate Milo Butler Highway extension between Carmichael Road and Cowpen Road.

According to the Provision of the Acquisition of Lands Act Chapter 252 (Statute laws of The Bahamas 2000 ed.), Section 6, the Government is authorised to compulsorily acquire any land for a “Public Purpose”.

Please take note of the procedures below:

- 1. Publish a “notice of Intended Acquisition” in the Official Gazette;**
- 2. Post a copy of the said Notice in an accessible place on the Site;**
- 3. Shortly after the publication of the “Notice of Intended acquisition” publish a “Notice of Possession” on the said site;**
- 4. And (in most cases) publish a “Notice of Vesting”.**

Once the procedure is completed, the Government has the inherent right to enter upon and possess any land within The Bahamas.

Although this right is inherent, both the Constitution of The Bahamas as well as the above-mentioned Act has provisions that safeguard the interest of landholders. Therefore, the Acquisition must be carried out in strict adherence to statutory and Constitutional requirements. An aggrieved party may in the first instance, challenge the constitutionality of the acquisition if the correct procedures are not followed.

Please note that the Constitution further provides in Section 28 that no land is to be compulsorily acquired without fair compensation. This provision is also included in the said Act. Once proper title documents are received, the Government will then undertake a Title Search to determine whether the

claimant has set out a satisfactory Claim to the acquired property.

If our Title Search indicates that a satisfactory Claim has been made, The Office of the Prime Minister will contact the said Claimant with a view of negotiating a fair and reasonable compensation. If the Title Search is negative the Claimant will be advised. Compensation may vary from monetary compensation to land exchange, depending on the particular case at hand, or property replacement.

Once a fair compensation is agreed upon, the Government will expedite the payment of compensation within a reasonable time. The said applicant/claimant will then be required to sign a Deed of Release releasing the Government from any further claims as it relates to that parcel of land/property.

The Government "Notice of Possession" of the site/lands for the completion of the New Providence road Improvement Project (CNPRIP) was published in the local newspaper on November 23rd, 2010. As a claimant, your client is required to contact the Office of the Prime Minister and provide all documentation in proof of claim to the land. Please note the incomplete documents will further prolong the compensation process.

While the process of compensation is taking place, it is the intention for the Government to commence, advance construction works followed by road construction and improvement works. Your co-operation and assistance is hereby requested for carrying out such works ..."

14. The Plaintiff has not been compensated pursuant to the Acquisition of Lands Act or at all.
15. To date, the road works contemplated by the Government have not materialized. The acquired property remains in its original state as purchased by the Plaintiff.

16. On 8 July 2022 a locus in quo was conducted on the subject property. There remains a concrete foundation on the property and there are surrounding residential and multifamily buildings adjacent to the acquired property.

The Plaintiff's Evidence

Laclevia Danica Colebrooke

17. The Plaintiff purchased the subject property in January 2006. She states that she purchased the land to build a two-unit two-bedroom multi-family income earning apartment structure. Her intention was to rent one of the units for \$750.00 per month and occupy the other as her residence.

18. She explained that she was eager to commence building the apartment structure. She engaged the service of Lynden Hepburn to produce architectural and engineering plans to submit to the Ministry of Work & Transport for approval.

19. On 21 August 2007, the Plaintiff submitted a building permit application to the Ministry of Works and transport and was issued the application number 108177. However, her plans were never approved.

20. It is her evidence that she made countless inquiries as to the approval of the plans without success. On 7 June 2008 she received a letter from Mr. Craig G. Delancy stating that her property may be the subject of a proposed corridor extension from Carmichael road to Cowpen road.

21. She also indicates that on 24 May 2011 Khader Alikhan of the Ministry of Works and Transport wrote to Deyane Russell, her previous Counsel, confirming that the Government possessed the acquired land by publishing the "Notice of Possession" on 23 November 2010.

22. The Plaintiff avers that she instructed Deyane E. Russell & Co. to contact the Office of the Prime Minister to arrive at a reasonable compensation figure for the acquisition of the subject land. The compensation included a possible land swap and payment of consequential loss because of the acquisition. She states that the Ministry of Works and Transportation suggested an alternative property on Marshall Road on 8 January 2013. However, that land was rejected as it was not comparable.

