Privy Council Appeal No. 18 of 1966

Aik Hoe & Company Limited – – – – – – *Appellant*

v.

Superintendent of Lands and Surveys, First Division – – *Respondent*

FROM

THE FEDERAL COURT OF MALAYSIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST MARCH 1968

Present at the Hearing:

VISCOUNT DILHORNE
LORD GUEST
LORD WILBERFORCE
LORD PEARSON
SIR ALAN TAYLOR

[*Delivered by* LORD WILBERFORCE]

This is an appeal from an order of the Federal Court of Malaysia which reduced the amount awarded to the appellant by the High Court of Borneo as compensation for the resumption of certain lands in Sarawak.

On 1st April 1960, which is the relevant date for assessing the value of the lands, the appellant was the registered proprietor under long leases of two parcels of land in the area of Kuching, in Sarawak. These are numbered K.O.T. 16178 and K.O.T. 16179 and are respectively 25·72 acres and 17·82 acres in extent. These lots are situated 4 miles from Kuching, a town, at the material time, having a population of some 50,000 inhabitants: they had been brought within the municipality of Kuching on 1st January 1960. Apart from some minor improvements on Lot 16178 they were undeveloped and without water or electricity: they were within a mixed zone area and so could be held by non-indigenous proprietors.

As regards their physical characteristics it is relevant to state that they both had extensive frontages to the Pending road, one lying on the north and the other on the south. They were both somewhat low-lying, and so, in certain possible events, exposed to the risk of flooding. Lot 16178 is, except for about 1 acre, below the 10 foot contour line: Lot 16179 is as to above one-half of its area below that line. To be above normal flood level it has been assumed that it is necessary to be at least 9 feet in height, and one of the factors affecting value is the cost of filling the land up to that height. Lot 16179 has upon it two grave plots affecting 1·1 acres. An area of 0·16 acres is similarly affected on Lot 16178.

The lands were required by the Government in connection with the projected new port of Kuching. It is common ground that its intended development was generally known from 1958 onwards when the Government built a new wharf at Tanah Puteh, a short distance to the west of the lands.

The owners in the first instance claimed compensation at the rate of $30,000 per acre. There was an enquiry before the Superintendent of Lands and Surveys, and on 16th March 1963 he made an award of $237,760 which represents about $5,500 per acre. The owners then applied to the High Court, claiming that the award was insufficient. In December 1964

the Government made an increased offer of $307,778, which represents about $7,000 per acre, but this was refused by the owners, and the case went to trial. The hearing in the High Court before Harley J. and two assessors, took place in Kuching in March 1965. The case for the appellant was substantially based upon the evidence of Mr. J. M. Carter, a qualified valuer who practised in Singapore and who had been instructed to inspect the lands and value them in April 1963. His first aggregate figure was $698,000 for the two lots, but during the hearing he revised this to $607,000 to take account of the higher cost of filling the lots to a level of 9 feet. He reached this figure by first arriving at a starting, or basic, figure of $15,500 per acre and then making adjustments in accordance with the individual characteristics of the two lots. These produced figures, for Lot 16178 of $306,000 ($11,900 per acre) and for Lot 16179 of $301,000 ($16,900) per acre.

The Superintendent called Mr. Ambrose Foo, a valuer in the Land and Survey Department, and an engineer.

After the evidence had been completed and counsel had addressed the court, the learned judge, in a lengthy, careful, and fair summing up, stated the effect of the evidence to the assessors.

On the following day, they gave a joint opinion in the following terms:

> " From the evidence, we the undersigned assessors are of the opinion that the amended claim figure of $607,000 in page 15 of the Report of Mr. J. M. Carter is a fair one, particularly so when the overall price per acre is $13,900."

The learned judge thereupon gave a brief judgment in which, after stating that the figure reached by the Assessors was close to what he had in mind, in fact within 10 per cent of it, he stated that he thought it right to give full weight to the Assessors' views. He accepted their figure and gave judgment accordingly.

