[SUPREME COURT]

McINNES and Another v COMMISSIONER OF HIGHWAYS*

Matheson J

11 November 1991; 15 May 1992

Real Property — Resumption and acquisition of land — Compensation — Injurious affection — Preliminary question — Land and Valuation Rules 1978, r 73(8)(j) — Land Acquisition Act 1969, ss 23, 25.

The plaintiffs owned the Dublin Hotel and surrounding land. The hotel fronted the main road as it passed through the small country town of Dublin. Part of the land was acquired for the construction of a by-pass road. The by-pass was likely to result in loss of passing trade to the hotel.

By way of preliminary question the plaintiffs sought a determination as to whether they were entitled to compensation in respect of the loss of value of the land consequent upon the likely loss of trade and loss of value of the business.

Held: Compensation for injurious affection under s 25(b)(ii) of the Act is limited to things done upon the actual land acquired and does not extend to losses consequent upon the carrying out of a larger public purpose. Preliminary questions answered in the negative.

Land Acquisition Act 1969 (SA), ss 23, 25.

Lands Acquisition Act 1955 (Cth), s 23(1)(c).

Land and Valuation Rules 1978, r 78(8)(j).

Land Compensation Act 1973 (UK), s 44(1).

Land Clauses Consolidation Act 1845 (UK), s 63.

Commissioner of Highways v George Eblen Pty Ltd (1975) 10 SASR 384; *Edwards v Minister of Transport* [1964] 2 QB 134; *Rockingham Sisters of Charity v The King* [1922] 2 AC 315, discussed.

Morison v Commonwealth (1971) 34 LGRA 273; *Commonwealth v Morison* (1972) 127 CLR 32, distinguished.

PRELIMINARY QUESTION

J E Lunn, for the plaintiffs.

A R F Hall, for the defendants.

Cur adv vult

15 May 1992

MATHESON J. The parties hereto have agreed that a preliminary question be determined pursuant to r 73(8)(j) of the *Land and Valuation Rules* 1978, and certain facts have been agreed.

The plaintiffs were previously the registered proprietors of an estate in fee simple in the whole of the land comprised and described in Certificate of Title Register Book Volume 4332 Folio 461. Pursuant to the provisions of

*[EDITOR'S NOTE: An appeal by the plaintiffs to the Full Court of the Supreme Court was unanimously dismissed on 10 November 1992.]

the *Land Acquisition Act* 1969 (the Act) the defendant has acquired 3.486 ha of the plaintiffs' land (the subject land) for a public work or undertaking described in the Notice of Intention to Acquire Land as "the Port Wakefield Road RN 3500". The defendant proposes to use the subject land for the purpose of reconstructing a portion of the Wildhorse Plains to Dublin section of the Port Wakefield Road. The plaintiffs are the owners and licensees of the Dublin Hotel which stands on the land that they have retained, the area of which is .9344 ha.

After the construction and opening of the Port Wakefield Road on its new alignment, those travelling on that road will no longer pass through the Dublin township, and the plaintiffs' hotel will no longer have a frontage to that road. Access by road to the township and to the plaintiffs' hotel will be by two access roads leading off the Port Wakefield Road, one west and one east of the hotel.

The parties hereto agree that the plaintiffs will suffer loss as a result of the Dublin township being by-passed by the Port Wakefield Road, but do not agree about the extent of that loss.

The summons seeks determination of the question

"whether, in the circumstances of this case, the plaintiffs are entitled to compensation in respect of:

(a) the loss of value of the land retained by them consequent upon losses to be incurred by them as a result of any diminution in the trade of the hotel and,

(b) the value of the business conducted by them on that land

by reason of the execution of the authorised undertaking, namely the Port Wakefield Road RN 3500, on a route by-passing the township of Dublin."

Section 23 of the Act provides, so far as is material:

"(1)-(2) ...

(3) Upon the hearing of a disputed claim, the Court shall determine what amount should adequately compensate in accordance with this Act all persons interested in the subject land and shall make such orders as it thinks just in the circumstances."

And s 25 of the Act, so far as is material, provides (the emphasis is mine):

"The compensation payable under this Act in respect of the acquisition of land shall be determined according to the following principles:

(a) the compensation payable to a claimant shall be such as adequately to compensate him for any loss that he has suffered *by reason of the acquisition of the land*;

(b) *in assessing the amount referred to in paragraph (a) of this section* consideration may be given to —

(i) the actual value of the subject land;

and

(ii) *the loss occasioned by reason of* severance, disturbance or *injurious affection*;

(c)-(g) ...

(h) no allowance shall be made for any enhancement or diminution in the value of the land in consequence of -

(a) the passing of the special Act;

(b) the acquisition under this Act of any other land;

or

(c) any proposal to execute the authorized undertaking, or any expectation that it will be executed;

(i) ...

