ASPECTS OF LAW AND VALUATION ON COMPULSORY ACQUISITION OF LAND

Consolidated Plantation Bhd. v. *Pemungut Hasil Tanah Kelang* [1]

The Official Assignee (of the Property of Prabhaker Chundulal Shah) v. Collector of Land Revenue[2]

Ng Tiou Hong v. *Collector of Land Revenue* [3]

THE object of this note is to comment on certain issues which were considered in the determination of compensation awarded in four recent land acquisition cases. The comments will focus on a separate issue in respect of each case. These cases are drawn from three jurisdictions, namely, Malaysia, Singapore and England.

1. *Compensation for Severance and Injurious Affection*

In the Malaysian case of *Consolidated Plantation Bhd.* v. *Pemungut Hasil Tanah Kelang*[4] one of the issues was the amount of compensation to be awarded in respect of injurious affection to the land retained by the appellants. The amount claimed under this head was $14,657,250.00 for consequential loss resulting from the closing of their mill due to inadequate water supply caused by severance of their land, though the reduction of water supply as pleaded (and admitted by a witness for the respondent) was only 30% The Collector of Land Revenue on behalf of the acquiring authority made an award of compensation in respect of the land acquired and nothing more. On a reference to the High Court, the compensation awarded for the land was increased and awards were made for two other items, one of which was $205,920.00 in respect of the diminished value (due to severance and injurious affection) to the retained land. This amount was intended to be spent on close-turfing the land acquired so that the mill would have enough water for its operation.

The parties were at variance as to the amount to be awarded for severance and injurious affection to the mill. Therefore, the question to decide on appeal to the Federal Court was the measure of damages to be awarded for the likely loss attributable to the depletion of water supply to the mill. In their observation, their Lordships of the Federal Court said they failed to understand why 100% replacement value of the mill was claimed when the appellants alleged that the loss of water supply was estimated to be only 30%. This percentage was not even proved but, as noted above, was admitted by a witness for the respondent. In the circumstances, therefore, it was held on the evidence that the appellants had not proved their case and that the award of the learned judge should not be disturbed.

The important points from the judgment of the appellate court require some discussion. One is in relation to the observation on the claim for total loss to the mill and the other is in respect of the confirmation of the learned judge's awarding the cost of close-turfing

[1] [1984] 1 M.L.J. 273 F.C.
[2] [1984] 1 M.L.J. 155.
[3] [1984] 2 M.L.J. 35.
[4] *Supra,* note 1.

land which would no longer be under the ownership and control of the appellants. As regards the former, there is nothing wrong in principle in claiming total loss where this is substantiated by the evidence. This could occur where a scaled-down operation reduces profitability to a lower or negative figure. In such a case, the operation of a factory or business may no longer be an economically viable proposition. Therefore, it is only reasonable to be put in the same position (no worse, no better) after the acquisition as before in so far as money can do it.[5] In the case of the cost of close-turfing, counsel rightly criticised the propriety of the learned judge awarding the cost and also the impracticability of the turfing work to be done since the acquired land would no longer be the appellant company's property. However difficult it is to assess compensation for severance and injurious affection, there would appear to be no excuse for adopting such an approach. As the company will no longer have an estate or interest in the land acquired there can be no guarantee that the company will continue indefinitely to enjoy a supply of water from that land, unless the acquisition is subject to the acquiring body granting an incorporeal right, *e.g.* an easement/profit a prendre to enable the company and its successors in title to enjoy an uninterrupted water supply and an irrevocable licence coupled with an interest in land to permit the company to carry out and maintain the close-turfing in perpetuity. Even so, such an arrangement may encounter a great deal of difficulties in its enforcement.

In the final analysis, therefore, there can be no substitute for adequate compensation to be paid once and for all, reflecting present and prospective losses. Accommodation works (which are common in England) on the retained land are very effective in mitigating the extent of injurious affection and severance and hence the amount of compensation to be paid, but where such works are to be carried out on land under different ownership and control they would be a very poor substitute for full compensation.

