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IN THE HIGH COURT OF AUSTRALIA

JOHN BRIDGE LIMITED
(IN LIQUIDATION)

V.

THE COMMONWEALTH OF AUSTRALIA

REASONS FOR JUDGMENT

Judgment delivered at Sydney

on Friday, 9th November, 1951.

H. E. Daw, Gov. Print., Melb.
C.12280/45

JOHN BRIDGE LIMITED (IN LIQUIDATION)

v.

THE COMMONWEALTH OF AUSTRALIA.

JUDGMENT. WEBB J.

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THE COMMONWEALTH OF AUSTRALIA.

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This is an action for compensation for land acquired by the defendant Commonwealth under the Lands Acquisition Act 1906-1936 by a notification dated the 15th August 1945 and published in the Commonwealth Gazette of the 23rd. idem. The plaintiff is a real estate company in liquidation.

In a claim in the prescribed form dated 7th September 1945 and addressed to the Minister the items were:-

1.	Unimproved value of land	£16,276 2 4
2.	Added value given by improvements	37,479 5 2
3.	Interest for 16 years from 7th September 1930	25,612 12 2
	Total	£79,367 19 8

This claim for £79,367 19 8 is also made in the statement of claim in the action. The defence alleges that the amount claimed exceeds what the plaintiff is entitled to.

On 10th December 1945 the Minister offered £9,497 compensation. This offer was refused, and so the claim became a disputed claim for compensation within the meaning of the Act. On the 26th August 1946 the Minister offered £11,500 less £726.4.2 arrears of rates. This offer also was refused.

Counsel for the plaintiff did not press item 3 of the claim i.e. £25,612 12 2 for interest at 5% for 16 years. He also stated that the claim in item 1 for £16,276 2 4 took into account certain outgoings which he felt he could not press, including interest on purchase money, rates, taxes, stamp duty on transfer, and costs of transfer. I also understood him to say that the amount in item 1 was 3/7ths of the amount in item 2, and that item 2 stated the amount of the costs incurred by the plaintiff in respect of the purchase of land, of which the area resumed from the plaintiff was about 3/7ths. However, in the transcript of the shorthand notes he is reported as referring to £34,000; but I think this is a mistake and that he meant to refer to £37,000 i.e. item 2.

But whatever the claim and counsel's explanation of it, there remains to be seen how far the amounts in items 1 and 2 are supported by evidence.

The land in respect of which the plaintiff claims is part of what was known as the Broadoaks Estate and comprises 47 acres 2 roods 19 perches, of which the plaintiff was the equitable owner of 8.74 acres and the legal owner of the remainder. Nothing turns on the nature of the title. The 47 acres 2 roods 19 perches are part of a total resumption of 48 acres 2 roods 38½ perches effected by the gazettal of the notification on 23rd. August 1945. The owner of the balance of the resumed area i.e. 1 acre 19½ perches was the Maritime Services Board. The resumed area is situate in the municipality of Rydalmere and Ermington on the north bank of the Parramatta River. However, the southern boundary of the resumed area was not the river, but was a strip of land of a maximum width of 100 feet, adjoining a retaining or sea wall. The area of 1 acre 19½ perches was part of this strip. The whole strip, called the Reservation, belonged to the Maritime Services Board at the date of the resumption. A wharf which was there at the time of the resumption is still there. Before the resumption the land was occupied by the Forces, at first American and later Australian, apparently under the National Security Regulations, and 7 igloo type huts, each 100' x 400', had been built by the Forces, and are still there.

The land acquired from the plaintiff, other than the 8.74 acres, included part of an area of 112 acres purchased by the plaintiff in November 1927. At that time part of the southern boundary of the area was the river, and the land near the river included a mangrove swamp. In February 1929 the plaintiff, the Sydney Harbour Trust Commissioners, and the municipality of Rydalmere and Ermington made an agreement whereby, among other things, the Commissioners agreed to build a retaining wall to a height of 9' above low water mark and to fill in behind the wall to a depth of 7' and to a width of 300' i.e. to the higher land, then called the bank; and the plaintiff agreed to pay £6,500 (later £9,250) for the reclamation and for the transfer to the plaintiff of a

portion of the land delineated on a plan annexed to the agreement - actually the 8.74 acres - less the value of two pieces of land belonging to the plaintiff, one at each end of the southern boundary of the resumed land, and later included in the Reservation. The area filled in, apparently with sand dredged from the river, comprises about 38 acres, including the 8.74 acres. The balance of the resumed area, about 10 acres, is on a slight rise. As a result of the removal of the mangroves, the building of the retaining wall, and the filling in, the resumed area, which I inspected with counsel for the parties, has a neat appearance.

