Privy Council Appeal No. 47 *of* 1953

The Minister - - - - - - - - - - *Appellant*

v.

Christopher Bowes Thistlethwayte and another - - - *Respondents*

FROM

THE FULL COURT OF THE SUPREME COURT OF NEW SOUTH WALES

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND JULY, 1954

Present at the Hearing:

LORD PORTER
LORD OAKSEY
LORD REID
LORD TUCKER
LORD ASQUITH OF BISHOPSTONE

[*Delivered by* LORD TUCKER]

This is an appeal by leave of the Supreme Court of New South Wales from a judgment of that Court dated 28th September, 1953, upon a Case Stated by Sugerman, J. (the Judge of the Land and Valuation Court) dated 14th August, 1953.

By a judgment dated 20th March, 1953, Sugerman, J., had determined the amount of compensation for the compulsory resumption for public purposes of certain lands of the respondents in proceedings brought by the respondents against the appellant under the Public Works Act, 1912. The learned Judge considered himself bound by the decision of the High Court in *The Commonwealth* v. *Arklay* (1952) 87 C.L.R. 159 and assessed compensation on the principle held to be applicable in that case. The Supreme Court considered the present case indistinguishable from *Arklay's* case by which they were bound and answered the questions in the Case Stated accordingly.

The appeal was not argued at length before the Supreme Court as they were informed that its purpose was to obtain a reconsideration of *Arklay's* case by Her Majesty in Council unless the Court were of opinion that the present case could be distinguished from that case on the ground that the judgment of the High Court in *Arklay's* case was based upon, or largely influenced by, the requirement in Section 51 (xxxi) of the Constitution that legislation for the acquisition of property shall afford just terms.

The appellant's written case in the present appeal is framed in the same way. It contends that the decision in *Arklay's* case was erroneous and should be disapproved or alternatively that it can be distinguished by reason of the constitutional element present therein.

On the hearing of this appeal, however, an elaborate argument was addressed to their Lordships in support of a contention that the New South Wales legislation was wholly different from the legislation in question in

Arklay's case and that sections 5, 68 and 70 of the Valuation of Land Act, 1916, had established a new statutory basis for the assessment of compensation for compulsory resumption under certain specified Statutes, including the Public Works Act, 1912, which is the one presently relevant, and that the construction of these sections presented a problem quite different from that involved in *Arklay's* case which was concerned with the construction of the Lands Acquisition Act, 1906-1936, in the context of the National Security (Economic Organization) Regulations.

Their Lordships would have been reluctant to allow a matter of this importance to be raised at this late stage and without the benefit of the views of the Supreme Court thereon, but they do not consider it necessary or desirable to explore this question further in view of the proviso to Section 9 (1) of the Land and Valuation Court Act, 1921. This section deals with the hearing of claims for compensation in resumption cases and provides that " they shall be heard and determined in the following way and not otherwise—

(*a*) where the claim does not exceed one hundred pounds by a stipendiary or police magistrate or any two justices in petty sessions ; and

(*b*) where the claim exceeds one hundred pounds by the court without a jury :

Provided that for the purpose of any such determination the judge or magistrate or justices shall give effect to any provision of the Act, under which the land is acquired, which prescribes a basis for, or matters to be considered in, the assessment of compensation."

In the opinion of their Lordships, assuming sections 5, 68 and 70 of the Valuation of Land Act, 1916, standing alone might have resulted in some modification in the basis of assessment of compensation under the Public Works Act, 1912, the effect of this proviso is to restore that basis unimpaired.

Before proceeding to the questions of substance involved in this appeal, viz., the correctness or otherwise of the decision in *Arklay's* case and the admissibility of certain evidence relating to sales after the removal of price control, it will be convenient to dispose of the submission that the presence in *Arklay's* case of the constitutional element is sufficient to distinguish it from the present. Their Lordships are in agreement with the Supreme Court in holding that the suggested distinction is not a valid one. It is true that this element of difference existed, it is also true that it received some emphasis in the judgment, but none the less their Lordships are of opinion that the reasoning of that judgment must stand or fall independently.

It will now be convenient to refer to the statutory provisions relevant to *Arklay's* case and the present.

