THE BOARD OF EDUCATION FOR THE TOWNSHIP OF NORTH YORK ..... APPELLANT;

AND

VILLAGE DEVELOPMENTS LIMITED RESPONDENT.

1956
*Jan. 31
*Feb. 1
*Apr. 24

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Expropriation—Determination of value—Land suitable for subdivision—Uncertainty of statutory approval—Other uncertainties.

Land comprising 10·4 acres and forming part of a larger tract purchased by the respondent in 1952, were expropriated by the appellant. A plan for subdivision by the former owner submitted in 1951 was not approved by the Minister of Planning and Development. A new plan submitted by the respondent in 1953 was approved by the Planning Board upon certain conditions. In the interval, negotiations were carried on between the parties for the purchase of the required lands for a school

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site. The appellant offered $100,000 in Feb. 1954 upon certain conditions and while this amount was acceptable to the respondent, one of the conditions was not and the negotiations collapsed. The expropriation was made on March 22, 1954. A new subdivision plan was approved by the Minister on May 13, 1954.

Proceeding upon the basis that the respondent was entitled to receive the amount he would have realized if the property had been sold in building lots, the trial judge made an award of $129,708. This judgment was affirmed by the Court of Appeal.

Held (Abbott J. dissenting): That the appeal should be allowed and the compensation reduced to $110,000.

Per Taschereau and Cartwright JJ.: The land should be valued on the basis that the most advantageous use to which it could be put was subdivision and sale, but the trial judge appears to have erroneously calculated as a mere matter of arithmetic the total probable net realization from the sale of the land in this manner and to have awarded this sum instead of the present value of the anticipation that in the not far distant, but still not in the immediate, future such sum would be realized.

Per Rand J.: The arbitrator failed to give effect to the fact that while what was in prospect for the owner here was a land subdivision development, the subdivision had not yet been approved and was subject to the contingencies that might affect approval or might be annexed as conditions. It was therefore facing that uncertainty in realization of the possibilities of its land that the owner must have estimated its value, a value which in the circumstances would not seem to differ from market value with the same object in view. The amount allowed by the arbitrator disregarded in toto all the eventualities foreseeable or only vaguely foreshadowable by which a prudent person, looking forward immediately before the expropriation, would be influenced.

Per Locke J.: There was error in the principle applied by the trial judge. He appears to have assumed in making the award that the respondent was entitled as of right to register the plan prepared and to sell the lots shown upon it as building lots. There was no basis for any such assumption. It was wrong to ignore the statutory requirement of approval to any subdivision plan under the Planning Act and to fix the compensation as if the owner were entitled to proceed to an immediate sale of the land as building lots.

Per Abbott J. (dissenting): There is no reason to assume that an appropriate subdivision plan would not have been approved since it is clear that the land was admirably suited for that purpose. The value of the land to the respondent at the time of the taking was the amount for which it could be disposed of for residential purposes, making allowance for any expenses which might have been incurred, carrying charges and such risk as might be involved pending sale. The trial judge followed the proper principles and the appellant has failed to show that the unanimous judgment of the court below on a question which is essentially one of fact, was wrong.

APPEAL from the judgment of the Court of Appeal for Ontario affirming the judgment at trial.

J. T. Weir, Q.C. and *S. Webb* for the appellant.

J. J. Robinette, Q.C. and *E. A. Goodman, Q.C.* for the respondent.

The judgment of Taschereau and Cartwright JJ. was delivered by:—

CARTWRIGHT J.:—I agree with the conclusion of my brothers Rand and Locke that this appeal should be allowed and that the compensation awarded to the respondent should be reduced to $110,000.

In my view the learned Judge of the County Court erred in principle in that in determining the present value of the future advantages possessed by the expropriated land he acted on the assumption that the respondent was entitled as of right to proceed to the immediate sale of such land as building lots, and gave no effect to the circumstance that it could not lawfully sell the land in this way until a plan had been approved pursuant to the statutory provisions set out in the reasons of my brother Locke. There was no certainty that a plan would be approved in the immediate future. It is also my opinion that the learned Judge failed to give any effect to the uncertainties mentioned in the reasons of my brother Rand.

