IN THE SUPREME COURT OF BELIZE, A.D. 2015

CLAIM NO. 188 of 2015

MICHAEL MODIRI	**CLAIMANT**
AND	
ATTORNEY GENERAL OF BELIZE	**1st DEFENDANT**
MINISTER OF NATURAL RESOURCES AND AGRICULTURE	**2nd DEFENDANT**
COMMISSIONER OF LANDS	**3rd DEFENDANT**

BEFORE the Honourable Madam Justice Sonya Young

Hearings
2015
26th May
2nd June
25th June

Mrs. Nazira Myles for the Claimant
Ms. Marcia Mohabir for the Defendants.

Keywords: Land Acquisition (Public Purposes) Act Cap. 184 (The Act) – Compulsory Acquisition of Land – Public Purpose – Road Access – Notice - Compensation

JUDGMENT

1. This is a strange tale of a man's property being bulldozed and cleared into a road without his permission. A road which he says leads in one direction to

the business of a private entity. And on the other, to the private property of the owner of the said private entity, where there is a locked and guarded gate. The State has now compulsorily acquired that portion of his property on which the road exists, for the specified public purpose of road access. The man disputes this purpose and strenuously challenges the legality of the acquisition.

The History:

2. Michael Modiri bought the lands in Frank Eddy's Agricultural layout (The Property) in 2007 and 2008. He knew at that time that his property was land locked but he relied on the largesse of his neighbours, Sibun Grain and Cattle Ltd. for access. From 2012 he continuously sought the assistance of the government to gain proper public access. His use of the route continued peacefully until March 2013, when new owners of the Company erected a gate which blocked his path. Subsequently, he was only allowed to pass with the expressed permission of Mr. Bradley Paumen, a director of Sibun Grain and Cattle Ltd. He began negotiations for access, first with the new owner and then he renewed his efforts with the government. He explained his difficulty to both. The government gave assurances and Mr. Paumen, who likewise needed access to caves which lay beyond Mr. Modiri's land, contemplated a mutually agreeable arrangement.

3. However, sometime in early 2013 someone entered upon Mr. Modiri's property without his consent and cleared a ¾ mile long road leading directly to the caves. Mr. Modiri returned to Belize from the USA to find Bradley Paumen's business using this road as access to the said caves. He again discussed the matter with the government and Mr. Paumen. He sent a letter

dated 8th April, 2013 to the 3rd Defendant, Mr. Vallejos, who promised to investigate. Eventually, in 2014 he sought the assistance of the court (by a separate matter) in restraining this purported trespass and for a declaration of an easement of necessity.

4. During this time (and as early as 2013) the government began arranging the compulsory acquisition of The Property. They completed with the publication of the final of two notices in the Gazette on 28th February, 2015. They claim to have contacted Mr. Modiri by letter, to settle compensation. Mr. Modiri denies receiving same. The defence accepts that they never received a response to that letter. Mr. Modiri says he became aware of the acquisition during the injunction application, through the Defendant's attorney and an affidavit filed. By letter from his attorney to Mr. Vallejos, dated 13th January, 2015, he immediately protested the acquisition and informed that the existing road had been illegally cleared. He offered to meet to discuss the matter. He received no response. Mr. Vallejos admits receipt but denies responding.

5. Thereafter, Mr. Modiri offered alternative routes which used only State owned land and he explained the difficulty the acquisition would cause to the business venture he had planned on his said land. He maintains that not even he could access the road since the gate remains on his neighbour's property. It not only hinders, but prohibits him and other members of the public who have not been given initial access by his neighbours. The government has not been forthcoming with any assistance to him regarding his access situation. Furthermore, he says that the government did not

follow the proper procedure for compulsorily acquisition as outlined in the Act and this ought not to be allowed.

