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LISTS OR  
ON-LINE

6<sup>th</sup> Mo. 6 of 1945 (7)

IN THE HIGH COURT OF AUSTRALIA.

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THE MELBOURNE HARBOR TRUST  
COMMISSIONERS

V.

THE MINISTER OF STATE FOR THE  
NAVY

**ORIGINAL**

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REASONS FOR JUDGMENT.

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Judgment delivered at MELBOURNE  
on FRIDAY, 21st December 1945.

THE MELBOURNE HARBOUR TRUST COMMISSIONERS

v.

THE MINISTER OF STATE FOR THE NAVY

REASONS FOR JUDGMENT.

LATHAM C.J.

THE MELBOURNE HARBOUR TRUST COMMISSIONERS

v.

THE MINISTER OF STATE FOR THE NAVY

REASONS FOR JUDGMENT.

LATHAM C.J.

On 13th March 1944 the Minister for the Navy temporarily requisitioned the coaling vessel "Mombah", which was owned by the Melbourne Harbour Trust. On 22nd December 1944 the vessel was permanently requisitioned by the Minister under the powers conferred upon him by the National Security (General) Regulations, reg. 57. The parties were unable to agree upon the proper amount of compensation to be paid by the Minister and the claim for compensation came before a Compensation Board, which assessed the compensation at £15,000. The claimant was dissatisfied with this assessment and has applied to this court for a review of the assessment. The function of the court under reg. 60G(5) is to hear the application and to determine whether any compensation is payable and, if so, the compensation which it thinks just.

The "Mombah" was built in 1923 for use by the Royal Australian Navy. She is a specially constructed coaling vessel. She has no means of propulsion. The length of the vessel is 315 feet, breadth 50 feet, depth 28 feet, gross tonnage 3,440 tons, dead weight 5,400 tons. The vessel had originally 18, now 16, derricks and winches. She is exceptionally large as a coal storage vessel, having a capacity of 4,720 tons, and is expensively and elaborately constructed. It appears from the evidence that coal hulks generally do not exceed 1300 tons and, more generally, run about 300 or 400 tons. The "Mombah" was specially made so that she could coal ships in harbours or in rivers, and so that she was strong enough to be taken to sea. She was made with internal sloping sides so as to be self-trimming.

The "Mombah" is therefore a very unusual type of vessel. She was constructed for a special purpose and, unless she was fitted with engines, would be useful only where exceptionally

large /

large provision for coal storage was required, but would be especially useful in such a case. The evidence showed that only the Navy or a harbour authority would be likely to want such a vessel.

In 1930 the Navy was disposing of vessels which were then no longer required, and sold the "Mombah" to the Melbourne Harbour Trust for £4500. There is some evidence that the cost of construction of the "Mombah" was about £167,000. The Harbour Trust evidently got a very good bargain in buying the vessel for £4500, but the fact that the Trust bought her very cheaply has no bearing upon her value at the time of requisitioning.

The vessel was brought to Melbourne and was kept/<sup>moored</sup>by the Trust at Berth No. 22, Victoria Dock, in the River Yarra. This was a berth which was not ordinarily revenue-producing, and it was convenient for the purpose of allowing the "Mombah" to lie alongside. Colliers discharged into the holds of the "Mombah". The "Mombah" then, by the use of her winches and grabs, discharged the coal as required into the units of the Trust's fleet which came alongside in the river.

After the outbreak of war the Coal Commission, in order to expedite the bunkering of vessels, directed that colliers should, if possible, discharge coal from both sides at the same time, and the result of this direction was that, after some date in 1940, the "Mombah" had to be towed out, at considerable expense, to colliers to be loaded.

At the time of requisition the "Mombah" was 21 years old, and I find upon the evidence was in only a very moderate condition of repair - quite sufficient for her utilisation in a river as a coal hulk, but she was not really well kept, and could not have safely gone to sea, as she was originally designed to do. Evidence for the respondent was to the effect that the vessel was only worth her break-up value, which was estimated at £15,000. This sum represented the maximum amount which the vessel would bring if sold to separate purchasers of

all her possibly useful parts, if they bought them for use - not as scrap. This estimate, upon this basis, was not challenged. It assumed that no-one would buy the vessel for use as a vessel. The first question which arises is whether the break-up value, taken as accurately calculated, is a fair measure of the compensation which should be paid to the claimant.