I do not question the view of the learned Judge that the most advantageous use to which the land could be put was subdivision and sale and that it should be valued on that basis; but, with respect, he appears to me to have calculated as a mere matter of arithmetic the total probable net realization from the sale of the land in this manner and to have awarded this sum instead of the present value of the anticipation that in the not far distant, but still not in the immediate, future such sum would be realized.

I would allow the appeal and reduce the amount of compensation to $110,000. I would dispose of the costs as proposed by my brother Locke.

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RAND J.:—The general principle for estimating compensation for land taken enunciated by the Judicial Committee in *Cedar Rapids* v. *Lacoste* (1), is thus stated by Lord Dunedin at p. 576:

> (1) The value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taker.
>
> (2) The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined.

What was in prospect for the owner here was a land sub-division development. But the sub-division had not yet been approved and was subject to the contingencies that might affect approval or might be annexed as conditions. It was therefore facing that uncertainty in realization of the possibilities of its land that the owner must have estimated its value, a value which in the circumstances would not seem to differ from market value with the same object in view. But that was not the perspective in which the matter was approached by the arbitrator.

The land taken was part of a larger parcel bought by the respondent in 1952. A plan of the entirety had been prepared by the former owner and submitted for approval in 1951, but because of certain difficulties in the way of furnishing water and other facilities as well as possible school plans, the application was refused. In February, 1953, a new plan showing a large lot of the original block as reserved for school purposes, but otherwise divided into lots as in the previous plan, was submitted for and given provisional approval by the Minister, subject, however, to the consent of local authorities. The provisional approval remained in abeyance until the following year. In the spring of 1954 the Board had settled upon acquisition of what had been set aside on the plan with the addition of a few lots and a roadway adjoining it, and in February negotiations took place between the parties looking to the compensation. This was agreed upon at $100,000 and the only reason why the transaction was not then concluded was the insistence by the Board on retaining $10,000 as security for the installation by the respondent of the several services, in which the respondent declined to acquiesce. On

(1) [1914] A.C. 569.

March 22 the Board filed the expropriation plan and within two months the final approval of the sub-division for the remaining land was given.

When the case came on before the arbitrator the respondent submitted its case on the basis of the plan of lots as proposed in 1951. It gave evidence of certain sales made prior to approval; it was not disputed that there was a live market for lots generally in that section of the Township; and the average price of $3,300 was not seriously contested before us. On this material the gross selling price became a matter of mere mathematical calculation; from this were deducted the estimated expenses of installing the services and an amount equal to 10% of the gross price for incidental costs; the balance remaining was the amount allowed, $129,708. It is reasonable to take this as the foreseeable maximum.

That this mode of computation was, formally at least, a departure from the principle of Cedar Rapids was not challenged; but Mr. Robinette argued, and before the Court of Appeal successfully, that the elements of risk which lay between the time of the expropriation and the final approval of the plan by the Minister and thereafter, were so attenuated that they could be disregarded and, without violating the principle, the estimation could properly be made on the footing that the land at the moment of expropriation had become a sub-division on the market. The question is whether or not the contention is sound, and I am unable to agree that it is. To countenance that basis, not as an evidentiary circumstance but, as the arbitrator used it, as an absolute formula, would introduce such a corroding qualification of the principle as would expose it in every case to a contest over the number of such risks and the strength of their probability. The evidence in my opinion should have been rejected; but whether that is so or not, the basis cannot be applied as it was.

It is easy, of course, to be wise after the event; but when the question is put as it should be put, which is, what would a prudent business man in the position of the respondent be willing to accept in the light of all of the future possibilities as they appear immediately before the expropriation as the fair amount to compensate him for his loss, the determining considerations appear in a somewhat different and

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Rand J.

more uncertain aspect. We know what in fact the respondent did agree to, $100,000. Mr. Robinette properly submits that in assenting to that amount the respondent had in mind the avoidance of the risks of the estimation by the arbitrator as well as the trouble and expense of the arbitration. The amount agreed to by the parties would, of course, work both ways. But conceding a reasonable amount for that risk, it will represent what, in the opinion of the respondent, would have been reasonable compensation. That amount is, of course, uncertain as all of these estimates are, but I should say that 10% added to the amount agreed to can fairly be said to cover the item.