6. He now seeks the following relief:

1. A Declaration that the Decision made by the 2nd Defendant and published in the Belize Gazette on the 27th day of January 2015 was unreasonable, irrational and an abuse of power causing real prejudice and loss to the Applicant.
2. A Declaration that the compulsory acquisition of the Applicant's property was not duly carried out for a public purpose and in accordance with the law.
3. A Declaration that the compulsory acquisition of the Applicant's property is an arbitrary deprivation of the Applicant's property.
4. An Order quashing the Decision of the 2nd Defendant that the Applicant's property is necessary for a public purpose; specifically public access for persons using the area and landlocked areas.
5. Further or in the alternative damages.
6. Costs
7. Such further relief that this Honorable Court deems just and fair in the circumstances.

The Issues:

7. There are two issues to be determined:

1. Was the property acquired for a public purpose?
2. Was the acquisition done in accordance with The Act?

Was the Property Acquired for a Public Purpose:

8. There can be no dispute that the court has jurisdiction to review the decision of the Minister. Section 3 of the Belize Constitution protects the right of every person in Belize from arbitrary deprivation of their property. Section 17(1) then states:

> *"No property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired except by or under a law that –*
>
> *(a) prescribes the principles on which and the manner in which reasonable compensation therefor is to be determined and given within a reasonable time; and*
>
> *(b) secures to any person claiming an interest in or right over the property a right of access to the courts for the purpose of –*
>
> *(i) establishing his interest or right (if any);*

(ii) determining whether that taking of possession or acquisition was duly carried out for a public purpose in accordance with the law authorising the taking of possession or acquisition;
(iii) determining the amount of the compensation to which he may be entitled; and
(iv) enforcing his right to any such compensation."

9. The court, in exercising this function, is expected to be vigilant and to carefully scrutinize the use of the statutory authority which allows this serious invasion of a person's proprietary rights. The onus is always on the acquiring authority to demonstrate that the purpose was proper and the acquisition was lawfully done; see **Prest v Secretary of State of Wales (1982) 81 LGR 193, 201**.

10. What is most distressing, is that the instant case is almost identical to the Belizean Court of Appeal case of ***The Attorney General v Samuel Bruce Civil Appeal No. 32 of 2010.*** This case clearly and appropriately addressed most of the issues presently arising. I therefore do not find it necessary to reinvent the wheel.

11. In that matter, the Respondent was the owner of land which was compulsorily acquired by the Appellants, for the purported public purpose of the construction of a privately owned primary school. Although the declaration was duly gazetted, no Section 3 notices were posted on a building or in the local area as required by law. There was, exhibited, a letter from the Commissioner of Land and Survey to the Appellant which indicated at its conclusion that the Appellant should *"respond stating your claim for compensation so that a mutually agreed price may be determined without undue delay."* The Appellant's lawyers submitted a value of the property, to which

there was no counter offer. The appellant, much like this Claimant, protested and questioned the Government's rationale for the acquisition. He eventually sought judicial review of the decision.

12. The Court of Appeal accepted that a public purpose should include *"an object or aim, in which the general interest of the community, as opposed to a particular interest of individuals is directly or vitally concerned"* – ***Hannabai Framjee Petit v Secretary of State for India (1914) LR Vol. XL11***. This definition was referred to by Byron CJ (Ag.) (as he then was) in ***Baldwin Spencer v The Attorney General of Antigua and Barbuda and others Civil Appeal No. 20A of 1997,*** as *"the root decision on the meaning of a public purpose."*

13. Counsel for the Defendants assert that a public purpose could be achieved through private enterprise as well as through any public agency. She also relies on the cases of **Baldwin Spencer (ibid) and Narayan Singh v Bilhar (1978) A.I.R. 136**. I agree wholeheartedly with Counsel but simply state that it is not the method which concerns us, rather it is the purpose.

14. Undoubtedly, road access is a public purpose when its object or aim includes the general interest of the community. Having so established, it now becomes "the duty of the court to determine whether the compulsory acquisition was duly carried out for the specified public purpose in accordance with the Act" – ***Samuel Bruce (ibid)***.

15. We begin by considering the reasons which informed the Minister of Natural Resources' decision to acquire this particular piece of property. In

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223 Lord Greene explained that: "The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account."