(j) allowance shall be made in favour of the Authority for any enhancement in value of land adjoining the subject land in which the claimant is interested *by reason of the execution of the authorized undertaking*, but in no case shall the claimant be liable to make any payment to the Authority in respect of such enhancement in value;

and

(k) ..."

Much of the argument focused on the words "injurious affection" in s 25(b)(ii), although the plaintiffs did not limit their argument thereto.

The plaintiffs referred the Court to *Commissioner of Highways v George Eblen Pty Ltd* (1975) 10 SASR 384. Wells J said (at 389):

"When the facts and stated issues are brought to bear on the provisions of s 25, certain problems of construction clearly present themselves:

Is compensation payable in respect of any loss fairly and reasonably attributable to the acquisition, or must every part of the compensation awarded be capable of being subsumed under a traditionally recognised head of compensation?"

At 390, his Honour said:

"When s 25 ordains that 'The compensation ... shall be determined according to the following principles' it appears to me to be speaking of the practical task facing this Court upon a reference; it is not providing for the calculation of compensation in accordance with some esoteric formula. The compensation to be determined by the Court is to compensate the claimant for 'loss' — that word is quite at large — 'that he has suffered by reason of the acquisition of the land' — this passage links the loss in respect of which the claim is made to the acquisition and, in my opinion, the inevitable dispossession, as effect is linked to cause.

Paragraph (b) mentions certain traditional heads of compensation, but the appearance of the word 'may' makes it clear that the stated heads are not intended to be exhaustive; *those that are explicitly referred to must, I think, subject to qualification imposed by the context, be accorded the meanings respectively that have been developed over the years by courts when fixing compensation with respect to each.*"

It is convenient here to quote a passage from the judgment of Stephen J, then a judge of the Supreme Court of Victoria and the judge at first instance, in *Morison v Commonwealth* (1971) 34 LGRA 273. At 294 his Honour said:

"It was emphasised in the *Sisters of Charity of Rockingham* case that 'compensation claims are statutory and depend on statutory provisions. No owner of lands appropriated by statute for public purposes is entitled to compensation on the grounds that his land is "injuriously affected" unless he can establish a statutory right. The claim therefore, of the appellants, if any, must be founded in a Canadian statute'. Subject only to the constitutional requirements as to just terms, this is equally

applicable in the present case and attention must therefore be focused upon the words of the Commonwealth Act here applicable."

The phrase "injurious affection" is not defined in the Act. It was described by Harman LJ in *Edwards v Minister of Transport* [1964] 2 QB 134 at 144 as:

"A piece of jargon having a respectable pedigree and prolific of litigation in our courts for a century or more ..."

All the English cases decided before the decision of the Privy Council in *Rockingham Sisters of Charity v The King* [1922] 2 AC 315 (which was concerned with s 20 of the *Expropriation Act* 1906 (Can)), limited compensation for injurious affection to activities on the very land acquired, and the Privy Council gave a similar construction to the Canadian provision. The English cases were concerned with the terms of s 63 of the *Land Clauses Consolidation Act* 1845 (UK), which provided:

"In estimating the ... compensation to be paid by the promoters of the undertaking, ... regard shall be had ... not only to the value of the lands to be purchased ... but also to the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise *injuriously affecting such other lands by the exercise of the powers of this or the special Act, or any Act incorporated therewith.*"

Those cases were reviewed and applied by the Court of Appeal in *Edwards v Minister of Transport* (supra). The plaintiff was the owner of a dwelling-house with about two acres of grounds. He also owned an adjacent grazing field of some 2½ acres in extent. The Minister had constructed a large modern trunk passing the plaintiff's land. In order to construct that road, the Minister had compulsorily acquired from the plaintiff two small triangular pieces of land containing a total of 340 sq yds. The new trunk road was constructed on an embankment above and immediately to the east of the plaintiff's land. For the greater part of its length it did not impinge on the plaintiff's land. The evidence established that owing to the fact that the road rose somewhat steeply where it passed the plaintiff's house he would be considerably disturbed by dust, clashing gears and flashing lights. The parties agreed that if the measure of compensation was the diminution of value of the plaintiff's entire holding resulting from the construction of the by-pass, the additional compensation for injurious affection was £4,000, but if that compensation was limited to the damage suffered to the plaintiff from acts done on the two small pieces of land which the Minister had acquired from him the damage was £1,600.

It was held unanimously by the Court of Appeal that the plaintiff was entitled only to compensation for so much of the injurious affection as arose from activities on the two acquired pieces of land, and that accordingly he was only entitled to £1,600.

