SAINT JOHN HARBOUR BRIDGE AUTHORITY ..... APPELLANT;

AND

J. M. DRISCOLL LIMITED ..... RESPONDENT.

1968
*Feb. 29
Mar. 1
May 13

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Expropriation—Compensation—Valuation—Actual use not highest and best use of lands in question—Necessary to remove buildings before lands could be utilized for highest and best use—Valuation of buildings not to be added to potential value of lands—Damages allowed for business disturbance but not for special value of lands to owner.

The appellant, by registration on April 21, 1966, of a resolution dated March 14, 1966, expropriated certain land owned by the respondent on the west side of the mouth of the Saint John River at Saint John, New Brunswick, near the docks of the National Harbours Board on the west side of Saint John Harbour. The respondent was a firm heretofore supplying dunnage, bracing and other wooden materials to ships taking cargo in the Port of Saint John, particularly during the winter season. It remained in possession of the expropriated property until July 1, 1966.

By the provisions of the *Land Compensation Board Act,* 1964 (N.B.), c. 6, the compensation for such expropriation was to be fixed by the Land Compensation Board and the Chairman of the Board, after a hearing, fixed the compensation to be paid to the respondent by the appellant at $124,500 together with interest at 5 per cent from July 1, 1966. An appeal by the respondent to the Appeal Division of the Supreme Court of New Brunswick was allowed and that Court by its order increased the compensation to which the respondent was entitled to $197,565. An appeal from the judgment of the Appeal Division was then brought to this Court.

Held: The appeal should be allowed and the award amended as follows: for land value $135,565.00; for damages for business disturbance $7,710.69.

There was no error in the conclusion of the Appeal Division that the value of the land in question should be fixed at $1 per square foot. That figure represented the opinion of the respondent's appraiser 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 expropriation.

Having adopted the rate of $1 per square foot as the value of the lands, it was an error in principle to add to that amount any valuation of the

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

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buildings. Accordingly, 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.

No amount should be allowed for special use to the owner. The Appeal Division were not fixing the value of the lands upon the use to which they were being put at the time of expropriation but found upon the evidence of the owner's appraiser the potential value of the land based on a higher and better use and thereby increased the value of the lands from 35¢ per square foot to $1 per square foot. If there were an element added to the latter rate to compensate for the special value to the owner it would be in breach of the well-recognized principle that so far as the damages sustained as a result of expropriation are concerned, the owner is entitled to be fully compensated but not enriched thereby.

The respondent, having found it impossible to obtain other suitable premises and having had to wind up its business selling only the inventory and the personal property, which it had to accomplish in a very short time and in a disorderly fashion, was entitled to compensation for business disturbance.

Irving Oil Co. Ltd. v. The King, [1946] S.C.R. 551; *Jutras v. Minister of Highways for Quebec*, [1966] S.C.R. 732; *Drew v. The Queen*, [1961] S.C.R. 614, referred to.

APPEAL from a judgment of the Supreme Court of New Brunswick, Appeal Division, allowing an appeal from a decision of the Land Compensation Board. Appeal allowed.

E. Neil McKelvey, Q.C., and *Thomas B. Drummie*, for the appellant.

Donald M. Gillis, Q.C., for the respondent.

The judgment of the Court was delivered by

SPENCE J.:—This is an appeal from the judgment of the Appeal Division of the Supreme Court of New Brunswick pronounced on July 12, 1967. By that judgment the said Appeal Division had allowed an appeal from the decision of the Land Compensation Board pronounced on September 22, 1966.

The respondent company owned a parcel of land in the City of Saint John containing 135,565 square feet. These lands were on the west side of the Saint John River at the point where the river flowed into Saint John Harbour and had frontages on Market Street, King Street and on the river. Near the centre of the river frontage, a parcel 105 feet in width along the river by a depth of 400 feet was owned by Connor Brothers Limited, and the respondent had granted to that company a right-of-way 18 feet in width

leading from the easterly end of this parcel of land to King Street, so that the respondent's lands were divided into two pieces, with, however, complete ease of access from one part to the other across the said right-of-way. The respondent was a firm heretofore supplying dunnage, bracing and other wooden materials to ships taking cargo in the Port of Saint John, particularly during the winter season. Before and after its incorporation, it has always been a business owned by the Driscoll family and operated by it for almost 100 years. Originally situate on the east side of the harbour in Saint John City proper, the business was moved to the west side after the fire of 1877. The property was enlarged by subsequent purchases over the years until about 1957 or 1958 it became possible to locate all its activities and its lumber yards in the one location under review.

