

[HIGH COURT OF AUSTRALIA.]

THE MINISTER OF STATE FOR THE NAVY APPELLANT ;

AND

RAE . . . . . RESPONDENT.

*National Security—Requisitioning of ship—Assessment of compensation—Interest on compensation moneys—High Court—Jurisdiction—Procedure—National Security (General) Regulations (S.R. 1939 No. 87—1943 No. 224), regs. 57, 60a.*

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HOBART,  
Feb. 18.  
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SYDNEY,  
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During war-time the Commonwealth, in pursuance of the power conferred by reg. 57 of the *National Security (General) Regulations*, acquired the *Myrtle Burgess*, used by the owner in crayfishing. Under the conditions prevailing it was, and would be for some time, impossible for the owner to replace the vessel. The conditions, too, made it impossible that such craft should have an ascertainable market value.

*Held* that in reaching a conclusion as to compensation for the taking of a piece of property such as the *Myrtle Burgess* it is necessary, or at all events wise, to pursue as many means of estimation as are open, to compare them, and then, as an exercise of judgment, to fix what, upon considerations this process suggests, appears to be fair compensation. To find the value of the *Myrtle Burgess* as a going concern to its owner at the time of acquisition it was proper first to take the items of capital expenditure which had been incurred by the owner and make some estimate of the extent which they should be depreciated for physical deterioration. Allowance should be made for the fact that she was taken from the owner as a going concern used in the earning of profits. What system of depreciation was to be employed in a given case was a question of suitability to be judged as a matter of fact. It was desirable, in the second place, to consider the matter from the point of view of replacement or reinstatement less depreciation. In existing circumstances, where replacement by building was out of the question for at least three years, the immediate availability for the purpose of a profitable business of an existing, though old, craft must operate to raise its price above the depreciated equivalent of replacement cost and an addition should be made therefor. In the third place it was wise to use such evidence as was available to attempt to construct



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a pre-war value, and then to add what was thought to be an appropriate percentage to represent the increase in cost of production and generally in the value of craft.

The practice of allowing interest was not challenged in the case. His Honour referred to the equitable principle whereby interest is allowable on arrears of purchase money upon the compulsory acquisition of property which might be the subject of a contract falling within the cognizance of a court of equity and enforceable by the remedy of specific performance, and observed that it may be true that compensation moneys for the acquisition of the full property in a ship bear interest.

Jurisdiction of High Court and procedure in applications for review under reg. 60G of the *National Security (General) Regulations* considered.

#### REVIEW OF COMPENSATION.

The Minister for the Navy applied to the High Court, under reg. 60G of the *National Security (General) Regulations*, to review an award of compensation by a Naval Compensation Board, acting under reg. 60F, to John Rae, in respect of the acquisition by the Commonwealth under reg. 57 of a craft named the *Myrtle Burgess*, of which Rae was the owner.

The matter was heard by *Dixon J.*, in whose judgment the facts are fully stated.

*Alderman K.C. and Cox*, for the appellant.

*Creese*, for the respondent.

*Cur. adv. vult.*

May 10

DIXON J. delivered the following written judgment:—

This is an application to the High Court in its original jurisdiction to review an award by a Naval Compensation Board to the respondent, John Rae, in respect of the acquisition by the Commonwealth of a craft named the *Myrtle Burgess* of which Rae is the owner.

The proceedings are taken under the *National Security (General) Regulations*. As I understand it, the *Myrtle Burgess* was acquired in pursuance of the power conferred by reg. 57 and the Board acted under reg. 60F in assessing the compensation.

