IN THE CAYMAN ISLANDS COURT OF APPEAL

CICA 3 of 2013
G0426/2011

BETWEEN:

ABSHIRE BODDEN
The Executors of the Estate of HAROLD BODDEN
(Namely GENE THOMPSON and HAROLD WRIGHT)

Appellants

- and –

THE NATIONAL ROADS AUTHORITY
Acting by THE DIRECTOR OF LANDS AND SURVEY

Respondents

AND

CICA 10 of 2012
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Appellants

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Respondents

BEFORE:

The Right Hon Sir John Chadwick, President
The Hon Abdulai Conteh, Justice of Appeal
The Hon Sir Richard Ground, Justice of Appeal

Appearances: Michael Barnes QC and Kate McClymont, instructed by Broadhurst LLC for the appellants in No. 3 of 2013, and the respondents in No. 10 of 2012;
Guy Roots QC and Dawn Lewis, instructed by the Attorney General's Chambers, for the appellants in No. 10 of 2012, and the respondents in No. 3 of 2013.

Dates of Hearing: 11, 12 April 2013. Judgment delivered: 25 April 2013

JUDGMENT

Sir Richard Ground, Justice of Appeal

INTRODUCTION

1. This is the judgment of the Court. These appeals arise out of interlocutory rulings by Smellie CJ given in the course of an appeal to the Grand Court from an assessment of compensation by the Roads Assessment Committee ('the RAC'). The RAC is the tribunal established by section 7 of the Roads Law ('the Law') to determine disputes regarding the compensation to be paid to the owners of land which has been compulsorily acquired for road purposes. An appeal lies from such an assessment to the Grand Court pursuant to paragraph 8 of the Second Schedule to the Law. In this case the RAC made an assessment in favour of the owners of Block 28C parcel 1 ('the claimants'). The National Roads Authority ('the NRA'), which, as the statutory body charged with the construction and development of public roads, was the acquiring authority, lodged an appeal from that. Pending the hearing of the appeal the parties made cross-applications: the NRA applying for a stay of the award pending appeal, and the claimants for the immediate payment of the sum awarded. Those summonses came before the learned Chief Justice in the Grand Court on 26 January 2012. On 27 February 2012 the Chief Justice delivered a written ruling granting a stay, on condition of payment of a sum in respect of the claimants' costs. Although those orders are not appealed by either side, in the course of his ruling the Chief Justice made findings as to the nature, extent and mode of hearing of such an appeal, and the claimants seek to challenge those. That challenge is the subject of appeal No. 3 of 2013. The NRA, while not disputing the order for payment of a sum in respect of costs as a condition of the stay, seek to challenge the basis on which that sum was assessed, and that is the subject of appeal No. 10 of 2012[1]. We heard both appeals sequentially, starting with appeal No. 3 of 2013, as they arise out of the same written decision, and for the same reason will deal with them together, in that order, in this judgment.

[1] Leave to appeal was given to both parties on 7 November 2012.

2. The substantive appeal to the Grand Court now stands adjourned until the decision of this Court on this appeal. The actual issues on that appeal are not before us, and we express no view upon them.

THE BACKGROUND

3. The underlying facts are that the NRA was proceeding to acquire compulsorily 3.31 acres of land forming part of Block 28C, Parcel 1[2] for the purpose of extending the East–West Arterial Highway. At the material time the land was owned by the claimants, Harold Bodden (who has since died) and his brother Abshire Bodden, as tenants in common. The NRA took possession of the land in March 2007, and the section of the new highway built on it is now open to the public. However, the NRA and the claimants were unable to reach agreement regarding compensation, and in November 2009 the claimants referred their claim to the RAC. Before the RAC, the NRA argued that no compensation was payable to the claimants because the property had previously enjoyed no road access and the new highway had provided it with such access thereby increasing its value by more than the value of any damage. The claimants on the other hand contended that the property did have road access via a prescriptive easement and therefore that the new highway had not increased its value. There was an evidential hearing before the RAC on that issue, and both parties also called expert evidence in relation to the value of the acquired land, the diminution in the value of the retained land caused by its severance from the land taken, and the injurious affects of the new highway.

4. The RAC issued a decision in favour of the claimants on 29 September 2011. It found that the property had benefitted from a prescriptive easement prior to the acquisition and that the access provided by the new highway had not therefore increased its value. In assessing compensation the RAC found that:

(i) The value of the acquired land was CI$1.75 per square foot;

(ii) The value of the retained land was CI$1.25 per square foot;

[2] The assessment proceedings also concerned 0.03 acres of property forming part of Block 28C, Parcel 178 ("Property B"), but that is not relevant to these appeals.

(iii) An area equal to 5% of the total area of the retained land now has no value as a result of severance; and

(iv) An area of 150,000 square feet of the retained land was reduced in value by 10% as a result of injurious affection by the new highway;

On that basis the total compensation awarded to the owners by the RAC was CI$342,886.15[3], and they also awarded them their costs to be assessed or agreed.

