IN THE HIGH COURT OF AUSTRALIA.

ZERBE

v.

THE AUSTRALIAN APPLE AND PEAR MARKETING BOARD AND THE COMMONWEALTH OF AUSTRALIA.

ORIGINAL

REASONS FOR JUDGMENT.

Judgment delivered at MELBOURNE.

on THURSDAY 14/3/46

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THE AUSTRALIAN APPLE & PEAR MARKETING BOARD
& THE COMMONWEALTH OF AUSTRALIA.

JUDGMENT.

McTIERNAN J.

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THE AUSTRALIAN APPLE & PEAR MARKETING BOARD
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JUDGMENT. McTIERNAN J.

The plaintiff is the survivor of two partners who carried on a business of growing and selling apples and pears. They had orchards at Doncaster and Croydon, which are in the metropolitan district of Victoria. They carried on this business under the firm name of Lawford and Zerbe.

The action was begun by both partners, and it is founded upon reg. 12 of the National Security (Apple and Pear Acquisition) Regulations. The action was for compensation for apples and pears which the Commonwealth acquired from the partnership in 1940, 1941 and 1942. The acquisition was made under reg. 12 by means of three separate orders dated 27th February 1940, 24th December 1940 and 19th December 1941. Tonking's case/66 C.L.R., 77, decided that reg. 12 gives a claim for compensation to any grower whose apples and pears are acquired from him by an order made under this regulation, and that the claim may be enforced by an action in any court.

Lawford died in May 1944 and Zerbe then became entitled by law to the assets of the partnership. The proceedings were amended by consent by leaving out the name of Lawford as a plaintiff. Zerbe, the sole plaintiff, sues on his own behalf and of those beneficially entitled to Lawford's interest in the assets of the partnership.

The claim made in the action is in terms limited to the number of bushel cases of apples and pears delivered by Lawford and Zerbe to the Board and afterwards packed out of store to the market. The particulars of the varieties and grades of these apples and pears and the number of cases of each variety and grade are in the first and second columns of pp. 1 - 4 of Ex. "O". The exhibit contains the details of the plaintiff's claim. The

valuation /

valuation put forward in this exhibit of the apples and pears of the 1940 harvest detailed in those columns is less than the advances appertaining to that harvest paid by the Board to Lawford and Zerbe. The claim in respect of those apples and pears is left out of the amended statement of claim.

The plaintiff now claims compensation equal to fair market value or compensation upon just terms, less advances for the two subsequent acquisitions, taken severally. In each of those cases the valuation put forward in Ex. "O" exceeds the advances. Defences of payment and set off based upon the advances paid in respect of each of the three years are raised by the amended defence. These defences put in issue the amount of compensation payable in respect of the three acquisitions. There is no dispute about the quantities or varieties of apples and pears acquired from Lawford and Zerbe. The particulars of each acquisition are in Ex. 10. Further, the parties agree that the particulars in the first and second columsn of pp. 1 - 4 of Ex. "O" are accurate. These are the particulars of the apples and pears packed out by the Board from Lawford and Zerbe's deliveries. The claim in respect of two cases of five crown apples mentioned at p. 1 of Ex. "O" is not pressed.

The plaintiff adduced evidence for the purpose of proving the prices at which he claims that Lawford and Zerbe would have sold the apples and pears in respect of which compensation is claimed on the wholesale market if there had been no acquisition. The plaintiff claims that these supposed prices, reduced to a net amount, would establish the value, as at acquisition, of the apples and pears in question, to Lawford and Zerbe. Acquisition was upon harvesting.

An objection was made on behalf of the defendants to this evidence. The argument in support of the objection was, as I understand it, that under the conditions to which the objects of the Regulations were expressly directed, it would not be possible to find the market value of any apples and pears at the

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time of acquisition for the purpose of the Regulations: according to this argument, the measure of compensation is a due proportion of the net proceeds of the apples and pears sold by the Board, regard being had in calculating the proportion to the varieties and grades, as well as the proportion of the claimant's apples or pears, as the case may be, to the total quantity acquired.

The alternative argument, as I understand it, was that if market value, as at acquisition, is the measure of compensation, the adoption of any criterion of value other than a due proportion calculated in the above-mentioned manner would be contrary to the principle of the Regulations.

These arguments are inconsistent with the doctrine in Tonking's Case (supra), according to which the measure of compensation to be applied in an action under Reg. 12 is the value at acquisition of the acquired apples or pears to the claimant for compensation.

In my opinion the compensation payable to a claimant may be determined in an action under reg. 12 upon any admissible evidence relevant to the issue of value as at acquisition. A proportion of the net proceeds of apples or pears sold by the Board, if fairly calculated, may be evidence of the value of the claimant's apples or pears as at acquisition: but it is not the only evidence which could be relevant to that issue. In my opinion the objection to the evidence should not be upheld upon either of the above arguments.