The Minister of State for the Navy, being dissatisfied with the assessment as excessive, invokes the Court under reg. 60G. It is evident that, up to the stage when an application is made to the Court the assessment and award of compensation must be regarded as an administrative matter. A Compensation Board cannot, under our constitutional system, exercise any of the judicial power of the



Commonwealth. That power is brought into play for the first time when, on so called proceedings to review, the Court determines the compensation. They are in truth originating proceedings in the original jurisdiction, just as are the "appeals" from the Commissioner of Taxation and from taxation Boards of Review and Valuation Boards. As the matter concerns a claim by Rae against the Commonwealth, it is one over which the High Court has original jurisdiction in virtue of s. 75 (iii.) of the Constitution, as has been pointed out by *Williams J.* in the recent case of *James Patrick & Co. Pty. Ltd. v. Minister of State for the Navy* (1). There is, however, a possible difficulty as a matter of procedure. Regulation 60G provides for a procedure by way of review, but it names, as courts of competent jurisdiction for its purposes, courts which, if the matter arose between subject and subject, would be competent to entertain it. Unfortunately, as between subject and subject, this Court would not have jurisdiction unless the litigating parties were residents of different States or in some other way the matter fell within so much of s. 75 of the Constitution as may include litigation between subject and subject or within s. 30 of the *Judiciary Act*.

Conceivably sub-reg. 8 of reg. 60G ought to be construed as concerned only with competence in respect of amount, or as referring to competence as between subject and subject notwithstanding that jurisdiction depends upon the fulfilment of some additional condition, such as residence in different States. Such an interpretation, however, puts some strain on the language of the provision.

In the present case, both parties desire the Court to determine the question of compensation and the objection is not taken that the High Court does not fill the description in sub-reg. 8. As I regard the point as affecting, not the jurisdiction of the Court to determine Rae's claim against the Commonwealth, but the form of the proceedings by which it was brought before the Court, I shall comply with their request and deal with the matter.

As it is an originating proceeding, the question should be tried on fresh evidence and independently altogether of the proceedings conducted before the Compensation Board, and of the process by which the Board reached its conclusion. The parties, however, agreed that, in lieu of calling oral evidence, the transcript of the testimony given before the Board and some of the documents produced to it should be placed before the Court and used as evidence. It is on this material that I must do my best to determine what compensation Rae should receive for the taking of his vessel.

(1) (1944) A.L.R. 254.

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It was first taken temporarily on 18th June 1943, and then totally or permanently on 2nd November 1943 ; that is to say, on the later date the entire property in the *Myrtle Burgess* was acquired. I have not heard anything about hire for the intervening period, and what I am asked to do is to assess the compensation payable for the acquisition of the ownership of the craft. She is an auxiliary ketch of a little under 40 tons register, fitted as a fishing vessel and, at the time when she was taken by the Commonwealth, employed in crayfishing. She was built in 1917 and bought by Rae in 1925 for fishing between Tasmania and Victoria.

The transcript shows that, upon or in connection with the vessel, Rae incurred the following capital expenditure, about which there is no dispute :—

1925	Purchase price	..	..	..	..	£1,950
	Cost of new rigging	..	..	..	..	120
1930	Cost of a deck engine	..	..	..	..	20
	New bottom and well	..	..	..	..	200
1935	New motor boat	..	..	..	..	190
1939	New engine (Gardiner Diesel)	..	..	..	..	1,030
	Anchor chains	..	..	..	..	45
1942	New cabin and wheel house	..	..	..	..	80
						£3,635

When he installed the new engine, however, Rae disposed of the old one for £450 and that must be deducted to arrive at his net capital expenditure. In the same way, the value of his old dinghy should be deducted—£85. These deductions leave a net expenditure of £3,100.

Rae is a man seventy-four years of age, who, apparently, depended on the revenue he received from the *Myrtle Burgess* and from another craft called the *Alida*. The latter he had placed under the control of some other fisherman who paid him one-third of the profits ; but the *Myrtle Burgess* was worked by his son-in-law on Rae's behalf.