23. As an alternative, Deyane E. Russell & Co. suggested land in any Government Subdivision such as the Subdivision in Ardestra Gardens. However, on 30 January 2013, the Office of the Prime Minister indicated that the Government Subdivision in Ardestra Gardens was zoned for single family lots only. It was also communicated to her that the Office of the Prime Minister would contact the Department of Lands and Surveys to advise on other possible locations for a duplex lot.
24. In July 2020, the Plaintiff engaged the services of Cedric Parker & Co. to seek a settlement of this outstanding claim against the Government of The Bahamas. Counsel requested that the Office of the Prime Minister do provide, within 28 days, its position on the amount of compensation arising from the acquisition of the subject property. However, no response was provided.
25. Due to the compulsory acquisition of her property in November 2010, the Plaintiffs states that she has not been compensated and is unable to build her two-unit two-bedroom multi-family income earning apartment structure. The latter of which would have taken no more than a year. She obtained a mortgage from Scotia Bank (Bahamas) Ltd. to finance the purchase of the acquired property, which has been satisfied. It was her intention to extend her loan with scotia bank to facilitate the construction of my apartments.
26. Due to her inability to build the rental unit, she explains that she has been paying rent in the sum of \$800.00 per month and have been unable to receive an income from same.
27. It is her evidence that at all times the Ministry of Works and Transport and the Office of the Prime Minister knew of her intention to build the rental units as plans were submitted in 2007.

Wellington Woods

28. Mr. Woods is an appraiser with 35 years experience. He was deemed an expert witness at Trial.
29. Mr. Woods stated that the acquired property is zoned as a residential/Multi-Family Lot, which is located within Nairn's subdivision. He confirmed that Nairn's Subdivision is a subdivision approved under private Roads and Sub-divisions Act.

30. He further testified that before an area is approved as a subdivision, it must have basic infrastructure such as electricity, roads, and water. He stated the following in his report:

“The area is fully serviced by some good paved road access and is fully serviced by all utilities. It is well built up with construction continuing, and there are vacant lots around the area. The quality of construction is good, and in conformity with the style and design of neighboring subdivisions.”

31. His report dated 23 November 2021 set the market value at \$72,786.00 and the value of property based on comparable value in the year 2010 at \$67,587.00.

The Defendant’s Evidence

Kingsley Smith

32. Kingsley Smith (“Mr. Smith”) acts as Counsel in the Office of the Attorney General. He provided evidence of the market value which at the time of acquisition was an undeveloped/rural farm land, and appraised by Peter Galanos as at the date of acquisition at \$42,000.00. This was allowed as at the date Mr. Galanos was deceased.

33. Mr. Smith was not called as a witness during trial.

The Issues

34. The issues which arise for determination are:

- a. Whether the Plaintiff is entitled to prompt and adequate compensation for the compulsory acquisition of land, which is the subject of this action pursuant to Art. 27 of the Constitution of The Bahamas;**
- b. Whether the Defendant has compensated the Plaintiff for acquisition of land that was compulsorily acquired on 23 November 2010;**
- c. Whether the Defendant breached Article 27 of the Constitution by its failure to pay prompt and adequate compensation after it compulsorily acquiring the Plaintiff’s land on 23 November 2010;**

- d. Whether Section 18 of the Acquisition of Lands Act requires the addition of 5% interest to be added to each year-end total until payment is made;
- e. Whether the Plaintiff is entitled to exemplary and/or punitive damages for breach of Article 27 of the Constitution;
- f. Whether the Plaintiff is entitled to damages incurred in bringing this action, which includes damages that arise from the use of expert evidence;
- g. Whether the Plaintiff is entitled to consequential loss, which includes the cost incurred for architectural plans and building permit fee(s) that was paid in preparation of construction on the land that was compulsorily acquired in 23 November 2010.

OR

- h. Whether the Plaintiff ought to be compensated pursuant to Article 27 of the Constitution of The Bahamas and the provisions of the Acquisition of Lands Act Chapter 252;
- i. Whether the Defendant breached Article 27 of the Constitution of The Bahamas by its failure to pay prompt and adequate compensation when it compulsorily acquired the Plaintiff's land on 23 November 2010;
- j. Whether the Plaintiff is entitled to the fair market value of subject land and other damages pursuant to and in accordance with the Act and Constitution.

The Law

35. Pursuant to Article 27 of the Constitution of The Bahamas, all citizens (as far as possible) is afforded a protection from the deprivation of property. Article 27 provides:-

27. (1) 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 where the following conditions are satisfied, that is to say —
(a) the taking of possession or acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the

development or utilisation of any property in such manner as to promote the public benefit or the economic well-being of the community; and

(b) the necessity therefor is such as to afford reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property; and

(c) provision is made by a law applicable to that taking of possession or acquisition —

(i) for the making of prompt and adequate compensation in the circumstances; and

(ii) securing to any person having an interest in or right over the property a right of access to the Supreme Court, whether direct or on appeal from any other authority, for the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled, and for the purpose of obtaining prompt payment of that compensation; and

(d) any party to proceedings in the Supreme Court relating to such a claim is given by law the same rights of appeal as are accorded generally to parties to civil proceedings in that Court sitting as a court of original jurisdiction.