2. *Evidence as to Market Value*

It is not clear whether evidence as to what was the market value of the land acquired was an issue in the local case, *The Official Assignee (of the Property of Prabhaker Chundudal Shah)* v. *Collector of Land Revenue*.[6] Whether or not this was an issue, it would appear that their Lordships in the local Court of Appeal made a serious error in holding that as the date of purchase of the said property by the appellant was approximate to the valuation date, *i.e.* 30 November, 1973, the purchase price was to be regarded as the market value for the purposes of compensation.

In that case the land was zoned in the Master Plan for Her Majesty's forces, though it had not been occupied for that purpose since 1939. On the date of acquisition the land was being lawfully used as a pepper warehouse, for which purpose it was bought in July 1971 at a price of $400,000.00 and for which planning permission was formally granted in 1972. In January 1975 the land was compulsorily acquired, and the Collector of Land Revenue awarded a sum of $87,637.50, which he subsequently increased to $211,972.00. The latter

[5] *Ricket v. Metropolitan Rail Co.* [*1867*] L.R. 2 H.L. 175.
[6] *Supra,* note 2.

figure was upheld by the Board of Appeal on the basis that it reflected the market value of the property having regard to its zoned use. The existing use was ignored altogether by both the Collector and the Board even though the zoned use was no longer possible.

On appeal to the Court of Appeal, it was held that as this alternative basis of arriving at the market value of the property under section 33(5)(e) of the Land Acquisition Act was no longer available the market value of the property as at 30 November 1973 within the meaning of subsections (l)(a) and (5) of section 33 should be assessed on the basis of its existing use. Accordingly, the appellate court decided that the award was to be increased to $400,000.00, *i.e.* the price paid for the property. Obviously, this figure was taken to be the market value of the property as at 30 November, 1973, on the basis of the then existing use. It was a substantial improvement to that awarded by the Collector, whose award was approved by the Appeals Board. The Court of Appeal is to be applauded in holding that the zoned use, which was no longer practicable, should not form the basis of assessing the market value of the subject land.

However, from a valuation point of view, it is wrong in principle in this case to adopt the purchase price as the market value of the property in November 1973 on the premise that the date of purchase was sufficiently proximate to the date of valuation without considering other factors relevant in late 1973, in particular sales evidence. That premise could be adopted in an inactive market between the two dates in question, but in an inflationary era one must look into evidence of sales of comparable lands in the neighbourhood in the recent past, *i.e.* before the valuation date. However, this is not an inflexible rule, and in the civil appeal of *Collector of Land Revenue* v. *Manilal & Sons (Pte.) Ltd.*[7] where the Appeals Board's decision was rightly affirmed, the Commissioner of Appeals said, *inter alia, "*... it is entirely erroneous to suggest that the Board cannot consider any sale which took place after the relevant date." Sales evidence on or around 30 November 1973 will be relevant in considering what was the market value as at that date.

In *Chuah Say Hai & Ors.* v. *Collector of Land Revenue, Kuala Lumpur*[8] Gill J. held, *inter alia:*

> Where a large area of land is acquired recent sales in the vicinity are the only guides for ascertaining the valuation. The recent sale of the land acquired can be checked with prices paid in the past for similar land in the neighbourhood. In the present case the price paid for the land in the immediate vicinity of the land acquired in September 1962 was the best check on the price paid for the acquired land bearing in mind the all-round increase in the price of land over that period.

The important point to note is that if the acquired land was the subject of a sale in the recent past the sale price can be used as evidence as to the market value, bearing in mind that it is necessary to check that price against other recent sales of land in the locality. If there has been an all-round increase in value since the sale of the subject land

[7] [1979] 1 M.L.J. 102.
[8] [1967] 2 M.L.J. 99.

that increase must be taken into account. It is clear from the authorities[9] that where the land acquired was purchased by the owner within a reasonable time of its compulsory acquisition, the price paid affords infinitely the best evidence as to its market value. In *Ghulam Hussain* v. *Land Acquisition Officer, Bandra,*[10] the Privy Council observed that a sale fourteen months previously of land in the neighbourhood with similar advantages was cogent evidence, especially when nothing was shown to have happened which materially affected the value of the land between the date of sale and the Government notification. The implication here is that the market was relatively stagnant during the period of the fourteen months and so there was no all-round increase in the value of land.

