Source: New Zealand Institute of Valuers (Inc). (1959). Principles and practice of urban valuation in New Zealand. New Zealand Institute of Valuers, Wellington.

Jacobsen Holdings Ltd v Drexel

Court of Appeal Wellington
17 July, 15 August 1986
Cooke P, Somers and Casey JJ

Property law – Landlocked land – Compensation – Application for reasonable access to commercial farm property – For many years access had been by de facto road crossing neighbouring property – Access denied following dispute – Right-of- way granted by High Court – Compensation estimated on basis of detriment to servient land – Whether there was sufficient evidence to find that the land was landlocked - Whether Judge was erroneous in exercising his discretion – Whether estimation of compensation should have included betterment to applicant's property – Property Law Act 1952, s 129B

The plaintiffs owned 50 hectares of rural land in the Bay of Islands with a frontage to Paroa Bay. Their property had no legal road access. There was a strip of land 72 metres long and 10 metres wide crossing the first defendant's land, which at some time had been metalled, and this de facto road had been used for access by previous owners of the plaintiffs' property for many years. The plaintiffs' land was being developed as a pecan nut enterprise with experimental plantings of other plants and trees. For some time the plaintiffs had been using the road to convey materials, machinery and workmen and had established a substantial commercial enterprise. However the parties had a difference of opinion and the first defendant closed the strip until the plaintiffs were prepared to pay $45,000 for access. The plaintiffs were only prepared to offer up to $2000. Consequently, the plaintiffs sought an order under s 129B of the Property Law Act 1952 for reasonable access to their property. In the High Court, the Judge held that the plaintiffs' land was landlocked, and he granted the plaintiffs a right-of-way over the strip with $2000 in compensation payable to the first defendant. The Judge assessed the compensation on the basis of the loss or detriment to the first defendant's property without considering the betterment conferred on the plaintiffs. The first defendant appealed against the granting of the right-of-way on the grounds that there was insufficient evidence that the plaintiffs' land was landlocked and that the Judge had erroneously exercised his discretion under s 129B, and in the alternative that the Judge had erred in principle in assessing compensation.

Held: 1 The Judge's finding that the plaintiffs' farm property was landlocked was virtually inevitable as there was no suggestion that the sea provided reasonable access and there was no other lawful access. The easement was justifiably ordered in exercise of the Judge's discretion after his consideration of all the matters listed in s 129B(6) of the Act. The appeal against the order granting the right-of-way was dismissed.

2 Compensation for land subject to an order under s 129B should be assessed on the basis of what a willing seller and a willing buyer would arrive at, during friendly negotiations, taking into account the particular potentialities of the land in respect of each party. All factors of benefit or detriment on either side are material in assessing the amount of compensation appropriate. These might include any increased profitability to the plaintiffs' commercial venture, the special needs the plaintiffs who might have been willing to pay more for the land than others in a market situation, the injury or damage caused to the first defendant, and the value of the land to the first defendant with all its existing advantages, possibilities and potentialities. As the Judge had not approached the question of compensation this way, the case was remitted to the High Court for further consideration.

Vyricherla Narayana Gajapatiraju v Revenue Divisional Officer, Vizagapatam [1939] AC 302; [1939] 2 All ER 317 (PC) applied.

Other cases mentioned in judgments
Coleman v Myers [1977] 2 NZLR 225.
Collins v Kennedy [1972] NZLR 939.
Cooke v Ramsay [1984] 2 NZLR 689.
Glass v Commissioners of Inland Revenue 1915 SC 449.
Inland Revenue Commissioners v Clay [19141] KB 339 (Scrutton J), [1914] 3 KB 466 (CA).
Lambe v Secretary of State for War [1955] 2 QB 612; [1955] 2 All ER 386.
Lucas and Chesterfield Gas and Water Board, Re [1909] 1 KB 16.
Mitchell v Rands (High Court, Christchurch, M 99/80, 19 February 1982, Cook J).
Moreton Club v Commonwealth (1948) 77 CLR 253.
Nelungaloo Pty Ltd v Commonwealth (1948) 75 CLR 495; [1948] ALR 145.
New Zealand and Australian Land Company v Minister of Lands (1895) 1 3 NZLR 714
Russell v Minister of Lands (1898) 17 NZLR 241.
Seaforth Land Sales Pty Ltd's Land (No 2), Re [1977] Qd R 317.
White v Barnett (High Court, Wellington, M 565/83, 20 February 1985, Eichelbaum J).

