Privy Council Appeal No. 31 of 1922.

The Auckland Harbour Board - - - - - - *Appellants*

v.

The King - - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF NEW ZEALAND.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH DECEMBER, 1923.

Present at the Hearing :
VISCOUNT HALDANE.
LORD SUMNER.
LORD PARMOOR.
LORD WRENBURY.
SIR CHARLES DARLING.

[*Delivered by* VISCOUNT HALDANE.]

The question which arises on this appeal is whether the Government had a right to deduct £7,500 from a sum of £25,094 5*s*. 8*d*. which was admittedly due to the appellants under a claim made under the Public Works Act, 1908, of New Zealand. It is conceded that the latter amount was payable as though awarded under the Act, as compensation for land which the appellants had reclaimed at Mechanics Bay, near Auckland, and which the Government had taken under statutory powers for railway purposes. By Section 126 of the Harbours Act of 1908 the amount of the compensation to which the appellants were entitled when, as here, the Government took the land of the appellants for railway purposes was not to exceed the amount which the appellants had actually laid out on the land, either for cost of reclamation or in permanently improving it. The sum of £25,094 5*s*. 8*d*. was ultimately, in the autumn of 1916, arrived at on this basis.

The Government withheld the £7,500 out of the total amount thus claimed, and the appellants presented a Petition of Right in respect of the sum deducted. This Petition was dismissed on the 7th November, 1921, by the Supreme Court of New Zealand, the Chief Justice dissenting, and the appellants have brought this appeal.

The appellants, the Auckland Harbour Board, which originally came into existence at an earlier date, were to be deemed under the provisions of the Harbours Act, 1908, to have been constituted under it. But the Board as originally constituted had previously, on the 24th December, 1897, made a lease to John Burns and Company, Limited, for a term of fifty years, at a rent of £200 per annum, of a piece of land, forming part of the Board's endowment, marked " V " on a plan produced at the hearing. This land was close to Auckland Harbour. The Government took it on the 13th December, 1909, for railway purposes, and John Burns and Company thereupon became entitled by statute to compensation. They claimed £21,894 10*s*. This claim was, however, agreed to be settled under the following circumstances. The Auckland Harbour Empowering Act was passed in 1912. On the preamble that it was desirable to empower the appellants to grant to John Burns and Company a lease of such allotments of land (being other than that marked " V ") then in course of reclamation by the appellants at Mechanics Bay, as should be agreed on by the Government, the appellants and John Burns and Company, and to authorise the payment to the appellants of such sum as might be agreed on in consideration of the appellants granting the lease, it was enacted by Section 7 that it should be lawful for the appellants to grant to John Burns and Company, without putting the same up to public auction or public tender, a lease of such allotments on the land then being reclaimed at Mechanics Bay, in accordance with Section 12 of the Auckland Harbour Empowering Act, 1911, as might be agreed on between the Minister of Railways (representing the Government), the appellant Board, and John Burns and Company, such lease to be on such terms and subject to such conditions as might be agreed upon between the parties, and to be in part compensation for the taking by the Government of the land then occupied by John Burns and Company (marked " V " on the plan). Sub-section 2 of Section 7 provided that it should be lawful for the Government to undertake for the Crown to pay to the appellant Board such sums as might be agreed upon in consideration of the Board granting the lease to Burns and Company. Sub-section 3 provided that it should be lawful for the Minister of Railways (as representing the Government), and he was thereby empowered, without further appropriation than the Act itself, to pay to the appellant Board out of the Public Works Fund such sums as might be payable to the Board by the Crown in accordance with such agreement.

Prior to the passing of this Act of 1912, certain improvements to the Water Frontage and Harbour of the City of Auckland had been determined on, and an agreement, dated the 3rd

November, 1911, had been entered into between the Government and the appellant Board. Under this the appellant Board had agreed to commence and complete the reclamation of an area of tidal land in close proximity to the parcel marked " V." The Government were to pay to the appellants the cost of doing this. It was provided that of the area to be so reclaimed the portion marked " Z " on the map should remain vested in the appellant Board as part of their endowment, the portion marked " Y " should be a public highway, and the portion marked " X " should be vested in the Government for railway purposes. It was also provided by this agreement that if at any time thereafter any part of the area marked " Z " was taken by the Crown, under powers conferred on it by the Harbours Act of 1908, the cost of reclamation by the Board should, for the purpose of assessing compensation under Section 126 of that Act, be deemed to be money actually laid out on the land by the Board, notwithstanding that such money had been repaid to the Board by the Crown under the agreement.

