UNIVERSITY OF TORONTO (*Respondent*) ..... APPELLANT;

AND

ZETA PSI ELDERS ASSOCIATION OF TORONTO (*Claimant*) ..... RESPONDENT.

1968
*Oct. 16, 17, 18
1969
Jan. 28

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Expropriation—Valuation—Expropriation of fraternity house by university—Jurisdiction of appellate Court to review arbitrator's award—Greater of replacement and redevelopment values awarded—Reinstatement standard not applicable—The Expropriation Procedures Act, 1962-63 (Ont.), c. 43.

Property of the respondent consisting of land having an area of 15,730 square feet and a fraternity house was expropriated by the appellant university. The subject land was a corner site, immediately contiguous to the university, and it was agreed that its highest and best use, apart from the building thereon, was for the erection of an apartment building. Following a hearing the Ontario Municipal Board fixed the compensation at $160,000. On appeal from the Board's decision, the Court of Appeal increased the compensation to $202,260. The university appealed and the fraternity cross-appealed from the judgment of the Court of Appeal.

Held (Judson and Pigeon JJ. dissenting): The appeal should be dismissed and the cross-appeal allowed.

Per Cartwright C.J. and Spence J.: The task of this Court was to determine whether the arbitrator had proceeded on some incorrect principle or overlooked or misapprehended some material evidence of fact and in turn whether the Court of Appeal had done so in its disposition of the issue.

The fraternity's contention that compensation for the subject property should be fixed upon reinstatement value was properly rejected by the Municipal Board and by the Court of Appeal. Generally, the reinstatement standard was applicable only in respect of property for which there was no market or general demand. This could not be said of the property in question.

The Municipal Board in its decision considered the evidence of value on two different bases, *i.e.*, replacement and redevelopment. In making his appraisal for redevelopment purposes the university's valuator had considered properties as comparable which were not comparable and it did not seem that he gave consideration to corner influence and prime location. Therefore, to accept his valuation, as the Municipal Board did, was to arrive at a valuation based on a misapprehension of the effect of the evidence and so was to fail to act in accordance with principle.

The Court of Appeal again adopting the value for redevelopment as the highest and best use of the subject property fixed the per square foot

*PRESENT: Cartwright C.J. and Judson, Ritchie, Spence and Pigeon JJ.

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valuation at a higher figure than that given by the university's valuator, but reduced the total appraisal for that purpose by an amount of 1,500 square feet on the basis that the fraternity did not require lands of such area, and then added to the amount of the land value, so adjusted because of what was viewed as oversize, the sum of $30,000 for renovation and reconstruction, and the sum of $1,500 for moving and incidental expenses. The reduction could not be supported, as a developer intending to build an apartment house on the site would have to pay the same amount per square foot for all the lands and would have to buy it all. The addition of an amount for renovation and reconstruction was also an error in principle. A developer would pay only the cost of acquiring the lands and would not pay anything for a building which he intended to remove.

On a consideration of the evidence, the value for redevelopment purposes was placed at $194,490, and that for replacement at $210,500. The greater of these two values was the value to which the fraternity was entitled, and with the addition thereto of $1,500 for moving and incidental expenses, the fraternity was entitled to compensation of $212,000.

Per Ritchie J.: Errors in principle found by Spence J. to have been made by the Board, *i.e.* (i) failing to appreciate that in this case the overriding consideration in determining "value to the owner" was the value which the respondent attached to the maintenance of its fraternity domicile and that the fact that it was deprived of its "home" was an essential and substantial ingredient to be taken into account in determining the loss for which the respondent was entitled to compensation by way of replacement and (ii) accepting a value of $3 per square foot for that part of the respondent's land that was used as a parking area, afforded a justification for the review made by him. Agreement was expressed with his analysis of the circumstances and with his proposed disposition of the case.

Per Judson and Pigeon JJ., *dissenting:* The appeal should be allowed and the valuation of the Municipal Board restored; the cross-appeal should be dismissed. The Court of Appeal had erred in principle in awarding an increase in the square foot valuation, in giving the sum of $30,000 for renovation and reconstruction of any property which the fraternity might purchase as a substitute, and in awarding $1,500 for moving and incidental expenses.

The fraternity's cross-appeal asking for the value of the land for redevelopment purposes between the brackets of $160,000 and $236,000, plus the depreciated reconstruction cost of the building at $103,754.80, would involve the assessment of compensation on the basis of reinstatement. This basis was to be applied only when there was no possible market for the property as used. Evidence before the Board fully justified the finding that there was such a market.

On a review of pronouncements of great authority prior to *Winnipeg Supply & Fuel Co. Ltd. v. Metropolitan Corporation of Greater Winnipeg,* [1966] S.C.R. 336, the principle upon which the reasons in the deciding opinion in this appeal rested was questioned.

[*Saint John Harbour Bridge Authority v. J. M. Driscoll Ltd.,* [1968] S.C.R. 633; *Diggon-Hibben Ltd. v. The King,* [1949] S.C.R. 712, applied.]

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APPEAL and CROSS-APPEAL from a decision of the Court of Appeal for Ontario[1], allowing an appeal from a decision of the Ontario Municipal Board. Appeal dismissed and cross-appeal allowed, Judson and Pigeon JJ. dissenting.