36. Where land is to be acquired either for private agreement for purchase or compulsory purchase, the Acquisition of Land Act. Ch 252 governs such procedure.

37. Where the value of land exceeds \$4,000.00 and parties cannot agree on an appropriate figure **Section 15 of the Act** provides for the necessary procedure to be conducted. Section 15 provides -

"15. (1) if -

(a) the promoters and the persons interested have been unable to agree on the acquisition of the same by private purchase;

(b) the value of the selected land exceeds the sum of four thousand dollars,

the value of the selected land and the compensation payable for all or any interests therein, shall be determined by the court according to the following provisions."

38. **Section 28** of the Act details the matters which the court shall consider when assessing the appropriate amount of compensation. Section 28 reads:

28. In determining the amount of compensation to be awarded under this Act the magistrate or the court sitting with or without assessors, as the case may be, and any other assessor appointed under the provisions of this Act shall take into consideration the matters mentioned in paragraph (a) of this section and shall not take into consideration the matters mentioned in paragraph (b) of this section —

(a) (i) the market value of the selected land at date of the declaration made under section 6 of this Act;

(ii) the damage (if any) sustained by the persons interested at the time of awarding compensation by reason of severing such land from other land of the persons interested;

(iii) the damage (if any) sustained by the persons interested at the time of awarding compensation by reason of the acquisition injuriously affecting other property belonging to him whether real or personal in any other manner or his actual earnings;

(iv) if in consequence of the acquisition he is compelled to change his residence or place of business, the reasonable expenses (if any) of such change;

(v) any accommodation works offered by the promoters and the execution of which is to the satisfaction of the magistrate or of the court sitting with or without assessors secured to the persons interested;

(b) (i) the degree of urgency which has led to the acquisition;

(ii) any disinclination of the persons interested to part with the selected land;

(iii) any damage sustained by the persons interested which if caused by a private person would not constitute a good cause of action;

(iv) any damage which after the time of awarding compensation is likely to be caused by or in consequence of the use to which the selected land will be put;

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

- (vi) any increase in the value of unselected land likely to accrue from the use to which selected land will be put;
- (vii) any outlay or improvements on selected land made, commenced or effected with the intention of enhancing the compensation to be awarded under this Act.

39. **Section 29** of the Act concerns additional sums payable for compulsory purchase. The Section provides:-

29. In addition to the amount of compensation awarded under this Act the magistrate or the court, as the case may be, shall further award a sum of ten per centum on the market value of the selected land mentioned in subparagraph (i) of paragraph (a) of section 28 of this Act in consideration of the compulsory nature of the acquisition, but the provisions of this section shall not apply to any compensation given for any damage or loss sustained by reason of the taking of any selected land or by reason of severance.

40. **Section 18** reads:-

18. (1) Upon payment or tender of all the purchase money or compensation agreed or awarded to be paid and of all costs payable to the persons interested in respect of any selected land purchased or taken by the promoters; or whenever any of the respective cases shall happen wherein the money is herein authorised or directed to be paid to the Treasurer and such payment has been made to him, or, if in the opinion of the Minister it is necessary for a public purpose that possession of the selected land should be obtained by the promoters before such payment or tender, it shall be lawful for the Minister by notice in the Gazette to declare that the selected land has been appropriated for the public purpose mentioned in such notice and thereupon except as hereinafter in this section provided the selected land and the fee simple and inheritance thereof and all the estate, use, trust and interest of all parties therein shall thenceforth become vested in and become the property of the promoters for such public purpose, and the promoters may enter upon and take possession of the same, and in all cases in which delivery of

possession shall be refused the magistrate may issue his warrant to any peace officer to enter upon the land the possession of which is refused or withheld and to take possession thereof and to deliver possession to such person as shall in the warrant be nominated to receive the same, being a person in that behalf appointed by the promoters, and such peace officer is hereby authorised and required to take and deliver possession accordingly:

Provided that, if possession of the selected land be taken before such payment or tender, the promoters shall pay, in addition to the purchase money or compensation agreed to be paid or awarded to be paid, interest on such purchase money or compensation at the rate of five dollars per centum per annum from the time of the publication of such notice in the Gazette until payment of such purchase money or compensation.

