Trinity Term
[2022] UKPC 33
Privy Council Appeal No 0023 of 2020
and 0024 of 2020

JUDGMENT

Estate of Dame Bernice Lake QC (Deceased) (Appellant) *v* Attorney General of Anguilla (Respondent) (Anguilla)
Estate of Dame Bernice Lake QC (Deceased) and another (Respondents) *v* Attorney General of Anguilla (Appellant) (Anguilla)

From the Court of Appeal of the Eastern Caribbean Supreme Court (Anguilla)

before

Lord Briggs
Lord Kitchin
Lord Sales
Lord Hamblen
Lady Rose

JUDGMENT GIVEN ON
15th August 2022

Heard on 10 and 11 May 2022

Estate of Dame Bernice Lake QC (Deceased) and Conch Bay Development Ltd (Appellant/Respondents)
Thomas Roe QC
Kendrickson Kentish
Kerith Kentish
(Instructed by Joyce Kentish & Associates)

Attorney General of Anguilla (Respondent/Appellant)
Richard Clayton QC
Dwight Horsford AG
Richard Moules
(Instructed by Sheridans and Attorney General's Chambers (Anguilla))

LORD SALES AND LADY ROSE:

1. This case is concerned with the assessment of compensation in respect of the compulsory purchase of land on Anguilla in 2003 by the Government pursuant to the Land Acquisition Act (Chap L10) ("the Act") to extend the runway at the airport. The land was owned by Dame Bernice Lake QC, since deceased. These proceedings have been maintained by her estate, and for convenience the Board will refer to Dame Bernice and her estate together as "the Lake appellant".

2. A dispute arose between the Government, represented by the Attorney General, and the Lake appellant about the amount of compensation to be paid. Pursuant to the Act the dispute was referred to a Board of Assessment (Sir Clare Roberts QC, Mr Clarvis Joseph and Mrs Elizabeth Stair) ("the BoA"). The BoA assessed the compensation due in the sum of US$1.26m. The Lake appellant appealed against this assessment to the Court of Appeal on a number of grounds. The Court of Appeal allowed the appeal in part and substituted a figure of US$19.5m as compensation. It dismissed other aspects of the Lake appellant's appeal, including in respect of the extent of injurious affection of land, that is to say, the adverse effect on land retained by the Lake appellant resulting from the runway extension project.

3. There are now two appeals before the Board. The Attorney General appeals against the Court of Appeal's decision to substitute its own award of compensation for that of the BoA. He maintains that there was no error by the BoA and no proper basis on which the Court of Appeal could set aside the award it had made. The Lake appellant appeals against the Court of Appeal's dismissal of its appeal in relation to the extent of injurious affection of the retained land.

4. As regards the Attorney General's appeal, Mr Thomas Roe QC for the Lake appellant accepts that the decision of the Court of Appeal is flawed and cannot stand. However, he maintains that the Court of Appeal's criticism of the decision of the BoA is valid, with the result that the case should be remitted for a further hearing before the same or a differently constituted Board of Assessment. The important question on the Attorney General's appeal, therefore, is whether the BoA's decision is vulnerable to challenge.

FACTUAL BACKGROUND

5. Over a considerable period of time, Dame Bernice Lake (and now her estate) and members of her family have been interested in assembling a parcel of land on Anguilla with a view to developing it as a high-end tourist resort. Together, they held

land to the east of the airport, extending from the coast on the south of the island to far inland. The Lake appellant owned a plot identified as Parcel 100, comprising 110 acres of land immediately to the east of the airport and extending down to the coast. Members of the family owned a larger adjacent plot to the east identified as Parcel 126, comprising 256 acres which also included a portion of coastline.

6. In 2000 the Lake appellant and family members applied for planning permission to develop a tourist resort on Parcel 100 and Parcel 126 ("the combined plot"). The application remained on file for many years without a decision being made by the planning authority.

7. In 2003 the Government decided that the existing airport runway should be extended to the east in order to accommodate larger aircraft to serve the tourist industry on the island. The extension plan meant that additional land was required to allow for the extension of the runway and the safety zone at the end of it. The land the Government believed was required comprised 26 acres from within Parcel 100.

8. The Government and the Lake appellant were not able to agree terms for the acquisition so the Government used its powers of compulsory acquisition under the Act to acquire the land it required. The date on which the acquisition took effect was 28 November 2003, which was the material date for the purposes of valuing property pursuant to the Act.

9. The runway extension was completed in January 2004. It transpired that only 10 acres out of the 26 acres acquired were actually required ("the 10 acre plot"). The remaining 16 acres ("the 16 acre plot") were returned to the Lake appellant in 2008 and again became part of Parcel 100.

10. Also in 2008, the Government made an interim payment of US$3m to the Lake appellant in respect of its obligation to pay compensation in relation to its acquisition of the 10 acre plot and the 16 acre plot.

11. Meanwhile, in 2007 outline planning permission was granted for the development of a tourist resort on the combined plot and Conch Bay Development Ltd ("CBDL") was formed as the corporate vehicle to carry that project forward. In March 2008 CBDL became the successor in title to the owners of Parcel 126 and hence acquired any right they had to compensation under the Act in respect of that Parcel. However, the project did not progress very far.

THE LAW

12. The Act makes provision for the compulsory acquisition of land by the Government for public purposes. Compensation must be paid pursuant to the Act for such an acquisition.

13. Section 18 of the Act is headed "Rules for assessment of compensation". It is agreed that it has to be read in light of the Constitution of Anguilla (SI 1982/334) ("the Constitution"), which is the fundamental law of the state. Section 7(1) of the Constitution provides:

> "No interest in or right over any property of any description shall be compulsorily acquired, and no such property shall be compulsorily taken possession of, except by or under the provisions of a written law which-
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> (a) prescribes the principles on which and the manner in which adequate compensation thereto is to be determined;
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> (b) requires the prompt payment of such adequate compensation;
>
> (c) prescribes the manner in which the compensation is to be given; and
>
> (d) the manner of enforcing the right to any such compensation."