W. D. Griffiths, Q.C., and *J. T. DesBrisay, Q.C.*, for the appellant.

W. L. N. Somerville, Q.C., and *G. Cihra*, for the respondent.

The judgment of the Chief Justice and of Spence J. was delivered by

SPENCE J.:—This was an appeal by the University of Toronto from the decision of the Court of Appeal for Ontario[1] pronounced on May 1, 1967, by which judgment the Court of Appeal allowed an appeal from the decision of the Municipal Board pronounced on August 4, 1966. The Board had fixed the compensation allowed to the Zeta Psi Elders Association of Toronto at $160,000. By its decision the Court of Appeal for Ontario had increased that compensation to $202,260.

The Elders have cross-appealed from the said judgment of the Court of Appeal.

The University of Toronto enacted a by-law on August 6, 1964, which was registered on the next day expropriating the entire holding of the Zeta Psi Elders situated in the City of Toronto and known municipally as 118 St. George Street. Under the provisions of *The University Expropriation Powers Act*, 1965 (Ont.), c. 135, and *The Expropriation Procedures Act*, 1962-63 (Ont.), c. 43, the compensation was to be fixed by the Ontario Municipal Board. That Board held a hearing over seven days receiving the evidence of many witnesses, particularly three experts on the question of appraisal: James I. Stewart, for the claimant Elders, and Kevin W. Hicks and Robert A. Davis for the respondent the University of Toronto, and after reserving its judgment gave the decision recited aforesaid which was later varied by the Court of Appeal as I have set out.

Before proceeding with these reasons, I think it proper to again indicate the function of this Court upon the consider-

[1] [1967] 2 O.R. 185.

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ation of such an appeal. I had the occasion to point out in *Winnipeg Supply & Fuel Co. Ltd. v. Metropolitan Corporation of Greater Winnipeg*[2]:

> Sufficient to say that the Court of Appeal has jurisdiction to act when the arbitrator has proceeded on some incorrect principle or has overlooked or misapprehended some material evidence of fact.

and I referred to that passage in the reasons given for the Court in *Saint John Harbour Bridge Authority v. J. M. Driscoll Ltd.*[3] It would seem, therefore, that the task of this Court is to determine whether the arbitrator had proceeded on some incorrect principle or overlooked or misapprehended some material evidence of fact and in turn whether the Court of Appeal had done so in its disposition of the issue.

The Zeta Psi Fraternity had a chapter in Toronto from the year 1879 on. In the year 1911, they had purchased the subject property, an imposing residence built in 1885 on the west side of St. George Street one house north of the intersection of St. George and Harbord Streets. The fraternity occupied those premises for use as a fraternity house from that date until the expropriation in 1964. There had been small renovations or additions through the years but in 1950 the fraternity had considered the demolition of the building on the premises and its replacement with another building or, as an alternative, a move to other premises. The fraternity decided to make a complete renovation and structural alteration of the building on the site at a cost of about $47,000. In the year 1955, the one house to the south and separating the house from Harbord Street had been expropriated by the City of Toronto and demolished and Harbord Street at its easterly end bent north-east so that it ended at St. George Street immediately opposite Hoskin Avenue, the street which runs from St. George Street to Queen's Park. At this time, the City of Toronto also expropriated a small portion of the lands owned by the fraternity at its south-east corner and conveyed to the fraternity, in return, a small block at the south-west corner of the fraternity's lands so that thereafter the fraternity had its whole southerly frontage from east to west adjoining Harbord Street. This left the fraternity with a corner property immediately across Harbord Street from the new,

[2] [1966] S.C.R. 336 at 338.

[3] [1968] S.C.R. 633

very large and imposing university buildings, and diagonally across the intersection of St. George Street and Harbord Street from fairly new and imposing university residences. Looking further east from the subject premises there was an unobstructed view of the entire back campus of the University of Toronto, and in the distance Wycliffe College, a part of Hart House, and at the end of Hoskin Avenue, Queen's Park. The subject property had been, from the time of its first establishment as a fraternity house, one of the two finest sites in Toronto for a fraternity house. Many years before, its only rival for that distinction, the Kappa Alpha Fraternity house at the north-west corner of Hoskin Avenue and Devonshire Place, had been expropriated by the university, so that from then until the time of the expropriation of the subject premises the Zeta Psi Fraternity house at 118 St. George Street was by far the most advantageous site for a fraternity house in Toronto. Moreover, there is no doubt that the fraternity was an eminent one in that group. The Zeta Psi Fraternity had no intention whatsoever of giving up the subject property, and after the expropriation its only intention was to find other premises as close as possible to the subject premises both in location and standard of amenities and to continue to carry on therein the operation of the fraternity. Since the arbitration, the Elders for the Zeta Psi Fraternity have purchased other premises at 180 St. George Street, one block north of Bloor Street, *i.e.*, exactly three blocks north of the subject property. The transaction not having been closed until after the expropriation hearing before the Municipal Board, the final details thereof could not be presented to the Board. The Court of Appeal for Ontario declined to receive evidence thereon. It is regrettable that the property in the City of Toronto which was most comparable to the subject property could not have been the subject of any detailed study by either the Municipal Board or the Court of Appeal for Ontario. This Court, under the circumstances, could receive no evidence thereon.