The claimant is entitled to fair compensation, that is, to payment of the value of the article which has been taken by the acquiring authority. Where there is a market for the article the market price determines the value, appropriate depreciation being allowed where the article is no longer new. Where, however, there is no market, it is necessary to have recourse to other methods of ascertaining value. The fact that there is no market for an article does not show that it is without value. In some cases the value may be estimated by considering replacement cost, with an allowance for depreciation.

In other cases original cost less depreciation may be an appropriate measure. In the case of ships the question to be asked is: "What is the value of the ship to the owners as a going concern?" - cf. The Harmonides, 1903 P., 1. In all cases the criterion has been held to be the value to the claimant, and not the value to the acquiring authority. In the case of land it may be that the land acquired has a very special value to the acquiring authority, but that fact is not allowed to enable the owner of the land to (as it were) hold up the authority, by requiring a price determined by the necessities of the authority. But the probability that such a particular person may want the land is an element to be taken into consideration in determining value: see Raja Vyricherla Narayana Gajapatiraju v. The Revenue Divisional Officer, Vizagapatam, 1939 A.C., 302. The real test is: "What would a not unwilling vendor be prepared to sell the property for to a willing purchaser?" - or, as it was put in Pastoral Finance Association v. The Minister, 1914 A.C., 1083, in the case of land: "Probably the most practical form in

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which the matter can be put is that they [the claimants] were entitled to that which a prudent man in their position would have been willing to give for the land sooner than fail to obtain it".

I exclude replacement cost as a basis. There is no evidence to suggest that any potential purchaser of the "Mombah" would take into account what it would cost him to build such an exceptional vessel. Similarly, original cost less depreciation will give, in my opinion, no guide whatever to what any person would be willing to pay for such a ship. The evidence shows, I think, that nobody would today even think of building such a ship, and so both original cost or present day cost of building the ship are in my opinion quite irrelevant matters in this case. The ship exists, though no-one would build her today. The question is, what would the owner, assumed to be prepared to sell, be willing to sell her for to a person who would be willing to buy her.

Unless the "Mombah" was worth nothing except for sale to be broken up, that is, unless she was a quite uneconomical proposition as a coaling vessel, something more than the break-up value of £15,000 should be awarded. The Trust has submitted evidence to the effect that the life of the vessel when new would be 50 to 55 years, and that she still has a life of approximately 29 years. Upon this basis, allowing what was said to be a proper rate of depreciation on a present day cost of about £240,000, the value of the vessel in December 1944 was said to be about £106,000. Admittedly this was a maximum claim. In my opinion this basis for ascertaining compensation should not be accepted, for the reason (as I have already said) that it would not be a practical proposition to construct a vessel like the "Mombah" at the time in question. Costs of ship-building were, as is shown by the evidence, very high indeed, and rather than pay over £100,000 for a storage vessel for coal, any shipowner would have been prepared to "make do" with a coal hulk or hulks which <sup>could</sup> though doubtless after some delay,

be bought for a much smaller sum, or with wharf storage. In my opinion the figure of £240,000 less depreciation bears no/ relation to the realities of value in the case of the "Mombah".

It was realised by the claimant's witnesses that it was most unlikely that as much as £106,000 would be paid by any conceivable purchaser for the vessel, or that the claimant would, upon any hypothetical bargaining, decline to sell until the purchaser bid such an amount. The sum of £60,000 was accordingly suggested as a sum which a purchaser could be expected to pay and the Harbour Trust to accept.

I have little doubt that the Harbour Trust would most willingly have accepted £60,000 if it had been offered, but the evidence has not satisfied me that any purchaser, including the Navy, would ever think of offering a sum approaching £60,000.

