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SAMUEL COCOMILE (*Claimant*) .....APPELLANT;

AND

THE MUNICIPALITY OF METROPOLITAN TORONTO (*Contestant*) RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Expropriation—Compensation—Valuation—Claimant's case that highest and best use of land was for erection of apartment building—Arbitrator's opinion that proposed building although physically possible was not economically feasible—Award based on amount speculator would pay in hope of making future profit—Claimant's appeal dismissed by Court of Appeal—Further appeal dismissed by Supreme Court of Canada.

The Municipality of Metropolitan Toronto expropriated 2.4 acres of vacant land belonging to the claimant and an arbitrator awarded

*PRESENT: Cartwright C.J. and Martland, Judson, Hall and Spence JJ.

$25,000 in compensation. The Court of Appeal dismissed the claimant's appeal from the award. On appeal to this Court the claimant submitted that the award should be increased to $243,500.

The lands expropriated consisted of an area of table land, then a rather steep slope down the side of a valley and finally an area of flat lands at the bottom of the valley. The claimant's case was that the highest and best use of the lands in question was for the erection of an apartment building. The arbitrator was of the opinion that evidence given on behalf of the claimant with regard to the prices of other properties in the near neighbourhood and in other districts could not be accepted as none of the properties he gave could be considered in any way comparable to the subject land. He was also of the opinion that the apartment scheme proposed by one of the claimant's witnesses although physically possible was not economically feasible. On the other hand, he accepted the appraisal put on the property by a valuator for the contestant who gave as his opinion that the only value on the land was an amount of $25,000 which would be paid by a speculator in the hope of making a profit on it in the future.

Held (Spence J. dissenting): The appeal should be dismissed.

Per Cartwright C.J. and Martland, Judson and Hall JJ.: The majority of the Court agreed with the conclusions of the arbitrator.

Per Spence J., *dissenting*: The arbitrator was in error in his conclusion as to comparable properties and his conclusion that the scheme was not reasonably capable of realization did not seem to be in accordance with the evidence given at the trial. The arbitrator should have accepted the evidence given on behalf of the claimant and rejected that given on behalf of the contestant.

However, the proper course in considering an appeal in this Court was to consider whether the calculations and assessment of land valuations were made in accordance with the proper and well-recognized principles. In accepting the evidence given by the valuator for the contestant based on a land residual technique, the arbitrator did not proceed in accordance with proper and well-recognized principles and such evidence should have been rejected. The situation, therefore, was that the arbitrator was left with no proper evidence which he was willing to accept. In the circumstances, there was no solution other than to direct a new hearing of the arbitration.

APPEAL from a judgment of the Court of Appeal for Ontario dismissing an appeal by the claimant from an arbitrator's award fixing the compensation payable by the contestant to the claimant by reason of the expropriation of certain land. Appeal dismissed, Spence J. dissenting.

J. T. Weir, Q.C., and *M. J. McQuaid*, for the claimant, appellant.

G. M. Mace and *D. C. Ross*, for the contestant, respondent.

The judgment of Cartwright C.J. and of Martland, Judson and Hall JJ. was delivered by

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JUDSON J.:—In December of 1958 the Municipality of Metropolitan Toronto expropriated 2.4 acres of vacant land belonging to the claimant, Samuel Cocomile. The arbitrator awarded $25,000 in compensation. The Court of Appeal dismissed the claimant's appeal from the award. In this Court the claimant submits that the award should be increased to $243,500.

In 1956, the claimant bought the property, together with the house on it, for $22,000. It was then in the hands of the Trust company as an asset of an estate under administration. It was listed for sale at $23,900 for some months and eventually sold to the claimant at $22,000. The real estate department of the Trust company had prepared a detailed report on the property. It contains a description of the land, of the building, the condition of the building, the assessment and the valuation. The following is a description of the land:

> The subject property is located on the North-East side of Donlands Avenue in the Township of East York adjoining the property whereon is standing the Leaside Bridge. This property is divided into 4 lots. The main lot, lot No. 1, 40 ft. by approx. 140 ft. has the building erected upon it. This lot has a level part extending back about 50 ft. and falls steeply into the ravine. Lot 2 approx. 30 ft. by 140 ft. is pie shaped, it's levelled back about 25 ft. and falls into the ravine. Lot 3, 105 ft. by 140 ft. is pie shaped with practically no level land. Lot 4 comprises approximately two acres of land in the Don Valley.
>
> Upon consultation with the Metropolitan Toronto Planning Department it appears according to the present plan, for the Don Valley Roadway, that part of this land will have to be expropriated for this purpose. The main land value in this property is a pie shaped portion with 70 ft. of frontage on Donlands Avenue extending back to a maximum depth of about 60 ft. The area is zoned for residential use and the remaining part of the lot has little commercial value.
>
> The lot is landscaped and there is an asphalt private driveway and domestic sidewalks.

The building was described as a two-storey brick house about 25 years old, structurally sound and well constructed. It was agreed for the purpose of this arbitration that the value of the lands and premises remaining to the claimant after expropriation was $15,000.

The claimant based his case on the suitability of the site for the building of an apartment house. One witness gave evidence that a 374-suite building could have been placed on the expropriated land. This witness did no more than say that it was physically possible to fit such a build-

ing into the site. He gave no consideration to the economic feasibility of such a scheme. Another witness did not think that the site could have been sold for a 374-suite building. He thought that a 250-suite building was more suitable to the site and the area. On this basis he arrived at a value of $243,500 for the land expropriated. He took a land value of $1,350 per suite, multiplied it by 250, then deducted two sums, one of $79,000 for the extra cost of construction on a valley site and $15,000 for the residual value of the land and buildings.

The arbitrator rejected these valuations of the land based upon the physical possibility of construction but in total disregard of economic commonsense. The conclusions of the learned arbitrator are stated in the following extract from his reasons:

> I have considered the evidence of the witnesses for the Claimant and I am of the opinion that the evidence of Mr. Strung with regard to the prices of other properties in the near neighbourhood and in other districts cannot be accepted as none of the properties he gave can be considered in any way comparable to the subject land. The great majority of the comparables are based on flat table land and the subject land is side-hill land, with very little table land except at the base of the ravine.
>
> The apartment scheme proposed by Mr. Bregman may be possible and according to the engineer's report could be built on the property, but in my opinion was not reasonably capable of realization and is altogether too remote, uncertain and improbable. No such apartment had been built on the side valley lands in or near the Don Valley up to the date of expropriation in 1958 and would not be, considering all the circumstances. To consider building a $3,000,000 or $4,000,000 apartment on the subject land and close up to the Leaside Viaduct with the base of the apartment on the valley floor and the entrance down seven floors below on the hill, appears to be nothing more than a dream that could not be realized and would not be economically feasible.
>
> I accept on the other hand, the appraisal put on the property by Mr. MacKenzie who gave as his considered opinion that the only value on this land was an amount of $25,000 which would be paid by a speculator in the hope of making a profit on it in the future.
>
> The Claimant stated the highest and best use of the subject property was for the purpose of building an apartment building, and their calculations of value for the land are based on a 250 suite apartment. I reject this opinion.
>
> The Arbitrator should not treat an advantage consisting of a chance as if it were a certainty, or consider that a hypothetical purchaser would be sure to be a purchaser in fact. The special adaptability as suggested by the Claimant's witnesses for a proposed apartment site cannot in any way be considered by me as anything more than a chance.
>
> I accept the evidence of Mr. MacKenzie that the highest and best use is its present existing use and that in his opinion no builder would build a 250 suite apartment or even a smaller apartment on this site.

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I am therefore of opinion that the Claimant as a prudent man as of the date of the expropriation would not have paid more than $25,000 rather than be ejected from the property. This includes all potentialities.

I agree with these conclusions, as did a unanimous Court of Appeal.

I would dismiss the appeal with costs.

SPENCE J. (*dissenting*):—This is an appeal from the judgment of the Court of Appeal for Ontario delivered on April 7, 1965, whereby that Court dismissed without written reasons an appeal from the award of His Honour Judge F. J. McRae, as arbitrator under the provisions of *The Municipal Arbitrations Act*, R.S.O. 1960, c. 250, made November 26, 1963, by which the claimant was allowed the sum of $25,000.

