1960 CITY PARKING LIMITED (Claimant) ..APPELLANT;

*Nov. 2

AND

1961 THE CORPORATION OF THE CITY OF TORONTO (Contestant) ..... RESPONDENT.

Mar. 27

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Expropriation—By municipality of leasehold interest—Principles applicable in determining compensation—Value of leasehold interest to lessee—The Municipal Act, R.S.O. 1950, c. 243.

The City of Toronto appealed from the award of an arbitrator who awarded the claimant $50,193.45 compensation for the compulsory acquisition of a parking lot and a service station located thereon. By

the judgment of the Court of Appeal the compensation was reduced to $5,149.82 with interest, which represented the amount spent on improvements, plus 10 per cent of that sum for time and effort spent on the improvements, and $1,200 for being deprived of possession.

The claimant held the lot under a ten-year lease which contained a provision as to the lessor's right of sale in the event of her receiving an offer to purchase the property and an option to the lessee to make an identical offer. Approximately two months after the claimant had taken possession the city passed a by-law expropriating the property for municipal purposes.

The arbitrator found that a reasonable lessee in the position of the claimant at the date of the by-law would have been prepared to agree to pay a rental of 61 per cent of the gross parking revenue and 1¼ cents per gallon of gasoline sold rather than surrender possession of the demised premises. The Court of Appeal was of the opinion that the rental value of the premises at the date of expropriation was no more than the rent reserved in the lease (50 per cent of the gross parking revenue, with a minimum of $770 per month).

The claimant appealed from the judgment of the Court of Appeal to this Court.

Held (Locke and Cartwright JJ. dissenting): The appeal should be dismissed.

Per Kerwin C.J. and Abbott and Judson JJ.: The principles to be applied in determining the compensation to be awarded the claimant whose interest as lessee was to be valued were as stated in *Bignall v. The Municipality of Metropolitan Toronto,* [1957] O.W.N. 408. The value of the lease to the claimant was the difference between what he had to pay as rental and what he would be prepared to pay as a reasonable man rather than surrender possession of the premises.

The Court of Appeal had not overlooked the evidence that the amounts derived from parking and from sales of gasoline had increased over the estimates of the claimant at the time of the making of the lease, and therefore no additional amount should be allowed because of this evidence.

Per Locke J., *dissenting*: While the award made by the arbitrator could not be supported, the conclusion reached by the Court of Appeal was not supported by the evidence.

The arbitrator, having formed his estimate of what he considered to be the premium value of the lease, in determining the compensation to be paid, apparently proceeded upon the basis that the annual profits from the property would at least be equal in each year to the amounts comprising the premium value since, otherwise, the full benefit of this premium value would not be realized. To do so was to follow the course condemned by the Judicial Committee in *Pastoral Finance Association v. the Minister,* [1914] A.C. 1083. Furthermore the provision for the earlier termination of the lease appeared to have been ignored in deciding the amount of the award, and a further material matter not mentioned was the amount of income tax which would be levied upon the claimant's profits.

The lot in question was, due to its location, a very valuable one for public parking, and the fact that the claimant company was skilled in the operation of such a business was not a factor to be disregarded in estimating the value of the lease to it.

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The admissible evidence (evidence of earnings following the date of the expropriation by-law should be excluded as irrelevant) supported the view taken by the arbitrator that the business done would, in all probability, have exceeded very considerably that contemplated both by the lessor and the claimant's president at the time when the lease was executed.

A prudent person in the position of the claimant would have paid a sum of $10,000 rather than be dispossessed, plus the amount expended for improving the property.

Per Cartwright J., *dissenting*: The findings of fact made by the arbitrator were supported by the evidence of the actual parking revenues and sales of gasoline up to May 31, 1956, and should not have been disturbed. This evidence was admissible under a term of the agreement by which the claimant remained in possession up to January 7, 1957.

However the arbitrator did not attach sufficient weight to the existence of the sale clause in the lease. Having arrived at the increased rental which a prudent lessee would have been prepared to agree to pay rather than give up possession, it was next necessary to convert the difference between that rental and the rental reserved in the lease into a lump sum. This involved a calculation factors in which would be the rate of percentage to be used and the time which the lease had to run. The last mentioned of these factors was uncertain by reason of the sale clause and made the question as to what lump sum should be awarded difficult to answer. If one-half of the amount fixed by the arbitrator were awarded, the reasons of the arbitrator (which were correct) for not awarding any additional amounts for the improvements made by the claimant would still be applicable.

APPEAL from a judgment of the Court of Appeal for Ontario[1], varying an expropriation award of an official arbitrator. Appeal dismissed, Locke and Cartwright JJ. dissenting.

J. D. Arnup, Q.C., and *R. B. Robinson*, for the claimant, appellant.

J. Sedgwick, Q.C., for the contestant, respondent.

The judgment of Kerwin C.J. and of Abbott and Judson JJ. was delivered by

THE CHIEF JUSTICE:—There is no dispute as to the principles to be applied in determining the compensation to be awarded the appellant whose interest as lessee is to be valued. The arbitrator and the Court of Appeal accepted as correct the following statement of Aylesworth J.A. in *Bignall v. The Municipality of Metropolitan Toronto*[2]:

> It is clear that the only element to be taken into consideration is the value to the owner of the land expropriated. That means in the case of a lessee such as the present respondent, that the value for which he is to

[1] [1959] O.W.N. 303, 19 D.L.R. (2d) 689.
[2] [1957] O.W.N. 408 at 410.

receive compensation is the value of the lease to him. The value of the lease to him, in my view, is the difference between what he is called upon to pay as rental and what he would be prepared, as a reasonable man, actually to pay rather than surrender possession of the premises.