The apples for which compensation is claimed are divided into seven varieties - Delicious, Democrat, Granny Smith, Stewart, Jonathan, Rome Beauty and Statesman: the pears were made up of four varieties - Beurre Bosc, Packham, Josephine and Winter Nelis. There are four grades of each variety - domestic, good, fancy and extra fancy. There are no apples or pears of the domestic grade in the claims made by Ex. "O" in respect of 1941 and 1942. The several varieties and grades have different values. There are many varieties of apples and pears in addition to those that have been mentioned.

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The seven varieties of apples and the four varieties of pears acquired from Lawford and Zerbe, except Beurre Bosc pears, were all suitable for keeping in cold storage for sale late in the year. It is established that Lawford and Zerbe could, at the time of acquisition of each of the three harvests, have reasonably expected that the management of Lawford Fruit Exchange Pty. Ltd. would have made sufficient space available to them in the Company's cool stores for all the apples and pears which the firm decided to store, and that the firm could have controlled the clearance of these stocks from the Company's stores.

The keeping quality of the fruit and Lawford and Zerbe's ability to take advantage of it were important elements in the value of the apples and pears acquired from them at the time of harvesting. Another element to which it might be supposed importance attached would appear to have been the proximity of the Melbourne market: but Ex. "O", which contains the plaintiff's valuation, does not turn this element to much advantage. The explanation lies in the fact that, as will afterwards appear, in Melbourne the plaintiff's fruit was not sold under a brand relied upon as giving it a reputation elsewhere.

The plaintiff asks the court to determine compensation on the assumption that if there had been no acquisition the firm would have realised the potential value which the apples and pears had at the time of harvesting as apples and pears that could be kept for sale in the late months of the year. According to Ex. "O", compensation is claimed upon the assumption that the apples, which it describes, would have been sold from August down to the end of the year, and the pears, mainly from July to the end of the year. The evidence proves that by August the apple harvest has been consumed or has perished, except the stocks in cold storage and shed stored apples. There would be but little of the latter left after the end of August. The greatest quantities of shed stored apples were in Tasmania. Pears are not shed stored. By July the quantities of pears for sale are limited to the clearances from cool storage. The demand for pears is strongest in the warm weather.

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The intake into the cool stores does not go on strongly, if at all, after 30th June. Before that date the apples and pears for sale on the market consist of all the non-keeping varieties and the keeping varieties which are not held for sale after that date. After that date, apart from shed stored apples, the apples and pears for sale on the market are limited to the cool store stocks; in normal times the prices in each month would be influenced by the rate of clearance of these stocks.

In the present case it is not known and it cannot be discovered at what price, time or place the Board sold any portion of the apples and pears which Lawford and Zerbe delivered to the Board. In this respect the facts of the case are different from the facts in Tonking's case; the evidence in that case traced the claimant's apples from the orchard to the point of sale by the Board's agent.

In 1940, 1941 and 1942 the Board sold apples and pears grown in Victoria, which were of the same varieties as the apples and pears acquired from Lawford and Zerbe, in Melbourne and in markets in New South Wales and in Queensland. Ex. "E" contains the average monthly prices in Melbourne, and Ex. "P" the average monthly prices in New South Wales and Queensland. The average monthly prices of any of these varieties varied substantially. If the Board's prices are adopted as the basis of valuation, these variations raise a question as to the mode of ascertaining the price to be applied. Is it to be an average price, and, if so, is the average to cover both month and place of sale?

Ex. "O" embodies a marketing plan which the late Mr. Lawford is said to have settled shortly before his death in 1944. It is said that in this programme Mr. Lawford indicated the months and places in which he would have sold the apples and pears the subject of the present claim if there had been no acquisition in 1940, 1941 and 1942. It is said also that in settling this programme Mr. Lawford took into consideration the war-time conditions, acquisition and control excepted, which affected the marketing of apples and pears in those years. Mr. Lawford was experienced in the marketing of apples