Appeal
This was an appeal from a judgment of Prichard J (Auckland, A 1163/82, 16 March 1984).
B V MacLean for the appellant (Jacobsen Holdings Ltd).
R J Asher for the first respondents (J A and S F Drexel).
There was no appearance for the second, third and fourth respondents.

Cur adv vult

Cooke P: This is an appeal from a judgment of Prichard J granting an application for reasonable access to landlocked land, in exercise of the jurisdiction conferred on the High Court by s 129B of the Property Law Act 1952. The section was inserted in the Act in 1975. As sealed the order is expressed to grant the plaintiffs Mr and Mrs Drexel) a right-of-way over a strip of land owned by the first defendant Jacobsen Holdings Ltd); the plaintiffs are to pay to the Jacobsen company $2000 in compensation; the parties are given leave to apply for further directions as to he terms and conditions of user and maintenance.

Section 129B(7) empowers the Court by para (a) to vest in the owner of the landlocked land a legal estate in fee simple in any other piece of land, and/or by para (b) to make an order attaching and making appurtenant to the landlocked and an easement over any other piece of land. No doubt the Judge here intended to make an order under para (b) and intended the right-of-way to be permanently appurtenant to the land presently owned by the plaintiffs, not purely personal to them or limited in period. There may be a question as to whether if any subdivision of the dominant land is ever possible the easement will be appurtenant to each parcel; but neither the High Court nor this Court has been asked so far to consider that possibly academic point.

The appeal is against the whole of the judgment, but in my view it was obviously a case where the Judge was entitled to order an easement and in the exercise of his discretion justifiably did so. The real dispute and the only real difficulty concerns compensation.

As to the grant of an easement it is enough to say that the lands of the opposing parties are rural lands in the Bay of Islands. The Jacobsen company agreed to purchase its land in 1977; the plaintiffs through a family company (the title has since been transferred to them personally) agreed to purchase their land, something over 50 hectares, a little later in the same year. The land now owned by the plaintiffs does not have legal road access. It has a frontage to Paroa Bay, but there is no serious suggestion that this is reasonable access within the meaning of the section. No relevant rights-of-way have been obtained over the land of any other neighbour. The finding that the plaintiffs' land is landlocked was virtually inevitable. Jurisdiction thus existed under the section.

De facto road access to the land now owned by the plaintiffs has long been by a short dedicated piece of road which is joined to the main Paroa Bay road by a strip of land, about 72 metres long and 10 metres wide, being part of the large area of farmland now owned by the Jacobsen company. The strip has become known as the missing link. In recent years the strip has been metalled, apparently by the County Council, and for many years, probably at least 60, it has been used as an access driveway or track by the owners for the time being of what is now the plaintiffs' land and by other owners with whose position this case is not concerned.

This usage has been by tolerance of the owners of what is now the Jacobsen company's land, but for reasons which need not be recited here Mr Jacobsen and Mr Drexel had a difference of opinion. The upshot was that Mr Jacobsen said that he would be happy to let Mr Drexel have access for about $45,000, whereas apparently the plaintiffs were prepared to offer no more than $2000.

The Judge found in effect and with ample justification in the evidence that matters of alleged detriment to the Jacobsen property from the granting of a legal right-of-way were insignificant or minor, or remediable by such measures as a cattle stop or gates. He gave general consideration to the matters listed in s 129B(6)(a) to (d) and referred specifically to various facts falling under three of those paragraphs, namely (a), (c) and (d). Paragraph (b) – "The circumstances in which the landlocked land became landlocked" – would have brought in here fairly ancient history, which was reasonably treated by the Judge as calling for no detailed examination. In dealing with an application under the section a Judge is not required to refer specifically in his judgment to aspects of no importance in the particular case. He is entitled to focus on such of the listed considerations as are of particular relevance. That Prichard J clearly did. So far as the grant of a right-of-way is concerned the appeal must fail. In his judgment in this appeal Somers J deals with some of the facts rather more fully and I agree with all that he says.