The Municipal Board, in the lengthy and carefully detailed reasons for its decision, considered the expert evidence given by the many witnesses including those to whom I have referred. It had been the Elders' contention before the Board, before the Court of Appeal, and in this Court, that the compensation for the subject property

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should be fixed upon the standard which has been referred to as "reinstatement", and which standard was applied by Thorson P. in *The Queen v. Community of the Sisters of Charity of Providence*[4]. Cripps on Compulsory Acquisition of Land, 11th ed., at p. 907 ff., discusses the question of reinstatement value pointing out that it is a method of arriving at the value to the owner which, of course, it has been said in a very large number of cases, is the compensation to which the claimant is entitled. At pp. 907-8, the learned author states:

> Generally it was only given in respect of property which was of such a nature (for example, a school, church, hospital, house of exceptional character, business premises in which the business could only be carried on under special conditions or by means of a special licence) *that there was no market or general demand for such property*; and a market value deducted from the income derived would not constitute a fair basis in assessing the value to the owner.

(The italicizing is my own.)

This statement, I think, is one which does reflect the jurisprudence upon the subject. Despite the evidence adduced by the University of Toronto as to the statement of the Caput of the University on February 1, 1960, in which it emphasizes the non-official character of the fraternities at the University of Toronto, I would be of the opinion that a fraternity house was within the type of use which would bring its property within the class of those to which reinstatement might apply. I am, however, of the opinion that it cannot apply in the particular case for it cannot be said that as to the subject property there was no market or general demand. In Toronto, a very large number of fraternities maintain chapters and occupy fraternity houses. As I have said, the site of the subject property was, at the time of the expropriation, the pre-eminent site in Toronto for a fraternity house. There was, in my view, a strong demand for that property for use as a fraternity house had the Zeta Psi Fraternity ever determined to move elsewhere or, a most unlikely event, determined to cease the maintenance of a fraternity house in Toronto. I, therefore, as did the Municipal Board and the Court of Appeal for Ontario, need not consider reinstatement value. Moreover, it would appear that a valuation considered on replacement basis in

[4] [1952] Ex. C.R. 113, [1952] 3 D.L.R. 358.

the circumstances of the present case would arrive at the same result as a valuation considered upon reinstatement basis.

The Municipal Board in its decision considered the evidence of value given upon two different bases: Firstly, the basis of replacement to which I have already referred and, secondly, the basis of the value of the site for sale for redevelopment purposes. The Municipal Board accepted the evidence of Mr. Hicks, one of the two expert witnesses called by the university whose evidence had been confirmed by Mr. Davis, the other expert called by the university. In such evidence, to which more detailed reference will be made hereafter, Mr. Hicks appraised the value of the subject site for redevelopment purposes at $10.25 a square foot. Since the said premises contain 15,730 square feet, Mr. Hicks rounded out that figure at $160,000. Mr. Hicks, turning to the replacement value, found that the replacement value was only $140,000. He, therefore, concluded and the Board accepted that conclusion and based judgment on it, that the highest and best use of the land was for redevelopment purposes and that the claimant was entitled to the sum of $160,000.

Mr. Stewart, giving evidence on behalf of the claimant, had submitted values far beyond that found by Mr. Hicks. He had appraised the value of the site for redevelopment purposes at $15 a square foot which he rounded out at $236,000. Mr. Stewart's opinion on the replacement basis was the sum of $284,000.

In the Court of Appeal for Ontario, Evans J.A., in his reasons, said:

> Mr. Stewart's evidence suffered from a lack of comparables since in his opinion there was only one suitable comparable while Mr. Hicks used many properties both north and south of Bloor Street and west to Spadina. He does not appear to have given any consideration to the additional value which attaches because of corner influence nor has he, in my opinion, adequately considered the undoubtedly prime location of the subject property. These two factors add a premium to the value of the expropriated land which in my opinion of the evidence should result in a value of $12.00 per square foot as redevelopment land.

Therefore, the Court of Appeal for Ontario again adopting the value for redevelopment as the highest and best use of the subject property fixed the valuation at $12 per square foot and not $10.25 as had been done by the Municipal Board, but reduced the total appraisal for that purpose

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by an amount of 1,500 square feet on the basis that the fraternity did not require lands of such an area, and then added to the amount of the land value, so adjusted because of what was viewed as oversize, the sum of $30,000 for renovation and reconstruction, and the sum of $1,500 for moving and incidental expenses. The Court of Appeal for Ontario, therefore, varied the award increasing the sum to the amount of $202,260. The reasons advanced by both tribunals must be considered.

Mr. Hicks recited in his evidence and there was produced as ex. 30 forty sales which he found to be in some degree comparable. These sales were in an area extending north of Bloor Street, well-nigh to Dupont Street, westerly to Walmer Road and Kendal Avenue and easterly almost to Avenue Road. Mr. Stewart had confined his search for comparables to a much narrower area as the fraternity officers had insisted that they could only relocate in an area bounded on the east by Bedford Road, on the north by Lowther Avenue, and on the west by Spadina Road. The University of Toronto had expropriated the subject property in the course of a large expropriation which took in all the property, except some owned by the province, north of Harbord Street to within a few hundred feet of Bloor Street, and westerly toward Spadina Avenue. However, when that extended area is occupied by university buildings, none of the alleged comparable properties will be as close to such extended campus as the subject property is to the present campus nor will any of them occupy a site of such eminence in reference to the university campus. Certainly, it would appear from the evidence and particularly the cross-examination of Mr. Hicks that sites on Walmer Road, on Kendal Avenue, on Bedford Road, and on such streets as Prince Arthur, cannot be considered as in any way comparable to the subject site for either replacement or redevelopment purposes.

