

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 HOLDEN AT GEORGE TOWN
3 CIVIL DIVISION

Cause No: G 426/2011

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6 IN THE MATTER OF THE ROADS LAW (2005 REVISION)
7 AND IN THE MATTER OF THE LAND ACQUISITION LAW
8 AND IN THE MATTER OF A COMPENSATION CLAIM BY:

9 ABSHIRE BODDEN and the Executors of the Estate of HAROLD BODDEN, being
10 GENE THOMPSON and ALFONZO WRIGHT: Block 28C, Parcel 1

11 AND

12 The Executors of the Estate of HAROLD BODDEN, being GENE THOMPSON and
13 ALFONZO WRIGHT: Block 28C, Parcel 178

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15 BETWEEN:

16 THE NATIONAL ROADS AUTHORITY
17 ACTING BY THE DIRECTOR OF LANDS
18 AND SURVEY

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20

APPELLANT

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22 AND:

23 ABSHIRE BODDEN and the Executors of
24 the Estate of HAROLD BODDEN, being
25 GENE THOMPSON and ALFONZO
26 WRIGHT, Block 28C, Parcel 1

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RESPONDENTS/APPLICANTS

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31 Appearances:

Ms. Dawn Lewis of the Attorney General's
Chambers for the Appellant

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Ms. Kate McClymont of Broadhurst
Barristers for the Respondents

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37 Before:

The Hon. Mr. Justice Charles Quin

38 Heard:

16th July 2012

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JUDGMENT

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3 1. There are two Summonses before the Court.

4 2. First the Summons of the Appellant– the National Roads Authority (“NRA”) -
5 issued on the 30th March 2012 for an Order:

6 i. That the Appellant be granted leave to appeal to the Court of Appeal
7 pursuant to s.11(5)(b) of the Court of Appeal Rules against that part of
8 the Order of the Honourable Chief Justice made on the 27th February
9 2012 and filed on the 28th March 2012 in Cause Number 426 of 2011
10 that states:

11 a) “The costs awarded to the Respondents pursuant to the Roads
12 Assessment Committee decision delivered on the 29th
13 September 2011 are payable on an indemnity basis; and

14 b) That the costs of the Respondents’ Cross Summons dated the
15 25th October 2011, as it relates to payment of costs arising from
16 the Roads Assessment Committee’s decision delivered on the
17 29th September 2011 are awarded to the
18 Respondents/Applicants on an indemnity basis.”

19 3. Secondly, there is the Summons of Abshire Bodden and the Executors the estate of
20 Harold Bodden (“the Respondents”) for leave to file the application for leave to
21 appeal out of time pursuant to s.11(5)(b) of the Court of Appeal Rules, that the

1 Respondents be granted leave to appeal part of the Order of the Grand Court made
2 in this proceeding and dated the 27th February 2012.

3 4. In addition, the Respondents seek an Order that the Appellant pays the costs of and
4 occasioned by this application on an indemnity basis.

5 ***Relevant Chronology and Background***

6 5. On the 14th November 2006 (the declared day) under s.3 of the Roads Law (2005
7 Revision), boundary plan 493, was published in the Cayman Islands Gazette
8 Number 23/2006, declaring the NRA's intention to acquire 3.31 acres of land that
9 forms part of Block 28C, Parcel 1 and 0.03 acres of Block 28C Parcel 178. The
10 registered owners of the land were Abshire Bodden and Harold Bodden, the
11 Respondents.

12 6. After hearing evidence and submissions from both parties on the 6th, 13th, 15th, 17th
13 December 2010 and on the 6th July 2011, the Roads Assessment Committee
14 ("RAC"), on the 29th September 2011, reported its decision, by which it awarded
15 compensation to the Respondents in the amount of \$342,886.15. This award was
16 made under the Roads Law in respect of the Respondents' land, compulsorily
17 acquired by the NRA.

18 7. In their decision dated the 29th September 2011 the RAC ordered that costs to be
19 assessed are agreed.

- 1 8. On or about the 15th October 2011 both parties submitted their written submissions
2 on the costs. Unfortunately, the RAC did not have the opportunity to render a
3 decision on the question of costs.
- 4 9. On the 18th October 2011 the NRA issued a Summons before the Grand Court
5 asking for a stay of the award of the RAC and further, that costs of the Summons be
6 in the Cause of the Appeal.
- 7 10. On the 24th October 2011 the NRA issued a second Summons seeking an Order
8 that, pursuant to GCR O.15 r.62 the Executors of the estate of Harold Bodden be
9 added as the 2nd and 3rd Respondents to the NRA's Appeal, and also that the costs
10 of the Summons be in the cause.
- 11 11. On the 27th February 2012 the learned Chief Justice granted the NRA's application
12 for a stay of the Judgment of the RAC pending the determination of the NRA's
13 Appeal on condition that the NRA pays, immediately, the Respondents' costs thus
14 assessed.
- 15 12. The Court has been informed by Crown counsel for the NRA that these costs have
16 been paid to the Respondents.
- 17 13. The learned Chief Justice had received the three schedules of costs claimed by the
18 Respondents relating to the proceedings before the RAC. The learned Chief Justice
19 confirmed that they included legal as well as professional expert fees for valuations
20 and expert testimony, all amounting to \$97,807.14. He added that, in the interest of
21 saving the further time and expense involved in going to taxation,

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“I record here that I would regard those fees as reasonable and as due to the Respondents.”