One can turn therefore to compensation, which raises an issue of principle of some importance. As already mentioned the detriment to the servient property has been found to be small. As to the dominant property, some further facts need to be taken into account. The plaintiffs purchased the land (in the name of their company) in 1977 for about $60,000 and claim to have spent since about $300,000 on improvements. They have had a house built and various farm buildings, and they have entered into a partnership with a Mr Long to develop a pecan nut enterprise on the farm. Mr O A G Long is an authority on the pecan nut tree. Some 700 of these trees have been planted on about 15 acres. Mr Drexel says that this is the largest single planting of pecan nut trees in New Zealand and that it is "anticipated" that in due course – some years, according to Mr Long's affidavit – the farm will show a handsome profit and pave the way for a pecan nut industry in New Zealand. There are also experimental plantings of macadamia nuts, chestnuts, walnuts, almonds and avocados. They have planted 40,000 pine trees and are at present grazing a small number of livestock, which will be increased when the trees grow high enough. A full-time manager and a part-time worker are employed. Ultimately seasonal workers may be needed for harvesting. In short, the on evidence a substantial commercial enterprise is under way.

In evidence in the High Court the registered valuer, Mr W A Burgess, called for the plaintiffs said that he valued the missing link, 720 square metres, at $750 based on a land value in that locality of $7000 per hectare, with 50% premium because the seller was reluctant. His assessment of the current market value of the Drexel property, with the missing link not a legal access, was $390,000. If the right-of-way was formally obtained he would value the property at $392,000. He explained the difference as made up of $750 for land required, $1000 survey costs and $250 legal fees.

Mr A C Nicols, the registered valuer called for the Jacobsen company, assessed the difference in value of the Drexel property with and without legal access as $50,000. He based this on what he claimed to be comparable sales. In this Court Mr Asher, counsel for the other side, submitted to us that this figure was not justified under cross-examination. Mr Asher put it that Mr Nicols had conceded that the relevance of the first of two sales used, namely the initial Drexel purchase itself, depended on Mr Drexel having purchased at a discount ("which he had not") and that the other sale

was of a Wellington property and that in that connection the valuation evidence presented by Mr Nicols indicated that as a matter of practice little or no compensation is paid when an easement is granted to landlocked land.

Section 129B(8) empowers the Court to make an order under the section upon such terms and subject to such conditions as the Court thinks fit in respect of:

"(a) The payment of compensation by the applicant to any other person;"

In his judgment Prichard J rejected what he understood to be the submission of Mr MacLean for the defendant that compensation was to be measured by the value of the betterment conferred on the plaintiffs. Mr MacLean told us that he had not meant to put it so high: merely that the correct measure of compensation under s 129B can take into account, in appropriate cases, the strategic nature of the land and the added value that access may give it. And that this is especially so when landlocked land is bought for commercial purposes, for in such cases the costs of obtaining access are part of the normal incidents of business risk. At all events that was how he argued here. On the other hand Mr Asher argued that it is the owner's loss that has to be estimated.

Mr Asher was supporting Prichard J, who said in his judgment that the compensation referred to in the section is for loss or detriment to the defendant's property. Pointing out inter alia that the defendant could not necessarily expect to extract the same payments from other owners seeking a legal right to use the way, he assessed compensation to the defendant "for such detriment as he . . . suffers" from the grant to the plaintiffs as $2000. The Judge added that this was something like four times the value of the land. His figure was thus the same as that of the plaintiffs' valuer, although he did not expressly say that he was adopting the latter's figure or mode of computation. It does seem that the Judge excluded, totally or at least largely, any consideration of benefit to the land of the plaintiffs.

Some New Zealand High Court cases on compensation under the section and a Queensland Full Court case on a similar but not identical section are collected in the judgment of Somers J. No clear consensus on principle emerges from them. Without duplicating the account of them to be found in his judgment, I will go directly to the question of principle.

As to principle the approach which commended itself to Prichard J has a ready appeal and undoubtedly finds its way into judgments from time to time, but in my respectful opinion it embodies a fallacy. Certainly the measure of compensation can in general be described, not as the gain to the person who takes the property, but as the loss to the person from whom property is taken or, in other words, the value to the owner dispossessed. For instance language of that kind was used by Williams J in *New Zealand and Australian Land Company v Minister of Lands* (1895)13 NZLR 714, 716 (cited by Prichard J in the judgment now under appeal), and by Dixon J in *Nelungaloo Pty Ltd v The Commonwealth* (1948) 75 CLR 495, 571, and *Moreton Club v The Commonwealth* (1948) 77 CLR 253, 257. But that is not the same as the detriment to the dispossessed owner's remaining property.

What the owner loses by a compulsory order, whether for taking of the fee simple or only an easement, includes potential; which carries with it the power to bargain with any would-be purchaser for whom the potential has particular value. Hence certain further observations in the judgments just cited. Williams J went on to speak of ascertaining the fair selling value of what is taken. Dixon said that the loss cannot be less than the money value into which the dispossessed owner might have convened his property had the law not deprived him of it. Then Dixon J adopted the proposition that a very common way of proving the value to the dispossed owner is to base it upon, thought not necessarily confine it to, the market price.

