Privy Council Appeal No. 24 of 1934.

The Standard Fuel Company of Toronto, Limited - - - *Appellant*

v.

The Toronto Terminals Railway Company - - - - *Respondent*

FROM

THE COURT OF APPEAL FOR ONTARIO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 17TH MAY, 1935.

Present at the Hearing:

LORD BLANESBURGH.

LORD THANKERTON.

LORD RUSSELL OF KILLOWEN.

[*Delivered by* LORD RUSSELL OF KILLOWEN.]

The respondent (hereinafter referred to as the Railway Company) was empowered to expropriate lands for the construction of a railway viaduct on land reclaimed from Toronto Harbour on Lake Ontario. On the 5th November, 1926, a notice of expropriation was given by the Railway Company to one Boulton as owner, and the appellant (hereinafter referred to as the Fuel Company) as tenant of certain lands near the foot of Church Street, Toronto; the Railway Company offering to pay $160,000.00 to the owner and $40,000.00 to the tenant in full compensation for the lands and all damage caused by the exercise of the power of expropriation. These offers were not accepted, and an arbitration accordingly took place under the provisions of the Railway Act, 1919 (9 & 10 Geo. V. cap. 68).

By an arrangement come to between the land owner Boulton and the Fuel Company (to which, however, the Railway Company was not a party), the arbitrator was asked to treat the claim for compensation as one claim; i.e. there was to be a sum assessed in respect of the value of the land as though only one person was interested therein (the sum being divisible between Boulton and the Fuel Company in undisclosed proportions); and the compensation, if any, for buildings and business disturbance was to be determined as if the land and business belonged to a single owner. In short the claim was to be treated as one claim.

Evidence was given before the arbitrator as to the value of the land by an expert on each side. The land was used by the Fuel Company for its business as a dealer in coal and coke, with buildings for that purpose erected upon it. It is, however, clear that neither of the experts treated the land, for the purposes of his valuation, as a coal yard, or paid any attention to the value of the buildings upon it. Each took into account the various purposes for which the property could advantageously be used, and valued it upon the footing that the site had been cleared of its business and buildings, and was a vacant site available for any use to which it could most advantageously be put. In this way it is obvious that a very much larger figure must have been reached than the value of the land as a coal yard. Even upon this footing the two experts differed widely in their figures; Mr. McBrien for the claimants fixing the value at $395,939.00, Mr. Poucher for the Railway Company fixing it at $214,637.00. The arbitrator accepted the exact figures of Mr. Poucher, who in arriving at them declined to treat the buildings as an element of any value; for he said " I would not consider that those buildings would add anything to the value of that land because I think if the land were used to the best advantage the buildings would have to be demolished."

Having accepted the value of the land arrived at upon this footing, the arbitrator by his award awarded $214,637.00 to be paid to Boulton with interest. In addition he awarded a sum of $102,006.69 and interest to be paid to the Fuel Company as full compensation for the disturbance of business and for the value of the buildings, plant, equipment, etc. This sum was (as appears from the reasons of the arbitrator) composed of $62,006.69 for the value of the buildings, etc., and $40,000.00 for disturbance of business.

The Railway Company appealed to the Court of Appeal for Ontario. This right of appeal is, according to the express terms of the Railway Act, 1919 (section 232), a right to appeal from the award upon any question of law or fact. As pointed out by this Board in the case of *Ruddy* v. *The Toronto Eastern Railway Company* (21 Can. Railway Cases 377) the award is thus placed in a position similar to that of the judgment of a trial Judge. From his judgment an appeal is always open both upon fact and law; though upon questions of fact an Appeal Court will not interfere with the decision of the Judge who has seen the witnesses, unless there is some good and special reason to throw doubt on the soundness of his conclusions.

In the present case the Court of Appeal set aside the award of $102,006.69 and awarded a sum of $20,000.00 and interest to the Fuel Company in full of all compensation to that Company other than its share in the sum of $214,637.00 awarded as compensation for the lands. From

the judgments delivered it would appear that Mulock, C.J.O. and Middleton J.A. were of opinion that nothing should be awarded as compensation for buildings, etc., or for business disturbance, but that a sum of $20,000.00 might properly be allowed in respect of compulsory taking and for expenses cast upon the tenant in changing the site of his business premises. The reason for excluding all compensation for buildings and business disturbance was the fact that the large value attributed to the land was attributed to it as a potential site for a factory or some other industry, and was only arrived at upon the footing that the coal business and the buildings in connection with that business were so detrimental to the value of the land, that unless and until they were removed from the land its full value could not be realised. To allow the increased factory site value to stand, and in addition to allow compensation for buildings and business removal would in effect be to make the Railway Company pay twice over.

Magee J.A. took a different view. Without in any way dealing with the arguments which prevailed with the majority of the Court, he merely stated that $50,000.00 would be a proper amount to pay in place of the $102,006.69 which had been awarded for buildings, etc., and business disturbance.

An appeal having been brought to His Majesty in Council, the matter has been fully argued before their Lordships' Board. The case is *sui generis.* It is no doubt a peculiar case, dependent on its own facts, the peculiarity arising from the curious arrangement come to between the owner and the tenant, that the claims should be treated as one claim for compensation, and from the fact that as a result the value of the land has been placed at a higher figure by being treated as a cleared site available for any use to which it could most advantageously be put.

Their Lordships having considered the relevant evidence in the case and the arguments which have been adduced, are of opinion that the view taken by the majority in the Court of Appeal was correct. The value of the land (in which the tenant takes a stipulated though undisclosed share) has been brought out at an increased figure by having been valued on the footing above indicated, i.e. upon a footing which presupposes that both the buildings and the business have already disappeared. From that part of the award no appeal has been taken by Boulton, by the Fuel Company, or at all, and it stands. On that footing the value of the buildings, etc., and compensation for business disturbance can no longer properly enter into the matter, not because the value of the land has been increased by any specific figure representing actually either the value of the buildings or damages for business disturbance; but because an increased value has

been attributed to the land upon a hypothesis which is inconsistent with the existence of a claim either for the value of buildings or for damages for business disturbance.

In regard to the sum of $20,000.00 awarded by the Court of Appeal, there is no appeal in relation thereto, and their Lordships need say nothing about it, except that it will necessarily stand.

In the result their Lordships are of opinion that the appeal should be dismissed, and they will humbly advise His Majesty accordingly.

The Fuel Company will pay to the Railway Company its costs of the appeal, but subject to the set off next mentioned. The Railway Company at one time took the formal objection that no appeal lay as of right to their Lordships' Board. This objection to jurisdiction was withdrawn at the hearing, but it had resulted in the presentation by the Fuel Company of a Petition for special leave to appeal, should such leave prove to be necessary. Their Lordships are of opinion that the Fuel Company's costs of this petition should be taxed and set off against the costs to be paid to the Railway Company by the Fuel Company.

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In the Privy Council.

THE STANDARD FUEL COMPANY OF TORONTO, LIMITED

v.

THE TORONTO TERMINALS RAILWAY COMPANY.

DELIVERED BY LORD RUSSELL OF KILLOWEN.

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