[HIGH COURT OF AUSTRALIA.]

THE COMMONWEALTH OF AUSTRALIA . APPELLANT;
DEFENDANT,

AND

ARKLAY . . . . . RESPONDENT.
PLAINTIFF,

H. C. OF A. 1951-1952.

1951.
MELBOURNE, *Oct.* 18, 19; *Nov.* 13.
Webb J.

1952.
MELBOURNE, *Feb.* 26-28; SYDNEY, *July* 31.
Dixon C.J., Williams and Kitto JJ.

Resumption—Land—Compensation—Acquisition by Commonwealth—After cessation of hostilities—System of land sales control in force at relevant date—"Value"—Lands Acquisition Act 1906-1936 (*No.* 13 *of* 1906—*No.* 60 *of* 1936), *s.* 28 (1) (a).

Under the *Lands Acquisition Act* 1906-1936 in estimating the value of land to an owner dispossessed during a period of land sales control, where the land possesses no particular suitability for some particular business or activity carried on by the owner and has no added potential value if put to better use, the valuer should estimate the price which a vendor willing but not anxious to sell would agree to, if he were allowed, and a willing purchaser would give to obtain, although in his turn he would be subject to controls in re-selling. To arrive at the result he is at liberty, if on the evidence that seems the most satisfactory method, to take into account what he estimates to be the price at which the Treasurer would have consented to the sale at the relevant date and an amount representing the increased value of the land which must arise, if from nothing else, from the fact that when controls terminated it would sell in a free market and might be expected to realize a greatly enhanced price.

Decision of *Webb* J. affirmed.

APPEAL from *Webb* J.

On 16th May 1951 Phyllis Joy Arklay commenced an action as plaintiff in the High Court of Australia against the Commonwealth of Australia, as defendant to recover compensation for the acquisition by the defendant on 12th December 1946 of her land situated at 481 Sydney Road, Coburg, Victoria. A statement of the facts appears in the judgment of *Webb* J. hereunder.

Gregory Gowans Q.C. and *P. H. N. Opas*, for the plaintiff.

G. A. Pape, for the defendant.

Cur. adv. vult.

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1951, Nov. 13.

WEBB J. delivered a written judgment of which the following are, for the purposes of this report, the material portions :—

In this action the plaintiff claims compensation for land resumed under the *Lands Acquisition Act* 1906-1936 on 12th December 1945. On the land there was a brick shop with a modern type front. The items of the claim in the prescribed form addressed to the Minister were :

1.	Improved value of land	£3,500
2.	Added value given by improvements	1,114
3.	Loss of business of grocer and hardware merchant on acquired land and re-establishment in similar business elsewhere	15,000
	Total	£19,614

On 14th November 1950 the Minister offered £5,500 as compensation. This was refused.

In the statement of claim compensation was claimed on the following basis :

(1)	Loss of the said freehold property as measured by the cost of purchasing a comparable freehold property in the vicinity thereof	£15,000
(2)	Cost of purchasing tenancy interest and goodwill of premises at 106 Bell Street, Coburg aforesaid in order to carry on the said hardware business temporarily	750
(3)	Cost of alterations and renovations to render the said temporary premises suitable for the conduct of the said hardware business..	250
(4)	Cost of purchasing tenancy interest and goodwill of premises at 464 Sydney Road, Coburg aforesaid in which to carry on hardware business	1,500
(5)	Cost of alterations and renovations of last-mentioned premises to render same suitable for the conduct of a hardware business	250
(6)	Estimated loss consequent on transfer of hardware business from 481 Sydney Road aforesaid	400
(7)	Loss incurred on forced sale of stock when vacating acquired premises—	
	(i) Groceries	175
	(ii) Hardware	250
(8)	Loss on grocery business	400
		£18,975

The defence admits that the plaintiff is entitled to compensation on just terms; but alleges that the amount claimed is excessive. Just before the hearing the plaintiff agreed to accept £2,450 in respect of the claims in items (2) to (8) inclusive, in the statement of claim; so that the only question remaining is the value of the land and improvements as on 1st January 1946.