Having cited these various forty comparables, Mr. Hicks seems to have given a figure based on his opinion but not calculated by an analysis of the comparables of $10.25 a square foot. Evans J.A., in the Court of Appeal for Ontario, noted and, with respect, I think rightly, that such figure had not been one giving sufficient weight to corner influence or to prime location, and increased the valuation to $12 per square foot.

Since all agree that the highest and best use of the subject lands, apart from the buildings thereon, would be for the erection of an apartment building, I find an interesting comparison to be the sale of lands for such redevelopment purposes in the immediate neighbourhood. Mr. Hicks had admitted that the subject property not only had the finest location for a fraternity house but that St. George Street was the preferred site for apartment development and, therefore, of course, lands on St. George Street would have the highest value for redevelopment as apartment sites. He also testified that from 1957 to 1964 the price paid for lands for redevelopment in the St. George Street area had increased at the rate of about 6 per cent per year. Therefore, from the comparables cited in ex. 30 by Mr. Hicks, I took the lands on St. George Street as close as possible thereto which were sold for redevelopment purposes. It is necessary to adjust the sales value up or down at the rate of 6 per cent per year in order to arrive at a comparable valuation as of the date of the expropriation herein. There were seven such sales cited in the evidence as follows:

189-197 St. George Street
Large site on St. George Street, midway between Lowther Avenue and Bernard, *i.e.*, 2½ blocks north of Bloor Street.

157 St. George Street
North-east corner of St. George Street and Lowther Avenue, *i.e.*, 2 blocks north of Bloor Street.

153 St. George Street
Just south of 157 St. George Street.

149 St. George Street
Two doors south of 153.

64 Prince Arthur Avenue
North side of Prince Arthur, east of St. George Street.

South side of Prince Arthur Avenue
West of St. George and east of Huron Street.

North side of Prince Arthur Avenue
Midway between Avenue Road to Bedford.

I accept the submission made by counsel for the university that 149 St. George Street and 153 St. George Street should be eliminated from this comparison. At an earlier date, the zoning regulations had permitted the construction on a site on St. George Street and in that area of a building three-and-a-half times the square foot area of the site. An amendment of those building regulations by by-law

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reduced the size of a building which could be constructed on a site to one having a floor space of twice the size of the site. This caught those two other houses on 149 and 153 St. George Street with apartment houses on either side of them. An amendment was enacted permitting the increase in the floor area of these two premises alone to three and one-half times the site area. As a result, they were sold in October 1960 for $14 a square foot and $13.86 a square foot, respectively.

Taking the other five sales and making the 6 per cent annual allowance of increase or decrease in price in order to arrive at the value for development purposes in August 1964, we find a valuation of $11.45 a square foot. As I have already pointed out, they are all a considerable distance north of the subject site, that is, in August 1964, they were that much further away from the university. The subject property was, at the date of the expropriation, a site immediately contiguous to the university, and it had a very considerable advantage for apartment house development purposes. Had it been possible to erect an apartment house thereon at that date in August 1964, the premises would have been very valuable as prospective housing for faculty. It is the situation in that August 1964 and not the situation after the expropriation which must be considered, but even if we consider the latter situation then the sites which I have indicated above will all be further from the extended campus than the subject site is from the present campus and only one of them was a corner site. I am of the opinion, therefore, that that $11.45 average indicates a value for redevelopment purposes of the subject site in August 1964 of $13 per square foot. This valuation is, in my view, to be preferred to that given by Mr. Hicks because he considered as comparable properties which, in my opinion, are not comparable and because he does not seem to have given consideration to corner influence or prime location although he admitted in cross-examination that the subject site possessed them both. Therefore, to accept Mr. Hicks' valuation of $10.25 per square foot, as the Municipal Board did, was to arrive at a valuation based on a misapprehension of the effect of the evidence and so was to fail to act in accordance with principle. This $13 per square foot for 15,730 square feet gives a valuation for redevelopment purposes of $194,490. As has been pointed out already, Evans

J.A. in the Court of Appeal reduced the amount allowed for redevelopment purposes by deducting from the area of the site for which compensation was being allowed an area of 1,500 square feet, being of the opinion that the subject site was that much larger than the area required for its use as a fraternity house site. With respect, I think this deduction cannot be supported. The valuation for redevelopment purposes is the valuation of all the lands whatever had been their use prior to the expropriation. A redeveloper intending to build an apartment house on the site would have to pay the same amount per square foot for all the lands and would have to buy it all. In fact, the land at the south-west corner would be as valuable as any other portion of the lands because it would permit him to design an apartment building with a garage entrance from Harbord Street to the rear of his building, leaving unmarred by driveways and available for his apartment building the whole of the St. George Street frontage. I would, therefore, have fixed the valuation for redevelopment purposes at the said $194,490. It should be noted that in arriving at the value of $13 per square foot, I have used only the comparables cited by Mr. Hicks in his evidence for the respondent, although not all of them, and have adjusted the values to the date of the expropriation using his evidence alone.

It must be noted that that figure does not make any allowance for an amount referred to by Evans J.A. in the Court of Appeal for Ontario as being for renovation and reconstruction.

