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27, 1950

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IN THE PRIVY COUNCIL  
ON APPEAL FROM  
THE HIGH COURT OF AUSTRALIA

UNIVERSITY OF LONDON  
W.C.I. 5TH  
20 JUL 1953  
INSTITUTE OF ADVANCED  
LEGAL STUDIES

B E T W E E N:

GRACE BROS. PTY. LIMITED  
(Plaintiff) Appellant

and

THE COMMONWEALTH OF AUSTRALIA and  
THE MINISTER OF STATE FOR THE INTERIOR  
(Defendants) Respondents

CASE FOR THE APPELLANT

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B E T W E E N GRACE BROS. PTY. LIMITED  
(Plaintiff)  
Appellant

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CASE FOR THE APPELLANT

p.3 1.22.

- (1) The Appellant is a company duly incorporated according to the laws of the State of New South Wales and at all material times was the registered proprietor of certain land contained in Certificate of Title registered Volume 5078 Folio 163 under the provisions of the Real Property Act 1900 as amended of the State of New South Wales upon which land is erected a building known as the "Grace Building". The said building is situate on the corner of York, King and Clarence Streets, Sydney, in the said State and comprises a basement, ground and eleven upper floors.
- (2) By notification published in the Commonwealth of Australia Gazette No. 216 of 1945 on the eighth day of November One thousand nine hundred and forty five the Respondents purported to acquire the said land and building pursuant to the Lands Acquisition Act 1906-1936. The said notification (except for the description of the land affected being the said land) is in the words and figures following:

"It is hereby notified and declared by

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His Royal Highness the Governor General acting with the advice of the Federal Executive Council that the land hereunder described has been acquired by the Commonwealth under the Lands Acquisition Act 1906/1936 for the following public purpose namely: Purposes of the Commonwealth at Sydney, New South Wales".

- (3) The Respondents thereupon entered upon the said land and building and commenced alterations and demolitions thereon.
- p.1. (4) The Appellant thereupon commenced a suit in the original jurisdiction of the High Court of Australia against the Respondents wherein it claimed a declaration that the Lands Acquisition Act 1906-1936 was void as being ultra vires the Constitution of the Respondent Commonwealth and alternatively a declaration that the notification referred to in paragraph (2) hereof was void as not being authorised by the said Act, and also asked for an injunction to restrain the Respondents from dealing with or interfering with the said land and building.
- p.2 l.9.
- p.6 l.30. (5) The Appellant moved for an interlocutory injunction; the Respondents demurred to the Statement of Claim asserting the validity of the said Act and of the said notification and both matters were argued together before the Full Court of the High Court of Australia on the Twenty eighth day of February and the First day of March One thousand nine hundred and forty six.
- p.13.
- pp.14 - 15. (6) By an order made by the said Full Court of the High Court of Australia on the seventeenth day of April One thousand nine hundred and forty six the demurrer was allowed and the motion for the interlocutory injunction was dismissed with costs including all reserved costs and the action was dismissed with costs.
- pp.47 - 49. (7) By an order made on the fourth day of March One thousand nine hundred and forty nine by the King's Most Excellent Majesty in Council

the Appellant was given leave to appeal against the said order of the said High Court as to the questions :

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- (a) whether the Appellant is entitled to be compensated under Section 29 (1) of the said Lands Acquisition Act 1906-1936 or upon a common law basis (i.e. whether the said Section 29 (1) is ultra vires or not), and
- (b) as to the principle upon which such compensation is to be given to the Appellant

but not as to whether the actual acquisition of the said land under the said Act is invalid.

- (8) The Lands Acquisition Act, 1906-1936, so far as material provides as follows:-

"5. In this Act, unless the contrary intention appears --

.....

"Land" includes any estate or interest in land (legal or equitable), and any easement, right, power, or privilege over, in, or in connexion with land, and also includes Crown land, but does not include public parks vested in or under the control of municipal or local authorities and dedicated to or reserved for the recreation of the people, or such other lands dedicated to or reserved for the use and enjoyment of the people as have been specified by..... Proclamation;

.....