As to the law: s. 28 (1) (*a*) of the *Lands Acquisition Act* 1906-1936 provides that, in determining the compensation for land resumed, regard shall be had to the value of the land acquired; and s. 29 (1) (*a*) provides that the value of the land acquired by compulsory process shall be assessed according to the value of the land on 1st January preceding the date of acquisition, in this case on 1st January 1946. This Court decided in *Spencer* v. *The Commonwealth* (1) that the basis of valuation under the *Lands Acquisition Act* should be the price that a willing purchaser would, at the date in question, have had to pay to a vendor not unwilling, but not anxious, to sell. Where the land has a special value to the owner the Privy Council in *Pastoral Finance Association Ltd.* v. *The Minister* (2) stated the value to be the sum which a prudent purchaser *in the position of the owner* would have been willing to give for the land resumed sooner than fail to obtain it. However, when this land was resumed in December 1946 reg. 6 of the *National Security* (*Economic Organization*) *Regulations* was in force, and had been in force for some years; but it expressly provided that it did not apply to transactions to which the Commonwealth, among others, was a party, i.e. it did not apply to voluntary purchases of land by the Commonwealth or to compulsory acquisitions by the Commonwealth. If it were expressed to apply it would, I think, have been invalid, as denying the just terms secured by s. 51 (xxxi.) of the Commonwealth Constitution. See *Johnson Fear Kingham* v. *The Commonwealth* (3). But in negotiations for such purchases the parties would be influenced by prices paid for comparable land during this economic control. Laws which did not directly apply to the transaction, but applied to other comparable transactions, would necessarily or probably affect the price to be arrived at (*Nelungaloo Pty. Ltd.* v. *The Commonwealth* per *Latham* C.J. (4)). A price really agreed upon, even a price influenced by economic control, would be in conformity with the just terms requirements in s. 51 (xxxi.). But when the Commonwealth decides to exercise its compulsory powers during such economic control

(1) (1907) 5 C.L.R. 418.
(2) (1914) A.C. 1083.
(3) (1943) 67 C.L.R. 314.
(4) (1948) 75 C.L.R. 495, at p. 541.

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then, although *Spencer's Case* (1) and the *Pastoral Finance Case* (2) continue to apply, and a hypothetical vendor and purchaser continue to be postulated, still different considerations are assumed to influence them. In *Moreton Club* v. *The Commonwealth* (3) *Dixon* J. formed the conclusion that if there had been no controls it would have been possible in March 1946, when the Commonwealth compulsorily acquired the balance of the club's lease, for the club to have disposed of the balance at a very high premium, and that 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. Yet the compensation for the land was fixed at £4,000. His Honour observed that because of the controls it was 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. It would be presumed that the buyer would not be prepared to infringe reg. 6 and incur a penalty, although the purchase if made would be enforceable, as reg. 10 provides. But the owner of land is not bound to sell during such economic control, but may await the removal of controls, and the hypothetical parties would be assumed to negotiate on that basis. They would take into account the time that controls would be likely to last, i.e. what time would elapse before the owner of the land could find a purchaser who could lawfully pay a price that would represent the true value of the land to the owner. The time of the removal of controls might be conjectural, but would still be a consideration; at all events, if not then too remote (see *Spencer's Case*, per *Griffith* C.J. (4) and *Reg.* v. *Brown*, per *Cockburn* C.J. (5)). Now this land was resumed on 12th December 1946 i.e. after all hostilities had ceased in World War II. It is true that the tribunal assessing the compensation mentally places itself in the position of the bargaining parties as on the critical date, in this case 1st January 1946 (see *Spencer's Case*, per *Isaacs* J. (6)); but any changes in the land itself and in the possibility of using it since the preceding 1st January are taken into account, though the value of the land so regarded is taken at an earlier date (see *Grace Bros. Pty. Ltd.* v. *The Commonwealth*, per *Latham* C.J. (7)). The fact that hostilities ceased in early August before the resumption would not be excluded from consideration in determining what the negotiating parties might forecast on the

(1) (1907) 5 C.L.R. 418.
(2) (1914) A.C. 1083.
(3) (1948) 77 C.L.R. 253.
(4) (1907) 5 C.L.R., at p. 432.
(5) (1867) L.R. 2 Q.B. 630, at p. 631.
(6) (1907) 5 C.L.R., at p. 441.
(7) (1946) 72 C.L.R. 269, at p. 281.

critical date as to the time when controls would be lifted. So too evidence of prices paid for comparable lands, not only before but after the critical date is admissible, the weight of the evidence varying with the distance in time of the comparable sale from the critical date. Prices on future sales, not too remote in time, might well be within the range of forecast at the critical date, not being prices obtained during a period of unexpected prosperity or depression.

The owner of the land in estimating what he would get if he retained it until controls were lifted would allow, on the one hand for the revenue it would be likely to produce, and on the other hand for the rates, taxes and other outgoings he would be likely to pay pending its disposal: and also for the earlier payment for the land. In the case of vacant city or suburban lands the revenue might be likely to prove negligible and the expenditure considerable.

However, as *Dixon* J. pointed out in *Nelungaloo Pty. Ltd.* v. *The Commonwealth* (1), the hypothesis upon which the inquiry must proceed is that the owner has not been deprived of his ownership and of his consequent rights of disposition existing under the general law at the time in question.