The appellant, by registration on April 21, 1966, of a resolution dated March 14, 1966, expropriated the property; the respondent remained in possession only until July 1, 1966. By the provisions of the *Land Compensation Board Act*, 1964 (N.B.), c. 6, the compensation for such expropriation was to be fixed by the Land Compensation Board and Louis A. LeBel, Q.C., Chairman of the Board, after a hearing, fixed the compensation to be paid to the respondent by the appellant at $124,500 together with interest at 5 per cent from July 1, 1966.

The respondent appealed to the Appeal Division of the Supreme Court of New Brunswick and that Court by its order aforesaid increased the compensation to which the respondent here was entitled to $197,565. Each of the three honourable members of the Court gave written reasons. Ritchie J.A. would have allowed a compensation of $165,621.50 and also an amount of $62,000 for the value of the buildings which amounted to a total of $227,621.50. West J.A. would have allowed the sum of $197,565 in full compensation, and Limerick J.A. would have allowed only the sum of $135,565, also in full compensation.

In its appeal to this Court, the Saint John Harbour Bridge Authority asks that the award of $124,500 made by the Land Compensation Board be restored or, alternatively, that the award should not be increased to any greater amount than $135,565 which Limerick J.A. would have awarded.

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The respondent J. M. Driscoll Limited asks that the award as made by the Appeal Division of the Supreme Court of New Brunswick at $197,565 be affirmed and that the respondent should be allowed further damages for business disturbance as found by Ritchie J.A. and for special value of the land to the owner as found by the Chairman of the Land Compensation Board as well as by Ritchie J.A. Of the amount of $227,621.50, Ritchie J.A. would have affirmed the allowance of $15,000 by the Chairman of the Land Compensation Board as being a proper amount to allow to the claimant for the special value to it of the land and he would also have awarded the sum of $15,056.50 as damages for business disturbance resulting from the expropriation.

In late years, the business of the respondent company was totally confined to the supplying of lumber and timber required by the cargo carrying vessels which from time to time docked in Saint John Harbour. The respondent's premises had at the river end several wharves and some years ago lumber was delivered to the respondent's premises from ships directly over these wharves, but in late years that had not been carried on and it would appear that silt had pretty well filled in the berths adjacent to the wharves. It was, however, quite possible by dredging to have restored deep water docking facilities on the respondent's river frontage, although the economic practicality of that step was a matter of some debate before the Land Compensation Board.

The entrance to the respondent's premises on King Street was said to be only 200 feet away from the entrance to the National Harbours Board's very extensive wharves, slips and railroad sidings, and the respondent made most of its sales to ships tied up at those wharves. The respondent carried on the only such business in west Saint John and its premises were excellently suited from the point of view of site and from the point of view of the buildings thereon to carry out the business of the company. The business, however, was not a particularly profitable one, the net profit for the six years preceding the expropriation having averaged only $13,189.

Although the two chief shareholders of the respondent were most anxious to continue in business and preserve

the firm for their sons, the respondent, after the expropriation, was not able to find a suitable location at which its business could continue. Therefore, the respondent was forced to sell not the business as a "going concern" but only its stock-in-trade and personal property to another company which operated from small nearby premises and delivered the supplies to the ships from its distant lumber yards. As I have pointed out, the respondent went out of possession of its premises on July 1, 1966, less than two and a half months after the registration of the resolution following the expropriation.

The task of an appellate court in considering the award made by an arbitrator upon an expropriation has been stated by this Court on frequent occasions and was summarized very shortly in *Winnipeg Fuel and Supply Company Ltd. v. Metropolitan Corporation of Greater Winnipeg*[1], at p. 338 as follows:

> 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.

It is the contention of the appellant in this Court that the arbitrator in fixing the sum of $124,500 as the total compensation payable to the claimant had not proceeded on any incorrect principle and had not overlooked or misapprehended material evidence of fact.

