SOME ASPECTS OF COMPENSATION.*

The risk of losing to the Crown or other public authority assets required for public purposes has been inherent to ownership since the earliest times. In later years this risk has been increased by the number of statutory authorities given powers of acquisition and in Australia by the fact that Commonwealth as well as State needs must be filled. However, it is regarded as proper that a person deprived should be compensated in some degree in respect of his loss. I say in some degree because although it has been said that "In a resumption case it is the duty of the Court to ascertain the maximum amount the owner would have obtained for the land in the best possible circumstances. The Court is not supposed to be astute to cut down the figure to the limit."[1] It is seldom if ever that the deprived owner is fully compensated for his loss or for the dislocation occasioned thereby.

Claims for compensation in respect of land acquisitions by the Crown and by local or other statutory authorities are assessed pursuant to the Public Works Act 1902-1965. In the case of the Commonwealth its Lands Acquisition Act 1906 makes somewhat similar provisions. Where statutory authority is given for the acquisition of other assets, *e.g.* an electric lighting undertaking, the same provisions with suitable adaptations are made to apply.

Let us look then at the provisions of the Public Works Act in so far they as deal with the assessment of compensation.

Section 63 as it now stands provides that in assessing compensation regard shall be had solely to the following matters.

Firstly the value of the land taken with any improvements thereon or of the estate and interest of the claimant therein as at the sixtieth consecutive day preceding the date of the gazettal of the notice of the taking or resumption and without regard to any increased value occasioned by the proposed public work. In the case of land required for a railway, the valuation date is the first day of January or the first day of July whichever is the later immediately preceding the first day of the session of Parliament in which the bill authorising the railway is passed. Where improvements have been effected after the valuation date and without notice of the intended resumption the claimant is allowed in addition the actual cost of such improvements.

* A paper read at the 1966 Law Summer School held at the University of Western Australia.

1 Willoughly M.C. v. Valuer General, (1934) 12 L.G.R. 41.

Secondly the loss or damage, if any, sustained by the claimant by reason of:

(i) removal expenses.
(ii) disruption and reinstatement of a business.
(iii) the discontinuance of building works in progress at the date when the land is taken and the termination of building contracts relative thereto.
(iv) architects' fees or quantity surveyors' fees actually incurred in regard to such works.
(v) any other facts which the respondent or the Court consider just to take into account having regard to the circumstances.

Thirdly the damage if any sustained by the claimant by reason of the severance of the land taken from adjoining land of the claimant including any injurious affection to any such land.

Where land is taken compulsorily the respondent or the Court may include in the compensation an additional amount not exceeding ten per centum of the amount otherwise assessed for the compulsory taking. An allowance is also to be made by way of rents and profits or alternatively interest from the date of resumption to the date of payment with suitable protection to the Crown in respect of any advance payment or where an offer of compensation is made and rejected and the claimant is ultimately awarded no more than the amount offered.

The various items secondly above referred to were introduced into the Act in 1955—a somewhat belated realisation that when land has been used for business purposes an owner forced to find other premises and to move his business may suffer greater loss than the value of the land taken.

The words "disruption and reinstatement" are very wide and properly interpreted should provide reasonable compensation to a business proprietor deprived of his business premises and forced to seek a new location. I am not aware of any reported case in which the words have been judicially considered. It is to be noted that a private owner deprived of his residence does not receive special treatment and unless he can prevail on the respondent or the court to regard his uprooting and transmigration as "other facts" warranting special consideration under *placitum* (v) his compensation is likely to be the bare value of his land and improvements and nothing more.

Section 28 of the Commonwealth Lands Acquisition Act 1906 as amended is not so specific as the Public Works Act. It merely says

that in determining the compensation regard shall be had to the following matters:

(a) the value of the land acquired
(b) the damage caused by severance
(c) any enhancement or depreciation in value of other land of the claimant adjoining the land taken or severed.

Any enhancement in value of such land is taken off the compensation payable.