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and pears. However, it is not said that he expressed an opinion as to the prices at which the firm's fruit would have been sold in the months and places which he indicated. The details of this marketing plan are set out in the third, fourth and fifth columns of pp. 1 - 4 of Exhibit "O". The prices per case set out in these pages are average monthly prices. They are the average of the actual prices, exact or approximate, at which the Board sold apples and pears of the respective varieties and grades set out in the Exhibit, at the times and places which Mr. Lawford is said to have indicated in the abovementioned marketing plan. The list of prices was compiled from the Board's account sales of Victorian apples and pears. There is no dispute about the accuracy of the figures in Ex. "O" representing such average prices. I think that it would explain the scheme of the Exhibit if I were to say that the line on p. 1 beginning with the words "Fancy and Good" means that the plaintiff alleges, first, that Mr. Lawford Senr. expressed the opinion that if there had been no acquisition his firm would have sold 17 cases of "Fancy and Good" Delicious apples in September 1940 at Sydney; and secondly, that the plaintiff, guided by the Board's price, alleges that if the supposed sale had taken place, the price would have been at least 4/10d. per case; and thirdly, that the minimum wholesale value of these 17 cases was £4:2:2. The Exhibit also sets out the expenses which Lawford and Zerbe would have incurred if the supposed sales in the months and places that Mr. Lawford is said to have indicated had actually taken place. There is no dispute about the figures which are put in the exhibit to represent these supposed expenses.

The plaintiff claims also that, if there had been no acquisition, and Lawford and Zerbe had sold in the months and places which Mr. Lawford is said to have indicated, the prices would have been better by 25% than the Board's prices mentioned in the Exhibit.

The plaintiff claims that the value of the apples and pears the subject of the action to Lawford and Zerbe at the time of harvesting was the net amount produced by deducting the supposed expenses from the alleged total value calculated upon the basis of a price, which

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is the Board's price increased by 25%. The Exhibit shows the value of the total number of cases of the respective varieties calculated upon that basis, the advances paid in respect of each year's acquisition, and the difference in each year between the advances and the alleged total net value of the apples and pears in respect of which the plaintiff claims that compensation became payable.

Three grounds are put forward for adding 25% to the Board's prices which the plaintiff adopts for the purpose of Ex."O".

First, the plaintiff says, as is the fact, that the prices in Ex."O" are average prices. Hence they are compounded of the prices at which the Board sold Victorian apples and pears of the respective varieties grown by Lawford and Zerbe, but of all conditions, whether good, bad or indifferent. There is some general evidence that the apples and pears grown by Lawford and Zerbe had a good reputation for quality and adherence to the standards for determining grade. That no doubt was the reputation of the apples and pears of many other Victorian growers. In order to add anything to the Board's prices because they are average prices, it would be necessary to find that the fruit which Ex."O" assumes that Lawford and Zerbe would have sold, was superior in quality to other Victorian fruit of the same varieties and grades. If that were the position, the amount at which to assess the superiority could not be other than a matter of conjecture.

Secondly, the plaintiff says that if there had been no acquisition Lawford and Zerbe's apples and pears would have been sold under a particular brand, LFX, which was used in connection with fruit sold out of the stores of the Lawford Fruit Exchange Pty. Ltd. This was a packing house through which the apples and pears grown by Lawford and Zerbe and other growers went to the market before the period of Board control. For reasons depending upon difficulties arising from the war-time economy, which existed during control, the Board did not use the individual brands of the Victorian packing houses, but used a new brand, VAC, on all cases of apples and pears packed under the Board's control in Victoria.

It is claimed by the plaintiff upon the evidence of a number of fruit agents that the presentation of fruit to the market under a brand with a good reputation enhances prices substantially. Prior to control, LFX was not used upon the Melbourne market or in connection with direct sales interstate. It was put on cases consigned for sale in other States and on cases shipped overseas. The evidence satisfies me that under the Board the inspection, grading and packing of apples and pears was done by experienced persons and in a proper manner. There can be no doubt that fruit presented to the market under the VAC brand had all the selling points of fruit presented under the LFX brand. This claim to increase the Board's prices because they replaced LFX by VAC raises this question - What difference would there have been in prices which apples and pears grown by Lawford and Zerbe would have brought in 1940, 1941 and 1942, if, on the one hand, it is assumed that they were presented to the market under LFX and, on the other hand, it is assumed that they were presented under VAC? Upon the evidence, there would be a difference in favour of the former brand, but only while the individual buyer's confidence in the latter brand was being established, and I find upon the evidence that relatively few transactions would be needed to establish it. The percentage which it would be proper to add to the Board's prices to represent that difference could not be fixed otherwise than by a mere guess. At first, it was the plaintiff's case that it would be necessary to add a premium of 25% solely on account of the non-user of the LFX brand.

A submission is also made that, because of the loss of the association of the name of Lawford and Zerbe with the produce of their orchards in the markets where their fruit had not been marketed under the LFX brand, the prices obtained by the Board should be written up in order to be made a fair basis of compensation.

