

IN THE SUPREME COURT OF  
THE REPUBLIC OF VANUATU  
(CIVIL JURISDICTION)

CIVIL CASE NO. 28 OF 2013

BETWEEN: KILBRIDE LIMITED  
Claimant

AND: REPUBLIC OF VANUATU  
Defendant

Coram: Justice Mary Sey

Counsel: Mark Hurley for the Claimant  
Frederick Gilu for the Defendant

Date of Hearing: 5 December 2013

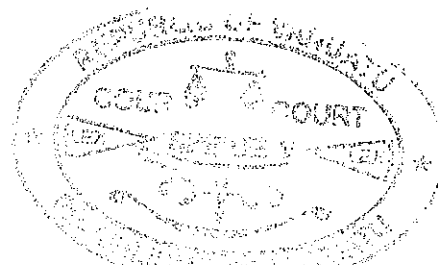
Date of Decision: 25 April 2014

**JUDGMENT**

1. This case concerns the amount of compensation to be awarded to the Claimant in respect of the acquisition of its land known as Mandela Park with leasehold title no. 11/OB24/048 (“the land”).

**Background**

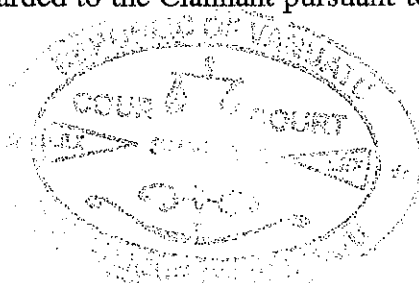
2. On 26 March 2011, the then Minister of Lands and Natural Resources gave notice of his intention to acquire the land for public purpose pursuant to s.4 (1) of the *Land Acquisition Act* [CAP 215] (“the Act”).
3. Pursuant to s.4 (3) of the Act, on or about 13 April 2011 the Claimant gave written notice to the Acquiring Officer of its objection to the notice.
4. By a declaration dated 6 September 2011 and published in Official Gazette No. 38 of 2011, the then Minister declared for the purpose of sections 4 and 6 of the Act that the land should be acquired.
5. The Acquiring Officer proceeded with the acquisition process and by clause 6 of his notice dated 9 September 2011 he gave notice to the Claimant to submit its claim for compensation.



6. On 7 October 2011, the Claimant gave notice to the Acquiring Officer and included the submission of two property Valuation Reports which set out the basis of the computation of the Claimant's claim for compensation.
7. These Valuation Reports are from:
  - a) Tahi Consultants and Real Estate Services dated 24 January 2011 which places the market value as at 24 January 2011 at VT245,800,000; and
  - b) Vanuatu Property Valuations Limited dated 6 June 2011 which places the market value as at 6 June 2011 at VT207,000,000.
8. By notice dated 29 January 2013 the Claimant was advised that the Acquiring Officer had assessed its compensation of the unexpired term of the registered lease at VT66,500,000 based on the Valuation Assessment Report prepared by the Valuation Unit, Lands Department, and dated 30 August 2011.
9. By its letter dated 1 February 2013 the Claimant advised the Acquiring Officer that it did not accept the assessment of compensation of VT66,500,000 for the land because it does not reflect the "market value" as required by section 9(1)(a) of the Act.
10. The Acquiring Officer responded to the Claimant by letter dated 20 February 2013 stating that the offer is final and non-negotiable.
11. The Claimant is dissatisfied with the Acquiring Officer's said assessment under the Act and hereby appeals to this Court against that assessment and seeks the following reliefs, inter alia:

"1. A declaration that the assessment as notified by the Acquiring Officer in his notice dated 29 January 2013 does not comply with the matters to be taken into account as provided by section 9(1) of the Act having regard to the Valuation Reports submitted to him by the Claimant;

2A. That in lieu of the assessment of compensation in the Acquiring Officer's notice dated 29 January 2013 that this Honourable Court assess the compensation to be awarded to the Claimant pursuant to the Act.



2. In the alternative, an order that the Acquiring Officer or the Valuer General reassess compensation to be awarded to the Claimant for the land in accordance with section 9(1) of the Act;
3. In the alternative, an order that following the Acquiring Officer's or Valuer General's reassessment of the compensation payable to the Claimant for the land in accordance with section 9(1) of the Act that such assessed sum shall be paid to the Claimant within 90 days;
4. In the event of the Defendant's failure to comply with paragraph 3, the Claimant be at liberty to transfer, encumber or otherwise deal with the land as it shall deem fit, without further notice to the Defendant....."

