IN THE SUPREME COURT OF FIJI

Civil Jurisdiction

Civil Action No. 152 of 1959

Between:

NORMA ATHOL FERRIER-WATSON Plaintiff

v.

THE ATTORNEY-GENERAL Defendant

Crown Acquisition of Lands Ordinance (Cap. 140)—assessment of compensation—principles to be applied in arriving at valuation.

This was a determination by the Supreme Court under the Crown Acquisition of Lands Ordinance of the compensation awardable to the plaintiff in respect of the compulsory acquisition by the Crown of certain areas of the plaintiff's freehold land at Nadi. The court reviewed the principles to be applied and the factors to be taken into account in arriving at a proper valuation of the land in question.

Held (*inter alia*)—that in so far as the method of valuation adopted by the Fiji Supreme Court in an earlier case of this nature (*Director of Lands v. Watson & Or.* No. 28 of 1946) appeared to conflict with the decision of the Privy Council in *Maori Trustee v. Ministry of Works* 1958 1 All E.R. 336, it could no longer be followed.

Cases cited:

Spencer v. The Commonwealth of Australia, Commonwealth Law Reports, *Vol.* 5, 1907–8, p. 418.

Harris v. Minister for Public Works 1912 (12 S.R.) (N.S.W.) 149.

Maori Trustee v. Ministry of Works 1958 3 All E.R. 336.

Director of Lands v. Watson & Or. Fiji Supreme Court No. 28 of 1948.

Turnor & Anor. v. Minister of Public Instruction, Commonwealth Law Reports, Vol. 95. 1956–57, p. 245.

Re Atherton Tolga Resumptions (1919) 8 C.L.L.R. 59.

D. M. N. McFarlane for the Plaintiff.

Justin Lewis, Solicitor-General, for the Respondent.

KNOX-MAWER, Ag. J. (10th November, 1961).

By an originating summons taken out under section 9 of the Crown Acquisition of Lands Ordinance, Cap. 140, the plaintiff seeks the determination of the amount of compensation awardable (under section 13) in respect of three areas of freehold land compulsorily acquired from her by the Crown on 17th April, 1958. The areas of land in question are at Nadi and are specifically delineated on the plans exhibited before the court A, B and C.

The court has ordered three issues for determination:—

(i) What is the value of Area A, the date of the notice of intention to acquire this land being 17th April, 1958, and the time of taking possession of this land being 25th July, 1958.

(ii) What is the value of Area B, the date of the intention to acquire this land being 17th April, 1958, and the time of taking possession of this land being 25th July, 1958.

(iii) What is the value of Area C, the date of the intention to acquire this land being 17th April, 1958, and the time of taking possession of this land being 2nd May, 1958.

The second issue, concerning the value of area B, is no longer in dispute, the plaintiff, by her counsel, having accepted the amount of 26s. offered by the Director of Lands. Judgment has already been entered for this amount.

Certain facts have been agreed by the parties and a statement thereof has been filed by the defendant, to which reference is made. I do not propose to recite all the admitted facts.

Area A comprises 7 acres and 18 perches. It formed part of a larger area of 43¼ acres of which possession was taken by the authorities, under the Defence Regulations 1939, on 29th May, 1942. As has been stated above, area A was compulsorily acquired under the Crown Acquisition of Lands Ordinance, (Cap. 140), on the 17th April, 1958. The remainder of the 43¼ acres was returned to the plaintiff, part on 31st December, 1958, and the rest on 28th February, 1959.

Area C was compulsorily acquired from the plaintiff on 17th April, 1958 for the realignment of a railway.

It is common ground that the basis of valuation of the areas in question is " the price that a willing purchaser would, at the date in question, have had to pay to a vendor not unwilling, but not anxious, to sell ". This was laid down in the case of *Spencer v. The Commonwealth of Australia*, Commonwealth Law Reports, Vol. 5, 1907–8, p. 418. The following passage from the judgment of Issacs J. in that case is particularly apposite:—

> " To arrive at the value of the land at that date, we have, as I conceive, to suppose it sold then, not by means of a forced sale, but by voluntary bargaining between the plaintiff and a purchaser, willing to trade, but neither of them so anxious to do so that he would overlook any ordinary business consideration. We must further suppose both to be perfectly acquainted with the land, and cognizant of all circumstances which might affect its value, either advantageously or prejudicially, including its situation, character, quality, proximity to conveniences or inconveniences, its surrounding features, the then present demand for land, and the likelihood, as then appearing to persons best capable of forming an opinion, of a rise or fall for what reason so ever in the amount which one would otherwise be willing to fix as the value of the property."