14. It is common ground that reading section 18 in a manner which conforms with section 7 of the Constitution means that its text requires modification in two respects. First, in an earlier constitutional challenge brought by the Lake appellant to the compulsory acquisition of the land in this case, the Court of Appeal upheld the constitutionality of the Act but ruled that certain parts of section 18 were unconstitutional so that the provision should be read with those parts being excised: *Attorney General of Anguilla v Bernice Lake QC* (2005) CA No 4 of 2004.

15. The effect of that ruling by the Court of Appeal is that section 18 provides, so far as material, as follows:

> "18(1) Subject to the provisions of this Act, the rules set out in this section shall apply to the assessment and award of compensation by a Board for the compulsory acquisition of land.
>
> (2) The value of the land shall, subject as hereinafter provided, be taken to be the amount which the land, in its condition at the material time, might be expected to realise if sold at that time on the open market by a willing seller.
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> …
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> (8) No allowance shall be made on account of-
>
> (a) the acquisition being compulsory or the degree of urgency or necessity which has led to the acquisition;
>
> (b) any disinclination of the person interested to part with the land acquired;
>
> …"

16. Secondly, in order to ensure that section 18 produces an outcome which conforms with the requirement of section 7 of the Constitution that there be adequate compensation, it is common ground that section 18 should be read subject to the addition of a rule equivalent to section 7 of the Compulsory Purchase Act 1965 (UK) ("the 1965 UK Act"), as follows:

> "In assessing the compensation to be paid by the acquiring authority under [the Act] regard shall be had not only to the value of the land to be purchased by the acquiring authority, but also to the damage, if any, to be sustained by the owner of the land by reason of the severing of the land purchased from the other land of the owner, or otherwise injuriously affecting that other land by the exercise of the powers conferred by [the Act]."

17. That rule supplements the basic rule in the compulsory purchase regime in the United Kingdom, at rule 2 of section 5 of the Land Compensation Act 1961 (UK) ("the 1961 UK Act"), which states that "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 realise", and thus broadly corresponds to section 18(2) of the Anguillan Act.

18. Accordingly, in line with section 7 of the 1965 UK Act, it is agreed by the parties for the purposes of this appeal that section 18 of the Act includes the possibility of compensation being awarded for injurious affection (ie detrimental impact) in relation to other land retained by the owner of the land which is compulsorily acquired and for damage sustained by the owner "by reason of the severing of the land purchased from the other land of the owner" (compensation for severance). Compensation for severance may be payable if the two parcels of land together have a value in combination which is greater than the sum of their parts.

19. In the course of these proceedings, a number of methods for calculating the compensation due have been discussed. The method which was the focus of the discussion in the Court of Appeal, as explained below, was the one used in the decision of the Land Valuation Tribunal at Auckland, New Zealand in *Hamilton v Minister of Lands* [2012] NZLVT 2 ("*Hamilton*"). It was common ground that the date as at which the value of the land being acquired and any injurious affection in relation to other land retained by the Lake appellant should be assessed is 28 November 2003.

20. Section 10 of the Act provides for all questions and claims relating to payment of compensation under the Act to be submitted to a Board of Assessment appointed in accordance with the provisions of section 11. Section 11 stipulates that a Board of Assessment shall be composed of a judge of the High Court, as chairman, a member appointed by the Governor in Council (ie the Government) and a member appointed by the owner of the land to be acquired (ie the Lake appellant). Section 16 provides that the Board of Assessment "shall decide upon the claims for compensation … submitted to them and shall make an award".

21. Section 16(3) states: "An appeal shall lie against a decision of the Board to the Court of Appeal". This is not limited to a question of law. It is common ground that the usual approach to appeals where the first instance tribunal has determined questions of fact applies. An appellate court will only intervene in relation to such matters if the first instance tribunal has misdirected itself in some way or has made a finding which it could not rationally make.

THE PROCEEDINGS BEFORE THE BoA

22. The hearing before the BoA of the Lake appellant's claim for compensation under the Act took place over five days in 2014. The Lake appellant claimed compensation under three main headings. The first was the value of the 10 acre plot that was compulsorily acquired. The second was the value of the 16 acre plot for the period before it was returned to the Lake appellant in 2008. Thirdly, the Lake appellant made a claim for compensation for injurious affection of the land retained by it (ie the part of Parcel 100 left after the 10 acre plot was carved out), which is to say for the detrimental impact on that land from the public works associated with the compulsory acquisition of the 10 acre plot.

23. In addition to the Lake appellant's claim, CBDL made a claim for compensation in relation to Parcel 126 on the grounds that it was to be treated as land associated and integrated with the Lake appellant's land which was the subject of compulsory acquisition.

24. Factual evidence on behalf of the Lake appellant was given by George Lake, who is one of the personal representatives of Dame Bernice's estate and was a director of CBDL. He described in detail the initiation and progress of plans to develop the combined plot from the mid 1990s onwards, noting that the capital expenditure required was calculated at that time to be in excess of US$200 million.

25. The key evidence informing the BoA's deliberations was the parties' respective experts' valuation reports. The Lake appellant lodged expert evidence from two valuation experts. One had provided a residual valuation of the combined plot but this report was abandoned at the start of the hearing before the BoA. The Lake appellant's only valuation expert at trial was Mr Carlyle Glean Jr B.Eng, MA Sc, PE who filed three reports on valuation. The Attorney General relied on the expert evidence of Mr Edward Childs of Smith Gore BVI Ltd. Mr Glean and Mr Childs were both cross-examined on their reports at the hearing. The parties also made detailed written submissions after the trial.

(a) The Lake appellant's and CBDL's case before the BoA

26. The principal points of dispute between Mr Glean and Mr Childs related to what should be taken to be the "highest and best use" ("HBU") of the 10 acre plot as at 28 November 2003. This included consideration of what should be taken to be the HBU of the combined plot, and whether the 10 acre plot was properly to be regarded for the purposes of valuation as an integral part of the combined plot. The concept of

HBU of the relevant land was fundamental for working out the compensation available in respect of the land which was compulsorily acquired under the Act and also for working out the extent of injurious affection of land retained by the Lake appellant.