The evidence as to the profits derived by Rae from that ship is extremely unsatisfactory. In the ten months ending 30th April 1943, an accountant says that the revenue from her exceeded the operating expenses by £1,317. No amount appears to have been deducted on account of repairs and depreciation. Out of these returns, it would seem that Rae's son-in-law received £400 for wages and £280 as a share of the profits. Rae says that his own income tax return showed a profit of £844 from the *Myrtle Burgess*. He also said that the last year had been his best and from both vessels



he received £1,400, of which the *Alida* earned about £400. It was the best year because of the high price allowed for crayfish. Before that, £600 a year was about his average.

His son-in-law was very hard working and, no doubt, the returns were good. I am prepared to assume that they averaged about £600 per annum and that in the recent period they had risen higher, but it has to be remembered that crayfishing is quite different from cargo carrying and that in a great degree the returns represent the skill and energy of the fishermen.

Unfortunately under the conditions prevailing it is, and will be for some time, impracticable for Rae to replace the vessel with another fishing craft. The conditions, too, make it impossible that such craft should have an ascertainable market value. Little evidence was forthcoming as to the sales of other vessels, and none of it was of any assistance. A shipbuilder, however, testified that to build a similar ship to-day would cost for the hulk, spars and iron-work about £3,500. Apparently the engine, if procurable, would cost at least £1,000 installed and it would be necessary to allow something between £275 and £300 for rigging and sails. The cost of a new ship of the same type might perhaps be taken as somewhere between £4,775 and £5,000. The *Myrtle Burgess*, however, besides being twenty-six years old at the time of acquisition, was clearly not in very good condition. Her trade is a hard one, and, further, the borer had been at work, though the damage done had been repaired.

A few other facts were proved that may perhaps be considered material. It appears that the vessel was insured by Rae for £1,500 and that, in 1928, in applying for an overdraft, he placed a value upon her of £2,000. At the time of acquisition the vessel needed slipping, a process costing £50 or £60.

Evidence was given of the rise in shipbuilding costs during the war—100% on materials, 25% on labour, or 60% to 70% overall. Then some attention was paid in the evidence to the life which should be assigned, for the purpose of depreciation, to the various elements forming the total vessel. In the result, the Compensation Board fixed periods for the hull, engine, and other subjects set out in the foregoing list and depreciated accordingly, but by the “straight line” method. Of the original cost of all the items, viz. £3,100, they wrote off £825 8s., leaving a balance of £2,274 12s.

Adopting a suggestion or concession made by counsel for the Commonwealth, the Board then added a sum representing 10 per cent on the hull and on all items but the diesel engine, and 20 per cent on that. These percentages were considered a proper allow-

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ance on account of the appreciation of values that had taken place. This brought the total up to £2,595. A sum of £75 10s. was added for loss on certain fishing gear sold at an undervalue (a questionable item) and for loss on a premium for unexpired insurances and a licence fee. "This," said the Board, "brings us to £2,670 14s. without allowing any part of the claim in respect to loss of profits." Then the Board proceeded to add 30 per cent of the value of the vessel "in order to insure a full equivalent of the property taken." The value was thus increased to £3,373 14s. and with the £75 10s. added the compensation awarded became £3,449 4s.

The addition of this 30 per cent appears to be the chief cause of the Commonwealth's instituting the present proceedings by way of review. The addition is attacked as having no basis in principle and as rendering the compensation excessive. An objection in point of principle is made also to the straight-line method of depreciation as unduly favourable to the owner.

The Commonwealth has offered to pay £2,700 and it was said that, whether the matter were judged by original cost or expenditure, less depreciation; by reconstruction or replacement cost, less depreciation; or by the evidence of value placed upon the vessel before the war, plus war appreciation, the amount offered would be found sufficient.

The course taken by the Board is not of direct concern in this Court, which must form its own estimate of the compensation payable to the owner. But the study made of the case by the Board and the care and attention it has given to the examination of the rather unsatisfactory and disordered record is not only helpful, it serves also to show where the difficulties lie. The fact is, I think, that, before the Board, an attempt was made to reach an estimate of value by too close an adherence to a system of calculation with an overall increase to cover elements incapable of computation.