The arbitration was to fix the compensation for the expropriation of 2.413 acres in the then Township of East York in the County of York. The claimant's case was that the highest and best use of these lands, upon which basis, of course, the valuation must be fixed, was for the erection of an apartment building. The claimant, therefore, adduced the evidence of one Joseph Strung to prove the value of the lands sold for such purposes in the immediate area in East York within the several years before the expropriation and upon such basis to give his opinion of the value for such purposes of the lands expropriated. There were, however, rather unusual problems as to site. The lands expropriated may be described as having certain table area on the level of Donlands Avenue upon which there was a detached brick residence, then a rather steep slope down the side of the Don Valley, and finally an area of flat lands at the bottom of the valley. There was 125 feet difference in elevation resulting from this slope of the side of the valley. Moreover, the lands at the top in the table area had a thick cover of very sandy soil. Therefore, the claimant had to demonstrate that this particular area did have its highest and best use as an apartment building. In order to do so, the claimant employed the services of one Sydney Bregman, an architect of some very considerable ability, who had to his credit the design of many modern buildings in Metropolitan Toronto, and a professional engineer, Peter A. Hertzberg, who had several years practice as a consulting

engineer with a large firm doing that work in Metropolitan Toronto, particularly in the designing of industrial buildings.

Mr. Bregman produced a series of plans to exhibit an apartment building which he testified could be erected on the site. These plans were marked as ex. 7 and delineated a 374-suite building the front of which at the west corner would be set back from the street line of Donlands Avenue about 280 feet, in T-shape and the leg of the T running to the north, *i.e.*, along the valley bottom lands. The design showed a driveway leaving Donlands Avenue and curving to the table lands and down the slope of the valley through a landscaped park at a grade of 13.7 per cent to a main entrance which was at the seventh floor of the building. The building would then continue a further nine floors above this main entrance. On the north front, *i.e.*, the front which looked across the valley, apartments ran all the way up the whole sixteen floors but on the south front, *i.e.*, the front which looked towards Donlands Avenue, the apartments faced out from the floors from the lobby up. Some of the apartments on the lower of those floors faced this long landscaped slope up to the table land and some were above the level of the table lands. A levelled parking space in front of the building was shown which resulted in the commencement of the slope being about 100 feet south of the building.

Mr. Hertzberg gave evidence that such a building could be constructed on those lands, the soil tests having been such as would permit it, and that the additional cost of construction of the building due to it being situated on such sloping lands would be $79,000. Mr. Strung gave evidence that there was a demand for apartment suites in that particular area of Metropolitan Toronto at the time of the expropriation in 1958. He was of the opinion that a 374-suite building would be so much larger than any nearby apartment building that a bidder would probably not erect a building of more than 250 suites.

Mr. Strung arrived at his opinion of the value of the lands expropriated by two different means. In his report marked at trial as ex. 11 he included a sales analysis chart of 26 properties which had been purchased for apartment buildings in the years 1956 to April and May 1959. Since

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those dates represented the closing of the transactions of sales, he was of the opinion that the sales must have been negotiated either prior to or just at the time of this expropriation. Mr. Strung showed that the lands comprising these 26 locations had been purchased at such amounts, in view of the buildings later erected on them, that the sale price per suite in the completed buildings varied from $708 to $1,614. He also testified and, in my opinion, with much more relevance, that the sale price per square foot of the lands included in these 26 different apartment house sites purchased varied from $2.04 to $5.12. Mr. Strung gave it as his opinion, based on the aforesaid figures showing the price per suite paid for the land purchased, that the price per suite which a prudent purchaser would pay for the lands expropriated in order to erect a 250-suite apartment building was about $1,350 and therefore arrived at a valuation of the lands at $337,500 less the $79,000 additional necessary for the erection of the apartment building due to the sloping nature of the lands or a total of $258,500. This valuation was not accepted by the learned County Court Judge and I am of the opinion that the evidence is of no assistance in determining the award which should be made.