27. The contention of the Lake appellant and CBDL before the BoA, as particularly set out in the reports and oral evidence of Mr Glean, was that Parcel 100 and Parcel 126 were so closely associated in terms of contiguity, ownership and prospective combined use that they should be regarded as a single unit, ie in the form of the combined plot, for the purposes of application of the scheme for compensation under the Act. Mr Glean's evidence was to the effect that the value of the combined plot should be assessed as at 28 November 2003, before the compulsory acquisition of land and the implementation of the runway extension scheme, on the basis that it was a unitary whole which was suitable for high-end tourism development, including hotel, marina, condominiums, villas and golf course, in accordance with the application for planning permission made in 2000 and the permission granted in outline (for the remaining part of the combined plot) in 2007. In support of his contention that the proposed resort was financially viable at the material time, Mr Glean relied on and exhibited a funding proposal of 2011 ("Exhibit N") prepared by CBDL with a view to persuading the Jumeira Hotel Group to invest in the resort scheme.

28. On the basis that high-end tourist development on the combined plot was viable in planning terms and was feasible in financial terms, Mr Glean selected as comparable sales of land in the open market a series of sales of small parcels of undeveloped coastal land in Anguilla suitable for high-end villas or similar. He averaged these to produce a range of market values per acre and, after adjusting for what he said was the superior quality of land in the combined plot, allocated the combined plot to the higher end of that range. In this way he derived a value per acre for such high-end tourist development on the combined plot of US$1,294,000. His evidence was that this should be taken to be the HBU value for every acre of the combined plot, including each acre in the 10 acre plot subject to compulsory acquisition. He therefore arrived at a valuation of the 10 acre plot, taken by itself, of 10 x US$1,294,000 = US$12,940,000.

29. Mr Glean then turned to address the extent of injurious affection of relevant land in a separate calculation exercise. For this he identified the relevant land as the remainder of the combined plot and again took the HBU for the plot to be US$1,294,000 for each acre. He then worked out how much of the combined plot fell within the approach zone for the airport and valued the reduction in its development value on the basis that there was a planning restriction preventing any building at all on higher ground in that zone throughout the combined plot. According to him, this

would eliminate the most attractive parts of the combined plot for building high-end tourist villas, bringing down the value per acre of the combined plot left after the acquisition of the 10 acre plot (ie 351 acres) to US$1,000,000. Thus, he calculated the value of 351 acres of the combined plot at the pre-acquisition value per acre (US$1,294,000) being US$454,194,000 and deducted from that the post-acquisition value of that 351 acres at US$1,000,000 per acre to arrive at the value for injurious affection of US$103,194,000.

30. This, added to the value of the 10 acres acquired (US$12,940,000), gave a total for the compensation due of US$116,134,000.

31. Mr Glean described the figure of US$103,194,000 as being for "Damages (severance and injurious affection)", but as his calculations showed in substance it was a sum purely for injurious affection. He did not suggest that the HBU value per acre of the 10 acre plot and the HBU value per acre of the remainder of the combined plot were affected by their being severed from each other. The issues identified by the Lake appellant and CBDL for determination by the BoA thus included only the issue of compensation for injurious affection, with no question of any issue of compensation for severance of the 10 acre plot being raised.

32. Mr Glean did not perform a separate valuation exercise in relation to the 16 acre plot.

(b) The Attorney General's case before the Board

33. Mr Childs on behalf of the Attorney General disputed Mr Glean's contention that the combined plot should be treated as an integrated unit for the purposes of assessment of injurious affection. Mr Childs emphasised that, at the material time, Parcel 100 and Parcel 126 were owned by different people and were physically divided.

34. He nevertheless dealt in detail with the viability of the proposed high-end tourism development for the combined plot on which Mr Glean had based his valuation. Mr Childs accepted in his evidence that the tourist development of the combined plot might have been legally permissible in planning terms. But in his report and his oral evidence he expressed serious reservations regarding the financial feasibility of the proposed development of the combined plot, particularly in view of the fact that it had no or only limited beach front, by contrast with the beach location of other high-end tourist developments. The beach area on the coastal section of Parcel 100 was not in the ownership of the Lake appellant and lay on the

other side of a public road. The coastline of Parcel 126 was rocky, rather than beach. Moreover, a resort residential development as proposed would have required substantial investment in infrastructure prior to the sale of real estate.

35. On the basis that the asserted high-end tourism development of the combined plot was unrealistic, Mr Childs concluded that the HBU for the 10 acre plot "would be residential development for Anguillian residents provided the height of development was consistent with the transition zone regulations operating at the airport" (ie the planning position in relation to the approach zone for the runway). He identified evidence of the market value of the 10 acre plot from sales of comparable land suitable for similar residential development, giving a value of US$50,000 per acre, to arrive at his figure of US$500,000 as compensation for that plot.

36. Mr Childs also made the same assessment of HBU as residential use in relation to the remaining part of Parcel 100, after removal of the 10 acre plot. In view of the size of the remainder of that Parcel, Mr Childs' view was that the price per acre would be somewhat lower than for the 10 acre plot, at US$35,000. He used that figure per acre as the basis for his calculation of the amount of compensation for injurious affection in relation to development within 42 acres of Parcel 100 which lay within the approach zone ("the 42 acre plot"). He used a similar approach to the use of the 16 acre plot (which was part of Parcel 100), but valuing it at US$50,000 since it was a smaller plot like the 10 acre plot, as the basis for his calculation of the compensation due in relation to that.

37. Mr Childs addressed the issue of severance in his report, correctly noting that "severance is not limited to land that has been severed from the whole (ie the remainder of the land)"; but he continued "in this instance we do not consider the assessment of compensation for severance to be relevant as no land has been affected by severance as the result of [the Government] compulsorily acquiring [the 10 acre plot] within Parcel 100." In other words, in his opinion the 10 acre plot and the remainder of Parcel 100 could not be said to have a greater value when looked at together as compared with looking at the sum of their value as separate parcels of land. As noted above, Mr Glean and the Lake appellant did not seek to present any case to dispute this assessment.