THE LEGISLATION

5. Appeals from the RAC are governed by paragraph 8 of the Second Schedule to the Roads Law which provides –

> "8. (1) The Roads Authority or any person interested in the portion of land or having a right over such land who is aggrieved by an award of the Committee under this Law may, within 21 days of the date of the award or such longer period as the Grand Court may for good cause allow, appeal to the Grand Court on the ground that –
>
> (a) the extent of the interest or right in the portion of land has been wrongly determined; or
>
> (b) the Committee has erred as a matter of law.
>
> (2) Proceedings under subparagraph (1) may be regulated by rules of court.
>
> (3) On the hearing of an appeal brought under this paragraph, the Grand Court may make such order (including an order for costs) as it thinks fit."

6. Although no specific rules to regulate such appeals have been made under subparagraph (2), there are general provisions governing appeals from statutory tribunals in Order 55 of the Grand Court Rules. GCR Ord. 55 derives from, and is materially the same as, Ord. 55 of the Rules of the Supreme Court of England and Wales as they stood prior the coming into effect of the Civil Procedure Rules. The Order applies to "every appeal which by or under any enactment lies to the Court from . . . any tribunal or person." There is no dispute between the parties that those rules apply in this case. The key provision governing how such an appeal will conducted is Ord. 55, r. 3(1), which provides –

[3] This included $7,318.15 for injurious affection to the other parcel, but that is immaterial for this appeal.

"(1) An appeal to which this Order applies shall be by way of rehearing and must be brought by original motion."

THE APPEAL TO THE GRAND COURT

7. The NRA appealed the assessment of compensation to the Grand Court by Notice of Appeal dated 18 October 2011 on five grounds, which in summary were that the RAC –

(i) determined wrongly the extent of the claimants' interest in Block 28C parcel 1 by deciding that it had the benefit of a prescriptive easement;

(ii) erred in law in deciding that there was a prescriptive easement;

(iii) erred in law in deciding that planning permission for low density residential development would have been granted;

(iv) erred in law in deciding that the land should be valued as though satisfactory access were available and planning permission for low density residential development would have been granted with access by means of the alleged easement;

(v) erred in law in deciding that the retained land had not increased in value as a result of the access provided by the new road.

8. Grounds (ii) to (v) assert errors of law, and so, on their face , fall within subparagraph 8(1)(b) of the Second Schedule to the Roads Law. We do not express any view at all on whether that will prove to be so when the grounds are argued. Ground (i) does not on its face assert an error of law, and there is an issue whether, properly considered, it falls within subparagraph 8(1)(a) as concerning the extent of the claimants' interest or right in the land. We deal with that below. We note that Mr. Roots QC asserts that all the points he wishes to raise on this ground of appeal are also points of law, and so within paragraph 8(1)(b) in any event. We do not need to consider that and again express no view on it.

THE CHIEF JUSTICE'S RULING

9. As explained at the outset, the ruling which is the subject of this appeal was given on cross-summonses, the NRA seeking a stay on payment of the award pending the determination of its appeal, and the owners asking the court to order immediate payment of the compensation. Those

summonses, along with a further one which is not material to this appeal, came before the learned Chief Justice on 26 January 2012. The Chief Justice correctly determined that, in considering the application for a stay, he had to consider, among other things, whether the appeal had a realistic prospect of success. In that regard he was faced with a jurisdictional argument from the claimants that the prescriptive rights issue was not within subparagraph 8(1)(a). At the time the claimants were arguing that subparagraph 8(1)(a) was limited to the resolution of issues of title between competing claimants. That construction is no longer pursued, but it shaped the Chief Justice's approach. In particular, in rejecting the claimant's narrow construction, he concluded that the terms of subparagraph 8(1)(a) –

> "29. . . . imply a right of appeal, for determinations including as to whether the value of the interests or rights has been accurately and properly assessed by the RAC."

In doing so he considered that he was acting consistently with an earlier decision of Quin J in *Concept Limited v National Road Authority* 2009 CILR 629.

10. The Chief Justice then went on, although it may not have been necessary to do so in order to determine the application before him, to consider the nature of the appellate hearing. In this he may have been prompted by comments by Quin J at an interlocutory stage in the *Concept* case. As a result he concluded that –

> "33. Consistent with my finding that the right of appeal is not confined only to a matter of law (or to the determination only of interests or rights in the portion of land acquired as narrowly argued) I find, as a matter of procedure, that the appeal is one that allows for a rehearing de novo on the merits of the RAC's decision."

He then quoted *Concept* (*supra*), and continued –

> "34 This view of the wide ambit of the appeal procedure is in keeping with the ambit of the jurisdiction which I conclude exists to hear appeals on the merits of the RAC award generally, as well as on matters of law.

> 35. I would add this limitation only: it is in relation to the procedure by way of rehearing de novo, that the appeal must be confined to those matters identified in paragraph 8 of the Second Schedule as explained above.
>
> 36. It follows, and I so conclude, that the NRA has standing to challenge the factual merits as well as the legality, of the RAC's decision, by way of this appeal. And, in so doing, as a matter of procedure, the NRA would be entitled, as was decided also in the ***Concept*** case (above), to adduce new evidence, if relevant to the outcome."

11. It is those observations which the claimants seek to challenge in appeal No. 3 of 2013. The NRA does not seek to uphold the Chief Justice's view of the procedure and the extent of a rehearing, nor his decision that "value" is within subparagraph 8(1)(a)[4]. The only real difference between the parties is as to whether the existence and extent of appurtenant rights (in this case the alleged prescriptive rights of access) are within subparagraph 8(1)(a)[5].

