IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 426 of 2011

BETWEEN

NATIONAL ROADS AUTHORITY

Appellant

And

ABSHIRE BODDEN and

The EXECUTORS of the ESTATE of HAROLD BODDEN

Respondents

Mr. G. Roots, QC & Ms. D. Lewis
Instructed by Attorney General's Chambers
for the Appellant

Mr. M. Barnes, QC & Ms. K. McClymont
Instructed by Broadhurst LLC
for the Respondents

Henderson, J.

Hearing: March 25 & 26, 2014

Judgment: June 3, 2014

JUDGMENT

1. After the Governor (upon the recommendation of the Appellant, the National Roads Authority (the "NRA")) declared his intention to construct a road over a portion of the land owned by Abshire and Harold Bodden (together, the "Claimants"), they made a

claim to the Roads Assessment Committee (the "RAC") for compensation. In its decision (the "Decision") of September 29, 2011 the RAC awarded $342,886.15 to the Claimants. This appeal by the NRA is from that Decision. The appeal is brought under s. 8(1)(b) of the Second Schedule (the "Schedule") to the *Roads Law (2005 Revision)* (the "Roads Law"). In light of that provision and as a result of an earlier decision of our Court of Appeal in this case, the appeal must be restricted to an inquiry into whether the RAC "has erred in a matter of law". In disposing of the appeal this Court is empowered to "make such order (including an order for costs) as it thinks fit": *Schedule*, s. 8(3).

Facts

2. The date of His Excellency's declaration, to which I will refer as the "Declared Day", was November 14, 2006. On that day Abshire and Harold Bodden were the registered owners, as tenants in common, of a parcel of land I will refer to as "Property A". The two men were brothers. Harold Bodden (alone) was the registered owner of an adjacent parcel, "Property B". These two parcels were undeveloped land covered with grass and other vegetation. Harold Bodden was also the owner of a third parcel of land, the "House Lot", which was adjacent to both Property A and Property B and contained a house.

3. On the Declared Day the Governor announced the intention to acquire about 3.31 acres from Property A and 0.01 acres from Property B to use for a new road. The announcement gave rise to an immediate right in Abshire and Harold Bodden to

compensation for any "net loss" each man may have suffered. The governing principles are set out in the *Roads Law*. For there to be a net loss, the damage attributable to the compulsory acquisition would have to exceed the "value of the advantage to the claimant" generated by the new road: *Roads Law*, s. 8(2). An attempt to agree upon compensation with respect to Property A was not successful, although a compromise was reached in the case of Property B. Abshire and Harold Bodden applied to the RAC to set their compensation for Property A; they elected to have a "one-stage assessment" which would proceed to assess full and final compensation upon the assumption that the road would be built as intended: see *Roads Law*, s. 11.

4. Important principles governing the assessment of compensation are set out in the *Schedule* and made applicable to a claim for compensation by s. 12(2) of the *Roads Law* . As a starting point, it is necessary to determine (through expert evidence) the market value of the acquired land on the Declared Day: *Schedule*, s. 6(1)(a). "Market value" means the amount which the land if sold on the open market by a willing seller might be expected to realise: *Schedule*, s. 1(1). The phrase "might be expected to realise" is itself defined as referring to "the expectation of properly qualified persons who are informed of all particulars ascertainable about the property and its capabilities, the demand for it and likely buyers": *Schedule*, s. 1(1). In determining market value the RAC is required to assume

> *that planning permission would be granted in respect of the land ... for a use which conforms with the planning use outline in the development plan for that location and for which it is reasonable to assume that planning permission would have been granted. (Schedule, s. 6(3)(a))*
> [underlining added]

5. On the Declared Day, Property A was zoned Low Density Residential. The Claimants said that its market value must be assessed on the assumption that planning permission would have been granted for a residential sub-division development if requested. The NRA argued that such a request would have been denied because Property A had no appropriate road access.