"Owner" includes, with respect to land, any person who under this Act is enabled to sell or convey the land to the Commonwealth, and means, with respect to Crown land, the State to which the land belongs;

"Public purpose" means any purpose in respect of which the Parliament has power to make laws, but shall not include the acquisition of territory for the Seat of Government of the Commonwealth under the Constitution;

"Special Act" means any Act authorizing the carrying out of any public work in connexion with any public purpose;

.....

.....

PART II. -- ACQUISITION OF LAND.

Division I. - Modes of Acquisition.

13. The Commonwealth may acquire any land for public purposes --
- (a) by agreement with the owner; or
  - (b) by compulsory process.

Division 3. - Acquisition by Compulsory Process.

15. (1) The Governor-General may direct that any land may be acquired by the Commonwealth from the owner by compulsory process.
- (2) The Governor-General may thereupon, by notification published in the Gazette, declare that the land has been acquired under this Act for the public purpose therein expressed.
- (3) A copy of the notification shall be laid before both Houses of the Parliament within fourteen days after its publication in the Gazette if the Parliament is then sitting, and if not then within fourteen days after the next meeting of the Parliament.
16. (1) Upon the publication of the notification in the Gazette, the

land described therein shall, by force of this Act --

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- (a) be vested in the Commonwealth; and
- (b) be freed and discharged from all trusts, obligations, estates, interests, contracts, licenses, charges, rates, and easements,

to the intent that the legal estate therein, together with all rights and powers incident thereto or conferred by this Act, shall be vested in the Commonwealth.

- (2) Where the land described in the notification is Crown land of a State, or is by virtue of any law of a State vested in any person on behalf of the Crown or for any public purpose, the notification shall also have the effect of cancelling any dedication or reservation to which the land was subject at the date of the publication of the notification.

- 17. Upon the publication of the notification in the Gazette, the estate and interest of every person entitled to the land specified in the notification, and the title of the State to any Crown land specified in the notification, shall be taken to have been converted into a claim for compensation.

#### PART IV. -- COMPENSATION.

##### Division 1. -- Right to Compensation.

- 26. Where any land (other than Crown land) is acquired by compulsory process, the owner of the land shall, if deprived of the land in whole or in part, be entitled to compensation under this Act.
- 28. (1) In determining the compensation

under this Act, regard shall be had (subject to this Act) to the following matters:-

- (a) The value of the land acquired;
  - (b) The damage caused by the severance of the land acquired from other land of the person entitled to compensation; and
  - (c) The enhancement or depreciation in value of other land adjoining the land taken or severed therefrom of the person entitled to compensation by reason of the carrying out of the public purpose for which the acquired land was acquired.
- (2) The enhancement or depreciation in value shall be set off against or added to the amount of the value and damage specified in paragraphs (a) and (b) of sub-section (1) of this section.

29. (1) The value of any land acquired by compulsory process shall be assessed as follows:-

- (a) In the case of land acquired for a public purpose not authorized by a Special Act, according to the value of the land on the first day of January last preceding the date of acquisition; and
  - (b) In the case of land acquired for a public purpose authorized by a Special Act, according to the value of the land on the first day of January last preceding the first day of the Parliament in which the Special Act was passed.
- (2) The value of the land shall be assessed without reference to any increase in value arising from the

proposal to carry out the public purpose.

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Division 5. -- Payment of Compensation.

40. Compensation shall bear interest at the rate of three per centum per annum from the date of the acquisition of the land, or the time when the right to compensation arose, until payment thereof is made to the claimant or until the amount thereof has been deposited in the Treasury.

Provided that, where the compensation awarded in an action for compensation, or determined in a judicial proceeding, is not more than the amount offered by the Minister in satisfaction of the claim for compensation, the compensation shall only bear interest to the date when the offer of the Minister is communicated to the claimant.

42. Any claimant or person entitled to any compensation shall, upon application to the Minister and upon making out to the satisfaction of the Attorney-General a title to the land in respect of which the compensation is payable, and upon executing such conveyances or assurances as the Attorney-General directs, be entitled to receive payment of the compensation".

