Privy Council Appeal No 92 of 2006

Mon Tresor and Mon Desert Limited *Appellant*

v.

(1) Ministry of Housing and Lands
(2) Board of Assessment *Respondents*

FROM

THE COURT OF APPEAL OF MAURITIUS

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Delivered the 9th June 2008

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Present at the hearing:-

Lord Scott of Foscote
Baroness Hale of Richmond
Lord Carswell
Lord Brown of Eaton-under-Heywood
Sir Peter Gibson

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JOINT MAJORITY OPINION OF LORD SCOTT OF FOSCOTE AND LORD CARSWELL

1. The issue on this appeal is whether the Supreme Court of Mauritius were right to reverse the decision of the Board of Assessment to value the lands compulsorily purchased by the Government of Mauritius by the residual value method and to accept instead the valuation propounded by the Chief Government Valuer, based on comparisons with an added hope value. By an award dated 5 April 2004 the Board of Assessment (Caunhye J, Mr Y Coret and Mr D Ramasawmy), having rejected the comparisons put forward, adopted the residual value basis and awarded

the appellant the sum of Rs 39,743,588. The Supreme Court (Matadeen and Domah JJ) allowed the respondents' appeal and in a written judgment given on 19 January 2006 amended the award by substituting the figure of Rs 6,430,000.

2. It was not in dispute that the appeal from the Board of Assessment to the Supreme Court under section 24 of the Land Acquisition Act was a full appeal on both fact and law, as is the further appeal to the Privy Council. Such appeals are governed by the principles laid down by the House of Lords in *Benmax v Austin Motor Co Ltd* [1955] AC 370. An appellate tribunal ought to be slow to reject a finding of specific fact by a lower court or tribunal, especially one founded on the credibility or bearing of a witness. It can, however, form an independent opinion on the inferences to be drawn from or evaluation to be made of specific or primary facts so found, though it will naturally attach importance to the judgment of the trial judge or tribunal. On an appeal from a specialist tribunal such as the Board of Assessment the Supreme Court or the Privy Council should ordinarily be slow to reject its findings on matters of pure valuation, but if it considers that the tribunal has misapprehended material facts or that the primary facts established do not lead correctly to the inferences which it has drawn from them, it can and should reverse the decision of the tribunal.

3. The subject land consists of a plot of land at Telfair, Moka, measuring 12 arpents and 86 perches (equivalent to 54,280 square metres or 5.428 hectares). The land formed part of a larger area planted with sugar cane and owned by the appellant Mon Tresor and Mon Desert Limited, which is part of the Lonrho group of companies. It was acquired by the Mauritian Ministry of Housing and Lands under the Land Acquisition Act for the purpose of building a National Children's Hospital and Institute of Cardiology and Neurology. The statutory notice under section 8 of the Act was published on 8 April 2000, which forms the date on which the land is to be valued.

4. The land was surrounded by a large tract of prime agricultural land under sugar cane cultivation, owned on three sides by the appellant company. It lies approximately 200 metres from the Reduit-St Pierre public highway and 200 metres from an estate of public housing known as Cite Telfair. The site did not have electricity, water or foul drainage services, and access was by an untarred estate road. The land on the other side of the highway contained a substantial amount of development, including the University of Mauritius and the Mahatma Gandhi Institute. The subject land was zoned for agricultural purposes, and one of the issues in the appeal was the extent of the possibility that it might be rezoned for residential or other development in the foreseeable future.

No application had been made before 8 April 2000 to rezone the site for planning purposes, and no development permit had been obtained for residential or other development. On the contrary, in correspondence with the Ministry of Housing and Lands in April 2000 the appellant resisted the compulsory acquisition on the ground of the value to it of the land for sugar cane production. In evidence before the Board of Assessment the company secretary stated that it had difficulty in fulfilling all its commitments for producing sugar cane and wished to keep production as high as possible. There was accordingly no indication that at the material date it had any intention of parting with or developing the land. There was a significant amount of undeveloped agricultural land, some 100 arpents, on the other side of the highway which was within the area in which residential development could take place.

5. In April 2001 things took an unexpected turn. The Government brokered an arrangement referred to in evidence as the "Illovo deal", described by the Supreme Court as a "very special support deal", which affected the whole zoning scheme of the area. Under this scheme a tract of land immediately surrounding the subject land was rezoned for residential purposes in preparation for a major development. Mr Noor Dilmohamed, the Chief Government Valuer, who gave expert evidence on behalf of the respondent Government department, stated categorically in evidence that no reasonable man could have foreseen that such a deal would be forthcoming and that "at the relevant date no valuer could have unless he is a magician."