It should be noted that in the present case under discussion, the purchase of the subject property took place some twenty eight months prior to 30 November 1973, the valuation date, and having regard to the general rise in property values during that period about 25% should have been added to the purchase price, assuming the price paid in July 1971 was a reasonable market price.

The case as reported in the Malayan Law Journal[11] would appear to be lacking in one important aspect, *i.e.* sales evidence as to market value in November 1973 and legal arguments in support thereof. In the circumstances, therefore, once the appellate court decided on the question of the relevant basis of valuation in determining the market value as at 30 November 1973, the case should have been remitted to the Appeals Board for further consideration as to market value on the correct basis.

3. *Method of Assessing Market Value of a Large Tract of Land*

In the recent Malaysian case, *Ng Tiou Hong* v. *Collector of Land Revenue, Gombak,*[12] the Federal Court held, *inter alia:*

> The real test by which the market value can be arrived at is to gather from the other sales what the whole land would be likely to realise in the market about the time of the acquisition. (In this case) It is clear that the learned judge erred in failing to apply the correct principle as a basis in determining the market value of the land.

This was an appeal against the decision of the learned judge in the High Court to which the Collector's award was referred. The learned judge divided the land into two parts and accepted a figure of $30,000.00 per acre submitted by the appellants in respect of some 12 acres and $15,000.00 per acre submitted by the Collector's valuer in respect of 135 acres (the remainder). The appellate court felt it was wrong in principle to adopt the learned judge's approach in land acquisition cases as the following paragraphs[13] would appear to suggest:

> Under the Act there is no provision relating to the method of valuation. However the courts have adopted the principle of

[9] *Nanyang Manufacturing Co.* v. *Collector of Land Revenue, Johore* [1954] 2 M.L.J. 69.
[10] AIR [1928] P.C. 305.
[11] *Supra,* note 2.
[12] *Supra*, note 3.
[13] *Supra,* note 3 at p. 37 *per* Syed Agil Barakbah F.J.

> valuing the scheduled land as a whole especially in cases where the area is large and owned by numerous individual owners in different portions. In *Chuah Say Hai & Ors.* v. *Collector of Land Revenue, Kuala Lumpur,* Gill J.'s ruling in that case was later re-affirmed by the Privy Council in *Collector of Land Revenue* v. *Alagappa Chettiar,* which held that under the Land Acquisition Act, 1960 the scheduled lands are to be valued as a whole. The learned judge in that case valued the whole of the 23 acres as a single unit even though the totality of the land acquired were held by the applicants in seven separate titles for areas varying between approximately 11 acres and just under half an acre. He was right in law in doing so.
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> In contrast is the Indian case of the *Collector* v. *Ramchandra Harischandra.* The judge in that case adopted a similar method in the present case. On appeal he was overruled on the ground that it was impossible to divide the whole of approximately 13 acres of land into separate portions and give one value to so much of the frontage land and divide again the interior land into separate portions and value them again at different rates. Of course, in the present case the learned judge did not adopt the latter part since he did not sub-divide the interior part of the scheduled land into separate portions but only took the remainder as a whole and assessed a lesser value than the north west portion. The real test by which the market value can be arrived at is to gather from the other sales what the whole land would be likely to realise in the market about the time of acquisition. It is clear therefore that the learned judge erred in failing to apply the correct principle as a basis in determining the market value of the scheduled land.

It would seem that the learned judge in the present case was criticised for apportioning the land into two parts and applying a different rate in respect of each without making it clear that the evidence suggested that that approach was unsuitable in the circumstances. The decision could be interpreted in such a manner as to exclude the learned judge's approach altogether in land acquisition cases even where the evidence suggests different rates should be used to value different parts. The three cases cited in the two paragraphs extracted from the judgment should be looked at.