A value so reached on a compulsory acquisition during economic controls must ensure just terms. The owner is placed in the best position he can hope to occupy as at the critical date. He cannot complain that the controls prevent him from selling at his own price and compel him to withhold his land from sale until the controls are lifted. In this respect he is in the same position as every other owner. But on a compulsory acquisition, even while controls continue, he is always entitled to the full value of what he has under the general law as it then is. During controls the general law prevents a buyer from lawfully giving him more than the controlled price, but it permits him to postpone the sale until controls are lifted, and he is to be compensated accordingly.

[His Honour dealt with the evidence which had been given, then continued :—]

I have come to the conclusion that, as at 1st January 1946, the Treasury would not have approved of the sale of the subject land and improvements at a higher price than £3,400, being about £130 per foot for the land and £800 for the improvements. But that would not have represented their true value at that time. Rather than sell at that price a prudent owner would have preferred

(1) (1948) 75 C.L.R., at pp. 571, 572.

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to await the removal of controls, whereupon I find that the value of the land and improvements would have been about £4,100 including £160 per foot for the land; and that within six months of the removal of controls the value of the land and improvements would have been about £4,550 including £175 per foot for the land. Seeing that the special value to the plaintiff above the market value has been allowed for in the agreement for £2,450 in respect of items (2) to (8) inclusive in the statement of claim, there is no occasion to apply the test in the *Pastoral Finance Association's Case* (1). The test is that stated in *Spencer's Case* (2). Applying that test, the hypothetical vendor is not to be identified with the plaintiff. The valuation for the purpose of the family arrangement, and those referred to in the plaintiff's solicitor's letter of 25th May 1945 can be treated only as evidence of what might have influenced the hypothetical parties; but as evidence they have little value.

The hypothetical vendor would have elected to keep the property until the controls were lifted rather than sell it at the price the Treasury would have approved, which would have been substantially less than its true value. The time when they would be lifted would be somewhat conjectural; but having regard to the cessation of all hostilities nearly five months before the critical date, the time of lifting would not then be considered remote. I think they would be likely to have concluded that the lifting would take place somewhat earlier than proved to be the case, and, allowing for a normal course of development in the meantime that the unimproved land would then be worth what I find it proved to be worth, namely £160 per foot rising to £175 per foot within a period of six months after controls were lifted; and that the increase in the value of the improvements, even after allowing for the age of the brick building, would be at least in the same proportion. Meantime the business could have been carried on. How profitable it was does not appear; but as at the critical date it had endured for fifty-two years. Probably the income exceeded the outgoings. At all events the plaintiff saw fit to carry it on for over two years after the resumption. But there would be a discount for the payment of the price before controls were lifted.

I have reached the conclusion that the value to the plaintiff of the subject land and improvements as at 1st January 1946 was £4,350. Adding this amount to the £2,450 agreed upon in respect of the other items of the claim I find the total value to

(1) (1914) A.C. 1083.

(2) (1907) 5 C.L.R. 418.

have been £6,800, of which £3,000 has already been paid, leaving £3,800 still to be paid.

I give judgment for the plaintiff for the sum of £3,800 and her costs of the action. Liberty to apply.

From this decision the defendant appealed to the Full Court.

J. D. Holmes Q.C. (with him *E. J. Hooke* and *G. A. Pape*), for the appellant. It is submitted that the compensation payable under the *Lands Acquisition Act* 1906-1936 was the market value of the land at the date of acquisition. That market value was fixed by the system of controls then in force. There is a conflict here as to whether *Spencer* v. *The Commonwealth* (1) should be applied. The learned trial judge did apply it. The question is: what is the "real value" that authorities which were excepted from the system of price control of land would have paid?

[DIXON C.J. referred to *In The Matter of the Tramway Board Act* 1915 *and In The Matter of an Arbitration between the Melbourne Tramway and Omnibus Co. Ltd. and the Tramway Board* (2), reasons for the Award of *Cussen* J.]

Pastoral Finance Association Ltd. v. *The Minister* (3) is not relevant here, because it is directed to a question of special value. *Spencer's Case* (1) recognizes the proposition that controls or lack of controls are irrelevant in determining market value. See per *Griffith* C.J. (4), per *Barton* J. (5), per *Isaacs* J. (6). The principle to be applied in the case of an authority exercising compulsory powers is what would the vendor sell at in negotiation, and not the value to the resuming authority. [He referred to *Raja Vyricherla Narayana Gajapatiraju* v. *Revenue Divisional Officer, Vizagapatam* (7); *Olsen* v. *The United States* (8); *Cunningham* v. *Commonwealth* (9); *McCathie* v. *Federal Commissioner of Taxation* (10); *Abrahams* v. *Federal Commissioner of Taxation* (11); *Perpetual Trustee Company (Limited)* v. *Federal Commissioner of Taxation* (12); *Commissioner of Land Tax* v. *Nathan* (13); *Commissioner of Succession Duties (South Australia)* v. *Executor Trustee and Agency*