6. Both sides produced evidence of sales of land on which they relied as comparables, in order to establish the value of plots of land in the area. The appellant's valuer Mr Rhoy Ramlackhan produced three comparables, but each of them was, as the Board of Assessment pointed out, in a far better location, being proximate to developed areas with amenities. For this reason both the Board and the Supreme Court, rightly in our view, declined to rely on them for comparison. Mr Dilmohamed produced five comparables, all of which related to sales of plots of agricultural land in the district of Trianon, some one and a half kilometres from the subject land. Each of these plots was in the middle of a large area of agricultural land under sugar cane production, well away from services or other development and with access only by estate roads. For this reason the Board of Assessment took the view that they did not have sufficient similar characteristics and that therefore the direct comparison method should be ruled out as unreliable. They accordingly resorted to the residual method of valuation. This method, deduced from a hypothetical development, assumes that the land in question can be developed for ultimate sale to purchasers. It is described in Johnson,

Davies and Shapiro, *Modern Methods of Valuation of Land, Houses and Buildings*, 9th ed (2000), p 165, as follows:

> "The method works on the premise that the price which a purchaser can pay for such property is the surplus after he has met out of the proceeds from the sale or value of the finished development his costs of construction, his costs of purchase and sale, the cost of finance, and an allowance for profits required to carry out the project."

The Supreme Court, on the other hand, rejected the residual method on the ground that the development potential was "at best speculative and in any event not one which can reasonably be expected to be reached in the short term". They accordingly accepted Mr Dilmohamed's valuation, based on the comparables of agricultural land, with an uplift for "hope value".

7. In our opinion the following propositions may be deduced from the authorities:

(a) The value of an interest in land compulsorily acquired is the amount which that interest, if sold on the open market by a willing seller, might be expected to realise at the date of first publication of the statutory notice. This familiar principle is given statutory form in Mauritius by section 19(3) of the Land Acquisition Act.

(b) In assessing this value the best evidence is comparison with figures from other sales of comparable property.

(c) The land acquired must be valued not merely by reference to the use to which it is being put at the time at which its value has to be determined, but also by reference to the uses to which it is reasonably capable of being put in the future: *Gajapatiraju v The Revenue Divisional Officer, Vizagapatam* [1939] AC 302.

(d) The use for which the land is being acquired must be disregarded in making this assessment: *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* [1947] AC 565; *Waters v Welsh Development Agency* [2004] UKHL 19, [2004] 1 WLR 1304.

(e) Where there are no comparable sales resort may be had to the residual value method. This should be reserved for exceptional cases and will not be applied where the open market value is otherwise ascertainable by such assessments as a spot valuation: *Cripps on Compulsory Acquisition of*

Land, 11th ed (1962), para 4-200. As the Lands Tribunal stated in *Perkins v Middlesex CC* (1951) 2 P & CR 42:

> " … a spot valuation based upon experiences of the market is more likely to be right than calculations which depend upon many assumptions and forecasts."

(f) A spot valuation can take into account the existence and amount of hope value. Its assessment depends upon an amalgam of factors, the likelihood (ranging from complete certainty to a very slight possibility) of the requisite planning permission being granted, the demand for the suggested development, the time which such development would take and the projected costs. The resulting figure represents the premium over existing use value which a developer may be thought willing to pay in order to acquire the land in the hope of turning it to profitable account.

We accordingly consider that if a spot valuation based upon comparison plus an element of hope value can give a realistic figure for the amount which a speculative developer might be willing to pay for the land, it would be wrong to adopt the residual value method. In our opinion that method should only be adopted where a proposed development scheme has such prospects of success that the comparison method cannot give such a realistic and reasonably assessable figure. It is materially more suitable for valuing land where variables such as the chance of obtaining planning permission are not large and the effect on the valuation of any contingencies can be readily assessed: cf *Lavender Garden Properties Ltd v London Borough of Enfield* (1967) 18 P & CR 320, *affd* [1968] RVR 268.

8. In the present case we are of opinion, for the reasons which we shall give, that the Supreme Court were right in assessing the possibility of a successful and profitable development taking place as low. We further consider that the comparables relied upon by Mr Dilmohamed gave an acceptable basis for assessing the value of the subject land, with an appropriate adjustment for a modest amount of hope value. There were no local sales with hope value, so the assessment has to be a spot figure. The comparables which he propounded varied in size between one arpent and eleven arpents, the sales took place between December 1996 and November 1997 and the price per arpent ranged between Rs 300,179 and Rs 409,636. The Government's figure of Rs 500,000 per arpent for the subject land therefore contained a hope value premium somewhere between 18 per cent and 40 per cent.

9. If this conclusion is correct, *cadit quaestio,* but in order to determine whether it is correct it is necessary to consider, as the Supreme Court did, the prospects which a developer might calculate of his being able to develop the land successfully for residential purposes.

10. The appellant's projected scheme contained a number of variables, which required assessment by the hypothetical developer:

- the demand for the type of housing proposed, which affects both the price which the developer could charge on the sale of plots and the time that it would take to complete the sale of the plots;
- the projected costs of the infrastructure works;
- the developer's projected profit margin;
- the impact of the several taxes chargeable;
- the chances of obtaining the necessary permits and the time required to do so if they can be obtained.

11. The Board of Assessment made findings on the first three of these, which were strongly disputed by the respondent Ministry, whose valuer's figures were less favourable to a developer. In the ordinary way we would regard these matters as falling within the area in which an appellate court should be slow to interfere with the findings of a specialist tribunal. Although the figures accepted may have been somewhat generous to the appellant, one would not on that ground alone reject them on appeal. The Board were, however, plainly wrong on the road access costs and, on the evidence adduced, their estimate of the time which would elapse before completion of the project was quite unrealistic. These flaws would have entitled the Supreme Court to review the items concerned.