41. In *Winterhaven Holdings Ltd et al v The Hon. Dr. Hubert Alexander Minnis, Prime Minister of The Commonwealth of The Bahamas et al 2020/CLE/gen/1182* the Hon. Sir Brian Moree Kt. discussed the application of Section 18 of the Act. He stated:

“The proviso in section 18(1) of the Act applies when the promoters have taken the land and not tendered or paid the money which the previous owner was entitled to receive under the Act. In that situation, the previous owner does not have the land and he does not have the money which he must be paid under the Act. In those circumstances, the proviso ‘kicks in’ to provide the previous owner with interest on the money which is due to him under the Act until it is paid. The interest is to compensate the owner, at least partially, for the deferred payment of money which he is entitled to upon either the private sale or compulsory acquisition of the land. That is commercially efficacious and I saw no basis in the Act to interpret the proviso as only requiring interest to be paid on a part of the outstanding money and not all of it.”

42. Both parties accurately cited *Collie v The Prime Minister [2012] 1 BHS J No. 18* where the above sections were explained by the Court. In that case, the applicant sought a declaration that he was the owner by documentary title

to land situated in Acklins Island which was compulsorily acquired by the Water & Sewerage Corporation pursuant the Acquisition of Land Act, and as such is entitled to compensation under the Act.

43. Justice Adderley stated:

“26. Under the Act three components are to be included in the compensation given to the persons interest (s 28)

(1) The market value of the selected land on the date of publication in the Gazette of a Notice of Intended Acquisition pursuant to section 6 of the Act

(2) If it was compulsorily acquired a further 10% on the market value because of the compulsory nature of the acquisition and this premium is not to be added to any other head of compensation other than the market value (s 29).

(3) If possession is taken prior to payment or tender of the compensation, interest at the rate of 5% per annum on the amount of compensation or tender from the date of publication in the Gazette of the Declaration of Vesting until payment (proviso to s 18).

27. Section 28 of the Act is the starting point. It prescribes guidelines to the Court of what should be included and what should be excluded in determining the amount of compensation.

28. The first item is the market value (s 28 (a) (i)). In addition to the market value the following matters set out in Section 28(a) should be taken into account:

(1) at the time of awarding compensation, damage sustained by any of the following: by severing the land from other land of the persons interested s.(a) (ii), by reason of the acquisition injuriously affecting his other real or personal property in any other manner, or by reason of the acquisition injuriously affecting his actual earnings (s 28 (a) (iii),

(2) if he is compelled to change his residence or his place of business the reasonable expenses of the change (s 28 (a) iv)

(3) any satisfactory accommodation works offered by the promoters and secured to the persons interested.

29. Not to be taken into account are the following matters set out in section 28(b): the urgency with which the land had to be acquired (s.28(b)(i)), the persons not being inclined to sell (s.28(b)(ii)), the likely damage to the selected Land, or increase in value to accrue to the unselected land by virtue of future land use of the selected land (s.28(b)(iv) - (vi)), any outlay or improvements made, commenced or effected with the intention of enhancing the compensation to be awarded (s.28(b)(vii), and any damages sustained by the persons interested which if caused by a private person would not constitute a cause of action (s.28(b)(iii)),

These provisions embody provisions of English and common law jurisdiction and various principles of valuation that have evolved over the years.”

The Parties Submission on Right to Compensation

44. The Plaintiff argues that the Defendant has breached Article 27 of the Constitution in two respects and also the provisions of the Acquisitions of Lands Act.

45. Firstly, the Defendant has failed to make prompt and adequate payment for the compulsory acquisition of the Plaintiff's property as outline in Article 27 of the Constitution.

46. Secondly, the money is property within the meaning of Article 27 of the Constitution and is therefore protected. The Plaintiff cited **Arawak Homes Ltd. v The Attorney General and another** where Madam Justice Allen recognized the importance of strict adherence to the Act to achieve prompt and adequate compensation as mandated by Article 27 of the Constitution. Madam Justice observed:

“30. Before beginning an analysis of the learned trials judge's decision in relation to the valuation it must be remembered that the rules that apply to the determination of compensation for compulsorily acquisition of land are those contained in

the Acquisition of Land Act. It is by these rules that any assessing tribunal must conduct itself in endeavoring to arrive at an award.”

