BETWEEN:

FEDERAL DISTRICT COMMISSION, on the Information of the Attorney-General of Canada..... } PLAINTIFF;

1934
Nov. 12 &13.
1935
Jan. 22

AND

HENRI DAGENAIS ..... DEFENDANT.

Expropriation—Expropriation Act—Compensation money—Cost of plans and other expenditures included in award.

Plaintiff expropriated certain land in Ottawa, the property of defendant. Defendant claimed that the amount of compensation money to which he was entitled should include the cost of plans prepared for the erection of a building on the property, and other incidental expenditures made by him.

Held: That the owner of land compulsorily taken from him is entitled to receive as compensation the value of the land to him, not to the expropriating party.

2. That the price for which the land would sell in the open market is not necessarily the proper test.

3. That the Court must consider all the circumstances and ascertain what sum of money will place the party dispossessed in a position as nearly similar as possible to that which he was in before the land was expropriated, since the measure of compensation should be the loss which the owner has sustained in consequence of his land being taken from him.

4. That *compensation money* in s. 23 of the Expropriation Act, R.S.C. 1927, c. 64 should include any loss or damage suffered by the owner, and which was incidental to, or flowed from, the taking of land.

5. That the cost of the plans, and the other expenditures claimed, either made the lands that much more valuable to the defendant, or, they constitute a loss or damage arising directly from the taking of the land and for which compensation should be allowed.

INFORMATION by the Crown to have certain property expropriated, valued by the Court.

The action was tried before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

H. P. Hill, K.C. for plaintiff.

T. A. Beament, K.C. and *G. E. Beament* for defendant.

The facts and questions of law raised are stated in the reasons for judgment.

The PRESIDENT, now (January 22, 1935) delivered the following judgment:

This information relates to a parcel of vacant land expropriated, in May, 1934, by the Attorney-General of Canada, on behalf of the plaintiff, the Federal District Com-

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mission—hereafter to be referred to as the "Commission" —under the provisions of the Federal District Commission Act, 1927, and amendments thereto. The Commission, *inter alia,* is empowered to acquire by purchase, or by expropriation, lands in the City of Ottawa, for the purpose of public parks or squares, avenues, drives, etc., and the Expropriation Act, Chap. 64 R.S.C. 1927, is made applicable in the case of expropriation proceedings instituted by or on behalf of the Commission. The defendant is a building contractor, and, I understand, sometimes erects buildings on his own account.

The lands in question here are located in what is known as the New Edinburgh section of the City of Ottawa, on the north side of the Rideau river; they lie between the south side of Stanley avenue and the Rideau river, having a frontage of 61½ feet on Stanley avenue, and a depth back towards the Rideau river of 98 feet on one side, and 114 feet on the other side; on either side are relatively small parcels of land owned by the Commission, unimproved public park lands, and which, I understand, form part of a public improvement scheme not yet fully developed. The lands are therefore bounded on the front by Stanley avenue, on the rear by the Rideau river, and on either side by public park lands. The lands contain altogether 6,619 square feet.

By some error, the full width of the defendant's property between Stanley avenue and the Rideau river was not expropriated, there being left a fringe of land, nine inches wide, on either side of the expropriated lands; those fringes of land would of course be utterly valueless and useless to the defendant, and in his statement of defence he so pleads and claims damages on that account. It was, however, agreed between counsel that in determining the compensation payable to the defendant I should take into consideration the whole of the defendant's property, just as if it had been entirely included in the expropriation; so therefore whatever compensation I decide to allow the defendant, it will be understood as comprising the value of the unexpropriated fringes of land, and the defendant must convey to the Commission those remnants of his property. That would seem to be a sensible and satisfactory method of disposing of an otherwise awkward situation.