16. The evidence provided in the present case is, undoubtedly, very sparse. It comes from Mr. Vallejos, the sole witness for the defence, who could not even say definitively when he received the Minister's decision (except that it was either February or early 2014). Nonetheless, he states that the acquisition, for the stated purpose of road access was a directive given by the Minister to *"connect other properties and to advance and further the network of properties that were land locked within the area"* - **Paragraph 8 of the first affidavit of Wilbert Vallejos**.

17. He went on to explain that *"this particular route was chosen as it was found to be the easiest route as the terrain is made up of many contours and other surrounding land consisted of forest resources."* He exhibits a map as evidence of this. I apologize, but I, understandably, have no map reading skills worthy of an amateur, far less an expert. It was expected (at the very least) that an expert report, containing all this information in detail and at a level understandable to any lay person, would have been presented. There was none. Certainly, there are surveyors capable of this on the staff of the second or third Defendant.

18. Moreover, the court was uncertain what it was expected to make of this particular assertion especially when the witness also testified that he had never visited the area, had no first-hand knowledge of it and the only thing ever inspected was the said road.

19. The witness then went on to explain that there was already an existent access road which would ease the government's pursuit of its road building project. The final consideration, he says, was that government reserves, including the Dark Night Cave System were inaccessible. The government, through its agency (National Institute of Culture and History), had partnered with a company known as Dark Night Cave Tubing Adventures Limited (owned by Bradley Paumen) which facilitated tourists visiting the archaeological reserve. The project was therefore a revenue earner for the government.

20. The first reason asserted was not proven. I am of the opinion that especially where alternatives are suggested by the land owner some definitive proof should be provided to show that indeed his private land was the most adequate for the purpose. That there was an existing road, seems to completely overlook the advent of that road and the fact that it had been cleared without Mr. Modiri's permission. Had anyone taken the time to hold proper discussions with Mr. Modiri, prior to the acquisition, this could easily have been discovered.

21. Belatedly, the defence witness through amplification of his witness statement, offered that there once existed a logging route through Mr. Modiri's property. Again, he offered no proof other than the words emanating from his mouth. He was unable to say at what point in the

beautiful ancient history of Belize this route existed or where on Mr. Modiri's property it was to be found. I was not convinced.

22. Certainly, ease of the project is a worthy consideration but so too are alternatives which many involve state lands or less of a hardship for the Claimant; see ***Samuel Bruce (ibid)*** which relied on ***Brown v Secretary of State for the Environment 1979 WL 69009 (1980) 4 Op & CP 284.*** In that case although a designated inspector found there were five other sites available, the local authority nonetheless compulsorily acquired the applicant's land. The court quashed the order and held that the availability of alternative sites was indeed a material consideration.

23. Mr. Vallejos in the instant case states that alternate sites were considered but were apparently not found to be appropriate. Yet, under cross-examination he admitted that the only property inspected was the existing gravel road through Mr. Modiri's property. He also admitted that Mr. Modiri showed members of his staff alternatives, one which went through a small portion of his own property and others which did not touch his property at all. He accepts however that these alternatives were never investigated. This court finds that the alternatives were not sufficiently or at all explored. It is therefore doubtful that this acquisition was necessary in the public interest.

24. In ***R v Secretary of State for Transport and others ex parte de Rothschild (1989) 1 All ER 933*** reference is made to ***Prest v Secretary of State for Wales (ibid) at page 937 para b*** where Lord Denning MR states:

> "To what extent is the Secretary of State entitled to use compulsory powers to acquire the land of a private individual? It is clear that no Minister or public authority can acquire any land compulsorily except that power to do so be given by Parliament: and Parliament only grants it, or should only grant it, when it is **necessary in the public interest**." (Emphasis mine)

25. Lord Denning goes on to state that if there is any reasonable doubt on the matter, it ought to be resolved in the citizen's favour. For this reason alone, I find that the Minister's decision ought to be quashed.

