In re Whareroa 2E Block, Maori Trustee v Ministry of Works - [1959] NZLR 7

Judicial Committee
7, 8, 9, 10 July; 2 October 1958
Viscount Simonds, Lord Morton of Henryton, Lord Keith of Avonholm, Lord Somervell of Harrow, Lord Denning

Public works -- Assessment of Compensation for Land taken -- Land in Undeveloped State -- Land to be valued as it was on Specified Date, Any Potentialities being Taken into Account -- Sale of Land as Whole to be Contemplated -- Other Considerations if Lots in Subdivision immediately Saleable on Specified Date -- Basic Considerations in assessing Compensation -- Finance Act (No. 3) 1944, s. 29 (1) (b).

In assessing compensation under s. 29 (1) (b) of the Finance Act (No. 3) 1944 for Maori land intended for subdivision that has been taken under the Public Works Act 1928 and its amendments, the Maori Land Court must have in view the requirement of the consent of the Minister under s. 8 (9) (a) of the Maori Purposes Act 1943 to any sale of the land, and under the Land Subdivision in Counties Act 1946 to the scheme plan of any subdivision and the possibility of material modification of that plan.

The land must be valued for what it in fact was on the specified date, any potentialities being taken into account; and the Court must contemplate the sale of the land as a whole, unless it appears that the necessary legal consents to a subdivisional plan had been given, and a survey on the ground at the specified date would have disclosed that the land, or some part of it, was in fact so far subdivided that the subdivided parts could at that date have been immediately sold and title given to individual purchasers, in which case the parts so subdivided may be separately valued, for the purpose of arriving at the total amount of compensation.

So held, by the Judicial Committee of the Privy Council, affirming the first two heads of the opinion expressed by the Court of Appeal, sub. nom. In re Whareron 2E Block [1957] NZLR 284, 290, and varying the third head of that opinion.

Turner v Minister of Public Instruction (1956) 95 C.L.R. 245, approved.

St. John's College Trust Board v Auckland Education Board [1945] NZLR 507; [1945] G.L.R. 261, overruled.

Statement of Lord Dunedin in Corrie v MacDermott [1914] A.C. 1056, 1064, referred to.

APPEAL (No. 12 of 1958) from the judgment of the Court of Appeal, sub. nom. In re Whareroa 2E Block [1957] NZLR 284, where the facts sufficiently appear.

E. D. Blundell (of the New Zealand Bar) and P. O'Connor, for the appellant.

Solicitor-General for New Zealand, Wild Q.C., and Moylan, for the respondent.

Cur adv vult

The judgment of their Lordships was delivered by

LORD KEITH OF AVONHOLM.

This is an appeal from the judgment of the Court of Appeal of New Zealand on a Case Stated by the Maori Land Court relating to the basis of compensation to be awarded in

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respect of land taken compulsorily by the Crown under the Public Works Act 1928.

It will be convenient to set out chronologically certain relevant dates and events.

In 1948, a plan was prepared for the subdivision of certain Maori land of some 242 acres in extent in the neighbourhood of the harbour at Tauranga. This plan required the approval of the Minister of Maori Affairs. Any sale of plots of less than 10 acres within the area, before this consent was obtained, was illegal.

Later in 1948, an application was made to the Maori Land Court for an order vesting the 242 acres in a trustee. The object was to facilitate transfers of land within the area by avoiding the need for a multiplicity of signatures. By order, dated July 15, 1948, the Maori Land Court vested the land in the Waiariki District Maori Land Board (hereafter referred to as the Maori Land Board) as trustee. This order did not become operative until approved by the Minister of Maori Affairs.

On September 13, 1951, the Minister of Works gave notice of intention to take about ninety-one acres of the 242 acres.

In November, 1951, the Minister of Maori Affairs notified his approval of the order vesting the 242 acres in the Maori Land Board.

On September 11, 1952, there was gazetted a proclamation taking the 91 acres and vesting that area in the Crown as from September 15, 1952 (hereafter called the specified date): 1952 New Zealand Gazette, 1468.

On September 29, 1952, the Maori Land Board claimed as compensation for the taking of the 91 acres the sum of £ 109,011, of which £ 95,711 was for the value of the land and the balance for injurious affection of other land.

On September 30, 1952, under the Maori Land Amendment Act 1952, the Maori Trustee (the present appellant) came in place of the Maori Land Board.

On April 6, 1954, an application by the Minister of Works for ascertainment of compensation for the land taken came before the Maori Land Court.