6. Mr. Ron Sanderson, Assistant Director of Planning in the Department of Planning, said in his affidavit and oral evidence that a subdivision is "normally" required to have two access roads, although the law requires just one and that is sometimes deemed sufficient. An acceptable access road must be 30 feet wide. He said that where the access road (or roads) required an easement over adjacent land planning permission for a sub-division was usually granted only if such an easement had been registered. However, "on rare occasions" planning permission would be granted conditionally, on the expectation and condition that an easement would be registered before development could proceed.

7. Property A on the Declared Day was landlocked: it had no registered easement giving it access to a highway. If the evidence of Mr. Sanderson is correct, a purchaser of Property A could have obtained, at the most, a conditional planning permission which would have required it to acquire and register at least one, and possibly two, easements over land lying between Property A and Hirst Road, the nearby highway.

8. The Claimants said that Property A enjoyed at least two prescriptive easements which could have been registered without difficulty and thus a purchaser would have received planning permission. The NRA argued that the requirements for a prescriptive easement had not been satisfied in either case.

9. Mr. Uche Obe, Senior Valuation Officer of the Valuation and Estates Office, gave expert evidence of value on behalf of the NRA. He concluded that the Claimants could not establish that Property A enjoyed a prescriptive easement giving it appropriate access to the nearby highway (Hirst Road) and, as a result, a purchaser would not have obtained planning permission for a subdivision. He observed that no evidence of vehicular travel was shown on some aerial photographs he had examined. He does not appear to have interviewed Heather Bodden, to whom reference is made below. He found that the value of the advantage to the Claimants presented by the new road far outweighed the value of the lost land; the Claimants, he said, had suffered no net loss.

10. Mr. Michael Treacy of Bould Consulting Limited gave expert valuation evidence on behalf of the Claimants. The instructing solicitors asked him to assume the existence of a prescriptive easement, which he did. He mentions having discussed the prescriptive easement issue with Heather Bodden and having examined aerial photographs. He concluded that the net loss suffered by the Claimants on both properties was $564,200.

11. The RAC's task was, in part, to establish the market value of Property A on the Declared Day. That question depended to a considerable degree upon whether a prospective purchaser would have expected to receive planning permission for a sub-division. The

primary factual issue with which the RAC had to grapple was a hypothetical question: if, on the day before the Declared Day the Claimants had sold the land and the purchaser had applied for planning approval for a sub-division development, is it reasonable to conclude that it would have been granted? The answer appeared to depend upon whether Property A enjoyed a prescriptive easement giving it access to Hirst Road of the sort needed for a sub-division and, in particular, whether such an easement would have been recognized by the Registrar of Lands.

12. The House Lot, owned on the Declared Day by Harold Bodden, connects Property A to Hirst Road. The Claimants say that Property A enjoyed "a 30-foot vehicular prescriptive easement" over the House Lot which provided access to Hirst Road. They also noted that Property B enjoyed a registered 30-foot vehicular easement over the House Lot and alleged that Property A had a 30-foot vehicular prescriptive easement over Property B which connected with the registered easement. A question of major importance to the RAC's Decision was whether the evidence established the existence of one or both of these prescriptive easements.

13. The Claimants' case was advanced in the affidavit and oral evidence of Heather Bodden. Her affidavit reads in its material part:

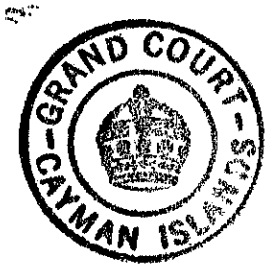
> *5. I grew up living in the house located on the House Lot with my Mum and Dad and my sisters, Property A is adjacent to Property B and to the House Lot. When I was growing up and to this day, our family spent a lot of time on Property A. When I was a young girl Property A had fruit trees including tamarind, guinep, cassava, avocado, mango, banana, orange and grapefruit trees in abundance. My family and I would tend the trees and pick and distribute the fruit. For the last ten years or so Property A has been used as grazing land for cows and horses.*

6. For as long as I can remember we accessed property A from Hlrst Road by walking or driving across the House Lot or across Property B. I am now 54 years old so I can confirm that this access has been enjoyed unimpeded for my entire life.