47. It is on this basis that the Plaintiff contends that she was entitled to prompt and adequate payment and interest on money that she has been deprived of. The deprivation of said money by the Defendant, which is not in dispute, equates to another breach of Article 27 protection afforded to the Plaintiff under the Constitution. The Plaintiff further highlights that the 18 January letter from the Defendant is an acknowledgement that the Plaintiff has not been compensated for the compulsory acquisition.
48. The Plaintiff argues that the 5% interest per annum is payable on the sum of the market value and 10% uplift. If payment is made on or before the date of acquisition, no interest payment is payable. This also means that interest is to be prorated if payment is made within the year of acquisition or if outside of one year or subsequent year but before the anniversary of the acquisition. If payment is to be made in any year on the anniversary of the acquisition, the landowner is entitled to the full 5% interest. Every year the Defendant fails to pay attracts interest to the amount of “compensation” for that particular year. Naturally, the amount of the “compensation” will change each year due to the addition of interest to the compensation for the previous year.
49. In the Second Supplemental Affidavit of the Plaintiff filed 2 May 2022, Roshan A. Noronha CPA, CA, PA observed that the compensation under the Act is \$134,669.44 as at February 2022 if the market value of the property in November 2010 was \$67,587.00.
50. An adjustment of that sum must be made as it prorated interest as at February 2022. Interest as at November 2022 (anniversary of the acquisition) is \$6,357.80 for the year, which equates to a prorated interest of \$530.00 per month in 2022. Accordingly, the statutory compensation is \$131,926.00 (\$127,156.00 + \$4,770.00) as at August 2022 \$132,456.00 (\$127,156.00 + \$5,300.00) as at September 22; \$132,986 (\$127,156.00 + \$5,830.00) as at October 2022; \$133,516.00 (\$126,156.00 + \$6,300.00) as at November 2022.
51. The Plaintiff submits that damages incurred for this assessment of compensation under the Act should also be awarded. The Plaintiff paid \$500.00 to Mr. Noronha to provide a calculation under the Act and \$550.00 for the Appraisal Reports.

52. It is the Plaintiff's argument that the Promotor, being in a position of power, deprived the Plaintiff of Article 27 protection for three years. Without prejudice to same, the provisions in the Act states that compensation commences from the date of the Notice, is likely unconstitutional if persons like the Plaintiff are not compensated from the date they are deprived of their rights and protection under Article 27.

53. The Defendant contends that there is no breach of Article 27 of the Constitution since the Acquisition of Land Act was enacted before Independence. Thus, it cannot be held to breach any fundamental right. Only by its provisions can compensation be made.

54. The Defendant submitted that "The Acquisition of Lands Act came into effect in 1913 preceding the Constitution of 1973. The Defendant's interpretation is that the Acquisition of Lands Act is saved by the Savings Laws Clause of the Constitution of the Bahamas, thereby trumping the Constitution itself. At the time of independence all existing laws are saved."

55. The Defendant referenced the words authored by Professor McIntosh in **Caribbean Constitutional Reform Rethinking the West Indian Policy 2002**. The learned author wrote:

"... all laws, except those of fundamental political importance, are saved according to their letter, either by an express provision of the new constitutions; or are deemed to be saved, assuming no express provision. So, from a conceptual standpoint, every existing law is conceived as if reenacted by the Independence Constitution, and on this view, would be read, subject to the constitutional prescription of the higher law."

56. On this basis the Defendant argues that these laws are saved by what is referred to by scholars and writers as the "savings laws" clause. According to **the Saving Law Clauses of the Commonwealth Caribbean and the Death Penalty** written by O'Brien this clause exempts pre-independence law "from constitutional challenge, either wholly or partly."

57. It is further submitted by the Defendant that under any law enacted before 1973, nothing done under the authority of that written law shall be held to be inconsistent or in contravention of the fundamental rights of the Constitution.

58. The Defendant relied on Article 30 of the Constitution which states:

“30. (1) Subject to paragraph (3) of this Article, nothing contained in or done under the authority of any written law shall be held to be inconsistent with or in contravention of any provision of Articles 16 to 27 (inclusive) of this Constitution to the extent that the law in question — (a) is a law (in this Article referred to as “an existing law”) that was enacted or made before 10th July 1973 and has continued to be part of the law of The Bahamas at all times since that day; (b) repeals and re-enacts an existing law without alteration; or (c) alters an existing law and does not thereby render that law inconsistent with any provision of the said Articles 16 to 27 (inclusive) in a manner in which, or to an extent to which, it was not previously so inconsistent.”

59. It is also the Defendant's contention that pursuant to Section 18, where compensation is not paid right-away, nor promptly, the owner of the land is paid 5% interest per year on the market value. The 5% interest is to be added to the market value as stated in Section 28 of the Act.

