Privy Council Appeals Nos. 42 *and* 43 *of* 1918.

The Melbourne Tramway and Omnibus Company, Limited - *Appellants*

v.

The Tramway Board - - - - - - *Respondents*

The Tramway Board - - - - - - *Appellants*

v.

The Melbourne Tramway and Omnibus Company, Limited - *Respondents*

(Consolidated Appeals)

FROM

THE SUPREME COURT OF THE STATE OF VICTORIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 31ST MARCH, 1919.

Present at the Hearing:

VISCOUNT HALDANE.
VISCOUNT FINLAY.
VISCOUNT CAVE.
LORD DUNEDIN.
LORD PHILLIMORE.

[*Delivered by* LORD DUNEDIN.]

By Act No. 765 of 1883 of the Parliament of Victoria, the Melbourne Tramway and Omnibus Company, Limited (hereinafter called "The Company") was empowered to construct tramways in the city of Melbourne and the adjoining boroughs. That Act contained a clause similar to that in the General Tramways Act of the United Kingdom, which provided that, at the expiry of twenty-one years after the passing of the Act, the local authority might acquire the tramways by paying the "then value, exclusive of an allowance for present or future profits of the undertaking." The Act further confirmed and incorporated a schedule which contained an agreement with the various

boroughs which provided that a Tramway Trust created under the Act should, if it so elected, construct the tramways and then lease them to the Company for a period of thirty years. This election was made, and the tramways were constructed by the Trust and handed over to the Company. The tramways so handed over consisted of the lines and the motive power, it being a cable system. The rolling stock, etc., had to be provided by the Company.

The Company proceeded to work the tramways, and from time to time extensions were made under various supplementary Acts, but the arrangements as to construction and lease were always the same. The lease fell to expire on the 1st July, 1916. Had that date been allowed to arrive without arrangement the state of affairs would have been that the Company would have found themselves the owners of tramway rolling-stock and plant for which they had no use, and the Trust would have found themselves in possession of a tramway system without the necessary appliances to make it effective. In order to prevent the dislocation which might thus ensue the Legislature stepped in, and passed the Tramway Board Act of 1915. The title of that Act is :—

> "An Act to make temporary provision with respect to tramways and tramway undertakings the subject of leases granted by the Melbourne Tramways Trust to the Melbourne Tramway and Omnibus Company, Limited, and to dissolve the said Trust and for other purposes."

By it a new body called "The Tramway Board" was constituted, the old Tramway Trust was dissolved, and provision was made for the Board carrying on the tramways after July 1st, 1916. The property of the old Trust, *i.e.*, the permanent way and motive power appliances—was made over to the Board by force of statute. As regards the property of the Company, the following provisions were made : The Company had to make a list of all things belonging to them. From that list the Board was to select what they wished, which formed what may be called Category A. Then the Company, from what was left, were to form a list of what they wanted to keep ; this formed Category B. The remaining articles formed Category C. Categories A and C were then by force of statute transferred in property to the Board, and for them the Board were to pay. It will be well to quote textually the important parts of the section which made these provisions. It is section 34 :—

> "(1) In order that there may be no interruption of traffic on the said tramways, the following provisions shall apply to the tramway undertakings of the said company not the subject of the leases aforesaid (including the buildings, rolling stock materials and tramway plant of the said company suitable, used or required for the purpose of working the Royal Park tramway) :—"
>
> (i) provides for the inventory or list ;
>
> (ii) for the list of things required by the Board ;
>
> (iii) for the list of things retained by the Company ;
>
> (iv) for the vesting of the things under (ii) and the things included in neither (ii) nor (iii) ;

(v) "The Board shall in respect of all the things so vested make to the said company such compensation as is determined by arbitration under this Act, but with respect to the things which vest in the Board under this sub-section, but are not specified in the notice of acquisition, the arbitrator in determining the amount of compensation to be made by the Board therefor shall have regard only to their utility for the purposes of the Board under this Act, and any subsequent owner of the said tramways and tramway undertakings."

By section 44 it was provided that the arbitrator should be one of the judges of the Supreme Court appointed by the Governor in Council.

The proceedings directed by the Act were duly carried out, and an arbitration ensued. Cussen, J., was the judge appointed, and he held an enquiry and pronounced an award. The award, so far as material for the present case, was as follows :—

"Now I the said arbitrator do, subject to the statements hereinafter contained, determine the amount of the said compensation to be £335,000 (Three hundred and thirty-five thousand pounds) and award the same accordingly.

"And I further declare that in arriving at such amount I have given effect to the principles or matters set out hereunder:—

"1. I have had regard to the 30th day of June, 1916, as the date in relation to which the value of the said things was to be ascertained.

"2. In respect of many of the said things including rolling stock I have fixed their values by considering them as things *in situ* (or established, assembled and arranged) capable of earning a profit, and in many cases this in my view necessitated fixing values practically by reference to structural cost less a proper deduction for depreciation.

"3. In fixing values as set out in paragraph 2, I have not regarded the possibility or probability of the Cable Tramway system being converted into an Electrical Tramway system or considered statements made by witnesses on that subject.

. . . . . .