The arbitrator heard evidence of several persons upon the question of values. Dr. Peters, the chief shareholder and active managing head of the respondent, gave evidence in reference to its business. A Mr. Nevin Burnham gave evidence of an accounting character in an attempt to establish value for the lands by use of profit figures and other statistics. This evidence was not interpreted by the Chairman as having any probative value, nor did any member of the Appeal Division use it in coming to his conclusion. It was not urged in this Court.

The three persons who gave evidence of land values as experts upon the subject were Mr. Ross Corbett and Mr. J. L. Feeney for the respondent, and Mr. Walter Mitham for the appellant. Mr. Feeney attempted to ascertain the value of the lands by calculating the cost of building the lands up to their present contour. Such an approach did

[1] [1966] S.C.R. 336.

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not find favour with the Courts below and it also was not urged in this Court. Therefore, this appeal revolves about the evidence given by Mr. Corbett for the respondent and Mr. Mitham for the appellant and the compensation which should be awarded based on a proper consideration of that evidence. As has been often repeated, the standard of valuation of compensation for expropriation of lands has been put concisely by Rand J. in *Diggon-Hibben Ltd. v. The King*[2], 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 that moment, pay for the property rather than be ejected from it.

It is to find the amount which should be fixed by that standard that is the task of the arbitrator. The arbitrator, of course, must consider the value of the land for its highest and best use. If that highest and best use is not the use to which the lands were put at the time of the expropriation then the potentiality of such highest and best use in the future gives to the lands their value and the present value of that potentiality must be considered. The highest and best use of the lands in question were given by Mr. Corbett in his report in these words:

> In my opinion, the present site of the subject property, located so strategically on the corner of King Street and Market Place, with a 384 foot Street frontage on King, plus the frontage on Market Place, plus the Harbour frontage would have its highest and Best Use development as a large warehouse or manufacturing plant, taking advantage of the benefits of this site.
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> To arrive at the land value, several contributing factors must be taken into consideration. Harbour front property privately owned is at a premium in Saint John, at this time. In recent years, it has been generally accepted, that prices ranging from $1.00 to $1.85 per square foot have been paid depending on location, desirability, and consumer demand.

Both Mr. Corbett and Mr. Mitham agreed that it was very difficult to find lands comparable to those expropriated on the west side of Saint John Harbour. This situation may be easily explained when one examines the map of the area filed as an exhibit at the hearing and notes that by far the greatest part of the lands having access to the water in the immediate area of West Saint John were owned and occupied by the National Harbours Board. Under these circumstances, Mr. Mitham sought properties in West Saint

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[2] [1949] S.C.R. 712.

John which had been the subject of recent sales. His method of obtaining this information was somewhat surprising and disturbed Ritchie J.A., as he seems merely to have discussed the size and sale price of these various properties with some solicitors. However, as Ritchie J.A. pointed out, it was said by this Court in *City of Saint John v. Irving Oil Co. Ltd.*[3], at p. 592:

> The nature of the source upon which such an opinion [the opinion of the real estate expert] is based cannot, in my view, have any effect on the admissibility of the opinion itself. Any frailties which may be alleged concerning the information upon which the opinion was founded are in my view only relevant in assessing the weight to be attached to that opinion, and in the present case this was entirely a question for the arbitrators and not one upon which the Appeal Division could properly rest its decision.

As I shall point out hereafter in this case, it is not the credibility of the expert's opinion nor the soundness of the factual base therefor, but rather its applicability to the property expropriated which is the question before this Court.

Mr. Mitham cited five properties particularly, and his evidence thereon was dealt with by Ritchie J.A. in his reasons for judgment. Ritchie J.A. pointed out that four of the five were sales of small residential lots on Winslow and Tower Streets and Riverview Drive, all in west Saint John and some few blocks away from the subject property. The reported sale price of these four lots varied from 11 to 20.7¢ per square foot. None of these lots had any harbour frontage, none were wider than 100 feet and some only 50 feet. They were typical small residential lots and the value could have no relationship to a piece of property over three acres in area bounded by two main streets, and with considerable frontage on the harbour. The fifth property cited by Mr. Mitham was a tract of land on the east side of the harbour having an area of some 186,600 square feet. Very little evidence was given as to this property, except that the appellant's officers had told Mr. Mitham that the appellant had purchased it at a price of 29¢ per square foot. When Mr. Corbett was cross-examined in reference to this property, he replied, "I don't think there is any comparison between that piece of land and the subject property".

