[HIGH COURT OF AUSTRALIA.]

THE MORETON CLUB . . . . . PLAINTIFF;

AND

THE COMMONWEALTH . . . . . DEFENDANT.

H. C. OF A. 1948.

BRISBANE, *July* 28.

MELBOURNE, *Sept.* 20.

DIXON J.

Resumption—Interest in land—Leased premises—Use as residential and social club—Compulsory acquisition by Commonwealth—Unexpired term of lease—Value to lessee—Compensation—Quantum—Lands Acquisition Act 1906-1936 (*No.* 13 *of* 1906—*No.* 60 *of* 1936), *s.* 37—*National Security* (*Landlord and Tenant*) *Regulations* (*S.R.* 1945 *No.* 97—1946 *No.* 48), *regs.* 15 (1) (*a*), 33 (1) (*a*) (i)—*National Security* (*Economic Organization*) *Regulations* (*S.R.* 1942 *No.* 76—1945 *No.* 189), *reg.* 6 (1), (2) (*a*).

Under the *Lands Acquisition Act* 1906-1936, the compensation payable to the owner of property which has been compulsorily acquired is to be assessed at the value to the dispossessed owner. This may, though need not necessarily be, the market value. According to the particular circumstances, the owner may be able to show that the value of the property to him was greater than the market value and this may be so where the market value is restricted by such provisions as reg. 33 (1) (*a*) (i) of the *National Security* (*Landlord and Tenant*) *Regulations* (forbidding the taking of a premium in association with the transfer of a lease) and reg. 15 (1) (*a*) of those regulations (limiting the rent payable, subject to a determination of a Fair Rents Board, to that payable on a prescribed date).

ACTION.

An action for the determination of a disputed claim for compensation was instituted in the original jurisdiction of the High Court pursuant to s. 37 of the *Lands Acquisition Act* 1906-1936, by the Moreton Club, a company duly incorporated and registered in Queensland under the provisions of *The Companies Acts*, 1931 *to* 1942, against the Commonwealth.

The plaintiff claimed compensation in the sum of £5,594 13s. 9d. in respect of the compulsory acquisition from it by the Commonwealth on 13th March 1946 of an interest in land, being the residue

H. C. OF A. 1948. THE MORETON CLUB v. THE COMMONWEALTH.

of the term of a lease of two floors of a building situate at the corner of Creek Street and Adelaide Street, Brisbane, granted to the plaintiff for a term of fifteen years commencing on 3rd August 1938. The two floors in question were used by the members of the plaintiff as a clubhouse and had been specially designed and constructed for that purpose.

The action was heard before *Dixon* J. in whose judgment the material facts are set forth.

McGill K.C. and *Lukin*, for the plaintiff.

Hutcheon K.C. and *Hanger*, for the defendant.

Cur. adv. vult.

Sept. 20.

The following written judgment was delivered :—

DIXON J. This is an action for compensation instituted in the original jurisdiction of the Court pursuant to s. 37 of the *Lands Acquisition Act* 1906-1936. The plaintiff is the claimant in a disputed claim for compensation in respect of an interest in land compulsorily acquired by the Commonwealth. The interest in question is the residue of the term of a lease of the second and third floors of a building at the corner of Creek and Adelaide Streets, Brisbane. The land and buildings, that is, the full property in them, were acquired by compulsory process by the Commonwealth as on 15th March 1946. The lease had been granted to the plaintiff on 15th August 1939 for a term of fifteen years commencing on 3rd August 1938. The residue of the term therefore on 15th March 1946 was seven years four months and twenty-one days. The parties have treated it for convenience as seven and one-half years. Notice of the acquisition was served upon the plaintiff as one of the lessees of the land. The plaintiff is an incorporated company limited by guarantee. It was formed in 1927 for the purpose of establishing and maintaining a social club for women and providing a clubhouse. It constitutes a members' club, though incorporated. The premises comprised in the lease formed the clubhouse. The two floors of which the leased premises consisted had been constructed by the owner specially for the club in accordance with plans that had been agreed upon. An entrance was provided in Creek Street removed from the part of the building used for business purposes. From that entrance there was a lift for the exclusive use of the club, which was financially responsible for its upkeep. The two floors contained dining room, lounge, card