"5. Having regard to my construction of the leases from the Melbourne Tramways Trust to the said Company—

"(*a*) I have allowed the Company compensation in respect of the spare wire ropes claimed for, whether such ropes were new or previously used.

"(*b*) I have not allowed the said Company compensation in respect of an automatic stoker or in respect of reels and their accessories or in respect of some other things of small value which have either become incorporated with or accessory or incidental to the permanent fixed property or which have been added to the list of things supplied by the Trust and used for the performance of similar functions.

"(*c*) Save as set out in paragraph (*b*) I have allowed the said Company compensation for materials, tools and appliances claimed for whether such things were usually kept in the engine houses or not and whether such things were ordinarily described as spares or not.

"And I further declare that I have attached to my award as Appendix A a statement of my reasons for giving effect to the principles and matters above referred to, and as Appendix B a copy of the lease made by the said Trust to the said Company, and as Appendix C a statement showing lists of things enumerated in the schedules to various leases from the said Trust

to the said Company and that such Appendices so far as they illustrate or explain the principles or matters above referred to and numbered 1 to 5 are to be taken as part of my award."

In the appendices mentioned the learned judge most carefully and ably discussed the various matters on which argument had been held before him, and gave his reasons for his judgment.

Upon this the Board made a motion to the Supreme Court to set aside the award or otherwise to remit the award for reconsideration by the arbitrator. This motion was discussed before the Supreme Court, consisting of Madden, C.J., and Hodges and Hood, JJ. The Court by a majority (Madden, C.J., dissenting) remitted the award for reconsideration as to heads 2 and 3, but affirmed the decision as to the rest.

The Company have appealed to His Majesty in Council against this judgment, and the Board has cross-appealed as to the affirmance of heads 5 (*a*) and (*c*).

There was a question raised originally by the Company whether, as the arbitrator had not stated his award in the form of a Special Case, any appeal against his award was possible. That question was decided adversely to the Company by the Court of Appeal, and was not practically raised before this Board, but it was conceded on both sides that the appeal competent was an appeal on questions of law only, and not on questions of fact.

It will be convenient at once to dispose of what may be termed the minor point of the principal appeal, namely, whether the arbitrator was wrong in disregarding in fixing the compensation the chance that the plant taken over might be rendered less valuable by the possibility of the whole system being converted into an electric system, which would render much of the plant unavailable. Their Lordships agree on this matter with the learned arbitrator, and with the learned Chief Justice. The probability of such a change appears on the evidence to rest entirely in the region of speculation, and not to justify any deduction from the compensation for the value of the things taken over.

The principal question, therefore, comes to this: Was the arbitrator wrong in law in estimating the compensation due for the plant by calculating the cost at which that plant would have been supplied at the date of transference, and then making a deduction for the fact that the plant was not new, but was partially worn out. The majority of the Court of Appeal have held this method to be wrong, and their judgment turns entirely on the meaning of the word "compensation." There is a long series of cases decided under the Lands Clauses Act which have laid down that compensation must be estimated as the value to the seller, and not the value to the buyer. Applying that doctrine, the learned judges are of opinion that the only matter to be considered is what the Company could have got for its plant; and this, as the market was obviously a limited one, would have been only such sum as the Board would be prepared to pay in order to outbid a buyer who would buy the plant in order to take it away elsewhere and employ it on some other system.

Their Lordships think that the learned judges have laid too much stress on the one word "compensation" employed in the section quoted, and have not considered sufficiently the scope of the Act as a whole. It must be remembered what the situation was. Had nothing been done, the position on the expiry of the lease would have been this: The Company would have been deprived of the tramway for which the plant was primarily intended and useful. If a sale were forced, it could only, if the Company were refused a renewal of the lease, be sold at a great disadvantage. On the other hand, the Board would have had a tramway system without plant to work it, and the furnishing of new plant, if they failed to secure the plant belonging to the Company, would have taken many months during which time their system would have been totally unremunerative. But besides this position of the parties—each in a position to injure the other, neither in a position to compel benefit to himself—there was the position of the public. The more obstinate the parties were as against each other the more the public would suffer. "*Quidquid delirant reges plectuntur Achivi.*" It was in the interests of the public that the Legislature intervened, and in their Lordships' view the Act must be construed in the light of this position and these considerations. This idea is not left to the imagination; it is actually expressed in the Statute in the opening words of section 34 already quoted—"In order that there may be no interruption of traffic on the said tramways, the following provisions shall have effect:"

There are some other sections of the Statute which it may be well to cite:—

> *Section* 48. "In fixing any amount of compensation under this Act the arbitrator shall determine the value of the subject-matter of the arbitration in accordance with—
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> "(*a*) the specific provisions (if any) of this Act for determining the same; and also
>
> "(*b*) (if, and so far as it is necessary), the provisions of the *Lands Compensation Act* 1915 as to estimating compensation as if those provisions with the necessary modifications were applicable to the case."

and in particular:—

> *Section* 46 (1) "The authority of the arbitrator shall extend to the settlement and determination by him subject to this Act and on such terms and in such manner as is most just and fit of the matters referred to him and also of all such matters and questions (including any adjustments of accounts between the parties to the arbitration) as are in the judgment of the arbitrator incidental thereto or consequential thereon to the end that his award or awards may effect a final and equitable settlement."