12. It is not disputed that the Claimant is entitled to compensation as envisaged under section 10 of the Act which provides that:

*"Compensation shall be awarded to the custom owner of the land and the persons interested therein for loss of rents and loss of any financial gains for the period from the date of the notice of intention of acquisition till compensation awarded under section 9 is paid in full."*

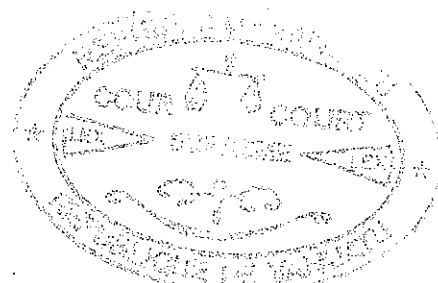
13. The primary issue posed for determination by this Court is whether the assessment of compensation made by the Acquiring Officer was in accordance with section 9(1) of the Act.

### **The Evidence**

14.. The Claimant relies on the following sworn statements:

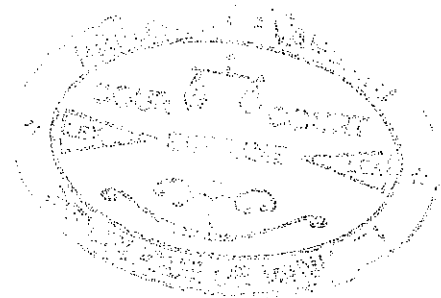
- a) Douglas Reid Patterson filed on 10 July 2013; and
- b) Jeremy Dick filed on 26 August 2013.

15. The Claimant contends that in determining the proper level of compensation for a compulsory acquisition, "the value to be paid for is the value to the owner as it existed at the date of the taking not the value to the taker."



16. The Claimant further contends that there is no justification under the Act for the Acquiring Officer to depart from valuation based on the sales comparable approach and to assess the value of compensation based on the unexpired term of the registered lease. Furthermore, that if the unexpired term of the lease was a legitimate matter to be taken into account in determining compensation it would need to be one of the statutory matters to be considered, but it is not.
17. At paragraph 37 of his sworn statement dated 10 July 2013, Mr. Patterson states that:

“Sales values have not declined because of the unexpired term of the lease, simply because it is a straightforward administrative process, open to any lessee, to extend any urban lease that has a term of less than 75 years. Any registered lessee can extend the term of a lease less than 75 years by using the procedure in section 32B of the *Land Leases Act* [CAP 163], as amended, and pay the premium and administrative fees required.”
18. The Claimant also takes issue with the Valuer General’s reduction of the market value by taking into account the lessor’s and lessee’s interests.
19. The Claimant submits that the assessment of compensation should be based on the market value of the land by adopting the comparable sales approach, because it is commensurate with actual market behaviour, and not the Valuer General’s opinion as to how the market should act.
20. On the other hand, the Defendant submits that having assessed the possible market value of what would be the probable value of sale, such assessment must be made in light of the remaining period of the lease as the Claimant’s interest on the land (subject for resumption) is a leasehold interest and not similar to the interest of a custom owner who has a perpetual ownership of land (subject to the Land Acquisition Act).
21. The Defendant submits that in construing section 9(1)(a) of the Act, reference should be given to other provisions of the Act so as to give some meaning to the application of section 9(1)(a) of the Act.



22. The Defendant further submits that the Acquiring Officer did comply with section 9(1)(a) of the Act in his determination of the market value of the property of the Claimant based on a leasehold interest.
23. The Defendant relies on the following sworn statements:
- a) Rocky Adams, Acquiring Officer, filed on 1 August 2013; and
  - b) Menzies Samuel filed on 3 December 2013.
24. In his report, Mr. Adams states: "Regardless of the fact that the Government would only compensate the unexpired term of the lease as discussed above, it is worth knowing what the Market Value of the subject Property is." Mr. Adams then concludes that the Value Compensation of the unexpired term of the registered lease is VT 66,500,000.