12. The case really turns, however, on the last two factors, the treatment of which by the Board of Assessment was inadequate or incorrect. It was established by reference to statute law at the hearing before the Privy Council that three permits would be required for the development to proceed, a development permit relating to zoning or planning, a morcellement permit and a land conversion permit. We shall deal with these separately and the evidence relating to them.

13. The subject land was situated within a planning area within the meaning of the Town and Country Planning Act and the outline scheme for the district zoned it for agricultural use. By virtue of s 14(3) of the Act no authority is to pass or approve any plan for building or development which contravenes the scheme. Accordingly, the only way in which a developer could have obtained the development permit

required under the Act was to submit an application under s 24 to have the scheme modified and the land rezoned. That application would have had to go to the Town and Country Planning Board for its approval, which requires consultation with central government ministries and the local authority, and finally to the President for the modification order to be made.

14. Mr Ramlackhan in his valuation assumed that the necessary permits would all be granted and had not checked the chances of success in obtaining them. Mr Dilmohamed had made enquiries with the relevant bodies of the Ministry of Housing and concluded that it was unlikely that in the normal course of things the land would be rezoned. His testimony on this point was not challenged in cross-examination. Mr Pubiswar Hemoo, Principal Town Planner at the Ministry of Housing, expressed the opinion that as the site was far from the existing village it would be very difficult to have allowed the rezoning and that there would be very little chance of obtaining the permit. He agreed in cross-examination that there was no reason why the subject land would have been excluded when the surrounding land was rezoned. It is quite apparent, however, that he was speaking of the situation which appertained when the Illovo deal was in being and an application was made to rezone the land surrounding the subject land as part of that deal. We do not accept that his answers at this point in his evidence negated the conclusion of the Supreme Court that there was only a "bleak and remote possibility" of obtaining a rezoning at the material time. On the evidence presented to the Board of Assessment we do not see that any conclusion was open to them but that there was little chance of a developer's being successful in a rezoning application. The Board did not refer at any point in their decision to the difficulties involved, notwithstanding the evidence that they had received, and appear to have assumed that the lands would be rezoned, the only question being the time it would take. In our view the Board's decision was unsustainable in this respect.

15. Morcellement is the division of a plot of land into two or more plots and under the Morcellement Act requires a permit from the Morcellement Board. By virtue of the provisions of that Act an applicant developer is required to submit details of infrastructural work, comprising such matters as roads, access and road connections and sewerage. A morcellement fee is payable, which at Rs 6 per square metre would amount to Rs 325,680 for the subject lands. There was no suggestion in the evidence that obtaining a morcellement permit would cause particular difficulty or delay, but it is one more hurdle to be surmounted before a development could proceed. The need to satisfy the conditions of the Ministry of Public Infrastructure meant that an access road would have to be constructed on the line and to the specification laid down by them,

with a consequential effect on the costs, which the Board failed to acknowledge in its costing of the infrastructural works.

16. The third permit, discussion of which formed a considerable part of the argument before us, is the land conversion permit. Mr Ramlackhan did not take this into account at all, assuming, incorrectly as it was established, that it would not be required if the land were rezoned. The Board of Assessment accordingly left it out of account in reaching its conclusions, whereas the issue of whether a permit could be obtained at all was very significant, as was the impact of the land conversion tax. This factor alone casts a considerable shadow over the validity of the Board's conclusions.

17. Land conversion is dealt with under the Sugar Industry Efficiency Act, which is aimed at regulating the conversion of agricultural land, especially land under sugar cane cultivation, to non-agricultural use. Section 5 provides that no agricultural land shall be put to a non-agricultural use except (a) where the prescribed conditions are satisfied; (b) with the prior written authority of the Minister; and (c) upon payment of the land conversion tax. The Minister is advised by a Land Conversion Committee and he has to have regard, inter alia, to the necessity for ensuring that the level of production of sugar is sufficient, preserving agricultural land, optimising agricultural production, preventing speculation in agricultural land and respecting outline schemes and planning and development directives.

18. The land conversion tax, based on area, was calculated at Rs 18,998,000. Section 5(7) of the Act specifies a number of situations in which land conversion tax will not be payable. The one material to the present case is set out in s 5(7)(f):

> "(f) in respect of land … where … the applicant undertakes –
> (i) to sell to the Government at nominal rates, within a period of 6 months after the application is granted, 25 per cent of the agricultural land to be converted;
> (ii) to plough back at least 60 per cent of the proceeds arising from the conversion, of which at least half to sugar production, or diversification, within sugar in Mauritius, in the schemes specified in the Fifth Schedule, and the remainder to any other economic activity in Mauritius."

The Fifth Schedule sets out a range of schemes in which the proceeds could be invested, including both agricultural and industrial projects. It was represented on behalf of the appellant that it could readily satisfy the

conditions, but it is less clear that the hypothetical developer would find it so straightforward. Moreover, Part III of the Sixth Schedule provides for a further restriction on the developer:

> "Where an authorisation for conversion granted under section 5 is in respect of land to which the rates applicable are the rates specified in Category I of Part I, and where the land converted is in excess of 5 hectares, the applicant shall, within a period of two years —
> (a) plough back at least 50 per cent of the proceeds arising out of the conversion to sugar production at field or factory level or diversification within sugar;
> (b) fully compensate the loss in agricultural production computed by the committee by generating an equivalent amount of such production for at least one crop cycle of eight years by —
> (i) putting under cane cultivate other land belonging to the applicant; or
> (ii) implementing projects relating to water and energy saving irrigation methods."