12. Although the claimants wish us to correct what they say are fundamental errors in the approach of the Chief Justice, Mr. Barnes QC very properly draws our attention to a potential preliminary difficulty, being that the Chief Justice's observations did not find their way into his actual order, as he merely granted the stay, subject to a term as to the payment of a sum of money in respect of costs (which is the subject of appeal No 10 of 2012, with which we deal below). It may be said, therefore, that we are being asked to entertain an appeal against the judge's reasons rather than the actual decision. In this respect we were referred to *Secretary of State for Work & Pensions v Morina & Anor.* [2007] EWCA Civ. 749, where a similar issue arose. There the resolution was to parse out the decision –

> "10. . . . the "decision" referred to by Commissioner in paragraph 1 was in each case and in reality two decisions – first, that he had jurisdiction to hear the appeal and, secondly, that the appeal should be dismissed on the merits. . . . Having said that, however, I am not to be taken to be enabling a whole range of "winners' appeals." It is significant that, in the present case, the subject matter of the proposed appeals to this Court is a ruling by the Commissioner on a fundamental issue of jurisdiction and not a finding such as the finding of adultery in *Lake*. The latter was of interest only to the parties and, as between them, was of no lasting legal significance in view of the finding of condonation . . . I would

[4] See the Respondent's Notice of 14 February 2013, paragraphs 1 and 2.
[5] See Ibid. at paragraph 4.

> expect this Court to refuse the successful party below permission to appeal against an immaterial finding of no general significance.
> . . .
>
> 12. I should add that if and to the extent that our considering this appeal rests on an exercise of discretion, it is clearly appropriate to exercise that discretion affirmatively in view of the general importance of the issue. In these circumstances, I would unhesitatingly grant permission to appeal."

13. While we are very aware of the dangers of entertaining an appeal against reasons alone, we consider that, properly construed, the learned Chief Justice's ruling embodied quasi-declarations as to the meaning and application of subparagraph 8(1)(a) and the procedure to be followed on such appeals which are of general application, and of considerable importance. We think, therefore, that this case is within the approach adopted in *Secretary of State v Morina* (*supra*). In any event, although the Order drawn up at the time said nothing about the mode of trial, the Chief Justice's holdings in this regard subsequently formed the basis for a directions order made by Henderson J on 3 May 2012, which expressly provided that –

> "2. The trial of this action will be conducted as a hearing *de novo*."

In the remainder of the Order Henderson J then proceeded to give directions on that basis. That order is susceptible to an appeal, and we gave the necessary leave in the course of the hearing, the NRA offering no objection.

EXTENT OF THE RIGHT OF APPEAL

14. We now turn to consider the learned Chief Justice's analysis of the extent of the right of appeal conferred by subparagraph 8(1)(a). We consider that he was wrong when he held that subparagraph 8(1)(a) extends to include the value of the claimant's interest in the land. We do not think that the words are capable of bearing that meaning. The subparagraph gives any aggrieved person "interested in the portion of land or having a right over such land" the right to appeal on the ground that "the extent of the interest or right in the portion of land has been wrongly determined". The interest or right concerned is therefore the claimant's interest in or right over the relevant portion of land. The extent of which that right or interest must, plainly, be determined before it can be valued for the purposes of compensation. The expression 'interest' is really just another way of saying 'title'. A "right over such land", as it seems to us, refers to

rights over the land, such as easements or restrictive covenants appurtenant to other land, which are enjoyed by a person who does not have title to the land.

15. The distinction between the extent of the claimant's interest and its value is one drawn in the English case law. For instance, in *Rugby Joint Water Board v Footit and Shaw-Fox* [1973] AC 202, which concerned *inter alia* whether in the circumstances of that case the right to serve notices to quit upon protected agricultural tenancies had arisen, Lord Hodson said at 220A –

> "The ability to give an effective notice to quit is an element in the value of the land and cannot be disregarded. When the precise nature of the interest has been ascertained then the land can be valued."

Properly understood, as it seems to us, Lord Hodson is saying there that, in determining the extent of a landlord's interest (or title) to land which is subject to a protected agricultural tenancy (in the context of awarding compensation following compulsory acquisition), it is necessary to ask whether he is able to give an effective notice to quit and so bring the tenancy to an end.

16. There were various alternative interpretations of subparagraph 8(1)(a) floated before the Chief Justice. At one point the claimants argued that it referred to the geographical extent of the parcel, but that is no longer persisted with and is plainly wrong. Another argument was that it meant the determination of their respective rights amongst competing claimants. The Chief Justice rejected that, saying.

> 27. Fourth, despite the plain words of the statute expressly giving a right of appeal to the NRA or any person "who is aggrieved" by an award, the NRA would have no right of appeal on matters of quantum of an award in the ordinary case, as such a matter would not ordinarily be an issue arising as an error of law but as one of factual assessment."

17. We are satisfied, however, that, on a true reading, neither party has an appeal on the question of value alone, unless it does involve a point of law. If the legislature had wanted to confer a right of appeal against the RAC's assessment of value it could easily have said so in plain words. The assessment of value is, after all, the RAC's function, and it is inconceivable that the legislature overlooked the point. The only conclusion can be that the legislature deliberately

restricted the right of appeal, and, as we note below, there are sound policy and practical grounds for doing that.