(9) Upon this appeal the principal questions which will arise are:-

- (a) The true construction of the said Section 29;
- (b) The validity of the said Section 29 upon its true construction;
- (c) The true basis of compensation including the question as to the provision of adequate interest.



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(10) As to the first of these questions the Appellant submits that upon the true construction of Sections 28 and 29 the Act purports to limit compensation to the value of the land as it was on the first day of January in the year of acquisition in its then physical state and according to its then use.

p.15, l.23.  
p.46.

The Justices of the said High Court or at least a majority of them, Starke J. not expressing any specific opinion upon this point, thought that upon the true construction of Sections 28 and 29 the Act provided that the compensation should be the value of the land of the dispossessed owner in its condition at the date of acquisition but assessed upon a scale of values appropriate to the first day of January in the year of acquisition.

p.19, l.5.

Latham C.J. in this regard said:

(72 C.L.R.  
p. 281)

"The assessment of value which is required by ss. 28 and 29 is an assessment of the value of the land acquired; that is, of the land as it is when it is acquired - in its then ownership and in its then physical state, regard being had to all its actual and potential uses. Any changes in the land itself and in the possibility of using the land since the preceding 1st January are taken into account under the Act, though the value of the land so regarded is taken at an earlier date".

p.24, l.45.

Starke J. said:

(72 C.L.R.  
pp.285-286)

"The special provisions in s.28 provide that enhancement or depreciation in value of other land shall be set off against or added to the amount of the value and damage specified in the section whilst those in s. 29 provide that the value of the land shall be assessed without reference to any increase in value arising from the proposal to carry out the public

purpose for which the land is acquired. But such provisions are usual and certainly not unreasonable. But s.29 also provides that "The value of any land acquired by compulsory process shall be assessed as follows:-

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- (a) In the case of land acquired for a public purpose not authorized by a Special Act, according to the value of the land on the first day of January last preceding the date of acquisition; and
- (b) In the case of land acquired for a public purpose authorised by a Special Act, according to the value of the land on the first day of January last preceding the first day of the Parliament in which the Special Act was passed".

The latter provision (Par. (b) is common enough and its object, I apprehend, is to ascertain the true value of the land before the exercise of the compulsory powers. And the provision in par. (a) has much the same object. Once it is known or rumoured that a Government Department is buying or acquiring land a rise in value may be expected. The true value of the land is thus ascertained at about the time of a compulsory acquisition".

Dixon J. said:

p.32, l.2.

"That point depends upon s. 29 (1), which directs in effect that where the acquisition is not authorised by a Special Act the value of the land should be assessed as at the first of January preceding the taking, and, where there is a special Act, as at the first of January preceding the first day of the Parliament in which the special Act was passed.

(72 C.L.R.  
pp.291-292)

This provision appears to have been directed to obtaining a value uninfluenced by the prospect of the Commonwealth's acquiring the land, a thing for which sub-s.(2) of s.29 attempts again to provide. It is said, however, to be unjust to fix an anterior date arbitrarily because (1) values may have

greatly changed, and (2) the property may have been improved. The second complaint is not, I think, in accordance with the meaning of the provision, which appears to me to relate only to values prevailing and not to the state of the property.

The first complaint depends upon the conception of a value as at the exact date of the acquisition. In conditions of great economic instability, when the measurement of values in money fluctuated violently and rapidly, it perhaps might be that just terms would require not only valuation, but payment, almost as at the date of acquisition".

p.37, l.35.

McTiernan J. said:

(72 C.L.R.  
p.296)

"The sub-section is not open to attack on the ground that its effect would be to deprive the owner of the value of improvements made between the date fixed by the sub-section and the date of acquisition. According to its proper interpretation the sub-section requires the compensation to be assessed according to its value at the fixed date, but not according to its then physical state".

p.43, l.43.

On this aspect of the case Williams J. agreed with the majority of the Court and said:

(72 C.L.R.  
p.301)

"The effect of s. 29(1) is to require this value to be assessed as at 1st January 1945. There was a good deal of argument as to the meaning of this sub-section. In my opinion it means that the property is to be valued on its actual physical condition at the date of expropriation with all its existing advantages and all its possibilities, but this value is to be assessed at a sum which a reasonably willing vendor would have been agreeable to accept and a reasonably willing purchaser would have been agreeable to pay rather than fail to obtain the property in a friendly negotiation which took place on the previous 1st January".