Harman LJ said (at 151) that the test is:

"... whether that which is done *on the claimant's land* has caused injury to the claimant's other land" (and see per Donovan LJ at 157 and Russell LJ at 158).

This case is commented on in the Commonwealth Law Reform Commission Report (1980) No 14 entitled "Lands Acquisition and Compensation". I have found the relevant parts thereof singularly helpful in the resolution of this case. The Commission said (at 155):

"A 1969 Justice Report recommended that the principle applied in *Edwards'* case be reversed 'so that an owner who has had part of his land taken from him will receive full compensation for the injurious affection to the land he retains, regardless of whether or not the damage is caused by the use of land taken from him'.

... Section 44(1) of the *Land Compensation Act* 1973 (UK) follows the Justice recommendation. It provides that:

> 'Where land is acquired or taken from any person for the purpose of works which are to be situated partly on that land and partly elsewhere, compensation for injurious affection of land retained by that person shall be assessed by reference to the whole of the works and not only the part situated on the land acquired or taken from him.'

This provision means that landowners from whom land is acquired will now receive compensation calculated by reference to the effect of the whole of the works and that each owner will not be treated differently according to the particular use made of the portion of land acquired from him. However, it is still vital that an affected landowner have some portion of land, however small, acquired from him. If no land is taken, although the landowner may be substantially affected by nearby public works, he is still not entitled to compensation on the principles applicable to s 63. He may, in England, be entitled to compensation under s 68 of the *Lands Clauses Consolidation Act* 1845, if he can satisfy the more restrictive principles applicable to that section. Since 1973, he may be entitled to compensation in respect of depreciation caused by physical use. But he will be better compensated if he loses some land."

Counsel for the Commissioner before me pointed out that the new Port Wakefield Road will not only by-pass the Dublin Hotel, but also other businesses in the township of Dublin, including a service station and a pizza shop. He stressed that the building of major roads and highways nowadays frequently by-passed townships in the interests of segregating high speed through traffic and local traffic.

The learned authors of the Report then went on to consider the decision of the High Court in *Commonwealth v Morison* (1972) 127 CLR 32, and to analyse the various judgments. Their Honours were concerned with s 23(1)(c) of the *Lands Acquisition Act* 1955 (Cth) which provides:

> "Section 23(1)(c) of the *Lands Acquisition Act* 1955 provides: '(1) In the determination of the amount of compensation payable in respect of land compulsorily acquired under this Act, regard shall be had to — ... (c) the enhancement or depreciation in value of the interest of the claimant, at the date of acquisition, in other land adjoining or severed from the acquired land by reason of the carrying out or the proposal to carry out the public purpose for which the land was acquired.'"

I can not do better than quote what was said in the Report (at 155-157) about the facts in the case and the various judgments:

> "The case involved the compulsory acquisition of part of a grazing property for the purpose of extending an existing airport so that it could be used for jet aircraft. The actual work proposed to be carried out on the resumed land was the construction of a paved extension to an existing runway with a further area as a premature touch-down area. In

addition the land was to be used for the placement of certain navigational aids and construction of a new main taxiway, which had no utility unless used in conjunction with the existing facilities. Taken together with the existing facilities the new works, by enabling use of the airport by jet aircraft, would have increased depreciatory effect on the land retained. The Commonwealth submitted that compensation extended only to the effect on the value of the retained land of the work done on and use made of the resumed land. The Court unanimously rejected this submission but the reasons for judgment differed.

Chief Justice Barwick (with whom Mr Justice McTiernan concurred) was not prepared to exclude the relevance for s 23 of decisions under s 63 of the *Lands Clauses Consolidation Act* despite differences in the wording of the two sections. He considered that where the work to be done and the stated public purpose were both confined to the acquired land little difference could exist in the application of the two provisions. Furthermore, he regarded the rule that the relevant depreciation in value of retained land is that caused by the use of the constructions placed on the acquired land, as a sound principle in the application of s 23. If depreciatory factors could be isolated to the work or use of work done on the acquired land the Chief Justice would regard it as proper to confine the depreciation, and hence the compensation, to the effect of those factors. However, in the instant case the effect of the use of the constructions on the acquired land could not be isolated. The results of the use of the whole work could properly be said to flow from the use of the works on the acquired land. The Chief Justice appears to take the view that the principle in *Edwards'* case will apply unless the work on and use of the acquired land is an integral and inseparable part of a single use of the whole project. If one could separate entirely the depreciation due to works on and use of the acquired land compensation would be limited to such depreciation. He gave no examples of, or guide to, the method of separation of depreciatory effect. Mr Justice Walsh suggested that, in the absence of authority, the depreciation caused by the extended use of the airport as a whole would be within s 23(1)(c). He went on to discuss *Rockingham Sisters of Charity v The King* and *Edwards* but concluded that the instant case was distinguishable. The present work was an extension of an existing facility rather than establishment of a new undertaking and the land acquired was not intended, as it was in those other cases, to play a minor part in the undertaking. It was solely or primarily by the use of the acquired land that the purpose of the undertaking, extension of the airport to permit use as a jet airport, was to be accomplished.