Mr. Corbett having testified, as I have pointed out, that there was no comparable property in west Saint John the

[3] [1966] S.C.R. 581.

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sale of which he could examine and testify upon, referred to a series of properties on the east side of Saint John Harbour, and Ritchie J.A. also dealt with those properties in his reasons. One was a property known as the Thorne wharf, consisting of some 71,000 square feet which had been sold for $1.65 per square foot, the second, a parcel of land on Water and Prince William Streets in downtown Saint John which was sold at $4.11 per square foot, and which, of course, was in no way comparable. The third consisted of the various properties sold by the Eastern Coal Company to the National Harbours Board in 1947 at $1.70 per square foot. After a very careful analysis of all of the evidence given by these two experts, the members of the Court of Appeal were unanimous in their opinion that the evidence of Mr. Corbett should be accepted for the reason that he based his opinion on properties which had comparable advantages to that of the respondent's, while Mr. Mitham had, on the other hand, based his opinion on small residential lots lacking any of the advantages for commercial development possessed by the respondent's lands. That commercial development would, in the opinion of the appraiser as I have pointed out from his report, be for a large warehouse or manufacturing enterprise. Mr. Corbett had placed a value of $1 per square foot for that use upon the lands, and when such price is considered with the selling price of the various properties which he cited as comparable and which varied from $1.65 up, it will be seen that he appropriately discounted the value to make allowance only for the present potential.

It was the submission of counsel for the appellant that where experts' opinions vary the question of their competence, credibility and the weight to be given to their testimony is a matter to be determined by the tribunal which heard the witnesses and had an opportunity to weigh and compare the value of the various items given. In my opinion, in the present case, the Appeal Division has not trespassed upon that principle, despite some misgivings as to the weight of the evidence given by both experts, the Court of Appeal has considered them as being altogether creditable and as having the facts on which they might base their sometimes rather loosely expressed opinion. The Appeal Division, however, preferred to accept the opinion given by Mr. Corbett over that given by Mr. Mitham on

the ground that the comparable properties cited by the latter were, in truth, not comparable properties while those cited by the former, although not exactly comparable, were of considerably greater assistance in finding the value of the type of property which was in question in the expropriation. In doing so, I am of the view that the Appeal Division found that the tribunal of first instance had misapprehended material evidence of fact and therefore had the right and the duty to make other findings.

To summarize, the Appeal Division were unanimous in accepting the figure of $1 per square foot as being the proper value to be attached to the respondent's lands. For the reasons which I have outlined, I am of the opinion that there was no error in that conclusion. To adopt it would result in the value of the lands for the purpose of the award being fixed at $135,565 but the formal order of the Appeal Division fixed the compensation at $197,565. The difference of $62,000 is the amount found by the arbitrators as being the fair value of the buildings upon the lands and which valuation was not contested before the Appeal Division. As I have already pointed out, Limerick J.A. would not have allowed that amount of $62,000 in addition to the sum of $135,565 being of the opinion that the buildings added nothing to the value of the lands for the purpose of fixing the award upon expropriation.

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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In these circumstances, I agree with the comment of Limerick J.A. in his reasons for judgment:

> The test of this method of land valuation would be demonstrated if there were two identical lots side by side, one vacant and one with buildings such as were on the land expropriated; under such circumstances would a buyer wishing to establish a warehouse or manufacturing business pay more for the land with the buildings thereon which he would have to demolish than he would for the vacant land? The answer is obvious. It is possible that the cost of removal of the buildings should be deducted from the vacant land value, but as no evidence of what the cost would be was offered and it is possible that a purchaser might be prepared to absorb such cost, this Court would not be justified, in the circumstances, in making any allowance therefor.

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.