S. 28(1)(a) of the Lands Acquisition Act 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 preceeding the date of acquisition, in this case on 1st. January 1945. This Court decided in Spencer v. The Commonwealth (5 C.L.R. 418) 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 Limited v. The Minister (1914 A.C. 1083) 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 August 1945 Reg. 6 of the National Security (Economic Organisation) 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 & Ors. v. The Commonwealth (67 C.L.R. 314). 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 (75 C.L.R. 495 per Latham C.J. at 541). A price really agreed upon, even a price influenced by economic control, would be in conformity with the just terms requirements in Section 51 (xxxi). But when the Commonwealth decides to exercise its compulsory powers during such economic control then, although Spencer's case supra and the Pastoral Finance case supra continue to apply, and a hypothetical vendor and purchaser continue to be postulated, still different considerations are assumed to influence them. In The Moreton Club v. The Commonwealth (77 C.L.R. 253) 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 supra per Griffiths C.J. at 432

and The Queen v. Brown L.R. 2 Q.B. 630 per Cockburn C.J. at 631). Now this land was resumed on the 23rd. August 1945 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 1945 (See Spencer's case supra per Isaacs J. at 441); but any changes in the land itself and in the possibility of using it since the preceeding 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 72 C.L.R. 269 per Latham C.J. at 281); 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 critical date as to the time when the war would end and 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 or 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 supra at p. 571-2, the hypothesis upon which the enquiry 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

best
the/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 ~~xxxxx~~ it permits him to postpone the sale until controls are lifted, and he is to be compensated accordingly.

Evidence for the plaintiff was given by its former secretary, Mr. Moule, and its former sales Manager, Mr. Ralph. A third witness for the plaintiff appears to have been called under a misapprehension. Moule said that the entire Broadoaks Estate of 112 acres was purchased by the plaintiff in November 1927 for £20,275,5.0, and that subsequently £9,250 was paid by the plaintiff to the Maritime Services Board "for improvements". If the area resumed was of the same quality as the rest of the 112 acres the total purchase price suggests that about £8,690 was paid for the resumed part. Ralph was the sales manager of the plaintiff for six and a half years, and was associated with real estate for over 30 years. He had seen the subject land before reclamation. He though "it was outside the scope of any valuation...you would not get it valued by standing on it and looking at it. It is what is underneath and the amount of money involved in putting it there". He said that it was the only area he ~~xxxx~~ knew on the north side of the Parramatta River where a boat could come in under its own steam, and that it had a deep water frontage of 15 to 18 feet. Having in view a siding on the resumed land he said that the railway was not more than half to three quarters of a mile away. and that the main road less than a quarter of a mile; that the land was level and ideal for industry; and that it was suitable for oil firms, motor car firms and firms of that description. After some questioning he said eventually he valued the resumed area at £2,000 per acre as at the 1st. January 1945. Under cross-examination

he said he relied on sales in 1949 and 1950, but he was told by counsel for the defendant not to give particulars. However, he had not given particulars of these, or of any, sales in his examination in chief.

For the defendant Commonwealth evidence was given by Mr. Davis, the solicitor for the Cumberland County Council, Mr. Stuckey M.E., B.Sc., Mr. Jackson, the supervising valuer of the Federal Land Tax Department, and Mr. Dimond, a member of a firm of real estate agents and valuers. Mr. Davis produced two interim plans showing the proposed classification of industrial and living areas in Rydalmere and Ermington. The Cumberland County Council had these plans prepared. Both the Council and the plans came into existence between the 1st. January 1945 and the date of the resumption; but in any event the classifications, so far as they affected the resumed area, had not been determined; and even if the resumed area had been classified as a living area, it would still have been possible to get from the council a permit to use the area for some industrial purposes.

Mr. Stuckey stated that the flat reclaimed land resumed was suitable only for buildings of the lightest type - of fibro and weatherboard - and that the walls of even cottages of brick were likely to crack. As to factories, heavy machinery could cause sinkages which would throw the machinery out of operation. The igloo type buildings on the land had light timber arches and roofs of light galvanised iron. In one of them he noticed a sinkage of the floor to the extent of two or three inches,(apparently where goods had been stacked.). He said these defects could be remedied at a cost. He would envisage piling; but did not know how deep the mud was.

Mr. Jackson had been associated with valuation work since 1917. He made a valuation of the resumed area in three sections (1) the 8.74 acres of relaimed land, which he valued at £250 per acre; and (2) the 30 acres of filled in land, which he also valued at £250 per acre; and (3) the remaining area of about 10 acres which he valued at about £300 per acre, a total valuation of £12,685.