However, there is a great divergence of opinion as to the amount to be awarded under the circumstances existing in the present case. The Court of Appeal unanimously arrived at an estimate different from that of the arbitrator, one Member of this Court would substitute another amount and a third Member still another.

I do not read the reasons of Chief Justice Porter and of Roach J.A. as overlooking the evidence that the amounts derived from parking and from sales of gasoline had increased over the estimates made by Herman at the time of the making of the lease. I am, therefore, unable to agree that something additional should be allowed because of this evidence. The question of the effect of income tax was not argued before us and such a point would require careful consideration and possibly further evidence.

I am not prepared to disagree with the amount fixed by the Court of Appeal and would, therefore, dismiss the appeal with costs.

LOCKE J. (*dissenting*):—The question to be determined is the value to the appellant of its leasehold interest in the property in question as of November 7, 1955, being the date of the bylaw expropriating the lands for municipal purposes under the provisions of *The Municipal Act,* R.S.O. 1950, c. 243. The principle to be applied is that which has been stated many times in judgments of this Court and which was restated in *Woods Manufacturing Co. Ltd. v. The King*[1].

The lease is dated August 17, 1954, and was for a term of 10 years to commence on September 1, 1955. The negotiations for the lease were carried on by Mr. W. B. Herman, the president of the appellant, with Mr. Louis Rotenberg, the husband of the lessor. The property was at that time occupied by a tenant who used it as a public parking lot and gasoline filling station, upon terms which were not disclosed. A provision of the lease which is of importance permitted the lessor, in the event of her receiving a *bona fide*

[1] [1951] S.C.R. 504 at 508, 2 D.L.R. 465.

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offer to purchase the land, to advise the lessee of her intention of accepting such offer, whereupon the lessee should have ten days from the date of such notification to offer to purchase the premises. The lessor agreed that if the lessee's offer was on the same terms and conditions and otherwise identical with the offer received by her, to accept the offer of the lessee. If the lessee failed to submit such an offer and the lessor should accept the offer made to her, the lease might be terminated on 90 days' notice. There were provisions for reimbursing the lessee for improvements made by it upon the property, in the event of the termination of the lease under this provision.

Herman had prior to this time a long experience in directing the operation of parking lots in the City of Toronto. The appellant company was one of the most extensive operators in that business at the time in question, having some 65 to 70 locations where such business was carried on. He was aware at the time of the negotiation of the lease that the then occupant of the premises was carrying on an unsuccessful operation, both from the amount of revenue derived from the parking of cars and from the sale of gasoline. According to the evidence, the sales of gasoline on the premises were at the rate of about 40,000 gallons a year, which would be insufficient to make the business profitable. The lease in question required the lessee to pay to the lessor one-half of the gross receipts from the parking of automobiles and trucks and some incidental revenue, but expressly excepted any receipts from the operation of the service station on the premises. While greatly experienced in the parking end of the business at the time the lease was negotiated, the appellant had not theretofore been engaged in the sale of gasoline. Giving evidence, Herman said that he had underestimated very badly the amount of parking revenue the lot would produce and the amount of gasoline that his company could sell on it, saying that he had thought they might get a gross parking revenue of from $1,500 to $1,800 a month and that they might sell 100,000 gallons of gasoline a year. He said that at the time he negotiated the lease he did not attach much importance to the possible sales of gasoline and that he would have made the same deal as to parking revenue even if there had been no service station on the property.

The appellants took possession on the date specified in the lease and made improvements to the building and paved the lot. The pumps and storage tanks used by the former defendant were replaced by such equipment provided by the British American Oil Co. Ltd. The appellant had been in possession for the period of slightly more than two months when the expropriation by-law was passed. The evidence is undisputed that the revenue from parking in the months of September and October were greatly in excess of what Herman had anticipated, being $2,778.62 for September and $2,872.65 for October. Gasoline was apparently sold only during the last two weeks of September and the sales amounted to 1,184 gallons. In October this was increased to 5,282 gallons. Evidence for the appellant showed that these sales very greatly increased from November 1, 1955, to May 31, 1956, averaging monthly during that period some 22,000 gallons. The monthly parking revenue during the same period averaged slightly in excess of $3,000.