Calculations have been submitted designed to show that the utilisation of the "Mombah" resulted in a considerable saving in the cost of coal handling and in Exhibit "G" (as corrected) a comparison was made between the costs of handling coal with the "Mombah" for an assumed period of 29 years and the costs of handling coal without the "Mombah" upon the assumption that, while improved coaling facilities would be provided in the port in the future, they could not be so provided before about 1950. In the period, therefore, between 1944 and 1950 it would be necessary (as it has been necessary in the period 1944 to the present time) to utilise for the purpose of storing coal part of the coal wharves under the control of the Trust, that is, a portion of the south coaling wharf. This part of the wharf is ordinarily revenue-producing, whereas Berth No. 22, where the "Mombah" used to be tied up, was not revenue-producing. The use of a revenue-producing wharf as was suggested - 200 feet for two years and 500 feet for the next four years - would mean that the Trust would be deprived of the chance of earning revenue for that wharf frontage. The absence of the "Mombah" ----- also meant that front end loaders would have to be provided and the wharf and plant would have to be maintained. Another element which it was claimed should be taken into consideration /

consideration in calculating the cost of providing for coal storage facilities was an amount to cover cost of interest and depreciation on the shore handling plant, the wharf and the mechanical plant. This calculation was based upon the view that 200 lineal feet of wharf would be sufficient until December 1946, <sup>500 feet</sup> and that/(providing storage for about 4000 tons) would be required after the latter date. After making allowance for the fact that some of the expenditure would begin at a future date and that the expenditure should be regarded as spread over a period, namely the assumed useful life of the "Mombah", the result was brought out that the capitalised cost of providing for coal storage facilities for the Trust's floating plant after the "Mombah" had been requisitioned in December 1944, calculated in respect of the period of the hypothetical useful life of the "Mombah", was £66,253.

With this figure the claimant's witnesses compared a figure of £28,762, which, according to their evidence, represented the cost of providing for coal storage facilities for the Trust's floating plant if the "Mombah" had been retained by the Trust to the end of its assumed useful life of 50 years from construction. In this calculation it was assumed that the "Mombah" would provide for coal storage to the maximum required for a period of 29 years from 1944, but that thereafter it would be necessary to provide wharfage for coal storage - a length of 500 feet - which, at  $8\frac{1}{2}$  tons per lineal foot, would provide for some 4000 tons. The present value of the cost of this shore installation was calculated at over £14,000. The capitalised cost of the maintenance of the "Mombah" for 29 years was taken in at £700 per annum, representing over the 29 years calculated a present value of about £12,000. A further item of cost was added by including 29/50ths of the book value of the "Mombah" (£5571) at the date of acquisition by the Navy. From the total of these amounts was deducted an estimate of the present value of the scrap value of the "Mombah" at the end of a useful life of 50 years. The result of these calculations

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was to bring out an amount of £28,762 as representing the cost of providing the necessary storage facilities if the "Mombah" had not been acquired by the Navy. The difference between £66,253, and £28,762, namely £37,491, was therefore said to represent the capitalised cost of the increased expenditure involved in providing and operating the Trust's coaling plant as the result of the requisition of the "Mombah" in December 1944. This sum (£37,491) was therefore said to represent the value of the "Mombah" to the Trust.

These calculations were criticised at various points. The estimate of cost of providing means of storage in the place of the "Mombah" was, it was contended, greatly exaggerated. First, it had been assumed that no additional coaling facilities would be provided for a period of at least six years, whereas it was said that in any port improved coal storage facilities would receive a high priority, and therefore a shorter period should be taken. It was further contended that there was no ground ----- for supposing that 500 lineal feet would be necessary for coal storage from December 1946 onwards. 500 lineal feet would provide for a constant storage of over 4000 tons ----- which, it was contended, was in excess of all reasonable estimates of possible requirements. So far as information is available, it is shown that on only three occasions since the Harbour Trust acquired the "Mombah", in 1930, has the Trust had in hand a quantity of over 3000 tons. At the present time industrial trouble in the coal industry has reduced the Trust, with other coal users, to a hand to mouth existence. Over a period from 1927 the Trust has handled on the average 279 tons per week, the maximum being 480 tons in a week. Industrial troubles may not be permanent, but the claimant's estimates of requirements are in my opinion overstated.