(1) (1907) 5 C.L.R. 418.
(2) (1917) V.L.R. 472, at pp. 478 *et seq.*
(3) (1914) A.C. 1083.
(4) (1907) 5 C.L.R., at p. 431.
(5) (1907) 5 C.L.R., at pp. 435, 436.
(6) (1907) 5 C.L.R., at p. 440.
(7) (1939) A.C. 302, at p. 312.
(8) (1934) 292 U.S. 246, at pp. 256, 257 [78 Law. Ed. 1236, at p. 1245].
(9) (1948) 79 C.L.R. 424, at p. 426.
(10) (1944) 69 C.L.R. 1.
(11) (1945) 70 C.L.R. 23, at p. 31.
(12) (1942) 65 C.L.R. 572.
(13) (1913) 16 C.L.R. 654, at p. 661.

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Co. of South Australia Ltd., per *Starke* J. (1) ; per *Dixon* J. (2) ; *Nelungaloo Pty. Ltd.* v. *The Commonwealth* (3) ; *Priestman Collieries Ltd.* v. *Northern District Valuation Board* (4).] The principle of *Swift and Co.* v. *Board of Trade* (5) is that the subject cannot benefit out of an acquisition to an amount greater than he would have obtained on the market. In *Corrie* v. *MacDermott* (6) it was held that the value of the land in the existing state of the law was to be taken. There, one of the factors in the existing state of the law was the limitation upon the use to which the land itself could be put by the trustees of the society, while it was in their hands. To take into account a retention value on the part of the vendor is to depart from *Spencer's Case* (7). It is there made clear by *Isaacs* J. (8) that no consideration could be given to the disinclination of the seller to sell. [He referred to *Lovegrove* v. *The Housing Commission of New South Wales* (9) ; *McMahon* v. *The Housing Commission of New South Wales* ; *McMahon* v. *The Valuer-General* (10).] Among the class of persons who are hypothetical purchasers within the doctrine of *Spencer's Case* (11) are not only ordinary members of the public but authorities of the States and the Commonwealth. That is discussed in *O'Donohoe* v. *The Valuer-General* ; *King* v. *The Valuer-General* (12). *Moreton Club* v. *The Commonwealth* (13) is not relevant here, because it was concerned with special value in that the club was 1s. 6½d. per square foot better off in the premises which were acquired than it was in the premises to which it went. The "retention" value or "potential" value is only another way of trying to compensate a loss in some general sense. [He referred to *Colombo M. C.* v. *Chettiar* (14).] In the United States of America it has been rejected entirely as a part of just compensation. See *United States* v. *Commodities Trust Corporation* (15).

Gregory Gowans Q.C. (with him *P. H. N. Opas*), for the respondent. There is nothing in *Spencer* v. *The Commonwealth* (7) that requires anything but a fair price as the objective sought by the test, nor is there anything which requires the ignoring of such price as would be likely to be obtained with the removal of the restrictions at some future date. The test in *Spencer's Case* (7) is a hypothetical

(1) (1947) 74 C.L.R. 358, at p. 370.
(2) (1947) 74 C.L.R., at p. 373.
(3) (1948) 75 C.L.R. 495.
(4) (1950) 2 K.B. 398.
(5) (1925) A.C. 520.
(6) (1914) A.C. 1056.
(7) (1907) 5 C.L.R. 418.
(8) (1907) 5 C.L.R., at p. 442.
(9) (1949) 17 L.G.R. (N.S.W.) 83.
(10) (1946) 16 L.G.R. (N.S.W.) 54.
(11) (1907) 5 C.L.R. 418.
(12) (1949) 17 L.G.R. (N.S.W.) 112.
(13) (1948) 77 C.L.R. 253.
(14) (1947) A.C. 188.
(15) (1950) 339 U.S. 121 [94 Law. Ed. 707].

process which not only asks the tribunal to imagine a vendor in certain circumstances and a purchaser in certain circumstances but also requires the tribunal to imagine a price at which they would meet. In *Spencer's Case* (1) the Court distinguished questions as to land, from questions as to chattels. See, per *Griffith* C.J. (2), per *Barton* J. (3), per *Isaacs* J. (4). [He referred to *Deputy Federal Commissioner of Taxation* v. *Gold Estates of Australia Ltd.* (5); *Assessment Committee of the Metropolitan Borough of Poplar* v. *Roberts*, per Lord *Buckmaster* (6); per Lord *Atkinson* (7); per Lord *Sumner* (8).] The system of control should be ignored for the purposes of the formula in *Spencer's Case* (1). There may be cases, of which *Priestman Collieries Ltd.* v. *Northern District Valuation Board* (9) was one, in which legislation requires the exclusion of the "potential" value. In like position is *O'Donohoe* v. *The Valuer-General*; *King* v. *The Valuer-General* (10).