In *Chuah Say Hai's* case,[14] the question of using different rates for different portions was not one of the issues to be decided. The case turned on the question of comparables used to value the land and undivided shares in that land. As regards *Alagappa Chettiar's* case,[15] the appeal before the Privy Council turned mainly on questions whether the learned judge correctly weighed the reliability of the divergent opinions of the respective valuers as to comparables or appreciated the different legal incidents of divided and undivided shares in land. Their Lordships of the Privy Council did not find any apparent reason to disagree with the learned judge and, therefore, the decision of the High Court was restored. *Chuah Say Hai* and *Alagappa Chettiar,* therefore, can be distinguished from the present case in that they had nothing to do with applying different rates to different portions of the subject land.

[14] *Supra,* note 8.
[15] *Collector of Land Revenue* v. *Alagappa Chettiar* [1971] 1 M.L.J. 43.

One of the issues in the Indian case of the *Collector* v. *Ramchandra Harischandra*[16] was whether the learned judge was right in adopting different rates for different portions of the land, having regard to the evidence. In the appeal against the decision of the learned judge, Macleod CJ. observed:

> But if a few of the frontage plots were sold, there is no evidence that the remainder of the land could be sold for building purposes, and that is a fact which we find in so many cases has not been recognised, where attempts have been made to value the potentiality of the land like this.

The evidence in that case did not support a valuation of the land by applying different rates to different portions, and this was the reason why the learned judge's decision was overruled, not because his method was not applicable to land acquisition cases.

In Malaysia, Singapore and India, the respective Land Acquisition Acts require the subject land to be valued as a whole, and the figure arrived at is to be apportioned among the various persons entitled to compensation. The valuation of the land as a whole does not necessarily mean that a flat rate throughout must be used to value the land. What is important is that the land as a whole must be valued in estimating its market value on the premise that there is a single purchaser willing and able to purchase it, but how the valuation is done is another matter. In this regard, it should be noted that the summation method of valuation is well recognised among practising valuers the world over. It requires a summation of the estimated values of the constituent parts of the property. Each part is separately assessed. It is primarily a question of fact whether it is a suitable method in any particular situation. For example, where part of the subject land is zoned for commercial use and the rest is zoned for residential, it will be necessary to apply the summation method, which necessarily implies the use of different rates for the different parts.

Where the subject land is zoned for a single use, *e.g.* residential, and is capable of subdivision into house plots, its value will nevertheless reflect the price a single hypothetical purchaser will pay even though that purchaser would be prepared to subdivide it and sell it in separate parcels. It will be wrong to add the values of the separate plots, on the assumption that the land can be subdivided immediately, for the purpose of estimating the market value of the subject land. It is the possibilities of the land and not its realized possibilities that must be taken into account. However, there are circumstances when a number of purchasers could be assumed, as in the case where the owner is in the process of subdividing with a view to selling to individual purchasers. In *Maori Trustee* v. *Ministry of Works (N.Z.)*[17] the Privy Council held that the court must contemplate the sale of the land as a whole, but in appropriate circumstances may contemplate a plurality of buyers of the whole. A single purchaser is not an inevitable assumption.

From a valuation point of view there is nothing wrong in principle in adopting the approach of the learned judge, provided the circumstances of the case and the comparables available would suggest that such an approach is suitable. What is required to be valued is the

[16] [1926] Bom. 44.
[17] [1959] A.C. 1.

scheduled land to be acquired, and the market value must be assessed for the whole land. However, the approach adopted in estimating that value is an entirely different matter. In estimating the market value a valuer should not be criticised for adopting a certain rate to value one part and a different rate to value another part of the land where sales evidence as analysed for similar land in the neighbourhood indicates that this is the correct approach.