38. Mr Childs' assessment that there was no loss attributable to severance of the 10 acre plot was in line with, and supported, his view that it was appropriate to value the 10 acre plot on a stand-alone basis, as land suitable for residential development only, by reference to equivalent comparable sales of such land. This was a point he also emphasised in his oral evidence. It should be noted that, from Mr Childs'

perspective, this was a relevant but not critical point to make. Since his assessment was that the HBU for the whole of Parcel 100 was residential development, it made little difference whether the value of the 10 acre plot was assessed on a stand-alone basis separate from the remainder of Parcel 100, or as an integral part of Parcel 100. In fact, in view of Mr Childs' approach to the value per acre of the remainder of Parcel 100 (at US$35,000), it was more generous to the Lake appellant to assess the value per acre of the 10 acre plot on a stand-alone basis (at US$50,000).

39. As to injurious affection, Mr Childs' evidence was that 42 acres of the retained acreage of Parcel 100 was adversely affected by the extension of the runway. 20 acres suffered a diminution in value of 50% because it was affected by both noise and a restriction on future building development and a further 22 acres suffered a diminution in value of 25% because of the effect of noise.

THE BoA'S DECISION

40. The BoA handed down its decision in April 2016.

41. The first issue determined by the BoA was whether, as CBDL claimed, the land in Parcel 126 was so closely associated with the Lake appellant's land which was subject to compulsory acquisition as to give CBDL a right to claim compensation under the Act. The BoA dismissed the case of the Lake appellant and CBDL that the 10 acre plot was to be regarded as an integral part of the combined plot. Instead, the BoA held that the relevant larger parcel of which the 10 acre plot formed part was Parcel 100: para 74. CBDL therefore had no right to compensation.

42. Before the Board the submission by the Lake appellant that the combined plot is relevant for valuing the compensation due to them has fallen away and is not pursued. It should be noted, however, that it was relevant for the BoA to determine the appropriate larger parcel for the purposes of assessing compensation for injurious affection.

43. The BoA separately assessed the value of the 10 acre plot and the 16 acre plot and then considered the amount of damage by reason of injurious affection of other land as a separate item. The BoA's approach to the assessment of compensation for the Lake appellant followed the way in which both sides invited them to assess what was due under the Act.

44. The BoA decided that the value of the 10 acre plot which had been acquired and retained by the Government should be determined on a stand-alone basis, not as a sub-parcel of the combined plot as the Lake appellant had argued. At para 82 it reiterated that the 10 acre plot "is capable of being assessed on a stand-alone basis" and it held "that it is on such basis that compensation should be addressed". Accordingly, it is clear that the BoA was not saying that the value of acquired land should always only be assessed on a stand-alone basis; rather, it accepted Mr Childs' reasoned opinion why it was appropriate to do so in the circumstances of this particular case.

45. The BoA found the evidence of valuation given by Mr Glean to be incredible and accepted the expert evidence of Mr Childs "that the 10 acres can be assessed on a stand-alone basis" (para 77). The BoA then accepted Mr Childs' evidence that the HBU of the 10 acre plot was for residential development. On this basis, again accepting his evidence, it valued the 10 acre plot pursuant to section 18(2) of the Act at US$500,000.

46. The BoA went on to award the Lake appellant compensation for the compulsory acquisition of the 16 acre plot, but adjusted to reflect the fact that it had been returned to the Lake appellant after 4 years and 4 months. The BoA once again accepted the evidence and calculation of Mr Childs and awarded compensation based on a notional rental figure for that period for land suitable for residential development use only. On this basis, the BoA awarded US$210,000.

47. The BoA did not assess a value in relation to damage from severance, because Mr Glean and the Lake appellant did not suggest there was any and Mr Childs' evidence was that there was none.

48. As regards compensation for injurious affection of land within the relevant larger unit retained by the Lake appellant (Parcel 100), the evidence of Mr Glean was to the effect that injurious affection arose from detrimental impacts associated with the movement of aircraft through the new approach zone and Mr Childs' evidence was to the same effect. It was agreed that the relevant affected part of the remainder of Parcel 100 (as distinct from the combined plot) was the 42 acre plot. The approach of the Lake appellant, CBDL and Mr Glean was to treat the whole of that plot as an area of total restriction for all built development. The approach of Mr Childs was to distinguish between noise effects and partial restriction on building.

49. The BoA did not accept the case of the Lake appellant and CBDL to the effect that there was a total restriction of development within the approach zone. Instead, it found the approach adopted by Mr Childs to be more credible and reliable.

Whether there is any valid challenge to that finding is the subject of the Lake appellant's appeal, considered below.

50. Accepting Mr Childs' evidence on this issue, the BoA found that the 42 acre plot was subject to detrimental impact from the extension of the runway in two respects: (i) by the imposition of new planning restrictions as to the extent of development permitted, which, whilst not prohibiting all development of the land as the Lake appellant contended, would reduce the value of the land subject to them, and (ii) by increased noise from aircraft flying closer overhead. As to 20 acres of the 42 acre plot, which were higher and closer to the extended runway, the BoA found that both (i) and (ii) applied and on that basis awarded compensation at 50% of the value they would have had as at 28 November 2003 had the runway extension not taken place. As to the remaining 22 acres, which were lower and further from the runway, the BoA found that only (ii) applied and on that basis awarded compensation at 25% of the value they would have had.

51. In deciding the value to which to apply those percentage diminutions in value, the BoA, again accepting the evidence of Mr Childs, decided that it was appropriate to use the same comparable land sale transactions for valuation of Parcel 100 generally as had been used in relation to the 10 acre plot, but with adjustment to take account of the greater size of Parcel 100. The BoA therefore adopted a value of US$35,000 per acre for the land suffering from injurious affection: para 110. On this basis, the BoA made an award for injurious affection in the sum of US$550,000, which Mr Childs had rounded up from the sum of US$542,500 arrived at by his calculations: para 111.

