THE MUNICIPALITY OF METROPOLITAN TORONTO (*Contestant*) APPELLANT;

1961
*June 8
Oct. 3

AND

A. LOWRY, A. RICHARDSON and GUARANTY TRUST COMPANY OF CANADA, Trustees of the Estate of LYDIA J. FLEMING, Deceased (*Claimants*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Expropriation—Previous sale of parcels adjoining expropriated strip—Purchasers agreeing to purchase portions of strip at a higher price under option clause—Proper valuation—Allowance for compulsory taking denied.

The appellant municipality expropriated part of the respondents' farm for a parkway, the expropriated lands forming a strip which bisected the said farm from south to north approximately at its centre. The respondents had previously entered into agreements of sale of the west and east parcels of the farm, but had reserved from sale the parkway lands and a small additional strip. Each of the agreements contained a provision under which the respective purchasers were to purchase one-half of the parkway lands lying between their respective purchases at $15,000 per acre, if called upon by the respondents to do so at any time within three years.

The appellant's offer, following expropriation, was refused and the parties went to arbitration. The resulting award was appealed on two grounds: (1) that the arbitrator had erred in taking into account the option

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provisions in the agreements of sale in arriving at the amount of compensation to be awarded and (2) that he erred in awarding any allowance for compulsory taking. The Court of Appeal unanimously allowed the appeal with respect to the second ground but the majority dismissed the appeal with respect to the first ground.

Held (Kerwin C.J. dissenting): The appeal should be allowed.

It was undisputed that the respondents were entitled to receive from the expropriating authority the value to them of the parkway lands at the date of expropriation. On the uncontradicted evidence it also could not be disputed that—except for the effect of the agreements of sale—the highest value to the respondents of those lands was $12,500 per acre. The form of words used in the agreements could therefore have no other purpose than to assure to respondents a total price worked out on the basis of $12,800 per acre for all their lands.

While the respondents were free to make any bargain the purchasers were willing to agree to, they could not by attributing a higher value to the strip to be expropriated and a correspondingly lesser value to the balance of their property, thereby throw upon the expropriating authority the obligation to pay out of public funds more than the expropriated lands were in truth worth to the respondents as owners.

Per Kerwin C.J., *dissenting*: The arbitrator was correct in finding that the value to the owners was not less than the amount at which they could have sold the expropriated lands under valid enforceable contracts at any time within three years from the restrictive dates of purchase of the parcels which had been sold. As found by the Courts below, the agreements were *bona fide*.

Per Curiam: A motion that the amount of the award should be varied by the addition of 10 per cent for compulsory taking was dismissed in view of the judgment in *Drew v. The Queen*, [1961] S.C.R. 614.

APPEAL from a majority judgment of the Court of Appeal for Ontario[1], dismissing in part an appeal from an award of compensation by Forsyth C.C.J for certain lands expropriated by the appellant. Appeal allowed, Kerwin C.J. dissenting.

Hon. R. L. Kellock, Q.C., and *A. P. G. Joy, Q.C.*, for the appellant.

J. D. Arnup, Q.C., and *J. J. Carthy*, for the respondents.

THE CHIEF JUSTICE (*dissenting*):—Although counsel for the appellant studiously avoided describing the agreement between the Fleming estate and responsible purchasers as fraudulent, it appears impossible to allow the appeal unless one comes to the conclusion that the parties thereto and their advisers conspired to concoct a scheme which was a sham and which was entered into for the express purpose

[1] [1960] O.W.N. 373, 24 D.L.R. (2d) 374.

of forcing the appellant to pay at the rate of $15,000, instead of $12,500 per acre. It was suggested that if the parties could agree upon the figure of $15,000, they might have agreed to twice that sum, but I am satisfied that, even if one could imagine the parties entering into any such pact, the Courts would be able to deal with that sort of contrivance. There is nothing in the record to indicate that the arrangement was not arrived at between parties dealing at arm's length. In fact, no attempt was made by the municipality to suggest that this was not the case.

The arbitrator was correct in finding that the value to the owners was not less than the amount at which they could have sold the lands under valid enforceable contracts at any time within three years from the restrictive dates of purchase of the parcels which the estate had sold. The Court of Appeal had no difficulty in determining that the agreements were *bona fide* and affirmed the order of the arbitrator. Not only has no good reason been shown to set aside the concurrent findings of the Courts below, but upon a review of the evidence I have come to the same conclusion.

The appeal should be dismissed with costs. The respondents served notice that they would contend that the amount of the award should be varied by the addition of an allowance of ten per cent for compulsory taking. In view of the judgment of this Court in *Drew v. The Queen*[1], this motion must be dismissed but without costs.

The judgment of Cartwright, Fauteux, Abbott and Judson JJ. was delivered by

ABBOTT J.:—This appeal is from a majority judgment of the Court of Appeal for Ontario[2], dismissing in part an appeal from an award made by His Honour Judge Forsyth of the County Court of the County of York fixing the compensation payable to respondents for certain lands expropriated by appellant for the Don Valley Parkway pursuant to by-law 902 of the Council of the appellant municipality passed on February 10, 1959.

The lands expropriated (hereinafter referred to as the parkway lands) consisted of 29.33 acres of raw farm lands forming part of a farm of the respondents of approximately

[1] [1961] S.C.R. 614, 29 D.L.R. (2d) 114.
[2] [1960] O.W.N. 373, 24 D.L.R. (2d) 374.

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241.08 acres, bounded on the south by Eglinton Avenue East in the appellant municipality, and running north to the Canadian Pacific Railway, the Don Mills Road forming its westerly boundary and the Canadian National Railways its easterly boundary.