By contrast another example of the approach followed in the judgment now under appeal is to be found in a different context in *Coleman v Myers* [1977] 2 NZLR 225. There, in relation to the value of shares for which a takeover offer had been made, the Judge at first instance had placed great weight on the limited rights enjoyed by small shareholders, to the extent of excluding or minimising the relevance of the prospect of large capital profits to the bidder. The reasons leading me to think that

the potential of the assets in the offeror's hands was an important factor in assessing fair value or compensation appear at pp 335-340 of that report. Without repeating them in extenso here, I will merely express the opinion that in principle they apply to valuation questions generally. It is for essentially the same reasons that I respectfully differ from another High Court Judge in the present case also.

An authoritative discussion of general principle is in the opinion of the Privy Council, delivered by Lord Romer, in *Vyricherla Narayana Gajapatiraju v Revenue Divisional Officer, Vizagapatam* [1939] AC 302. There is also a helpful application of that authority by the English Court of Appeal in *Lambe v Secretary of State for War* [1955] 2 QB 612, a case which it is enough to mention without lengthening thus Judgment by detailed discussion of it. In the *Vizagapatam* case the undeveloped land acquired by compulsion had little value except for some water-supply scheme and the acquiring authority was the only possible party who could put the land to use for any such scheme. The Privy Council held that it was necessary to ascertain what a willing purchaser would pay, even if the only possible exploiter of the potential was the acquiring authority or the dispossessed owner himself, although as it happened in that particular case the dispossessed owner could not have made use of the land for water-supply.

Their Lordships said:

> "But sometimes it happens that the land to be valued possesses some unusual, and it may be, unique features, as regards its position or its potentialities. In such a case the arbitrator in determining its value will have no market value to guide him, and he will have to ascertain as best he may from the materials before him, what a willing vendor might reasonably expect to obtain from a willing purchaser, for the land in that particular position and with those particular potentialities."

In principle that appears to me to apply to a right-of-way such as that ordered in the present case, since it has a unique value for the owner of the land to which it is to be appurtenant.

The Privy Council judgment emphasises that the hypothesis is a willing seller and a willing buyer. Compulsion on either side is to be disregarded: the seller is not to be treated as one forced by circumstances to sell his potentiality for anything he can get, the buyer is not to be treated as one driven to buy. It is the price that willing parties would arrive at in friendly negotiation that has to be found, on such materials as are available. Beyond rejecting the concept of an imaginary auction their Lordships did not give any express guidance as to how this exercise is to be done if there are no truly comparable market transactions. They recognised that in many cases it might be a matter of considerable difficulty. In the case before them giving the matter the best consideration they can, they appear to have selected a compromise figure not purporting to be based directly on any specific formula or evidence.

Modern statutes relating to the compulsory acquisition of land for public purposes commonly provide that in assessing compensation the special suitability of the land for any purpose shall not be taken into account if the purpose is one for which there is no market apart from the needs of a particular purchaser. In New Zealand such a provision is included in the Public Works Act 1981, s 62(1)(d). No corresponding limitation has been enacted in s 129B(8) of the Property Law Act. "Compensation" thereunder bears its ordinary meaning and should be assessed in my opinion on the broad basis already indicated.

Under the section the Court is not bound to award compensation, but usually it will be equitable between the parties to do so and to assess it on the footing of what a willing grantor and grantee of an easement or vendor and purchaser of the fee simple would agree in friendly negotiation. If the order under the section gives legal access to a commercial property or a farm, that can properly be treated as a material factor, for it may be reasonable to suppose that a grantee or purchaser who is able to put the right-of-way or land to profitable use is likely to be willing to pay something more for it on that account.

In assessing compensation purely sentimental matters have to be put aside: see the *Vizagapatam* case at p 312. So too of course any question of personal impecuniosity or affluence: compare the *New Zealand and Australian Land Company* case. But the present case does not raise such issues. Subject to those qualifications, all factors of benefit or detriment on either side are material under the section, including for instance any inconvenience or disturbance that the owner of the servient or transferred land may suffer and any advantage that he may gain. These are all considerations which would legitimately influence the parties in the hypothetical friendly negotiation. They all go to what sum is reasonable as the value or price or consideration or compensation – terms which seem to me to be interchangeable and identical in effect when a fair figure has to be arrived at as between the parties and there are no special limiting statutory provisions.