It will be seen that the price per suite differs with the number of suites which are contained in the building which the purchaser plans to erect. The building as delineated by Mr. Bregman contained 374 suites. Mr. Strung was of the opinion that a builder would only erect a structure to contain 250 suites. It may well be that any particular bidder for vacant lands upon which he intends to erect an apartment building will govern himself directly by the amount per suite which he feels he can afford to pay for the lands, but the award must be based not on what one particular bidder plans to build as a building but on what willing purchasers would agree to pay for the lands with the bidder free to use the lands as he deems fit.

I am of the opinion that a much more accurate gauge than this one of so-called cost per suite is Mr. Strung's second method. As I have said, he found that the sale price per square foot of the lands in those 26 purchases varied from $2.04 to $5.12. By arithmetical calculation they average $3.60. They are all buildings in the immediate East York area within a few short blocks of the edge of the Don Valley. Mr. Strung pointed out that the buildings

which were situated chiefly on Gamble Avenue and Cosburn Avenue, although a few were on Bayview Avenue in the then Town of Leaside, were in groups of rather commonplace apartment buildings often facing each other across a street in a middle class area, while the land expropriated was a little distance farther north and in a group of better class houses and in addition had what Mr. Strung regarded as a very considerable advantage, the unimpaired view free of nearby apartments across the Don Valley. It was pointed out to Mr. Strung that the Leaside Bridge ran parallel to the easterly limit of the lands expropriated and had its southern terminus on Donlands Avenue only 126.58 feet east of the said easterly limit of the lands expropriated, but Mr. Strung was of the opinion that the view nevertheless was most attractive. He did acknowledge that sloping lands always went for a lower price than flat lands and Mr. Daniels, another real estate agent called for the claimant, in reply, made the same admission.

It was Mr. Strung's opinion that the square foot value of the lands expropriated, by a weighted comparison with the sale price of the other lands in the 26 different apartment locations in the area, was $2.79 per square foot and acknowledged that this square foot rate would have to be reduced by the additional cost of construction on steeply sloped land. That cost, as I said, had already been established by Mr. Hertzberg at $79,000. The area of the lands expropriated was taken as being 121,010 square feet, so $79,000 spread over that area would work out at 65 or 66 cents per square foot. If that figure is deducted from the $2.79 it leaves $2.13 or $2.14 as being the value which Mr. Strung would give per square foot for the land expropriated. For the area of 121,010 square feet this would amount to $257,751.30 at $2.13, and $258,961.40 at $2.14, say $258,000. It will be seen that by this method Mr. Strung arrived at almost exactly the same amount as by the values per suite method, but for the reasons which I have outlined I am of the opinion that in the latter method he was proceeding in a much sounder fashion. Of course, the $258,000 valuation as submitted by Mr. Strung must be reduced as he suggested by the amount of $15,000, the agreed value of the small portion of the land upon which the residence was situated and which was excepted out of the expropriation.

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It should be noted that in-chief the claimant adduced no evidence as to the cost of the erection of the building as outlined by Mr. Bregman nor the amount of the rentals which could be obtained per suite. This course was the logical one on the case as put forward by the claimant. The claimant's production of the building plans designed by Mr. Bregman was simply to answer the obvious objection to the use of the alleged comparables in the 26 sales that the lands expropriated because of their contours were not suitable for apartment house construction and that therefore such was not the highest and best use. It was in an attempt to demonstrate that the lands could be used advantageously for such apartment house construction that Mr. Bregman and Mr. Hertzberg did their work. Any figures as to cost of construction of the building as designed by Mr. Bregman and the rentals which one could hope to obtain from the suites were given by the claimant's witnesses only in cross-examination in the contestant's attempt to apply its "residual" method to the building designed by Mr. Bregman. There were certain errors in the evidence given in that cross-examination to which I shall refer and which had a very important effect upon the conclusions which the arbitrator arrived at when considering the evidence given on behalf of the claimant.