26. Most instructive, however, was the fact that none of the reasons given for the acquisition occasioned access to anything specific other than the caves or to anyone other than the private entity. The Claimant maintains that beyond the cave, the road leads only to a cliff. The defence could not refute his allegation as the witness accepted that he simply did not know.

27. It was again, only under amplification, that the witness indicated that there were properties, other than the caves which would benefit from the acquisition. He spoke of lands owned by 'Brad Paumen through his companies, land adjacent to those owned by Mr. Modiri and unassigned government lands'. Clearly, coming as late as it did, access to those lands could not have been of paramount consideration. What baffled me more, was how road access was being advanced, when the road would in fact be controlled by a private entity who could deny access to the very persons whom the defence claims would benefit. In particular, Mr. Modiri, whose land is now in issue.

28. It is the evidence of the defence that the private land through Bradley Paumen's property had not been acquired by the State. One cannot overlook the fact that the land adjoining Mr. Modiri's was simultaneously compulsorily acquired from another private owner. Yet, having crossed the bridge over the Sibun River, neither of these private owners could get freely to those roads. It defies logic and cannot be right.

29. Finally, I consider the revenue earning capability of the cave-use partnership. Again, one cannot deny the fact that this partnership agreement was entered into after the decision for the acquisition had been taken in February or early 2014. The agreement was made on the 5th September, 2014. I therefore reject that it could have formed any true part of the Minister's consideration.

30. I therefore find that the compulsorily acquisition was not for a public purpose as it was not taken in the general interest of the community, but rather solely for the interests of an individual entity.

Was the Acquisition done in accordance with The Act:

31. Section 3 of The Act states:

> *"(1) Whenever the Minister considers that any land should be acquired for a public purpose, he may cause a declaration to that effect to be made in the manner provided by this section and the declaration shall be prima facie evidence that the land to which it relates is required for a public purpose.*
>
> *(2) Every declaration shall be published in two ordinary issues of the Gazette, there being an interval of not less than six weeks between each publication, and copies thereof shall be posted on one of the buildings, if any, on the land or exhibited at suitable places in the locality in which the land is situate.*
>
> (3) The declaration shall specify the following particulars to the land which is to be acquired-
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> *(a) the district in which the land is situated;*

(b) a description of the land, giving the approximate area and such other particulars as are necessary to identify the land;

(c) in cases where a plan has been prepared, the place where, and the time when, a plan of the land can be inspected;

(d) the public purpose for which the land is required.

(4) ..."

32. In the present case, the defence offers that there was an error in the property search which resulted in the belief that the land was owned by someone other than the Claimant. The original gazetted declarations identified the owner as George Belisle. What confounds this situation is that the defence witness under cross-examination accepted the competence and skill of his officers in conducting land searches. He stated that all the necessary resources were available for a proper search to be conducted. He also accepts that an error had somehow been made. Yet, when that error was discovered, there was no delay in issuing the corrigendum to allow for discussions with the true owner. Mr. Vallejos accepted that the first notice Mr. Modiri could have had was the gazetted declaration. This cannot be fair or just.

33. In fact, the last issue discussed in the **Samuel Bruce (ibid)** decision is the right of the private land owner to be heard before the decision is made to compulsorily acquire. The Court quoted from the appealed High Court decision and agreed that *"elementary fairness and justice [required] that a person whose land is about to be compulsorily acquired should know beforehand and be afforded an opportunity if he wants to make representation to dissuade the decision maker."* Their Lordships then considered a number of commonwealth decisions as well as the local decision in **British American Bank and Dean Boyce v Attorney General and the Minister of Public Utilities (Civil**

Appeal Nos. 30 and 31 of 2010. They concluded that indeed, the land owner was entitled to a fair hearing in the circumstances and denial of same was neither just nor fair.

34. When I consider the circumstances surrounding the case at bar, I find that both parties would have benefited tremendously if such discussions were held. Mr. Modiri would have ventilated his objections and all that he stood to lose if the property was acquired. The government, would equally have been able to explain in detail all their considerations and the reasons they settled on his property as most suitable. Perhaps even an amicable settlement may have been reached. But for this court, the defendants, having proceeding as they have, acted neither fairly nor justly.

