[HIGH COURT OF AUSTRALIA.]

CUNNINGHAM . . . . . PLAINTIFF;

AND

THE COMMONWEALTH . . . . . DEFENDANT.

H. C. OF A. 1948.

SYDNEY, *July* 28, *Aug.* 5.

Williams J.

Resumption—Land—Acquisition by Commonwealth—Compensation—Assessment—Re-investment—Prospective loss of income—Allowance therefor—Lands Acquisition Act 1906-1936 (*No.* 13 *of* 1906—*No.* 60 *of* 1936), *ss.* 28 (1) (*a*), 29 (*a*), 37.

The dispossessed owner of land, let on a monthly tenancy, and at a rent equal to the fair rental value is not, upon its resumption by the Commonwealth, entitled to compensation for a prospective loss of income upon re-investment of the capital.

ACTION.

In an action brought by Hilda Josephine Cunningham in the High Court against the Commonwealth, the plaintiff claimed the sum of £4,135 as compensation for the compulsory acquisition by the Commonwealth of land owned by her situated at Chippendale, Sydney, New South Wales.

Included in that claim was an item of £835 as compensation for loss of income on re-investment.

The action was tried before *Williams* J. in whose judgment hereunder further facts appear.

J. K. Emerton, for the plaintiff.

G. P. Stuckey, for the defendant.

Cur. adv. vult.

Aug. 5.

The following written judgment was delivered by :—

WILLIAMS J. This is an action brought under the provisions of s. 37 of the *Lands Acquisition Act* 1906-1936, hereinafter called the Act, to recover compensation for the compulsory acquisition by the Commonwealth on 12th October 1944 of the plaintiff's land in

Dangar Place, Chippendale, for the public purpose of erecting a post office. This is a public purpose not authorized by a special Act so that, in accordance with s. 29 (*a*) of the Act, the value of the land must be assessed as on 1st January 1944. But it is common ground that there was no difference between the value of the land on that date and the date of acquisition.

Section 28 provides that, in determining the compensation, regard shall be had to the three matters mentioned in sub-ss. 1 (*a*), (*b*) and (*c*), but the only one of these matters which is material in the present case is (*a*) which provides that in determining the compensation regard shall be had to the value of the land acquired.

The plaintiff claims as compensation £4,135, being the addition of the following items: (1) unimproved value £970; (2) value added by improvements £2,030; (3) £300 as loss occasioned by the compulsory acquisition calculated at ten per cent on the improved value of £3,000; (4) £835 as compensation for loss of income on re-investment.

The defendant admitted in the statement of defence that the unimproved value of the land was £970. On 23rd April 1945, it also admitted that the value of the improvements was £2,030. The items still in dispute are therefore items (3) and (4).

The circumstances in which it is justifiable to include the third item in the value of the land were explained in *Geita Sebea* v. *Territory of Papua* (1). None of these circumstances have been proved in this case and I must therefore disallow item (3).

The real contest has centred around item (4). At the date of acquisition there was erected on the land factory premises in which J. C. Goodwin & Co. Ltd. was carrying on the business of bent plate glass manufacturer. The company first went into possession of the premises in 1930 and subsequently leased the premises from 13th February 1932 to 17th March 1940. Since 17th March 1940, the company has continued in possession of the premises on the terms of the unexpired lease with an added understanding that the company would not expect the plaintiff to expend any moneys on repairs and I think it was implicit in this understanding that the company would keep the factory in repair. This had been the practice during the lease and the plaintiff had not been called upon to do any repairs since she had expended £49 in 1932 in paying half the cost of repairs to the roof. The rent which the company was paying for the premises was £286, the outgoings which the plaintiff was paying, comprising municipal and water rates and insurance, amounted to £46, so that the net rents received by the

(1) (1941) 67 C.L.R. 544, at pp. 555, 559.

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plaintiff were £240, giving a return of eight per cent per annum on £3,000, taking that to be the improved value of the premises.