On the other hand, the amount of $129,708 disregards in toto all of the eventualities foreseeable or only vaguely foreshadowable by which a prudent person, looking forward immediately before the expropriation, would be influenced. We are all too familiar with this sense of vague mistrust to have any doubt about the wisdom of caution in such judgments. We have only to recall the confidence, particularly among the sanguine financial leaders in 1929, in the assumption of the permanence of values then reached, to appreciate the fallibilities of such opinions. What confuses the issue here is the introduction of post facto actualities which were hidden from the minds of men on March 22, 1954.

From the amount allowed by the arbitrator there would of necessity be deducted a percentage to represent those uncertainties which are somewhat broader than those of an arbitration. Taking it at 15% of the maximum computation, the result would leave approximately the same as by the other method, that is, $110,000.

I would, therefore, allow the appeal and reduce the amount of compensation from the amount awarded to that sum. The costs of the arbitration will remain as directed, but the appellant will have its costs in the Court of Appeal and in this Court.

LOCKE J.:—This is an appeal from a judgment of the Court of Appeal for Ontario which dismissed the appeal of the present appellant from an award made by His Honour Judge Forsyth as compensation for certain lands expropriated by the appellant under the provisions of the *School Sites Act* (c. 348, R.S.O. 1950).

The lands taken, 10·4 acres in extent, formed part of a larger tract of 18·4 acres purchased by the respondent from one Harry Mendel in September, 1952. In July 1951 Mendel had had prepared a plan of a subdivision of the property, dividing the portions not required for streets into 94 lots designed for use as residential property. In September of that year, this plan was submitted to the Department of Planning and Development for approval, as required by s. 26 of the *Planning Act* (c. 277, R.S.O. 1950). The Minister had referred this plan to the Planning Board of the Township for its consideration. That board decided that it should not recommend the approval of the plan for two principal reasons, namely, the Township's inability to supply the property with water and because of the school problem in the area. These recommendations were forwarded to the Minister on May 13, 1952 and the plan was not approved.

The respondent is engaged in the business of dealing in subdivisions and in general construction work. After purchasing the tract, on its instructions the town planning consultant who had prepared the plan for Mendel prepared a new plan showing what was substantially the east half of the property as a high school site, the balance being divided into building lots and streets upon which the lots fronted. In March of 1953 this plan was submitted to the Planning Board and on April 30, 1953, the Board decided that it would recommend its approval upon certain conditions. The principal of these was that the respondent should enter into an agreement with the council of the Township regarding the installation of services such as the supply of water and for the disposal of sewage, payment of taxes and other related matters. For reasons which are not explained in the evidence, the agreement, the making of which was made a condition precedent to obtaining the recommendation of the Planning Board for the plan, was not settled until March 24, 1954. While so dated, a by-law authorising its execution by the Township was not passed until May 10, 1954.

In the interval, negotiations had been carried on for the purchase of the required lands, the appellant by an offer in writing dated February 26, 1954, offering the sum of $100,000 upon conditions stated in a schedule to the offer.

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Locke J.

One of these specified that the appellant should have the right to retain $10,000 of the purchase price to insure completion by the respondent of certain specified works by May 1, 1955. While the amount offered was acceptable to the respondent, the condition mentioned was not and the negotiations collapsed.

On March 22, 1954, the appellant passed a resolution expropriating the lands in question, describing them by metes and bounds. The area taken included 9 building lots shown on the prepared plan along the west side of the school site, which the respondent had theretofore assumed to sell, and an area shown as Block A lying along the south border of the part there designated as a high school site. The resolution did not in terms require immediate possession of the lands taken and on May 17, 1954, a second resolution was adopted that immediate possession be required and taken. The respondent, apparently following the settlement of the terms of its agreement with the Township dated March 25, 1954, had a new plan prepared giving effect to the changes agreed to, and this was approved by the Planning Board and thereafter by the Minister on May 13, 1954, and registered.