14. The learned Chief Justice ordered that the costs awarded to the Respondents pursuant to the RAC’s decision delivered on the 29th September 2011 are payable in any event and on any indemnity basis and are assessed in the amount of CI\$97,807.14.

15. In addition, the learned Chief Justice ordered that the Appellant, namely NRA, should pay forthwith that aspect of the award of the RAC in the amount CI\$7,318.15 that relates to the property described as Block 28C Parcel 178.

16. The learned Chief Justice also ordered that the costs of the Respondents’ cross summons dated the 25th October 2011, as it relates to the payment of costs arriving from the RAC’s decision delivered on the 29th September 2011 are awarded to the Respondents in any event and on an indemnity basis.

17. The Appellant, NRA, applies for leave to appeal, pursuant to s.6(f) of the Court of Appeal Law which reads:

- “6. *No appeal shall lie-*
- (a) ...*
- (b) ...*
- (c) ...*
- (d) ...*
- (e) ...*

1 (f) without the leave of the Grand Court, or of the Court, from an
2 interlocutory judgment made or given by the Judge of the
3 Grand Court”

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5 18. The learned Chief Justice followed the classic dicta of Potter LJ. in the English
6 Court of Appeal case of *Purfleet Farms Ltd. v. Secretary of State for Transport,*
7 *Local Government and the Regions* [2002] EWCA Civ 1430 where he cited from
8 Potter LJ’s decision at paragraph 29:

9 “....the proper approach of the tribunal for (award of) the costs of a successful
10 claimant (i.e. a claimant who is awarded more than the amount of an
11 unconditional offer by the respondent) should be that he is entitled to his costs
12 incurred in the proceedings in the absence of some “special reason” to the
13 contrary. Whether such special reason exists in any case is a matter for the
14 judgment of the Lands Tribunal.”

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16 The learned Chief Justice also applied Potter LJ’s principle of equivalence where he
17 stated:

18 “The principle of equivalence which is accepted as a cornerstone of all
19 compulsory purchase compensation cases, determines that the claimant has the
20 “right to be put so far as money can do it in the same position as if his land had
21 not been taken from him” (*Horn v. Sunderland Corporation* [1941] 2 KB 26)
22 were a claimant not awarded all of his costs he would not be put in the same
23 position as if his land had not been taken from him.”

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25 Finally, the learned Chief Justice quoted Potter LJ at paragraph 26 of *Purfleet*
26 *Farms*:

27 “I am not satisfied that the position in cases of disputed compensation is the
28 same as that which applies to litigation generally. It seems to me that the
29 underlying principle in these cases is that the acquiring authority is liable to
30 pay compensation to the owner or occupier of the lands taken. The expenses of
31 determining the amount of disputed compensation may be seen to be part of the

1 *reasonable necessary expense which is attributable to the taking of the lands*
2 *compulsorily by the acquiring authority. The principle which applies to*
3 *litigation as applied by Lord President Robertson in **Shepherd v. Elliott** and*
4 *quoted by MacLaren on Expenses at page 21 is that the cost of the litigation*
5 *should fall on him who caused it. The cost of determining the amount of the*
6 *disputed compensation would seem, according to this principle, to fall on the*
7 *acquiring authority without whose resort to the use of compulsory purchase*
8 *powers there would have been no need for the owner or occupier to be*
9 *compensated.” (Lord Morison in **Emslie & Simpson Ltd. v. Aberdeen District***
10 ***Council** (No. 2) [1995] 35 RVR 159.)*

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12 19. At paragraph 50 of the Chief Justice’s Ruling he stated:

13 *“Having accepted those submissions I have considered the three schedules of*
14 *costs claimed by the Respondent relating to the proceedings before the RAC.*
15 *They include legal as well as professional expert fees for valuation and expert*
16 *testimony, all amounting to \$97,807.14. In the interests of saving the further*
17 *time and expense involved in going to taxation I record here that I would*
18 *regard those fees as reasonable and as due to the Respondent.”*

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20 20. Accordingly at paragraph 2 of the learned Chief Justice’s Order he awarded the
21 costs pursuant to the RAC’s decision delivered on the 29th September 2011 to be
22 payable in any event and on an indemnity basis and assessed in the amount of
23 C\$97,807.14.