The Superintendent appealed from this to the Federal Court of Malaysia. Suffian J., who delivered the main judgment made a detailed review of Mr. Carter's evidence, on which the High Court's award was based, and reached the conclusion that this was in several respects wrong in principle and that the figures given were too high. He reduced the award to $370,140 based upon a value for Lot 16178 at the rate of $8,000 per acre, and for Lot 16179 at the rate of $9,000 per acre, to which had to be added $4,000 for improvements.

The appellant seeks to have the award of the High Court restored: there is no cross-appeal by the Superintendent.

Before dealing with the issues of fact which arise, it is necessary to set up the appropriate framework of law. This may be done under three headings.

1. The Land Code of Sarawak (Cap. 81.). This requires (s. 60 (1) (*a*)) that in determining the amount of compensation, the Court shall take into account " the market value ", at the relevant date—viz: 1st April 1960. As regards proceedings before the High Court, it is provided (s. 59) that the Court " shall appoint two assessors for the purpose of aiding the Court in determining the objection ". Section 66, somewhat ambiguously drafted, appears to require the grounds of any award to be stated.

It is clear from these provisions that the findings of the assessors are not to be equated with findings of a jury: that they are for the assistance of the court: and that the determination is that of the court.

2. The jurisdiction of the Federal Court in relation to an award by the High Court. Section 68 of the Land Code gives to either party (subject to a pecuniary limitation) the right to appeal from the decision of the High Court to the Court of Appeal. This provision is in quite general terms and there can be no doubt that the appeal is by way of rehearing. It was so dealt with by the Federal Court of Malaysia. In accordance with the Courts of Judicature Act of 1964 s. 69 (4) the Federal Court has power to draw inferences of fact and give any judgment which ought to have been given or made.

Their Lordships are of opinion that the Federal Court of Malaysia had full power, taking into account the evidence of primary fact which was before the High Court, to review the inferences and conclusions of the High Court, and to draw its own inferences and reach its own conclusions. No doubt consideration must be given to the fact, as is well established in reported cases, that land valuation inevitably involves an element of appreciation and impression, as well as some element of local knowledge. The findings of the Trial Court in such cases, particularly when supported by expert assessors with local knowledge, should be approached with respect and not lightly disturbed. But as was said in an Indian case, depending upon an enactment similar to the Land Code " as in the case of any other judicial proceedings, the findings must be based upon evidence and legitimate deductions from it, and if there is an appeal, both the evidence and legitimate deductions are subject to reconsideration by the appeal court," though " it may be more difficult [to satisfy the appeal court that the judgment is wrong] in land acquisition appeals than in other cases ". (*Assistant Development Officer v. Tayaballi* A.I.R. 1933 Bombay 361, 364).

3. The attitude of this Board to an award by a Court of Appeal. This has been clearly stated on more than one occasion in relation to decisions by courts in India, where the law as to the compulsory acquisition of land resembled closely that of Sarawak. In *Nowroji Rustomji Wadia v. Bombay Government* (L.R. 52 I.A., 367) Lord Sumner, delivering their Lordships' judgment used these words:

> " It has been declared in decisions of the Board . . . that appeals in valuation cases will only be entertained on questions of principle: see *Secretary of State for India v. General Steam Navigation Co., Rangoon Botatoung Co. v. The Collector Rangoon: Charan Das v. Amir Khan* . . . and *Narsingh Das v. Secretary of State for India.* Errors in law, including errors in appreciating or applying the rules of evidence or the judicial methods of weighing evidence, are matters that can and will be dealt with on appeal by this Board. . . . In cases relating to the acquisition of land the whole matter, both of fact and law, is a proper subject of appeal in India, for there local knowledge and experience enable the learned judges to form useful judgments upon the whole case. . . . Where their Lordships have neither the materials nor the experience on which to found an opinion of their own, in a matter where the opinion of competent Courts in India differ . . . it is not their practice to interfere, . . . unless there appears to be error in law or miscarriage of justice." (loc. cit. pp. 369–70).