18. The Chief Justice also said, in this context:

> 28. Fifth, the construction being propounded by Ms. McClymont would run counter to paragraph 8(3) of the Second Schedule to the Roads Law which provides that upon hearing an appeal, the Grand Court may make such Order (including as to costs) "as it thinks fit". This last is a provision that can make sense only in the context of an appeal where the issues to be determined below are again at large before the appellate court."

19. This line of reasoning appears to be derived from that of the House of Lords in *Lloyd v McMahon* [1987] AC 625, where at p. 697D Lord Keith observed that the wide powers conferred upon the court hearing an appeal under section 20(3) of the Local Government Finance Act 1982[6] were an argument for a "rehearing of the broadest possible scope". In the case of such an appeal the statute is wholly silent about the permissible grounds of appeal. We do not consider that such reasoning has any application where the statute specifies the permissible grounds of appeal, and the applicable rules deal with the procedure. In that context, subparagraph 8(3) of the Second Schedule to the Law adds nothing to the permissible grounds for an appeal which are spelled out in subparagraph 8(1). Rather, it deals with the powers of the court in respect of any permissible ground that it finds to have been made out.

20. The ascertainment of title is obviously much simplified in a jurisdiction, such as the Cayman Islands, where the Torrens system of land registration applies, but there will still be issues. A claimant may, for example, assert an unregistered prescriptive right. Even a registered interest may throw up nice questions as to its exact extent, as is illustrated by the facts of *Rugby Joint Water Board v Footit and Shaw-Fox* (*supra*) itself. An explanation why the draftsman of the legislation chose to break out matters of title from the general rule in paragraph 8, that an appeal may only be on a point of law, may be found in the development of the English law in this area. Prior to 1919 the statutory valuation tribunals had no jurisdiction to determine questions of title,

[6] The relevant part of section 20(3) of the Local Government Finance Act 1982 says:

> "(3)Any such person who is aggrieved by such a decision may appeal against the decision to the court and-
> (a)in the case of a decision to certify that any sum or amount is due from any person, the court may confirm, vary or quash the decision and give any certificate which the auditor could have given;"

and even thereafter their determination was not conclusive and was subject to challenge in other proceedings in which the issue arose. Some such distinction may have guided draftsman's thinking when he framed paragraph 8.

21. Whatever the reason for the form of paragraph 8(1), it reflects a departure from the English statutory regime, where, apart from the continuing jurisdiction of the courts to entertain questions of title, it has always been the case that the decision of the body responsible for assessing the amount of compensation is final save for a right of appeal on a point of law only. That is not an uncommon approach where parliament has chosen to confer jurisdiction upon a statutory tribunal. There are obvious practical reasons for doing this: it provides for finality, and prevents the courts being swamped by appeals. That is also a consideration when we come to the manner of dealing with appeals from such bodies, which we consider below. For the moment, the important point is that where the legislature has chosen to restrict appeals to points of law only, it is the duty of the courts to respect it[7].

22. There remains one difficult question on the ambit and meaning of "the extent of the interest or right in the portion of land"; which, given that the primary issue in this case was whether the land itself was 'landlocked' or had the benefit of prescriptive rights giving it access over adjacent land, we think we must address. Is that issue within subparagraph 8(1)(a)? As we have said, the paragraph refers to "the extent of the [proposed appellant's] interest" in the land which has been compulsorily acquired. On a strict interpretation it is difficult to see how the existence (or non-existence) of an appurtenant right over other land could be within that expression: appurtenant rights over other land are part of the property itself, not of the claimant's interest in the property. Thus, in the Land Register, they go in the Property Section not in the Proprietorship Section of the Register[8]. A similar issue could arise if the land was said to be the subject of some right

[7] Neither party referred us to the provisions of section 15 of the Constitution, which guarantee property rights. Those provisions do contain requirements in respect of any law governing compulsory acquisition, including a claimant's right of access to the Grand Court. We have not considered whether they have any impact on the issues before us, or whether the Roads Law as interpreted by us is compliant with the Constitutional requirements.

[8] See section 9 of the Registered Land Law –

(appurtenant to other, neighbouring, land) which affected its enjoyment. Again, on a strict interpretation , it is difficult to see how the existence (or non-existence) of an adverse right over the land could be within the expression "the extent of the [proposed appellant's] interest" in the land which has been compulsorily acquired. It is a feature of that land itself: not a feature which goes to the extent of the proposed appellant's interest in that land.

23. Against that Mr. Roots urges a purposive interpretation, saying that such issues can be complex, involving difficult questions of mixed fact and law and so should be subject to review by the courts[9]. As we have said, we do not find that question easy. However, having considered the matter carefully, we do not think that we can extend the clear words of the statute in this way, and so hold that subparagraph 8(1)(a) is restricted to questions of the claimant's title to the land and does not include questions as to the extent of the land itself. We have in mind that in most, if not all, cases the question whether prescriptive rights have been acquired over land will involve a question of law; and subparagraph 8(1)(b) will provide a right of appeal in such cases.