In *Saint John Harbour Bridge Authority v. Driscoll, supra,* it was said, at pp. 641-2:

> The value of the buildings at $62,000 had been part of the award made by the Land Compensation Board but it must be remembered that in that award the value of the land was being assessed at the rate of 35¢ per square foot while as I have said the Appeal Division were unanimously of the opinion that it should be fixed at $1 per square foot. It must also be remembered that this latter figure of $1 per square foot represented the opinion of Mr. Corbett as to the value of the land when put to its highest and best use, that is, for a large warehousing or manufacturing enterprise and did not represent the value of the land when used by a small business supplying lumber items to ships. Before any purchaser could utilize the land for that highest and best use, the purchaser would have to remove from the site the considerable number of frame buildings which existed at the time of the expropriation and which had been valuable and efficient for the use for which the owner was putting them at the time of the expropriation.
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Therefore, I am of the view that having adopted the rate of $1 per square foot as the value of the lands, it was an error of principle to add to that amount any valuation of the buildings and that the award of the Appeal Division should be reduced by the sum of $62,000 representing the value of the buildings included in the amount awarded.

Similarly, if one is considering the value of the subject site for redevelopment purposes, then the redeveloper must before he can proceed to accomplish his purpose, *i.e.*, the erection of a large apartment house, demolish the building constructed in 1885 which at the time of the expropriation occupied the lands. Salvage from that demolished building would certainly be slight and not cover the cost of demolition. The developer would pay only the cost of acquiring the lands and he would not pay one cent for a building which he intended to remove.

As I have said, what must be awarded upon an expropriation is the value to the owner. In Canada the classic statement thereon was given in this Court by Rand J. in *Diggon-Hibben Ltd. v. The King*[5], at p. 715 as follows:

> . . . the owner at the moment of expropriation is to be deemed as without title, but all else remaining the same, and the question is what would he, as a prudent man, at the moment, pay for the property rather than be ejected from it.

The owner must consider whether he would sell the site for its highest and best use, that is, undoubtedly, development as an apartment site, or whether it is more valuable to him to hold it and continue to use it for its present purposes. As I have said, the Zeta Psi Fraternity had only the intention to continue in the use of the subject site for a fraternity house, and its only intention for the future is to carry on a fraternity house in the best site it could obtain for such purpose. As I have said, this purpose has now been accomplished but unfortunately too late to provide us with the necessary evidence for consideration upon the present appeal.

When the fraternity could not carry on in the subject site, it is entitled to the value of that site to it and that value is, in my opinion, the greater of either the value of that site for redevelopment purposes or the cost of replacing that site with another for the purpose of carrying on a

[5] [1949] S.C.R. 712.

fraternity house. It was with this consideration in view that evidence was given before the Municipal Board with respect to replacement costs. As I have said, the evidence given by the expert for the claimant and that by the experts for the respondent varied startlingly, Mr. Stewart arriving at a valuation of $284,000 when giving evidence for the claimant and Mr. Hicks arriving at a valuation of only $140,000 when giving evidence for the respondent. The Municipal Board rejected the evidence of Mr. Stewart, I think, from a perusal of the reasons given on behalf of the Board, chiefly because he arrived at his result by the use of one comparable only, that was the property at 182 St. George Street. That property had been purchased in the year 1958 by the Delta Upsilon Fraternity when that fraternity had, at that time, been dispossessed of its former premises across Harbord Street, a short distance south of the subject property, by expropriation by the university. With respect, I agree with the view of the Municipal Board that it is not proper to assess the replacement value of 118 St. George Street by the consideration of one comparable only, *i.e.*, 182 St. George Street. I am, however, of the opinion that if one were to consider the evidence given by Mr. Hicks on behalf of the respondent, one may avail oneself of much more evidence as to comparables and arrive at a result differing considerably from the result at which he arrived. Mr. Hicks approached the replacement value in two different fashions. He, firstly, took his figure of $10.25 per square foot as the value for replacement and then by some calculation which I have not been able to fathom arrived at a valuation for use as a fraternity house of one-half of that amount per square foot rounding it out at $5.25, and then added to the amount so found a depreciated amount for buildings. Mr. Hicks then proceeded to check the result arrived at by this somewhat mysterious procedure, with the sale of about eight buildings in the area for use for other than redevelopment. The purchasers of those buildings did not intend to demolish the buildings but rather to use them after renovation for their purposes. The schedule of those buildings was produced as ex. 29 and it contains nine examples. Two of them lettered in the schedule as "D" and "E" should be disregarded as they would appear to have been truly apartment house sites.

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One of them, the premises at 651 Spadina Avenue, I would disregard as being far from a comparable. It was a very large building on a large site which had been used as a young ladies' private school for many decades, thereafter for some other purpose, and is now being used as a Ukrainian students' residence. The premises, I think, from the point of view of their site on Spadina Avenue below Bloor and from the point of view of building, would be quite impossible to consider as a fraternity house. In the comparables, however, set out as ex. 29, were five properties actually purchased from 1958 on by various fraternities for use as fraternity houses. Those properties were as follows:

182 St. George Street
Purchased as I have said by the Delta Upsilon.

94 Prince Arthur Avenue
North side of Prince Arthur Avenue one block west of St. George Street. Purchased by the Alpha Delta Fraternity.

407 Huron Street—Purchased by Zeta Delta Association.

409 Huron Street—Purchased by Phi Gamma Delta Fraternity.
East side of Huron Street immediately south of Bloor Street.

157 St. George Street
Purchased by Deke Alumni Association. North-east corner of St. George Street and Lowther Avenue.

Mr. Hicks in his evidence gave a careful analysis of all of those properties and gave values per square foot of the buildings on the premises as compared to the building on the subject premises. He concluded his analysis of the site at 182 St. George Street by testifying:

> This would give an indicated value for 118 St. George, which is seven thousand six hundred and ninety-one square feet [that is the square foot area above the ground floor of the subject premises] . . . of $18.22 per square foot.