The learned judge, in determining the amount of the compensation, proceeded upon the basis that the owner was entitled to receive the amount he would have realized from the expropriated property if it had been sold in building lots, as contemplated by the proposed plan rejected by the Minister in 1952, less the amount it would have been necessary to expend upon the property for the provision of the services called for by the agreement of March 25, 1954, and a further deduction for the carrying charges, for interest, legal fees, taxes, selling commissions and other related expenditures. Estimating that there would have been realized from the sale of the lots, less these deductions, an amount of $129,708, he allowed the owner this amount, with interest from March 22, 1954. He further found that the property was excellently situated for subdivision purposes and that that was the most advantageous purpose to which the land could be put and that the lots could have readily been sold after the registration of the plan. While these

findings are clearly supported by the evidence, I think, with respect, there was error in the principle applied in determining the question to be decided.

It appears to have been assumed in making the award that the respondent was entitled as of right to register the plan prepared in 1951 and to sell the lots shown upon it as building lots. With respect, there is no basis for any such assumption. The Legislature of Ontario has by the *Planning Act* made provision whereby the council of a municipality (an expression defined to include a township) may define and name a planning area and, when defined, the council may appoint a Planning Board which, by virtue of s. 4, is declared to be a body corporate. The Board so constituted is by s. 8 charged with the duty of investigating and surveying the physical, social and economic conditions in relation to the development of the planning area and, inter alia, after holding public meetings for the purpose of obtaining the participation and co-operation of the inhabitants of the area in determining the solution of problems or matters affecting the development of it, recommend a plan to the council: if approved, the plan is submitted to the Minister for approval. Other provisions of the statute provide that where land is to be subdivided for the purpose of being sold in lots by reference to a registered plan of subdivision, the person desiring to register the plan shall forward it to the Minister for approval. It was under this provision that the plans to which I have referred were submitted to the Minister of Planning and Development. S-s. 4 of s. 26 provides that, in considering a draft plan of subdivision, regard shall be had, *inter alia,* to the health, safety, convenience and welfare of the future inhabitants. S. 27 declares that every person who subdivides and offers for sale or agrees to sell land by a description in accordance with an unregistered plan of subdivision shall be guilty of an offence and, on summary conviction, liable to a specified penalty.

The Legislature has further, by the *Board of Education Act* c. 38, R.S.O. (1950), the *Department of Education Act* (c. 94), the *Public Schools Act* (c. 316) and the *High Schools Act* (c. 165) made provision for the establishment, maintenance and control of public and high schools in the province and provided for the establishment of municipal

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Locke J.

Boards of Education. One of the duties imposed upon such Boards is to provide adequate accommodation, according to the regulations, for all pupils.

As far back as 1951, the Planning Board of the Township of North York had, as above pointed out, considered the necessity of providing, by any plan to be recommended to the Minister, for further schools in the area. In addition to the subdivision proposed by Mendel, two other subdivisions lying to the north and west of the area in question had been approved and plans registered. By March of 1953 it is clear that the Board, in the discharge of its statutory duties, had determined to recommend that the area in question should not be approved for subdivision but, to the extent then indicated to the respondent, set aside as a high school site. While the record contains no evidence upon the point, it is proper, in my opinion, to assume that the appellant Board in the discharge of its functions had decided that, in the interests of the community as a whole, a high school should be established on the site indicated on the second plan. As the earlier plan prepared indicates, there was a public school lying immediately to the north and west of the limits of the proposed subdivision.