In reaching a conclusion as to compensation for the taking of a piece of property such as that now in question, it is necessary, or at all events wise, to pursue as many means of estimation as are open, to compare them, and then, as an exercise of judgment, to fix what, upon considerations this process suggests, appears to be a fair compensation.

If there is a market for a ship that is the most satisfactory test of its value, and it is best proved by those who know the ship and the market. But, where there is no market, you must ask what is its value as a going concern to its owners at the time of acquisition. The amount of capital invested, the amount of depreciation, and the amount of profits may be taken into account. "You may look at



the original cost, plus the money expended on her, and so forth. That is of assistance, but it is not complete assistance, because it is a rough and ready method. You may look and see also how the ship is paying. That, however, is not a complete test, because you cannot be sure that the way she has been paying will continue" (per *Gorrell Barnes J.*, *The Harmonides* (1)). You may look too at the value of a new ship like her "but you would have to discount her value down" (2).

The existence of a profitable charter may be taken into consideration as "a material element of value": See *The Castor* (3). It is taken into account in appraising the capital value of the vessel as an instrument of profit in the actual conditions obtaining at the time of requisition. But, even in assessing damages for the loss of a ship by collision, prospective profits are not given as an addition to value. They are merely taken into account in ascertaining "the value of the ship to her owner as a going concern at the time and place of the loss": See *Liesbosch, Dredger v. Edison S.S. (Owners)* (4). But there is a wide difference in their nature between the returns from fishing and, to take an example, the profits of a time charter party: See *The Anselma de Larrinaga* (5).

To find the value to the owner it is, I think, in the present case, proper first to take the items of capital expenditure making up the sum of £3,635 gross, or £3,100 net, and make some estimate of the extent they should be depreciated for physical deterioration. Functional obsolescence seems never to terminate the life of a fishing craft. Physical decrepitude comes first, even if tardily. As against the depreciation on account of age and use, some allowance must be made for the increase that had taken place in values by the time the ship was acquired.

Further, it must be borne in mind that the items represent the expenditure incurred in obtaining a ship and putting her into a condition in which she is fully equipped and ready for use in the trade the owner carries on. She is taken from him as a going concern earning profits or, more accurately perhaps, a going concern used in the earning of profits. That is a consideration which makes it proper to recognize that the value to him is somewhat more than the written-down cost of obtaining, and installing, or combining, the collection of items he has caused to be assembled into a fully equipped vessel of the kind he needs for his trade. Perhaps this is all the Compensation Board meant to cover when they added 30 per cent. If so, the added sum appears to me to be too great.

(1) (1903) P. 1, at p. 6.

(2) (1903) P., at p. 6.

(3) (1932) P. 142, at p. 149.

(4) (1933) A.C. 449, at p. 464; (1932)

P. 52, at p. 65 and pp. 73, 74.

(5) (1913) 29 T.L.R. 587.

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On the other hand, I see no reason, in the present case, to apply the method of depreciation called the "reducing balance." What system of depreciation is to be employed in a given case is in a great measure a question of suitability depending on the facts. The law prescribes none of the systems commonly used in commercial or accountancy practice to the exclusion of the others. It is a matter of what is appropriate to be judged as a matter of fact: See *Cunard S.S. Co. v. Coulson* (1); *Peninsular and Oriental Steam Navigation Co. v. Leslie* (2); *British India Steam Navigation Co. Ltd. v. Leslie* (3), which however, to some extent depend upon the statutory authority of the commissioners to allow what they think just and reasonable. A brief but clear discussion of the chief methods in use and of their respective merits and defects will be found in *Stanley W. Rowland's Accounting*, (H. U. L.), pp. 131-138. In the present case it appears to me that the diminishing balance method works too favourably for the Commonwealth because of the very heavy reduction it makes in the earlier period of its application to the life of an asset: See *op. cit.*, p. 134. On the other hand, the chief criticisms of the "straight-line" method are, first, that it is not easily applied to a conglomerate plant composed of items purchased at different dates, and second, that it leads to a danger of depreciating by more than 100 per cent in totality. Neither the difficulty nor the danger operates here. Under the present law of income tax in Australia the taxpayer may elect to adopt the "straight-line method" for the purpose of ascertaining his taxable income; otherwise the reducing balance method is used: See s. 56 of the *Income Tax Assessment Act 1936-1944*.