If one takes the rounded square foot area of the buildings in the said property as 7,700 square feet and applies thereto the average of Mr. Hicks' values of the five comparables, *i.e.*, $18.11 per square foot, one arrives at the average valuation of the building and the lands occupied by the fraternity of $139,447. As I have said, this figure is arrived at by considering the sale of other premises for fraternity house occupation as close as possible to the claimant's present advantageous site, although, as I have pointed out, all such sites to a considerable degree lack the pre-eminence of the subject site. There is, in addition another factor which

must be considered. Those five sites had an average square foot area of land either occupied by the building or used for other purposes or unused of 9,519 square feet. The subject site had an area of 15,730 square feet. There was much evidence and much cross-examination in reference to Mr. Hicks' evidence that the "extra land" should only be valued at $3 per square foot as this was an alleged valuation of lands used for parking. I am of the opinion that that evidence and any reliance placed upon it in arriving at a result is ill-conceived. What the claimant is entitled to on replacement is replacement of the present premises as close as one may arrive at it. If the claimant has a large property of 15,730 square feet whether or not it did occupy the whole of the old site for its building or whether or not it will occupy in the new premises only 7,700 square feet, it matters not whether that "extra land" is used for parking or for landscaping or for any other purpose. The claimant had it before the expropriation, and if the claimant is entitled to replacement the claimant is entitled to have it again and, failing that, a fair value for it.

As I have said, the comparable accommodations used to value the fraternity house and the necessary lands about it would justify a valuation of $139,447. Since those comparable accommodations averaged 9,519 square feet, the claimant is entitled to compensation for what it will not obtain in any of those comparable accommodations, *i.e.*, an additional 6,211 square feet of land. At what amount per square foot should those 6,211 square feet be valued? Again, turning to the properties which had been purchased for use as a fraternity house, I find that four of them had been purchased at an average square foot price for the whole land of $11.44 per square foot. As will be seen, I have eliminated one of the five purchases for the purpose of occupying as a fraternity house; that was a purchase made in 1966, almost two years after the expropriation. It was a purchase of a building at 409 Huron Street which had already undergone an extensive renovation with a large addition at the rear, and I am of the opinion that the purchase of the land site including land and buildings, when the buildings cover such a large percentage of the site and when the buildings included this large new addition, would throw out the value of the land itself. Therefore, eliminating that sale, I find

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that the average valuation of the lands sold for occupation of the buildings thereon as fraternity houses is the said figure of $11.44 a square foot, and the value therefore of 6,211 square feet of such lands, which is the extent of the "extra land" of the subject site, is $71,053. Adding that amount to the amount of the value for use of the fraternity house and its adjacent lands previously fixed at the amount of $139,447, I arrive at a valuation of the subject site at 118 St. George Street for use as a fraternity house of $210,500.

There was allowed in the Court of Appeal for Ontario the sum of $1,500 for moving and incidental expenses. No objection was made to that allowance in argument before this Court. It would seem to be a proper item when the replacement basis of valuation is that accepted and it would seem to be a modest allowance. Adding that sum, therefore, I find that the claimant is entitled to compensation of $212,000. The claimant is entitled to interest on that amount from the date of the expropriation until payment.

Therefore, I would dismiss the appeal herein and allow the cross-appeal increasing the award to the claimant cross-appellant as I have outlined. The claimant should have its costs in this Court and the amount of $625.80 as allowed in the judgment of the Court of Appeal for the reporting and transcribing of the proceedings as required by the Municipal Board.

RITCHIE J.:—I have had the benefit of reading the reasons for judgment of my brothers Spence and Pigeon and I would dispose of this case in the manner proposed by my brother Spence.

I find it necessary, however, to express my views as to the function of this Court on the consideration of such an appeal.

As has been pointed out by my brother Spence, the majority of this Court in *Winnipeg Supply & Fuel Co. Ltd. v. Metropolitan Corporation of Greater Winnipeg*[6], endorsed the statement that it was "Sufficient to say that the Court of Appeal has jurisdiction to act when the arbitrator has

[6] [1966] S.C.R. 336 at 338.

proceeded on some incorrect principle or has overlooked or misapprehended some material evidence of fact". I think it desirable to say that the word "misapprehended" as used in this context should, in my view, be taken as meaning that the arbitrator has made a mistake of fact and that it should not be construed as justifying this Court in reviewing the evidence and substituting its views for that of the arbitrator on the theory that if he was of a different opinion, he must have "misapprehended some material evidence of fact".

As I read the reasons for judgment of my brother Spence, he appears to me to have found that the Board erred in principle in failing to appreciate that in this case the overriding consideration in determining "value to the owner" was the value which the respondent attached to the maintenance of its fraternity domicile and that the fact that it was deprived of its "home" was an essential and substantial ingredient to be taken into account in determining the loss for which the respondent was entitled to compensation by way of replacement.

I think also that Mr. Justice Spence rightly considered that the Board had erred in principle in accepting a value of $3 per square foot for that part of the respondent's land that was used as a parking area. I agree that this "extra land" should be valued on the same basis as the land occupied by the building.

As I have indicated, I agree with the careful analysis of the circumstances which is contained in the judgment of my brother Spence, and I think that the errors in principle to which I have referred afford a justification for the review which he has made.