(11) It is respectfully submitted that the construction of the section adopted by the Justices of the High Court or by a majority

of them allowing the valuation to take account of changes in the physical condition of the property and changes in its actual or potential user, although those changes had come only after the preceding 1st January, is inadmissible on the wording of the Act. Had this construction not been adopted it seems probable that a majority of the Court, at least, would have accepted the Appellant's submission as to invalidity. Indeed, it is difficult to see how they could have arrived at any other conclusion having regard to the fact that in the course of less than a single year the value of the land may be increased many times, for example, by the erection of buildings or the reconstruction of existing buildings. Further the value must it is respectfully submitted be the value to the dispossessed owner who may have acquired the land after the commencement of the year for a specific purpose not contemplated by anyone else possibly after waiting for a number of years for the land to come into the market and the price paid by him for it may bear little or no relation to its value in the market on the previous 1st January.

The Appellant respectfully submits that the validity or invalidity of the section should be decided upon the basis that it requires that changes of physical condition, or user, actual or potential, between the preceding 1st January and the date of acquisition cannot enter into the computation of value for the purpose of compensation.

- (12) As to the second of these questions, namely as to the validity of Section 29 the Appellant submits that whether or not its construction of Sections 28 and 29 is accepted Section 29 fails to provide just terms of acquisition and is invalid. The Appellant submits that placitum (XXXI) of Section 51 of the Constitution gives a power to legislate for the acquisition of property upon just terms and that therefore the provision in the legislation of just terms is a condition of constitutional validity. The Commonwealth has no power of eminent domain; the placitum

contains a power to acquire compulsorily but only on terms of giving just terms. The Commonwealth has no rights apart from the Legislation and it is not a case of arbitrating to arrive at what is fair between the Crown and the owner but of determining what are just terms upon which an owner shall be dispossessed. The uniform rule in assessing compensation when such compensation is not provided for by statutes passed by plenary and unlimited legislatures is to give the value of the thing taken and this can only be just if the thing taken is valued as at the date of the taking. "Just terms" are not satisfied by reasonable terms or by reasonably just terms, or by not obviously unjust terms. The question of whether or not the precise terms provided by the law are just terms being a Condition of constitutional validity is a matter for the determination of the Court

- (i) If the Appellant's construction be accepted and the compensation to be paid to a dispossessed owner under Sections 28 and 29 is limited to the value of the land as it was on 1st January in the year of acquisition then such a provision clearly fails to provide just terms of acquisition in that it does not even ensure the replacement by compensation of the value to the dispossessed owner of the property in fact taken;
- (ii) If the construction adopted by the Justices of the High Court is correct Section 29 fails to provide just terms of acquisition, Section 29 (2) making full provision against any increase in value by reason of any proposal to carry out the public purpose, and there being no reason to assess the value of the property in fact taken as at any date anterior to the date of acquisition. Values may vary greatly between the preceding first day of January and the date of acquisition due to circumstances unconnected with the proposal to carry out the particular public purpose as for example by the carrying

out of some other public purpose or the proposed provision of public amenities particularly in areas which are being rapidly developed or by seasonal variation in lands subject to drought and quick recovery therefrom. It is further respectfully submitted that in a general law authorising acquisition it is not enough that the terms provided may be just in some circumstances though unjust in others; that the constitutional condition requires that in such a law the provisions for terms of acquisition shall be so expressed and so flexible in operation as to afford just terms in all cases which it may reasonably be intended to cover

(iii) In either case just terms of acquisition require the payment of adequate interest between the date of acquisition and the date of actual payment upon the amount otherwise due to the dispossessed owner; Section 40 does not so provide.

(13) As to (i) above no Justice decides or suggests that an Act so providing would afford just terms of acquisition.