rooms, kitchen, private dining room, offices, bedrooms, eleven in number, and two maids' rooms and further rooms and appurtenances. The premises were designed to supply the needs of the club and proved most suitable. In the early part of 1942, however, the club felt impelled by the circumstances that then existed to hand over the premises to the American Red Cross. That organization entered into occupation on 1st May 1942 and remained in possession until the end of 1945. The United States Government became a formal party to the transaction, which eventually took the shape of a lease. They undertook the obligation of the rent to the club's landlord. Two or three months' delay after 31st December 1945 took place before the American authorities actually handed back the premises to the club, and in the meantime the Commonwealth Government intervened and acquired the building. The club, which had suspended all normal activities but was preparing to resume them, at once looked for other premises. Great difficulty was experienced in finding any that were at all suitable. But finally a lease was secured of a wooden building in Wickham Terrace. The term was for three years with an option of renewal for two years. It was an old and not very suitable two-storey building. Renovations and alterations were necessary costing over £1,100. Even then the accommodation for members and staff remained inadequate. The new clubhouse is much less commodious and satisfactory than that in the premises acquired by the Commonwealth. It is unnecessary to go into details but it is evident that the two places are hardly comparable. In the nature of the building, its size, the number and dimensions of the rooms, the appurtenances and appointments and the site, the club is at a great disadvantage through the loss of the premises acquired by the Commonwealth and through the impossibility of fully replacing them. The difference in the size and number of rooms is shown by the fact that whereas in the old premises as many as 400 guests and members have been entertained at once, not more than 150 could be received in the new clubhouse, and by the further fact that proper bedroom accommodation could be provided in the former clubhouse for fourteen members, while in the new not more than six could be put up even with the use of a verandah.

The rent of the new premises is, however, somewhat lower; it is £1,050 per annum. The rent of the former clubhouse was £1,180 7s. per annum, together with £75 per annum for the lift. The floor space occupied by the club in the old premises, excluding passages, amounted to 10,203 square feet. The rent and cost of

H. C. OF A. 1948.

THE MORETON CLUB v. THE COMMONWEALTH.

Dixon J.

lift worked out at 2s. 5½d. per square foot per annum. Including passages and verandahs, but excluding certain low-roofed rooms underneath the building suitable only for storing things, the floor space of the present club premises at Wickham Terrace amounts to 6,630 square feet, and the rent thus works out at 3s. 2d. a square foot. If the cost of the alterations be spread over five years, that is, over the term and the period of the option of renewal, and be added to the rent as part of the outlay to secure the premises, the amount would be increased to about 4s. a square foot.

To fix the compensation to be paid to the club for the compulsory acquisition of the lease of the former premises of the club might not be difficult, if the club as lessees might freely have assigned the lease or sublet at whatever figure an assignee or sub-lessee might be prepared to offer. But it is objected on the part of the Commonwealth that the club could not freely have disposed of the premises either by selling the lease or subletting the premises.

The first point taken is that the assignee or sub-lessee could only have used the premises as a residential club. This contention depends upon the covenants or conditions of the lease. In that document whenever the expression "the lessee" is used and the context so admits it is to extend to and comprise and include not only the lessee but its successors and permitted assigns. There is a covenant on the part of the lessee that it will use the demised premises for the purpose of a residential club and for no other purposes. To this covenant there is a proviso to the effect that on application by the lessee in writing the lessor may in his absolute discretion consent to the use of the premises for some other purpose, but the use must not compete with other tenants. The lease contains a covenant against assignment or transfer of the lease without the lessor's consent, with a proviso that the consent shall not be arbitrarily or capriciously withheld in the case of a monetarily responsible person or company.

Upon the proper construction of these provisions I do not think that the covenant to use the premises as a residential club only would bind an assignee of the lease, once the lessor had consented to the assignment. The parties can hardly have supposed that in Brisbane another residential club or clubs would be found as assignees of the lease. It is evident that the basis of the covenant is the character of the plaintiff company, and that it can have no reference to other possible occupiers of the premises to whom the lessor may consent. The definition of "lessee" in so far as it extends to assignees is inapplicable. In any case it is to be supposed

that the lessor would have exercised his discretion in favour of permitting some other use of the premises if the necessity of applying to him had arisen. The point does not in any view appear to me to have much importance. For in the great demand or pressure for office space existing in 1945 the plaintiff would have had little difficulty in arranging the matter.

The second point taken is that reg. 33 (1) (*a*) (i) of the *National Security* (*Landlord and Tenant*) *Regulations* prohibits the taking of any sum of money in consideration of or in association with the assignment or transfer of a lease. For that reason, it is said the lease could have no marketable value in the hands of the club.

The regulation stood at the date of acquisition in the form in which it appeared in S.R. 1945 No. 97. In that form the regulation gave the Fair Rents Board no authority in the case of a dwelling house to consent to the receipt of a premium or other sum of money on the assignment or transfer of a lease. A residential club is probably a dwelling house within the regulation. The expression is defined as any prescribed premises leased for the purpose of residence.

Thirdly, it was objected that the prospect of subletting at an increased rent could not have been of much, if any, value because under reg. 15 (1) (*a*) the rent was limited, subject to a determination of the Fair Rents Board, to that payable in respect of the premises on the prescribed day, which was said to be fixed as 31st December 1940 by order published in the *Gazette*.

The fourth point taken was that under the *National Security* (*Economic Organization*) *Regulations*, reg. 6 (1) and (2) (*a*), a sub-lease for more than three years could not have been granted by the club without the consent of the Treasurer.