No objection was made before the arbitrator to the admission of this evidence and, as the matter is not mentioned in the reasons delivered in the Court of Appeal, I assume that its admissibility was not argued there. Since the appellant is entitled to be compensated for the value of the lease to it and since that matter is to be determined by estimating what the lessee would, as a prudent person, have paid at the relevant date for the leasehold interest rather than be deprived of it, there appears to be no logical basis for the admission of evidence of matters thereafter occurring of which, of necessity, the appellant could know nothing and which could not influence its decision as to what it could prudently pay. That decision could be based only on facts known to the lessee at the time of making it. It is "what would he as a prudent man *at that moment* pay for the property rather than be ejected from it" (*Woods Manufacturing Co. Ltd. v. The King,* at p. 508). Had there been a disastrous slump of business after November 7, 1955, evidence of that fact would be equally inadmissible. In my opinion, the evidence in either case should be excluded as irrelevant. I consider that nothing that was said by Kerwin

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J. (as he then was) in *The King v. Halin*[1], or by Nolan J. in the judgment of this Court in *Roberts v. The Queen*[2], supports the admissibility of this evidence. In the latter case, evidence to establish market value was admitted of sales of land on the open market within a reasonable period after the date of the expropriation, it being proved that there was no material change in the market for such land in the *interim*. The evidence received in this case was for an entirely different purpose, being to show the earning capacity of the property as of a later date. If it were in law admissible, its weight would, in my opinion, be negligible, though it would afford some support for Herman's evidence that he was of opinion that the revenue from parking would be greatly in excess of the amounts contemplated at the time the lease was negotiated and possession taken.

The appellant sought to establish the value of the leasehold interest by evidence to the effect that the rent reserved of 50 per cent. of the gross receipts from other than gasoline sales was substantially less than it would have been prepared to pay for such a lease on November 7, 1955, rather than be dispossessed. The lease provided that land taxes, except to such extent as they might be increased by improvements made by the lessee, were to be paid by the lessor. Taxes and other expenses incident to the operation of the business were payable by the lessee. The main expense of operating both the parking and service station businesses was for labour, this requiring the employment of three men. According to Herman, the cost of operation of such a property for labour does not increase in proportion to the increase of parking revenue and he said that it cost no more to operate the lot when it was producing a gross revenue of $3,000 a month from parking than it would have, had his original estimate of a revenue of about $1,500 a month from this source proved accurate. He said that no additional men were employed or required for the operation of the service station.

The lessor received no share of the revenue or profit derived from the sale of gasoline. The appellant had made a written agreement with the British American Oil Company for the use of equipment supplied by it, and the

[1] [1944] S.C.R. 119.
[2] [1957] S.C.R. 28 at 36, 6 D.L.R. (2d) 305.

purchase of gasoline and oil at the current rate charged to retail dealers by that company in Toronto. Herman, however, said that before the appellant took possession of the property he had made an agreement with the oil company entitling it to purchase gasoline at .02cts less per gallon than the price defined in the written agreement. This arrangement was not apparently reduced to writing and while the witness Hodgins, an employee of the company, was called by the appellant, he said nothing about the matter. The arrangement apparently enabled the appellant to sell gasoline at .05cts less than the price current at the majority of other filling stations and, according to Herman, at a profit.

Herman's evidence was that as of November 7, 1955, the appellant would have agreed to pay to the lessor 66⅔ per cent. of the revenue derived from the property, other than from the sales of gasoline.

Mr. Murray Bosley, an experienced real estate agent and valuator living in Toronto, said that he considered from the standpoint of the lessee that a fair economic rent to pay for the property as of the relevant date was 65 per cent. of the parking revenue. The witness formed this opinion after considering figures supplied to him by the appellant as to the parking revenue and sales of gasoline during the period September 1, 1955, to May 31, 1956, and assuming the continuance of revenue at the level shown during the balance of the year.

Mr. Frederick Hotrom, who was shown to have some forty years' experience in the real estate business in Toronto, expressed the opinion that the rent reserved of 50 per cent. of the gross revenue was about normal, compared with that payable for other such lots in Toronto. He had not considered the possible revenue to be derived from the sale of gasoline but said that this would not affect his opinion. He was satisfied that Rotenberg would not rent the property for less than a rental that was fair to the lessor and appeared to be of the view that, since he had not stipulated for a share of the profit from sales of gasoline, he did not regard this as of importance. The witness, while of very long experience, had not theretofore had anything to do with leases and rent for parking purposes when the

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rental reserved was a percentage of the gross receipts and he had not considered the figures as to the receipts after November 7, 1955, in forming his opinion.

Mr. R. F. Heal, who had had an extensive experience in dealing in real estate in Toronto, was of the opinion that 50 per cent. of the gross revenue was practically a standard rate for leases of this nature and that the leasehold interest was of no value at the time of the expropriation. He considered, rightly in my opinion, that only the result of the operations up to that date were to be considered in deciding the value to the lessee. Dealing with gasoline sales, as these had been only at the rate of some 14,000 gallons in October 1955 and, assuming a continuance of this rate of sales, he did not consider that the business would be profitable and said that he could not understand how anyone could make money on such a turnover when selling gasoline at .05cts less than the current price.

Mr. John W. Walker, the general manager of the parking authority in the city of Toronto, had negotiated a large number of leases for the parking lots of his employer and showed that, when leased on a percentage basis, there was a considerable variation in the rent reserved. The city operated 40 of such lots and the witness showed that some rentals paid were less than 50 per cent. of the gross revenue and some exceeded that amount. It was apparently considered that the site in question was a desirable parking site as the purpose of the expropriation was to construct a parking garage having a capacity of several times that of the lot, as used by the appellant. The witness agreed that the higher the gross revenue the higher the percentage a lessee could afford to pay. He had not been asked to consider the rental value of the property in the light of the revenue derived after November 7, 1955.