[DIXON C.J. referred to *In the Matter of the Tramway Board Act 1915 and In the Matter of an Arbitration between the Melbourne Tramway and Omnibus Co. Ltd. and the Tramway Board*, per *Cussen* J. (11).]

Swift and Co. v. *Board of Trade* (12) was concerned with perishable goods, which could not have any "retention" value. In *United States* v. *Commodities Trust Corporation* (13) the legislation required that the controlled price was to be a fair and reasonable price. *In re an Arbitration Between The City and South London Railway Co. and The Rector and Churchwardens of the United Parishes of St. Mary Woolnoth and St. Mary Woolchurch Haw.* (14) is authority for the proposition that potential value based on the possibility of the restriction being lifted is to be taken into account. Although the restriction against alienation there was not statutory, there is no distinction for present purposes. *MacDermott* v. *Corrie* (15) deals with the same type of problem. This Court held that potential value might be taken into account. No distinction was drawn by *Barton* A.C.J. between a restriction on price and a restriction on use. [He referred to *Corrie* v. *MacDermott* (16); *W. H. Burford*

(1) (1907) 5 C.L.R. 418.
(2) (1907) 5 C.L.R., at p. 431.
(3) (1907) 5 C.L.R., at p. 435.
(4) (1907) 5 C.L.R., at p. 440.
(5) (1934) 51 C.L.R. 509.
(6) (1922) 2 A.C. 93, at p. 103.
(7) (1922) 2 A.C., at p. 107.
(8) (1922) 2 A.C., at pp. 114, 116.
(9) (1950) 2 K.B. 398.
(10) (1949) 17 L.G.R. (N.S.W.) 112.
(11) (1917) V.L.R. 472, at p. 481.
(12) (1925) A.C. 520.
(13) (1950) 339 U.S. 121 [94 Law. Ed. 707].
(14) (1903) 2 K.B. 728.
(15) (1913) 17 C.L.R. 223.
(16) (1914) A.C. 1056.

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and Sons Ltd. v. *The Commonwealth* (1); *Ellis* v. *The Commonwealth* (2); *Tanti* v. *Carlson* (3); *Moreton Club* v. *The Commonwealth* (4).]

J. D. Holmes Q.C., in reply.

Cur. adv. vult.

THE COURT delivered the following written judgment:—

This is an appeal by the defendant from a judgment of *Webb* J. in an action brought by the plaintiff under the *Lands Acquisition Act* 1906-1936 in this Court to recover compensation for the acquisition by the Commonwealth of her land situated at 481 Sydney Road, Coburg, in the State of Victoria. The date of acquisition was 12th December 1946 but under the Act the value of the land must be assessed according to its value on 1st January last preceding the date of acquisition, in the present case 1st January 1946. At the date of acquisition there were shop premises erected on the land in which the plaintiff was carrying on a grocery and hardware business. The plaintiff claimed compensation for the loss of the land estimated on a basis which took account of the loss occasioned by the forced sale of her stock on vacating the premises and of the expenses involved in obtaining other premises at first temporary and then permanent in order to continue to carry on her business. The amount of these special items of loss was agreed upon so that all that his Honour had to assess was the compensation to the plaintiff for the acquisition of her land and the improvements thereon considered as land having no special value for the plaintiff. His Honour assessed this compensation at £4,350.

Prior to reaching this sum his Honour made the following findings: "I have come to the conclusion that, as at 1st January 1946, the Treasury would not have approved of the sale of the subject land and improvements at a higher price than £3,400, being about £130 per foot for the land and £800 for the improvements. But that would not have represented their true value at that time. Rather than sell at that price a prudent owner would have preferred to await the removal of controls, whereupon I find that the value of the land and improvements would have been about £4,000 including £160 per foot for the land; and that within six months of the removal of controls the value of the land and improvements would have been about £4,550 including £175

(1) (1949) S.A.S.R. 310.
(2) (1950) S.A.S.R. 30.
(3) (1948) V.L.R. 401; (1948) 2 A.L.R. 547.
(4) (1948) 77 C.L.R. 253.

per foot for the land". The reference to the Treasury in this passage is to the control then in force over the sale of land embodied in the *National Security* (*Economic Organization*) *Regulations*.

The purpose of the appeal, we were told, was to obtain a decision upon a question of principle and the defendant was prepared to pay the costs of the appeal in any event. The question of principle, so it was said, arises from his Honour's findings in the following way. The only special value that the property had for the plaintiff was its value as property on which she could carry on her grocery and hardware business. But the plaintiff had been fully compensated for the loss of this special value by agreement and the compensation which his Honour had to assess was limited to the value of the land and improvements. It was contended that his Honour should not have assessed compensation for the loss of the land and the improvements at more than their "market value" on 1st January 1946 and that on his findings this was £3,400, the highest price at which his Honour considered that the Treasury would have approved of a sale on that date. The appeal therefore raises directly the question of principle whether in the case of land compulsorily acquired under the *Lands Acquisition Act* during a period of controls, possessing no special suitability for some particular business or activity carried on by the owner and having no added potential value if put to some better use, the assessment of compensation may exceed the highest price which the controlling authority might be expected to allow. For example the appellant denies that the assessment may include some amount in excess of the controller's price to compensate the owner for the loss of the opportunity which might arise, if he held the land until controls expired, of then selling the land at an enhanced price on a free market.