On July 11, 1955, the Maori Land Court stated a Case for the opinion of the Supreme Court of New Zealand which, of consent, was removed into the Court of Appeal which, on December 19, 1956, gave the judgment which now comes before their Lordships' Board: [1957] NZLR 284.

The relevant provision which governs the assessment of compensation in s. 29 (1) (b) of the Finance Act (No. 3) 1944, which is in the following terms:

> The value of land shall, subject as hereinafter provided, be taken to be the amount which the land if sold in the open market by a willing seller on the specified date might be expected to realize.

The Case Stated, after pointing out that it would have been useless for the Maori Land Board to have proceeded with the subdivision after the issue of the notice of intention to take the land, continues:

> "No evidence was adduced to show when the subdivision would have been proceeded with if the Minister's approval had been granted at an earlier date. The evidence adduced did show that the carrying out of a subdivision would have involved a considerable outlay for roading, drainage and other development, and other costs of subdivision.
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> Upon hearing the evidence and submissions of counsel the Court has found that part of the land would have been immediately
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> saleable at the date of the taking in lots upon a subdivision either for residential or industrial purposes, and that the balance would have been saleable in lots upon a subdivision for residential or industrial purposes from time to time over a period of years subsequent to the date of taking.
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> A question of law arises as to the basis upon which the value of the land should be assessed, including the question whether there should be any difference in the method of assessment of the value of, first, that part of the land which would have been immedi-

ately saleable in lots at the date of the taking and, secondly, that part which would have been saleable in lots from time to time over a period subsequent to the date of the taking.

The questions which are stated for the opinion of this honourable Court are:

(1) Is the value of the land to be assessed upon the assumption that the claimant sold the land at the date of the taking in one undivided parcel to one purchaser desirous of acquiring it for the purpose of subdivision and sale in lots?

(2) Is the value of the land to be assessed upon the assumption that the claimant sold at the date of the taking that part of the land which was then immediately saleable in lots to several purchasers in lots according to a subdivision made by him and sold the balance of the land to several purchasers in lots from time to time over a period subsequent to the date of the taking according to a subdivision made by him?"

Certain further questions were submitted on the assumption that these two questions were answered in the negative, but it is unnecessary to refer to these for the purposes of this appeal. The Court of Appeal did not answer the questions stated specifically, but expressed its opinion in the following order:

"(1) In accordance with s. 29 (1) (b) of the Finance Act (No. 3) 1944, and subject to the other provisions of that section the function of the Maori Land Court is to ascertain as the value of the land the amount which the land if sold in the open market by a willing seller on the specified date might be expected to realize. The specified date is September 15, 1952.

(2) The valuation must be of the land in the state in which it is on the specified date; any potentialities shall be taken into account in assessing its value.

(3) The Court must contemplate the sale of the land as a whole unless on the specified date there could have been separate sales of particular portions, and there was a market for such separate portions. Only if the land had been legally subdivided at that date so that particular lots might have been sold and title given can it be said that there could have been separate sales of particular portions.

(4) If the land has to be valued as a whole, the Court in assessing the potentialities may take into account the suitability of the land for subdivision, the prospective yield from a subdivision, the costs of effecting such a subdivision, and the likelihood that a purchaser acquiring the land with that object would allow some margin for unforeseen costs, contingencies, and profit for himself" ([1957] NZLR 284, 290, 1. 5).

Their Lordships construe the findings of fact in the Case Stated, as narrated above, as meaning that there was at the date of the taking

no more than a paper plan of a proposed subdivision, and that, if the approval of this plan had been received from the appropriate Minister and the subdivision had been in fact carried out by the provision of the necessary roads, drainage, and other facilities, some of these lots could have been sold immediately for residential or industrial purposes and the balance sold in lots from time to time over a period of years subsequent to the taking. This their Lordships take to correspond with the view expressed somewhat more shortly by Shorland J. where he says: "The words 'upon a subdivision' are taken from the Case Stated, but they require some amplification. I construe the words 'upon a subdivision' as meaning upon a subdivisional scheme having received the approval of the appropriate Minister of the Crown, and having been completed to the stage at which the owner could in fact and in law sell the subdivided allotments to separate purchasers" ([1957] NZLR 284, 300, 1. 52).

Their Lordships are not clear what is involved in the content of the second question of law submitted by the Maori Land Court. If it refers to lots in fact subdivided by the owner at the date of the taking, there were no such lots. If it refers to a notional subdivision by the owner in accordance with the development plan their Lordships are of opinion for the reasons to be given that no valuation upon such a hypothetical sale in subdivision can be entertained. It is probably because of the difficulties underlying this second question of law that the Court of Appeal thought proper to give its decision in the form in which it did.