In many cases the amount of compensation to be paid is ultimately agreed between the late owner and the acquiring authority following a period of horse trading and hard bargaining. If however the parties are unable to reach agreement recourse may be had to litigation. Under the Public Works Act the claimant may either sue in a court of competent jurisdiction or he may elect to go before a special compensation court presided over by a Supreme Court Judge or a magistrate and assisted by two assessors one appointed by each of the parties to the dispute. If the question concerns the value of land only the assessors will probably be sworn valuators or persons otherwise experienced in the valuing of land. If other questions arise, *e.g.* the value of a commercial undertaking such as a town electric supply—they may be engineers or accountants. In claims against the Commonwealth the claimant can sue in the High Court or in a State Court of competent jurisdiction.

It is necessary to consider the various aspects of a claim in more detail and the first matter for consideration is the value of the asset taken.

As was said by Sir Samuel Griffiths C.J. in *Spencer v. The Commonwealth*[2] the test of value is what would a man desiring to buy the land have had to pay for it on that day (*i.e.* the fixed day) to a vendor willing to sell it for a fair price but not desirous to sell. As was pointed out both by the Chief Justice and Isaacs J. the fact that there was no market for the land on the fixed day is irrelevant because it must be assumed that there was a buyer ready and willing to purchase and that such buyer was prepared to pay a fair price for the land. That price must be ascertained by a consideration of the value of the subject land to the owner. As was said by Fletcher Moulton L.J. in *Re. Lucas and Chesterfield Gas & Water Board*[3] in a passage subsequently adopted by the Privy Council, "the owner receives for the lands he gives up their equivalent *i.e.* that which they were worth

2 (1907) 5 C.L.R. 418.
3 [1909] 1 K.B. 16, at 29.

to him in money. His property is not therefore diminished in amount but to that extent it is compulsorily changed in form. The equivalent is estimated on the value to him and not on the value to the purchaser."

It is important to note that it is the value of the land to the owner which must be ascertained and this is well illustrated by the case of *The Commonwealth v. Reeve*[4] a claim under the Lands Acquisition Act 1906. The claimant was the lessee of a room used as a coffee shop in Grace Building in Sydney, a property taken over by the Commonwealth. The lease was of indefinite duration by reason of the protection afforded by National Security Regulations and the claimant had built up a substantial business amongst persons working in the neighbourhood. The claimant was unable to obtain alternative premises and the Court held that in assessing the value of the claimant's interest the Court must ascertain the value of the premises to him having regard to the use to which they were being put. In other words, the value of local goodwill was part of the value of the claimant's interest in the premises.

Regard must also be had to all the potentialities which the land has although, as pointed out in *Rostron's Case*[5] the value of the land must be ascertained as at the fixed date and prosperity unexpected or depression which no man would have anticipated if happening after the date named, must be disregarded. The claimant may not have been using the land for the purpose for which it is or is likely to be best suited but in assessing value he is entitled to be compensated on the basis of a sale to a buyer requiring the land for the purpose which gives to the land its highest value. This is well illustrated by *Vyricherla's Case*[6] where Lord Romer giving the opinion of the Board, said "it has been established by numerous authorities that the land is not to be valued merely by reference to the use to which it is being put at the time at which its value has to be determined but also by reference to the use to which it is reasonably capable of being put in the future."[7] This is sometimes referred to as the "special adaptability" of the land. In *Vyricherla's Case* the land was taken for the purpose of a reservoir to provide water for an adjoining harbour. The land was peculiarly well adapted for this purpose in that it straddled a valley providing a suitable site for a dam or barrage

4 (1949) 78 C.L.R. 410.
5 Minister of State for Home Affairs v. Rostron, (1914) 18 C.L.R. 634.
6 Raja Vyricherla Narayana Gajapatiraju v. Revenue Officer, Vizagapatam, [1939] A.C. 302.
7 *Ibid.*, at 313.

fed by a natural spring at the head of the valley with an adequate flow of water. At the time of resumption the valley was used by the claimant for agricultural purposes only. It was held by the Privy Council that in assessing the value of the land regard must be had to its suitability for the purpose for which it had been taken.