The learned arbitrator, while referring to a passage of the judgment of Aylesworth J.A. in *Bignall v. Municipality of Metropolitan Toronto*[1], which dealt with the expropriation of a leasehold interest where that learned judge stated that the lessee was entitled to the value of the lease to him, that being the difference between what he is called upon to pay as rental and what he would be prepared as a reasonable man to pay rather than surrender possession of the

[1] [1957] O.W.N. 408.

premises, and to the further fact that there was a clause permitting the termination of the lease upon the conditions above referred to, computed the compensation by allowing the present value of the sum of what he considered to be the annual premium value of the lease throughout the balance of the ten year term. The arbitrator was apparently invited to determine the value of the lease to the appellant as of the date of the expropriation by considering, *inter alia,* the revenue derived from the property, both from parking and from the sale of gasoline up to a date some six months after November 7, 1955, and upon his estimate of its continuance at this high level during the balance of the term.

Dealing with the matter on this footing, he considered that the annual sales of gasoline would approximate 260,000 gallons and that the fair rental value of the premises for this purpose for which nothing was paid was .01¼ cts. per gallon, amounting to $3,250 annually. He estimated that the gross earnings from parking for the remaining period of the lease would average $36,301.20 a year, that a fair rental on this basis was 61 per cent of these gross figures and that, as the lease called for payment of only 50 per cent of such gross, the lease had a premium or added value for this purpose of $3,933.13. The total of these two estimates is $7,243.13.

While the appellant did not undertake to estimate the gross annual profit which might be anticipated, sufficient evidence was adduced which, if accepted by the arbitrator, would tend to show that the annual profits reasonably to be expected would be in excess of the above mentioned sum.

In arriving at the present value of the lease to the appellant the arbitrator adopted a figure used by the witness Bosley, who had expressed the opinion that what the arbitrator referred to as the premium value of the lease per annum was $9,739.80 and took the sum of this difference for 8 years and 8 months, being the balance of the 10 year term as of the date the appellant gave up possession, and calculated that the present value of that sum was 6.29982 times the said annual premium value. The arbitrator, using this method of computation, multiplied the figure of $7,243.13 by 6.29982 thus arriving at a total figure of $45,630.41, to which was added 10 per cent for compulsory taking.

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The judgment of the Court of Appeal set aside this award and reduced the total compensation to $5,149.82 and allowed interest on that sum at 5 per cent from January 7, 1957.

All of the learned judges of the Court of Appeal were of the opinion that the rent reserved by the lease was the full rental value of the property for the purposes to which it was being put and that, accordingly, the lease had no market value. The learned Chief Justice of Ontario, while referring to the revenue from the operations of the property between November 1955 and May 1956, said that there was no evidence to indicate that the lease was worth more as a parking lot than at the date of the lease "when the claimant puts its own valuation upon it." Roach J.A., referring to the fact disclosed by the evidence that both Rotenberg and Herman were shrewd and experienced business men and it was reasonable to conclude that when they finally settled upon the terms of the lease the claimant got no better bargain than anyone else could have got, considered that the rental value in the open market as of that date was thereby established.

While, in my opinion, the award made by the arbitrator cannot be supported, I am unable with great respect to agree with the conclusions reached in the Court of Appeal or with the reasons advanced for those conclusions.

In *Pastoral Finance Association v. The Minister*[1], Lord Moulton, delivering the judgment of the Judicial Committee, after referring to the fact that at the hearing evidence of the prospective savings and additional profits had been put forward in support of a claim that the capitalized value of the increase in the profits of the business due to them should be added to the market value of the land in arriving at the compensation, said in part (p. 1088):

> That which the appellants were entitled to receive was compensation not for the business profits or savings which they expected to make from the use of the land, but for the value of the land to them. No doubt the suitability of the land for the purpose of their special business affected the value of the land to them, and the prospective savings and additional profits which it could be shewn would probably attend the use of the land in their business furnished material for estimating what was the real value of the land to them. But that is a very different thing from saying that they were entitled to have the capitalized value of these savings and additional profits added to the market value of the land in estimating their

[1] [1914] A.C. 1083.

compensation. They were only entitled to have them taken into consideration so far as they might fairly be said to increase the value of the land.

The learned arbitrator, having formed his estimate of what he considered to be the premium value of the lease, in determining the compensation to be paid in the manner above explained, apparently proceeded upon the basis that the annual profits from the property would at least be equal to these amounts in each year since, otherwise, the full benefit of this premium value would not be realized. To do this was to follow the course condemned by the Judicial Committee. Furthermore, while mentioning the provision for the earlier termination of the lease and saying that he regarded it as lessening its value, this appears to have been ignored in deciding the amount of the award.

A further material matter which would, of necessity, affect the judgment of the appellant in deciding what amount it would pay rather than be dispossessed was the amount of income tax which would be levied upon its profits. During the cross-examination of Herman he was asked as to the annual income of the appellant, to which he replied that he did not know at what point in 1955 the company "reached $20,000" and said that he did not have the income tax statement there. The matter was not further mentioned in the evidence and, from the fact that it was not mentioned in the reasons for the award, it was presumably not argued before the arbitrator. It is to be remembered that the appellant operates some 65 to 70 filling stations in Toronto and elsewhere and, accepting Herman's evidence as to the expected profit from the operation of the property in question, it may properly be assumed that the total net income from all of the company's operations would be greatly in excess of $20,000 during the years when the lease continued in effect. Corporation incomes in excess of that amount were subject to tax in the amount of $3,600 plus 45 per cent. of the amount by which the amount taxable exceeded $20,000, a rate which applied also to the taxation years 1957 and 1958. In 1959 the percentage rate mentioned applied to incomes in excess of $25,000. It would obviously be only the net

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income that would be considered by a lessee in deciding what amount it could prudently pay rather than be dispossessed.