An impression left by exposure to such questions over the years, at the Bar and on the Bench, is that the hallowed willing seller-willing buyer test, if faithfully applied, solves any problems of principle. Added complications of theory are to be viewed with suspicion. The real difficulties arise in applying the basic test to the facts and are unlikely to be alleviated by any more refined formula.

Here the Judge did not approach the case in the foregoing way. He looked only at, or at least concentrated on, detriment to the grantor. He did say that the $2000 represented about four times the value of the fee simple of the strip, so it is possible that he would have arrived at the same figure on the friendly negotiation approach, but one cannot be sure. For permanent legal access to what is hoped to be a profitable property $2000 might seem on the low side. Another reason for doubt is that the Judge's figure coincides with that of the plaintiffs' valuer and the latter's mode of computation is vulnerable in principle. It includes $250 because the grantor is unwilling, which is an illegitimate supposition, and $1250 for costs, which will presumably fall on the grantee in addition to the compensation payable to the grantor.

The safest course is to remit the question of compensation to Prichard J to enable him to reconsider it. That will be best undertaken by the Judge when the incidental terms and conditions have been settled, including clarification of any point about the duration or assignability of the easement. To this limited extent I would allow the appeal.

The Court being unanimous the appeal is dismissed as to the order granting a right-of-way but allowed as to the amount of compensation, the case is remitted to the High Court for further consideration. For costs of the appeal the appellant will have $1000 and disbursements, including the cost of reproducing the case and reasonable travelling and accommodation expenses of counsel.

Somers J: On 16 March 1984, following a defended hearing in the High Court at Auckland, Prichard J gave an oral judgment in which orders were made under s 129B of the Property Law Act 1952 granting the plaintiffs, Mr and Mrs Drexel, a right-of-way over a strip of land owned by the defendant Jacobsen Holdings Ltd (I will call them "Jacobsens"), directing Mr and Mrs Drexel to pay $2000 by way of compensation, and reserving leave to each side to apply for further directions as to the terms and conditions of user and maintenance of the right-of-way. Jacobsens now appeal contending that a right-of-way ought not to have been granted and, the alternative, that the Judge erred in principle in assessing

There is no dispute about the primary facts which can be stated quite shortly In August 1978 Mr and Mrs Drexel acquired some 50 hectares of rural land in Northland. Its only legal access was by sea. Practical access was gained by the use of a formed and metalled track some 75 yards long passing over the Jacobsen land from one dedicated road to another dedicated but fragmented piece of legal road passing across a neighbouring property into the Drexel property. Such access was by the express or implied, and revocable, licence of Jacobsens. The right given to the Drexels under s 129B is over that access.

It is clear that when the Drexels acquired their land they knew there was no legal road access and were aware too that the Jacobsens' predecessor in title had mentioned a sum of $10,000 to their vendor (a company of which Mr Drexel was a director) as appropriate consideration for dedication

of the access as a road There was an early discussion with Jacobsens in which the latter suggested as a quid pro quo for legal access over its land an access way to the sea over the Drexel land. This was not acceptable to the Drexels whose subsequent efforts were directed to getting the Bay of Islands County Council to take the strip of Jacobsen land for the purposes of a public road. The Council agreed to this on the understanding that the Drexels would pay half the costs involved in the taking but not more than $1500. However the Council's steps to take the land were declared unlawful in the High Court on 16 August 1982 on Jacobsens' application.

Following this event Mr Drexel made offers to Jacobsens which were unacceptable. In September 1982 Jacobsens asked for $45,000 and when told that was too much closed the track to further use. In the meantime between acquiring their land and the closure of access the Drexels had built a house and carried out other improvements including a substantial horticultural development on their land using the Jacobsen track to convey materials, machinery and workmen for those purposes.

Two grounds were advanced on behalf of the Jacobsen company against the order granting a right-of-way. The first was that there was no sufficient evidence that the Drexel land was landlocked; the second that the Judge had erroneously exercised his discretion.

For the purposes of s 129B of the Property Law Act a piece of land is landlocked if there is no reasonable access to it, and the expression reasonable access is defined as meaning "physical access of such nature and quality as may be reasonably necessary" for the occupiers lawful use and enjoyment of it. It was never suggested that the sea provided such access and it was common ground there was no other lawful access. I am of opinion that those features sufficiently establish that the land was relevantly landlocked. The suggestion that the Drexels may have been able to negotiate access through the property of another neighbour does not in any way affect this conclusion.