This case is also important in establishing that notwithstanding the restriction contained both in the Public Works Act and in the Lands Acquisition Act whereby increased value resulting from the proposed public work is to be ignored, the fact that the only probable or possible buyer of the land for its special purpose is the resuming authority does not deprive the owner of the right to have the land valued on the basis of its suitability for that purpose. The knowledge that some person will be prepared to give a large price for the land for a particular purpose both from a practical and an economic point of view must enhance the value of the land.

If there are any restrictions which limit the extent of the available market or the price that may legally be asked by the owner on a voluntary sale, these must also be given due consideration. A general statement to this effect is to be found in *Stebbing v. Metropolitan Board of Works.*[8]

Perhaps we can leave this aspect of compensation by quoting the remarks of Eve J. in *South-Eastern Railway Co. v. London County Council*[9] where he summed up the matters to be taken into consideration as follows:—[10]

> "(1) The value to be ascertained is the value to the vendor, not its value to the purchaser; (2) in fixing the value to the vendor all restrictions imposed on the user and enjoyment of the land in his hands are to be taken into account but the possibility of such restrictions being modified or removed for his benefit is not to be overlooked; (3) market price is not a conclusive test of real value; (4) increase in value consequent on the execution of the undertaking for or in connection with which the purchase is made must be disregarded; (5) the value to be ascertained is the price to be paid for the land with all its potentialities and with all the use made of it by the vendor; and (6) the true contractual relation of the parties—that of purchaser and vendor—is not to be obscured by endeavouring to construe it as another

8 (1870) L.R. 6 Q.B. 37.
9 [1915] 2 Ch. 252.
10 *Ibid.*, at 258.

contractual relation altogether—that of indemnifier and indemnified."

The next consideration is the manner in which the value is to be ascertained, *i.e.*, the evidence which must be adduced to fix the value. It is easy to say that the value will be proved by the expert testimony of persons skilled in valuation but this begs the question. Expert testimony of this nature is no more than a guess albeit an informed guess. As was said by Isaacs J. in *Hazeldell Ltd. v. The Commonwealth*:—[11] "The value of land where there is no market price is always a matter of opinion. Opinion is largely dependent on the personal equation." But the expert who goes into court and says "I looked at the land and I value it at so much" without any logical reason to support such valuation, is unlikely to carry much weight with the assessor. The first thing that a valuer looks for is the information provided by sales of comparable land. It may be that similar premises in the locality have recently changed hands in an open market deal. In the case of agricultural land there may have been sales within the district. This information if available, provides a base upon which the expert can build. He must compare the subject land with the land or lands which have been sold. The subject land may have advantages which the other land lacks. The subject land may be less advantageous; it may be nearer to or further from amenities. These must be suitably allowed for.

Having completed his comparisons, the valuer must look for any special adaptability of the subject land and consider whether it has potentialities to it. From a consideration of these matters he builds up his valuation.

If the land is improved, the valuer must give consideration to the value of the improvements. As a general rule the value of these is ascertained by estimating what it would cost at the fixed date to put the improvements on the land and in the case of improvements which are subject to depreciation by the passage of time such as buildings, fences, fixed plant and so on by reducing the value on a depreciation basis. Some regard must also be had to the state of repair. Obviously improvements which have been well maintained will be more valuable than those which have been allowed to deteriorate. In some instances improvements may not add to the value of the land itself and in a few isolated cases improvements may represent a deduction rather than an addition to the main asset.

[11] (1924) 34 C.L.R. 442, at 452.

If there is no established market price, the expert must cast round for some other means of valuation.

