IN THE HIGH COURT OF AUSTRALIA.

THE MINISTER OF STATE FOR THE NAVY

v.

GOLDIE

REASONS FOR JUDGMENT.

Judgment delivered at MELBOURNE

on WEDNESDAY, 23RD MAY, 1945.

H. J. Green, Govt. Print., Melb.

C.2774

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REASONS FOR JUDGMENT. LATHAM C.J.

This is an appeal from a decision of the Supreme Court of Western Australia upon a review under the provisions of the National Security (General) Regulations referring to compensation for, inter alia, property taken under the regulations. Three pearling luggers were taken in February 1944, after having been used under a temporary requisition since about February 1942. A Compensation Board assessed certain moneys as representing what should fairly be payable by way of compensation in pursuance of the regulations. An application was made to the Supreme Court of Western Australia for review, and it is from the decision upon that review that the appeal is brought to this court.

The largest and most valuable of the luggers taken was the "Gloria", and it has been agreed between the parties upon this appeal that the value of the other two vessels concerned, the "Roser" and the "Niobe", bear the proportion respectively of 70% and 50% to the value of the "Gloria". The luggers are pearling luggers used at Broome, and are specialised vessels constructed for pearling at Broome. They are built at Broome, and no similar vessels are built anywhere else. The Navy, however, required the use of these vessels, and acquired them under the regulations.

No luggers were available for purchase upon the market. There were no sales of luggers from time to time which would enable a court to ascertain and apply a criterion of value. It was therefore necessary to ascertain what a willing purchaser would be prepared to pay to a not unwilling vendor in accordance with the general principle which has been stated in this court in Spencer's Case, 5 C.L.R., 418. A method of

ascertaining /

ascertaining the value in accordance with that principle would be to ascertain what it would cost to build a lugger. The parties in effect agree, because evidence on the point was not challenged, that the cost of constructing a lugger such as the "Gloria" in about February 1944 would have been about £2600. His Honour adopted that figure, but he then made a deduction on account of the age of the lugger acquired, namely some seven years, and depreciated that figure at a reducing rate of 7½% on hull, rigging and engine, applying the same percentage to all those elements of value.

No figure applied for purposes of depreciation can be absolutely precise. It is contended upon this appeal that the engine should have been depreciated at a higher rate than the other elements mentioned. Our attention, however, has been called to a passage in the transcript on page 140, where it was conceded on behalf of the Commonwealth that 7½% all over would not be an unfair rate of depreciation. There was evidence to support an allowance of depreciation at that rate. The application of this rate of depreciation reduces the sum of £2600 to £1500.

It is argued, however, that, as the possibility of the resumption of pearling depended, for fairly obvious reasons, upon the termination of the war, the improbability of being able to use any lugger which might be built during a substantial, though indefinite, period would be an element leading a buyer to offer a lower price than otherwise would be the case. His Honour, it appears to me, did take this element into consideration. Against it His Honour Mr. Justice Dwyer set off the allowance which is often made for compulsory taking (for "incidentals"), and he also considered that the future level of costs of building luggers was uncertain, so that it could not be said with any degree of assurance that the costs would go down to any particular level. On the whole, I am of opinion that in such a matter as this, into which a large element of judgment enters, it is impossible for this Court to be satisfied that His

Honour /

Honour was wrong, and that therefore the appeal should be dismissed.

A particular question arises as to the allowance of interest. Counsel has challenged the allowance of interest, disputing the power of the Compensation Board and the Court upon review to allow interest. The matter, however, has not been argued at all. I consider that there should be full argument before a matter of such importance is decided by this Court. We have been informed that in any event the Minister would allow interest under reg. 60J. In my opinion, in these circumstances, we should allow the judgment to stand without deciding whether or not either just terms of compensation necessarily include an allowance for interest, or (putting the matter in another way), whether an exclusion of an allowance for interest is inconsistent with the provision of just terms. In my opinion for these reasons the appeal should be dismissed.

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JUDGMENT. RICH J.

In this particular case I consider that the trial judge was right in adopting as a method of valuation the wartime replacement cost of the lugger Gloria less depreciation. It was conceded that at the date of acquisition the sum of £2,600 was the replacement cost. His Honour then took into consideration the factor of war conditions and proceeded to reduce the sum thus arrived at. The amounts for depreciation and wartime factors depend on the facts of each case to which no hard and fast rule can be applied. Whether I should have made larger or smaller deductions is of no importance and I am content with the learned judge's finding of £1,500 as the replacement cost of the Gloria less depreciation. I agree that interest should also be allowed and with the order proposed by the Chief Justice.