This restriction was not the subject of discussion in the Board's decision or that of the Supreme Court, and we were not informed whether there are any avenues of escape from this requirement, but prima facie it appears to be a significant restriction on a developer's freedom of movement and a deterrent to the conversion of agricultural land. It would therefore appear very likely that the hypothetical developer would be unable to take advantage of the exemption and would be liable for the tax.

19. The appellant's valuer had not taken the issue of obtaining a land conversion permit into account or checked the chances of success in obtaining a permit. Nor did Mr Dilmohamed deal with the prospects of success in the course of his evidence. The Supreme Court stated in their judgment (Record, p 214) that "the unchallenged evidence of the Town Planner was that at that time there would have been very little chance of obtaining the land conversion permit under the Sugar Industry Efficiency Act." Mr Hemoo's evidence appears, however, to have been directed entirely to the possibility of rezoning under the planning legislation, save for an unresolved point about the time which it would take to obtain a land conversion permit. We are left to speculate about the issue, which we are reluctant to do, and the most we can say is that the Minister would have had to approve the conversion, having regard to the factors in s 5(5) of the Act which may constitute contrary factors, and that the possibility of obtaining exemption from the land conversion tax appears very problematical.

20. One further fact emerged in evidence which did not receive any attention in the decisions of the lower courts, but which seems to us to have some significance. In his cross-examination at page 80 of the Record Mr Ramlackhan stated that in the previous 10 to 15 years developers had not been buying properties to convert them into residential properties. What they had been doing was developing other people's land at a fixed fee, without any risks on their part. Although the residual value method presupposes a hypothetical developer, it is part of an exercise designed to ascertain what the land would have fetched in the open market. If there were in fact no buyers in the open market for development, this tends to show that the residual value method in the present case will not give a realistic figure for the true value of the land.

21. In our opinion the decision of the Board of Assessment contained a number of defects. In the first place, they were too ready to depart from the comparison method of valuation of the land and to adopt the residual method. Secondly, their calculation based on the residual method was flawed, in that

> (a) it assumed the existence of a hypothetical developer and disregarded the evidence of the absence of purchases for development;
> (b) the estimate of the infrastructural costs, in particular the access road, was on the evidence too low;
> (c) the estimate of the time which the project would require was substantially too low;
> (d) it left out of account the issue of obtaining a land conversion permit and the impact on the project of land conversion tax;
> (e) no allowance was made for the risk of failing to obtain the necessary permits, ignoring the evidence adduced by the respondent Ministry.

In the process the Board of Assessment accepted with too little question the evidence of Mr Ramlackhan, which was deficient in a number of material respects, particularly in relation to land conversion and its cost and to the risk of failing to obtain the permits for the development. In the result the Board failed to give proper consideration to the issue whether the hypothetical development would have been viable and whether any developer would make an offer at all or be prepared to pay more than agricultural value with a modest hope value in addition.

22. It may be seen from the foregoing that there were serious difficulties in the way of accepting the residual method of valuation, in particular the impact of land conversion tax and the very substantial

possibility that the necessary permits could not be obtained at all. Several calculations of the costs were put forward at various times in an attempt to furnish a value of the land based on the residual method. The appellant's figure, contained in Mr Ramlackhan's written valuation of 8 August 2002 was scaled down by the Board of Assessment as being excessively high. The Board's own assessment suffers from the defects to which we have alluded. Mr Dilmohamed's assessment based on the residual method (Record, p 269) concluded that the project would not be viable, but it did not bring the deduction of land conversion tax into account in the correct part of the calculation and required adjustment. An attempt was made to provide that adjustment by the production during the hearing of the appeal of a revised assessment. This reworked figure showed a value per arpent which was very little more than the Government's offered figure and made assumptions about cost based on the Government's own figures and not those accepted by the Board of Assessment. It also made a deduction of 50 per cent for the risk, which is a purely arbitrary assessment. The best conclusion one could reach on these figures is that if the risk factor were ignored and the Board's assumptions about costs accepted, there could be enough profit to justify an offer price materially higher than the Government's figure of Rs 500,000 per arpent, perhaps two or three times that figure. We do not propose to attempt to rework the calculation, which is a difficult exercise requiring a valuer's professional skills, and in any event would be highly speculative.

23. In our view it is impossible to tell from the evidence what notional deduction a developer might then make for the risk of failing to get the permits, the time factor involved and the doubts about the extent of demand for housing – assuming any developer could be found who would be interested in such a project. This leads us to the conclusion that resort to the residual method is an inappropriate means of assessing the value of the subject land. We consider accordingly that the Supreme Court were right to reverse the decision of the Board of Assessment and reject a valuation based on that method. It was right to accept a valuation based on existing use value plus a modest addition for hope value. The only figure which it had before it on this basis was that of Mr Dilmohamed, and in our view the Supreme Court was justified in adopting it.