As to (ii) above Latham C.J. said:-

"It is contended for the plaintiff that the Act fails to provide just terms for the acquisition of property for four reasons. In the first place, s.29 requires compensation to be assessed according to the value of the land on the 1st day of January last preceding the date of acquisition. It is argued that an expropriated owner must, if he is treated justly, be entitled to obtain the value of his property as at the date of acquisition.

p.17, 1.3.  
(72 C.L.R.  
pp.279-280)

In my opinion this argument takes too narrow a view of the powers of Parliament under s. 51 (xxxi). Section 51 (xxxi) empowers Parliament to enact legislation providing a method of acquiring property, and imposes upon Parliament the necessity of providing just terms for the acquisition of property. Payment of the value of the property at the time of acquisition would

doubtless be a just basis of compensation in most cases, but there might be particular cases in which it could reasonably be contended that the payment of the value as at that date was not entirely just. The value of the property might have been depreciated in advance by Government action, as, for example, by the acquisition by the Government in a residential area of land near the land as to which the question of compensation arose, it being the known intention of the Government to use the land for some industrial or other purpose which had depreciated the value of the land acquired. In such a case it might be said that it would be unfair to limit the owner to receiving by way of compensation the value at the date of acquisition. Some criticism of the justice of terms of acquisition of property depending upon the circumstances of particular cases could often be advanced with some reason. I do not think that the terms of s. 51 (xxxi) entitle the Court to declare a statute providing a general method for the acquisition of property invalid because in particular cases it was possible to devise a more just scheme. The Court should not, in my opinion, hold such legislation to be invalid unless it is such that a reasonable man could not regard the terms of acquisition as being just.

Justice involves consideration of the interests of the community as well as of the person whose property is acquired. In some cases the announcement of the intention of the Government to acquire land might itself put up the value of the land. It is at least not obviously unjust to make provision against the community being compelled to pay higher prices for such a reason".

p. 23, 1.40.

(72 C.L.R.  
p.285).

Starke J. said:

"The Act is attacked on the ground that it fails to provide 'just terms' for the acquisition of lands as required by the Constitution, s. 51 (xxxi). This

contention was based upon the proposition that the Constitution requires that any law made by Parliament with respect to the acquisition of lands shall provide compensation to the owner of any land acquired, the value of the land to him with all its potentialities and with all the actual use of it by him. Apparently, according to this contention, the power conferred upon the Parliament is wholly for the protection and benefit of an owner (whether a State or person) without any regard to the interests of the community as a whole.

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But, in my opinion, the contention is radically unsound though it finds some support in the opinions of members of this Court in the case of the Australian Apple and Pear Marketing Board v. Tonking ((1942) 66 C.L.R. 77, at pp. 84, 85, 106), and I venture to repeat what I said in Minister of State for the Army v. Dalziel ((1944) 68 C.L.R. 261, at p. 291):- "The constitutional power given to the Commonwealth by s. 51 (xxxi) is a legislative power and not, as in the Fifth Amendment of the Constitution of the United States of America, a provision that private property shall not be taken for public use without just compensation. Under the Australian Constitution the terms of acquisition are, within reason, matters for legislative judgment and discretion. It does not follow that terms are unjust merely because 'the ordinary established principles of the law of compensation for the compulsory taking of property' have been altered, limited or departed from, any more than it follows that a law is unjust merely because the provisions of the law are accompanied by some qualification or some exception which some judges think ought not to be there. The law must be so unreasonable as to terms that it cannot find justification in the minds of reasonable men".

Dixon J. said:

"The legislative power given by s. 51 (xxxi) is to make laws with respect to a

p.30, l.30.

(72 C.L.R.  
pp.290-291)



compound conception, namely, "acquisition-on-just-terms". "Just terms" doubtless forms a part of the definition of the subject matter, and in that sense amounts to a condition which the law must satisfy. But the question for the Court when validity is in issue is whether the legislation answers the description of a law with respect to acquisition upon just terms. In considering such a matter much assistance may be derived from American judicial decisions and juridical writings dealing with analogous difficulties, but they must be used with care and, in my opinion, cannot be applied directly to s. 51 (xxxi). Under that paragraph the validity of any general law cannot, I think, be tested by inquiring whether it will be certain to operate in every individual case to place the owner in a situation in which in all respects he will be as well off as if the acquisition had not taken place. The inquiry rather must be whether the law amounts to a true attempt to provide fair and just standards of compensating or rehabilitating the individual considered as an owner of property, fair and just as between him and the government of the country. I say "the individual" because what is just as between the Commonwealth and a State, two Governments, may depend on special considerations not applicable to an individual.