Thirdly, the plaintiff says that for the period down to about 30th June in each of the three years the Board released to the markets less, and after that date more, apples and pears than

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would have come on to the markets if the trade had enjoyed freedom from control; the result, the plaintiff says, was that the Board artificially flattened the general price level in the latter half of each year, whereas during that part of the season it would, under free enterprise, have had an upward trend. I think that this ground is not consistent with the first or second grounds advanced for adding to the Board's prices in Ex."O" to reach the value of the respective lots of apples and pears to which the Exhibit applies those prices. In the first and second grounds those prices are regarded as evidence of a basic value to which it is contended that a margin should be added, in the case of the first ground, for superior quality, and, in the case of the second ground, for the marketing advantages possessed by the LFX brand: but in the third ground the prices appear to be regarded as unsatisfactory and inadequate because they are the result of an artificial interference made by the Board, to the disadvantage of growers, with the run of the season: in such circumstances the Board's prices would be false evidence of value and I think that it would be impossible to argue from them to the true value ~~under~~ in a supposed state of affairs in which there was free marketing.

In 1940, 1941 and 1942 there were war-time restrictions on the shipment of apples and pears from Australia. The restrictions are explained by Ex. 57. The official statistics of apple and pear production and export during the six years before the war are set out in Ex. 9. They show that the average annual production of apples was about 10,000,000 bushel cases, and of pears 1½ million bushel cases, and the annual export approached to half of the apple crop and one-third of the pear crop. The normal demand of the Australian people in the pre-war years had been fully met by the unexported apples and pears.

The results which the war-time shipping restrictions had on supply and demand in Australia are shown by Ex. 6. This contains the estimates of each State's harvest made by the Board for the purpose of acquisition. In 1940 the numbers of bushel

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cases of apples and pears exported were 1,819,158 and 133,566 respectively. The surpluses of apples and pears which remained in Australia over the quantities which could be consumed or used were 2,362,562 bushel cases and 224,719 bushel cases respectively. In 1940 the acquisition did not operate until 1st March 1940. In 1941 the exports were 138,201 bushel cases of apples and 7,481 of pears. The surpluses which remained in Australia were 6,808,648 bushels of apples and 938,507 bushel cases of pears. In 1941 and 1942 the acquisition orders caught the whole harvests: in 1941 there were record harvests. In 1942 Japan had entered the war and the Eastern markets were cut off. There was no shipment of apples or pears from Australia in 1942. The surpluses of apples and pears which remained in Australia in that year over the quantities that could be consumed or used were 3,474,161 bushel cases of apples and 209,703 bushel cases of pears.

Ex. 6 shows the sales of fresh fruit on the Australian markets and the growth in the quantities which were processed: the Board developed the processing of apples and pears in order to increase consumption.

The disorganization of the Australian markets was inevitable when the war-time restrictions on the shipment of apples and pears overseas began. Under the Regulations the Board had the selling monopoly of the apples and pears which were acquired by the Commonwealth. It minimised the disorganization of the market caused by the retention in Australia of the surpluses which in normal times would have been exported, by limiting the quantities of apples and pears which might be sold or offered for sale in Australia to the quantities which the growers were asked to deliver. The supply of apples offered to the markets and the selling were planned and controlled by experienced executives employed by the Board. The Board kept large quantities of the apples and pears harvested off the markets by limiting the quantities which it called upon the growers to deliver, and it limited the quantities of these deliveries which would become available for marketing as fresh fruit, by diverting portion to processing;

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and, as to the balance, it made a portion available for sale as fresh fruit before June 30th and held the residue in cold storage for sale as fresh fruit after June 30th. For example, in 1941 the estimated quantity acquired in the Commonwealth ---------- amounted to 13,835,632 bushels. The Board obtained only 7,026,984 bushels from the growers. It diverted 1,418,725 bushels of the latter quantity to processing and sundry uses. The quantity which the Board put on the market for sale as fresh fruit was 5,608,259. Before 30th June it marketed 2,997,270 bushels and had 2,610,989 bushels available for marketing at 30th June. This included 2,431,399 bushels in cold storage, 109,590 bushels in transit and 70,000 bushels shed stored in South Australia. These particulars are in Ex. 47. There are similar particulars relating to the year 1942 in Ex. 48.

The total space measured in bushels which was available to the Board at 30th June 1942 for the cold storage of apples and pears in each State is shown by Ex. 44. The total cool store stocks of apples and pears in each State on that date are shown by Ex. 45. The total space available could have taken 3,491,888 bushels, but the total space occupied was 2,736,500.

Exhibit 6 shows that in 1940 the apples acquired in Victoria exceeded the apples delivered in that State by 698,062 bushels. There was also a large surplus of pears in Victoria. In 1941 the surplus of apples in Victoria was 847,596 bushels and of pears 425,623 bushels. In 1942 all apples and pears which were acquired in Victoria were delivered. Ex. 10 gives corresponding particulars concerning Lawford and Zerbe's apples and pears in each of the three years.