7. As far as I am aware there was never any formal agreement that Property A was allowed to access Hirst Road over the House Lot or over Property B, it was just the way it was as the land is in common ownership. It is all family land and so there was never any need to enter into an agreement, gain consent to use the access or to register an easement, any such suggestion is ridiculous in the circumstances as the land is in common ownership and so the House Lot, Property A and Property B were all treated as being the same parcel of property.

8. I have been informed by Kate McClymont that Mr. Obi has suggested in his report that if the access we have always had from Property A to Hlrst Road was registered, that my father might have claimed payment for that easement from my uncle Abshire as Abshire owned an interest, along with my father, in Property A. That is simply preposterous. I can confirm with absolute certainty that there is no way my father would have required payment from Abshire for registration of the easement or to seal the access way that had always been used by them and their family. These properties are all family land.

14. Once my father's estate is settled the House Lot and Property B will be owned by my sisters and I and Property A will be owned by my sisters, my cousin Benjie Bodden (Abshire's son) and myself. I can confirm that if the right of way over the House Lot and Property B that has been in existence for as long as I can remember were to be registered or that access way sealed, that my sisters and I would not charge ourselves and our cousins to register that easement or seal that access way. Any other suggestion is nonsense.



10. For at least 45 years (being as far back as I can remember clearly) Property A has enjoyed peaceable, open and uninterrupted enjoyment of access to Hirst Road over the House Lot and also over Property B. I am informed by Kate McClymont that in accordance with the Prescription Law (1977 Revision) and the Registered Land Law (2005 Revision) that as at 14 November 2006 there was therefore a prescriptive easement over the House Lot and Property B to Hlrst Road in favour of Property A. More importantly, the land between Hirst Road to Property A was all in common ownership with Property A. It is highly artificial to suggest that my father was supposed to register an easement over his own land in

favour of his other land or to suggest that he might deprive himself such access or charge his brother for access thereby denying it not only to his brother but also to himself.

11. Property A, the House Lot and Property B are in common ownership and have access to Hirst Road as a result of that common ownership, Property A also have [sic] prescriptive easements to Hirst Road over the House Lot and Property B.

14. The hearing took place over 5 days. Heather Bodden, Michael Treacy, and Uche Obi gave evidence. The RAC's written Decision, delivered some 2 ½ months later, begins by identifying the existence of a prescriptive easement as "the primary issue for resolution". The Decision then summarizes the evidence of Heather Bodden and mentions photographs tendered by the Claimants which show track marks running from Property A across Property B to (I assume) the registered easement. The Decision concludes:

> *The Committee was satisfied on all the evidence that there was a prescriptive easement benefitting Property A and that the parcel was not landlocked as alleged by the [NRA].*

15. The essential legal elements of a prescriptive easement are not mentioned. The Decision does not specify whether Property B or the House Lot (or both) is the servient tenement. There is no finding as to the approximate width of the easement or the route it takes. There is no discussion about the impact of a change in the use of Property A from agricultural land to a residential subdivision. The Decision says nothing about the impact of the characteristics of the easement upon the likelihood of a grant of planning permission. The sentence quoted above constitutes the entirety of the RAC's Decision

about the easement. After addressing some other issues which are not material to this appeal, the Decision awards $342,886 in compensation to the Claimants.

Analysis

16. In the Cayman Islands the existence of a prescriptive easement is governed by section 2 of the *Prescription Law (1997 Revision)*, which says:

> *When ...*
>
> *any way or easement ...*
>
> *a claim to which may be lawfully made at the common law, by custom, prescription or grant, has been actually enjoyed or derived upon, over or from any land or water of Her Majesty the Queen, any person or any body corporate by any person claiming right thereto, without interruption for twenty years, the right thereto shall, subject to the provisos hereinafter contained be deemed absolute and indefeasible, unless it appears that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.*

Thus, the statutory requirements are continuous enjoyment for twenty years and lack of written consent for the usage. For the other requirements, resort must be had to the common law.