Section 28 of the Commonwealth Lands Acquisition Act, 1906-36, is in the following words :—

28.—(1) " In determining the compensation under this Act, regard shall be had 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."

Section 45 (3) of the Public Works Act, 1912 (N.S.W.), provides :—

" Every person shall upon asserting his claim as hereinafter provided and making out his title in respect of any portion of the said resumed lands be entitled to compensation on account of such resumption in manner hereinafter provided."

Section 124 reads :—

"For the purpose of ascertaining the purchase money or compensation to be paid regard shall in every case be had by the magistrates, arbitrators, surveyors, valuators, or jury (as the case may be) not only to the value of the land to be purchased or taken, but also to the damage (if any) caused by the severing of the lands taken from other lands of the owner, or by the exercise of any statutory powers by the Constructing Authority otherwise injuriously affecting such other lands ; and they shall assess the same according to what they find to have been the value of such lands, estate, or interest at the time notice was given, or notification published, as the case may be, and without being bound in any way by the amount of the valuation notified to such claimant, and without reference to any alteration in such value arising from the establishment of railway or other public works upon or for which such land was resumed."

The National Security (Economic Organization) Regulations (relevant to *Arklay's* case and the present) are : —

"6. (1) Except as provided by this Part, a person shall not, without the consent in writing of the Treasurer—

(*a*) purchase any land ;

(*b*) take an option for the purchase of any land ;

(*c*) take any lease of land ;

(*d*) take a transfer or assignment of any lease of land ; or

(*e*) otherwise acquire any land.

(2) Nothing in this regulation shall prevent—

(*e*) any transaction to which the Commonwealth, a State, or any authority of the Commonwealth or a State, or to which any person acting on behalf of the Commonwealth, a State, or an authority of the Commonwealth or a State is a party. . . .

(5) In the case of an application for consent to purchase any land the application shall be accompanied by a valuation of the land by an independent approved valuer, unless, in special circumstances, the Treasurer dispenses with such a valuation."

The respondents are Trustees of the Will of William Moore deceased and were at all material times the registered proprietors for an estate in fee simple of the lands described in the schedule to a notification of resumption by the appellant published in the New South Wales Government Gazette dated 20th September, 1946. The lands had been developed as a golf course and were being so used at the date of resumption. The land was suitable for development by subdivision into residential lots for which purpose the construction of roads and drainage and other works would be necessary.

At the date of resumption, which is the relevant date for the purposes of compensation, the Commonwealth National Security (Economic Organization) Regulations were in force. These Regulations ceased to apply in New South Wales on 20th September, 1948. They were replaced on that date by the Land Sales Control Act, 1948, of New South Wales the provisions of which were similar to those of the Regulations but vacant land was exempted from the operation of the Act by regulations made thereunder. The land in question was treated as vacant land. Land Sales Control in New South Wales was not permanently retained and no longer operates.

The resumption having taken place during a time when the price control Regulations were in force and when there was accordingly no free market for land the main issue before the Valuation Court was the proper measure of compensation. The respondents contended that it should be assessed in accordance with the principles approved by the High Court in *Arklay's* case, whereas the appellant contended that the price should be determined at the figure at which the Treasurer would have consented to a purchase of the land at the date of resumption.

In *Arklay's* case, where the same question arose, the court after stating that " value " in the context in question meant the value of the land to the owner and referring to the formula for ascertaining this value which had been laid down in Australia in *Spencer's* case 5 C.L.R. 418 in these terms :—

> " What is required is an estimate of the price which would have been agreed upon in a voluntary bargain between a vendor and purchaser each willing to trade but neither of whom was so anxious to do so that he would overlook ordinary business considerations "

proceeded (at page 170 of 87 C.L.R.) as follows :—

> " This test requires considerable adaptation when compulsory acquisition occurs in a period of controls. The test pre-supposes that a vendor can ask any price which it would be reasonable to expect the purchaser to pay. This price would usually exceed the price fixed by a Controller ; for there would be no necessity to fix prices if they were intended to represent market prices. It would be unreasonable to impute to a vendor a willingness to sell his property at the controlled price to a purchaser who was likely, if he held the land until controls were abolished, to be able to sell the land at an enhanced price. An owner, though otherwise willing to sell, would himself prefer to wait, if guided by ordinary prudence, in the hope that the regulation of land sales requiring the consent of the Controller would terminate."