Ritchie J.A. would have added two further amounts to the award. Firstly, a sum of $15,000 to represent the special value of the lands to the owner, and secondly, a sum of $15,056.50 to represent damages for business disturbance resulting from the expropriation. The propriety of awarding either of these sums must be considered. It is, of course, true that if the lands have a special value to the particular owner who was in possession of them at the time of the expropriation, then there must be an element of the award to reflect such special value: *Irving Oil Co. Ltd. v. The King*[4], *per* Hudson J. at p. 558 and cases therein cited.

It is also true that the lands in so far as site and equipment were concerned were excellently suited for the use put by the owner and had a special value to him for such purpose. It must, however, be remembered that the Appeal Division are not fixing the value of those lands when used for such purpose but found upon the evidence of Mr. Corbett the potential value of the land based on a higher and better use and thereby increased the value of the lands from 35¢ per square foot to $1 per square foot. I am of the opinion that if there were an element added to that latter rate to compensate for the special value to the owner it

[4] [1946] S.C.R. 551.

would be in breach of the well-recognized principle as stated by Abbott J. in *Jutras v. Minister of Highways for Quebec*[5], at p. 745:

> So far as the damages sustained as a result of the expropriation are concerned, the appellant is entitled to be fully compensated *but not enriched thereby.*

(The italicizing is my own.) I would, therefore, not allow any amount for special value to the owner.

The respondent claimed a 10 per cent addition to the award for forcible taking. Ritchie J.A., citing *Drew v. The Queen*[6], concluded:

> Until such time as the *Drew* judgment is modified or varied, the allowance for compulsory taking is, for all practical purposes, abolished.

In so far as that decision ended the automatic addition of a 10 per cent amount to the award which had been arrived at by a careful consideration of the compensation to which the claimant was entitled, I agree with Ritchie J.A.'s comment. However, I am also in agreement with his view that a displaced owner should be left as nearly as possible in the same position financially as he was prior to the taking. In the present case, the respondent having occupied its lands with this particular business then would expect to obtain a valuation of the lands by a sale on the open market at the amount found by the Appeal Division, *i.e.*, $1 per square foot. It would also expect to be able to terminate his use of those lands for the purpose of carrying on the trade which the respondent carried on in an orderly fashion and, in all probability, to move the site of the enterprise elsewhere. In the present case, the respondent found it impossible to obtain other suitable premises and had to wind up its business selling only the inventory and the personal property. This it had to accomplish in a very short time. As I have pointed out, it was less than two and one-half months from the date of the resolution expropriating the lands to the date on which possession was surrendered.

The evidence as to the realization of the respondent's assets was most unsatisfactory. It would appear that a company known as Murray & Gregory Limited made an agreement to purchase the inventory and all the equipment other than the land and the buildings, but the amount to be paid

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[5] [1966] S.C.R. 732.

[6] [1961] S.C.R. 614.

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under that agreement was in no way specified and even at the date of the hearing seems to have been fixed as to each individual item at the time it was required by Murray & Gregory Limited. I am of the opinion that this disorderly realization of the respondent's assets other than land does constitute an element of damage which should be considered under the heading of "business disturbance". Ritchie J.A., with respect, accurately termed it "an amount covering the damage resulting to the company by reason of being forced out of business". The calculation of that amount may be made with some accuracy from the evidence. As I have pointed out above, the average net profit of the company for the last six years was $13,189. It is reasonable to allow one year for the orderly realization of the assets of the business and therefore to postulate that in the year following April 21, 1966, the date of the registration of the resolution expropriating, the company would have earned $13,189. The company yielded possession on July 1, 1966, and from that date on the award would earn interest at 5 per cent. The appellant, therefore, should be debited with the amount of $13,189 for business disturbance less 5 per cent on $135,565 from July 1, 1966, to the end of the year commencing April 21, 1966, or $5,478.31. The compensation for business disturbance therefore would be $7,710.69.

I would, therefore, allow the appeal and amend the award as follows:

For land value, 135,565 square feet at $1 per square foot	$135,565.00
For damages for business disturbance	7,710.69
Total	$143,275.69

The appellant is entitled to its costs in this Court but the costs in the Courts below should be disposed of as in the orders made by the Land Compensation Board and the Appeal Division of the Supreme Court of New Brunswick.

Appeal allowed with costs.

Solicitors for the appellant: Drummie & Drummie, Saint John.

Solicitors for the respondent: Gilbert, McGloan & Gillis, Saint John.