24 21. Furthermore, as the Respondents were entirely successful before the Chief Justice
25 in their Cross Summons, he granted an Order for costs for the appeal from the
26 proceedings below, in any event and on the indemnity basis.

27 22. Crown counsel, on behalf of the Appellant, NRA, submits that the RAC’s
28 jurisdiction regarding costs stems from s.2(6) of the Second Schedule of the Roads
29 Law which provides as follows:

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“The committee may order that the costs of any proceeding incurred by any party shall be paid by another party and may tax or settle the amount of any costs to be paid under such order, or direct in what manner they are to be taxed.”

23. Crown counsel submits that the RAC at the conclusion of its decision ordered costs to be assessed or agreed.

24. The Respondents rely on the case of *Purfleet Farms* in support of their position that their costs should be taxed on an indemnity basis. Crown counsel submits that *Purfleet Farms* merely addresses the issue as to how costs will be awarded in land compensation proceedings, rather than the issue of on what basis such costs would be taxed. Crown counsel relies upon the dicta in *Purfleet Farms* where it was held:

“The proper approach of the Tribunal for the costs of the successful claimant (i.e. one who is awarded more than the amount of an unconditional offer by the Respondent) should be an entitlement to all costs incurred in the proceedings in the absence of some “special reason” to the contrary.”

25. Crown counsel submits that *Purfleet Farms* was an appeal to the English Court of Appeal from a decision of the Lands Tribunal, where the Lands Tribunal had stated *inter alia*:

“The general rule that costs follow the event was only the starting point for an award of costs; a party’s conduct should be taken into account, including whether or not the claim had been exaggerated and the relationship between award and the contention of the parties. Further, although the CPR did not apply to proceedings in the Tribunal, regard should be had to them where applicable, in particular, with regard to the award of costs.”

1 26. Crown counsel submits that *Purfleet Farms* essentially addresses the issue of how
2 costs will be awarded, rather than the issue of on what basis costs are taxed. Crown
3 counsel supports this by stating that there is an absence of any authority in land
4 compensation costs awarding successful litigants costs on an indemnity basis.

5 27. In addition, Crown counsel submits that, unlike England, the RAC does not have its
6 own rules as it relates to costs and therefore one is thrown back on the Rules of the
7 Grand Court (GCR).

8 28. Crown counsel highlights O.62 r.4(11) which reads:

9 *“The Court may make an inter partes order for costs to be taxed on an*
10 *indemnity basis, only if it is satisfied that the paying party has conducted the*
11 *proceedings, or that part of the proceedings to which the Order relates,*
12 *improperly, unreasonably or negligently.”*

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14 29. Crown Counsel submits that the Chief Justice did not find that NRA had conducted
15 any part of the proceedings improperly or unreasonably or negligently.
16 Furthermore, Crown counsel submits that it would be inappropriate in this case for
17 the RAC or the learned Chief Justice to order that costs should be taxed on an
18 indemnity basis, and relies upon the English Court of Appeal decision of *Excelsior*
19 *Commercial and Industrial Holdings Ltd. v. Salisbury Homer Aspden & Johnson*
20 *(Costs)* [2002] EWCA Civ 879 at paragraph 39 where Waller LJ. formulated the
21 question as follows:

22 *“The question will always be: is there something in the conduct of the action or*
23 *the circumstances of the case which takes the case out of the norm in a way*
24 *which justifies an order for indemnity for costs?”*

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- 1 30. Crown counsel submits that this was a case where the parties had gone before the
2 RAC for assessment of compensation. An offer had been made, negotiations were
3 unsuccessful and, acting on the advice of legal and other experts the matter was
4 brought before the RAC.
- 5 31. Crown counsel submits that NRA had acted on the basis of expert advice and it was
6 not a case where the NRA had not recognised that it had an obligation to pay
7 compensation and costs, nor is it the case that the NRA had decided not to appeal
8 but had refused to pay.
- 9 32. Crown counsel submits that the NRA has not behaved in an arbitrary or malicious
10 fashion, nor could its conduct of any part of the proceedings be described as
11 improper, unreasonable or negligent. To use Waller LJ's words in *Excelsior*
12 *Commercial and Industrial Holdings* there is nothing in this case "*which takes it out*
13 *of the norm in a way which justifies an indemnity for costs.*"
- 14 33. Accordingly, Crown counsel submits that the prospects of success of its proposed
15 appeal are good in the sense that the chances are not fanciful.
- 16 34. Furthermore, Crown counsel submits that the question of indemnity costs, whether
17 before the RAC or before the learned Chief Justice is a matter of general principle,
18 possibly to be decided for the first time, and therefore it is a fitting one to be heard
19 by the Court of Appeal.
- 20 35. Crown counsel says that she has been instructed by NRA that it has been receiving
21 applications now, which invariably ask for costs on an indemnity basis and

1 therefore the NRA would like the two grounds of their appeal to be considered by
2 the Court of Appeal for further clarification.