Each side has called two witnesses to assist the court in arriving at a proper valuation. The plaintiff's first witness was Mr. Ewins, a well-known surveyor and valuer of great experience and seniority. Secondly, the plaintiff called Mr. Park, a veteran legal practitioner with unrivalled conveyancing knowledge of land dealings in the Nadi area, where he has worked since 1926. On behalf of the defendant the learned Solicitor-General called, firstly, Mr. Tetzner, who is clearly a most able valuer. I think the fairness with which Mr. Tetzner gave his expert opinion was revealed by his willingness to concede,

in cross-examination, the conjectural element involved. Finally the defendant called Mr. Evans, the Land Development Officer, who has given expert evidence upon questions of land valuation in New Zealand courts.

As the learned Solicitor-General has agreed, the particular difficulty facing the court in this case is that there were no comparable sales of freehold land in the immediate area at the relevant time (1958). This is unfortunate because, as was pointed out in *Harris v. Minister for Public Works* 1912 (12 S.R.) (N.S.W.) 149, one of the strongest factors to be considered is the price at which land was being sold in the neighbourhood at the time in question. I shall return to this later in my judgment.

I will now review the factors which I have taken into account in arriving at my valuation. I will deal firstly with area A.

Area A lies some 3½ chains off the main road leading from Nadi township to Nadi Airport. It is about one mile distant from the centre of Nadi township. There has been extensive development both in and around Nadi township and Nadi Airport since the last war. Further urban growth along and near to the main road in question has taken place and will continue. It is true that area A has no legal access to the main road but the notional sub-division plan (exhibited by consent) reveals what could be done. It is not disputed that the most likely purchasers of land in the area would be Indians. As Mr. Park has indicated, in 1958 there was probably more Indian prosperity in the Nadi area than subsequently. The " bank squeeze " and " cane dispute " came later. It might well be that the purchase price for residential freehold plots could have been more easily found by Indian buyers in 1958, than recently. Whilst it is true that the subject area is fairly low lying and, indeed, a small portion of it is particularly so, I agree with Mr. Ewins that the same can certainly be said of almost all the land in the district. It can therefore be rightly maintained that area A is suitable for residential building. On the other hand, as Mr. Tetzner has pointed out, there is other land available for residential building, some of it nearer the main road, than area A. Mr. Ewins has spoken of area A as having been " ripe " for residential sub-division in April, 1958. Mr. Tetzner has referred to its " potential " subdivisional value for residential purposes. In my view the following passage from the judgment of Gresson J. in *Maori Trustee v. Ministry of Works* (as approved by the Privy Council—see 1958 3 All E.R. 336 at p. 341) is applicable to area A:—

> " In my opinion, in this case the land must be valued for what it in fact was on the specified date—a tract of land capable as to some, perhaps all of it, of subdivision into building allotments, and of being sold at some time and over some period in that form. That circumstance would influence a purchaser in his determination or price. In estimating what price a purchaser would be willing to pay, recourse may be had to an examination of the estimated gross yield from a subdivision as yet notional only, and the estimated deductions that a purchaser would have have to take into account; but that is the extent to which a notional subdivision can be regarded. There must be excluded from the court's contemplation retention by the claimant and an assessment of what in his hands it would yield if subdivided, because that course is not open to him. At the time value has to be determined, the land was in fact not subdivided so as to permit of sale piecemeal. A good deal requires to be done before there can be disposal in that manner, and as well as expenses there will be risk and delay."