In my opinion, it is made clear by the evidence in this matter that the lot in question was, due to its location, a very valuable one for public parking and that the appellant, by reason of its long experience, could utilize its natural advantages to the fullest extent. It was shown that the business activities carried on in the vicinity of the property attracted large numbers of persons who required parking facilities. The property was expropriated by the city for that purpose, the evidence disclosing that after possession was taken a garage having six times the parking capacity of the bare lot was erected upon the property. The fact that the appellant was skilled in the operation of such a business is not a factor to be disregarded in estimating the value of the lease to it and, in my opinion, the evidence supports the view taken by the arbitrator that the business done would, in all probability, have exceeded very considerably that contemplated both by the lessor and by Herman when the lease was executed in 1954.

The parking receipts for September and October were between $1,200 and $1,300 in excess of the amount necessary to pay the minimum rent reserved by the lease of $770 a month and exceeded Herman's estimate by more than $1,000 a month. As the lessee was entitled to half of the gross revenue from parking it was thus assured a gross monthly return of roughly $1,400 which would yield an additional $500 a month gross profit if that figure could be maintained. The lessee might further reasonably anticipate, in my opinion, that the arrangement which enabled it to sell gasoline at such a considerable discount would attract added custom for the parking facilities. Herman was not experienced in the operation of filling stations, according to his evidence, up to the time that this lease was negotiated. The sales for the portion of the month of September in which the filling station was operated and for the month of October were small, only totalling some 6,600 gallons. Herman said that he anticipated that the

filling station would operate at a profit and that its operation would not increase the cost of labour for the operation of the parking lot. There is, however, nothing in the admissible evidence to support the arbitrator's estimate of average annual sales of 260,000 gallons. The evidence given by Herman to the effect that the greater the revenue to be derived from parking the larger percentage of the gross revenue could be paid as rent is supported by the evidence of the witness Walker, and the learned arbitrator has accepted the evidence that for a lease of property producing a gross revenue from parking of $3,000 a percentage of 61 per cent. was a fair rental at the time.

I do not think that this is a case which should be sent back for rehearing by the arbitrator since it appears to me that there is no further evidence relevant to the point to be decided that could be adduced. Upon the evidence in the record it is my opinion that a prudent person in the position of the appellant would have paid a sum of $10,000 rather than be dispossessed, plus the amount expended for improving the property as to which I would adopt the figure accepted by the Court of Appeal of $3,590.75.

I would allow this appeal with costs in this Court and direct that the respondent pay to the appellant the sum of $13,590.75 and, in addition, 10 per cent thereof for forceable taking, and interest on these amounts since January 7, 1957.

CARTWRIGHT J. (*dissenting*):—This is an appeal from a judgment of the Court of Appeal for Ontario[1] pronounced on July 2, 1959, allowing an appeal by the City of Toronto from an award made by Harold W. Timmins, Esquire, Q.C., an official arbitrator, dated February 24, 1958, fixing the compensation payable to the appellant for its leasehold interest in a parcel of land in downtown Toronto expropriated by the respondent for municipal purposes.

By the award the compensation payable to the appellant was fixed at $50,193.45 plus interest and costs. By the judgment of the Court of Appeal this was reduced to $5,149.82 plus interest and costs.

[1] [1959] O.W.N. 303, 19 D.L.R. (2d) 689.

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There does not appear to have been any difference of opinion between the learned arbitrator and the members of the Court of Appeal as to the principle to be applied in fixing the compensation. All accepted as accurate the statement of Aylesworth J.A. in *Bignall v. The Municipality of Metropolitan Toronto*[1]:

> It is clear that the only element to be taken into consideration is the value to the owner of the land expropriated. That means in the case of a lessee such as the present respondent, that the value for which he is to receive compensation is the value of the lease to him. The value of the lease to him, in my view, is the difference between what he is called upon to pay as rental and what he would be prepared, as a reasonable man, actually to pay rather than surrender possession of the premises.

On the argument before us, I did not understand counsel to question either the accuracy of this statement or, subject to the effect of the sale clause to be mentioned hereafter, its applicability to the case at bar.

The demised premises were owned by one Minnie Rotenberg. The negotiations leading to the making of the lease were carried on in August 1954, at which time the premises were in the possession of a tenant under a lease expiring on August 31, 1955. On behalf of the owner the negotiations were conducted by Mr. Louis Rotenberg, hereinafter referred to as Rotenberg, and on behalf of the appellant by its president Mr. W. B. Herman, hereinafter referred to as Herman. It is common ground that both of these persons are shrewd and experienced business men.

A formal lease was executed; it is dated August 17, 1954, and is for a term of ten years to be computed from September 1, 1955, on which date the appellant was to be given possession. The appellant went into possession early in September 1955 and commenced selling gasoline on September 14, 1955.