The state of affairs supposed by the plaintiff for the purpose of making a valuation is that there was no Government acquisition or control. In that state of affairs there would have been undoubtedly a very large unsaleable surplus: it would have been larger than the surplus for which no outlet could be found by the Board in the events which actually happened, for the Board adopted expedients for the use and disposal of the fruit which I do not think would have been resorted to under war-time conditions if the market had been left free. In fact it was

impossible for the Board to find an outlet during the relevant period for a large part of the harvest. In 1940, 1941 and 1942 if there had been free competition in the sale of apples and pears the great excess of the supply over the demand would have meant a fall in prices to a very low level indeed - the level would, in my opinion, have been low at all times of the year. It must be remembered that there would have not only been the question of finding a market, but prospective or possible buyers would have been confronted with the existing and oncoming excessive supplies of which they would have means of forming their own estimate. I think that the consequences of the disorganization of the market by the surplus of production which would be catastrophic at the time of harvesting would not be exhausted before the expiration of the selling season. It appears to me to stand to reason that the effects of such a large overplus of supply could not disappear during the period after the intake into cold storage ceased (and before the next began) and I do not think that upon the whole the evidence supports the plaintiff's contention that if there had been no acquisition and control, having stored their apples and pears, they would have been able to market them at a time when prices would not reflect the breakdown of the market. It is not without significance that one criticism of the Board's administration is that it stored more apples until a later period than the market could consume at the prices which would have otherwise have been obtainable. Under private enterprise such a tendency would have been still greater. But any attempt to reconstruct a hypothetical market upon the assumption that there was no Board raises very speculative issues. Having regard to the circumstances proved in this case, the prices obtained by the Board are not a criterion of prices to which a buyer and seller would have agreed at harvesting time in any of these three years. The evidence establishes that the prices in Exhibits "E", "P" and "O" were obtained because the Board kept off the markets large quantities of the year's harvest and limited the quantities which it released to the markets, and that the prices both before and after 30th June in each year were the result of such control. Having regard to these facts, if the

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hypothesis that there was free enterprise in 1940, 1941 and 1942 is adopted, I think that it would be erroneous to base the value of the apples and pears now in question upon the prices got by the Board in any of those years.

The plaintiff's contention that the Board sold less apples and pears in the first half of the year and more in the second half than would have been sold under free enterprise, means that, although in the first half of the year it controlled the glut and stabilised values, in the second half of the year its selling policy depressed values. In order to establish this contention the plaintiff relies upon the tables of figures showing cool storage stocks and the statistics of the Board, including the quantities of fruit which the Board brought from Western Australia and Tasmania, where there were bigger surpluses of fruit than in the other States. I am not prepared to hold that this contention is made out. The figures show that a substantial part of the cold storage space available to the Board was not occupied: clearly there were apples and pears which it could have got to occupy much of the unused space. Under free enterprise the growers would not have failed in the latter half of the year to meet the demand which the Board satisfied. I cannot conceive that they would have sold less apples or pears in the latter half of the year than the Board sold. The fruit to meet that demand would have been cold-storage fruit and, in the case of apples, also shed-stored. It is, of course, a matter of conjecture what would have been the amount of these stocks. I would presume that in the circumstances that if the job of handling their own apples and pears had been left to the individual growers, many would have stored to the limit of their opportunities. Those in a financial position would probably have held larger stocks in cold storage than in normal times. This probability is suggested by the figures relating to cool store stocks in 1937, a year of heavy production: however, the break in prices, which occurred at the end of that year, has been attributed to seasonal defects in the fruit rather than to the size of the cool store stocks in the late months of the year. The possibility is not to be excluded that more provision would have

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been made for the shed storing of apples. The evidence shows that shed stored apples go on the market in good condition and that sales of shed stored apples go on at least until the end of August: but this provision cannot be made very extensively, except in the cooler climates. There is no real basis for concluding that under private enterprise the Western Australian and Tasmanian growers would have succeeded in sending less apples and pears to Sydney and Queensland than the Board did. The Western Australian growers had apples of good quality, especially Granny Smith apples, and were well organized. There is evidence that the Board imported large quantities of cases from Western Australia to meet a shortage in the Eastern States: in the circumstances, it is difficult to suppose that, if the trade had not been under the control of the Board, the cases would have arrived empty, as they did.