52. The BoA also awarded interest in relation to these sums. Since the sums awarded by the BoA were less than the US$3m interim payment made in 2008, the interest awarded only ran to the date when that payment was made. The sum total of the award made by the BoA was US$1.26m.

THE DECISION OF THE COURT OF APPEAL

53. The Lake appellant and CBDL appealed to the Eastern Caribbean Court of Appeal. The hearing of the appeal took place in December 2016 and the Court of Appeal handed down its decision in December 2018. The sole substantive judgment was by Michel JA, with whom Blenman JA and Paul Webster QC JA (Ag.) agreed.

54. The Court of Appeal dismissed the appeal by the Lake appellant and CBDL against the BoA's finding that the 10 acre plot was not part of a unit comprising the

combined plot of Parcel 100 and Parcel 126. The Court of Appeal held that the BoA had been entitled to find on the facts that Parcel 126 was not fused or amalgamated with Parcel 100 and hence that CBDL was not entitled to compensation under the Act by reason of the compulsory acquisition of part of Parcel 100. This meant, among other things, that CBDL was not entitled to any award for injurious affection in relation to Parcel 126. There is no appeal against this ruling.

55. However, the Court of Appeal upheld the Lake appellant's submission that the BoA had erred in its approach to the valuation of the 10 acre plot. It ruled that the BoA had been wrong to assess the 10 acre plot on a stand-alone basis. Instead, it should have adopted the "before and after" method of valuation according to which one takes the value which the whole of the parcel of land of which the acquired land forms part would have had at the material date if there had been no acquisition and deducts from that the value which that parcel of land has after allowing for the removal of the acquired land. The difference between the two gives an overall value for the value of the acquired land plus any damage due to severance plus any damage by injurious affection of the retained land in the parcel.

56. The application of this method can be illustrated by the New Zealand case of *Hamilton* which the Court of Appeal discussed at paras 30-40. *Hamilton* concerned the acquisition of land and airspace for the purpose of constructing a new viaduct carrying a motorway. The relevant legislation provided for compensation for land taken for the construction of the foundation and piers to support the new structure and also for injurious affection of the owner's retained land which would have a motorway running above it, resulting in a restriction on development of buildings on some of the land above a height of 8 metres. The evidence provided to the tribunal by expert valuers for both parties adopted the "before and after" method of valuation by which they placed a value on the total area of unencumbered land and compared that with the value of the total remaining land (that is minus the acquired land) including some with a more limited height restriction.

57. The tribunal in *Hamilton* decided that the appropriate approach to valuation in that case was to determine the value on the "before and after" basis. The before value was 3,023m^2 at $2,100 psm. After acquisition the retained land comprised 2,863m^2 which included substantial areas (1,066 m^2) which were significantly impaired by the development. The after value of the retained land was assessed at $1,850 psm because it suffered from the overriding presence of the extended viaduct, a poorer shape configuration and uncertainty about the continued presence of the existing buildings. Within the retained land the tribunal identified parcels located beneath the viaduct which suffered significant further diminution in value because of the new height restrictions and loss of potential for redevelopment.

Percentage reductions to the overall value of $12,850 psm were applied to those areas.

58. Michel JA was, wrongly, under the impression that this was the valuation method which Mr Glean had used. In Michel JA's opinion, the BoA's approach was wrong because it meant that no account was taken of the fact that the 10 acre plot was severed from Parcel 100 (comprising 110 acres) and that its value as part of Parcel 100 "may have been greater in price per acre than would be the case if assessed as a stand-alone 10 acre parcel of land" (para 23). Michel JA gave two reasons why the BoA had gone wrong. First, in rejecting the case of the Lake appellant and CBDL that the 10 acre plot had formed part of a larger unit comprising the combined plot, the BoA had made a finding that it had formed part of a larger unit comprising Parcel 100: para 24. Secondly, in his view the BoA's approach made a nonsense of the fusion and amalgamation principles which should be taken to inform section 18(2) and it was wrong to ignore "the fact that the acquired land [the 10 acre plot] is but a severed part of a larger piece of land [Parcel 100], from which larger piece it acquired its value": paras 25-27.

59. Applying the "before and after" method used in *Hamilton* himself, Michel JA observed that this required that the value of Parcel 100 should be determined in its before condition (ie 110 acres) and in its after condition (ie 100 acres), with the HBU being the use most profitable to its owner which is legally permissible, physically possible and financially feasible. He held that the BoA had erred in its assessment of the HBU of the 10 acre plot and the use to which other parts of Parcel 100 could have been put if the runway extension project had not taken place, including the 16 acre plot and the 42 acre plot. In Michel JA's view, since Parcel 100 stretched from the road along the coast inland to the edge of the airport, it could not be seriously disputed that the land comprising Parcel 100 was suitable for tourism development, including high-end tourism development. Michel JA did not refer to any evidence in support of this assessment, nor explain why he rejected those parts of Mr Childs' evidence which clearly did dispute in particular the financial feasibility of the development even of the combined plot. He made that finding despite neither expert witness giving evidence to support this assessment or relying, for example, on a residual valuation figure to demonstrate the development value of the land.

60. Having decided that the HBU of Parcel 100 is "mixed residential and high-end tourism" (para 51), Michel JA noted at para 53 that the court did not have before it any values for Parcel 100 comprising a mix of coastal lands suitable for five-star development and lands bordering on the airport which were suitable at best for local residential development. He said that in light of the long passage of time since the date at which the land had to be valued, it was not feasible to remit the question of valuation to the BoA - the values before the court may be the best that could now be

available. Given that the HBU of the remainder of Parcel 100 was a mixture of residential and high-end tourism development, the valuation per acre ranged from that used by Mr Childs (which reflected residential use) to that used by Mr Glean (which reflected use for high-end tourism). He therefore added together what he took as the two experts' competing valuations and divided that sum by two to arrive at an average value of the acres in Parcel 100. The two figures he added were US$1,310,000 per acre, which was in fact slightly higher than the maximum given by Mr Glean based on a high-end tourism valuation, and a figure of US$5,000 per acre, which appears to be an error as Mr Childs' valuation was in fact US$50,000 per acre: paras 54-56. The value per acre which Michel JA arrived at by this method was US$657,500, and he therefore assessed the value of the 10 acre plot to be US$6,575,000.