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I am satisfied, as was claimed, that the defendant purchased the lands in question for the purpose, and with the intention of erecting thereon, sometime, a small apartment house; and he did not actually take over the lands until he had applied for and obtained a permit from the City of Ottawa authorities to erect thereon such a structure, and his application was accompanied by plans of the proposed structure; these plans were later discarded. Shortly before the expropriation, in May, 1934, the defendant had definitely decided to proceed with the construction of his proposed apartment house, which was to cost about $40,000; earlier, in March, his architect, Morin, prepared the plans for such a building, at a cost to the defendant of $1,000, this fee being two and one-half per cent of $40,000. The defendant's construction plans had so far advanced that he had a building survey made of the land, and he had staked the bounds for the excavation of the foundation of the proposed building, and this at a cost of $43; he had even approached one officer of the Commission to ascertain if it desired to purchase the excavated material, which, I understand, it frequently did; he had moved on the property a working office, and a lot of material, including a cement mixer, was made ready to move on the property, all preliminary to the commencement of construction, and in this connection he had spent about $100. There can be no doubt, I think, but that the defendant, in good faith, had prepared the plans of his proposed apartment building, and had taken the other steps which I have mentioned, with the intention of proceeding actively to construction, when the lands were taken from him. He now claims that he should be compensated for the cost of the Morin plans, and for the two other items of expenditure which I have just mentioned, in addition to the value of the lands. It was contended on behalf of the Commission that the plans could be utilized in the construction of some similar building, somewhere, some time, and I may at once dispose of that point. There is no substance whatever, in my opinion, in such a contention. It cannot be reasonably contended that it was incumbent upon the defendant to proceed to construction elsewhere so that he might utilize his building plans and thus save or minimize his loss, or that he should go

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searching for a site that would suit these plans. Building plans are usually prepared for a selected site; the plans are made for the site and not the site for the plans, and the site itself is usually selected for business reasons. If sometime in the future it should transpire that the plans can be utilized, that would be a stroke of good fortune for the defendant, but with that we are not presently concerned. Whether the cost of the plans is recoverable as compensation is one of the questions to be determined, and it is not entirely free of difficulty.

Before proceeding to a consideration of the evidence regarding the value of the lands taken, it might be convenient here to state that some evidence was given regarding the defendant's proposed apartment house, to show, as I understood Mr. Beament, that the project was a sound one financially. It was not contended that the estimated profits of the project should be capitalized, or that damages for loss of estimated profits should be given, or anything of that sort, but it was contended that this was an element for consideration in calculating the value of the land to the defendant, and this would be in conformity with the decision of the Privy Council in the case of *Pastoral Finance Association* v. *The Minister,* (1). I might add that the defendant's building was to contain thirteen small apartments, and the total cost of the lands and building together with other necessary expenses, was estimated at $51,000. The revenue from rentals was estimated at $9,120 annually, and the annual expenses at $3,910, leaving a net annual revenue of $5,210, which, it was alleged, would yield a net return of over ten per cent on the investment of $51,000. It will not be necessary or profitable to pursue further this phase of the case.

There is another matter which perhaps I should mention briefly. The defendant purchased the property in question from one Margaret Grant for the sum of $3,000, in April, 1932; and it was contended that the vendor was obliged to sell the land below its real market value because, at the time, her husband was in financial straits, and to assist him it was necessary to realize upon these lands. It is quite true that the circumstances of the vendor's husband were then such that he urgently required

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

financial assistance, and it is probably true that the sale of this property was accelerated by this fact. However, the cost of lands does not determine their value, but may be a relevant consideration in the assessment of compensation; and so, too, may be money bona fide spent in improvements by the owner. *Streathem and General Estates Co. Ltd.* v. *Public Works Commissioners* (1). I might also here add that an option of purchase was given by the owner of these lands, in 1931, for $6,000, but the option was never exercised.