It may be possible to form an opinion as to value by establishing a rental price to be capitalised. In other cases the value may be ascertained by having regard to the particular use to which the land has been put and by the capitalising of the profits derived from such use. In *Eastway v. The Commonwealth*[12] land was used for a foundry and engineering shop and the court was satisfied that no other suitable premises were available to the owner. The value was assessed on the basis of the loss of the business by capitalising the profit ability of the business. Similarly in *Morton Club v. The Commonwealth*[13] the subject premises were particularly suitable for club premises and owing to the existence of National Security Regulations it was impossible for the club either to build or to obtain suitable alternative accommodation. The value of the premises to the claimant was ascertained by a consideration of the price which it had to pay for alternative and less suitable premises.

We come now to the additional matters which were introduced into the Act in 1955, and I propose to briefly consider these.

(a) Removal Expenses.

The purpose of this is fairly obvious and in the case of a householder would be limited to the actual expense incurred in uplifting the household belongings and transferring them to the substituted residence. Where however the resumption has involved land used for business purposes the removal expenses may be somewhat more involved and would cover, in my view, the costs incurred in planning the move, the various expenses associated with uplifting of plant, fixtures, fittings, internal telephones and such like, and all costs related to re-installation.

(b) Disruption and Re-instatement of a Business.

This could be a matter of considerable complexity, and would involve a consideration of a great number of items. In the first place, the claimant would be entitled to compensation for loss of local goodwill if the move required the re-instatement of a business at some distance from the original location. In any event he would be entitled to compensation for business lost during the actual move and for any reduction in business incurred over a period before the customers became used to the new loca-

12 (1951) 25 A.L.J.R. 572.
13 (1948) 77 C.L.R. 253.

tion. The claimant would be entitled to the reasonable cost of advising customers of the move, *e.g.* advertising, circularising, etc. There could be items of expenditure in providing facilities at the new site which were available at the old site and which are not covered in the value placed on those premises. Again the claimant is entitled to be compensated for inconvenience which he or his business may suffer by reason of its re-location; staff may be lost; it may be more difficult to carry out business transactions from the new site than from the old; additional labour may be necessary to perform the same work and so on. All these items have to be evaluated and included in the claim. They are matters which the claimant and his staff are in a better position to justify than outside advisers but in many cases they require a careful look into the future on which the claimant will require legal guidance. A good example of the intricacies of such a claim is *Sydney Ferries Ltd. v. The Minister for Works of N.S.W.*[14]

(c) & (d) Abandoned building projects, architects fees, etc.

These items are specialised and relate only to the situation where building works have been commenced before notice of resumption and it became necessary to stop the works and terminate the building contract and to expenses incurred for architects fees and quantity surveyors fees in respect of buildings which it was proposed to erect on the subject land before the notice of the resumption or intended resumption was given to the owner.

(e) Other Facts.

This was intended as a dragnet to cover damages which the owner suffered by reason of the resumption and which are not the subject of specific provision in the Act. However, it would, in my view, require considerable imagination and a highly persuasive approach to induce the Department of Works or other respondent authority to compensate for items which are not specifically covered either by the Act or by judicial authority.

We come now to the item known as severence.

As the name implies, compensation here envisaged is for damage suffered by the claimant by reason of the severance of the lands taken from other land owned by the claimant. For example, a railway may be put through a farm property dividing it into two parts and the claimant may desire to continue to carry on his business on his remaining land. The remnant on one or other side of the railway

[14] (1928) 7 L.V.R. 65.

may be so small as to make it uneconomic for it to be worked at all. In such case the owner is entitled to be compensated to the full value of the land. If the severed portion is sufficiently large to remain an economic proposition for use, it is obvious that the cost of working it will be substantially increased by the inconvenience which will be suffered in having to cross the line every time it is necessary to visit the severed land. There may be installations which were formerly used to cover the whole area which may have to be duplicated by reason of the division.

Severence may occur notwithstanding that the lands were not contiguous, for example, two parcels of land may be separated by a public highway and a railway is put down alongside the highway. There will be a claim for severence because the railway offers difficulties which were not present when the road alone divided the properties, but in order to establish a claim for severence, there must exist prior to the resumption, some right of passage between the pieces of land even though it be as indicated along a public highway.

Severence must be distinguished from injurious affection which is another heading under which a claim will lie.