24. We would therefore dismiss the appeal with costs.

CONCURRING OPINION OF LORD BROWN OF EATON-UNDER-HEYWOOD

25. I have had the advantage of reading in draft the joint opinions respectively of Lord Scott of Foscote and Lord Carswell who favour dismissing this appeal, and of Baroness Hale of Richmond and Sir Peter Gibson who favour allowing it. In common with Lord Scott and Lord Carswell I too would dismiss it but, in the light of what will be the minority opinion, rather than simply subscribe to Lord Scott and Lord Carswell's opinion, I prefer to explain my decision in my own words. I recognise that this is an unusual course to take but I see no objection to it. Not merely is it the conventional course taken in comparable final appeals to the Appellate Committee of the House of Lords but it is the course taken by the Board itself in Scottish devolution appeals.

26. I gratefully take the detailed facts from the other opinions; they are most fully set out in that of Lord Scott and Lord Carswell. As they make clear, the appeal concerns an island of land some five and a half hectares in area (roughly equivalent to 240 metres square) within the appellant's very extensive sugar cane estate in Mauritius. The question raised on its compulsory acquisition by the government was as to its value on 8 April 2000. Section 19(3) of the Land Acquisition Act 1982 provides that:

> "The value of any interest in the land should be the amount which that interest if sold on the open market by a willing seller, might be expected to realise at the date of the first publication of the notice under section 8."

27. Elementarily, the price which the land might reasonably have been expected to fetch on the open market on 8 April 2000 would have been expected to reflect whatever development potential the land had. As stated by the Privy Council in *Gajapatiraju v Revenue Divisional Officer, Vizajapatan* [1939] AC 302, 313:

> "[T]he land is not to be valued merely by reference to the use to which it is being put at the time at which its value has to be determined . . . but also by reference to the uses to which it is reasonably capable of being put in the future . . . No one can suppose in the case of land which is certain, or even likely, to be used in the immediate or reasonably near future for building purposes, but which at the valuation date

> is waste land or is being used for agricultural purposes, that the owner, however willing a vendor, will be content to sell the land for its value as waste or agricultural land . . . [T]he possibility of its being used for building purposes would have to be taken into account."

28. The foundation of the Assessment Board's decision was that "it is beyond dispute . . . that as at 8 April 2000 the subject property had a real and obvious potential for higher development." On that basis, and "in the absence of any appropriate comparables with sufficient similar characteristics for residential development", they adopted the residual method of valuation, namely a calculation of the net profit a developer might reasonably have expected to achieve from the residential development of the land.

29. The Supreme Court on appeal took a very different view of the evidence. On their reading of it, "there was only a bleak and remote possibility of obtaining a re-zoning at the material time"; the evidence suggested "that the development potential was at best speculative and in any event not one which can reasonably be expected to be reached in the short-term." In these circumstances the Supreme Court thought the residual method of valuation inappropriate and substituted for it the rival approach contended for by the Minister: "the direct market comparison approach together with an enhancement for a slight hope value."

30. That the Assessment Board's decision could not stand so that the Supreme Court had no alternative but to allow the appeal from it is agreed by all members of this Board. As Lord Scott and Lord Carswell point out at paragraph 12 of their opinion, for residential development to proceed three permits would be required: a development permit relating to zoning or planning, a morcellement permit and a land conversion permit. Paragraphs 13 to 18 of that opinion detail the many obstacles and uncertainties which would have been faced in obtaining all these permits. Astonishingly, however, the Assessment Board took no account whatsoever of the risk that residential development might not be permitted and, indeed, valued the land on the basis that the whole development process would be completed within just two years from 8 April 2000. Lady Hale and Sir Peter Gibson make plain at para 14 of their opinion that they too regard the Assessment Board as having been clearly in error. These errors, indeed, seem to me to have been so egregious as to deny the Assessment Board's views the entitlement to such substantial degree of respect as is ordinarily due to an expert valuation tribunal. Lady Hale and Sir Peter Gibson suggest at para 7 of their opinion that "the transcript of evidence shows that the Judge who chaired the Board subjected the evidence on both sides to a proper level

of scrutiny." Be that as it may, the transcript of evidence certainly belies the Assessment Board's all important conclusion that the land's "real and obvious potential for higher development" was "beyond dispute"—on the contrary, it was hotly disputed.

31. The appeal from the Assessment Board's determination therefore had to be allowed. What divides your Lordships is: with what result? Were the Supreme Court entitled, as they did, simply to substitute the Minister's contended for valuation for the Assessment Board's unsustainable assessment or should they have remitted the case to the Assessment Board for reconsideration? Lady Hale and Sir Peter Gibson favour the latter course and I confess that at one time I too leaned towards it. In the end, however, I have come to the contrary conclusion and now think the Supreme Court right to have disposed of the appeal as they did.