The answer to the question must depend primarily upon the meaning of the particular Act providing for compensation, in this case the *Lands Acquisition Act*. Section 28 (1) (*a*) of this Act provides that in determining the compensation regard shall be had to the value of the land acquired. It is established that "value" in such a context means the value of the land to the owner. Where the amount for which a vendor may sell and a purchaser buy is not controlled the Court poses a hypothetical problem, the answer to which supplies this value. It is a familiar rule which in Australia was authoritatively formulated in *Spencer's Case* (1). Shortly stated what is required is "an estimate of the price which would have been agreed upon in a voluntary bargain

(1) (1907) 5 C.L.R. 418.

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between a vendor and purchaser each willing to trade but neither of whom was so anxious to do so that he would overlook any ordinary business considerations": *Commissioner of Succession Duties (S.A.)* v. *Executor Trustee & Agency Co. of South Australia Ltd.* (1). It is simply an analysis of what in all the relevant circumstances would be the price that a willing purchaser would have to pay a vendor willing but not anxious to sell in order to obtain the land. Where land has no special suitability for some business or activity carried on by the owner and has no added potential value if put to some better use, the value on a free market is usually its market value. The best evidence of this value is that of comparable sales of other land either before or after the date of acquisition but this evidence is often not available.

This test requires considerable adaptation when the compulsory acquisition occurs in a period of controls. The test presupposes that a vendor can ask any price which it would be reasonable to expect the purchaser to pay. This price would usually exceed the price fixed by a controller; for there would be no necessity to fix prices if they were intended to represent market prices. It would be unreasonable to impute to a vendor a willingness to sell his property at the controlled price to a purchaser who was likely, if he held the land until controls were abolished, to be able to sell the land at an enhanced price. An owner, though otherwise willing to sell, would himself prefer to wait, if guided by ordinary prudence, in the hope that the regulation of land sales requiring the consent of the controller would terminate.

The very regulation imposing the condition that the consent of the delegate of the Treasury must be obtained supposes that the amount which a willing vendor would demand and would obtain exceeds the price to which, as a matter of economic policy, they would be limited by the controller. The reason why value for the purpose of compensation is measured by what an owner prepared to sell would demand and what a buyer desirous of obtaining the land would give is that this ascertains the value in money contained in the land. Once the notion is introduced of an external authority forbidding the parties or one of them to require or give so much, it ceases to evidence the value contained in the land, the value to the owner, and becomes no more than a figure permitted as an expression of government economic policy. An inquiry into the figure which, on the hypothesis that on a given date an application was made to the Treasury, the Treasury control would have sanctioned may not, having regard to the administrative practice that

(1) (1947) 74 C.L.R. 358, at p. 367.

grew up, be impossible, but after all it is but an inquiry into what an administrator would have done in an event that did not take place and is far away from a measure of value to the owner. On the other hand the existence of a regulation of land sales would be calculated itself to affect what a buyer would be prepared to give. He himself would be buying an asset of which he could not, if need arose, freely dispose at the price he would demand from a buyer free to give it. It would not be right therefore to say that the existence of a regulation of land sales must be disregarded. It must be taken into account as it affects what a buyer would be prepared to give to obtain the land, not as limiting his freedom to offer what he likes or his freedom to buy at what he is prepared to offer, but as it operates on his judgment in determining what he is prepared to give, that is to say, as a consideration affecting the value of the land to him as a buyer. It may be remarked that it necessarily affects what a prudent man in the position of the dispossessed owner would have been willing to give for the land sooner than fail to obtain it: *Pastoral Finance Association* v. *The Minister* (1). What has to be ascertained as a measure of value is what the willing seller would demand, on the assumption that the consent of the controller would be forthcoming, and what a willing buyer would give, on the like assumption, on the footing that he is a buyer who must himself submit to the controls if and when his turn came to sell, should they not in the meantime be terminated. The least price at which a vendor could be reasonably expected to sell in these circumstances would be a price which would include, in addition to the price fixed by the controller if it could be ascertained, a sum to compensate him for the present value of the enhanced price which the purchaser might expect ultimately to obtain. This would be an ordinary business consideration which no vendor could be expected to overlook: *McMahon* v. *The Housing Commission of New South Wales*; *McMahon* v. *The Valuer-General* (2). This sum might be difficult to estimate but difficulty of estimation should never deter a Court from allowing in the assessment of compensation every item of value which should properly be taken into account. Useful examples of the way in which this retention value has been calculated and taken into account will be found in the judgments of *Ligertwood* J. in *W. H. Burford & Sons Ltd.* v. *The Commonwealth* (3), and *Abbott* J. in *Ellis* v. *The Commonwealth* (4). The amount added to the fixed price would depend partly upon the extent to which the valuer

(1) (1914) A.C. 1083, at p. 1088.
(2) (1946) 16 L.G.R. 54, at p. 56.
(3) (1949) S.A.S.R. 310.
(4) (1950) S.A.S.R. 30.