After observing that once the notion is introduced of an external authority forbidding the parties or one of them to offer or give such sum as they please the permitted figure ceases to evidence the value contained in the land to the owner and becomes no more than an expression of Government economic policy, the judgment proceeds to point out that it would not, however, be right to disregard the existence of the controls as a factor to be taken into consideration as affecting the buyer who would himself be precluded from re-selling above the controlled price. After referring to the question of principle upon which the opinion of the Court was sought the Court, at page 173, said, " On this question we have no doubt that under the Lands Acquisition Act in estimating the value of land to an owner dispossessed during controls, the valuer should estimate the price which a vendor willing but not anxious to sell would agree to, if he were allowed, and a willing purchaser would give to obtain the land, although in his turn he would be subject to the controls in re-selling."

Their Lordships can find nothing to question in this approach to a novel situation created by the existence of emergency legislation of a temporary nature rendering wholly inappropriate the time-honoured test of market value at a particular date in terms of a willing seller and a willing buyer without further qualification. It must not be forgotten that it is the value of the land to the owner that has to be ascertained, and that the willing seller and purchaser is merely a useful and conventional method of arriving at a basic figure to which must be added in appropriate cases further sums for disturbance, severance, special value to the owner and the like. Furthermore, when the subject matter of control is the sale of land suitable for development and the control is of a temporary nature and may reasonably be expected to be lifted in the near future—at the date of resumption hostilities had ceased for over a year—circumstances are present which permit of differentiation of a case such as this from others involving consumable goods or goods which would ordinarily be suitable for immediate sale. Whatever formula is adopted it must be one which gives effect in such cases as the present to the element of value to the owner in being deprived of his right to retain his property with a view to sale in the future at a date which may reasonably be expected to be not far distant at a price which will almost certainly exceed the present controlled price.

In so far as *Arklay's* case so decided their Lordships respectfully concur in the decision of the High Court and consider it equally applicable to the present case, and accordingly answer question (1) (*a*) of the questions submitted, which are shortly to be set out in full, " Yes " and the question (1) (*b*) " No ".

It appears, however, that what has been referred to as "the principle in *Arklay's* case" was considered by Sugerman, J., to extend to approval by the High Court of every step taken by Webb, J., the trial Judge, in arriving at his decisions in that case, including the admission of evidence of post control sales.

Their Lordships do not consider that the judgment of the High Court can properly be so construed. The actual decision dealt only with the specific question referred to above. It is true that the court stated that they were unable to find that Webb, J., had acted on any wrong principle, but the only wrong principle which had been suggested was his refusal to take the control price as decisive, and no question of the admissibility of evidence was argued. It would not therefore be right to use the case as forming a model necessarily to be adopted in all future cases or as decisive of any matter which was not in issue.

Their Lordships accordingly approach the remaining questions submitted to the Supreme Court as being in no way affected by the decision in *Arklay*. In this connection it may be convenient at this stage to set out in full the questions asked in the Case Stated. They are as follows: —

(1) Was the measure of the compensation to which the plaintiff was entitled in respect of the resumption of the subject land:

(*a*) the price which a vendor willing but not anxious to sell would agree to, if he were allowed, and a willing purchaser would give to obtain the land, although in his turn he would be subject to the control of land sales in reselling, that is to say the measure which I adopted following *The Commonwealth* v. *Arklay*; or

(*b*) the price which the Treasurer or his Delegate would have approved under the National Security (Economic Organisation) Regulations on a sale of the subject land on the date of resumption subject to the control of land sales then in force under the said regulations?

(2) If the answer is "Yes" to (1) (*a*) was the method pursued in order to ascertain the said price of following the method adopted by the learned Trial Judge in *The Commonwealth* v. *Arklay* with modifications necessary to apply it to the circumstances of this case, as more fully detailed in my reasons for Judgment hereinbefore referred to, a proper method in law?

(3) If the answer is "Yes" to (1) (*a*), was the evidence referred to under the several heads in para. 12 of this Case, or under any, and if so which, of these heads, admissible?