4. *Assessment of Compensation for Land Acquired separate from Assessment for Compensation for Severance and Injurious Affection*

In the English case of *Abbey Homesteads Group Ltd.* v. *Secretary of State for Transport,*[18] it was held *inter alia* that the compensation for the land taken must be assessed separately from the compensation for severance and injurious affection. This view is supported by a number of cases going back to the year 1915. In *Re South Eastern Railway Company and London County Council's Contract,*[19] Eve J. observed:

> Where an owner of two pieces of land forming an area suited, and it may be best suited, for development and use as one building site sells under compulsion a part of one piece as a part of that piece, and without any reference to his interest in the other piece, the purchase price of the land so contracted to be sold must be ascertained without reference to the vendor's interest in the other piece and is not to be ascertained by deducting the value of what is left to the vendor of his two pieces after the sale from the aggregate value immediately prior to the sale.

The relevant English statutory provisions and the observations *per curiam* in *Hoveringham Gravels* v. *Chiltern District Council*[20] and the judgment of Eve J. referred to above (which was affirmed by the Court of Appeal) support the conclusion that the land acquired must be valued for the purposes of compensation separately from other land retained by the owner. Also, the Lands Tribunal decision in *Turns Investments v. Central Electricity Generating Board*[21] was to similar effect.

As the *Abbey Homesteads'* case is rather complex and a detailed discussion will necessarily take up a lot of space, the remainder of this note will concentrate on the inequitable situation that can arise as illustrated in that case and the others mentioned. An example of a valuation[22] below will demonstrate the inequity.

> *Example:*
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> A parcel of land comprising one acre in area is worth $100,000.00, but if divided into two halves individually each half is worth only $40,000.00. One half is proposed to be acquired for an electricity sub-station, the construction and use of which will depreciate the retained land to $25,000.00. Assess the total compensation likely to be payable to the landowner.

[18] [1982] 263 E.G. 983 & 1095; 264 E.G. 59 & 151.
[19] [1915] 2 Ch. D. 252 at p. 260.
[20] [1977] 35 P. & C.R. 295, at pp. 301, 303 *per* Roskill L.J.
[21] (Ref/31/1980) of the U.K. Lands Tribunals, cited in the *Abbey Homesteads Case supra* note 18.
[22] This example is taken from Khublall, *The Law of Compulsory Purchase and Compensation — Singapore and Malaysia* 1984 Butterworth, p. 155.

Assessment

Market value of the entire holding before the acquisition		$100,000.00
Value of the retained land		25,000.00
Total loss		$ 75,000.00
Value of land taken	$40,000.00	
Severance damage to retained land (($100,000÷2) – 40,000)[23]	$10,000.00	
Injurious affection to retained land ($40,000-25,000)	$15,000.00	$65,000.00
Severance damage to land acquired		$10,000.00

Based on a 'before and after' valuation the total compensation should be $75,000.00, but in the light of the *Abbey Homesteads* case and the other cases cited, the compensation likely to be awarded in England is $65,000.00. The landowner will suffer a loss of $10,000.00 attributable to severance damage to the land acquired, and since that land is required to be valued separately the compensation for the land will not reflect that loss. Neither will compensation for severance damage and injurious affection to the land retained include that loss.

It is demonstrably clear that a landowner could suffer a substantial loss where the land acquired is assessed separately. This is an anomalous situation, and it detracts from the fundamental principle that the landowner, after the acquisition, should be no worse and no better off in so far as money can do it. There should be a speedy remedy to this inequitable situation. A simple before and after valuation should be made mandatory in such situations, and it is hoped that the local courts will follow this approach as the English cases are not binding here.

Conclusion

The *Consolidated Plantation* case has raised important issues as to the correct basis of compensation for injurious affection to land. Such a decision could set an unsatisfactory precedent for the future. The issues discussed in the next two cases have focussed on the question of the compensation to be awarded for the land acquired. As market value generally forms the basis of compensating a dispossessed landowner, it is important to ensure that comparables used in trying to determine that value must be substantiated by cogent market evidence at the relevant time. Also, the method and principles of valuation employed must reflect, where appropriate, the nature and use of the subject property, having regard to the state of the market. English authorities, such as the *Abbey Homesteads* case, should not influence local jurisprudence in areas where they are obscure in their reasoning and are manifestly unjust in their application to individual cases.

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[23] Before severance each half as undivided is worth $50,000, but once divided is worth only $40,000. Thus the reduction due to severance damage is $10,000.

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