The estimate of the cost of coaling without the "Mombah" was considerably increased by charging against the plant and wharfage a sum for the provision of general port facilities -

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lighting, beacons, dredging etc. But no such charge was included in the estimate of costs with the "Mombah" retained.

The calculation of costs upon the basis of the retention of the "Mombah" assumed that the maintenance of the "Mombah" would be only £700 per annum. It was pointed out that the cost of maintenance and repairs cost had greatly exceeded that amount in recent years, increasing from an average of £369 in the first five years to about £1000 in the last five years. I accept evidence given on behalf of the respondent that the "Mombah" needed extensive repairs to put her in first-class condition - an amount calculated by witnesses for the claimant at £10,000, and by a witness for the respondent at about £12,000. In my opinion £700 per annum is an under-estimate for the cost of maintenance. I also think that the opinion that the "Mombah" had a life of some 29 years from December 1944 is optimistic. Further, as I have already said, the allowance of 500 lineal feet appears to me to be excessive and to prevent me from relying upon the estimates made by the claimant's witnesses.

Costs of coaling with and without the "Mombah" were proved. Labour costs varied very considerably during the relevant period and a large addition for interest and depreciation after the removal of the "Mombah" made a fair comparison difficult. I do not think that the figures, involving as they do several variables, show, with any certainty, that there was any substantial reduction in coaling costs due to the use of the "Mombah".

It is quite impossible to estimate with mathematical accuracy the value of a special vessel such as this, constructed for a special purpose, with a very limited number of potential purchasers, because few purchasers would require her for the purpose for which alone she was suited. Evidence was given to the effect that it might be possible to install means of propulsion in the "Mombah" so that she could be used

as a collier. This evidence was not given in detail, and I am inclined to think that, having regard to her heavy and special construction, it would only be in very special circumstances that consideration would really be given to converting her into a sea-going collier. The evidence on this point was sketchy and did not satisfy me that conversion of the vessel into a collier was a practical proposition which any purchaser would have entertained in December 1944.

As I have already said, in my opinion the vessel was a useful vessel and worth more to the Harbour Trust than her break-up value. But I am of opinion that the amount of £37,491 is, for various reasons which I have indicated, an over-estimate of the value of the "Mombah" to the Harbour Trust during her expected period of life. In particular, substantial deductions must be made from this sum to meet what I regard as an under-estimate of the costs of maintenance and repairs for the "Mombah" in one calculation, and an over-estimate of required wharfage in the other calculation. The evidence as to comparative costs of handling from the "Mombah" and from the wharf went to show that there would be no saving in labour costs until there was a much larger through-put of coal. But the vessel provided a very convenient means of storing and handling coal and of keeping reserves safe, protected from the weather and under easy control. Making allowances for the matters to which I have referred, and admitting that anything like precise accuracy so as to avoid possible criticism is out of the question, I am of opinion that, on the whole, a fair amount to allow would be £20,000.

It has now been decided by the Full Court that in assessing compensation interest may be allowed as from the date of acquisition. I allow interest on £20,000 at 4 per cent from 22nd December 1944 to this date, i.e. £800. I therefore assess the compensation payable by the Commonwealth at £20,800 and order that that amount be paid to the claimant. The claimant has succeeded in obtaining an increased amount of compensation and should have the costs of the appeal.

This order is made upon the assumption that no payment has been made on account. If a payment on account has been made the matter can be mentioned before the order is drawn up.

22nd January 1946. It is now stated and agreed that £14000 was paid on account on 14th February 1945. The amount of compensation should therefore be assessed as follows:-

Difference between £14,000 and £20,000 ... £6000: 0: 0

Interest at 4% per annum on £20,000  
from 22nd December 1944 to 14th February  
1945 ... 118: 7: 2

Interest at 4% per annum on £6000 from  
15th February 1945 to 21st December 1945 203:16: 9

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Total ... £6322: 3:11

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