The contestant adduced the evidence of Mr. Arthur D. MacKenzie, who was an appraiser of some very considerable repute. His experience had been largely in the appraisal field rather than in the buying and selling of real estate and his appraisals had very often been for the purpose of advising financial enterprises such as insurance companies as to whether they should lend money on apartment buildings and the amounts which they should lend. I quote a question as to his method and his reply:

> Q. Would you give an outline of your method of appraisal and your valuation, please?
>
> A. Yes. Your Honour, as part of my qualification there I have stated that we do appraisal work for a large number of the insurance companies and that we have been doing this for myself now for seventeen years and in so doing we do make appraisals on a large proportion of the apartment houses in Toronto aside from working for many individual apartment builders and our procedure in appraising an apartment property is, first, to examine the site in detail and in many cases, as today, we have working drawings which we examine also in detail as part of the value of the whole to be completed. We estimate a fair market value for the site based on the comparison in general and our general knowledge of

the area and its acceptability for this particular type of development. We examine the plans with a view to the best layout of suites, best size and type of suite, number of bathrooms, room layout, elevators, heating, natural light and view, air conditioning, etcetera, all in relation to the area and the type of people who may rent in this particular area.

And further:

HIS HONOUR: Alright, go ahead.

A. With this done, Your Honour, we estimate a physical value of the cost or physical cost to complete this building on the site for which we have estimated a fair market value and as a check against this, and based also on the area, our knowledge of the area, we estimate the rents which we believe this building will draw in the area. We estimate the various expenses required to operate this building. These are taxes, real estate taxes, insurance, heating, janitor, hydro, water, maintenance and a vacancy allowance and a management allowance. This net or these expenses from the gross estimate diverge in net which we capitalize to get an economic value of this particular proposal. Now this is checked against our physical approach. It is also checked against market analysis of other apartment building sales as against the gross multiplier which is a very general rule. In other words, we use many guides to arrive at a final value of this completed property. Fully rented is our assumption.

HIS HONOUR: That is an economic value is it?

A. It is an economic value derived by using the gross, the expenses and the capitalization, but that again is checked against our physical value, etcetera, or the final value.

Mr. MacKenzie testified:

A. In this particular case, Your Honour, we had no comparable land prices, in my opinion, we must for that reason approach it from an economic direction to find out if there is any residual value of the land and this is part of my reason for this procedure.

I am of the opinion that this statement which Mr. MacKenzie advanced as his reason for his use of the so-called residual method, the method which the learned arbitrator accepted in making his award, illustrates the basic error in the contestant's case. There certainly were comparable properties in the immediate area. Mr. Strung had produced a list and a complete analysis of 26 apartment buildings within a short distance of the land expropriated. There were in Metropolitan Toronto literally thousands of apartment buildings which had been built on land purchased in the few years prior to this expropriation. All of these land sales were available and could properly have been used as comparables in considering the value of the lands expropriated. Of course, none of them were exactly the same, in site, in contour, or in size, as the lands

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expropriated. That situation prevails on other occasions in which any piece of land is compared with any other. Sometimes the differences are great, sometimes they are small. The comparisons must all be considered and weighed. Mr. Strung testified as to these 26 different sales and from his testimony one arrives at an average sale price of $3.60 per square foot. Then Mr. Strung weighed that average by taking from it an amount to reflect the net disadvantage of the lands expropriated. When I use the term "net disadvantage", I am referring to admission that sloping or uneven lands always brought lower prices but his opinion was that the expropriated lands had other advantages of view and position not possessed by the lands with which they were compared. The net reduction he gave must have been 81 cents per square foot below the average because he valued the lands expropriated at $2.79 per square foot while, as I have said, the average of the 26 sales, which were all of flat lands, was $3.60 per square foot. Mr. Strung made a further reduction as I have pointed out of 65 cents per square foot to allow for the $79,000 in additional building costs which would be incurred because of the sloped land.

I am therefore of the opinion that the learned arbitrator was in error when he said:

> Mr. Strung did not make any distinction in the subject site between table land and side-hill land. Most of the land of the subject site was side-hill land.

I am of the opinion that Mr. Strung's evidence did weigh the comparables in view of the sloping conditions of the expropriated lands and it would appear that he allowed 25 per cent reduction based on that factor in addition to another allowance of 65 cents per square foot for the additional costs of construction.