Para. 12 of the Case is as follows:—

"As relevant to the determination of the amount of compensation on that footing, adopting for that purpose the method of determination adopted by the learned Trial Judge in *The Commonwealth* v. *Arklay* with the modifications necessary for its application to the circumstances of the present case, I admitted evidence of the following matters subject however to the limitations and qualifications indicated in my reasons for Judgment (hereinafter referred to) as to the legitimate purposes, effect and use of such evidence:—

(A) Evidence of prices obtained on sales effected, after the termination of Land Sales Control, of individual residential lots situated in the neighbourhood of the subject land and comparable to those into which it would be subdivided on a proper mode of subdivision, to the extent that such evidence was a guide to the price which might be expected to be obtained for residential lots in a subdivision of the subject land if sold shortly after the termination of Land Sales Control, that is to say, on or about 31st December, 1948, or at or about the expiration of a period of six months from such termination.

(B) Evidence of the estimated cost, as at or about the periods mentioned in (A) above, of road construction, and drainage and other works, necessary for the development of the subject land in subdivision.

(C) Evidence of the opinions of expert valuers, founded upon, *inter alia*, the materials mentioned in (A) and (B) above as to what price the subject land might be expected to have realised if sold *in globo* at or about the times mentioned in (A) above."

Dealing first with question 3, and leaving question 2 for later consideration, it is clear from the judgment of Sugerman, J., that the evidence admitted under (A), (B) and (C) of para. 12 of the Case was only admitted for the purpose for establishing one step in the process of ascertaining the sum which might be expected to have been obtained for the land if sold *in globo* at the date of resumption on the hypothesis that vendor and purchaser were then free to agree any price they liked free from all control, so far as that particular transaction was concerned, but with knowledge on the part of the purchaser that any resale by him so long as Land Sales Control continued would be subject thereto. The question therefore becomes one of relevance. There could be no evidence as at the date of resumption of sales comparable to the hypothetical sale to be envisaged and consequently no evidence of the extent of demand or the prices which might be offered by purchasers. If evidence is available of prices obtained on the lifting of controls shortly after the date of resumption it will be relevant as giving some indication of the volume of demand and level of prices which might be expected to have existed at the date of resumption. The larger the interval between resumption and lifting of control the less cogent the evidence becomes and it must be a question of degree in every case to say at what stage it is inadmissible as wholly irrelevant. In the present case the interval was two years, but having regard to the fact that hostilities had ceased at the date of resumption their Lordships do not consider that the conditions prevailing at the date when control ceased were so different from those which must be deemed to have existed at the time of the hypothetical sale assumed in the *Arklay* formula as to render the evidence inadmissible as irrelevant. It is, of course, true that any figure so obtained will require to be discounted by the circumstance that the hypothetical purchaser will be prevented from reselling above the control price if he should be minded so to do during the continuance of control. On the other hand there was the reasonable prospect that by the time he had developed the land for subdivisional sales the control would have been lifted. The judgment of Sugerman, J., shows that he gave full weight to such considerations in arriving at his final figure. Considering it therefore impossible to hold as a matter of law that such evidence was inadmissible and seeing no reason in the circumstances of this case to draw any distinction between the evidence referred to in (A), (B) or (C) of para. 12 of the Case, their Lordships answer Question 3 " Yes ".

Returning to Question (2). In so far as this question has already been answered under (1) and (3) the answer is " Yes ", but if it is intended to go further and to invite express approval for every step in the judgment in the present case or for the precise method adopted at every stage by the Trial Judge in *Arklay's* case their Lordships consider it is unnecessarily and undesirably wide and would not be disposed to answer it.

In the result their Lordships agree with the answers given by the Supreme Court of New South Wales to the questions set out in the Case Stated by Sugerman, J., subject to the above qualification with regard to the answer to question (2).

Their Lordships will accordingly humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the respondents' costs of the appeal.

(39076) W:. 8082—47 100 8/54 D.L.

In the Privy Council

THE MINISTER

v.

CHRISTOPHER BOWES THISTLETHWAYTE
AND ANOTHER

DELIVERED BY LORD TUCKER

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