So far as section 48 (*b*) is concerned, it is clear that there is no contemplation of a universal adherence to the provisions of the Lands Compensation Act, so as to introduce a cast-iron view of what compensation must be, and the opening words suggest that compensation and value are, for the purposes of this Act, not antagonistic terms, as the learned judges of the majority suggest.

The outcome of the whole matter seems to their Lordships to be this: The primary object of the Statute was to prevent an impasse and consequent injury to the public. To do this the two parties are by statute coerced, so to speak, into a settlement. On the one hand was the extreme position of exacting a fancy price for the plant, because that plant was the only plant available for many months. On the other was the valuation of the plant at a break-up value, which would mean what it would have fetched if bought to be removed to some other place where there was a cable system. Between these extremes the arbitrator was to fix such compensation as should effect "an equitable settlement." It seems to their Lordships that within reason he was made master of the situation. As a matter of fact, he has adopted the method of valuation which was adopted in the cases of the Edinburgh Corporation and the London County Council, where the words used were, "the then value of the tramway excluding profits of the undertaking." Their Lordships think that this method was clearly within the arbitrator's powers. In so saying they recognise that this is a special case arising on the provisions of a statute specially expressed, and they are not in the slightest degree criticising or qualifying the series of decisions of which *Lucas* v. *The Chesterfield Gas and Water Board* (1909 1 K.B., p. 16), *The Cedars Rapids Company* (1914 A.C., p. 569), and *Ruddy* v. *The Toronto Eastern Railway Company* (decided on the 23rd January, 1917, by this Board, reported in [1917] W.N. 34), may be taken as examples. They would further remark that though, owing to the importance of the case, and the fact that there was an equal division of judicial opinion among the judges of the Supreme Court (the arbitrator being himself a judge), they have thought it right to express their opinion in their own words, they do not conceive that they are adding anything to the very able and luminous judgments of Cussen, J., as arbitrator, and Madden, C.J., in the Supreme Court, with which judgments in ordinary circumstances they would have been content merely to express concurrence.

This disposes of the principal appeal. The cross-appeal remains.

The whole argument turns on what is meant by the clause in the lease which binds the Company to maintain during the lease:—

> "All engines, boilers, machinery, ropes, plant, conveniences or appliances now belonging to or used in connection with the said tramways (including those specified in the second part of the Schedule hereto) or which may at any time hereafter or from time to time be substituted therefor or added thereto for the purposes of the said tramways,"

and at the end to give up the demised property, "including all such substituted and added property." As section 34, which provides for vesting and arbitration, applies only to the tramway undertaking, "not the subject of the leases," it is clear that any property which by the terms of the lease the Company is bound to hand over cannot be the subject of compensation.

The learned arbitrator in his opinion in Appendix A says this :—

> "I think the aggregate or heap which has to be considered is made up of the things which were in fact demised and these may be shortly described as the tramway tracks, cable, engine houses, fixed machinery with its accessories, reels, and a few odd tools. It is a question of fact when things are added to this aggregate or heap, but I think they might be added by being affixed to and becoming incorporated with the things which were in fact supplied by the Trust or by being added to the list of things supplied by the Trust and used to perform the same functions."

Their Lordships are of opinion that this is a correct statement of the law of the case. All that therefore remains is the application to the facts. As to this, so far as it depends on fact, the arbitrator is final. The arbitrator finds as a fact that :—

> "What the Trust in fact did was to construct the tramway tracks, to construct or establish engine houses, together with boilers, engines, etc., necessary to operate the endless wire ropes and to supply one new wire rope and certain reels and a small number of what may be called foundation or starting tools and other things of minor importance for each section. A list of the things so supplied may be obtained by referring to Appendix C to this award and Exhibits H 1 and I 1 which were put in at the hearing."

At one time in argument some doubt was suggested as to whether this statement could be supported on the evidence, but their Lordships have examined Appendix C and Exhibits H 1 and I 1, and are satisfied that it is supported by these Exhibits.

The principal item on which discussion turned was the cables. Applying the proposition of law of the arbitrator, it seems to follow that it is enough if the Company hand back what they got—a system so equipped as to be ready to work (and this applies not only to the original system, but to any extension thereof)—but that they are not bound to hand back articles which are merely kept to deal with emergencies, though the possession of such articles is a most proper precaution for a working company.

Their Lordships therefore agree with the unanimous view of the judges that on this matter the arbitrator cannot be said to have gone wrong. On the contrary, as shown by his finding 5 (*b*), he has shown great discrimination in the application of the principle he laid down. Their Lordships will, therefore, humbly advise His Majesty to allow the appeal, and to restore the award of the arbitrator; to refuse the cross-appeal; the appellants in the principal appeal and the respondents in the cross-appeal to have their costs in the Court below and before this Board.

In the Privy Council.

THE MELBOURNE TRAMWAY AND OMNIBUS COMPANY, LIMITED

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DELIVERED BY LORD DUNEDIN.

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