On November 7, 1955, the respondent passed a by-law expropriating the lands in question for municipal purposes, and it is as of that date that the compensation is to be fixed.

The parcel expropriated is of an irregular shape having a frontage on Dundas Square, its south boundary, of 121 feet 9 inches, a frontage on Victoria Street, its east boundary, of 58 feet 11 inches, a frontage on Dundas Street East, its north-east boundary, of 148 feet 3½ inches and a frontage

[1] [1957] O.W.N. 408 at 410.

on O'Keefe's Lane, its west boundary, of 148 feet $3\frac{1}{2}$ inches. On the south-west portion of the expropriated parcel stood a two-storey brick building having a frontage of 18 feet on Dundas Square and 89 feet on O'Keefe's Lane. The land leased to the appellant consisted of the whole of the expropriated parcel except the part occupied by this brick building. It is clear from the description of the demised lands in the lease that the portion occupied by the brick building was not included and this was confirmed by Mr. Herman's evidence. The learned arbitrator appears to have been under the impression that it was included and the terms of paragraph 3 of the lease, to be referred to later, seem inconsistent with the view that it was excluded. However, nothing seems to turn upon this and neither counsel made any point of the provision in paragraph 3 referring to this building.

While the expropriating by-law was passed on November 7, 1955, the appellant was permitted to remain in possession and to continue to operate its business until January 7, 1957; but it was a condition of this permission that in arbitration proceedings to fix the compensation to which it was entitled the appellant should not make use of any statements as to its earnings subsequent to May 31, 1956.

The rent payable was set out in paragraph 2 and part of paragraph 3 of the lease as follows:

2. YIELDING AND PAYING THEREFOR unto the Lessor, her heirs, executors, administrators and assigns, yearly and every year during the said term a rental equivalent to 50 per centum (50%) of the amount of the gross receipts (as hereinafter defined) in each year, but in no event shall the minimum annual rental hereunder be less than the sum of $9,240.00 which rental shall be payable $770.00 monthly in advance on the first day of each and every month commencing September 1st, 1955 and the balance of any rental, if any, which may become owing shall be ascertained and paid as hereinafter provided.

3. The term "gross receipts" shall include the gross receipts of each year from the following sources:

(a) All revenue derived from parking of automobiles and motor trucks on the demised premises.

(b) All rent revenue which the lessee may derive from the second floor of the building on the demised premises.

(c) All revenue derived from the leasing of billboards, taxi stalls and telephone booths and any other rental revenue which the Lessee shall derive by virtue of its use of the demised premises.

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The gross receipts shall not include the revenue derived from the first floor of the building on the demised premises and shall not include the receipts derived from the operation of the service station on the demised premises.

* * *

For the purpose of calculating rental, any Dominion, Provincial or Municipal taxes which the Lessee or other occupant of the demised premises is required to collect from its customers shall not be included as gross receipts.

We were informed by counsel that clauses (*b*) and (*c*) of paragraph 3, quoted above, are of no importance.

The lease contained a provision that if at any time during the term the lessor should receive a *bona fide* offer to purchase the demised premises which she wished to accept she should give the lessee 10 days' notice of her intention to accept and if within that period the lessee made an identical offer she would accept the offer of the lessee but if the lessee failed to make such an offer the lessor would be free to accept the first mentioned offer and have the right to require the lessee to vacate upon 90 days' notice after the completion of the sale. In the event of the lessee being required to vacate under this clause it was provided that the lessor should repay the cost of repairs and improvements made by the lessee to the demised premises and the costs of paving the lot but in no event was the lessor to be liable to repay more than $5000 if possession were taken during the first year of the term, $4000 if possession were taken during the second year of the term, $3000 if possession were taken during the third year of the term, $2000 if possession were taken during the fourth year of the term, $1000 if possession were taken during the fifth year of the term. If possession was taken thereafter no repayment was to be made to the lessee.

At the date of the lease there was on the demised premises a stucco service station building in a poor state of repair to the east of which was a gasolene pump "island" on which were two pumps. The terms of the lease to the former tenant are not in evidence. The business carried on on the premises by the former tenant was that of a parking lot and a service station selling Supertest gasolene; there is little evidence as to what revenue he in fact derived from either of these activities but there is evidence that at the time of negotiating the lease Herman believed that

the former tenant's operations had not been very successful, that his sales of gasolene had amounted to about 40,000 gals. a year, that the rental paid to Mrs. Rotenberg was substantially less than the $770 a month which was to be the minimum rental under the lease to the appellant and that in view of the results under the former lease Rotenberg thought he was making a "very good deal" with the appellant.

In the course of the negotiations for the lease Rotenberg asked for an estimate of the appellant's probable receipts and Herman's evidence as to this is as follows:

Q. At the time you negotiated that lease were you making forecasts of what you might make on it? A. We were at Mr. Rotenberg's request, because he was interested in knowing what he might earn with his fifty percent.

Q. And did you give him some estimates of yours before you signed the lease?—A. Yes, we did, sir.

Q. What did you estimate? A. Well, we estimated and we told him we thought it would gross at least fifteen hundred dollars a month, and that is why we were quite prepared to guarantee seven hundred and seventy dollars a month.