3 36. The Respondents submit that the Appellant does not have a real prospect of
4 success. Furthermore, they submit that the order for indemnity costs, both before
5 the RAC and the learned Chief Justice really does no more than what Lord Justice
6 Potter held in *Purfleet Farms*, and therefore was in keeping with the principle of
7 equivalence by placing the successful claimant financially as closely as possible to
8 the position in which he would be, had his property not been compulsorily acquired.

9 37. Having heard the submissions of both parties, it is my decision that I will grant the
10 Appellants leave to appeal on these two orders in relation to the question of
11 indemnity costs.

12 38. I accept the Appellant's contention that there is an absence of authority in land
13 compensation cases to specifically award costs on an indemnity basis. Further, the
14 learned Chief Justice at no stage stated that the Appellant had conducted the
15 proceedings or any part thereof improperly or unreasonably or negligently.

16 39. In this regard I follow and apply the dicta of the former Master of the Rolls Lord
17 Wolff in the *English Practice Direction (Court of Appeal: Leave to Appeal in*
18 *Skeleton Arguments)* [1999] 1 W.L.R. page 2 where he stated at paragraph 10 on
19 the general test for leave:

20 “...The general rule applied by the Court of Appeal and thus the relevant basis
21 for first instance Courts deciding whether to grant leave is that leave will be
22 given unless an appeal would have no realistic prospect of success. A fanciful
23 prospect is insufficient.”

1 40. I find that the Appellant’s appeal is not a fanciful appeal and it does have a real
2 prospect of success.

3 41. In addition, on the question of indemnity costs, as we understand them in GCR
4 O.62 r.8, I consider that this does raise a point of general principle which is
5 deserving of consideration by the Court of Appeal, or, as Lord Wolff stated in
6 paragraph 10:

7 “Leave may also be given in exceptional circumstances even though the case
8 has no real prospect of success if there is an issue which it is the public interest
9 should examined by the Court of Appeal”

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11 42. Putting it another way, I follow the dicta of the learned former Chief Justice, Sir
12 Dennis Malone where he, in granting leave to appeal *In the Matter of Universal
13 and Surety Company Limited* 1992-93 CILR 157 stated at line 34 on page 159:

14 “... the issue is one of importance upon which further argument and the
15 decision of the Court of Appeal would be to the public advantage.”

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17 43. Accordingly, for the aforesaid reasons I grant the Appellant leave to appeal to the
18 Court of Appeal in terms of its Summons dated the 30th March 2012 set out in
19 paragraph 2 above.

20 *In relation to the Respondents’ Summons dated the 12th July 2012 and their
21 Amended Summons dated the 13th July 2012, and their prayer for leave to file the
22 application for leave to appeal out of time:*

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24 44. I find that I lack jurisdiction to hear this application and I apply and follow the
25 decision of the learned Chief Justice in *Streeter and K Coast Development v.*

1 *Immigration Board and Governor-in-Council* 1999 CILR 264 where it is stated in
2 the first holding on page 265:

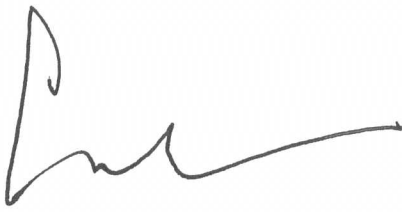
3 *“The Court lacked jurisdiction to hear the application, since only the Court of*
4 *Appeal (under r.8(1) of the Court of Appeal Rules, 1987) could extend the time*
5 *limit prescribed by those rules after the expiry of the time limit. After that time*
6 *the Grand Court could no longer hear the application for leave to appeal and*
7 *the Court of Appeal alone had power to extend the time in which to seek leave.”*

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9 The Chief Justice went on to state:

10 *“The power of extension contained in the Grand Court Rules O.3 r.5 related*
11 *only to matters within the Grand Court’s province under those rules.”*

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13 45. Accordingly the Respondents’ Summons dated the 12th July 2012 and their
14 Amended Summons dated the 13th July 2012 are dismissed. This does not prevent
15 them applying directly to the Court of Appeal. I order the costs of this hearing
16 follow the costs in the Appeal.

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18 **Dated this the 23rd July 2012**

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25 **Honourable Mr. Justice Charles Quin**
26 **Judge of the Grand Court**