The defendant paid the plaintiff £2,000 on account of the compensation moneys on 9th February 1945, so that there is a balance still to be paid. The plaintiff gave evidence that she was anxious to re-invest the £2,000 in another factory site to produce the same net return as she had been receiving from the resumed property. She therefore asked a local estate agent, her solicitor and the New South Wales Building & Investment Society whether it would be possible to re-invest the sum of £2,000 in this manner. She says that she was in each instance advised that it would not be possible to do so, but there is no evidence that she went beyond a casual inquiry. She did not instruct the estate agent to try and obtain such an investment. On the whole of the evidence I am prepared to hold that it would have been very difficult and probably impossible for the plaintiff to purchase comparable factory premises. But it was, in my opinion, quite unreasonable for the plaintiff to confine her inquiries to this limited form of investment in real estate. She should, at least, have been prepared to re-invest her money in house property, and I am not satisfied that it would have been impracticable for her to have purchased such property in a suitable suburban area within a reasonable time and thereby invest her money in as safe an investment as the resumed property and from which she could have obtained a comparable net return.

But it is unnecessary to go into details because I am of opinion that, even if it was impracticable for the plaintiff to re-invest her money in this manner, the loss of profit between a net return of eight per cent on her capital and the lower returns which she was able to obtain does not form part of the value of the resumed land. The established principle upon which compensation should be assessed is to ascertain the value of the property taken to the owner, and for this purpose to estimate what sum the owner could have expected a reasonably willing purchaser to pay if he had been reasonably willing to sell the property with all its existing advantages and future possibilities on the date of acquisition. There is no evidence that on this date the plaintiff's land was not being put to its best use. It was then subject to a tenancy giving a net return which was not more than a fair and usual return to be expected from such an investment. The tenancy was one which the tenant was entitled to terminate by one month's notice in writing. The plaintiff as a reasonably willing vendor could not have expected a prudent purchaser to pay more than the market value for such a property sooner than fail to obtain it. In this

case the only evidence of value is that the parties have agreed upon the sum of £3,000 as the improved value of the property. If the factory had been leased for a term, especially for a long term, at a rent that considerably exceeded the fair rental value of the premises, the land might well have had a value over and above its market value, and the plaintiff might reasonably have demanded this extra value. But the plaintiff has not proved any circumstances to show that the land was of more value to her as land than its improved value. I was referred to the cases of *Jubb* v. *Hull Dock Co.* (1); *Sparke* v. *Minister for Works* (2) and *Sydney Ferries Ltd.* v. *The Minister* (3). But the remarks relied upon in the first two cases were made in reference to statutes allowing compensation on a wider basis than the value of the land to the owner, and the third case related to a different method of valuation. No doubt the plaintiff has suffered and will continue to suffer a form of damage from the acquisition of her property in that she has received and may have to continue to receive a lower return from the re-investment of her money than she was receiving from the rents of the factory. But a prudent purchaser could not be reasonably expected to include compensation for such damage in his purchase money. In other words the damage is too remote. I must therefore disallow item (4).

For these reasons I give judgment for the plaintiff for £1,000, together with interest at the rate of three per cent per annum on £3,000 from 12th October 1944 to 9th February 1945, and at the same rate on £1,000 from that date to the date of entry of judgment. I order the defendant to pay the plaintiff's costs of the action other than the costs attributable to the claims of the plaintiff to recover the sums of £300 and £835 as part of the compensation. I order the plaintiff to pay the defendant's costs attributable to these claims. I order the two amounts of costs when taxed to be set off, and the balance to be paid by the party liable to the party entitled to the balance. Liberty to apply.

Judgment for the plaintiff accordingly.

Solicitors for the plaintiff, *Fisher & Macansh* with *J. T. Ralston & Son.*

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

J. B.

(1) (1846) 9 Q.B. 443 [115 E.R. 1342].

(2) (1891) 12 L.R. (N.S.W.) 276.

(3) (1928) 7 L.V.R. 65.