The computation which results from the method of taking actual cost less depreciation I should regard only as evidence. The result is not conclusive of value, but merely an indication.

Having obtained it, I think that, in the second place, it is desirable to consider the matter from the point of view of replacement or reinstatement less depreciation. That is to say, it is desirable to consider, so far as the evidence allows, what a comparable vessel would cost, and how much that cost should be depreciated on account of the actual age of the *Myrtle Burgess*, with which, in point of value, the hypothetical new ship must be compared. For this purpose the evidence already stated of the shipbuilder must be used, and some attempt must be made to apply a method of depreciation. In using replacement cost, less depreciation, as a guide to value, it

(1) (1899) 1 Q.B. 865; 4 Tax Cas. 63.

(2) (1900) 82 L.T. 137; 4 Tax Cas.

(3) (1900) 17 T.L.R. 104; 4 Tax Cas.



is perhaps less necessary to take into account, as a reason for enhancing the value, the fact that the *Myrtle Burgess* when acquired was a "going concern." For the hypothesis is that the new ship is presented to the owner equipped and ready for use in the crayfishing trade. But the fact that he was carrying on a profitable trade cannot be neglected altogether, and should be allowed to influence the assessment, at least by raising a presumption in favour of higher rather than lower figures, where there is any doubt. But it is, I think, necessary to go further. For it must be borne in mind that the basis for considering reconstruction cost less depreciation as evidence of value is the supposition that the prospective and hypothetical purchaser would be governed, or at least affected by his ability to get what he needed by having it constructed or reconstructed. So too would the owner in considering what would be a fair price; for that represents the cost of replacement. But in present circumstances replacement by building is out of the question for at least three years according to the evidence. So where there is a profitable trade the immediate availability of an existing, though old, craft must operate to raise its price above the depreciated equivalent of replacement cost. The addition must be made to depend rather on judgment than on calculation, but it should be moderate and fixed only for the purpose of insuring adequacy in what, after all, is rather a mechanical and artificial form of reasoning or procedure in the assessment of a fair figure. The result again will be a test or indication of value with which to compare that first result arrived at.

In the first place, I think it is wise to use such scanty evidence as is contained in the transcript to attempt to construct a pre-war value, and then to add to that what is thought to be an appropriate percentage to represent the increase in the cost of production and generally in the value of craft. This, on the materials available, is rather a speculative process; but, again, it does supply a certain amount of guidance which will serve as another check on the final result. Too much attention cannot be attached to Rae's valuation when he applied for an overdraft; nor should much more be paid to the sum for which he insured the vessel. It should be remembered that insurance is seldom full, particularly in marine risks. These figures must be compared with the direct evidence given that the vessel at the time of requisition bore the high value of £4,000. This value was placed upon the whole ship as at that time. It is an opinion expressed by the shipbuilder already mentioned; but, as this evidence stands upon the record, I feel little impressed with the valuation.

I do not think that it is useful to discuss in detail the actual calculations I have adopted. The computation of original cost adopted

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by the Naval Compensation Board is the foundation for the first mode of estimation. I have accepted the depreciation made, except that I think that in one or two minor items a little more life might be conceded. I have added, however, more than 10 per cent to represent the appreciation of values by reason of increased costs and other elements attributable to the war. I have then held in suspense, so to speak, until the other two methods have been tried, the addition of a sum, or possibly a percentage because of the considerations I have discussed.

Then, turning to the method of replacement cost less depreciation, I may remark that I have assumed a new vessel would cost £5,000, that half the life of the old was spent, and that engines depreciated much more rapidly than hull.