61. In conceding that the Attorney General's appeal must be allowed in part, Mr Roe accepts that Michel JA acted unfairly in adopting the method of averaging the two competing valuations without first indicating to the parties that he proposed to do so and wrongly failed to give them an opportunity to make submissions. Therefore, says Mr Roe, the Board should remit the case to the BoA with a direction that it receive further evidence from the parties about the value of Parcel 100, so that the "before and after" method in *Hamilton* could be used.

62. Turning to the compensation due for the acquisition of the 16 acres, Michel JA applied the rental valuation method proposed by Mr Childs but substituted the same far higher HBU value for that land to arrive at the figure of US$2,384,533.33.

63. As to injurious affection, Michel JA upheld the BoA's decision that no award for injurious affection should be made in relation to Parcel 126 because it was not part of an integrated parcel of land which included the 10 acre plot. He agreed with the BoA that compensation should be paid to the Lake appellant for injurious affection in relation to the part of Parcel 100 which it retained, and that this involved the 42 acre plot. He also upheld the BoA's assessment of the measure of injurious affection, namely 50% of value as to 20 of the acres and 25% of value as to the remaining 22 acres. He noted that the BoA was not convinced that the evidence before it supported the position of Mr Glean on injurious affection and that it found the evidence of Mr Childs to be more credible and reliable, and continued (para 66): "This was a factual finding made by the [BoA] on the evidence before it, and I can find no basis for this Court to overrule it." This part of the Court of Appeal's ruling is the subject of the Lake appellant's appeal to the Board. However, Michel JA overturned the BoA's assessment of the quantum of damage due to injurious affection because it had been based on its assessment of the value of the land contained in Parcel 100, "which value was itself based on an erroneous application of

the stand-alone method of valuation, leading to an incorrect assessment of [HBU]": para 67.

64. In the Board's view this involves an incorrect reading of the BoA's decision on injurious affection. Its valuation of the remaining land in Parcel 100 was not based on application of the stand-alone method of valuation (whether erroneous or otherwise), but on Mr Childs' evidence as to the value of Parcel 100 taken as a whole: see para 51 above.

65. In place of the BoA's assessment, Michel JA substituted his own erroneous averaged-out assessment of the value per acre of Parcel 100 and then applied the 50% and 25% discount measures to that: para 67. The Court of Appeal thereby arrived at a figure of US$6,575,000 for the 20 acre part of the plot and US$3,616,250 for the 22 acre part of the plot. The figure arrived at for compensation for injurious affection was US$10,191,250.

66. The total award of compensation made by the Court of Appeal was therefore US$19,150,783. In light of these higher compensation figures, the Court of Appeal also adjusted the sums due to be paid to the Lake appellant by way of interest.

THE ATTORNEY GENERAL'S APPEAL

67. The Attorney General appeals to the Board in relation to the compensation awarded by the Court of Appeal. In response to the Lake appellant's appeal, the Attorney General maintains that the measure of injurious affection of the 42 acre plot adopted by the BoA and endorsed by the Court of Appeal cannot be impugned.

68. It is accepted that the Attorney General's appeal should be allowed at least in part. As set out by Mr Roe in his submissions, the question is whether the BoA erred in its assessment with the result that its order ought also to be set aside and the case remitted for further hearing.

69. In the judgment of the Board, there is no sound basis on which the assessment of compensation by the BoA can be impugned. The Board considers that the criticisms by the Court of Appeal of the BoA's decision to value the 10 acre plot on the stand-alone basis are unfounded and the BoA was entitled to accept the evidence of Mr Childs regarding the valuation of the 10 acre plot, the 16 acre plot and the 42 acre plot on the footing of a HBU for all of them of residential development, rather than high-end tourist development.

70. It is important to emphasise that the only case which Mr Glean and the Lake appellant presented to the BoA in relation to assessing the amount of compensation due under the Act was a case based on an HBU of the combined plot. They did not seek to present any alternative case based on identifying the value of the 10 acre plot on a stand-alone basis, distinct from the combined plot and the rest of Parcel 100, or based on identifying the value of Parcel 100 and then deriving the value of the 10 acre plot as an integral part of that Parcel. Nor did the Lake appellant present any case or evidence based on the "before and after" method of valuation used in *Hamilton*. Mr Glean did not value the combined plot before the acquisition of the 10 acre plot and then value it after the acquisition of the 10 acre plot in order to arrive at a *Hamilton*-style "before and after" valuation in relation to the combined plot; still less did he value Parcel 100 before the acquisition of the 10 acre plot and then value it after the acquisition of the 10 acre plot. Mr Glean's methodology was developed in order to arrive, first, at a value for the 10 acre plot, and secondly, at a separate value for injurious affection of associated land (which he took to be the combined plot).

71. There are two reasons why the BoA's approach to valuation of the 10 acre plot on a stand-alone basis in the manner it chose to adopt cannot be said to be wrong in law. First, section 18(2) directs an approach to valuing the land which is compulsorily acquired on the hypothetical footing that it is placed on the open market as a distinct parcel of land by a seller who is willing to sell it as such. Section 18(8)(b) emphasises this point, by stating that any disinclination of the landowner to part with the land acquired is to be disregarded. According to this basic rule, therefore, it does not matter at this stage that the landowner might have been trying to preserve the acquired land as part of a larger parcel with a view to developing that wider parcel. It may be added that this is how the equivalent valuation rule in the 1961 UK Act has also been interpreted: see *Ramac Holdings Ltd v Kent County Council* [2014] UKUT 0109 (LC), para 62. As the Upper Tribunal pointed out in that case, "[i]nsofar as the claimant suffers a loss because of a diminution in the value of retained land then this will form a claim for compensation for severance and/or injurious affection. It does not justify adopting an artificial approach to valuing the reference land as if it still formed part of a larger whole." The BoA did not go wrong in law by approaching the valuation exercise in relation to the 10 acre plot as it was directed to do by section 18 of the Act, so long as it was also prepared to consider the issues of compensation for severance and injurious affection of land retained by the landowner, according to the analogy with section 7 of the 1965 UK Act. The BoA clearly was prepared to consider the relevance of the overall use of Parcel 100 in that context.