Ex. "O" should, in my opinion, be rejected as a standard of compensation upon a number of grounds. It is erroneous to apply the Board's prices as if they represented the value which the apples and pears would have had if Lawford and Zerbe and all other growers had been free to supply apples and pears to the markets in such quantities, times and places as they saw fit. Ex. "O" embodies the opinion of Mr. Lawford Senior that the firm would have sold the respective quantities of apples and pears mentioned in the Exhibit at specific times and places. The proof of the opinion depends upon hearsay evidence given by Mr. Trumble and the late Mr. Lawford's son. The evidence is of undoubted veracity and, as I understand the matter, this hearsay evidence is not objected to as a means of proving that the marketing programme was drawn up ---------- by Mr. Lawford Senior. But it is contended that his opinion, expressed so long after the events and for which no reasons are given, is very weak evidence to prove that Lawford and Zerbe would under free enterprise have sold the stated quantities of apples and pears at the times and places mentioned in the exhibit. In my opinion the evidence fails to prove ~~that~~ the allegation that they would have done so. Furthermore, in 1940, 1941 and 1942 the marketing of apples and pears was not only disorganized by the drop in exports, but it would also have been /

been affected by difficulties incidental to the war-time economy in connection with man power for harvesting and packing, materials and transportation. If Lawford and Zerbe could have sent apples and pears to North Queensland the possibility cannot be overlooked that Tasmanian and Western Australian growers would have sent quantities of their best fruit to the biggest Australian markets. I think the inconsiderable portion of the apples and pears which, according to the programme, Mr. Lawford said that they would have sold in Melbourne, their most accessible market, stamps the programme as artificial and unreliable. It would have been more natural for Lawford and Zerbe to have used the Melbourne market/ much more than Ex. "O" supposes that they would have used it. Another objection is that the marketing programme makes the very difficult assumption that in some of the markets Lawford and Zerbe would have sold greater quantities of the variety of fruit than the Board sold: the Exhibit claims that even at those sales better prices than the Board's prices would have been obtained.

A further point is that the months mentioned in the Exhibit are not necessarily the very months in which the apples and pears were packed out of store by the Board's agent: but the Exhibit makes no allowances for losses in the event of any hypothetical months being later than the month of the real delivery out of store. Lastly, if Lawford and Zerbe thought that the markets in the programme were the most advantageous markets in which to sell their apples and pears, it is reasonable to assume that other growers would have had the same idea: and then Lawford and Zerbe's fruit would have encountered gluts of the kind which the hypothetical marketing plan was concerned to avoid. Exhibit 41 shows that the total quantities of apples and pears grown by Lawford and Zerbe were a very small percentage of the total crops of the varieties of apples and pears grown in Victoria, and, in addition, that there were other varieties not grown by Lawford and Zerbe which were suitable for keeping for sale in the late months of the year.

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However, it is not the fact that Lawford Senior picked markets which upon the application of the Board's prices would give the best values; the valuation produced by adopting a principle of valuation like that in Exhibit "O" would rise and fall with changes in the combination of the hypothetical months and markets.

If the Board's prices are true starting points, it would be necessary to select specific prices, because the respective monthly prices for the varieties in question vary substantially. It would be arbitrary to value upon the presumption that the Board sold the apples and pears of Lawford and Zerbe which are to be valued in this case in particular months and places, or that Lawford and Zerbe themselves would have sold them in any particular months and places if there had been no acquisition. But if any such presumption were made it would be necessary to select a place as well as a month in order to arrive at the net value at the orchard, because if any of the Board's prices is a proper basis of valuation, the net value at the orchard would correspond with the price less freight and other charges.

The prices at which apples and pears were sold before acquisition in any year are not in my opinion helpful in the present enquiry because the overseas markets were then open and the conditions were not comparable with the conditions under which the growers would have attempted to market their apples and pears in 1940, 1941 and 1942 if there had been no acquisition. It does not seem to me to be possible to deduce from the Board's prices what, in the state of affairs to be assumed, namely no governmental acquisition or control, would have been the value of any of the apples and pears of the grades and varieties now in question, at harvesting, stated as a sum of money per case or by reference to any particular quantity. It might be reached by a guess but not, I think, by any rational inference. It is necessary, I think, to reason from other premises than the Board's prices in individual months and places.