Their Lordships will now examine the judgments in the light of these principles. They first have to consider whether the Federal Court was justified in rejecting the award made by the High Court. As this award avowedly rested upon the evidence of Mr. Carter, and indeed upon a total acceptance of that evidence, the question becomes this: was Mr. Carter's evidence such as the High Court could properly accept, or was it vitiated by false deductions or by the application of false principles. The critical portion of his evidence was that by which he arrived at the starting figure of $15,500: if that is successfully attacked the basis of the final figures disappears. It was as to the validity of this starting figure that the main difference existed between Mr. Carter and Mr. Foo.

Without entering into excessive detail, the manner in which the starting figure was arrived at may be described as follows. The problem was to arrive at the market value of these two comparatively large plots as on 1st April 1960. Mr. Carter sought to do this by comparison with the sale prices of other lots in the neighbourhood. No precisely comparable sale could be identified. There were differences in time—some sales were before and some after the relevant date: there were differences in size—all plots were smaller, most of them very much smaller than the plots in question: there were differences in situation—some being nearer to the town of Kuching, some further away; in level, and as to access: some contained an element of improvement. The process of making appropriate adjustments to cover all these differences was obviously a complicated one: Mr. Carter was fair-minded in his attempt to do so, but it appears

that he had not the benefit of having his evidence tested by cross-examination on a number of material points which have since emerged.

The Federal Court subjected his evidence to a detailed and critical examination: into the details it is not appropriate for their Lordships to enter. There were three main points of principle on which they found that Mr. Carter had been led into error.

1. Many of the relevant sales of possibly comparable properties took place before 1st April 1960. In order to arrive at a level of values as at that date, it was necessary to establish the trend of values. Both Mr. Carter and Mr. Foo agreed that over the previous two years, and probably over a longer period, land values were rising: the question was as to the extent of the rise. Mr. Carter's method, which he illustrated on a graph, was to take a pre-1960 sale and a post-1960 sale of a specific plot and to fix the 1960 value by arithmetical proportion: graphically, he drew a straight line between the two values as plotted on an arithmetical scale and marked off the intersection of this line with the 1960 co-ordinate, thus arriving at a value at the relevant date. The particular case chosen for illustration was one of a sale for $3,945 in 1958 and for $36,697 at the end of 1962. This, as plotted, showed a steeply rising trend. The fallacy of this method hardly needs comment. Without explanation of what brought about the remarkable rise in value, or (alternatively) evidence that prices were rising by arithmetical proportion continuously throughout the period, the graph represents pure assumption; it is an arbitrary selection of one from an infinite number of curves which might join the two points. This " trend " line was transferred by Mr. Carter to, and accordingly introduced an unwarranted assumption into, his key graph.

2. The key graph which was put in to demonstrate the $15,500 starting figure, as well as including the assumed trend line, contained a number of doubtful, or at least selective, elements. It contained projections of pre-1960 values on a straight line basis, which could only rest on assumption: it connected pre-1960 and post-1960 sales of different properties: it omitted to connect three cases where sales of the same property had taken place pre- and post-1960 which would have demonstrated a different (and less accentuated) trend but which Mr. Carter rejected as untypical. It was by the convergence of three constructed lines, constructed in each case upon unproved assumptions, that the graph purported to demonstrate the starting price of $15,500 per acre: this convergence was the striking feature of the graph and was bound to make a strong impression and as the Federal Court held a misleading impression upon the assessors.

Admittedly a graph is no better—and no worse—than the material on which it is based, and each individual plot on the graph represented an actual sale. But if these sales had been considered, with appropriate qualifying remarks, in tabular form, they would not have supported the conclusion.

It is right to say that the learned judge, in his summing up, gave to the assessors very proper warnings as to the reliability of the graphs, and as to the weight of Mr. Carter's evidence on the trend of prices, which, if the assessment had been made by a jury, might have made it difficult to challenge. But in the result the assessment was explicitly based upon an acceptance of Mr. Carter's evidence and the judge accepted the assessment. The Federal Court was right in holding that all stood or fell together.