72. Contrary to the view of the Court of Appeal, the BoA was not legally obliged to adopt the "before and after" approach as applied in *Hamilton*. A Board of Assessment may be entitled to choose to adopt such an approach in an appropriate

case, since it is possible that this might be one method by which a comprehensive, undifferentiated figure can be achieved to cover all the distinct elements for which compensation is to be awarded, namely for the value of the acquired land on a stand-alone basis (as required by section 18(2) of the Act) and for severance and injurious affection (as required by section 18 read so as to conform with section 7 of the Constitution). But being entitled to choose to use such a method is very different from being obliged to use it.

73. Mr Roe cited *Pattle v Secretary of State for Transport* [2009] UKUT 141 (LC); [2009] RVR 328, paras 61-63, which shows that under the equivalent United Kingdom regime it is accepted that the use of the *Hamilton*-style "before and after" approach may be legitimate in an appropriate case. In *Pattle* reference was made to research and recommendations by the Law Commission for England and Wales in its work on compulsory purchase which supports that view. However, neither in *Pattle* nor in the Law Commission materials was it suggested that a tribunal is obliged to use such an approach. Indeed, to the contrary, in its review of the existing law in its Consultative Report, *Towards a Compulsory Purchase Code: (1) Compensation* (Consultation Paper No 165, 2002), the Law Commission observed that compensation for the compulsory acquisition of land is traditionally assessed under separate heads for the market value of the land subject to acquisition, severance and injurious affection of retained land (para 3.3). Further, the Law Commission noted that, although using the "before and after" approach could be accepted in practice, "[i]n principle, it seems, the reduction in value of the retained land should be assessed separately from the value of the land taken" (para 5.15).

74. Under the Anguillian regime, the onus was on the Lake appellant to persuade the BoA that it would be appropriate to adopt an approach other than that mandated by section 18(2) of the Act, which focuses on valuing the acquired land on a stand-alone basis. In particular, if the Lake appellant wished to persuade the BoA that it was appropriate to adopt a *Hamilton*-style "before and after" approach to valuation, it had to adduce evidence in support of such an approach and to establish that it would be appropriate to adopt it. But it did not do that: see para 70 above. Mr Glean addressed the value of the 10 acre plot and the issue of injurious affection separately in his evidence, following the conventional approach, and Mr Childs for the Attorney General did the same. Against this background, the BoA cannot be criticised for following the conventional approach and assessing the value of the 10 acre plot on a stand-alone basis.

75. The second reason why it was lawful for the BoA to do this is that it was entitled, on the particular facts of the case, to reject the idea that the HBU of Parcel 100 was high-end tourism, particularly once it had rejected the Lake appellant's case that the HBU of the combined plot was the development described in Mr Glean's

report. Mr Glean did not attempt to assess the HBU of Parcel 100 since his evidence focused exclusively on the valuation of the combined plot. Nor did he attempt to assess the HBU of the 10 acre plot in any way apart from his argument that it was to be regarded as an inherent part of a unified parcel of land comprising the combined plot, which argument was rejected by the BoA and the Court of Appeal and has not been revived before the Board. It cannot be assumed that the much smaller Parcel 100 could be developed in the same way as the combined plot, or with the same value per acre. Indeed, among the "Basic Assumptions and Limiting Conditions" set out in the introduction to his first report, Mr Glean stated that the value estimates in the report "apply to the entire property and any proration or division of the total into fractional interests will invalidate the value estimate unless such proration or division of interests is set forth in the report". Development of the combined plot of 361 acres would have been likely to allow for economies of scale and the development of more extensive facilities, such as a proposed marina and golf course, to be shared by a larger population of residents buying properties there, without which a smaller development on Parcel 100 would have been likely to be less attractive and less financially viable.

76. In his submissions, the Attorney General had criticised the reasoning of Mr Glean in support of the contention that a high-end tourist development of the combined plot was financially feasible. CBDL had sought after the acquisition of the 10 acre plot to execute the resort project in the period 2006-2007 with the full support of the Government, in the benign conditions before the financial crash, but had failed to attract the financing to achieve this. Also, Exhibit N, relied on by Mr Glean, was a document in the form of a sales pitch by the developer to try to attract financing, which had been merely aspirational even in 2011, and was not evidence of financial viability supported by any independent expert assessment of such viability. The financing sought using Exhibit N had not materialised. Therefore the Lake appellant and CBDL had failed to make out any good positive case that in 2003 the 10 acre plot could be regarded as part of a high-end tourist development which had any realistic prospect of being carried into effect.

77. Having rejected that HBU, the BoA was entitled to accept the evidence of Mr Childs that it was appropriate to assess the value of the 10 acre plot separately from Parcel 100, and accordingly to give the 10 acre plot a higher value on that stand-alone basis. The evidence of Mr Childs could not be said to be defective or irrational. He gave proper and understandable reasons as to why no part of the land being assessed, whether the combined plot, Parcel 100 (or the 16 acre plot and 42 acre plot parts thereof), or the 10 acre plot, represented a viable opportunity for high-end tourist development in November 2003 of the kind alleged by the Lake appellant. He gave positive reasons why it was possible and appropriate to value the 10 acre plot on a stand-alone basis and for his own valuation figure, based on potential

residential development. He did the same in relation to the value of Parcel 100. The BoA was entitled to accept his evidence on these matters, not least because it had rejected the evidence of Mr Glean and his approach based on the alleged value of the combined plot.