Q. That is where the figure in the lease comes in? A. Yes. It was originally seven hundred and fifty. I don't know where the other twenty came in, and we thought we could probably gross as high as seventeen or eighteen hundred, and in the last months of the year, which was the fall of the year, there was a chance we might reach two thousand, which would give him a rent of a thousand dollars a month.

Q. And on that basis the two of you agreed on the terms of this lease in August, nineteen fifty-four? A. Yes, sir.

Herman testified that he understood that Rotenberg attached little significance to the operation of the service station; his actual words were:

. . . and he (Rotenberg) furthermore knew, Mr. Campbell, that his previous tenant had not sold enough gasoline to—to use the vernacular—to put in your left eye, and he didn't think that we would either, so he didn't attach very much importance to the gasoline business.

Herman's evidence as to his own view as to this at the time of entering into the lease is as follows:

Q. What do you pay for this service station on subject lot—did you pay? A. We paid nothing.

Q. You paid nothing for it? A. Yes.

Q. The rent for that lot—did the fact that you were getting that service station thrown in influence you in your tender and the amount of rent that you agreed on? A. As I told you earlier, I didn't attach too much importance or rate very highly the possible gasoline volume in that location at the time I entered into my lease with Mr. Rotenberg; and it is

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difficult for me to say to what extent I was influenced. I think I probably would have made the same deal with Mr. Rotenberg even if there hadn't been a service station on that lot.

Q. You say you would? A. I think I would have. You see, I had what appeared to be a profitable operation without the service station—just running a parking lot. I wasn't sure at the time I went in whether—I didn't know what the service station would bring.

The learned arbitrator, in his reasons for the award, after an elaborate examination of the evidence made the following findings of fact: (i) that the appellant had in fact made a "good deal"; (ii) that the revenues both from parking and the operation of the gasolene station went far beyond what the previous operators of the lot had been able to achieve; (iii) that this great increase of revenue was due largely to the skilful management of the appellant; (iv) that a substantial increase in the amount of gasolene sold would tend to some extent to reduce the gross revenue from parking; (v) that the lot was a small one as parking lots go and that its best use at the date of the by-law was that which was being made of it, i.e., "a small transient service station and a parking lot"; (vi) that the future of the business was subject to hazards and uncertainties such as competition from other parking lots and service stations which might be opened in the vicinity and the possibility of alteration in traffic and parking regulations by municipal by-laws; (vii) that the sale clause was a detriment to the lease; (viii) that the gross parking revenue for the balance of the term of the lease to be reasonably anticipated at the date of the by-law was $36,301.20 a year; and (ix) that the amount of the annual sales of gasolene for the balance of the term to be reasonably anticipated at the date of the by-law was 260,000 gallons.

The learned arbitrator went on to find that a reasonable lessee in the position of the appellant at the date of the by-law would have been prepared to agree to pay a rental of 61 per cent. of the gross parking revenue and $1\frac{1}{4}$ cents per gallon of gasolene sold rather than surrender possession of the demised premises.

I have read all the record with care and, in my opinion, the above findings are all supported by the evidence. The estimates of gross parking revenue and of sales of gasolene made by the learned referee are substantially less than those

made in the testimony of Herman who said he would have been prepared to pay a rental of 1½ cents per gallon of gasolene and more than 66⅔ per cent of the gross parking revenue rather than give up possession; but I think it clear from reading the whole record that the learned arbitrator regarded Herman as an honest and truthful witness.

Having made the above findings the learned arbitrator arrived at the amount of compensation by the following calculation:

61 per cent of estimated annual parking revenue of	$36,301.20	— 22,143.73
50 per cent of estimated annual parking revenue of	36,301.20	— 18,150.60
	Difference	3,993.13
1¼ cents per gal. on estimated annual sale of	260,000 gallons	3,250.00
	Total	$7,243.13

Taking $7,243.13 as the difference between the annual rental payable under the lease and that which a prudent lessee would have been willing to pay, the present value of this difference as of January 7, 1957, calculated over the period from the date of giving up possession to the date of expiration of the lease, i.e., from January 7, 1957, to August 31, 1965, was arrived at by applying the factor of 6.29982 which brings out the result of $45,630.41. On the assumption that the other figures arrived at by the learned arbitrator were correct counsel did not question the correctness of the factor mentioned.

The learned arbitrator added 10 per cent for compulsory taking and awarded as total compensation $50,193.45 with interest from January 7, 1957.

In the Court of Appeal the learned Chief Justice of Ontario was of opinion that there was no evidence that the rental value of the premises at the date of expropriation was more than the rent reserved in the lease, and Roach J.A. said in part:

> The claimant contended that, quite apart from the improvements, the actual rental value was considerably greater than the rental reserved by the lease because it got this lease at a bargain price or as Mr. Herman put it,—he got a "good deal". The learned official arbitrator gave effect to that contention; I would not. In his reasons he said: "The evidence of Mr. W. B. Herman, President of City Parking Limited, is that the claimant company has been in the parking business in Toronto and elsewhere for ten or twelve years and that they have had wide experience in

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the parking business and in the negotiating of leases and purchase of properties for parking stations." Mr. Rotenberg, who negotiated the lease on behalf of his wife, the owner, was also a shrewd, keen and experienced businessman. He was not likely to lease the lot to the claimant for a rental less than he could get from someone else on the open market at that time. He and Mr. Herman dealt at arms' length each unquestionably attempting to get on behalf of those whom he represented, the best possible terms. I think it is reasonable to conclude that when they finally settled on the terms of the lease, the claimant got no better bargain than anyone else could have got. The rental value on the open market as of that date, expressed in terms of a percentage of "gross receipts" with a guaranteed minimum, was thereby established. This is the cogent and compelling evidence to which I earlier referred. That value was increased only by the improvements that the claimant made.