3. Mr. Carter was faced with the difficulty that the two subject plots were very considerably larger than most of those chosen for comparison. Of the 10 lots chosen by him as being most relevant (Exhibit 8. Annexure A. 1), there was one of 5·43 acres, which, except to show the trend, he discarded, and one double lot of 3·97 acres which he used for the same purpose. The actual sales figure per acre in each of these cases was well below the starting value and also well below that ultimately fixed by the Federal Court. The remainder were small lots from 0·25 to 1·09 acres. On this subject of size of plot, Mr. Carter's evidence contained the following passage:

> " No allowance is required for the sizes of O.T. 16178 and 16179. The fact that they have areas of approximately 26 and 18 acres renders the lands more viable than small plots. . . . The proposition that small lots are worth more per unit of area than large lots is a fallacy of the development market."

Suffian J. criticised this passage: he said that though Mr. Carter might be right as regards large parcels situated in a densely populated area where there is a large capital surplus, he could not be right as regards these lots situate in a town of only 50,000 inhabitants. " Common experience has shown that in areas where there is a small population the price per unit of area for a large parcel is less than the price per unit of area for a small parcel."

Their Lordships will revert to this passage when they come to examine the finding of the Federal Court itself; at this stage they are only concerned with it in so far as it states a criticism of Mr. Carter's report. As such, it requires to be considered together with a later passage in the judgment of Suffian J. where he sums up some of those criticisms. He refers there to the omission of the High Court to consider the effect on the market price a willing purchaser might be prepared to pay of the risk of refusal or delay of sub-division permission, of the risk that the lands might never be required or might not be required for industrial and building purposes for a considerable time, and the necessity for the prospective purchaser making allowance for interest and development costs over an uncertain period.

It was admitted by Counsel for the appellant that these matters had not been specifically taken into account by Mr. Carter, or by the High Court, but they endeavoured to justify the omission on the ground that an appropriate allowance in respect of them was already included in the sales prices of comparable lots, so that it was not necessary, or indeed right, to allow for them again by way of deduction from the starting value of the lots in question. In support of this argument, they referred to passages in the judgment of Suffian J., in which the learned judge stated his view of the correct principles to be applied. These he stated in the words " a valuer must take into account the possibility that the lands might never be so required or might not be so required for a considerable time ". He cited a passage from the judgment of Lord Romer in an Indian appeal to this Board *Vyricherla Narayana Gajapatiraju v. The Revenue Divisional Officer Vizagapatam* ([1939] A.C. 302 at p. 313) in which his Lordship referred to the necessity for deduction from a value based on comparable sales of a proper sum to take account of the possibility that development might be delayed or might never take place.

A similar passage was quoted from the judgment of Lord Keith in the New Zealand apppeal *Maori Trustee v. Ministry of Works* ([1959] A.C.1 at p. 16). In citing, and relying on these passages, it was said that Suffian J. fell into error in confusing two distinct methods of valuation, viz., one based on comparable sales and an alternative method based on an estimate of value of the land as developed with deduction of an appropriate amount for delay and contingencies. Mr. Carter having adopted the former method, it was a false criticism that he had omitted factors appropriate to the latter: these are already reflected and inherent in the figures for sales of comparable land. Their Lordships are of opinion that the criticism in this matter which the Federal Court made of Mr. Carter's evidence was justified. They would agree that in matters of valuation, where the objective is to ascertain the market price, and where individual cases vary so much one from another, the attempt to apply passages drawn from judgments in other cases, where circumstances may be quite different, may be dangerous. But they do not accept that there are two clearcut and alternative methods of valuation, each with its own separate rules. In the search for evidence to show the market price of a given property on a given date, there may be a continuous spectrum of cases varying from contemporaneous sales of precisely similar properties (unlikely to be found in many cases) to sales at different dates of properties differing greatly in nature and development. Where, as here, much of the evidence is of the latter kind, it is not only proper but necessary, if the comparison

is to be relevant, to take account of the different potentialities of development which would seem important to a purchaser where what he is offered is a property of a scale considerably larger than those whose sale price is known: and this is none the less the case though the sale prices of these small units may themselves take account of *their* industrial or development potentiality. To suppose that a purchaser would be willing to pay a price for a lot large enough to comprise some 10 or more units of the size actually sold at a proportionate price directly related to the price at which these sales took place, must, in the absence of evidence of a positive demand for such lots, be unrealistic and improbable.