Coming now to a consideration of the value of the lands taken, and quite apart from any question concerning the building plans. The defendant claims the lands taken had a special value to him because of their special suitability as a site for an apartment house; it was claimed that this would be the best and most profitable use to which these lands could be put. Mr. Ross, an experienced real estate broker, gave evidence on behalf of the defendant; in his direct examination he arbitrarily valued the lands at $4,900, being about $80 per foot frontage on Stanley avenue, or 75 cents per square foot; later in his evidence he placed the value of the lands for private residential purposes at anywhere from $3,250 to $3,750, and he gave an additional value to the lands, ranging from twenty-five to thirty-five per cent, on account of their special suitability as a site for an apartment house. Another expert witness called on behalf of the defendant concurred generally in Mr. Ross's opinion as to the value of the lands. The Commission tendered $3,690 as being sufficient compensation. The amount of this tender was reached on the advice of Mr. Fitzsimmons, another experienced real estate broker, called as a witness on behalf of the Commission, by treating the lands as private residential property and valuing the same at $40 per foot frontage on Stanley avenue, amounting to $2,460, to which he added fifty per cent on account of the special suitability of the lands as a site for an apartment house, making a total of $3,690, or about 55 cents per square foot. So the expert witnesses on both sides appear to agree that on account of the suitability of the lands as an apartment house site, the same had some enhanced value to the defendant, over and above its mar-

(1) (1888) 52 J.P. 615.

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ket value for ordinary residential purposes. Mr. Fitzsimmons thought the property had advantages and disadvantages as an apartment house site, the latter being its exposure to winds, lack of shade, and generally the surroundings, the advantages being the uninterrupted light and air, and its future freedom from encroachment by other building construction. Mr. Ross thought the site a unique one for an apartment house, on account of its location beside the Rideau river, because it afforded an excellent outlook in every direction and which could never be obstructed by other buildings, and because of its proximity to two Dominion Government office buildings from which might be drawn tenants for the proposed apartment house.

Both Mr. Ross and Mr. Fitzsimmons left me with the impression that they found some difficulty in attaching positive values to the lands in question, though that perhaps might not appear from a reading of their evidence. In point of fact there was little in the way of prior sales in this vicinity to serve as a reliable guide to the value of the lands taken, particularly for the use to which the defendant was about to put it. The sale to Blackburn of a lot of land almost immediately across from the defendant's lands, on Stanley avenue, in 1931, for $8,000, should be a fairly reliable indication of the trend of land values in that section of Ottawa. This property, a corner property, with an old wooden building upon it, but which did not enter into the selling price, had a frontage of 138 feet on Stanley avenue, and 115 feet on Charles street, comprising altogether 15,870 square feet. The price paid for this property would amount to $58 per foot frontage on Stanley avenue or about 50 cents per square foot. The defendant paid for his lands at the rate of $50 per foot frontage on Stanley avenue. Mr. Ross was of the opinion that the defendant's property was worth fifty per cent more, per square foot, than the same area in the Blackburn lot. Then the sale of certain vacant land to the Commission in 1930, by Craig et al, was mentioned. This land, located on Lorne avenue, about 800 feet east of the defendant's lands, had a total street frontage of 300 feet, and a depth of 99 feet, and the selling price was at the rate of $25 per foot frontage. As I understand it, Commission park lands are on two sides of this property, a

spur line of the Canadian Pacific Railway on another side, and on the remaining side a row of unattractive buildings, which Mr. Ross described as "cheap." Mr. Ross was of the opinion that the defendant's lands were worth three times more than the Craig lands; other sales were referred to, but they are not helpful at all, and none could be more helpful than the two I have mentioned.

We may now direct our attention to a brief discussion of the principles to be applied in ascertaining the compensation to be paid owners who have been dispossessed of their properties. It is a well settled principle that the owner of land compulsorily taken is entitled to receive as compensation the value of the land to him, not to the expropriating party, and the price for which it would sell in the open market is not necessarily the proper test. It might be well to refer briefly to a few of the well known authorities on this point. In *Stebbing* v. *The Metropolitan Board of Works,* (1) Cockburn C.J. said:—

> When Parliament gives these compulsory powers, and provides that compensation shall be paid to a person from whom property is taken, for the loss which he sustains by reason of his property being taken, the sense of the matter is that he shall be compensated to the extent of his loss, and that his loss shall be tested by what was the value of the thing to him, not by what will be the value when the Board acquires it.