32. Critically, of course, the question here is whether really this was a case for the residual method of valuation at all. Lady Hale and Sir Peter Gibson at paragraph 15 of their opinion quote from Johnson, Davies and Shapiro's *Modern Methods of Valuation of Land, Houses and Buildings* (9th ed, 2000) a passage (at pp279-280) which I regard as going to the heart of the matter. For convenience I repeat it, adding the final sentence which completes the paragraph in the text:

> "A valuation to determine hope value is often impossible other than by adopting an instinctive approach, particularly in the stages when the hope of permission is remote; it can only be a guesstimate of the money a speculator would be prepared to pay. As the hope crystallises into reasonable certainty of a permission at some stage , a valuation can be attempted based on the potential development value deferred for the anticipated period until permission will be forthcoming, but with some end deduction to reflect the lack of certainty. Indeed, since most developers will buy only when permission is certain (preferring an option to buy or a contract conditional on the grant of permission before certainty has been reached) any sale in the period of uncertainty will probably require a significant discount on what might otherwise appear to be the full hope value."

33. In this case the fundamental uncertainties as to whether ever and if so when it might be possible to acquire all three necessary permits and then successfully complete the residential development of this land (put aside the further uncertainties as to the likely costs of such a development, including any land conversion tax) were to my mind such

as to rule out the residual method of valuation in this case. No doubt it made sense to adopt this method if all these uncertainties were to be ignored (as they were by the Board). But not otherwise. In determining the hope value as at 8 April 2000 all that could sensibly be achieved was "a guesstimate of the money a speculator would be prepared to pay". By no means had the stage been reached when "the hope crystallises into reasonable certainty of permission" when "a valuation can be attempted based on the potential development value deferred for the anticipated period until permission will be forthcoming with some end deduction to reflect the lack of certainty" (ie. the residual method of valuation). There was no such "reasonable certainty" here, still less the absolute certainty on which the Assessment Board based their own calculations. Whether or not the Supreme Court were correct in characterising the prospect as "bleak and remote" matters little; they were certainly justified in describing it as "at best speculative" and unlikely "in the short-term."

34. Chapter 11 of *Johnson, Davies and Shapiro*, entitled 'Residual Method of Valuation', appears to me to support the view that the development prospects of this plot were altogether too speculative to justify use of the residual method of valuation. Lady Hale and Sir Peter Gibson at paras 10 and 11 of their opinion quote from chapter 11. But the "uncertainty" produced by "a large number of variables" as discussed in that chapter is as nothing compared to the yet more fundamental uncertainties—as to whether and if so when and at what cost (including the likelihood and extent of land conversion tax payable) the three permits would have been obtained—surrounding the possible future development of this land.

35. Lady Hale and Sir Peter Gibson would remit the case for reconsideration in the light of their opinion. But how should the Assessment Board factor in all these many uncertainties which initially they quite simply overlooked. And how confident could the respondent ministry be that they were now doing so with complete objectivity? Or would it be necessary to have a complete rehearing before a freshly constituted Assessment Board?

36. Had the appellants, as willing sellers on the open market, advertised for sale this island of land, I find it difficult to suppose that any bids forthcoming from property developers would have been calculated by reference to the residual method of valuation. (I refer to it as an island of land simply to emphasise how matters stood before the Illovo deal—which of course has to be ignored—so dramatically altered the development landscape.) The most the appellants could have expected (and the final sentence from the above cited passage from Johnson, Davies and Shapiro is of some significance in this regard) would have

been a bid which included a premium over the basic agricultural land value.

37. For my part I readily acknowledge that that premium might well have exceeded the very modest amount (18-40% of the basic agricultural value as calculated by Lord Scott and Lord Carswell at para 8 of their opinion) included in the Minister's offer (although, as Lady Hale and Sir Peter Gibson point out at paras 4 and 16 of their opinion, the offer was in fact first made solely by reference to the land's agricultural value). The fact is, however, that no alternative case was ever advanced by the appellants contending for a higher uplift on basic value: the contest was at all times simply between the residual method of valuation and agricultural land comparables with a small hope value premium. If, as I believe, the residual method of valuation is fundamentally inappropriate in a case of this sort, the valuation dispute ought now to be regarded as finally at an end and the litigation concluded.

38. It is in these circumstances and for these reasons that I too would dismiss this appeal.

JOINT DISSENTING OPINION OF BARONESS HALE OF RICHMOND AND SIR PETER GIBSON

39. It is unusual in valuation cases for either side to be completely right. The Government of Mauritius compulsorily acquired a plot of land, 12 arpents and 86 perches (54,280 square metres) in area, in order to build a National Children's Hospital and Institute of Neurology and Cardiology. The Government valuer assessed its value at Rs 500,000 per arpent, giving a total of Rs 6,430,000 for the whole plot. The owner's valuer proposed a value for the whole plot of Rs 74,360,000. The Board of Assessment decided that it was worth Rs 39,743,588. The Supreme Court allowed the Government's appeal and substituted the Government valuer's figure of Rs 6,430,000. But it does not follow from the fact that the decision of the Board was open to criticism that the Government's figure had necessarily to be accepted as correct. In our view both were wrong.

40. Section 19(3) of the Land Acquisition Act 1982 simply provides that:

> "The value of any interest in the land shall be the amount which that interest if sold on the open market by a willing seller, might be expected to realise at the date of the first publication of the notice under section 8."