**Matters to be considered in determining compensation under the Act**

25. Section 9 provides as follows:

*"1. In determining the amount of compensation to be awarded for any land or easement acquired under the provisions of this Act, the Acquiring Officer or the Valuer-General under this Act shall take into consideration –*

- (a) the market value of the land or easement at the date of the notice of intention to acquire such land or easement;*
- (b) the value of damage sustained during investigations carried out under section 2;*
- (c) the value of damage sustained by the owner or any person interested by loss of any growing crops or trees which may be on the land at the time of notice of intention of acquisition of the land;*
- (d) the value of damage sustained by the custom owner or any person interested at the time of notice of intention of acquisition of the land by reason of severing such land from his other land;*
- (e) where a part of any land is acquired, the value of damage if any sustained by the custom owner or any*



person interested, at the time of notice of intention of acquisition of the land by reason of the acquisition injuriously affecting remaining part of his land and interest and any subsequent injurious affection by virtue of the use to which the acquired land or interest is put;

- (f) if, in consequence of the acquisition of the land, the custom owner or the person interested is compelled to change his residence or place of business, the reasonable expenses, if any, incidental to such change;
- (g) if, in consequence of the acquisition of the land and the easement therein, the adjoining land and easement therein are enhanced, the value of that enhancement which shall be deducted from the amount payable in compensation;
- (h) if, in consequence of the acquisition of the land and the easement the person interested is compelled to surrender, vary or re-register any registrable interest, the costs of such change."

#### **Definition of market value**

- 26. The Claimant's counsel submits that he is unaware of any decided cases in Vanuatu regarding the assessment of compensation pursuant to the provisions of the Act and that it is therefore necessary to look to the Superior Courts of other common law jurisdictions.
- 27. In light of this, an examination of relevant case law shows that some Superior Courts of other common law jurisdictions have invariably held that, in determining the proper level of compensation for a compulsory acquisition, the value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taker.
- 28. For instance, the Fiji Court of Appeal stated in Singh v Attorney General of Fiji [2008] FJCA 33 [10-11] as follows:

*"In Cedar Rapids Manufacturing & Power Company v Lacoste [1914] AC 569, 569, the Privy Council held that in determining the proper level of compensation for a compulsory acquisition:*

- (a) *The value to be paid for is the value to the owner as it existed at the date of the taking not the value to the taker.*
- (b) *The value to the owner consists of all the advantages which the land possesses, present or future, but it is the present value alone of such that falls to be determined.*



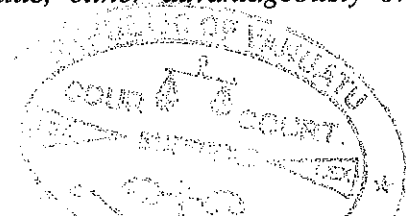
*The measure of the value of the land to be taken is the amount which the land might be expected to realise if sold by a willing seller, in the open market. The concept of compensation for not only the use to which land is currently being put at the time when its value is ascertained but also the use all [sic.] uses to which it is reasonably capable of being put in the future was reinforced in Raja Vyicheria Narayan Gajapatiraju v Vizagapatam [1939] AC 302. The concept of future used in this context includes not just probable future use but possible future use: Frazer v City of Frazerville [1917] AC 187...*

*11. At the trial, the learned trial judge considered as a working definition of the concept of market value (which is critical to section 12 of the State Acquisition of Lands Act) a definition proffered by the valuer for the Appellant. The working definition he accepted is that market value is the "estimated amount for which an asset should exchange on the date of valuation between a willing buyer and a willing seller in arm's height and length transaction after proper marketing wherein the parties as each acted knowledgeably, prudently and without compulsion". Slightly adjusted for syntax, this appears to be an appropriate working definition for this case."*

29. In Spencer v Commonwealth [1907] HCA 82; (1907) 5 CLR 418, Isaacs J. in the High Court of Australia said:

*"In the first place the ultimate question is, what was the value of the land on 1st January 1905?"*

*All circumstances subsequently arising are to be ignored. Whether the land becomes more valuable or less valuable afterwards is immaterial. Its value is fixed by Statute as on that day. Prosperity unexpected, or depression which no man would ever have anticipated, if happening after the date named, must be alike disregarded. The facts existing on 1st January 1905 are the only relevant facts, and the all important fact on that day is the opinion regarding the fair price of the land, which a hypothetical prudent purchaser would entertain, if he desired to purchase it for the most advantageous purpose for which it was adapted. The plaintiff is to be compensated; therefore he is to receive the money equivalent to the loss he has sustained by deprivation of his land, and that loss, apart from special damage not here claimed, cannot exceed what such a prudent purchaser would be prepared to give him. To arrive at the value of the land at that date, we have, as I conceive, to suppose it sold then, not by means of a forced sale, but by voluntary bargaining between the plaintiff and a purchaser, willing to trade, but neither of them so anxious to do so that he would overlook any ordinary business consideration. We must further suppose both to be perfectly acquainted with the land, and cognizant of all circumstances which might affect its value, either advantageously or*