On the 2nd September, 1913, another agreement, following on the Act of 1912, was entered into between the Minister of Railways, as representing the Crown, of the first part, the appellant Board of the second part, and John Burns and Company of the third part. After reciting the lease to Burns and Company of 1897, the taking of the land so leased in 1909 by the Government, the claim of Burns and Company for compensation of £21,894 10*s*. and that the claim for compensation had been agreed to be settled on the terms and conditions of this new agreement, that was to say :—

> " (*a*) that (at the request of the Minister and for the consideration hereinafter mentioned) the Board shall grant to the Company a lease upon the terms hereinafter set forth, of that piece of land, hereinafter described, being part of the land now being reclaimed by the Board at Mechanics Bay, in the said city (which was land closely adjacent to the piece marked ' V ') ;
>
> " (*b*) that the Minister shall pay the sum of five thousand pounds to the Company at the time mentioned in paragraph 2 hereof ;
>
> " (*c*) that the Company shall have the right to occupy the land taken by the said Proclamation upon the terms and for the period hereinafter set forth " ;

the agreement (which was under seal) then witnessed :—

> " that in pursuance of the premises and upon payment to the Board of the sum of seven thousand five hundred pounds at the time mentioned in paragraph 2 hereof, the Board shall grant to the Company, and the Company shall accept, a lease of a piece of land, being Lots two to seven inclusive of the reclamation of Mechanics Bay,"

for forty-two years from the dates at which the lots were ready for occupation. The intention was defined to be that the Company should have at least a ten years' extension of the term of their old lease, and the rent was to be £200. The agreement went on to provide, in paragraph 2, as follows :—

> " The Minister shall pay to the Board the said sum of seven thousand five hundred pounds when the Board grants and the Company accepts

> the said lease of the said reclaimed land, and the Minister shall pay to the Company the said sum of five thousand pounds within one calendar month from the date the Company gives up possession of its present premises."

It is convenient to pause at this point in the story in order to ascertain what the legal position was. Section 7 of the Act of 1912 had conferred on the appellant Board power to grant a lease to Burns and Company if such a lease had been agreed upon between the Minister, the appellant Board and Burns and Company, and the Minister was given the power to pay to the Board such sum as might be agreed on as consideration for the Board granting the lease. He was authorised, without further appropriation by Parliament than the Act itself gave, to pay to the Board " out of the Public Works Fund " such sum as might be payable to the Board by the Crown in accordance with any agreement so made. Pausing here, their Lordships are unable to construe the statute as doing more than conferring on the Minister the power to enter into an agreement, and, but only if and when a lease was granted by the Board in accordance with it, to pay an amount to be settled by negotiation as the consideration for it, out of a fund to be provided by Parliament. The whole matter remains so far an option to the Minister. It is this option which the subsequent agreement of the 2nd September, 1913, further defines. An arrangement had been come to between the Minister and Burns and Company by which their claim for £21,894 10*s*. was to be satisfied by the grant of the new lease by the Board, if requested by the Minister to grant it, and the payment to Burns and Company of £5,000. If the Minister asked the Board to grant the lease and paid them £7,500 they were to grant it, but this sum was only made payable when the Board actually granted the lease and the Company accepted it. The character of the transaction, which was optional for the Minister under the Act, accordingly remained similarly optional under the terms of the agreement.

An interval of nearly a year after the agreement elapsed without action being taken, and then a new suggestion was made. The Secretary of the appellant Board wrote to a Government official, the General Manager of the State Railways, on the 25th August, 1914, saying that in the course of a conversation between the Chairman of his Board and the General Manager it was understood that there was a possibility of the Government resuming the area marked " Z," which included the lots which were to be leased to Burns and Company. The Secretary asked the General Manager whether he desired the appellant Board to refrain from proceeding in terms of the agreement, and, if so, on what conditions. On the 27th October following the Secretary of the Board again wrote saying that the new lots were ready for occupation, and that the Board was in a position to grant the lease to Burns and Company and had included the £7,500 in a statement, which he enclosed, of the amount due to the appellants from the Government. This, he added, was in accordance with the understanding already referred to between the Chairman of