78. In the Board's respectful opinion, the criticisms of the BoA by Michel JA cannot be sustained. The BoA did not ignore the fact that the 10 acre plot was part of Parcel 100. It accepted the evidence of Mr Childs why, despite this, it was appropriate to assess its value on a stand-alone basis and, indeed, at a higher value per acre than would be applicable to Parcel 100 as a whole. There is no inconsistency in the BoA's reasoning regarding its decision at para 74 that the 10 acre plot was part of Parcel 100 and its later decision to assess its value on a stand-alone basis. It was relevant for the BoA to make a finding regarding the relevant larger parcel of land of which the 10 acre plot formed part, since that was the basis for the assessment it had to make about compensation for injurious affection of retained land. It was also relevant to the BoA's consideration, on the facts, whether it was appropriate to give a value to the 10 acre plot on a stand-alone basis. In the circumstances of the case, on the basis of the evidence of Mr Childs as accepted by the BoA, it was appropriate to do so.

79. Therefore the Board will humbly advise Her Majesty that the Attorney General's appeal should be allowed in full. Since, as set out below, the Board will also advise that the Lake appellant's appeal should be dismissed, there is no proper basis on which the case should be remitted to the BoA or a different Board of Assessment.

THE LAKE APPELLANT'S APPEAL

80. As outlined above, the Lake appellant's appeal is on a narrow point. Mr Roe submits that the BoA erred in accepting the evidence of Mr Childs regarding the measure of injurious affection in relation to the 42 acre plot and that the Court of Appeal likewise erred in dismissing the Lake appellant's appeal on this point.

81. The issue which arises concerns the effect of the policy and practice of the planning authority for the island regarding development within the 42 acre plot. In conjunction with the extension of the runway a new planning policy was adopted in September 2004 to limit development in the vicinity of the airport, in particular to ensure that building would be restricted in the area over which planes would land and take off (called the approach zone or the transition zone).

82. Policy AIR1 in the new planning policy stated:

> "The Government of Anguilla will not grant planning permission for development which:
>
> a) will interfere with or be adversely affected by the operation of the airport
>
> b) lies in the transitional surface and approach zone of the airport
>
> c) penetrates the approach slope of the airport runway
>
> d) is in any other way an obstruction and hazard to aircraft approaching or leaving the runway."

83. In 2009 the Lake appellant applied for planning permission to construct four two-storey villas within the 42 acre plot. By a decision letter dated 13 July 2011 ("the 2011 decision letter") the planning authority refused the application, giving as its reasons:

> "i. the [planning authority] wishes to prevent any future development which will interfere with or be affected by the future development of [the airport]
>
> ii. the proposed development lies within the take off zone of the runway [ie the approach zone] which is an area of total restriction for all built development; and
>
> iii. the proposal will contribute to an unacceptable build up of permanent residents in the area which is considered unsuitable by reason of its proximity to [the airport]."

84. For its appeal the Lake appellant relies on paragraph (b) of policy AIR1 and reason (ii) in the 2011 decision letter in support of its contention that one consequence of the runway extension was the introduction of a complete prohibition on building within the 42 acre plot, where building development had previously been permitted. According to the submission of Mr Roe for the Lake appellant, on the Lake appellant's appeal, this feature of the new planning regime was overlooked by the BoA when it made its assessment of the extent to which land retained by the Lake

appellant (the 42 acre plot), was detrimentally affected by the public works associated with the compulsory acquisition of the 10 acre plot when it made its award of compensation for injurious affection of the 42 acre plot. According to Mr Roe, in light of the new policy AIR1 in 2004 and the 2011 decision letter the BoA was bound to find that there was a complete restriction on building within the 42 acre plot as a result of the airport extension.

85. The opinions of Mr Glean and Mr Childs as to the measure of injurious affection in relation to the 42 acre plot depended on the factual position regarding planning policy and practice in relation to that plot after the runway was extended. Mr Glean and the Lake appellant asserted that the factual position was that planning policy and practice meant that there was a complete prohibition against building in that area. Mr Childs took the position to be, and the Attorney General maintained, that planning policy and practice was to the effect that limited building was permissible in the approach zone, provided it did not represent a risk to aircraft approaching or leaving the runway, and Mr Childs' report explained why limited building could take place on the plot without posing any such risk. The BoA found that the relevant factual position regarding applicable policy and practice was that on which Mr Childs based his opinion. The Court of Appeal found that the BoA was entitled to make that finding of fact.

86. The Lake appellant is therefore seeking to appeal on a matter of fact in a case where there are concurrent findings by the tribunal and court below. It is the long-established practice of the Board that an appeal in relation to concurrent findings by the courts in the local jurisdiction will only be allowed in exceptional cases: see, for recent statements of this principle, *Byers v Chen Ningning* [2021] UKPC 4, [2021] 3 LRC 434 and *Dass v Marchand* [2021] UKPC 2, [2021] 1 WLR 1788. The Board can see no basis on which the present appeal could be described as being in any way exceptional.

87. In view of the Board's practice in a case involving concurrent findings of fact, it is not appropriate to go in detail through the evidence. It suffices to point out that planning policy is not law and that what mattered for the purposes of assessing the value of injurious affection of the retained land was the likely impact in fact on that land as a matter of policy and practice. In support of his position on this part of the case, at the hearing before the BoA the Attorney General called as a witness Mr Vincent Proctor, a senior planning officer of the planning authority. Mr Proctor gave evidence about the 2011 decision letter and the planning restrictions in place in relation to the 42 acre plot after the extension of the runway. He was cross-examined. Mr Proctor's evidence was to the effect that there was no absolute prohibition on building in the approach zone and that, despite the way it was drafted, the 2011 decision letter was based on the fact that the proposed villas were

excessively high, so that it could not be taken to establish that all new building was forbidden in the approach zone. Moreover, there was other evidence to which the BoA referred (para 107) which bore out that view of the applicable planning policy and practice.

88. Accordingly, it cannot be said that there was a total absence of evidence on this issue capable of supporting the BoA's assessment. There is no other aspect of the case which could justify a departure from the Board's usual practice to refuse appeals in relation to concurrent findings of fact.

89. Therefore the Board will humbly advise Her Majesty that the Lake appellant's appeal should be dismissed.