MODE OF TRIAL

24. As noted above, neither party seeks to uphold the Chief Justice's decision as to the mode of trial. Indeed, the NRA went so far as to file a summons of 1 October 2012 seeking a variation of Henderson J's Order to limit each side to the evidence adduced before the RAC (although it left in place the direction that the appeal would be conducted as a hearing *de novo*). That summons was before Quin J on 7

"**9.** (1) The Land Register shall comprise a register in respect of every parcel which has been adjudicated in accordance with the Land Adjudication Law (1997 Revision), and a register in respect of each lease required by this Law to be registered.

(2) Each register shall show whether the land is private land or Crown land and, in respect of private land, whether the title is absolute or provisional, and shall be divided into three sections as follows—

A—the property section, containing a brief description of the land or lease, together with particulars of its appurtenances and, where the title is provisional, of the information recorded in the adjudication record under section 16 (1) *(d)* of the Land Adjudication Law (1997 Revision), and a reference to the Registry Map and filed plan, if any;

B—the proprietorship section, containing the name, and, where possible, address of the proprietor and a note of any inhibition, caution or restriction affecting his right of disposition;

C—the incumbrances section, containing a note of every incumbrance and every right adversely affecting the land or lease."

[9] In saying that Mr. Roots is at pains to make the point that he considers that all his grounds of appeal on this point are points of law within subparagraph 8(1)(b) in any event. We do not consider it either necessary or appropriate to express any view on that either way.

November 2012 at the same time as the claimants' application for leave to appeal out of time, but it was not determined.

25. The point turns simply on what is meant by the provision in GCR Ord. 55, r. 3(1) that "An appeal to which this Order applies shall be by way of rehearing". The provision derives from the Rules of the Supreme Court of England & Wales as they stood before the introduction of the Civil Procedure Rules, and in that jurisdiction it was always well understood and accepted that in that context "rehearing" meant a rehearing on the record, and not a new trial or hearing 'de novo'. This derived from the practice of the Court of Appeal in respect of the similar wording of Ord. 59, r. 3[10] the explanatory note to which in the Supreme Court Practice read:

> "**59/3/2 'By way of rehearing**' – These words do not mean that . . . the witnesses are heard afresh. They indicate that (unlike the common law application for a new trial after trial with a jury) the appeal is not limited to a consideration of whether the misdirection, misreception of evidence or other alleged defect in the trial has taken place, so that a new trial should be ordered. They indicate that the Court considers (so far as may be relevant) the whole of the evidence given in the court below and the whole course of the trial. It is, as a rule, a rehearing on the documents (including the official transcript of the evidence, or, if the evidence was not recorded in shorthand, by stenographic machine, or tape, the judge's notes of evidence) but it is a rehearing (see *per* Lord Wright in *Powell v Streatham Manor Nursing Home* [1935] AC 243 at 263)."

26. In *Powell v Streatham Manor Nursing Home* Lord Wright said at p. 263:

> "The essence of the matter is now contained in the initial words of Order LVIII, r. 1 (which has statutory effect), which are as follows: "All appeals to the Court of Appeal shall be by way of rehearing." These words apply to an appeal from the decision of a judge sitting without a jury. The position is different when the trial has been with a jury. Where the trial has been before a judge alone the rehearing is had on the evidence given before the judge, except in the rare case where further evidence has been permitted to be called before the Court of Appeal . . . In effect, therefore, the rehearing is very different from the original hearing: it is a rehearing on documents, including the judge's notes and sometimes, as in this case, also the shorthand notes, whereas the judge who originally heard the case both saw and heard the witnesses . . . A rehearing of this character is essentially different from a rehearing which takes place on an appeal to Quarter Sessions: on that latter appeal the witnesses are called and give their evidence afresh, as if there had been no previous trial . . . ".

[10] "3. (1) An appeal to the Court of Appeal shall be by way of rehearing and must be brought by motion . . ."

27. We see no reason to differ from that here, particularly if the statutory limitations on the right of appeal contained in paragraph 8 are respected. This is particularly so in respect of subparagraph 8(1)(b), because in the normal way an appeal on a point of law would rarely, if ever, call for factual evidence.

28. In coming to his conclusion Chief Justice relied upon a decision by Quin J in *Concept Limited v National Roads Authority* 2009 CILR 629. The passage relied upon (at paragraph 16 of the judgment) in fact refers to an earlier, interlocutory, decision on an application to amend:

> "16. On August 11th, 2009, I granted the appellant's application for leave to amend its Form B claim for compensation filed under s. 9(2) of the Roads Law. Furthermore, based on the provisions of O. 55, and the decision of the Grand Court in Ford v Immigration Appeals Tribunal, I found that this court is exercising both an original and appellate jurisdiction and therefore this appeal can be conducted as a rehearing de novo in which I am exercising an original, and, at the same time, appellate jurisdiction."

29. We do not understand the reference to an "original" jurisdiction in the context of an appeal from the RAC to the Grand Court. The Court is exercising a statutory appellate jurisdiction. The only candidate for a co-existent original jurisdiction might be judicial review, but that is itself a tightly constrained jurisdiction. Nor is it in play here: it has not been invoked in this case. It has its own procedural requirements (such as the need for leave) which have not been complied with here; and the jurisdiction will not be exercised where there is an adequate alternative remedy such as that provided by an appeal.