It is fundamental that the land must be valued in its state at the time of the taking. Under the Act of 1944, that value is to be assessed at the amount which a willing seller might be expected to realize if the land were sold in the open market at the date of the taking. This is not necessarily the price which it would fetch because the costs of realization will have to be taken into account. Section 29 corresponds to s. 2 of the Acquisition of Land (Assessment of Compensation) Act 1919, in the United Kingdom (9 & 10 Geo. 5 c. 57) (3 Halsbury's Statutes of England, 975), which did away with the extravagant claims and extravagant awards that were frequently made under the Lands Clauses Acts and similar legisla-

tion on the view that the owner was an unwilling seller. What in effect is being computed is the capital value of an asset; and, while in the case of land, it may not always be as easy to calculate this as it would be in the case of ascertaining the market price of easily realizable stocks or shares or commodities in the field of commerce, the problem does not generally present any great difficulty in the hands of competent land valuers. There are, however, as has frequently been observed, cases where land has a potentiality which may be realizable in the foreseeable future and if so will give the land an added value over and above its value for the uses made of it at the time of the taking. As the case of Vyricherla Narayana Gajapatiraju v Revenue Divisional Officer, Vizagapatam [1939] A.C. 302; [1939] 2 All ER 317 shows, the task of valuing land with such a potentiality may not always be an easy one. And, in such cases, it is difficult to envisage a sale to more than one hypothetical purchaser who is prepared to buy the land with a view to developing and realizing the benefit of this potentiality. There seems no reason, however, why this need be in all cases an inevitable assumption. If the area of land taken, for instance, is so large as to be capable of building development in the hands of separate purchasers operating in different sections of the total area more than one hypothetical purchaser could be imagined. But,

for purposes of valuation, the result would seem to be immaterial. The value of the whole in the open market for building development would seem to be equivalent to the sum of the values of the various parts if sold separately for the same purpose. The costs to the seller might be slightly greater in the one case than in the other and this might lead to the assumption of a slightly higher market price in cumulo in the case of a sale to a number of purchasers. But, as the costs of realization would be a factor to be taken into account in calculating the amount realized by the owner, the results in the end of the day should be very much the same. A similar situation might exist if there had to be assumed a sale of six houses by a willing owner-seller in the open market. He could hardly be expected to sell them in a single lot to one purchaser for less than he could realize by selling them separately to six purchasers. The purpose of the transactions in the illustrations given would, of course, be different, for in the case of land of which the value has been fully realized in the hands of the owner its sale would be for the personal use of the purchaser or as an investment having profit-bearing qualities and possibilities of capital appreciation, whereas in the case of land with a development potentiality the value of the land has not yet been fully realized and the land may be bought with the view, by further capital outlay, of realizing this potentiality. This necessarily leads to very different considerations in arriving at an estimate of market price.

In the case of the land in question here, there are, in their Lordships' view, three material factors which the compensation tribunal must have in view.

First, the consent of the Minister of Maori Affairs had to be given to any sale of the land in question by the Maori trustee under s. 8 (9) (a) of the Maori Purposes Act 1943. Secondly, the plan could not be carried into execution without the consent of the Minister of Maori Affairs or delegated authority as required by the Land Subdivision in Counties Act 1946. Their Lordships find it unnecessary to go through the provisions of this Act, but it contains an absolute prohibition of the sale of any allotment of less than 10 acres in any subdivision or the formation of any proposed road in connection therewith unless the scheme plan has been previously approved by the Minister or delegated authority. It is clear that as a scheme of land development the plan, if it had ever got to the stage of consideration by the Minister, might have been very materially modified in the matter of roads, drainage, accesses, the establishment of reserves, coordination with adjacent areas and other respects, if it were not entirely scrapped and had to be written anew. Thirdly, there were in fact no subdivided lots as shown on the plan, no roads, fences, accesses, drainage or other facilities. The land was still land that had to be developed for subsequent occupation as building land.

In the case of the first of these factors, it may be easy for the compensation tribunal to assume that the consent of the Minister of Maori Affairs would have been given as this was a scheme, as their Lordships were given to understand, for the benefit of the Maoris. The second factor raises very different considerations. The question whether, but for the notice to take and the subsequent taking by proclamation, the Minister would have approved of the proposed scheme clearly involves problems for the compensation tribunal on which their Lordships can only speculate and are unable to enter. It may be that all that can be affirmed is that, at the date of the taking, the land was ripe for

building development to a greater or less extent under some scheme or another which would be likely to obtain Ministerial approval. In short, the Compensation Court would have to consider the likelihood of the proposed scheme being approved by the Minister, or, if not, some alternative scheme, very much as they might have to estimate the probability of some restrictions on sale, temporary or otherwise, being removed, as pointed out by Lord Dunedin in Corrie v MacDermott [1914] A.C. 1056, 1064. This all leads up to the third consideration mentioned that there were at the date of the taking no subdivisions in fact. The task of the Compensation Court, as their Lordships see it, is to estimate how far the land was ripe at the date of the taking for subdivisional development and how soon, looking to the need of ob-

taining any necessary consents, the land would in fact, but for the taking, have been fully developed and to value it accordingly.