... In contrast, Mr Justice Menzies and Mr Justice Gibbs each distinguished the wording of ss 23 and 63. Mr Justice Menzies stated that, as the language of s 63 was 'quite different from that to be found in s 23(1)(c)', the English authorities could not be regarded as determining the construction of the Commonwealth statute. His judgment highlighted difficulties and artificialities which would result from adoption of the narrow principle in *Edwards'* case. First, at the time of acquisition, the particular use of each piece of land acquired might not have been determined. Second, and more fundamentally,

neighbours whose lands would in fact depreciate in value similarly from the effect of an undertaking involving acquisition of land from each of them would receive varying amounts of compensation depending on the particular use made of each piece of land acquired. Mr Justice Menzies concluded that the natural sense of s 23(1)(c) was that regard should be had to the whole purpose for which land was acquired, not merely to so much of the purpose as was to be fulfilled on the land taken from an individual owner. Mr Justice Gibbs stated that the words of s 63 were 'materially different from those of s 23(1)(c)'. As s 63 referred to damage resulting from the exercise of the power of acquisition it was understandable to limit the damage to that resulting from works on or use of the land actually taken. However, s 23 referred to the more extensive notion of the carrying out of the public purpose for which the land was acquired; which could involve use of land other than the land acquired. Mr Justice Gibbs distinguished the provisions of the Canadian statute considered in the *Rockingham* case. He then discussed the history of s 23(1)(c) before concluding that it should be construed according to its own terms and that it was not implicit in the ordinary and grammatical meaning of the section that the public purpose should be carried out on the land acquired ..."

I have given anxious consideration to this case, and also to the judgment under appeal of Stephen J (supra). At 296-297, Stephen J said in a most helpful and relevant passage:

"Accepting, as I must, the correctness of the limitation to mischief arising from the use of the actual land acquired in cases where legislation similar to the *Land Clauses Consolidation Act* is applicable there is, I believe, a distinction to be drawn between that type of legislation and the provisions of the Commonwealth Act. The Commonwealth Act, in s 23(1)(c), does not define the injury which is to be compensated by reference to the exercise of statutory powers of acquisition, as does legislation following the pattern of the *Land Clauses Consolidation Act*; instead compensation is to be determined by reference to the actual or proposed carrying out of a public purpose. The decisions on other legislation which follows the lines of the *Land Clauses Consolidation Act* concentrate rather upon the fact that a claimant is only singled out as entitled to compensation, unlike his neighbours who may suffer equally from injurious affection but from whom no land is acquired, because part of his land has been acquired by the exercise of statutory powers. This exercise of statutory powers not only gives him standing as a claimant for compensation but also serves as the delineating factor in defining the ambit of the mischief for which he can claim compensation; the mischief must originate on the land acquired ... On the other hand, under s 23(1)(c), while the status of a former owner of land from whom it has been compulsorily acquired is a prerequisite to a claim for compensation the ambit of relevant mischief is differently defined as that which arises from the carrying out or proposed carrying out of the public purpose for which the land is acquired, not that which arises from the exercise of the statutory power. The inquiry under the Commonwealth Act is, therefore, as to what injurious effect to retained land the carrying out of the particular public

purpose has had, or when nothing has yet been done, what injurious effect the proposal to carry it out has had.

Once it becomes necessary to look at the public purpose rather than at the exercise of statutory power there appears to me to be no room for the doctrine confining the inquiry to mischief originating on the acquired land."

His Honour's reasoning leads me to refer to the words I emphasised when quoting s 25 of the Act earlier in this judgment, and to contrast, as I now do, par (j) with par (b) thereof. In my opinion, the wording of the Commonwealth Act is significantly different to the Act now under consideration. Moreover, the facts are significantly different. I do not think that the *Morison* decision applies.

Counsel for the plaintiffs faintly sought to argue that they had a claim for special value, but failed to demonstrate that their claim fell within the authorities.

I have reached the clear conclusion that the plaintiffs' argument in the case at Bar fails. That conclusion will, I hope, encourage law reformers, however much it may disappoint the plaintiffs. I answer the question:
(a) no,
(b) no.

Solicitors for the plaintiffs: *Mouldens.*

Solicitor for the defendant: Crown Solicitor.

DAVID RIGGALL