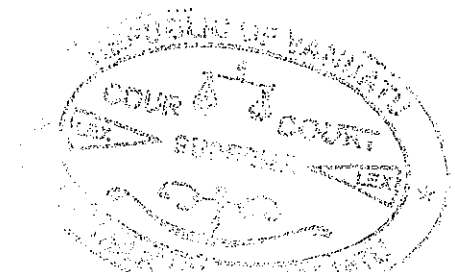


*prejudicially, including its situation, character, quality, proximity to conveniences or inconveniences, its surrounding features, the then present demand for land, and the likelihood, as then appearing to persons best capable of forming an opinion, of a rise or fall for what reason soever in the amount which one would otherwise be willing to fix as the value of the property."*

## **Findings**

30. It seems to me that for the purpose of this matter none of sub-paragraphs (b) to (h) of section 9 (1) of the Act are relevant.
31. The decisive factor is section 9(1)(a), namely, the market value of the land at the date of the notice of intention to acquire the land.
32. In his Assessment Report dated 30 August 2011 (annexure "RA1" to the sworn statement of Rocky Adams filed 1 August 2013), Mr Adams has applied the Australian Property Institute's (API) adoption of the International definition of the market value, namely:
- "Market Value is the estimated amount for which an asset should exchange on the date of valuation between a willing buyer and a willing seller in an arm's length transaction, after proper marketing, wherein the parties had each acted knowledgeably, prudently and without compulsion."*
33. Also, the definition of market value applied in the case of *Singh v Attorney General of Fiji* (which I referred to earlier in this judgment) is to all intents and purposes identical to the market value definition used by Rocky Adams in his Report dated 30 August 2011. Moreover, Mr Adams accepted, when it was put to him<sup>1</sup> in cross examination, that a valuation based on the unexpired term of the lease is not the same as the market value.
34. The Claimant's counsel submits that Mr. Adams does not proceed to assess compensation in accordance with that definition. Instead, Mr Adams has misdirected himself and incorrectly focussed his attention on "the unexpired term of the lease" and that the "unexpired term of the lease" is not one of the matters to be considered in determining compensation for the purpose of s. 9 (1) of the Act.

I agree.

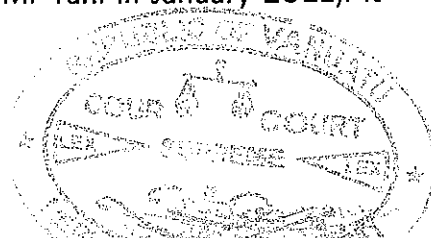




35. If the unexpired term of the lease was a legitimate matter to be taken into account in determining compensation for the purpose of section 9 (1) of the Act it would need to be one of the statutory matters to be considered, but it is not.
36. In any event, any registered lessee can extend the term of a lease less than 75 years by using the procedure in section 32B of the Land Leases Act [CAP 163], as amended, and pay the premium and administrative fees required. It is pertinent to note that in cross examination, both Messrs Adams and Samuel accepted that the ability of a lessee to apply under section 32B is an administrative process.

### Conclusion

37. In light of all the foregoing, I have reached the conclusion that, in determining the amount of compensation to be awarded for any land or easement acquired under the provisions of the Land Acquisition Act, the decisive factor is the market value of the land at the date of the notice of intention to acquire the land which, in this present case, was 26 March 2011.
38. In the circumstances, I grant the declaration sought by the Claimant and I hereby make the following Orders:
1. The assessment as notified by the Acquiring Officer in his notice dated 29 January 2013 does not comply with the matters to be taken into account as provided by section 9(1) of the Act having regard to the Valuation Reports submitted to him by the Claimant.
  2. The Acquiring Officer or the Valuer General should reassess compensation to be awarded to the Claimant for the land in accordance with section 9(1) (a) of the Land Acquisition Act within 30 days from the date of this Order.
  3. That the reassessment should take into account the valuations in evidence which range from VT190,932,000 (Mr Adams in August 2011) to VT245,800,000 (Mr Tah in January 2011). It



should also be borne in mind that Mr. Dick's market valuation of VT207,000,000 (in June 2011) is very similar to the Valuer General's market valuation of VT206,8000,000 (in November 2013) with both of them adopting the comparable sales approach.

4. That following the Acquiring Officer's or Valuer General's reassessment of the compensation payable to the Claimant such assessed sum shall be paid to the Claimant within 90 days.
5. The Defendant is to pay the Claimant costs on a standard basis to be agreed or taxed.

**DATED at Port Vila, this 25th day of April, 2014.**

**BY THE COURT**

  
**M.M. SEY**  
**Judge**