60. The Act considers that there may not be prompt payment of compensation, and has allowed for an additional 10% of the market value where compensation is not made at the time of acquisition. To the total of the Market Value plus 5% per annum single interest, then 10% of the Market Value is added.

61. The Defendant submits that the appropriate formula is *'Market Value x 5 % (x 12 years) = Amount + 10% of Market Value = Total'*.

Parties Submissions on the Market Value

62. Both parties cited **Arawak Homes Ltd v the Attorney General** and another for an appropriate definition of 'market value' as there is none in the Act. Adderley J stated:-

“21 There is no definition of 'market value' in the Act.

22 From such authorities that have been brought to my attention The Bahamian courts have invariably accepted the

definition of market value given by experts which usually is some variation of the following:

"The amount which the land might be expected to realize if sold in the open market by a willing seller to a willing buyer."

23 This is very similar to the statutory definition found in Rule (2) of section 5 of the Land Compensation Act 1961 of England which reads:

"The value of land shall... be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realize"

It is also similar to the definition found in s 29(1) (b) of the Finance Act 1944 of New Zealand which according to *Maori Trustee v Ministry of Works (P.C)[1959] AC* was in the following terms:

"The value of 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 on the specified date might be expected to realize.

25 What should be noted in the above statutory definitions is that 'value' refers to an 'amount' that might be 'realized', not the price at which the land is sold. It is in my judgment an attempt to capitalize the value of the land to the owner. Rarely, will a sale of land realize an amount equal to the market price at which it is sold. If an individual sells a house, for example, he might realize an amount equal to the market price from which he must deduct depreciation. In the case of a land developer the sale of 5 acres, for example, will likely be by way of its subdivision into lots and the amount realized might be the market price of the lots less his development costs. This view of market value is consistent with the universal principle that in the case of compulsory acquisition compensation must be assessed at the value to the owner not the value to the authority acquiring the land. It is also a method by which assessors calculate market value."

63. The Plaintiffs submits that the only credible evidence before the Court that sets the market value of the acquired property at the relative time has been provided by the Plaintiff from Mr. Wellington Woods. The Plaintiff states that Mr. Woods properly considered comparable sales in 2010 when the property was acquired by the Promoter. He also noted the special features of the property, i.e. what it was zoned for and the presence of utilities and roads. Upon doing same, he determined that the market value of the acquired property as at November 2010 was \$67,587.00. The Defendant has not provided any credible evidence to rebut this evidence.
64. The Plaintiff contends that “the appraisal report by Peter Galanos is wholly unreliable and should be rejected for the same reason the appraisal report of RM Hardy was rejected in **Rolle v the Prime Minister and others BS 2012 SC 173**. Despite acknowledging that the acquired property is located within a subdivision, which would mean that the Nairn Close Subdivision was approved, thereby having the necessary infrastructure, Galanos stated that type of property and zoning of same was underdeveloped rural farmland that was devoid of utilities. Not only is this evidence consistent with his own acknowledgement, Galanos also failed to provide supporting information in the Report for that determination. Further, Galanos’ report is also inconsistent with information provided by the Promoter, Ministry of Works & Transport.” “In its letter dated 24 May 2011, the Ministry for Works and Transport acknowledged that “Lot C” is in “Nairn Close Subdivision, off Cowpen Road”. Accordingly, the Court should accept the evidence of the Promoter in this regard.
65. It is the Plaintiff’s position that Mr. Galanos’ Report is defective for another reason. Although he stated that he applied the sales comparison approach to determine that the market value was 41,592.00 (5,199 sqft at \$8 per sqft) as at November 2010, unlike Mr. Wood’s report, Galanos did not provide any actual sales comparisons for the Court to consider. Woods testified that the failure to provide the actual comparable sales in the Appraisal Report is below acceptable appraisal standards.
66. The Plaintiff submits that evidence regarding market value must be credible failing which, it MUST be rejected. In **Rolle v. The Prime Minister and others** supra Adderley J, in rejecting the evidence of the Appraiser for the Promoter on the bases that his assessment of the market value was not fair as it did not take into consideration that acquired land had infrastructure, said the following:

“37 Compulsory acquisitions are very fact sensitive and much depends on the evidence that comes before the court for determining the quantum of the award. For this reason it is difficult to compare awards from case to case without first carefully analyzing what facts actually came before the court in a particular case upon which it made its finding of fact that a particular amount was fair compensation for the claimant. A fair compensation to the claimant as envisaged by the Constitution and under the current law is based on market value not market price. Appraisers need to be cognizant, therefore, that the Act mandates the court to grant awards based on market value not market price. 'Market value' is not defined in the Act but while market price is always a component of market value they are not necessarily the same. (see discussion of 'market value' in *Arawak Homes v The Attorney General and Prime Minister* No 2002/Cle/Qui/00262 Unreported).”