There are no provisions, comparable to those in the United Kingdom's Land Compensation Act 1961, relating to the assumptions which are to be made about the grant of planning permission for the development of the land. Nevertheless, it is common ground that the principle stated in *Gajapatiraju v Revenue Divisional Officer, Vizagapatam* [1939] AC 302, 313, applies:

> "For it has been established by numerous authorities that the land is not to be valued merely by reference to the use to which it is being put at the time at which its value has to be determined . . . but also by reference to the uses to which it is reasonably capable of being put in the future. . . No one can suppose in the case of land which is certain, or even likely, to be used in the immediate or reasonably near future for building purposes, but which at the valuation date is waste land or is being used for agricultural purposes, that the owner, however willing a vendor, will be content to sell the land for its value as waste or agricultural land . . . the possibility of its being used for building purposes would have to be taken into account."

41. There were two issues in this case. The land in question was in agricultural use as part of a sugar plantation. The first issue was whether the possibility of developing the land for "higher uses" in future should be taken into account at all. The second issue was as to the correct method of calculating its value. The Government valuer had relied solely on sales of agricultural land which he regarded as comparable. The Board and the owner's valuer adopted the "residual method", calculating what might eventually be realised if the site were developed for sale as residential building plots and then deducting the costs of that development.

42. In his written report, dated 13 March 2002, Mr Dilmohamed, the Deputy Chief Government Valuer, did not take into account the possibility of future development at all. He stated that "the highest and best use of the property is agricultural at the time of the acquisition and will remain unchanged in the foreseeable future considering its location outside the limits of permitted development as more fully shown in the

Outline Scheme" for the particular area. Hence, "The land has been assessed on the basis of its current use, that is agricultural land". He put a comparatively high value on it, "bearing in mind the location, accessibility and existing irrigation improvements". In his oral evidence to the Board, however, he said that his figure of Rs 500,000 per arpent "will take into consideration [a] slight hope value of about 10 – 15 per cent because on a purely agricultural basis it would not exceed 350,000 to 400,000 an arpent but that 100,000 as a surplus I have granted it as a hope value potentiality in the long term". If, contrary to his written evidence, that was what he was doing, he must have regarded the possibility as very slight indeed, as there was evidence that residential plots in the vicinity were selling at a rate of approximately Rs 11,100,000 per arpent.

43. The Board were of course aware that, in the "Illova deal" in 2001, an area of land around the site had been rezoned and the claimants permitted to sell it for residential building purposes exempt from land conversion tax. They were careful to remind themselves that they should not take account of evidence which was not available on the valuation date. Nevertheless, they concluded:

> "Yet, it is beyond dispute, independently of any evidence which came to light afterwards, that as at 8 April 2000 the subject property had a real and obvious potential for higher development although it was currently in an agricultural zone. This is mainly due to its location. It is located at about 200 metres from the Telfair Housing Estate and quite proximate to the Motorway at Reduit and near substantial institutional development like the University of Mauritius and the Mahatma Gandhi Institute."

44. The Supreme Court disagreed. Taking into account the evidence "that there was only a bleak and remote possibility of obtaining a rezoning at the material time", the need to apply for land conversion and pay land conversion tax, the costs of providing services and infrastructure, and that all the major institutional development was on the other side of the main road, they concluded that "these factors, when looked at objectively, tend to suggest that the development potential was at best speculative and in any event not one which can reasonably be expected to be reached in the short term".

45. In our view, the Supreme Court should not have over-turned the finding of the Board on this issue. The question was whether the land had a reasonable possibility of development which a willing buyer and a willing seller would take into account when negotiating a purchase price. There was evidence each way on the prospects of development and members of the Board were also entitled to take their own expert opinions

into account. The location of the land was very close to a junction between the major trunk road, described as a motorway, going from north to south on the island and a main road to the east. It was easy to get to from all over the island. Hence there had already been major institutional development close to the road junction, which had quite recently been improved. That development brought with it increased demand for housing. There had already been some residential development on this side of the main road. The site was close to this development and to the main road. Zoning and other obstacles were not insurmountable. All of this was apparent to the Board from the evidence of the witnesses and of their own eyes. As an expert valuation tribunal they were better placed to make the necessary judgments and predictions than anyone else. The transcript of evidence shows that the Judge who chaired the Board subjected the evidence on both sides to a proper level of scrutiny.

46. The real issue, in our view, is how the land, as agricultural land with a real possibility of development for residential use in the foreseeable if not immediate future, should have been valued. The Government valuer adopted the "direct capital comparison" approach. He looked at recent sales of plots of agricultural land from all over the island, some of them quite close to the subject land. The problem with this approach, as the Board pointed out, was that none of the plots chosen was directly comparable. Those that were in the same area of the island were not close to the main transport hub, indeed not close to the roads at all, or to another built-up area. As Johnson, Davies and Shapiro point out, in *Modern Methods of Valuation of Land, Houses and Buildings* (9th ed, 2000, p 14), "Property can never be absolutely identical, so that the use of this method is limited to the simplest cases."