The power conferred by s. 51 (xxxi) is express, and it was introduced as a specific power, not, like the Fifth Amendment, for the purpose of protecting the subject or citizen, but primarily to make certain that the Commonwealth possessed a power compulsorily to acquire property, particularly from the States. The condition "on just terms" was included to prevent arbitrary exercises of the power at the expense of a State or the subject.

In deciding whether any given law is within the power the Court must, of course, examine the justice of the terms provided. But it is a legislative function

to provide the terms, and the Constitution does not mean to deprive the legislature of all discretion in determining what is just. Nor does justice to the subject or to the State demand a disregard of the interests of the public or of the Commonwealth".

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McTiernan J. said:

p.36, l.14.

"The words 'just terms' are part of the composition of the power contained in s.51 (xxxi). It is a specific legislative power to make laws for 'the acquisition of property on just terms' from owners of the two classes and for the purposes to which s. 51 (xxxi) refers. It follows that Parliament has a discretion not only to provide for the acquisition of any property but also to enact the just terms which it thinks fit to be part of any law which it makes in pursuance of this power. In my opinion, if the terms enacted by Parliament might reasonably be regarded as just terms, there is no ground for holding that the law is not a law with respect to the acquisition of property on just terms. The question whether the terms enacted by Parliament might reasonably be regarded as just terms is for the Court to decide. If the Court decides that the terms might reasonably be regarded as just it will not declare the terms unjust and in excess of the power, even if the Court entertained an opinion that other terms would appear to be fairer. The words 'just terms' imply that the terms of acquisition should be just as between the owner of the acquired property and the Commonwealth".

(72 C.L.R.  
pp.294-295)

Williams J., who dissented from the majority of the Court on this point said:

p.44, l.10

"It was contended for the defendants that the antecedent dates were fixed because land values are apt to rise as soon as it is known that it is proposed to pass legislation to acquire land in that neighbourhood for some public purpose, and that these dates were chosen to ensure that the price paid for the land was not enhanced in this way. But

(72 C.L.R.  
pp. 301-  
302)

this danger is guarded against by s.29 (2) which provides that the value of the land shall be assessed without reference to any increase in value arising from the proposal to carry out the public purpose. It is clear in my opinion that to substitute an arbitrary date for the actual date of acquisition is liable to work injustice in many cases. In *Spencer v. The Commonwealth* (1907) 5 C.L.R. 418, at p.440) Isaacs J. said, in reference to a similar section in the property for Public Purposes Acquisition Act 1901, that "Prosperity unexpected, or depression which no man would ever have anticipated, if happening after the date named, must be alike disregarded". His Honour was there dealing with suburban land, and in the case of such land all kinds of improvements might take place between the arbitrary date and the date of notification due to causes which have nothing to do with the proposal to carry out the public purpose for which the land is to be resumed such as the construction of roads or pavements by the local council, or of water and sewerage works by the local water and sewerage board. Country land might be subject to a severe drought on the arbitrary date but might be enjoying a bountiful season on the date of the notification. Examples might be multiplied almost indefinitely of how the values on the two dates might differ materially quite irrespective of the carrying out of the public purpose for which the land was resumed. Mr Mason pointed out that the difference in values might be in favour of or against the dispossessed owner but this is to my mind immaterial. It is no satisfaction to an owner who has not received a fair equivalent in money for property of which he has been dispossessed to know that another owner has received more than the real value of his land. It is only if the value is assessed at the date of acquisition that an owner will in every instance be fairly and justly compensated for the loss of his property. In my opinion, therefore, s. 29 (1) (a) (and it would appear to follow s. 29 (1) (b) is not authorized by s. 51 (xxxi) of the Constitution and is invalid".