To return to the evidence of Mr. MacKenzie for the contestants, there may be some significance in the fact that Mr. MacKenzie also chose to design an apartment building for the site although he had given it in his evidence that the highest and best use of the lands expropriated was that for which they were presently employed, *i.e.*, a detached private residence on a corner of the table lands and all the whole balance unused and running to waste. Mr. MacKenzie, however, designed a building contrasting strongly to that designed by Mr. Bregman and one which

contained only 51 suites. It was agreed by both the claimant and the contestants that the then by-law provisions applicable in East York permitted a building even as large as the 374-suite one designed by Mr. Bregman. Why then should Mr. MacKenzie have designed a 51-suite building? It is evident that he did so because he chose to use only the small area of table land adjoining Donlands Avenue. In view of Mr. Bregman's and Mr. Hertzberg's evidence, that the very large building designed by them was quite possible architecturally and from an engineering point of view, it would seem a very uneconomic use of the site to place on the south flat part thereof only a 51-suite building. It is true that of the 26 comparables analyzed by Mr. Strung the largest was only a 91-suite building but that apartment building had been erected on a lot only 180 feet by 150 feet, *i.e.*, 27,000 square feet, while the lands expropriated had an area of 121,010 square feet. It would seem inevitable that if you placed on that large lot, whether it be level or whether it be sloping, only a 51-suite building then you could only afford to pay a very small amount for the lands. Once it has been shown that the large building is architecturally and from an engineering standpoint possible, and once it is shown that there is an effective demand in the neighbourhood for that large number of apartments, then surely a 51-suite building as designed by Mr. MacKenzie could have no relationship whatsoever to the highest and best use of the lands. To compare with that most limited use of the land, even its present use would have been a higher and better use, as Mr. MacKenzie seems to have quite adequately proved that a 51-suite building would leave at the best only a pittance which the buyer could afford to pay for the land.

In his evidence, Mr. MacKenzie was asked to deal with two other things. Firstly, the economic feasibility of the building designed by Mr. Bregman using his "residual" method to which reference has been made and, secondly, in cross-examination, to use the same method for analyzing the 26 sales of what the appellant submitted were comparable properties in the immediate neighbourhood. It was Mr. MacKenzie's opinion that using his residual method the building designed by Mr. Bregman would not allow any value at all to be assessed to the land. As I have already

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said, the claimant's witnesses had in examination-in-chief given neither the costs of construction of the Bregman designed building nor the rents to be expected therefrom, as these calculations were not part of the claimant's case.

In cross-examination, Mr. Bregman had been asked:

Q. Then would you tell us, roughly, what you think this project would cost?

A. Well, I would have to do some multiplication. I would perhaps give you a figure on a per suite basis and you can multiply it by three hundred and seventy-four if you wish.

Q. Is that the way you estimated your cost of this structure, the cost per suite?

A. Yes, keeping in mind the general design of the buildings we follow this cost up and down according to the type of construction and any inherent problems in the design.

Q. Perhaps you would give us that figure first then?

A. Well, I would—including the garage I would estimate it at approximately eleven thousand per suite. Roughly four million one hundred thousand, approximately.

Mr. MacKenzie, in his application of the "residual" technique to the Bregman design for a building, compared his capitalization of the income from such building at $7\frac{1}{4}$ per cent to that cost figure from Mr. Bregman's cross-examination and pointed out that it left no value for the land at all. Mr. Bregman was called in reply and gave evidence that his figure of $4,100,000 was a cost figure which he gave in the light of the costs at the time of the hearing upon arbitration, that is, in June of 1963, and that in his opinion the cost at the end of the year 1958 would have been about $9,625 per suite or $3,600,000 for a 374-suite apartment building. Mr. MacKenzie's capitalization at $7\frac{1}{4}$ per cent to which I have referred above was $3,670,000. Therefore, even if he had used the same rental figures but had taken a proper 1958 rather than a 1963 cost he would have found a $70,000 value in the lands expropriated. Moreover, if Mr. MacKenzie had taken the rentals as stated by Mr. Daniels who was called in reply, the value of the expropriated lands would have worked out at a much higher figure.