47. The claimant's valuer, on the other hand, had adopted the residual approach. He had calculated what the land would realise if parcelled out into building plots with appropriate roads and services, deducted the costs of doing this, originally arriving at the sum of Rs 74,360,000 but later revising this to Rs 66,500,000. The Government Valuer, while not accepting that the approach was valid, had also done a residual calculation, with a view to demonstrating that residential development of this agricultural land was not feasible. After deducting morcellement tax and capital gains tax from the gross profits, he arrived at the sum of Rs 28,140,915 or Rs 2,188,250 per arpent. He reduced that figure by 50% to Rs 1,094,125 for the risk that permission for the residential development would not be obtained. He then referred to the purchaser's liability for land conversion tax at the rate of more than Rs 1,400,000 per arpent.

48. The variables between the two valuers' calculations of the gross profits included the realisable price of the plots, the amount of the land to

be devoted to infra-structure and landscaping, the costs of providing the various items of infrastructure, and in particular the cost of providing an access road, and the delay in realisation. As Johnson, Davies and Shapiro (p 176) comment

> "Given a calculation based on a large number of variables, the actual range of answers which can be produced is wide. This uncertainty is the method's weakness but it is one which is acceptable so long as the estimates are prepared with as much information as is available to narrow possible errors."

49. Johnson, Davies and Shapiro also comment that, in the United Kingdom, the residual method "is disliked by the Lands Tribunal in compensation cases because it is not tested by 'haggling in the market'. In the open market, however, the residual method will continue to be the main cornerstone of many opinions of value, particularly those involving land for development or redevelopment." The United Kingdom compensation scheme is, of course, more complex than that in Mauritius, not least because it involves statutory assumptions about the grant of planning permission.

50. The Board concluded that, "in the absence of any appropriate comparables with sufficient similar characteristics for residential development", the direct comparison method should be ruled out and the residual method adopted. They then went through the various variables and in general adopted a middle course somewhere between those suggested by the claimant and those suggested by the Government. The figure at which they arrived, Rs 39,743,588, was nearer to that proposed by the Government Valuer in his residual value calculation than to that proposed by the claimant's valuer.

51. The Supreme Court concluded that as, on their view, the land fell to be valued as agricultural land only, the Board were wrong to reject the direct comparison method. Furthermore, even if the residual method could be adopted, the Board had erred in not taking into account the land conversion tax payable under the Sugar Industry Efficiency Act, exemption from which was not automatic. They had also erred in not taking into account the risk of failing to obtain the necessary planning permits and the length of time that all this might take.

52. In our view, the Board were clearly in error in failing to take into account the possibility that the necessary permits might not be obtained, the various possible permutations under which land conversion tax might or might not become payable, and the length of time that all this might take. Their calculations appear to have been on the basis that the

development would definitely be permitted and the benefit realised within two years. They took into account capital gains tax but not land conversion tax. The incidence of the latter was mentioned but not fully explored before them. On Mr Dilmohamed's approach to the calculation, the incidence of the tax would render virtually all residential development of agricultural land unviable unless the scheme could be exempted. In our view, he had over-stated its effect. It would be a deduction from gross profits in the same way as infra-structure costs and thus reduce the profits to which capital gains tax applied. There are also circumstances in which such development can be exempted. That much at least it is permissible to conclude from the "Illova deal" in 2001. But if nothing else, the possible incidence of the tax is one of the uncertainties that must be factored into any residual method calculation.

53. At the end of the day, where there is a reasonable prospect of development in the future, some method has to be found of assessing the "hope value" in the property. As Johnson, Davies and Shapiro (pp 279-280) candidly admit

> "A valuation to determine hope value is often impossible other than by adopting an instinctive approach, particularly in the stages when the hope of permission is remote; it can only be a guesstimate of the money a speculator would be prepared to pay. As the hope crystallises into reasonable certainty of a permission at some stage, a valuation can be attempted based on the potential development value deferred for the anticipated period until permission will be forthcoming, but with some end deduction to reflect the lack of certainty."

In other words, there will be a sliding scale from a "comparables plus" approach to a "residual value minus" approach. A hypothetical developer, purchasing land for his "bank", would be bound to do some calculation of how much he might eventually make from the development, as well as the risk that he might not be permitted to do it. He would do this even if there were truly comparable sales, though he would also look at these to make sure that he was not proposing to pay too much. That is no doubt why Johnson, Davies and Shapiro comment that the residual method is the main cornerstone for many opinions of value in the open market. It is certainly more scientific than a so-called "spot" valuation, which is not a term of art, and was used in quite a different legal and factual context in the case of *Perkins v Middlesex County Council* (1951) 2 P & CR 42.

54. In our view, therefore, both the Supreme Court and the Board fell into error. The Supreme Court erred in leaving out of account altogether the undoubted development potential of this land and thus adopting an

approach which had been premised on purely agricultural comparables. They cannot have taken the evidence of the Government valuer as indicating that he had made a serious attempt to assess the hope value of the land. He had put the same value on it as purely agricultural land in his written report. The modest increase to which he referred in his oral evidence bore no relationship to the enormous disparity between the price of residential plots and the price of agricultural land. On the other hand, the Board also fell into error in adopting the residual approach without discounting for the risk that the development might never happen, or might not happen soon, and at least considering the possible incidence of land conversion tax. The truth, as always, must lie somewhere between the two.

55. We would have allowed the appeal and remitted the case to the Board for reconsideration in the light of this opinion.