When land has been resumed from a person and that person retains land adjacent to the land resumed, he is entitled to claim compensation if the value of such land is affected either by the taking of the land resumed or by the purpose for which the resumed land is used. For example, if portion of a residential property is taken for the purpose of a railway, but the residence itself is not taken, its value could be seriously prejudiced by the running of trains on the land taken. Another instance of injurious affectation is where access to the retained land is obstructed by the blocking off of a highway which by reason of the resumption becomes a dead end street.

It seems that no claim for injurious affection will lie except in favour of a person from whom land has been resumed. It is the resumption only which brings into effect the compensation provisions of the Public Works Act. If there is injurious affection to land by reason of a public work but no resumption from that particular owner his claim if any would lie in tort.

In some cases a Crown Grant reserves to the Crown authority to take portion of the land without compensation for certain public purposes. If land is taken by authority of such reservation the owner will have no claim for compensation for the land taken but may sustain a claim based on severence, in respect of his remaining land. He will not, however, be able to sustain a claim for injurious affec-

tion. This was so decided by the Western Australian Full Court in *Worsley Timber Co. v. The Minister for Works.*[15]

As I have previously indicated, the Commonwealth Lands Acquisition Act 1906 does not specifically entitle the claimant to compensation otherwise than for the value of the land actually taken plus damage for severence and injurious affection. The Commonwealth is entitled however to set off against compensation any enhancement in the value of remaining land which the claimant may enjoy. It will therefore be remembered that the Commonwealth Constitution section 51 (XXXI) specifically states that resumption can only be made "on just terms" and in assessing compensation in respect of resumption made by the Commonwealth, the courts have always taken into account the various matters which have now become the subject of special enactment in the Public Works Act.

It remains to consider one further aspect.

The Public Works Act as it originally stood provided that where land taken or resumed produces rents or profits the amount thereof received by the resuming authority less the reasonable cost of collection from the date of resumption to the date of payment of compensation or the date of award whichever first occurs, shall be added to the compensation payable or on the option of the resuming authority it may pay interest on the amount of compensation for the same period at the rate of £6 per centum or such higher rate as it or the court considers adequate.

In 1955 a further provision was included to cover the position where the land taken does not produce rents or profits. In such case interest is to be paid at the rate ruling at the date of resumption in respect of overdraft accommodation granted by the Commonwealth Trading Bank. Such interest is payable from the date of the service of the claim on the respondent to the date of settlement or if the land was entered upon prior to the date of resumption from the date of entry. If the compensation awarded by the Compensation Court is no more than the amount offered by the resuming authority interest ceases at the date of the offer and if an advance payment is made to the claimant, interest on that sum ceases as at the date of payment.

As far as the Commonwealth is concerned, section 40 of the Lands Acquisition Act generously gives to a claimant interest at the rate of three per cent on the compensation when assessed from the date of resumption to the date of payment.

[15] (1933) 36 W.A.L.R. 52.

Before concluding, I should perhaps refer to one particular aspect of compensation which is met with frequently, *i.e.* in respect of land taken for widening a street. It is always difficult to assess the value of the land taken because although it consists of street frontage, the frontage remains with the owner in the land that he retains. It has been argued that the compensation payable in respect of such land should be based on the value of the land at the extreme rear end of the block affected, because that is virtually what is taken away from the owner. In effect, the taking of the road frontage merely reduced the depth of the block. This may be a fair argument in the case of residential suburban land but it is not a fair argument in the case of blocks of shallow depth or where from the situation of the land it is likely that it will be fully developed as in the case of city land. The correct method of assessing the compensation is, in my view, to value the land as a whole and to award compensation on the basis of the loss of an aliquot part of the total area.[16]

E. F. DOWNING.*

16 See, however, Lesmurdie Heights Pty. Ltd. v. City of Fremantle, [1965] W.A.R. 132, concerning compensation payable on land taken pursuant to the provisions of the Municipality of Fremantle Act 1925 and the City of Perth Act 1925.

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