I have referred to this evidence to show that not only is the "residual" technique one which, in my opinion, is not in accordance with the "proper and well-recognized principle" of fixing values in expropriations but it was inaccurately done.

The learned arbitrator rejected the evidence called on behalf of the claimant for reasons which he set out as follows:

> I have considered the evidence of the witnesses for the claimant and I am of the opinion that the evidence of Mr. Strung with regard to the prices of other properties in the near neighbourhood and in other districts cannot be accepted as none of the properties he gave can be considered in any way comparable to the subject land. The great majority of the comparables are based on flat table land and the subject land is side-hill land, with very little table land except at the base of the ravine.
>
> The apartment scheme proposed by Mr. Bregman may be possible and according to the engineer's report could be built on the property, but in my opinion was not reasonably capable of realization and is altogether too remote, uncertain and improbable. No such apartment had been built on the side valley lands in or near the Don Valley up to the date of expropriation in 1958 and would not be, considering all the circumstances. To consider building a $3,000,000 or $4,000,000 apartment on the subject land and close up to the Leaside Viaduct with the base of the apartment on the valley floor and the entrance down seven floors below on the hill, appears to be nothing more than a dream that could not be realized and would not be economically feasible.

In these reasons, I have attempted to demonstrate that the learned arbitrator was in error in his conclusion as set out in the first paragraph above. His conclusion in the second paragraph, that the scheme was not reasonably capable of realization and so altogether too remote, uncertain and improbable, seems to be not in accordance with the evidence given at the trial where at least four other large side-hill apartments in various parts of Metropolitan Toronto were cited, since Mr. Bregman and Mr. Hertzberg gave evidence that a building with similar properties as that designed for this site would be physically feasible. As to the existence of effective demand, the learned arbitrator seems to have accepted the opinion of Mr. MacKenzie, but Mr. Strung showed that at the immediate time of the expropriation building of apartments was proceeding apace in the area and very shortly thereafter, and particularly in the area immediately north of the Don Valley, the subject property being on the south bank, many very large apartments were erected.

Had I been presiding as the arbitrator, for the reasons I have outlined, I would have accepted the evidence given on behalf of the claimant and rejected the evidence given on behalf of the contestant. I was not, however, sitting as an arbitrator and I think that the proper course in con-

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sidering an appeal in this Court is that which I have outlined in *Kramer et al. v. Wascana Centre Authority*[1], at p. 248, and which was repeated in the unanimous judgment of the Court in *Florence Realty Co. Ltd. et al. v. The Queen*[2]:

> In my view, it is not the duty of this Court to engage in calculations or to exercise judgment as to land valuation in the Province of Saskatchewan. It is the duty of this Court to consider whether those calculations and assessment of land valuations were made in accordance with the proper and well-recognized principle.

For the reasons which I have outlined above, I have come to the conclusion that in accepting the evidence given by Mr. MacKenzie based on the "residual" technique, the learned arbitrator did not proceed in accordance with proper and well-recognized principles and that such evidence should have been rejected. The situation, therefore, is that the learned arbitrator was left with no proper evidence which he was willing to accept. Section 7 of *The Municipal Arbitrations Act*, R.S.O. 1960, c. 250, provides:

> The award may be appealed against to the Court of Appeal in the same manner as the decision of a judge of the Supreme Court sitting in Court is appealed from, ...

It is, of course, within the jurisdiction of the Court of Appeal for Ontario and of this Court on appeal from that Court to direct a new trial, and I can see no other solution other than to adopt such a course in this case.

I would, therefore, direct that the award be returned to the learned arbitrator to consider in accord with these reasons. The appellant should be entitled to the costs of this appeal and the appeal to the Court of Appeal for Ontario; the costs of the first arbitration, and of any subsequent hearing should be in the discretion of the arbitrator.

Appeal dismissed with costs, SPENCE J. *dissenting.*

Solicitors for the claimant, appellant: Arnup, Foulds, Weir, Boeckh, Morris & Robinson, Toronto.

Solicitor for the contestant, respondent: A. P. G. Joy, Toronto.

[1] [1967] S.C.R. 237.

[2] [1968] S.C.R. 42.