the Board and the General Manager. The Railway Department, however, replied in a letter stating that the £7,500 had been deducted from the amount shown by the statement, pending consideration. The Manager answered this letter by insisting that as the Board was in a position to grant the lease, and that it had only not been issued because of the request of the General Manager, the £7,500 was payable. In the end, on the 3rd December, 1914, the District Engineer of the Railway Department wrote to the Secretary that a voucher for the £7,500 had been passed for payment. Subsequently, however, the General Manager wrote to the appellants that he had been advised by the Solicitor-General that the £7,500 paid over to the appellants, in accordance with the voucher passed for payment, had been an illegal payment of public money, and that he had therefore deducted the amount from the total claim made by the appellant Board for reclamations of £25,103 13*s.* 5*d.*

From what their Lordships have already stated as their view of the transaction, it is apparent that the £7,500 never became payable. The option was never exercised under which Burns and Company were to be declared by the Government entitled to the lease. In point of fact, the Government shortly after made a different settlement of the claim of Burns and Company, under which the latter did not get the land which was to have been included in it. For in August, 1915, acting under their statutory powers, the Government resumed a part of the land belonging to the appellant Board which included what Burns and Company were to have had. The appellant Board were compensated for this resumption of the entire land in the manner and on the footing directed by the Harbours Act, 1908, and it thereupon became impossible for them to make a lease to Burns and Company of land to which they had no longer a title, and for the whole of which they had been paid by the Government. An independent settlement was made by the Government with Burns and Company who received, in addition to the £5,000 mentioned in the agreement of the 2nd September, 1913, a further sum of £14,500, and also a tenancy of certain premises for two years free of rent, in full satisfaction of all the Company's claims. As already stated, the appellants were compensated for the whole of the land in question, inasmuch as they had not to grant any lease, of the part at one time contemplated, to Burns and Company.

Their Lordships are of opinion that under these circumstances the appellants never became entitled under any contractual title to payment of the £7,500.

But it was argued that, as the voucher for this amount had been passed, and the money paid, the transaction could not now be reopened. It was said, and it appears to have been the fact, that the Controller and Auditor-General subsequently passed the sum handed over as having been payable out of public moneys appropriated in general terms for railway services by the New Zealand Parliament in 1914. But this is not a sufficient answer to the contention that the payment was not authorised. Section 7

of the Act of 1912 provides that the sum which was agreed on at £7,500 was to be payable to the appellants only on a condition, viz., on the granting of the lease, which was to be the consideration. The provision which Parliament thus made was to be in itself a sufficient appropriation, but only operative if the condition was actually satisfied. Their Lordships have not been referred to any appropriation or other Act which altered these terms. If, as must therefore be taken to be the case, it remained operative, the authority given by Parliament is merely the conditional appropriation provided in Section 7, for a condition which was not fulfilled. The payment was accordingly an illegal one, which no merely executive ratification, even with the concurrence of the Controller and Auditor-General, could divest of its illegal character. For it has been a principle of the British Constitution now for more than two centuries, a principle which their Lordships understand to have been inherited in the Constitution of New Zealand with the same stringency, that no money can be taken out of the Consolidated Fund into which the revenues of the State have been paid, excepting under a distinct authorisation from Parliament itself. The days are long gone by in which the Crown, or its servants, apart from Parliament, could give such an authorisation or ratify an improper payment. Any payment out of the Consolidated Fund made without Parliamentary authority is simply illegal and *ultra vires*, and may be recovered by the Government if it can, as here, be traced.

Their Lordships are unable to agree with the reasoning of the Chief Justice to the effect that the money had not really to be paid under the authority of Section 7 of the Act of 1912. Unless this section had been repealed, its terms were imperative when the claim of the appellant Board was entertained. They are unable to agree with the Chief Justice in the view that there is evidence of any later appropriation made by Parliament which dispensed with the condition imposed in 1912. If so to invoke analogies of what might be held in a question between subject and subject is hardly relevant. They find themselves more at one with the very different view of the majority of the learned Judges in the Supreme Court, especially with the opinions expressed towards the end of their respective judgments by Chapman J. and Hosking J.

For these reasons they will humbly advise His Majesty that this appeal should be dismissed, with costs.

In the Privy Council.

THE AUCKLAND HARBOUR BOARD

v.

THE KING.

DELIVERED BY VISCOUNT HALDANE.

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