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considered the existence of controls was depreciating the price which could otherwise be obtained in the market and partly upon the nature of the control and the probability of its continuance. The more depreciatory the control, and the shorter the period of its likely continuance, the greater should be the amount allowed under this head. But to go through the process of ascertaining what the delegate of the Treasury might be expected to sanction and to add a retention value is only one way of elucidating what the seller would demand and the buyer give, if not prevented from carrying through the sale by the want of consent of the Treasurer. Indeed it may be considered unnecessary in many cases and artificial. The question itself may be directly answered by a consideration of the character of the subject land, its annual value and profitable uses and the evidence of valuers as to the demand for like properties and what a vendor could reasonably expect to obtain if the market were free from a purchaser who was himself subject to the controls.

The Economic Organization Regulations were one of the sets of regulations enacted during hostilities the purpose of which was to prevent inflation. They did not directly fix the sale price of land at that existing on 10th February 1942, but applications for the consent of the Treasurer to a sale had usually to be accompanied by a valuation of an independent approved valuer specifying the amount which would have been a fair and reasonable price for the land on 10th February 1942, so that this was their basis. The general policy of the regulations was embodied in sub-reg. (10A) of reg. 6, though this sub-regulation did not come into force until 8th December 1946; S.R. 1946 No. 192. It provided that the Treasurer should not refuse to grant his consent, or make the granting of this consent subject to any condition, except for the purpose of giving effect to a policy of preventing or limiting increases in prices of land; preventing or limiting increases in rates of interest; or restricting the borrowing of money for use in investment in land. There was nothing in the regulations to prevent the Treasurer allowing a price above the prices prevailing on 10th February 1942, but the regulations exhibited an obvious purpose of pegging prices in the vicinity of those values. To assess the fair value to the owner of land compulsorily acquired under the *Lands Acquisition Act* during these controls it is open to the Court in our opinion, aided by any available evidence of what appeared to be the practice of the Treasurer, to estimate the price at which the Treasurer would have consented to a sale if the resumed land had been sold on the date on which its value for the purposes of

compensation had to be assessed. To that estimated price an addition would be necessary representing the increased value of the land which must arise, if from nothing else, from the fact that when controls terminated it would sell in a free market and might be expected to realize a greatly enhanced price. The value of the land in the present case had to be assessed according to its value on 1st January 1946. On that date hostilities had ceased and it was evident that the defence power was a waning power incapable of sustaining the Economic Organization Regulations except for a limited period.

The controls in question ceased as regulations made under the *National Security Act* 1939-1946 when that Act expired at midnight on 31st December 1946 but they were continued by the *Defence (Transitional Provisions) Act* 1946-1947 until they were repealed on 20th September 1948. The plaintiff as a reasonably willing vendor was entitled to expect that a purchaser would be willing to pay a greater sum than the controlled price in respect of the probable increase in the price of the land if she held it until the cessation of controls. The Economic Organization Regulations also provided that nothing in them should prevent any transaction to which the Commonwealth, a State, or an authority of the Commonwealth or a State, or to which any person acting on behalf of the Commonwealth, a State, or an authority of the Commonwealth or a State was a party, not being a transaction by reason only of the fact that (i) the Public Trustee or Public Curator or the Curator of the Estates of Deceased Persons, or any similar authority, of any State or Territory, of the Commonwealth was a party to the transaction; (ii) the consent of the Commonwealth, a State or any person or authority was necessary to, or given in connection with, the transaction. There were therefore on 1st January 1946 a limited class of purchasers who could pay any price for the land and in estimating its value to the owner the Court could take into account the possibility of one of these purchasers buying the land though this might not greatly enhance the value to the owner since such purchasers could not reasonably be expected to pay much more than the maximum price at which the land could be sold to members of the public.