30. In saying this we do not intend to say anything about other appellate jurisdictions under different statutory regimes. The case of *Lloyd v McMahon* [1987] AC 625 was put before us[11], but it turns upon the particular regime dealing with appeals from a district auditor's decision to surcharge. In such a case there will have been no hearing below of the sort conducted by the RAC, and hence no record on which to conduct a rehearing. Nor in that case did the provision giving the right of appeal contain any limitations on what the aggrieved person could complain

[11] And we take notice that it was referred to in the decision of *Ford v Immigration Appeals Tribunal* 2007 CILR 258, the decision of Smellie CJ referred to by Quin J in *Concept.*

about[12]. Moreover, such appeals have their own set of rules, which were then contained in Ord. 98 of the Rules of the Supreme Court 1965[13], which is a different and distinct provision from the Order governing appeals from statutory tribunals, which was then RSC Ord. 55 (which is the model for GCR Ord. 55). Thus, when Lord Keith says[14] "The relevant rules of court enable a rehearing of the broadest possible scope to take place", he is not referring to Ord. 55. The Order to which he is referring is in different terms; and, although it incorporates by reference some of Ord. 55, it does not incorporate the key provision which we are construing, namely Ord. 55 r. 3(1) and the requirement that appeals shall be "by way of rehearing". The ratio of *Lloyd v McMahon* in this respect should, therefore, be confined to its particular facts, as is clearly stated by Lord Keith at 697C – D:

> "It is, however, my opinion that *the particular appeal mechanism* provided by section 20(3) of the Act of 1982, *considered in its context*, is apt to enable the court . . . to inquire into the merits of the case and arrive at its own decision thereon." [Emphasis added]

COSTS

31. We now turn to the issue in appeal No. 10 of 2012, which concerns the appropriate basis for taxation of a successful claimant's costs before the RAC. The question of the costs before the RAC was not directly before the Chief Justice on the applications before him. The claimant's summons for payment did not refer to costs, but simply sought an order pursuant to section 13(1) of the Second Schedule to the Law for payment forthwith of the amount the NRA was ordered to pay by the RAC in its decision of 29 September 2011[15]. Nor did the order of the RAC quantify any amount in respect of costs. All the RAC had ordered was: "Costs to be assessed or agreed."

32. Nevertheless the Chief Justice went on to deal with costs, and in so doing proceeded on the basis that the general rule in compensation cases is that the claimants should have their costs on

[12] Section 20(3) of the Local Government Finance Act 1982 simply provided –

> "Any such person who is aggrieved by such a decision may appeal against the decision to the court and— .
> (a)in the case of a decision to certify that any sum or amount is due from any person, the court may confirm, vary or quash the decision and give any certificate which the auditor could have given ;"

[13] This is explained in the judgment of Lawton LJ in the Court of Appeal at p. 645 H of the report.

[14] See p. 697 D – E,

[15] It also sought in the normal way the costs of the application for payment itself – "That the Appellant [*i.e. the NRA because the application was made in the appeal to the Grand Court*] pay the costs of and occasioned by this application on an indemnity basis."

an indemnity basis unless there was something to disentitle them from that. The NRA appeal against that by their separate notice of appeal of 6 August 2012, contending –

> ". . . that the Honourable Mr. Chief Justice Smellie (sic) erred in law when he decided at paragraph 45 of his judgment that barring conduct on the part of the claimant resulting in an unreasonable escalation of the costs and expenses that a claimant is entitled to have them repaid on an indemnity basis."

33. The power to award and assess costs of compensation proceedings before the RAC is contained in subparagraph 2(6) of the Second Schedule to the Law:

> "(6) The Committee may order that the costs of any proceedings incurred by any party shall be paid by any other party and may tax or settle the amount of any costs to be paid under any such order or direct in what manner they are to be taxed."

34. Here, although the RAC dealt with the incidence of costs[16], they said nothing about the basis of taxation or assessment. Nor had they gone on to tax the costs themselves. We are told that they invited written submissions on this, which were filed by the parties, but that before they could adjudicate on the matter the Chairman resigned upon taking an appointment in another jurisdiction leaving the matter unresolved. That is where the matter stood when it came before the Chief Justice on the application for a stay of payment of the compensation award.

35. In considering the stay the Chief Justice was, properly, concerned to ensure that any stay would not deprive the claimants of their ability to continue to fund the litigation. He felt that that could be dealt with by recognising and giving some effect to the award of costs in their favour:

> "41. . . . it immediately occurred to me that the solution – the striking of the balance of convenience of advantage – would lay in recognising the Respondents' entitlement, already accrued, to the costs of the proceedings before the RAC.
>
> 42. An immediate payment of those costs by the NRA now would certainly alleviate the Respondents' concerns about funding the appeal, while avoiding the NRA's concerns about dissipation of the proceeds of the larger sum of the award if paid pending the appeal."

[16] Although the order is not without ambiguity all agree that it means the claimants should have their costs of the proceedings.

36. No-one contends that that was inappropriate or was not an approach which was not properly available to the Chief Justice. The question is where he went next; and whether he was simply using the likely amount of those costs when taxed as a guide to fixing a sum for payment on account, or whether he proceeded to tax or assess those costs himself, once and for all. The judgment is ambiguous on this; although, by the time one gets to paragraph 51 of his judgment, it may be said that the Chief Justice is in fact purporting finally to assess the costs:

> "51. I grant the NRA's application for a stay of the judgment of the RAC pending the determination of the NRA's appeal, on condition that the NRA pays, immediately, the Respondents' costs thus assessed. Thus, the Respondents' entitlement to their costs of the proceedings before the RAC and awarded in any event by the RAC is actualized."

