1963
*Nov. 21, 22
1964
Jan. 28

ALFRED K. HERRINGTON ..... APPELLANT;

AND

THE CORPORATION OF THE CITY OF HAMILTON ..... RESPONDENT;

AND

GISELE FERNANDE HERRINGTON AND SAMUEL TAYLOR ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Expropriation—Compensation fixed by Municipal Board—Books of going business almost non-existent—Valuation based on land values plus replacement cost of buildings less depreciation—Revision of Board's figures not to be attempted unless Board exercised judgment upon improper principles.

The City of Hamilton expropriated certain lands of which the appellant and his wife were owners as joint tenants and which formed part of the property of a partnership in which they were the only partners. One T was appointed receiver of all the assets of the partnership with power to manage the business of the partnership until the conclusion of the expropriation proceedings. The Ontario Municipal Board, which was appointed the sole arbitrator, fixed the compensation at $50,525. The husband, the wife and T appealed to ask that the compensation be increased. The appeal was dismissed. The husband alone decided to appeal to this Court, and served notice of appeal upon the solicitors for the City and the solicitor for his wife and T. A motion by the City to quash the appeal on the ground that the appellant had no status to maintain the appeal because a partner cannot sue alone to recover a debt due to the partnership was dismissed ([1964] S.C.R. 69.). The husband then proceeded with his appeal.

Held: The appeal should be dismissed.

The Municipal Board could not base a valuation of the expropriated premises on the profit situation of the business as the claimants' so-called books were almost non-existent. It was not possible for the Board to adjourn the matter for further and better evidence on the subject of profits. Such evidence did not exist and could not be created as the foundation data itself did not exist. The Board then proceeded to consider the evidence of value on the basis of land values plus replacement cost of buildings less depreciation. The board members heard the witnesses and had an opportunity to weigh and compare the value of the various pieces of evidence given, and the figures set out in their finding represented their judgment of the probative value of those various pieces of evidence. Unless it appeared that the Board were exercising their judgment upon improper principles, this Court should not attempt to revise their figures. The Court might have found much less drastic rates of depreciation but if that could be done only

*PRESENT: Cartwright, Fauteux, Judson, Ritchie and Spence JJ.

by exercising judgment upon the evidence, the Court should not apply its opinion of the evidence to amend that of the members of the Board who heard the evidence.

As to the claim for certain groynes, despite the fact that they must have cost the claimants a very considerable sum, albeit one quite impossible to determine on the evidence, the Court below was right in saying that the groynes simply were necessary for the preservation of the lands upon which the buildings stood; if the groynes had been absent there would be no land to be expropriated, and the claimants would have simply been able to claim for a useless water-covered lot. Therefore, the Board would not have been justified in making an allowance for the cost of the groynes.

APPEAL from a judgment of the Court of Appeal for Ontario, affirming an expropriation award fixed by the Ontario Municipal Board. Appeal dismissed.

Alfred K. Herrington, in person.

J. T. Weir, Q.C., and *B. H. Kellock,* for the respondent corporation.

The judgment of the Court was delivered by

SPENCE J.:—This appeal from the judgment of the Court of Appeal for Ontario was argued by the appellant in person. The appellant, however, was represented by skilled counsel both in the Court of Appeal and at the hearing before the Municipal Board when all the evidence was the subject of minute examination and cross-examination. That Board fixed the compensation payable to the appellants for the expropriation of the lands and buildings in the City of Hamilton at a total of $50,525 made up as follows:

1.	Duplex	$ 6,500
2.	Cottage property	2,000
3.	Vacant lots	3,025
4.	Cove Restaurant	30,000
5.	Allowance for disturbance	6,000
6.	Allowance for possibility that Van Wagner's Beach Road be rebuilt	3,000
		$ 50,525

In the Court of Appeal and again in this Court no question was raised as to any of the first three amounts. We are, therefore, concerned with the latter three only.