17. The evidence of Heather Bodden would provide the RAC with a reasonable basis for concluding that there was continuous enjoyment for at least 20 years. There is no suggestion in the evidence that the owner and possessor of the servient tenement, which in the case of both the House Lot and Property B was Harold Bodden, ever gave his consent in writing. Consequently, it was reasonable for the RAC to conclude that these statutory preconditions were satisfied.

18. The NRA says that Property A, the supposed dominant tenement, and Property B and the House Lot (the putative servient tenements) all had a common ownership and a common possessor. If so, that would prevent any prescriptive easement because a prescriptive easement is notionally a grant and it is meaningless to speak of a grant to oneself: see the remarks of Lord Wilberforce and authorities cited by him in *Sovmots Ltd. v. Secretary of State for the Environment et al.* [1979] AC 144 (HL) at p. 169; and see *Damper v. Bassett* [1901] 2 Ch. 350. The short answer to this, however, is that neither the possession nor the ownership was entirely common. The dominant tenement was held by Abshire and Harold Bodden as tenants in common while the servient tenements were held by Harold Bodden alone. This particular circumstance is not covered by authority. I see no reason in logic or in law why an owner of land cannot make a notional grant to himself *and* to another person jointly. Abshire Bodden acquires something of real and substantial value if Property A is accorded an easement over an adjacent parcel. The fact that the "grant" is meaningless from the viewpoint of Abshire's co-owner Harold when considered in isolation from Abshire's position is no answer.

19. To obtain planning permission, a developer needs an access road (or two) which meets certain specific criteria: such a road must be at least 30 feet wide, must follow a relatively straight path, and cannot pass too close to an existing residence. The evidence of Mr. Sanderson establishes these points. Since prescriptive easements impose a burden upon the owner of the servient tenement, who must tolerate some activity upon his own land, they are subject to limitations appearing from the manner in which

the right of way was used historically. The editors of *Gale on Easements*, 14th edition, 1972, at page 261, mention some typical limitations imposed by prior judicial decisions:

> *[Easements granting rights of way] are susceptible of almost infinite variety: they may be limited as to the intervals at which they may be used – as a right to be exercised during daylight, or (formerly) as a way for a parson to carry away his tithe. Again, they may be limited as to the actual extent of user authorized – as a foot-way, horse-way, carriage-way, or drift-way. Or they may be limited as to the purposes for which they may be exercised; thus there may be a way for agricultural purposes only, or for the carriage of coals only, or for the carriage of all articles except coals.* [footnotes omitted]

The RAC's conclusion that a prescriptive easement had been proved cannot properly be understood and assessed unless the potential limiting factors suggested by the evidence have been addressed.

20. Heather Bodden's evidence mentions "driving" across Property B and the House Lot from Property A; this could provide a reasonable basis for a finding by the RAC of an easement of 15 or so feet in width – enough to accommodate one truck. There is, however, nothing in her evidence which suggests the continuous usage of a route wide enough (i.e., 30 feet or so) to allow two vehicles to pass easily. The basis upon which the RAC concluded that the prescriptive easement was of sufficient width is not revealed.

21. Heather Bodden's evidence failed to specify a particular route or routes by which persons on Property A would travel across Property B or the House Lot to reach Hirst Road. What route did the RAC have in mind for the prescriptive easement? How close does it pass to the house? Does it include any right-angle bends? These are material

considerations to the question of whether a purchaser of Property A could have obtained sub-division planning permission. The Decision is silent on these questions.