Generally speaking the parkway lands consist of a narrow strip some 2,000 feet in length and 200 feet in width, which bisects the said farm from south to north approximately at its centre, the said strip widening slightly at its northerly end and more so at its southerly end to allow for a clover leaf at Eglinton Avenue. A parcel composed of approximately 97 acres of the farm lies to the west of the parkway lands and a parcel of approximately 111.26 acres lies to the east.

On September 22 and October 7, 1958 respectively, the respondents entered into agreements of sale of these two parcels but retained from sale the parkway lands and a small additional strip along part of the west limit of the parkway lands of 2.995 acres, the reason given for the retention of the additional strip being the possibility in the minds of the respondents that it might also be required for the parkway.

The sale of each of the two easterly and westerly parcels was at a price of $12,500 per acre, except for the extreme easterly part of the easterly parcel which was subject to a zoning restriction for residential purposes. The agreement of sale of this parcel, however, provided that if this zoning could be changed so as to permit of the construction of apartment houses, the price of the lands subject to the said restriction would be increased by $6,250 per acre, bringing the price up to the $12,500 per acre figure. The purchaser undertook to apply for such rezoning.

Each of the agreements for sale contained a somewhat unusual provision under which the respective purchasers were to purchase one-half of the parkway lands lying between their respective purchases at $15,000 per acre, if called upon by the respondents to do so at any time within three years. This option was not exercised by the respondents with respect to either purchaser.

On February 10, 1959, by-law 902 of the appellant municipality was passed expropriating the parkway lands. On October 15, 1959, the appellant offered to pay the respondents for the lands taken for the parkway at the rate of $12,500 per acre, but that offer was refused and the parties went to arbitration.

The learned arbitrator awarded the respondents compensation in the amount of $439,150, being at the rate of $15,000 per acre plus 5 per cent for compulsory taking, with interest at 5 per cent from the date of by-law 902, and in so doing based himself upon the option provisions contained in the said agreements. He held that apart from these provisions the value of the lands taken for the parkway, for the highest and best use to which they could be put, was $12,500 per acre.

Appeal was taken to the Court of Appeal on two grounds—(1) that the arbitrator erred in taking into account the option provisions in the agreements of sale above referred to in arriving at the amount of compensation to be awarded, and (2) that he erred in awarding any allowance for compulsory taking.

The Court of Appeal unanimously allowed the appeal with respect to the second ground but the majority dismissed the appeal with respect to the first ground. LeBel, J.A. dissenting, would have allowed the appeal with respect to that ground as well.

There are concurrent findings of fact as follows.

(i) That the best use to which the lands in question could be put was industrial development.

(ii) That their market value for this purpose was $12,500 per acre.

(iii) That the agreements entered into by the respondents under which they had a right exercisable within three years to compel the purchasers to purchase the lands which have now been expropriated at $15,000 per acre were *bona fide* and enforceable agreements.

Moreover the following further matters appear to be clear on the evidence and indeed were not seriously disputed.

(i) That before the agreements in question were entered into the respondents' advisers knew what part of the land was going to be expropriated.

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(ii) That it was of course possible but extremely improbable that there would be any change in the proposal to expropriate.

(iii) That the commercial value per acre of the lands to be expropriated was certainly not more than the average per acre of the whole block of land owned by the respondents.
(iv) That the purchasers under the agreements were willing, if necessary, to pay a total price equivalent to an average of $12,800 per acre for all the land owned by respondents.
(v) That the clauses in the agreements under which the purchasers could be compelled to pay $15,000 per acre for the parkway lands were designed with the imminent expropriation in mind and for the purpose of fixing a "floor price" which would be payable by the expropriating authority.

No evidence was called to show the reason why the purchasers agreed to this unusual term, but it was obviously a matter of indifference to them how the total price which they were willing to pay if necessary, was calculated.

Shortly stated, the respondents' contention is that the value of the parkway lands to them could not be less than $15,000 per acre, the amount which they were entitled to receive under the agreements, and that contention was accepted by the learned arbitrator and by the majority in the Court below.

It is undisputed that the respondents are entitled to receive from the expropriating authority the value of the land to them at the date of expropriation. On the uncontradicted evidence it also cannot be disputed that—except for the effect of the agreements in question—the highest value to respondents of the lands in question was $12,500 per acre.

The form of words used in the agreements could therefore have no other purpose than to assure to respondents a total price worked out on the basis of $12,800 per acre for all their lands.

While the respondents were free to make any bargain the purchasers were willing to agree to, in my opinion they could not by attributing a higher value to the strip to be expropriated and a correspondingly lesser value to the

balance of their property, thereby throw upon the expropriating authority the obligation to pay out of public funds more than the expropriated lands were in truth worth to the respondents as owners.

I would allow the appeal and vary the award of the learned arbitrator by fixing compensation at the sum of $375,424, being at the rate of $12,800 per acre on 29.33 acres with interest at 5 per cent per annum from February 10, 1959. The respondents served notice that they would contend that the amount of the award should be varied by the addition of an allowance of 10 per cent for compulsory taking. In view of the judgment of this Court in *Drew v. The Queen*[1] this motion must be dismissed, but without costs.

The appellant is entitled to its costs here and in the Court below.

Appeal allowed with costs, KERWIN C.J. *dissenting.*

Solicitor for the appellant: C. Frank Moore, Toronto.

Solicitors for the respondents: Wegenast & Hyndman, Toronto.

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*PRESENT: Kerwin C.J. and Locke, Cartwright, Martland and Judson JJ.

[1] [1961] S.C.R. 614, 29 D.L.R. (2d) 114.