In Eagle v. *The Charing Cross Railway Company,* (2), Bovil C.J. said:

> It cannot be said, to my mind, consistently with justice, that a man's damage is to be ascertained with reference to what he could sell his property for. He may say, 'I do not desire to part with it.'

In the well known case of *Pastoral Finance Association Ltd.* v. *The Minister* (3), Lord Moulton, who delivered the judgment of the Judicial Committee of the Privy Council, said:

> The appellants were clearly entitled to receive compensation based on the value of the land to them. This proposition could not be contested. The land was their property and, on being dispossessed of it, the appellants were entitled to receive as compensation the value of the land to them, whatever that might be.

In the case of *Bailey* v. *Isle of Thanet Light Railways* (4), Channel J., in giving judgment stated:

> I think our judgment must be for the claimants. The intention of the parties to use the land for a particular purpose may properly be taken into account. Compensation must always be assessed on the basis

(1) (1870) 40 L.J.Q.B. 1, 5.
(2) (1867) 36 L.J.C.P. 297, 303.
(3) (1914) A.C. p. 1087.
(4) (1900) 1 Q.B. 722.

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of value of the premises to the particular claimant. The matter may be tested in this way. Suppose the land taken consisted of trade premises to which a goodwill was attached. The question for the tribunal which had to assess the compensation would be, not what was the market value of the premises, but what was their value to the trader, including the goodwill.

The same principle has been affirmed in Canadian courts, on many occasions. That principle is therefore to be applied in this case, and it is the value of the lands to the defendant that must be considered, not its value to the Commission, nor necessarily the amount it would fetch in the market if the owner were desirous of selling it. In all such cases, if compensation is to be a reality, the Court must take into consideration all the circumstances and ascertain what sum of money will place the dispossessed man in a position as nearly similar as possible to that which he was in before. He should not be made poorer by the forcible taking of his property.

I come now to consider the matter of the cost of the building plans, and the other two small items of expenditure incurred by the defendant and which I have already mentioned and the question is whether the same should be considered in estimating the value of the lands taken, to the defendant, and whether they should enter into the amount of compensation to be allowed. It was contended by Mr. Hill that no compensation should be allowed on this account because such expenditures did not represent an estate or interest in the lands taken. In effect he urged that the only two things which are within the ambit and contemplation of the statute are the value of the lands taken, and such damages as may arise from other lands being injuriously affected by the construction of any public work. The point is an important one and requires consideration. If the provisions of the Expropriation Act are to be construed in the sense suggested by Mr. Hill, then I fear some of our courts in this country have been astray in their method of arriving at the amount of compensation payable in such cases, and the same would be true of other jurisdictions where the legislative authorization for the compulsory taking of lands are expressed in somewhat the same terms as here. Compensation has been allowed for loss of trade, loss of goodwill, disturbance of business, removal expenses, deterioration of movable personal property, the value of machinery in use upon ex-

propriated premises but rendered unsuitable for use elsewhere, expenses incurred in seeking a new location for business, storage of furniture, and the cost of machinery purchased for a going concern upon lands taken but not yet installed; many other such claims have been allowed as compensation, but those mentioned will be sufficiently illustrative. The principle seemed to be followed in such case was that the displaced owner should be left as nearly as was possible in the same position financially as he was prior to the taking, provided that the damage, loss or expense, for which compensation was claimed, was directly attributable to the taking of the lands. This would seem to be founded on common sense and reason. The measure of compensation should, in justice, be the loss which the owner has sustained in consequence of his lands being taken, because it could never have been contemplated that the community should benefit at the expense of a few of its members. Compensation should be proportionate to the loss which the owner has sustained, an equivalent of what is taken from him or that which he has given up. The Expropriation Act, section 23, speaks of "the compensation money . . . adjudged for any land or property acquired or taken"; the "compensation money" does not appear to be limited by the statute to the "value" of the lands taken, in fact, I think, the word "value" is not once mentioned in the Act. The "compensation money," it seems to me, is to be the equivalent of the loss which the owner has suffered for any land "taken," and is not to be ascertained only by considering the "value" of the land. I think, it must have been within the contemplation of the Act, that "compensation money" should include any loss or damage suffered by the owner, and which was incidental to, or flowed from, the taking of lands. The word "land" is defined in the Act as including ". . . easements, servitudes and damages, and all other things done in pursuance of this Act for which compensation is to be paid by His Majesty under this Act." The true construction of the word "damages" in this interpretation clause is perhaps difficult to determine, and in the absence of argument by counsel upon the point, I hesitate to express any opinion as to its intended meaning.