22. One can imagine that the agricultural use to which Property A has been put over the years might have resulted in the passage of vehicles over the alleged easement on a handful of occasions per day. If, as the Claimants have suggested, a sub-division containing about 50 residences were to be constructed on Property A, one could expect the number of vehicle passages to increase dramatically. It is then necessary to consider whether this would amount to a "radical change in the character" or a "change in the identity" of the dominant tenement, a change which would preclude the existence of an easement of the sort needed for a sub-division. For example, in *McAdams Homes Ltd. v. Robinson et al.* [2004] EWCA Civ 214 (CA), the Court of Appeal affirmed a decision that a change in the use of the dominant tenement from a bakery to a pair of houses (resulting in an increased use of drainage which was the subject of an easement) was such a radical change. Since this radical change in character was accompanied by a "substantial increase in the burden" on the servient tenement, the right to enjoy the easement was suspended or lost (*ibid.*, para. 49 to 51). Does the notional increase in the intensity of use of Property A make recognition of the prescriptive easement by the Registrar of Lands less likely? The Decision does not speak to this question.

The Decision

23. The *Schedule* (in s. 7(1)) requires the RAC to deliver its decision in writing. Section 8(1)(b) of the *Schedule* contemplates a review by this Court of the important questions

of law which the RAC was obliged to address, an exercise which is rendered impossible if the Decision fails to expose the reasoning behind its conclusions.

24. The *Cayman Islands Constitution Order 2009* contains, under the heading "lawful administrative action" in section 19, a right to reasons:

> 19. (1) All decisions and acts of public officials must be lawful, rational, proportionate and procedurally fair.
>
> (2) Every person whose interests have been adversely affected by such a decision or act has the right to request and be given written reasons for that decision or act.

25. The constitutional guarantee and the right of appeal on a question of law mean that a decision of the RAC must meet certain minimal standards. It is not enough to simply state a result; on the principle issues, the parties are entitled to know the reasoning and the primary findings of fact which led the RAC to its conclusion. The obligation has been described in this fashion by the House of Lords in *South Bucks District Council and another v. Porter (No. 2)* [2004] 1 WLR 1953, at p. 1964:

> *The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration.*
>
> ...
>
> *A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision.*

26. Regrettably, the abbreviated nature of the Decision renders impossible any review by me of the implicit finding that the requisite elements of a prescriptive easement had been established. The Decision presents no legal analysis at all; it simply states a conclusion. Moreover, it contains no findings of fact which would enable this Court to determine that the RAC's conclusion about a prescriptive easement was within the realm of reasonableness.

27. The failure of a tribunal to provide adequate reasons for a decision is itself a question of law. Although the NRA has not set out this ground in its Notice of Appeal I am satisfied that consideration of the adequacy of the reasons on the appeal does not take the Claimants by surprise. They have no doubt anticipated much of what has been said during argument and have not suggested they are prejudiced by the attack upon the adequacy of the reasons. I will grant leave to the NRA to amend its Notice of Appeal to include this ground. My order is that the Decision is set aside as inadequate and the claim for compensation is remitted to the RAC for a new hearing and a fresh decision.

28. Each of the parties will be permitted to adduce such additional evidence and make such additional argument at the new hearing as may appear to be necessary. In particular, the Claimants intend to argue that the market value of the land taken must reflect the fact that a purchaser of Property A on the Declared Day would know that he obtains at the same time an implied easement over the House Lot. That may result from necessity (an "easement of necessity"), from the intended use (an "easement of intended use"),

or from the rule in *Wheeldon v. Burrows* (1879) 12 Ch. D. 31 (CA); see generally, Megarry and Wade, *The Law of Real Property*, 8th edition, 2012, pp. 1286 ff. Knowing that an easement is implied, a purchaser would of course be willing to pay a higher price. The degree of increase in the market value will depend upon any perceived difficulties in having the easement registered and, most importantly, upon the perceived likelihood of planning permission being granted. The Claimants are at liberty to advance this contention even though it was not put forward (at least not clearly) at the initial hearing. The NRA is at liberty to present its own argument that the availability of an implied easement is never relevant in the context of a compulsory acquisition because the special characteristics of a notional vendor cannot be considered.

29. The parties may speak to costs if they are unable to agree.

Henderson, J.

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Judge of the Grand Court of the Cayman Islands

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