The particular question upon which we are asked to express an opinion on this appeal is the question of principle already mentioned. On this question we have no doubt that under the *Lands Acquisition Act*, in estimating the value of land to an owner dispossessed during controls, the valuer should estimate the price which a vendor willing but not anxious to sell would agree to, if he were allowed, and a

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willing purchaser would give to obtain the land, although in his turn he would be subject to the controls in reselling. To arrive at the result he is at liberty, if on the evidence that seems the most satisfactory method, to take into account both items under discussion. The meaning of " value " in s. 28 (1) (*a*) of the Act must be interpreted against the background of the Constitution which in s. 51 (xxxi.) requires that legislation for the acquisition of property shall afford just terms. As already explained that does not mean that in assessing compensation a system of price control existing on the crucial date should be ignored. It was stated by *Williams* J. in *Johnston Fear & Kingham* v. *Commonwealth* (1), in relation to goods, that " The fixed price would be an important element to be taken into account in assessing compensation. Where the market value of the goods would provide adequate compensation it might be conclusive ", and this element was taken into account by *Dixon* J. in assessing compensation for the compulsory acquisition of a lease in *Moreton Club* v. *Commonwealth* (2).

In the case of goods produced during a period of price control for immediate sale and consumption the fixed price might well provide fair compensation. Much would depend upon how the price was fixed and whether this price was a fair and reasonable price having regard to the costs of production and the margin of profit allowed in the light of the general control of the problem of inflation. Such goods, especially perishable goods, might have no retention value and no value to the owner except what he could then presently obtain. But the *Lands Acquisition Act* is dealing with compensation for the compulsory acquisition of land. It is an Act designed to provide just terms for the acquisition at all times whether Australia be at peace or war. Land is a permanent asset and it has a value capable of surviving temporary controls and financial strains and stresses that occur during hostilities.

In the present case *Webb* J. allowed for these elements. It would not be proper for this Court on an appeal of this nature to substitute its own opinion of the amount that should be allowed for that of the Court below unless it were satisfied that the Court below had acted on some wrong principle of law or that the value was entirely erroneous. We repeat the opinion of the Privy Council in an Indian appeal cited in *Commissioner of Succession Duties (S.A.)* v. *Executor Trustee & Agency Co. of South Australia Ltd.* (3), " Now this Board will not interfere with any question of valuation unless it can be shown that some item has improperly

(1) (1943) 67 C.L.R. 314, at p. 334.
(2) (1948) 77 C.L.R. 253.
(3) (1947) 74 C.L.R., at p. 367.

been made the subject of valuation or excluded therefrom, or that there is some fundamental principle affecting the valuation which renders it unsound". The appellant in the present case has failed to bring the present appeal within these principles. It has failed to establish that his Honour acted on some wrong principle of law or that the value was entirely erroneous. We consider that his Honour was right in allowing a substantial addition to the estimate of the price the delegate from the Treasury would sanction. The amount was peculiarly for him, but that allowed appears to us, if we may say so with respect, to be entirely reasonable.

Perhaps we should mention two cases to which we were referred by counsel for the appellant, one in the Court of Appeal in England, *Priestman Collieries Ltd.* v. *Northern District Valuation Board* (1), and the other in the Supreme Court of the United States, *United States* v. *Commodities Trust Corporation* (2). Both cases relate to the assessment of compensation for the compulsory acquisition of personal property, timber in the first place and pepper in the second. No constitutional requirements arose or could arise in the first case. It was simply a question of applying the particular provisions of the relevant Act to particular facts. It was there held that the Valuation Board was obliged to determine the value of stocks of mining timber in accordance with the provisions of an order controlling the prices of such chattels at the material date. In the second case, pepper had been requisitioned by the government of the United States during hostilities and whilst there was in existence a prices order which fixed the maximum prices at which pepper could be sold. The owners proved that pepper was not a perishable product but could be stored and held until a favourable occasion arose for its sale. Accordingly they claimed that the pepper had a retention value and that the fixed price did not afford just compensation within the Fifth Amendment of the Constitution. Under the relevant legislation prices had to be "generally fair and equitable" and Congress had provided that prices regulations could be subjected to judicial review. The purpose of the regulations was to enable Federal, State and local governments to purchase goods for wartime needs from any purchasers at the prices fixed for purchasers generally. The Court held that these prices provided just compensation for the acquisition of all pepper and that no compensation should be allowed for the higher price the owners were likely to realise if they held the pepper until there was an uncontrolled market. We do not think that

(1) (1950) 2 K.B. 398.

(2) (1950) 339 U.S. 121 [94 Law. Ed. 707].

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these cases decided under different legislation and relating to personal property throw any light on the present problem. The Economic Organization Regulations did not require that the prices at which land could be sold should be " generally fair and equitable ". They provided for the prices to be fixed administratively on an arbitrary basis having no real relation to current values. So far as it was held that the existence of controls is a factor to be taken into account, these cases break no new ground.

The appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant, *D. D. Bell*, Crown Solicitor for the Commonwealth of Australia.

Solicitors for the respondent, *W. E. C. Treyvaud & Co.*

R. D. B.