I cannot see why any expenditure incurred by the defendant, in good faith, in preparing building plans, or in

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connection with any other step relating to the construction of his proposed building, should not be considered in ascertaining the compensation to be awarded him. The expenditures made here were lost because of the taking of the lands. I do not think it is going too far to say that the defendant has in effect, given up to the Commission compulsorily his building plans, just as much as he has given up his lands. By the taking of the defendant's lands, his plans have been rendered valueless, otherwise their cost would have entered into the capital structure of the land and the apartment house as a going concern and would have been gradually liquidated by the net rentals earned by the apartment house as a going business concern. The preparation of the plans was the first step in the construction of the proposed building, after the purchase of the lands. The cost of the plans, and the other small expenditures, either made the lands that much more valuable to the defendant, or, they constitute a loss or damage arising directly from the taking of the lands and for which compensation should be allowed. If the proposed building had been about one-third completed, I cannot think it would be contended that the defendant should be denied compensation for the cost of the plans, for the cost of any work done, and probably a reasonable profit in addition. The degree of the completion of the structure should not affect the principle if a commencement has been made; the preparation of the building plans, and the doing of the other things I have mentioned was the commencement of the construction here: I perhaps should add that as the defendant was to be his own builder there was no necessity for a building contract being entered into.

There is a New South Wales case, which, for more than one reason, is of some interest here. The case is *Scottish Halls Ltd.* v. The Minister (1). In this case, land was taken on which the plaintiff was about to erect a building, after plans had been prepared and a tender accepted. Before soliciting tenders, a quantity surveyor was employed for estimating the quantities of materials required for the building, which would serve as a guide to those wishing to tender for the erection of the building. The

(1) (1915) 15 New South Wales State Reports 81.

custom there was that a building or quantity surveyor was employed by the architect, and paid by the successful tenderer, the builder, out of the first moneys paid him by the owner. The plaintiff claimed, *inter alia*, as compensation, losses and expenses in respect of the demolition of the old building, architect's fees, surveyor's fees, and legal expenses, all of which it was conceded the plaintiff was entitled to receive, except the one item of £284, being the fees of the quantity surveyor. That the fees of the architect who prepared the plans of the proposed building was a proper claim for compensation was not apparently contested. It was held by the Supreme Court of New South Wales, an appellate Court of three, in an action for compensation, that the plaintiff was liable to the quantity surveyor for his fee and entitled to recover it from the defendant, notwithstanding that the expropriation rendered the customary method of payment impossible. The claim of the quantity surveyor was allowed in the first instance by a jury, from which there was an appeal.

I have examined the Public Works Act of New South Wales and I find nothing in it which, for our purposes here, distinguishes it from our own Expropriation Act; the former Act employs the words "the value of the land to be purchased or taken." It is to be kept in mind that it was contended that because the quantity surveyor was employed by the owner's architect; there was no liability on the part of the owner; that point did not arise in the case of the architect's fees because he was employed by the owner. With this explanation of the facts of the case I may now quote from the judgment of the Court because it expresses a view I have already stated, that is, that the lands of the defendant in the case under discussion were more valuable in his hands by reason of the fact that he had made certain expenditures and incurred certain liabilities in connection with the construction of the building. The Chief Justice, who delivered the judgment of the court, said:

> But the question for us is whether on the evidence in this case it was not open to the jury to find that as the building surveyor had been employed by the plaintiff's agent to do certain work, and had done that work before the stoppage of the building occurred, there was an implied condition in the bargain between them that the work done should be paid for whether the particular method of payment they had contemplated came about or not. I think it was so open, and therefore,

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if any of these items were recoverable by the plaintiffs in the present action that item was rightly included. There was no contest about the recoverability of the other items, and this was apparently on the principle that an owner who has entered into contracts and incurred expense for the purpose of building on his land has made it more valuable in his hands than it would otherwise have been. If, for instance, a certain amount of work has been done by the preparation of foundations, or the commencement of the building, the land is more valuable in his hands than if it were a mere vacant site, and other necessary expenses incurred in regard to his building contract have the same effect. That seems a very reasonable view, and as that was the principle on which the jury were invited to consider these items in general exception only being taken in Dunwoodie's case on the ground that no liability for his payment rested upon the plaintiffs, I think the verdict ought not to be disturbed on that ground.

I approach now the question of the amount of compensation which should be awarded the defendant. It is always difficult to ascertain the precise equivalent in money for land; it is a matter of bargaining. It has been truly said that land is usually cheap or dear, according to whether the seller is more anxious to sell or the buyer to purchase. In this case, I think it is probable that the lands in question were acquired by the defendant at a price below their normal market value for ordinary residential purposes, and I cannot but think that Mr. Fitzsimmons depressed unduly this value, that is, if I am to have regard to the evidence regarding the sale to Blackburn; due regard must be paid to the Blackburn transaction in approximating the normal value of vacant land in that vicinity. I am inclined to agree somewhat with the statement of Mr. Fitzsimmons that the lands had, as an apartment house site, advantages and disadvantages, but he gave them an added value of fifty per cent for such a use, over their value for other uses. I am not disposed to think the lands possessed all the superior advantages, that Mr. Ross attributed to them, as an apartment house site, still, for such a purpose, they doubtless possessed some attractive features; neither can I agree with the opinion of Mr. Ross that the lands taken, were so much more valuable—fifty per cent—than the Blackburn lot, as an apartment house site. But it is conceded that, as an apartment house site, the lands taken were more valuable, by anywhere from twenty-five to fifty per cent, than for purely residential purposes. Then the admitted suitability of the lands in question for the business to which they were to be devoted affected the value of the lands to the defendant, that is to say, the defendant is en-

titled to have that taken into consideration as far as it may fairly be said to have increased the value of the lands to him. That was one of the principles laid down in *Pastoral Finance Association* v. *The Minister*, supra; in the practical application of that principle much of course depends upon the facts and circumstances of the case.

Taking into consideration all the facts disclosed in the evidence, all the elements of damage that ought to be taken into consideration including the forcible taking, and the principles of law to be applied in the case, I have concluded that a sum of $5,850 will represent a just and sufficient compensation to the defendant. I perhaps should make it clear that I have included in this amount the sum of $1,143, the amount of the three items of expenditure already mentioned, because, either the lands were that much more valuable in the hands of the defendant by reason of the expenditures made and liabilities incurred by him, in connection with the commencement of the construction of his apartment house, or, he would be entitled to be compensated in this amount as a loss or damage directly caused by the taking of his lands; I do not think it matters how this amount enters into the calculation of the compensation allowed. It perhaps should be mentioned that the defendant incurred some legal expenses in obtaining one of the two building permits, as I understand it, from the City of Ottawa. I have not been able to see my way clear to allow this item; I think it must be treated as an expense which the defendant himself must bear.

There will therefore be the judgment usual in expropriation cases. The defendant will be entitled to interest on the amount of compensation fixed from the date of the expropriation, together with his costs. I reserve until the settlement of the minutes the precise form the judgment should take in reference to the unexpropriated portions of the defendant's lands.

Judgment accordingly.