In this connection I have been referred by the learned Solicitor-General to the judgment of this court in *Director of Lands v. Watson and Kennedy* ((No. 28 of 1946). It is to be observed that the Privy Council has now laid down the following direction (*Maori Trustee v. Ministry of Works* (*supra*) at p. 343):—

> " The court must contemplate the sale of the land as a whole unless it appears that the necessary legal consents to a subdivisional plan had been given and a survey on the ground at the specified date would have disclosed that the land or some part of it was in fact so far subdivided that the subdivided parts could at that date have been immediately sold and title given to individual purchasers, in which case the parts so subdivided may be separately valued, for the purpose of arriving at the total amount of compensation."

Insofar therefore as the method of valuation adopted by Thomson J. in *Director of Lands v. Watson & Or.* (*supra*), appears to conflict with the decision of the Privy Council in *Maori Trustee v. Ministry of Works*, it can no longer be followed.

In paying the necessary regard to the notional subdivision in this case I am further assisted by certain principles laid down in *Turner & Anor. v. Minister of Public Instruction*, Commonwealth Law Reports, Vol. 95, 1956–57, p. 245. It will, I think, suffice if I quote from the headnote of the report:—

> " A parcel of unimproved land, having no special value to the owner, was resumed under the Public Works Act 1912 (N.S.W.). The most advantageous method by which it might have been realised if it had not been resumed was sale in sub-division, but at the date of resumption it had not been sub-divided. In order to value it for compensation, the Judge of the Land and Valuation Court adopted the hypothesis of a sale *in globo* to a purchaser buying with a view to sub-dividing and selling in sub-division. To find the price it would fetch on such a sale, he estimated the probable gross proceeds of sale of the several lots into which it might be sub-divided, and deducted from the total the probable expenses of sub-division, the amounts of interest and rates which would probably be incurred before realisation would be completed, and the probable expenses of selling. Questions arose as to whether two further deductions should be made. One was a deduction for what was called " risk of realisation ", that is to say the risk that the gross proceeds might have been over-estimated and the expenses under-estimated. The other was a deduction representing the amount of profit which a purchaser would expect to make by buying the land as one block and re-selling it in subdivision. The Judge held that the first of these deductions should be made but not the second. On a case stated, the Supreme Court of New South Wales held that both should be made. On appeal to the High Court, it was held that in valuing upon the hypothesis abovementioned it was necessary to make both the questioned deductions, in order that full allowance should be made for the fact that the potentiality of the land for sale in sub-division was not immediately realizable at the date of the resumption . . . "

In ascertaining the potential sub-divisional value of area A, Mr. Tetzner has made certain calculations based upon comparative figures obtainable from, what has been called, " the Baxter subdivision ". I agree that by and large no other comparable figures are obtainable, but unfortunately (for the purposes of comparison) the Baxter plots were leaseholds whereas area A is

freehold. There are also other differences. What has been referred to by the experts on both sides as an " urge " by Indian purchasers to acquire freehold land is another factor which the court must take into consideration. With reference to figures obtained from the Baxter sub-division and the discussion we have had regarding the capitalisation of rentals, I am guided by the following citation from *Re Atherton Tolga Resumptions* (1919) 8 C.L.L.R. 59, 67:—

> " Rent obtainable for land is an element which ordinarily would get some consideration in connection with proposals for sale of the freehold, and to that extent is a factor which, failing any better guide, might be considered in arriving at the capital value for purposes of compensation; but the prices obtained in sales of the fee simple in the open market are unquestionably better evidence of capital value than any calculation based on the rent and especially on the rent receivable at a particular time or over a limited period."

There are two other factors which I must mention. The first is that while having regard to the notional sub-division of area A for residential purposes, I have not lost sight of the figures which Mr. Tetzner has given me as to the agricultural value. The other factor is that in the calculations relating to a notional sub-division I have allowed 25 per cent for profit in preference to Mr. Ewins' 12 per cent and Mr. Tetzner's 33⅓ per cent.

Applying the principles I have cited from the authorities and having regard to all the relevant factors in this case I have found that Mr. Tetzner's figure of £300 per acre should be increased by 20 per cent, giving £360 per acre. The value of area A is therefore £2,560 10s. 0d.

Similarly with regard to area C, I consider its value should be assessed at £360 per acre. The value of area C is thus £879 15s. 0d.

The total compensation to which the plaintiff is entitled is accordingly £3,440 5s. 0d. The plaintiff is awarded judgment for this amount against the defendant.