As to (iii) above Latham C.J. said:

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"In my opinion there is not, up to the present time, any decision by a majority of the Court that provision for payment of interest from the date of acquisition must be made in order to render the terms of acquisition of property just. If there were such a decision the plaintiff would have a useful starting point for the development of the objection now under consideration. In the absence of any such decision, however, s. 40, limiting the rate of interest allowable to three per cent may, in my opinion, be regarded as a provision relating, not to the assessment of compensation, but as a provision which, while allowing and recognizing the obligation to pay full and just compensation, prescribes a maximum rate of interest of three per cent, thus imposing a limit upon the discretion of the Court in applying the rule of equity which was held to be relevant and applicable by the majority of the Court in the Huon Transport Case (1945) 70 C.L.R. 293) and again in the Marine Board Case ((1945) 70 C.L.R. 518). If s. 40 is so regarded, the limitation of the rate of interest to three per cent cannot be relied upon in order to show that the provisions for compensation contained in the Act are unjust".

p.21, l.1.  
(72 C.L.R.  
pp. 282-  
283)

Starke J. said that that submission was frivolous.

p.25, l.44.

Dixon J. said:

p.34, l.17.

"The third ground of attack on the justice of the terms of the Act is that s. 40 provides that compensation shall bear interest from the date of the acquisition, or the time when the right to compensation arose, until payment at three per cent per annum. It is said that the rate is so low as to be unjust, and that the only just course is to fix the rate prevailing for the time being.

(72 C.L.R.  
pp. 293-  
294)

The question of interest appears to me to be eminently a matter for the legislature

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to decide. It was laying down a general rule for an indefinite period. It was providing for a period occasioned by the time occupied, whether necessarily or unnecessarily, in assessing compensation, and at the same time conferring a right on the owner to have it assessed and, subject to parliamentary appropriation, paid. The Parliament chose to lay down a general rule, a thing to my mind not unreasonable, and to give interest limited to three per cent per annum.

The difficulties which courts of equity have experienced in adopting and varying a rate of interest for the different purposes of that jurisdiction are not unfamiliar. See, for instance, the discussion by Russell J. in *In re Baker*; *Baker v. Public Trustee* ((1924) 2 Ch.271, at pp. 273-275), by Eve J. in *In re Beech*; *Saint v. Beech* ((1920) 1 Ch. 40, at pp. 42-45), by Long Innes J. in *Nixon v. Furphy* ((1926) 26 S.R. (N.S.W.) 409; 43 W.N. 108) and by Harvey C.J. in *Eq. in Skinner v. James Syphonic Visible Measures Ltd.* ((1927) 28 S.R. (N.S.W.) 20; 44 W.N. 156) and also *In re Tennant*; *Mortlock v. Hawker* ((1942) 65 C.L.R. 473, at pp. 507, 508). It is not easy to see why the judgment of the legislature on this matter should be considered outside the limits of what might reasonably be thought just".

p.37, 1.43.

(72 C.L.R.  
p.296).

McTiernan J. said:

"Section 40 was also attacked on the ground that it does not provide just terms. It does not seem to me that it is unfair or inequitable to lay down as a general rule applicable to any person whose land is acquired under the Act that he should receive interest at the rate of three per cent per annum on the compensation for the period specified in the section. I think that it would be driving the conception of just terms too far to hold that it requires that the rate of interest should vary with any fluctuation of interest rates".

Williams J. said:

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"In Commonwealth v. Huon Transport Pty. Ltd. ((1945) 70 C.L.R. 293, at pp. 333-338) and Marine Board of Launceston v. Minister of State for the Navy ((1945) 70 C.L.R. 518, at pp. 537, 538) I expressed the opinion that in the case of income producing property it is a necessary incident of such terms that interest should be paid to the person dispossessed between the date of acquisition and the date of payment of the compensation. Section 40 of the Lands Acquisition Act provides, so far as material, that the compensation shall bear interest at the rate of three per cent per annum from the date of acquisition of the land until payment. There is a proviso to the section that where the compensation awarded in an action is not more than the amount offered by the Minister in satisfaction of the claim the compensation shall only bear interest to the date when the offer of the Minister is communicated to the claimant. But a claimant in an action for compensation who obtained an award of a court which was not immediately paid could enter the award as a judgment of the court, which would carry the same rate of interest as any other judgment, and he could do so even when not awarded more than the amount offered by the Minister because there could be no reason why interest should not be payable upon such an amount awarded where it is not paid immediately after the award. Thus the direction for payment of interest at three per cent is a direction which need only operate during the period required to ascertain the amount of the compensation. Division 2 of Part IV prescribes the preliminary steps that must be taken before a claim becomes a disputed claim for compensation. No time is provided within which the Minister must take the step required by s. 34 (2) but he would have to act within a reasonable time. There is nothing to prevent a claimant abridging the full time allowed for taking the requisite steps on his part in which case a relatively brief period need elapse before a claim is settled by agreement