With great respect, these observations appear to me to overlook the facts, (i) that by the date of the passing of the expropriating by-law it had already become apparent that the revenues to be derived from parking were greatly in excess of the estimates made by Herman and communicated to Rotenberg at the time of the making of the lease, and (ii) that the evidence as to the sales of gasolene made up to the end of May, 1956, shewed that the revenues from that source would greatly exceed those obtained by the former tenant. The preponderance of the evidence was to the effect that, generally speaking, the greater the gross parking revenue the greater will be the percentage thereof charged as rental. There was uncontradicted evidence that even if the appellant were obligated to pay a rental of $1\frac{1}{2}$ cents per gallon of gasolene sold sales of gasolene of the annual volume found by the learned arbitrator to be probable would yield a substantial profit; it is true that this was to some extent dependent on the favourable arrangement as to price which the appellant had made with the company from which it purchased its gasolene but there was evidence that this arrangement was likely to continue.

In determining what rental a prudent man in the position of the appellant would have agreed to pay at the date of expropriation rather than give up possession of the demised premises it was necessary for the learned arbitrator to decide, amongst other things, what estimate as to the revenues which would probably be derived in the future during the currency of the lease would be made by that prudent man. In doing this, he was, in my opinion, entitled to consider the evidence of the actual parking revenues and sales

of gasolene up to May 31, 1956. It appears from the whole record that the parties made it a term of the agreement under which the appellant remained in possession of the expropriated premises up to January 7, 1957, that in any arbitration proceedings evidence might be given of earnings up to May 31, 1956, but not of earnings subsequent to that date. In civil cases the rules of evidence may be relaxed by consent or contract of the parties; (vide the cases collected in Phipson on Evidence, 9th edition, p. 8).

In this case, the agreement of the parties relieves us of the task of deciding whether in the absence of any agreement evidence of the revenues actually derived from the demised premises during the period that the appellant remained in possession would have been admissible. Had it become necessary to decide that question, careful consideration would have had to be given to the judgment of the House of Lords in *Bwllfa and Merthyr Dare Steam Collieries (1891) Limited v. Pontypridd Waterworks Company*[1], and to the comments made thereon by Lord MacMillan, in *Lincolnshire Sugar Co. v. Smart*[2].

In my opinion the findings of fact made by the learned arbitrator which I have set out above were supported by the admissible evidence and should not have been disturbed, and I would have been of opinion that the final result at which he arrived was a proper one if the lease had been for a term certain of ten years.

I have, however, reached the conclusion that the learned arbitrator did not attach sufficient weight to the existence of the sale clause in the lease. Having arrived at the increased rental which a prudent lessee would have been prepared to agree to pay rather than give up possession it was next necessary for the learned arbitrator to convert the difference between that rental and the rental reserved in the lease into a lump sum. This involved a calculation factors in which would be the rate of percentage to be used and the time which the lease had to run. The last mentioned of these factors was, by reason of the sale clause, uncertain; it might well continue to August 31, 1965; it might equally well terminate in a little over ninety days.

[1] [1903] A.C. 426.

[2] [1937] A.C. 697 at 705.

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The evidence as to the probability of the lessor receiving an acceptable offer to purchase the property is understandably scanty, but Herman says in his evidence that it is true of most of the appellant's rented lots that there is a scheme to build on them in the future, that the rented lots they have lost in the past have usually been lost because someone decided to build on them or because they were sold and that "the casualty rate in regard to those lots is large". Against this is to be set Herman's evidence that the appellant was in a financial position to meet an offer made to purchase the property and purchased many of its lots; but if the appellant purchased the lot pursuant to the sale clause the lease would none the less be at an end, and, as is pointed out in the reasons of the Court of Appeal, there was no reason to suppose that the appellant would acquire the lot in this way for less than its full market value.

In view of this uncertainty as to how long the lease would have continued in force I find the question as to what lump sum should be awarded an extremely difficult one to answer but have reached the conclusion that this should be fixed at one half of the amount fixed by the learned arbitrator. If this amount is awarded the reasons of the learned arbitrator for not awarding any additional amounts for the improvements made by the appellant will still be applicable and I agree with those reasons.

For the above reasons I would allow the appeal and direct that the order of the Court of Appeal be varied to provide that the contestant do pay to the claimant the sum of $25,096.73 together with interest thereon at 5 per cent per annum from January 7, 1957, as full compensation for the lands taken including all damage suffered by the claimant by reason of the expropriation; the order of the Court of Appeal as to the costs in that Court and of the proceedings before the Official Arbitrator should stand; the appellant is entitled to its costs in this Court.

Appeal dismissed with costs, LOCKE *and* CARTWRIGHT JJ. *dissenting.*

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