With one qualification their Lordships would agree with the following passage in the judgment of Gresson J.: "In my opinion, in this case the land must be valued for what it in fact was on the specified date -- a tract of land capable as to some, perhaps all of it, of subdivision into building allotments, and of being sold at some time and over some period in that form. That circumstance would influence a purchaser in his determination of price. In estimating what price a purchaser would be willing to pay recourse may be had to an examination of the estimated gross yield from a subdivision as yet notional only, and the estimated deductions that a purchaser would have to take into account; but that is the extent to which a notional subdivision can be regarded. There must be excluded from the Court's contemplation retention by the claimant and an assessment of what in his hands it would yield if subdivided because that course is not open to him. At the time value has to be determined, the land was in fact not -- legally speaking -- subdivided so as to permit of sale piecemeal. A good deal requires to be done before there can be disposal in that manner, and as well as expenses there will be risk and delay" ([1957] NZLR 284, 289, 1. 37).

Their Lordships would accept this as an accurate statement of the position though, in their opinion, the passage would suffer in no way if the words "legally speaking" were omitted. In accepting this statement of opinion, their Lordships understand the learned Judge by the words "legally speaking" to be referring to a previous passage in his opinion where he says ". . . it is lawfully open to award compensation upon the basis of a sale to several purchasers in lots according to a subdivision, but only if in fact there is such a subdivision as would permit of this course being adopted at the relevant date" (ibid., 289, 1. 27). In the present case the land could not in fact be subdivided into lots available for immediate sale without the prior consent of the competent authority; and, for that reason, it may be not inapt to refer to a subdivision either as a lawful subdivision or a subdivision in fact. But the crucial and deciding factor, in their Lordships' view, is a subdivision in fact which has been lawfully carried out.

In the Court of Appeal all the learned Judges felt difficulty from an earlier decision of the Supreme Court of New Zealand in St. John's College Trust Board v Auckland Education Board [1945] NZLR 507; [1945] G.L.R. 261. Gresson J. and Shorland J. found reasons for distinguishing it and, it would seem, accepted it as a good decision on its special facts. F. B. Adams J. thought it was wrongly decided. Their Lordships agree with F. B. Adams J. It is unnecessary to

examine the facts of that case in detail. As was stated by Sir Michael Myers C.J., who gave the judgment of the Court, it was common ground that the land was suitable for subdivision into allotments for building purposes and that compensation should be awarded on that basis. There was no legal impediment to a subdivision. As appears from the case, both the claimant and the respondent submitted in evidence plans of hypothetical subdivisions of the land taken. It is clear that there was, in fact, no subdivision of the land, and that the land had the potentiality of subdivision. This potentiality was estimated by witnesses as being fully realizable in a relatively short period of time. The contest between the parties was whether the value of the land should be assessed on the assumption that the owner would have made his own subdivision and would have sought to sell the resultant building sections direct to purchasers or upon the assumption of a sale by the owner to a purchaser who, having purchased, subdivided the land into building allotments and marketed them. For present purposes, the material part of the Court's judgment is in the passage which runs: "If then the claimant is able to show that there was a market for the subdivisions as on December 15, 1942 [the relevant date] and that the subdivisions could then have been sold, it is open to the Compensation Court to award compensation upon the assumption that, on that date, the claimant sold the land to several purchasers in lots accordingly" (ibid., 513; 262) In their Lordships' view, this was an erroneous direction in law for the reason that there were in fact no subdivisions, and that, to give the claimant compensation on the basis that there were, would be to give him compensation for unrealized possibilities as if they were realized possibilities.