p.41, l.40.  
(72 C.L.R.  
pp.299-300)

or becomes a disputed claim for compensation which can be determined by an award of a court. Mr Barwick contended that in an Act of indefinite duration like the Lands Acquisition Act, it is requisite that a rate of interest should be provided which would be adequate in all reasonably conceivable circumstances, or in other words, that the rate must be fixed by some standard which varies as interest rates vary from time to time, as for instance a provision that the rate should be the same as the rate for the time being payable on government loans. But the power of Parliament under s. 51 (xxxi) of the Constitution is not in my opinion circumscribed to this extent. The rate of interest prescribed by s. 40 is, as I have said, intended to cover a strictly limited period. The rates of interest upon government loans have varied above and below the rate of three per cent. The rate of interest usually allowed by the Courts is four per cent per annum but this rate has also varied with prevailing interest rates. The rate of three per cent is, I think, on the low side, but it is substantial and is not in all the circumstances so low as to be unjust within the meaning of the placitum".

- (14) As to the third of these questions, the Appellant submits that in order to secure just terms on acquisition it is entitled to be paid such a sum as will represent:
- (a) the value to it as owner of the said land with all its potentialities and the use being made of it by the Appellant as at the date of its acquisition but without reference
    - (i) to any increase in value arising from the proposal to carry out the public purpose for which it was acquired and
    - (ii) to any claim of the Commonwealth of Australia or the Government thereof or of the "community" in or to the said lands or to acquire and possess the same;
  - (b) all damage directly suffered by the Appellant consequent upon the

acquisition of its said land (including any injurious affection of any other land of the Appellant);

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- (c) interest upon the total amount of (a) and (b) above computed from the date of acquisition to the date of payment to the Appellant at the rate current during that period upon comparable obligations and at least at the rate current during that period upon Judgments of the High Court of Australia.

- (15) The Appellant therefore submits that its appeal to the King's Most Excellent Majesty in Council should be allowed and that the judgment and order of the said Full Court of the High Court of Australia be set aside and that the demurrer be overruled and a declaration made that Section 29 of the Land Acquisition Act is void and of no effect and provision made for the Appellants costs of this Appeal and of the hearing in the High Court of Australia for the following amongst other reasons:-

pp.14-15.  
p. 13.

- (i) That upon the true construction of Section 29 thereof, the Lands Acquisition Act 1906-1936 limits the compensation payable under these sections to the value of the land as it was on the first day of January preceding the date of acquisition and in accordance with its then user and its then value
- (ii) That the majority of the Justices of the High Court of Australia were in error in holding that the Parliament of the Commonwealth might lawfully fix any terms of acquisition which were not obviously or unreasonably unjust as between the community and the dispossessed owner;
- (iii) That Sections 28 and 29 fail to secure just terms to the Appellant in respect of the acquisition of its said land;



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(iv) That Sections 28, 29 and 40 do not secure to the Appellant adequate interest upon the value of the acquired land between the date of acquisition and the date of payment for such acquisition.

G.E. BARWICK.

GILBERT DARE.

IN THE PRIVY COUNCIL

No. 17 of 1950

ON APPEAL FROM

THE HIGH COURT OF AUSTRALIA

B E T W E E N:

GRACE BROS. PTY. LIMITED  
(Plaintiff) Appellant

— and —

THE COMMONWEALTH OF AUSTRALIA and  
THE MINISTER OF STATE FOR THE INTERIOR  
(Defendants) Respondents

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CASE FOR THE APPELLANT

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