In each year the Board sold to the maximum capacity of the market, and there was a large surplus which was unsaleable and of no value. The value of the harvest of apples, considered as a whole, was represented by the aggregate return which the Board got for the apples which it succeeded in selling: the same thing is

true of the pears: the apples and pears which the Board sold were efficiently inspected, graded and packed, and were marketed by experienced agencies. I think that a proportion, fairly calculated, of the proceeds of apples and pears respectively is the best evidence available in this case of their value at harvesting. In order to calculate the proportion which would be a just measure of compensation, it is necessary to take into account the varieties and grades, because the values of individual varieties and grades are not uniform: see Tonking's Case, 66 C.L.R., 77, at p. 107, per Rich J. A computation of the amount of compensation which the Commonwealth became liable to pay was made in the defendant's case. It was made on the basis that a due proportion of the proceeds of the apples and pears sold by the Board was the criterion of their market value at the harvesting, with which acquisition was coincident. According to this computation the advances in each year exceeded the compensation payable: and if the computation is correct the defences of payment and set off would be made out. The computation is contained in Exhibits 12 and 14: it is also necessary to refer to Exhibits 11 and 40. The method is complicated, but can be shortly described. The net return from all the fruit sold is worked out. This is taken to be the net value of all the fruit acquired: the fruit acquired everywhere in Australia is treated as a single mass of fruit of which the Board sold as much as was saleable under the conditions which prevailed, and the unsaleable part of the mass of fruit is treated as having no value. Upon this basis the average net value per bushel of the acquired fruit is calculated. The next step taken is to calculate the average amount per bushel advanced to all growers and the average amount per bushel advanced to Lawford and Zerbe. It is found that the latter average amount exceeds the former one. The difference is taken to represent the margin of quality and value in favour of the fruit of Lawford and Zerbe. The amount of the difference is added to the amount adopted to represent the net value of the acquired fruit. The result is multiplied by the number of bushels acquired from Lawford and Zerbe. This gives the proportion of the proceeds of the fruit sold, which the defendants say is the best

evidence /

evidence of the market value which the fruit acquired from Lawford and Zerbe would have had at harvesting if there had been no acquisition, and they and all other growers had to contend in the best way they could individually do so, with the actual economic conditions existing during the three years of acquisition.

Having regard to the real nature of the payments described as advances, I think that it is unsound to attempt to extract from those payments any figure to represent a difference in quality between the fruit of Lawford and Zerbe and that of other growers. I find that the advances were loans to the growers to keep them on the orchards. In 1940 there was one rate per bushel for apples and one rate per bushel for pears: no grower was advanced more than another on the ground of quality or anything else. In 1941 and 1942 in making advances the Board took into account varieties and sizes, and besides, in 1942, the State where the fruit was grown. Exhibit 40 contains the classification of apples and pears which the Board applied in making the advances in 1941 and 1942. I find that in each of these years the advances were loans to the growers and that the amount of the loans was decided upon economic and political considerations. For these reasons I hold that Exhibit 12 is erroneous in principle, and that it does not establish that the advances paid in any of the three years exceeded the compensation payable to Lawford and Zerbe. In connection with Exhibits 12 and 14 I do not enter upon any of the other grounds upon which they were attacked.

Although I reject the defendant's computation of compensation, I think that a due proportion of the proceeds of sale, fairly calculated, is the best evidence from which to deduce what the market value was at harvesting. Looking at the matter as at the time of harvesting, I think that in the circumstances which then confronted the growers, the value of any apples and pears was quite indeterminate, if not problematical. The facts which have been proved in this case appear to me to show that the Board's prices in particular months, and markets, would not be sound guides in finding the prices which Lawford and Zerbe would have got if there had been no acquisition. The amount of harvested fruit delivered under the Board's instructions was limited to the amount which could be consumed as fresh fruit and used /

used in the processing industry and sundry ways: the Board's prices were the direct result of planning and control, and there is no evidence that any such measures would have been taken if there had been no acquisition, to stabilize the markets. But if it were right to attempt to found a valuation based upon the Board's prices, it would be necessary, as above stated, to make assumptions which could not be other than conjectural that Lawford and Zerbe would have sold specific quantities of fruit in some months and markets which would need to be the same as those in which the Board sold at those prices.

The question then is - How should the proportion of the proceeds of the sales made by the Board be calculated in order that it should fairly reflect the market value at harvesting of the apples and pears the subject of the present claim? The apples and pears to be valued being divided into grades and varieties, they cannot be valued in globo and it is necessary to make separate calculations of the proceeds derived by the Board from the sale or disposal of apples and pears respectively of each grade and variety in each of the three years under consideration.