67. Further, the Arawak Homes case outlines the formula for compensation. At paragraph 70 in the Arawak Homes case it is stated:-

“70 I now apply the applicable provisions of the Act outlined at paragraph 20 above under the discussion of The Law. It provides that because of the compulsory nature of the acquisition 10% must be added to the basic market value derived under s. 28, and to the basic value must also be added pursuant to the proviso to s 18 interest on the award at the annual rate of 5% per centum per annum from the date of publication in the Official Gazette of the Notice of Declaration of Vesting until payment of the compensation.”

Parties Submissions on Damages

68. The Court must now consider:

- a. Whether the Plaintiff is entitled to exemplary and/or punitive damages for breach of Article 27 of the Constitution.**

69. The Plaintiff asserts that the Defendant is, by implication, "conceding to the point that the Plaintiff's right to prompt and adequate payment as guaranteed by Article 27 of the Constitution has been breached. The Defendant has not addressed the fact that the Plaintiff was prevented by the Defendant from exercising her property rights since 2007 when she attempted to obtain a permit to build."
70. The compensation regime as set out under the Act must be consistent with Article 27 of the Constitution. The Government may prevent a citizen from using her land before compulsorily acquiring same. The compensation regime as set out under the Act does not address this period, which could be likewise length. However, this does not prevent the Court from awarding exemplary and/or punitive damages for breach of Article 27.
71. The Court has jurisdiction to award damages such as punitive and exemplary damages when the Government has taken oppressive, arbitrary, or unconditional actions. In **Takitota v the Attorney General [2009] UKPC 11**, the Privy Council observed the following:

[12] The award of exemplary damages is a common law head of damages, the object of which is to punish the Defendant for outrageous behaviour and deter him and others from repeating it. One of the residual categories of behaviour in respect of which exemplary damages may properly be awarded is oppressive, arbitrary or unconstitutional action by the servants of the government, the ground relied upon by the Court of Appeal in the present case. It serves, as Lord Devlin said in *Rookes v Barnard* [1964] AC 1129, [1964] 1 All ER 367, [1964] 2 WLR 269, to restrain such improper use of executive power. Both Lord Devlin in *Rookes v Barnard* and Lord Hailsham of St Marylebone LC in *Broome v Cassell & Co Ltd* [1972] AC 1027, [1972] 1 All ER 801, [1972] 2 WLR 645 emphasised the need for moderation in assessing exemplary damages. That principle has been followed in *The Bahamas* (see *Tynes v Barr* (1994) 45 WIR at 26), but in *Merson v Cartwright and the Attorney General* [2005] UKPC 38, [2006] 3 LRC 264 the Privy Council upheld an award of \$100,000 exemplary damages, which they regarded as high but within the permissible bracket.

72. The purpose of the award of such damages for breach of a constitutional right has been adequately explained by the Privy Council in **Attorney General of Trinidad and Tobago v Ramanoop** [2005] UKPC 15. Lord Nicholls observed the following in this regard:

[16] Their Lordships were helpfully referred to a number of authorities where courts in other countries have considered the scope of the remedies a court may order in respect of constitutional infringements. Of particular assistance is the New Zealand jurisprudence, notably observations of Cooke P in *Simpson v Attorney-General (Baigent's case)* [1994] 3 NZLR 667, 678, and the judgment of Thomas J in *Dunlea v Attorney-General* [2000] 3 NZLR 136, 152.

[17] Their Lordships view the matter as follows. Section 14 recognises and affirms the court's power to award remedies for contravention of chapter I rights and freedoms. This jurisdiction is an integral part of the protection chapter I of the Constitution confers on the citizens of Trinidad and Tobago. It is an essential element in the protection intended to be afforded by the Constitution against misuse of state power. Section 14 presupposes that, by exercise of this jurisdiction, the court will be able to afford the wronged citizen effective relief in respect of the state's violation of a constitutional right. This jurisdiction is separate from and additional to ("without prejudice to") all other remedial jurisdiction of the court.

[18] When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under s 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law.

[19] An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to

reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in this additional award. "Redress" in s 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions "punitive damages" or "exemplary damages" are better avoided as descriptions of this type of additional award.