The risk that the Planning Board of the Township, and the Minister of Planning Development on its recommendation, would decline to approve a plan of subdivision of the property in question into building lots, was one to which the area of 18·4 acres purchased by the respondent in 1952 was subject, in common with all other vacant lands in the Township. Before the passing of the expropriation resolution on March 24, 1954, it had been made clear to the respondent that the plan of subdivision as originally proposed in 1952 would not be recommended by the Planning Board to the Minister or approved by him, and it was in consequence of this that the second plan setting aside the area as a high school site was prepared. It cannot, therefore, be said that, as of the date of the expropriation and by reason of it, the respondent was deprived of its right to sell the property as building lots. There was no such market then available or in prospect since the land could not be sold in lots without the approval and registration of the plan. It was not the action of the appellant which deprived the respondent of such a market but the

inability of the latter to obtain the recommendation of the Planning Board and the approval of the Minister of the plan of subdivision. It is not, of course, suggested that either that Board or the Minister acted otherwise than in the manner they considered to be in the public interest in discharging their statutory duties.

The owner of property subject to zoning restrictions is not, if the land be expropriated, entitled to compensation on the basis of its value to him if used for some purpose forbidden by the regulations. The contrary of this proposition was asserted and rejected as long ago as 1870 in *Stebbing* v. *The Metropolitan Board of Works* (1). The owner of property suitable for use as licensed premises situate in a place where Part 2 of the *Canada Temperance Act* (c. 30, R.S.C. 1952) is in force cannot, if it be compulsorily taken, assert a value based on the profits which he would derive from the sale of liquor.

The fact that there was but one available purchaser for the property does not, of course, affect the right of the respondent to be compensated to the full extent of the value of the property to him as of the date of the expropriation, in accordance with the principle so often stated in this Court and restated in *Woods* v. *Manufacturing Co.* v. *The King* (2).

The evidence directed to establishing this, while considerable in extent, is not, in my opinion, entirely satisfactory. For the owner it was directed to showing what sum of money could have been realized had he been able to get the original plan, or something closely approximating it, registered, whereas it had become apparent to the respondent early in 1953 that this was impossible. Various valuations of the property as acreage was given on behalf of the appellant, these varying from $63,500 to $74,400. These valuations were, however, based on what the property would realize on the market and did not attempt to assess its value to the owner. In addition, evidence was given of a number of sales of land as acreage in the vicinity in the years 1951, 1952 and 1953, for prices varying from $2,700 to $4,725 per acre. The evidence, however, established that the land had materially appreciated in value between the year 1952 and the time of expropriation.

(1) (1870) L.R. 6 Q.B. 37 (2) [1951] S.C.R. 504.

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There is, however, concrete evidence as to an amount which the present respondent apparently considered to be the value to it immediately preceding the expropriation and that this amount of $100,000 was an amount which the appellant was prepared to pay, subject to conditions which need no longer be considered.

I have come to the conclusion that the proper course to be followed is to settle the amount of remuneration in this Court rather than to refer the matter back.

While it is to be presumed that the respondent offered to accept this amount at a time when it was fully informed as to its legal rights, it should be borne in mind that, being aware that the property was subject to expropriation at a price to be fixed by arbitration, it might well, in order to escape the delays, costs and uncertainty of arbitration and perhaps thereafter litigation, accept less than the full value of the property to it. In the circumstances, I think it proper to add ten per cent to the above mentioned figure for the compulsory taking. I would accordingly allow this appeal and fix the amount of the compensation at $110,000, with interest at the legal rate from March 22, 1954.

I would allow the appellant its costs in this Court and in the Court of Appeal. I would not interfere with the order made as to the costs of the hearing before His Honour Judge Forsyth.

ABBOTT J. (dissenting):—This is an appeal from a judgment of the Court of Appeal for Ontario which dismissed an appeal of the appellant from an award made by His Honour Judge Forsyth fixing the compensation for certain lands belonging to respondent and expropriated by the appellant for school purposes.

The property expropriated formed part of a larger tract of land acquired by the respondent in 1952 for the purpose of subdivision and sale as residential building lots, a purpose for which, it is clear from the record, the property was admirably suited. Approval of a subdivision plan by the appropriate public authorities was withheld for some time, apparently because of a shortage in the water supply and of possible requirements for school purposes.