The Board, dealing with restaurant property after reciting the history of the purchase of the various portions of it, the lease of certain other lands, the construction of the groynes

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to prevent erosion and of certain additions and also the complete washing out of the Van Wagner's Beach Road access, turned to the fixing of compensation upon the following basis:

1. Land Values.

2. Replacement value of buildings, less depreciation.

In the notice of appeal from the decision of the Board to the Court of Appeal for Ontario, the grounds of appeal include:

> 1. The Ontario Municipal Board erred in not applying the test of value to the owner in disallowing the Claimants compensation for the Groynes and for the partly completed addition to the restaurant.
>
> 2. The Board erred in not applying the test of value to the owner in awarding the Claimants compensation for the value of the leasehold interest.
>
> * * *
>
> 4. The Board erred in assessing compensation for the restaurant in not taking into account the income received from the business which the Claimants were carrying on in those premises.

Examining these grounds of appeal, Laidlaw J.A. said:

> It is sufficient to say that in my opinion the amounts of gross estimated profits shown on that statement are dependent to such an extent upon such uncertainties, speculation and estimates upon which no reliance can be placed as to render the probative value of that report nil. It would not be safe in my opinion for any tribunal exercising judicial functions to found an appraisal or an award of compensation on that evidence. In my opinion the claimant has failed entirely to establish the amount of gross profits from the operation of this business as a reliable and proper basis on which to award compensation. . . .
>
> Then in such circumstances what was the Board to do to ascertain the proper amount of compensation payable to the claimants? It was the duty of the Board, in my humble opinion, to consider the available evidence that would best enable them to value these properties and to fix a compensation that would be adequate and sufficient to indemnify the owners. The only basis upon which the Board could proceed in the particular circumstances was to consider the replacement value of the property expropriated less proper depreciation from the value of each of the various items.

Having read the evidence given upon the expropriation proceedings by Mr. Samuel Taylor, the receiver appointed by the Court in Ontario in an action by the female claimant against the male claimant, and also the evidence given by the male claimant A. K. Herrington and the other witnesses called by him, I am of the opinion that Laidlaw J.A.'s view as to the probative value of the evidence as to profits is a sound one and I would not have agreed to have based any

valuation of this expropriated restaurant premises upon such a haphazard conjecture.

Then, I turn to the same query as Laidlaw J.A. expressed upon what was the Board's task. It would naturally occur to one that the Board might have set the matter over for further evidence in order to obtain reliable information upon the profit situation for admittedly the concept of value to the owner in the case of a going business would require a valuation based on this profit situation. *Woods Manufacturing Company v. The King*[1], *per* Rinfret C.J., at p. 514. It is by such an investigation that there could be determined what amount the owner, as a prudent business man, would have been prepared to pay for the property on the date of the expropriation rather than be forced to give up title and possession.

It appears, however, from a survey of the evidence to which I referred that such information simply could not be produced. The claimants' so-called books were almost non-existent and consisted of some rather haphazard entries in a series of diaries from 1951 to 1958, and those entries bore little if any relation to the statement worked out by Mr. Taylor, the receiver. It would appear, moreover, that the data given with some degree of detail to Mr. Lounsbury, acting as adviser for the respondent corporation, again bore little relation to either the original data in these diaries or to Mr. Taylor's subsequently produced summaries. It is significant, in passing, that if Mr. Lounsbury informally offered $75,000 as compensation, an offer which it was stated, the claimant refused, he could only have done so on the inflated figures given to him by the claimant, to which I have just referred.

In the light of these circumstances, it was not possible for the Municipal Board to adjourn the matter for further and better evidence on the subject of profits. Such evidence did not exist and could not be created as the foundation data itself did not exist. The Municipal Board then proceeded to consider the evidence of value on the basis of land values plus replacement cost of buildings less depreciation, and the Board said:

> Essentially therefore the Board accepts the evidence of the respondent's witnesses as to the value of the restaurant and the leasehold interest in the parking lot.

[1] [1951] S.C.R. 504, 2 D.L.R. 465.