The High Court of Australia had occasion to consider this very question in Turner v Minister of Public Instruction (1956) 95 C.L.R. 245, under s. 124 of the Public Works Act 1912 (N.S.W.) which, though couched in different language, for present purposes may be regarded as introducing the same considerations as s. 29 (1) (b) of the New Zealand Act. The land in that case was about five acres in extent and was suitable for subdivision into nineteen residential allotments but had not in fact been subdivided. As stated by Sir Owen Dixon C.J., the case raised the precise question that arises here. He says: "In the case of the land in question no steps had been taken for subdivision. It was necessary to survey it, to prepare plans for subdivision, to obtain the consent of the local authority, to make streets or roads and then to place it upon the market. As the land stood it was incapable of sale in subdivision and it was necessary to make improvements or alterations in its physical condition before the subdivisional prices could be obtained. In those circumstances, it could not be sold in subdivision at the time of resumption. It was not therefore possible to ascribe to the

owner possession of the present value of its subdivisional potentialities on the footing that all you should do is to estimate what he would gain if he subdivided the land at a future date and reduced the result to its then present value. This means, too, that the conclusion is clearly right which the learned Judges of the Supreme Court expressed in the passage already quoted from their judgment, viz.: '. . . the only sale that could be considered is a sale of the land as it was at the date of resumption, that is unsubdivided, but having the clear potentiality that it was fit for subdivision'" (ibid., 274).

The opposed questions in the case were whether the compensation

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for the resumption of the land was to be determined (1) by reference to a hypothetical sale of the land at a price equivalent to the net amount which the owner might have expected to realize on subdividing it and selling it in subdivision, less only an allowance for the risk of realization; or (2) by reference to a hypothetical sale in globo to a purchaser buying with a view to subdividing and selling in subdivision and prepared to pay for the land no more than such a sum as would return to him out of the transaction an amount representing an appropriate allowance for the risk of the venture and a profit to himself. The majority of the Court (Williams J. dissenting) agreed that the first question should be answered in the negative and while Sir Owen Dixon C.J. did not think that the second question could be answered affirmatively as a matter of law, the rest of the majority members (Fullagar, Kitto, and Taylor JJ.) agreed that the Supreme Court of New South Wales from which the appeal had come had correctly answered this question in the affirmative.

At the hearing before their Lordships' Board in the present case, the appellant's counsel were faced with the difficulty that, on their submission, the land, on the assumption of its being retained for sales in subdivision by the owner, should be assessed at a higher value than if it were sold to a hypothetical purchaser for similar development. In their Lordships' view, it is impossible that the land should have two values, on the hypothesis required by the statute that it is sold in the open market by a willing seller. Both Kitto and Taylor JJ., in the case just cited, dealt with this point in a manner that seems to their Lordships unexceptionable. The land in the hands of the owner is just capital for whatever purpose he chooses to put it. And, if he chooses to employ his capital in a subdivisional scheme, the profit he will make cannot in anticipation be taken to increase the value of the land before that profit has been realized. As Kitto J. among other passages puts it: "There simply cannot be a difference between the price which would be agreed upon between a businesslike purchaser and a businesslike vendor and the amount which a businesslike owner would treat himself as leaving invested in the land in the event of his deciding to retain it" (ibid., 289); or as Taylor J. says: "The land at the relevant time was worth no more in the hands of the appellant than it would have been in the hands of some other owner who had acquired it with a view to subdivision" (ibid., 295). The matter may be stated in another way. If the owner be regarded as a hypothetical purchaser of the land to be valued wishing to buy it for subdivision, he would not be expected to pay more for it than any other purchaser buying for the same purpose.

In these circumstances, their Lordships' Board is unable to agree with the appellant's submissions. Their Lordships consider, however, that the third head of the opinion expressed in the order of the Court of Appeal should be varied. This seems to proceed upon the view taken by a majority of the Court that the case of St. John's College Trust Board [1945] NZLR 507; [1945] G.L.R. 261 was correctly decided on its special circumstances, and leaves it open to the Compensation Court to follow that decision if it thinks the facts warrant it. As the view of the Board is that that case was wrongly decided, and, as in any event the Board cannot agree with the way in which this direction is expressed, their Lordships are of opinion that the direction should be as follows:

> "(3) The Court must contemplate the sale of the land as a whole unless it appears that the necessary legal consents to a subdivisional plan had been given and a survey on the ground at the
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> *[1959] NZLR 7 page 15*
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> specified date would have disclosed that the land or some part of it was in fact so far subdivided that the subdivided parts could at that date have been immediately sold and title given to individual purchasers, in which case the parts so subdivided may be separately valued, for the purpose of arriving at the total amount of compensation."

For the reasons given, their Lordships will humbly advise Her Majesty that the appeal should be dismissed, but that the order of the Court of Appeal should be varied in the manner above expressed. The appellant must bear the costs of the appeal.Appeal dismissed: Judgment of the Court of Appeal varied.

Solicitors for the appellant: Cooney, Jamieson, Lees, and Morgan (Tauranga).

Solicitors for the respondent: Crown Law Office (Wellington).