[20] For these reasons their Lordships are unable to accept the Attorney General's basic submission that a monetary award under s 14 is confined to an award of compensatory damages in the traditional sense. Bereaux J stated his jurisdiction too narrowly. The matter should be remitted to him, or another judge, to consider whether an additional award of damages of the character described above is appropriate in this case. Their Lordships dismiss this appeal with costs.

73. Accordingly, the Plaintiff submits that the sum of \$250,000.00 should be awarded by the Government for breach of Article 27 of the Constitution as it cannot be argued that the Plaintiff has received prompt payment since 2010.

Decision

74. Compensation pursuant to the Acquisition Act is subsequent to the publishing of the Notice of acquisition which took place in 2010. The evidence reflect that the Ministry of Works in 2007 refused to issue the building permit. This prolonged deprivation of right, title, interest and benefit is unacceptable. The Government's failure to make prompt and adequate payment has caused the Plaintiff momentous loss.

75. Despite the compulsory acquisition for construction of a road, the works have not been carried out by the Government of The Bahamas. The court notes that there are homes and what appears to be apartments in the area surrounding the property. No evidence was led to substantiate why the Plaintiff, has been denied approvals resulting in her being forced to pay rent and satisfy a loan over the subject property.

76. The Court having visited the locus in quo and noting the development of the subdivision and the date of the conveyance to the Plaintiff rejects the evidence of

Mr. Galanos as it relates to the development of the property particularly roads and utilities. I do not accept that it was farmland.

77. The Government failed and or refused to approve her plans thereby preventing her from constructing her planned duplex. This is unacceptable and what is reprehensible is their failure to provide timely and adequate compensation.

78. The Court accepts the Government's inherent right to compulsorily acquire one's property for the collective good or benefit of the community. However, natural justice requires compensation. The prolonged failure to provide compensation has put the Plaintiff at a significant disadvantage and this failure is nothing short of disgraceful and unacceptable.

79. What is even more disconcerting is that the Plaintiff obtained a mortgage to purchase this property which she repaid/satisfied and hoped to use the property as an investment. The Government prevented the Plaintiff from obtaining a return on her investment. Her numerous requests for compensation went unanswered. She even requested the property be swapped with other Government land and there was no response.

80. The Court concurs with Sir Brian Moree in **Winterhaven Holdings Ltd. et al V The Hon. Dr. Hubert Alexander Minnis P. M.** that in circumstances where the party doesn't have the land or the compensation, interest is to be paid on the sum outstanding until compensation is given.

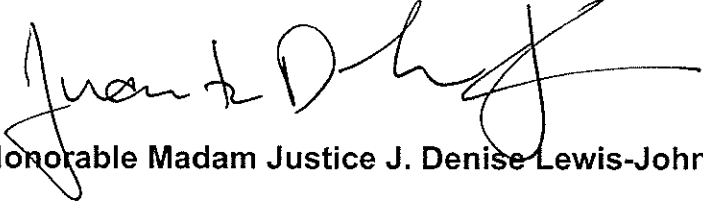
81. The Court finds that the Acquisition Act is not inconsistent or in contravention of the fundamental rights guaranteed in the Constitution. However, the compulsory acquisition of property, plus failure to provide prompt and adequate compensation resulting in significant hardship and almost financial ruin to the Plaintiff is grounds for the Plaintiff to receive damages for loss of revenue and cost of alternative housing.

82. For all of the reasons stated above, the Court having heard the evidence, watched the demeanor of the parties and having considered the relevant law finds as follows:-

- i. The Plaintiff is entitled to statutory compensation for the compulsory acquisition of the subject property in accordance with the Acquisition of Lands Act;

- ii. The Plaintiff is entitled to interest on the compensation amount until paid;
- iii. The Defendant is in breach of failure to provide prompt and adequate compensation to the Plaintiff;
- iv. The Defendant is in breach of Article 27 of the Constitution by failing to provide the Plaintiff with prompt and adequate compensation;
- v. There is no trespass and or nuisance by the Defendant;
- vi. The Plaintiff is entitled to loss of revenue and cost of alternative housing;
- vii. That exemplary damages were not specifically pleaded and thus the Plaintiff is not entitled to same per Order 18 Rule 8 (3) of Rules of the Supreme Court;
- viii. Sums due to be assess with the Judge and Registrar;
- ix. Cost to the Plaintiff to be taxed if not agreed.

Dated this 27th day of September 2023, A.D.


The Honorable Madam Justice J. Denise Lewis-Johnson