However, the area acquired from the plaintiff was not 48.74 acres, but 47 acres 2 roods 19 perches, as already appears. The balance was land belonging to the Maritime Services Board i.e. 1 acre and 19½ perches. This area of 1 acre and 19½ perches is part of the land valued by Jackson at £250 per acre. This area would, according to Jackson's valuation, be worth £281.10.0, so that Jackson's valuation of the land resumed from the plaintiff would be £12,403.10.0. In arriving at his valuation Jackson took into account a sale in September 1941 of land in South Street in the vicinity of the resumed land, but much closer to the railway and the main road, and in or near an industrial area. That sale was at £200 per acre. He also took into account other sales in the vicinity between 1941 and 1945, but which were made at much lower prices than the first sale i.e. at prices of £130 per acre and less. When Jackson made his valuation he did not know of the sale of land quite close to the resumed land, and on the eastern side of it, called Timbrol's land. He thought that Timbrol's land was better land than the resumed land. However, he did not see fit to reduce his valuation of the subject land when he learned of the sale of Timbrol's land, although that land had realised only £120 per acre. Cross-examined, Jackson said that a water frontage was not an advantage, and that water carriage had been in disfavour for many years. The depth of water at the wharf near the resumed land was only 7'. He knew of a sale in August 1942 of a block in Spurway Street, which forms the eastern boundary of the subject land. This block was sold at the rate of £750 per acre, but it was part of a subdivision, probably made at heavy cost for drainage, curbing, guttering and footpaths. In any event this block was close to the main road and in or near the industrial area. It was not obvious to Jackson on the 1st of January 1945 that substantial industrial development was about to take place, but a normal expansion was obvious. He took into account the potentialities as at 1st. January 1945. Re-examined he said that the main road was 50 chains from the corner of the resumed land; and the railway station 176 chains away by the nearer road.

Mr. Dimond had 30 years' experience in real estate. His valuation was £200 per acre. He made it in October 1944. He

took into account the sale of Timbrol's land and two other sales of land near the resumed land at £130 per acre. All three were, he thought, sufficient to make a comparison, but he though the subject land had been better prepared than Timbrol's land, which had a mangrove swamp in front and no retaining wall. He also thought there was better access to the subject land across the Reservation. Cross-examined he said that the value for sub-division would not have been higher in January 1945 than the value on an acreage basis; but he thoughtit could be sub-divided and sold in allotments. In these days water transport was a neglected factor on account of better roads and motor transport. Towards the end of the war development had been going on in Sydney, and an extension was envisaged on the cessation of hostilities; but not to the extent that took place. Moreover, the extent of user of land was becoming limited, because of town planning by local councils. The valuation of £200 per acre did not include anything for potentialities, as the council said the area was going to be residential.

I am unable to accept Ralph's valuation of £2,000 per acre. He did not give details of comparable sales in support of that valuation; nor was there any other evidence of comparable sales that supported it. £750 per acre was the highest price of which evidence was given, and that was for land which had been subdivided and sold in allotments, and was in a higher position, closer to the main road, and in or near an industrial area. Moreover, Stuckey's evidence, which I accept as reliable, indicated that much expenditure would be required to make the reclaimed and filled in parts of the subject land suitable for industrial buildings and storage, not to mention machinery, required in industrial operations. I am also satisfied that Ralph miscalculated the depth of water at the wharf, and the distance of the subject land from the railway and the main road. He contemplated a siding from the main railway, but if that siding were built, whether along the roads or over private lands, the cost would be considerable, and he gave no estimate of that cost.

On the other hand, however, I do not feel justified in adopting without modification either Jackson's or Dimond's valuation.

Dimond said he did not take potentialities into account, because the Council told him the area was going to be residential, but that appears to have been during or before October 1944. However, Davis said the classification of the area in question had not been determined as late as July 1945, and that the classifications made in respect of other areas were in fact confined to industrial and living areas, and, further, that permission might be given for some industrial operations, even in living areas. Jackson's valuation, however, did take potentialities into account, and I am not prepared to find that these potentialities were substantially greater as at the 1st. January 1945 than he estimated them to be. But I think he did not make sufficient allowance for the water frontage, including the wharf, the retaining wall and the reservation, and for the easy access across the latter to the resumed land. For the water frontage and access, I think there should be a substantial allowance, which I assess at £20 per acre.

I make no allowance for the cost of removal of the buildings erected by the Forces, as counsel for the plaintiff suggested should be made, apparently in view of the headnote in Secretary of State for Foreign Affairs v. Charlesworth Pilling & Co. (1901 A.C. 373). There is no item of claim for this, and in any event no evidence that would enable the cost to be estimated by me. The only indication of what that cost would be was given by Jackson in cross-examination, and then he merely said the cost would amount to hundreds, but not thousands, of pounds. I am unable to see how that cost can properly be regarded as an item of compensation in the circumstances of this case. If the buildings had been erected without authority, and it was not suggested they were, then they would as fixtures have become part of the land and the property of the plaintiff and their value would be allowed for in the compensation.

Counsel for the plaintiff also raised, but did not press for decision by me, the question of the validity of the acquisition because the notification stated the purpose to be "purposes of the Commonwealth near Rydalmere New South Wales". However he said he thought the point had been decided against him in Grace Bros. v.

The Commonwealth supra, although in the latter case the purpose was expressed to be simply "purposes of the Commonwealth", following strictly the wording of the National Security Regulationn.

I find that the value of the land resumed from the plaintiff, being 47 acres 2 roods 19 perches, was at the 1st. January 1945 £13,356. However Counsel for the defendant stated and Counsel for the plaintiff agreed, that the defendant Commonwealth had paid £8,000 to the plaintiff on account of compensation, and £726.4.2 to the local council in respect of rates owing by the plaintiff. The plaintiff therefore is entitled to a further payment from the defendant Commonwealth of £4,630, and I give judgment for the plaintiff for £4,630 with costs. Liberty to apply.