The varieties of apples and pears acquired from Lawford and Zerbe were grown in other States besides Victoria. But I think the value of such of the apples and pears of these varieties as were the produce of Victoria must be ascertained separately. The trade in apples and pears of each State is shown by the evidence to be a unit: while fruit from other States may compete with the domestically grown fruit of a given State, the value of any variety or grade of any variety of apples or pears grown in a State is best ascertained by averaging the prices obtainable for that variety or grade of the State, whether the sales are domestic or in other States. The growers in Western Australia and Tasmania were more dependent upon export than the growers in Victoria and the other States. Victoria was also a big exporter, but the growers in Victoria were in a more advantageous position than the Western Australian and Tasmanian growers to sell fruit in the biggest Australian markets. I would think that if the hypothesis is adopted that there had been no acquisition in 1940, 1941 and 1942 then, generally speaking, any lot

of Western Australian or Tasmanian apples or pears would have had less chance of being sold anywhere than a comparable lot of Victorian apples or pears. As regards the other three States, the conditions varied from those in Victoria in that none of them had such a large exportable surplus as Victoria, Victoria had larger cool store facilities, and another obvious matter was that Melbourne was the focal point for the Victorian trade in apples and pears. The value of apples and pears and the trade in each State are affected considerably by climatic conditions and accessibility to market. In other words, the apple and pear trade of one State appears to have been a separate trade from that of any other State. The Board organized its own business on a State basis. For these reasons I think that the market value as at harvesting of any apples and pears grown in Victoria would be more likely to be fairly represented by the result of the calculation under discussion, if apples and pears grown in Victoria only are taken into account, than by a result affected by the inclusion of apples and pears grown in Victoria and elsewhere in Australia. It is necessary, therefore to work out the proceeds of all fruit of each of the varieties and grades, now in question, grown in Victoria, wherever sold or disposed of. The proceeds of the sale or disposal of the fruit of each variety and grade grown in Victoria, derived by the Board, represents the value of all the fruit of that variety and grade which was acquired in Victoria. The Board sold as much of the acquired fruit as could be consumed or used in Australia or exported from it, and as the selling was done by persons of experience and skill in marketing, it is reasonable to presume - nothing to the contrary appears - that as much of each variety was sold as was needed to supply every market. It would follow that the amount of the proceeds of the sale of each grade of each variety grown in Victoria, divided by the number of bushels of and variety that grade/acquired in Victoria, gives the value per bushel of the fruit of such grade and variety acquired from each Victorian grower. The compensation payable to Lawford and Zerbe is computed by multiplying the figure representing the value per bushel by the number of bushels acquired from the firm, of the grade and variety to which the figure applies. It is not possible to determine whether

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the advances paid have satisfied the Commonwealth's liability or not until this calculation is made. There will be a declaration and order in the following terms:-

Declare that compensation is payable by the Commonwealth under Reg. 12 of the National Security (Apple and Pear Acquisition) Regulations (S.R. 1939 No. 148 as amended to S.R. 1942 No. 379) in respect of the acquisition made by the Commonwealth in pursuance of the said Regulations from Edwin Inglis Lawford and Edward Herman Zerbe described in the pleadings herein of the following quantities of apples and pears stated in Exhibit 10, that is to say 4477 bushel cases of apples and 3862 bushel cases of pears acquired by the Commonwealth under the Order dated 27th February 1940 and 4703 bushel cases of apples and 10,656 bushel cases of pears acquired by the Commonwealth under the Order dated 24th December 1940 and 3760 bushel cases of apples and 3624 bushel cases of pears acquired under the Order dated 19th December 1941; and that in the circumstances of this case such compensation ought to be assessed in respect of each of the said quantities of apples and pears respectively by making a separate computation in respect of each of the several grades, that is to say, extra fancy, fancy, good and domestic of each of the varieties mentioned in the said Exhibit X (of apples and pears the subject of such acquisition; and that the separate computations aforesaid should in each case be made by -

(i) taking the total quantity, expressed in bushel cases, of the apples or pears covered by the relevant Order grown in Victoria of the particular grade and variety and acquired by the Commonwealth;

(ii) ascertaining the total net proceeds obtained by the Board from the sale and disposal of so many of such apples or pears as were delivered by growers in Victoria to the Board and sold or disposed of by the Board;

(iii) dividing the total of such net proceeds by the total quantity expressed in bushel cases as aforesaid; and

(iv) treating the quotient as the value per bushel case of apples or pears of that grade and variety covered by such Order and applying it accordingly to the number of bushel cases of such apples or pears acquired thereunder from the said Edwin Inglis Lawford and Edward Herman Zerbe.

Further /

Further declare that the compensation for the apples and pears acquired from the said Edwin Inglis Lawford and Edward Herman Zerbe under the Orders aforesaid is the aggregate of the amounts ascertained in pursuance of the foregoing declaration.

Order that unless the parties agree upon the amount or amounts of compensation payable as aforesaid there be an inquiry to ascertain the same.

Further order that in so far as the costs of the defendants of and incidental to this suit have been increased by reason of the plaintiffs making the claim as expressed in Exhibit "C" herein, such increase shall be recovered from the plaintiff by the defendants but stay execution for such costs in the meantime.

Adjourn further consideration and save as aforesaid reserve all questions of costs.