Under the third heading or method, I have found it difficult to do more than note the effect of adding 60 per cent to 70 per cent to the figures given and to the full cost of the vessel in 1925.

In the compensation I would include £7 10s. for the loss of the licensing fee, and £8 for the loss of marine insurance. But I have not calculated as a specific item the loss on the sale of fishing gear not acquired by the Navy.

Having pursued each of the three methods and compared the results and considered the addition mentioned, I have arrived by way of estimate at a round figure. In my opinion the compensation payable to Rae in respect of acquisition of the *Myrtle Burgess* should be fixed at £2,950 for all the elements to which I have referred.

The Naval Compensation Board awarded interest at four per cent per annum on the compensation fixed and unpaid, calculated as from the date of acquisition until the date of payment. Counsel for the Commonwealth indicated that he desired in an appropriate case to object to the allowance of interest on compensation moneys, but agreed that this case did not present an appropriate opportunity of challenging the practice of allowing interest.

In the case of *Huon Steamship Co. v. The Minister for the Navy* (1), the question of awarding interest on rates of charter or hire outstanding upon ships compulsorily taken over has been argued in the Full Court. I deferred giving judgment in the present case in order to obtain the benefit of the Court's consideration of the *Huon Company's Case* (1) with reference to this and to other questions of valuation which might possibly affect this case.

It is, perhaps, desirable to point out that in *Swift & Co. v. Board of Trade* (2), while the House of Lords negatived the possibility, except under some express statutory authority, of allowing interest as part of compensation, it was conceded that, in the case of land, interest

(1) *Ante*, p. 293.

(2) (1925) A.C. 520.



on arrears of purchase money, whether upon a compulsory acquisition or a consensual contract of sale, might be awarded under equitable principles. In *International Railway Co. v. Niagara Parks Commission* (1), the Privy Council decided that the equitable principle in question extended to every form of property compulsorily acquired which might be the subject of a contract falling within the cognizance of a court of equity and enforceable by the remedy of specific performance. It is apparently settled that a contract for the sale of a ship is specifically enforceable. The authorities are, perhaps, not very satisfactory, because they do not include any definite exposition of principle. But *Lynn v. Chaters* (2) amounts to a direct decision of Lord *Langdale* M.R. In *Hart v. Herwig* (3) the rule was acted upon by the Lord Justices and again by *Grove J.* in *Batthyany v. Bouch* (4). *Claringbould v. Curtis* (5) also is an instance, no doubt. In *Behnke v. Bede Shipping Co. Ltd.* (6), Lord *Wright* accepts the rule. It may, therefore, be true that compensation moneys for the acquisition of the full property in a ship bear interest.

Regulation 60g (6) says that "the court may, in any review under this regulation, award such costs as it thinks fit." In the present case I do not think that the Commonwealth should receive any costs. It must be remembered that it is not an appeal but a primary judicial proceeding taken for the purpose of fixing the compensation payable to *Rae* and, though the Commonwealth has succeeded in reducing the amount awarded by the Naval Compensation Board, the amount I fix exceeds what was offered.

Having regard to all the circumstances, I think that no order should be made in respect of the costs of the proceeding before this Court.

*Award to the respondent Rae £2,950 as compensation for the acquisition by the Commonwealth of his vessel the Myrtle Burgess, together with interest at 4 per cent per annum, calculated from the time of acquisition until payment in full upon the balances of that sum for the time being unpaid.*

Solicitor for the appellant, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth, by *Dobson, Mitchell & Allport*.

Solicitors for the respondent, *Crisp & Crisp*.

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(1) (1941) A.C. 328.

(2) (1837) 2 Keen 521.

(3) (1873) 8 Ch. App. 860.

(4) (1881) 44 L.T. 177.

(5) (1852) 21 L.J. Ch. 541.

(6) (1927) 1 K.B. 640, at p. 661.