In the spring of 1954 the water situation appears to have been improved and appellant had also by that time taken a definite decision to acquire a part of respondent's property for school purposes. Discussions took place between appellant and respondent with a view to the former acquiring the property without the necessity of expropriation proceedings but these proved abortive for reasons which I do not find it necessary to discuss.

Notice of expropriation was given by appellant on March 22, 1954, and a short time later a plan of subdivision for the remainder of the respondent's property was approved.

Approval of a subdivision plan, by various public authorities, is required to protect the public interest, not to arbitrarily prevent the economic development of real property by its owner, and had the appellant decided to acquire some other property for school purposes, there is no reason to assume that an appropriate subdivision plan would not have been approved for the property expropriated, since, as I have said, it is clear from the record that it was admirably suited for that purpose.

The general principle to be followed in establishing compensation for compulsory taking of land, has been long since settled and consistently followed in the decisions of this Court, one of the most recent of which is *Woods Manufacturing Company* v. *The King* (1). The value to be paid is the value to the holder, not to the taker, and consists in all the advantages which the land possesses, present and future, although it is the present value alone that falls to be determined.

As Rand J. said in *Diggon-Hibben Ltd.* v. *The King* (2): "A compensation statute should not be approached with the attitude that Parliament intended an individual to be victimized in loss because of the accident that his land rather than his neighbours' should be required for public purposes:" and in my opinion the value of the land to respondent at the time of taking was the amount for which it could be disposed of for residential purposes, appropriate allowance being made for (i) any expenses which might have to be incurred, (ii) carrying charges and (iii) such risk

(1) [1951] S.C.R. 504. (2) [1949] S.C.R. 712 at 715.

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as might be involved pending sale. In arriving at such value, on the principles laid down in *Irving Oil Company Limited* v. *The King* (1), I am also of opinion that the usual ten per cent allowance for compulsory taking could properly have been included in the circumstances of this case.

It was established in evidence that fully serviced building lots, having a 50 ft. frontage, in the general area of the property expropriated, were selling, at the time of the expropriation, for from $3,200 to $3,700 each. In arriving at a valuation of the property expropriated, the arbitrator used as a basis of his estimate a figure of $3,300 per serviced lot. From a total potential value thus arrived at, he deducted an amount of $42,000 to cover the estimated cost of services which would not be required since the property was sold *en bloc,* and a sum of $14,412 (being ten per cent of the estimated value) as an allowance for carrying charges, interest, legal fees, commissions and the like. In his award, the arbitrator made no specific reference to having made any allowance for risk pending development and sale, and he made no allowance for compulsory taking.

Except to the extent the arbitrator may have failed to allow for risk involved pending sale, I do not think that in arriving at the value which he did, he failed to follow proper principles. The evidence would indicate that at the time of the expropriation, the risk of loss pending sale was slight and in my opinion, in terms of money, could not in any event have exceeded a sum equivalent to ten per cent for compulsory taking.

The appellant has failed to satisfy me that the unanimous judgment of the Court below, which confirmed the finding of the arbitrator on a question which is essentially one of fact, is wrong. In my opinion, therefore, it should not be disturbed.

At the hearing before this Court it was realized for the first time that in fixing the compensation at $129,708, an error had been made in the method of applying the 10% allowance for carrying charges, which had escaped the attention of all concerned. It was conceded that on a proper application of the 10% deduction the amount

(1) [1946] S.C.R. 551.

awarded should have been $125,508. The judgment below should be modified accordingly but otherwise the appeal should be dismissed; this should not affect the question of costs, and the respondent should have its costs of the appeal.

Appeal allowed with costs.

Solicitors for the appellant: *Armstrong, Kemp, Young & Burrows.*

Solicitors for the respondent: *Goodman & Goodman.*

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*PRESENT: Kerwin C.J., Taschereau, Locke, Fauteux and Abbott JJ.

(1) Q.R. [1954] Q.B. 582.