The judgment of Judson and Pigeon JJ. was delivered by

PIGEON J. (*dissenting*):—The property with which we are concerned in this expropriation was a fraternity house at the north-west corner of St. George and Harbord Streets, Toronto. It was a large old house, having been built in 1885. The land area was 15,730 sq. ft. It had been extensively renovated in 1950 at a cost of $47,700, and in 1964, when it was expropriated, it was in need of repairs which would

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have cost approximately $9,000. In 1955, a portion of the property on the south side had been expropriated by the City of Toronto for a street-widening. At that time the city took 727.1 sq. ft. at $6 per sq. ft., and the fraternity acquired in exchange from the city a parcel containing 2,260 sq. ft., now comprising the south-west corner of the expropriated property, at $4 per sq. ft.

The property was expropriated by the university on August 6, 1964. The Ontario Municipal Board, on August 4, 1966, awarded the fraternity $160,000. The Court of Appeal, on May 1, 1967, increased the award to $202,260. Before the Board, the fraternity submitted that the proper basis for compensation was to be determined on the principle of reinstatement. It claimed the market value of the land at $236,000, plus the depreciated replacement cost of its building at $103,750, for a total of $339,750. In the alternative, it claimed an award based on the cost of acquiring and renovating a comparable property together with an allowance for the relative inadequacies of that property as compared with the existing property.

The university, on the other hand, urged that the principle of reinstatement did not apply and that the fraternity was entitled only to the market value of the expropriated property when devoted to its highest and best use, which was for redevelopment as an apartment site, and that such market value was $160,000. The university also submitted that this value exceeded (a) the value of the expropriated property when used as a fraternity house (existing use value), and (b) the cost of acquiring and renovating a comparable property for use as a fraternity house.

The Ontario Municipal Board accepted the valuation of the experts called on behalf of the university. They arrived at a valuation of $10.25 per square foot for redevelopment as a site for apartments and found this to be more than existing use value. Their evidence was based upon an appraisal of at least twenty-three fraternity houses on St. George Street south of Bloor and elsewhere and, in addition, they considered all the sales since 1957 (over 200 in number) in an area to the north, west and south of the university campus.

Hicks first appraised the property on a basis of its redevelopment value as if vacant, and in this connection he selected and listed forty of the sales which he considered most significant.

Stewart (for the fraternity) first valued the expropriated property as if there were no buildings on the property and he worked from eight comparable sales, all of which were within a ten-minute walk of St. George Street. Three of these were on Huron Street, two on Prince Arthur, and two on St. George Street.

Stewart's second method of appraisal was to compare the expropriated property with the premises at 182 St. George Street, which had been purchased by another fraternity in 1958 for $115,000. He called this the market data approach and by this method he arrived at a valuation of $284,000.

Hicks' second method of appraisal was to establish the existing-use value as a fraternity house by using the same approach as Stewart except that he considered nine comparable properties which had been sold for fraternity, student residences or office use. He then estimated the price at which the expropriated property would have sold in August 1964 in the light of the established sale price for each of those comparables with certain adjustments. He came up with a figure of $140,000 if sold for fraternity house use in 1964.

The Board heard all this evidence and chose to accept the valuations, the procedures and the opinions of Messrs. Hicks and Davis in contrast with those of Mr. Stewart. I can find no error in their choice.

The Court of Appeal thought that the value as redevelopment land was too low at $10.25 and should be $12 per square foot. They awarded $170,760 for the land. This was arrived at as follows:

> Land value (15,730 square feet less 1500 square feet at $12.00 per square foot) $170,760.00

They also awarded $30,000 for renovation and reconstruction of any building to be purchased, and $1,500 for moving and incidental expenses, making a total of $202,260.

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I do not understand why the Court of Appeal valued 14,230 square feet at $12 per square foot and gave no value to the remaining 1,500 square feet. I could understand an increase in the square foot value but for the whole parcel. In any event, I do not think that a case was made out for any increase above the $10.25 per square foot awarded by the Municipal Board. When the Board accepted this figure they were giving effect to the evidence of Hicks based on an exhaustive study of land values for redevelopment purposes based on numerous sales to developers in that area. Of the 40 sales that he considered *in toto,* only one was at a price as high as $12 a square foot.

The second error in the judgment of the Court of Appeal was in giving the sum of $30,000 for renovation and reconstruction of any property which the fraternity might purchase as a substitute. Hicks' evidence as to existing-use value indicated that in August of 1964, the fraternity should have been able to purchase and, if necessary, renovate at a total cost of $140,000 a property which would have been the equivalent of the expropriated property for use as a fraternity although not in a location with as high a value for redevelopment.

In addition, the Court of Appeal awarded $1,500 for moving and incidental expenses, making the total of $202,260. In my opinion, there was error also in awarding this item when compensation was assessed not on the basis of existing-use value, but on the basis of value of the land for its highest and best use. This is a value that the owner cannot realize without moving.

I would allow the appeal and restore the valuation of the Municipal Board with costs here and below.

There was a cross-appeal by the fraternity asking for the value of the land for redevelopment purposes between the brackets of $160,000 and $236,000, plus the depreciated reconstruction cost of the building at $103,754.80. This would involve the assessment of compensation on the basis of reinstatement. It is settled law that this basis is to be applied only when there is no possible market for the property as used. Evidence before the Board fully justified the finding that there was such a market. In fact, there were several sales of such properties in the vicinity at the material time.

I would dismiss the cross-appeal with costs.