37. If he were assessing the costs he would have been in error. The Grand Court has no original jurisdiction to tax or assess costs before the RAC (unless, perhaps, they were referred to the Grand Court for assessment by the RAC itself). However, looking at it in the round, we think that the better approach is to assume that the Chief Justice was not intending to assume a jurisdiction he did not have, but was rather using the figure at which he thought the costs would be likely to result from a taxation by the RAC as a guide to fixing the amount to be paid as a condition of granting the stay. In his own words, he was "recognising" the entitlement to costs without finally determining it.

38. However, the real issue between the parties is the basis on which he quantified the costs. We think it important and necessary to decide this question. If it were the case that the Chief Justice had wrongly assessed the costs without jurisdiction, then the matter would have to be remitted to the RAC. If he was, as we think, merely using the likely amount of costs as a guide, then their taxation before the RAC is still pending. In either case the RAC will have to deal with these costs at some point, and in doing so are likely to consider themselves bound by the findings which the Chief Justice made as to the principles governing the correct basis for taxing costs in a case such as this. If we do not now address the issue of whether he was right in that respect, the matter will inevitably be back before this court at a later date. Nor are those principles fact

sensitive, although their application (which is plainly a matter for the RAC in the first instance) is.

39. The Chief Justice held that in the ordinary run of things a successful claimant should get its costs on an indemnity basis:

> "44. In keeping with the principle of 'equivalence', a successful claimant on a compulsory acquisition claim is entitled to be placed financially as closely as possible to the position in which he would be, had his property not been compulsorily acquired. Where as an incident of the acquisition he has had to incur costs and expenses in prosecuting his claim, the principle of equivalence must be reflected also in an award to cover his actual reasonable costs and expenses.
>
> 45. It would follow that, barring conduct on his part resulting in an unreasonable escalation of the costs and expenses; he is entitled to have them repaid on the indemnity basis."

40. We think that the learned Chief Justice was right in this regard (although it may be better to avoid the terminology of litigation taxation in such a case), and, for the reasons given below, consider that this conclusion derives from a correct application of general principle. We are told that the practice in England and Wales is different, and that there the Lands Tribunal normally awards costs on the standard basis. We do not think that the Lands Tribunal practice is determinative of the question in this jurisdiction, but rather consider that we are free to approach the matter afresh.

41. In coming to his conclusion the Chief Justice was guided by observations made by the English Court of Appeal in *Purfleet Farms Ltd. v Secretary of State for Transport, Local Government and the Regions* [2002] EWCA Civ. 1430. There Potter LJ said, at paragraph 29 –

> "Leaving aside the impact or influence (if any) of the CPR upon awards of costs in the Lands Tribunal it is my view that the proper approach of the tribunal for the costs of a successful claimant (i.e. a claimant who is awarded more than the amount of an unconditional offer by the respondent) should be that he is entitled to his costs incurred in the proceedings in the absence of some "special reason" to the contrary. Whether such special reason exists in any given case is a matter for the judgment of the Lands Tribunal."

42. Potter LJ considered that this approach was dictated by the principle of equivalence, which is –

> ". . . at the root of statutory compensation, the principle that the owner shall be paid neither less nor more than his loss."
> [per Scott LJ in *Horn v Sunderland Corporation* [1941] 2 KB 26 at 49].

43. The application of this principle to costs in compensation cases was considered by Lord President Hope (as he then was) in the Scottish case of *Emslie & Simpson Limited v Aberdeen District Council* [1995] RVR 159 at p. 164:

> "I am not satisfied that the position in cases of disputed compensation is the same as that which applies to litigation generally. It seems to me that the underlying principle is these cases is that the acquiring authority is liable to pay compensation to the owner or occupier of the lands taken. The expenses of determining the amount of disputed compensation may be seen to be part of the reasonable and necessary expense which is attributable to the taking of the lands compulsorily by the acquiring authority. The principle which applies to litigation . . . is that the cost of litigation should fall on him who caused it. The cost of determining the amount of the disputed compensation would seem, according to this principle, to fall on the acquiring authority without whose resort to the use of compulsory power there would have been no need for the owner or occupier to be compensated. That seems to me to be the proper starting point for the examination of the question of expenses in these cases."

44. Mr. Roots argues that *Purfleet Farms* is a decision on the incidence of costs, not on the basis of taxation; and that that is how it has been applied in England. We think that that is right. Indeed, in that case the Court of Appeal upheld the Lands Tribunal's decision that the conduct of the matter by the claimants (in overvaluing the land on the basis of expert's evidence which should have been recognized as unreliable, and which led to the waste of substantial time and expense) justified their being awarded only three quarters of their costs. What Potter LJ was concerned to do was distinguish the correct approach in Lands Tribunal matters from that in ordinary litigation, particularly in the light of the increasing tendency in the latter (partly as a result of the CPR) to look at the incidence of costs on an 'issue' basis and disallow a winner's costs on issues on which he had been unsuccessful.