35. We turn our attention to whether Section 3 has been complied with. There has been no evidence provided that the declaration had been exhibited at suitable places in the locality in which the land is situated. I find in this case that this notice would have been of particular importance because the Claimant lived abroad and may not have been able to see the gazetted notice. Additionally, the incorrect owner's name had been included in the original gazetted declaration. Perhaps someone else may have seen the posted notice had it been placed on his property. That person may have been able to inform him.

36. There can be no issue as to whether this requirement is mandatory or discretionary. **Samuel Bruce (ibid)** settled this when the court agreed with the finding of the High Court Judge that failure to duly post the notices

meant that the acquisition "was not carried out in accordance with the law authorizing compulsorily acquisition of land."

37. Further, the original notices incorrectly stated the land owner's name and could have been very misleading. This was later corrected by a corrigendum. I state, for completion, that to my mind a corrigendum was not sufficient to meet the requirement of The Act. The Act mandates (by the use of the word "shall") that the gazetted declaration must include a description of the land, with such particulars as are necessary to identify the land. I am of the opinion that, where the owner is known, there could be no better way to identify the land other than by the name of the owner. So, where the owner's name is erroneously stated, there is a fundamental misdescription of the land. A corrigendum may purport to correct the error but the true and practical purpose of that gazette notice may thereby be entirely lost. The corrected declaration, in its entirety ought to have been gazetted. This non-compliance with the mandatory requirements of The Act is fatal.

Compensation:

38. Section 6 of The Act directs that:

> "(1) As soon as any declaration has been published in accordance with section 3, the authorised officer shall, without delay, enter into negotiations or further negotiations for the purchase of the land to which the declaration relates upon reasonable terms and conditions, and by voluntary agreement with the owner of the land. (emphasis mine)
>
> (2) It shall not be necessary for the authorized officer to await the publication of the declaration before he endeavours to ascertain from the owner the terms and conditions on which he is willing to sell his land, but no negotiations or

agreement shall be deemed to be concluded unless and until the conditions of sale and acquisition have been approved in writing by the Minister."

39. But for a letter dated 26th February, 2015, which Mr. Modiri says he never received, the Defendants offered no other proof of an attempt to negotiate compensation with him. They admit that they received no response to that letter and that they have never since raised the issue of compensation with him.

40. Mr. Vallejos, in his witness statement, offers an excuse to the proper pursuit and consideration of compensation; *"The lands department was not given the opportunity to start negotiating as the court case started. It is the full intention of the government to compensate the Claimant for the land obtained."* This witness statement is dated 7th April, 2015 and the same evidence was given by the witness under cross-examination on the 2nd June, 2015 more than three months after the property had been compulsorily acquired.

41. To my mind, if all that was done in ***Samuel Bruce*** (ibid) did not amount to the issue of compensation being *"seriously engaged or pursued,"* then certainly the sole letter and the excuse of the filing of court matters and a subsequent injunction, would not suffice as justification for not negotiating or resolving the issue of compensation. The defence does not refute that they met with the Claimant (three times in fact) after their letter was supposedly sent to him. Yet, they never raised the issue. One need not refer to the greater number of court matters that are settled out of court rather than actually go to trial, to demonstrate the difficulty in accepting this proposition.

42. I find the excuse for the delay in seriously engaging the Claimant about compensation is flimsy and irrational - tantamount to no attempt at all. I therefore hold that the Ministry ignored its statutory duty to enter into negotiations with the Claimant **without delay**. This breach is likewise fatal to the acquisition.

43. I therefore make the following orders:

(1) A declaration is granted that the Second Defendant's decision to compulsorily acquire the Claimant's land, as set out in the schedule to the purported Declaration is an error of law, unreasonable and arbitrary.

(2) A Writ of Certiorari is granted quashing the said decision.

(3) Costs to the Claimant in the sum of $15,000 as agreed.

SONYA YOUNG
JUDGE OF THE SUPREME COURT