By these arguments the Commonwealth sought to show that the club's interest in the premises could have no great value, if value was to be estimated by the money into which the interest might be lawfully converted by one means or another. It must, however, be steadily borne in mind that compensation depends upon the value to the owner dispossessed. It is the owner's loss that is to be estimated and that may be done in various ways. "In cases of compulsory acquisition the value to the owner may, according to the circumstances, be proved in more ways than one, but a very common way is to base it upon, though not necessarily to confine it to, the market price—that is, the price which a willing buyer would give to a willing seller who was desirous of getting rid of the property and had made his preparations accordingly. In cases of compulsory

H. C. OF A. 1948. THE MORETON CLUB v. THE COMMONWEALTH. Dixon J.

acquisition, however, an owner may be able to show that the value to him is something more than such market price, and in such cases he may adopt one of two courses. He may either set out in detail all possible elements making up the value to him, or he may with regard to some incidental expenses and claims give general evidence indicating that a lump sum should be allowed in respect of a number of matters with relation to which it would be difficult or an unnecessary waste of time to go into details "—per *Cussen* J., *In re Wilson and the State Electricity Commission of Victoria* (1). He may, too, show the cost of replacement, where circumstances suggest that such cost is a guide. He may show what it would cost to purchase or lease, as the case may be, other suitable premises then existing or, if the circumstances make replacement or reconstruction cost, less depreciation, proper as a guide or check, he may give evidence in support of that basis of estimation.

In the present instance the plaintiff club, besides proving the facts I have already stated, led evidence of the rents at so much per square foot that space comparable in character in buildings in Brisbane brought even under the controls exercised in pursuance of the regulations. A valuer was called on each side, who not only gave his estimate of what, having regard to the controls, the former club premises might be expected to return but also of examples of rents payable in other buildings of a class more or less similar from a business point of view. I have compared the evidence of these gentlemen and considered their estimates with some care. I have also taken into account the rent and outlay in connection with the premises now occupied by the plaintiff club and the different character of the two clubhouses.

In the result I have formed the following conclusions :—(*a*) If there had been no controls it would have been possible in March 1946 for the plaintiff club to dispose of the balance of the lease at a very high premium, and such was the demand for accommodation that the hypothetical seller, willing but not anxious to dispose of it, would not have parted with it for anything less than £6,000 net. (*b*) Taking into account the controls, however, the plaintiff club might at that time reasonably expect to be able, after an expenditure which I estimate at £750 for alterations, to sublet the premises for a net return over the residue of the term averaging £1,900 per annum. If the rent and the annual cost of the lift is deducted (£1,255) from this sum there would be left an annual amount of £645. If the residue of the term had been seven and one-half years and the rent

(1) (1921) V.L.R. 459, at p. 464.

were paid annually and the amount in each year were the same (£1,900) and a rate of three and one-half per cent were adopted, the present value of the £645 as at March 1946 would be £4,165. After deducting £750, the cost of alterations, there would remain £3,415. (*c*) The sum of £3,415 does not represent the value to the plaintiff club of the occupation of the premises for the balance of the term. The value to the club was very considerably greater. (*d*) If it had been possible for the club to secure for the unexpired term other premises which met its needs as fully as did the building acquired by the Commonwealth, even though not as satisfactorily, the expenditure in increased rent over that term would, when reduced to a present value, have exceeded very greatly the sum mentioned. Any estimate is more or less conjectural but it is difficult to believe that it could be done for much less than £4,500. (*e*) In a case such as this the value to the owner of its interest in the premises cannot be assessed by the adoption of formulas or calculations. Obviously nothing which under the controls could have been lawfully paid to the plaintiff company would have induced it to part with the premises, because, in the conditions obtaining, they were necessary for the fulfilment of its functions as a club in the manner and to the extent considered appropriate. To replace them adequately proved impossible and that antecedently was to be expected. On the other hand, because of the controls, it is impossible to find a true measure of the value of the premises to the owner of the lease in what a willing buyer of the lease might lawfully pay. The duration of the regulations is a factor which might be taken into account with respect to sub-leasing, though not in relation to assignment. For the assignment pursuant to a supposed sale of the lease must be assumed as at, or shortly after, 15th March 1946. The Queensland *Fair Rents Acts* 1920 *to* 1938 apply only to dwelling houses as therein defined; and the definition excludes registered clubs.

A merely mechanical adherence to calculations is impossible in the present case, unwise as it is in all cases. In my opinion it is necessary to arrive at an assessment of compensation by taking into consideration all the facts and considerations I have mentioned in this judgment and by endeavouring to fix a sum which will fairly represent in money the value to the owner which the asset clearly possessed. An attempt should be made to arrive at a figure which does not go beyond the sum which certainly was contained in the asset as at the date of acquisition but otherwise fairly represents the value to the owner.

H. C. OF A. 1948. THE MORETON CLUB v. THE COMMONWEALTH.

So regarding the matter I assess the compensation at £4,000, together with £17 18s. 9d., the costs of removing furniture from the premises to a store. There will be judgment for the plaintiff for £4,017 18s. 9d. with costs.

Judgment for the plaintiff for £4,017 18*s.* 9*d. with costs.*

Solicitors for the plaintiff: *Chambers, McNab & Co.*

Solicitor for the defendant: *H. F. E. Whitlam,* Crown Solicitor for the Commonwealth.

J. B.