45. The question now before us is whether we should take the matter one step further and apply the principle of equivalence to the basis of assessment. It is a logical progression which we find hard to resist, for it is difficult to see why a claimant who has been put to the cost and expense of maintaining a successful claim to compensation should be out of pocket due to an approach to taxation which does not allow him all his reasonable costs.

46. In the end it may come down to a question of the burden of proof. That is really the distinction between taxation on the standard and on the indemnity basis in litigation in any event[17]. In that context we think that the wording adopted by Potter LJ in *Purfleet Farms* (that a claimant is entitled to his costs "in the absence of some special reason to the contrary") chimes with that of GCR Ord. 62, r. 13(3). It seems to place the burden of establishing the special reason for disallowing a cost or expense which has been incurred on the person objecting to it.

47. We do consider, however, that it is not particularly helpful or appropriate to import into the costs regime under subparagraph 2(6) of the Second Schedule to the Law the costs terminology of the Grand Court Rules. There is nothing in the subparagraph which requires this, either expressly or by necessary implication. We would prefer to say, therefore, that the claimants' costs should be assessed on the basis that all items should be allowed in the absence of some

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[17] GCR Ord. 62, r. 13 provides –

"Basis of taxation (O.62, r.13)

13. (1) On a taxation of costs on the standard basis there shall be allowed a reasonable amount in respect of all costs reasonably incurred and any doubts which the taxing officer may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the paying party; and in these rules the term "the standard basis" in relation to the taxation of costs shall be construed accordingly.

(2) Where the amount of costs is to be taxed on the standard basis, the taxing officer will only allow costs which are not only reasonable but are also proportionate to the matters in issue having regard to -

(a) the amount of money involved;
(b) the importance of the case; and
(c) the complexity of the issues.

(3) On a taxation on the indemnity basis all costs shall be allowed except insofar as they are of an unreasonable amount or have been unreasonably incurred and any doubts which the taxing officer may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the receiving party; and in these rules the term "the indemnity basis" in relation to the taxation of costs shall be construed accordingly.

(4) Where the Court makes an order for costs without indicating the basis of taxation or an order that costs be taxed on a basis other than the standard basis or the indemnity basis, the costs shall be taxed on the standard basis."

special reason to the contrary. Such a special reason would exist in respect of any item which was unreasonable in amount or unreasonably incurred, the burden of showing that being on the NRA. But subject to that we do not dissent from the learned Chief Justice's reasoning.

48. The Notice of Appeal also challenges the Order which the Chief Justice made for the costs before him. On that subject he said –

> "52. The Respondents have moreover, been entirely successful before me in their cross-summons which seeks, among other things, the payment of their costs from the proceedings below. I grant their order for costs of that aspect of their summons, in any event and on the indemnity basis. Otherwise the costs of this application upon the NRA's summons for the stay will be in the cause to await the outcome of the appeal."

49. That is not without difficulty, as the cross-summons did not in fact seek the payment of the claimants' costs from the proceedings below. It merely sought the payment of the "amount it was order[ed] to pay" by the RAC and the costs of the application for immediate payment[18]. However, although the NRA appeals against that award of costs, it only does so to the extent that such costs should be on the standard basis. In view of the general outcome of this appeal we see no reason to interfere with the Chief Justice's order in this regard.

CONCLUSIONS

50. For the reasons given above we allow the claimants' appeal in appeal No. 3 of 2013 to the extent that we hold that subparagraph 8(1)(a) of the Second Schedule to the Roads Law is –

(i) restricted to questions of the claimant's title to the acquired land;

(ii) does not extend to include the value of the claimant's land; and

(iii) does not include questions as to the extent of the land itself, or of any rights appurtenant to it.

[18] Paragraph 3 of the claimants' summons of 23 October 2011 asked "That the Appellant pay the costs of and occasioned by this application on an indemnity basis."

51. We also allow the claimants' appeal in appeal No. 3 of 2013 to the extent that we hold that an appeal under paragraph 8 of the Second Schedule to the Roads Law should be conducted by a rehearing on the record, and not as a new trial or a hearing *de novo*.

52. In respect of appeal No. 10 of 2012 we dismiss the NRA's appeal on the basis that the proper approach of the Tribunal to costs is that, where awarded to a claimant, they should be taxed or assessed on the basis that all items should be allowed in the absence of some special reason to the contrary. Such a special reason would include if any item were unreasonable in amount or unreasonably incurred, the burden of showing that being on the NRA.

53. We will hear the parties on the costs of the appeal if they wish, but are provisionally of the view that they should be the claimants', to be taxed if not agreed. We will also hear the parties on the basis of that taxation, although our reasoning on the costs issue generally would suggest that they should be taxed on the indemnity basis.

54. As we have said, we gave permission for an appeal from the Order made by Henderson J on 3 May 2012 –following and applying the Chief Justice's ruling as the scope and nature of the appeal to the Grand Court. Notice of appeal having been given, we treat the appeal from that Order as before the Court and we allow it. The directions which that Order contains need to be reconsidered in the light of this judgment.

55. We will also hear the parties on the form of the order. Our current view is that the declarations sought in the claimants' notice of appeal are unnecessary in view of the contents of this judgment.

Ground JA

Chadwick P

Conteh JA