Having read the reasons written by my brother Spence I must with great respect question the principle on which they rest. When formulated by him in *Winnipeg Supply & Fuel Co. Ltd. v. Metropolitan Corporation of Greater Winnipeg*[7], it was prefaced by the following sentence:

> It would seem that no purpose can be served by a review of the jurisprudence in reference to the variation by the Court of Appeal of an award made by an arbitrator.

I cannot think this is to be taken as a complete rejection by this Court of the authority of precedents. Therefore, I take it that the principle enunciated was accepted as implying no departure from established practice concerning the proper scope of the duty of an appellate tribunal on questions of fact and in particular in the assessment of compensation. However, a review of previous pronouncements of great authority on the subject has driven me to a different conclusion.

In *The King v. Elgin Realty Co. Ltd.*[8], Taschereau J. (as he then was), delivering the unanimous judgment of the Court, said (at p. 51):

> In expropriation cases it is settled, I think, that when determining the amount, a court of first instance has acted upon proper principles, has not misdirected itself on any matter of law, and that when the amount arrived at is supported by the evidence, a Court of Appeal ought not to disturb its finding. This rule has for many years been the guiding principle in this Court, and a reference may be made to *Vézina v. The Queen* (1889), 17 S.C.R. 1. At page 16, Mr. Justice Patterson, with whom concurred Strong J., Fournier J., and Taschereau J., said:
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> > "Where the tribunal of first instance has proceeded on correct principles and does not appear to have overlooked or misapprehended any material fact, an appeal against the amount awarded will in most cases resemble an appeal against an assessment of damages in an action, which would be a hopeless proceeding unless some very special reason for the interference of the appellate court can be shown."

I have found no case previous to the *Winnipeg Supply & Fuel Co. Ltd.* judgment in which a decision contrary to that pronouncement was rendered. However, I think I should note that similar views were expressed by the Privy Council in *Ruddy v. Toronto Eastern R.W. Co.*[9], where they affirmed

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[7] [1966] S.C.R. 336 at 338.
[8] [1943] S.C.R. 49.
[9] (1917), 38 O.L.R. 556 at 557.

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the unreported judgment of this Court reversing the Appellate Division of the Supreme Court of Ontario increasing an arbitration award, saying:

> Before considering the facts and the merits of the case, it is well to examine what is the real nature of the appeal covered by sec. 209. In their Lordships' opinion, it places the awards of arbitrators under the statute in a position similar to that of the judgment of a trial Judge. From such a judgment an appeal is always open, both upon fact and law. But upon questions of fact an appeal Court will not interfere with the decision of the judge who has seen the witnesses, and has been able, with the impression thus formed fresh in his mind, to decide between their contending evidence—unless there is some good and special reason to throw doubt upon the soundness of his conclusions.

I should also mention that in *Atlantic and North-West Railway Co. v. Wood*[10] the Privy Council rejected the contention that on an appeal under the same statute, the Court of Appeal was bound "to decide the case upon and in accordance with their own appreciation of that evidence and not the appreciation of the arbitrators" and held that "they should review the judgment of the arbitrators as they would that of a Subordinate Court, in a case of original jurisdiction, where review is provided for".

On the authority of those decisions and on principle it appears to me that the duty of an appellate tribunal in expropriation cases does not differ from its duty in reviewing compensation in other cases. On this I do not know of a better statement than that made by the Privy Council in *Nance v. British Columbia Electric Railway Company Ltd.*[11]:

> Whether the assessment of damages be by a judge or a jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then, before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage (*Flint v. Lovell*, [1935] 1 K.B. 354, approved by the House of Lords in *Davies v. Powell Duffryn Associated Collieries, Ld.*, [1942] A.C. 601).

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10 [1895] A.C. 257.

11 [1951] A.C. 601 at 613.

The last named case further shows that when on a proper direction the quantum is ascertained by a jury, the disparity between the figure at which they have arrived and any figure at which they could properly have arrived must, to justify correction by a court of appeal, be even wider than when the figure has been assessed by a judge sitting alone. The figure must be wholly "out of all proportion" (*per* Lord Wright, *Davies v. Powell Duffryn Associated Collieries, Ld.*, [1942] A.C. 601, 616).

This was relied upon and applied in *Widrig v. Strazer et al.*[12] and *Gorman v. Hertz Drive Yourself Stations of Ontario Ltd. et al.*[13]

I do not overlook the fact that the principle stated in the *Winnipeg Supply* case was also accepted in *Saint John Harbour Bridge Authority v. J.M. Driscoll Ltd.*[14] This cannot make it binding if at variance with previous decisions of this Court. It must be so under any view of the authority of precedents. If they are held binding, an exception for such case must be made as was noted in *Stuart v. Bank of Montreal*[15] by a reference to *Bozson v. Altrincham Urban District Council*[16]. On the other hand, if one rejects the doctrine then the principle is undoubtedly open to reconsideration. On that basis I would say that the rule adopted in respect of the assessment of damages that was also followed in the past in reviewing the assessment of compensation in expropriation cases appears to me preferable.

Appeal dismissed and cross-appeal allowed with costs, Judson and Pigeon JJ. dissenting.

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Solicitors for the respondent: Borden, Elliot, Kelly & Palmer, Toronto.

[12] [1964] S.C.R. 376.
[13] [1966] S.C.R. 13.
[14] [1968] S.C.R. 633.
[15] (1909), 41 S.C.R. 516.
[16] [1903] 1 K.B. 547.