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JUDGMENT. STARKE J.

The three pearling luggers in this case were acquired compulsorily, and the matter the Judge had to determine was - What was the value of the luggers so acquired to the owner?

There was no market value upon which he could rely, so he adopted the artificial method of assessment known as that of replacement value; that is to say, the cost of construction, taking the date of acquisition as the replacement date, less depreciation. I can see nothing in his judgment which suggests that he misapplied or misused that method. Therefore I agree with the judgment proposed.

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JUDGMENT. DIXON J.

The learned Judge had a difficult task. I think that he sought to perform it by ascertaining what a hypothetical buyer, treating him as what has been called an intellectual automaton, might be expected to give. For that purpose he took as his commencing figure the replacement cost of the lugger as in Broome, and he then proceeded to depreciate it at a rate of depreciation which upon the evidence it was open to him to adopt, and he applied the reducing balance or diminishing instalment method of depreciation, which it was also open to him to adopt. I think that, quite correctly, he took into account the conditions arising from the war which precluded the use of luggers for some time to come, a future period which he could only fix by conjecture. But I have some misgivings as to the mode of reasoning which at this point he proceeded to pursue. For, although he would otherwise have reduced the amount of compensation by reference to the consideration I have just mentioned, nevertheless as against it he then took into account certain countervailing circumstances.

I have more than a little difficulty in following the view that he took of these circumstances. Mr. Louch, however, has given an explanation which is intelligible, and, although I am not satisfied with the reasoning, yet on the facts it is perhaps not untenable.

In matters of valuation I think a Court of Appeal should be careful not to substitute its judgment on a matter of fact where a large element of discretionary judgment must be employed, simply because the conclusion of fact is arrived at rather by general considerations or a mode of reasoning than by acting on opinion

evidence /

evidence or direct testimony. After all, they are questions of fact, and in the present case I am not prepared to say that it necessarily appears on the face of the judgment that His Honour's reasoning is erroneous. Although I am not entirely satisfied, I am not prepared to dissent, and therefore agree in the judgment which has been pronounced. I should perhaps add that one of the counter-vailing circumstances which the learned Judge took into account was his own feeling that the amount accepted as the initial estimate of replacement value, before depreciation, was inadequate to cover what he would regard as the full cost when all incidentals were taken into account. I do not regard his judgment as meaning that he applied the old rule of adding something for compulsory taking. That rule has been considered in In re Wilson and the State Electricity Commission of Victoria, 1929 V.L.R., 459, and has been excluded for most purposes within the jurisdiction governed by decision of the Supreme Court of Victoria. I should require further time for consideration if I thought that that was the basis of His Honour's judgment. I think that His Honour merely gave effect to an opinion he had formed of the actual costs as they appeared to him on his view of the evidence and on his general knowledge of the circumstances arising from the war.

As to interest, there is a question outstanding on the construction of the regulation, but I think that it does not arise as a practical matter in this case, at all events it has not been seriously discussed. I therefore agree.

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JUDGMENT. McTIERNAN J.

I agree with the reasons for judgment of the Chief Justice.

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JUDGMENT. WILLIAMS J.

I agree. No reliance can, in my opinion, be placed upon the sales of other luggers by Robison and Norman Pty. Ltd. to the Navy about the date of the requisition, having regard to the circumstances under which they were made, as giving any real guide to the values of the three vessels impressed. His Honour was, therefore, forced, I think, on the material before him, to rely almost exclusively on replacement costs less depreciation for age to determine their value to the seller. The rates of depreciation he adopted for this purpose are supported by the evidence and there is nothing to suggest that the increase in costs on prewar figures he adopted was unreasonable or unlikely to continue in the future or such as not to afford a reasonable basis for a bargain between seller and buyer. His Honour in this way arrived at a figure of £1500 for the "Gloria" and that in my opinion on His Honour's reasoning was her value on that date. His Honour then made certain additional calculations which cancelled out each other. I must not be taken as agreeing that it was proper to make these calculations and in particular nothing should, in my opinion, be added to the replacement cost to cover the period it would take to build a new ship because the calculation of this cost does not produce the money to build a new ship, nor is it intended to place the seller in a position to do so but is intended to give the seller an equivalent in money for his old ship. But once His Honour arrived at the figure of £1500 any other circumstances suggested during the argument to vary that amount are too problematical, in my opinion, to form any basis for holding that His Honour was wrong in not reducing this figure. On the question of interest, for the reasons which I gave in the Munn Case, I think that the order was right.