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The Board then proceeded to cite the evidence of C. E. Parnell as to the value of the lands and the leasehold interest, *i.e.*, land $6,750, leasehold interest $1,080, and the evidence of Donald Hall as to the value of the restaurant buildings at $17,500, being able to verify one item in Hall's valuation by comparing his valuation of the duplex with that of Mason, a claimant's witness. The Board found that Mason was only 10 per cent higher than Hall on that item and so the Board added 10 per cent to Hall's estimate of $17,500. With the addition of $2,920 for fixtures not included in Hall's valuation, these amounts totalled $30,000. It was this question of the valuation of the restaurant buildings at $17,500 plus 10 per cent which gave me the most concern. Donald Hall gave the replacement value of each of the various portions of the buildings at February 1961 costs and said that those costs were about 10 per cent higher than the cost in the year 1958, the date of the actual expropriation. This would, of course, give the claimants the advantage of that increase in cost. His depreciation allowance was, however, very drastic varying from 33 per cent on the unfinished reinforced concrete addition to 60 per cent on some other portions of the building. Such depreciation items are somewhat shocking. They were, however, the subject of astute cross-examination by skilled counsel for the claimant and no evidence contra other than the haphazard estimates of the claimant himself was introduced. It must be remembered that the Board members heard the witnesses and had an opportunity to weigh and compare the value of the various pieces of evidence given and that the figures set out in their finding represented their judgment of the probative value of those various pieces of evidence. Unless in this Court it appears that the Board were exercising their judgment upon improper principles, this Court should not attempt to revise their figures. So this Court might have found much less drastic rates of depreciation but if we could only do so by exercising our judgment upon the evidence, we should not apply our opinion of the evidence to amend that of the members of the Board who heard the evidence.

As I have noted, the Board itself figured the rates of depreciation were excessive and added 10 per cent in an attempt to overcome that excessive depreciation. Again, it is a matter for the Board's judgment whether that 10 per cent was a sufficient allowance to cover the excess. The

various photograph exhibits, particularly those in exhibit 43, seem to show a tumble-down series of buildings and might give considerable support for what would appear an abnormally high depreciation.

The complaints to the Court of Appeal that the Board failed to allow the claimants' compensation for the groynes is dealt with by Laidlaw J.A. in the reasons for judgment. Firstly, reading the record, it would be very difficult to come to a proper ascertainment of the cost of these groynes upon the evidence given at the arbitration hearing before the Board. The evidence of the claimants again is haphazard at the best and the evidence given by others both for the claimants and for the respondent as to the costs of the groynes varied enormously. This factor, however, is not so important as the view taken in the Court of Appeal, and I think the proper view, as to the principle upon which the groynes should be considered. The Board in its reasons said:

> The Board feels that the claim presented by the claimants for expenditures on the groyne and on the proposed addition, and on the loss on the chattel property, and the value of the leasehold interest and of the goodwill, were all essentially without substance unless Van Wagner's Beach Road was to be rebuilt.

In the Court of Appeal, on the other hand, Laidlaw J.A. dealt with the value of the groynes on a different basis, and said:

> If the groynes had not been in existence and had not been in place at the time of expropriation, I think that no prudent purchaser would have given much if anything for the land having regard to the probability that it might be washed out for all useful purposes by storm waters. It is because of the existence of the groynes and the value of the land which they protect that the land has a value of $6,750.00. I think it would have been highly improper for the Board to have determined any separate amount as proposed by the claimants as an allowance to the owner for the groynes.

Despite the fact that these groynes must have cost the claimants a very considerable sum, albeit one quite impossible to determine on the evidence, I have come to the conclusion that Laidlaw J.A. was right in saying that the groynes simply were necessary for the preservation of the lands upon which the buildings stood; if the groynes had been absent there would be no land to be expropriated, and the claimants would have simply been able to claim for a useless water-covered lot. Therefore, the Board would not have been justified in making an allowance for the cost of

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the groynes. In this Court, no particular argument was addressed to two other complaints before the Court of Appeal, *i.e.*, the failure to value the air conditioning system in the building on the basis that it was a mere chattel, and the failure to make an allowance for a fresh water well on the land. Both of these matters were dealt with by Laidlaw J.A.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the respondent corporation: Mason, Foulds, Arnup, Walter, Weir & Boeckh, Toronto.