Their Lordships therefore agree with the Federal Court in thinking that these three objections to Mr. Carter's valuation are valid and also fundamental. It is amply established to their Lordships' satisfaction that the award of the High Court based as explicitly it is upon Mr. Carter's report and evidence cannot stand and the appeal, in so far as it seeks restoration of that award must fail.

There is then the question whether the award of the Federal Court can be sustained. As stated, that court fixed a value per acre of $8,000 for Lot 16178 and of $9,000 for Lot 16179; the Court did not state the basis upon which these figures were arrived at but (per Suffian J.) introduced them with the words " taking into account all factors which should be taken into account ". It was submitted for the appellant that Suffian J. had here fallen into the same error as that which he imputed to the trial judge, viz., of fixing a figure *ex vacuo* without any stated foundation. Their Lordships do not agree with this submission: the finding came at the end of a long and detailed judgment which had set out, compared, and analysed the available evidence of all sales and awards which could possibly be relevant. His figure must be taken to be based upon this analysis: he was under no obligation, and indeed it would be impossible, to provide an arithmetical justification for his finding: the process of valuation does not admit of any such exactitude.

The only issue with which their Lordships can be concerned is whether it can be said that, the Federal Court fell into any error of principle. On this issue, the judgment itself is explicit as to the basis on which it proceeds. The attack upon it was focused upon two main points.

First it was said that the Federal Court must be assumed to have taken into account those matters the omission of which from Mr. Carter's report they considered to be erroneous: these are the matters, summarised towards the end of the judgment of Suffian J., relating to the prospects and cost of development to which reference has previously been made.

Secondly, it was argued that the Federal Court must be taken to have based their figure upon an assumed principle, not proved by evidence, that large plots in the relevant area, would command a smaller proportionate price than small plots.

In their Lordships' judgment these criticisms are invalid for the reason that they pick out, and give undue emphasis to, two considerations of a general character, which the Federal Court was entitled to take into account together with a quantity of other available facts. The process by which they arrived at their figure, as shown by the judgment of Suffian J., was in fact to review all the sales contained in Appendix J prepared by the Superintendent, of which there are 31, and those contained in Exhibit 8 Annexure C prepared by Mr. Carter, of which there were 28 (most items were common to both lists), and also 17 awards of which 5 had been the subject of protestation leading to increases of price. In making this review they could not but advert to the fact, that all except one of the sales and awards were of small plots, many of which could realise their industrial potentiality without the necessity of sub-division, expenditure, or delay. Conversely there was no sale or award of any unit of a size approaching that of either of the lots in question with the exception of Lot 4729. This lot of 18·93 acres, and of a situation and character close to that of Lot 16178 though inferior as regards frontage and access, was one in respect of which an increased award of about $5,000 per acre was made: the next largest, Lot 5736, of 5·43 acres,

carried an increased award of $7,365 per acre. In their Lordships' opinion the appellant does not succeed in showing either that the Federal Court was in principle wrong in treating as relevant the factors mentioned above, or, on the figures themselves, that they attributed excessive weight to them. Indeed, the Federal Court made no greater use of the factors mentioned than to discard from the process of comparison certain sales of small lots, favourably situated, which on a proportionate basis would yield a high figure per acre: these sales disregarded, the figures which the Court itself fixed appear such as might well be indicated from a balanced review of sales and awards. In these circumstances, applying the principles which their Lordships have previously stated as appropriate where appeal is made to the Board, there is no sufficient justification for their Lordships to interfere.

Their Lordships will advise the Head of Malaysia that the appeal be dismissed and that the appellant pay the costs of the appeal.

38602—1 Dd. 178074 75 4/68

In the Privy Council

AIK HOE & COMPANY LIMITED

v.

SUPERINTENDENT OF LANDS AND SURVEYS, FIRST DIVISION

DELIVERED BY

LORD WILBERFORCE

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS
1968