Much of the argument on the second ground related to the matters mentioned in s 129B(6) which provides:

"In considering an application under this section the Court shall have

(a) The nature and quality of the access (if any) to the landlocked land that existed when the applicant purchased or otherwise acquired the land –

(b) The circumstances in which the landlocked land became landlocked –

(c) The conduct of the applicant and other parties, including any attempts that they may have made to negotiate reasonable access to the landlocked land –

(d) The hardship that would be caused to the applicant by the refusal to make an order in relation to the hardship that would be caused to any other person by the making of the order – and

(e) Such other matters as the Court considers relevant."

It was submitted that the Judge had not, or had not sufficiently, brought these matters to account. I think there is nothing in this point. The Judge expressly said that he had considered the matters set out in s 129B(6) although not all of them are subject of particular reference or detailed consideration by him. As to para (a) the Judge accurately stated the access existing when the Drexels acquired the land. As to para (b) it is not in doubt that the land has always been "landlocked"; the Judge understood this and the factor does not affect the case of either side. Mr MacLean put the main weight of the submission on para (c). It was suggested that the conduct of the Drexels was contemptuous of the property rights of the Jacobsens and showed no genuine attempt to negotiate. The Judge has not gone into detail on this matter although he has noticed the plaintiffs' monetary offer and the counter proposal by Jacobsens. The review of the evidence provided by Mr MacLean has not persuaded me that even on the construction of the facts most favourable to the appellant the conduct of the Drexels was such as to make the grant of a right-of-way unreasonable. The matter of hardship referred to in para (d) was plainly evidenced and I am satisfied that balance fell heavily in the Drexels favour. One obviously important feature is that the Drexels were allowed to use the right-of-way to build their house and develop their land. As to other matters the Judge referred to the possibility of passage over other land and rejected the suggestions made. He formed the opinion that in substance the disagreement was as to how much the Drexels should have to pay – that is to

say that the objection was not to passage at all but as to what recompense the Jacobsens should receive. The evidence justifies that conclusion.

Reference was also made by Mr MacLean to *Cooke v Ramsay* [1984] 2 NZLR 689 which was claimed to be persuasively similar to the present case. There are indeed likenesses but at least one clearly distinguishable feature – before ever the property in that case was bought the applicants were told they would have no right of access; here access was in fact afforded for many years.

No ground for disturbing the exercise of discretion by Prichard J has been made out. Indeed I am of opinion that he was right to order an easement of right-of-way be given.

The issue raised about compensation is more difficult. It is that the Judge in assessing compensation ought to have taken into account the betterment occasioned to the Drexel's land by the grant of a right-of-way.

Prichard J evidently accepted the evidence of a valuer called on behalf of the Drexels that the strip of bare farmland – it is 72 x 10 metres – was worth $500 or "allowing for the fact that we are not concerned with a willing seller" $750. He recorded the valuer's view that a right-of-way would be of negligible detriment to Jacobsens. After referring to s 129B(8)(a) and some cases mentioned to him the Judge rejected an argument which he recorded as being that compensation is to be measured not be the detriment to the defendant but by the value of the betterment conferred on the plaintiffs. Mr MacLean has told us that this overstates his submission which was that the enhancement of the value of, or betterment occasioned to, the Drexel land by the right-of-way was a factor to be considered in assessing compensation. After directing the grant of a right-of-way Prichard J having mentioned various matters of detriment to Jacobsens said that "the plaintiffs should pay to the first defendant by way of compensation for such detriment as he thereby suffers the sum of $2000". Mr Asher submitted that the Judge did not in fact treat betterment as irrelevant but merely rejected the proposition that betterment was recoverable. His Honour's reasons however show that he excluded from his assessment any reflection of enhancement of value of the Drexel property by the creation of the way.

Whether the advantage gained by the applicant who obtains a strip of land or right-of-way under s 129B can be brought to account in assessing compensation does not seem to have been the subject of considered judgment in the High Court although the cases point to some differences of opinion. In *Collins v Kennedy* [1972] NZLR 939 compensation was assessed by reference to the loss to the defendant and in *Mitchell v Rands* (Christchurch, M 99/80, 19 February 1982, Cook J) the fact that the plaintiff stood to gain was said to be not in point. On the other hand in *White v Barnett* (Wellington, M 565/83, 20 February 1985) Eichelbaum J said that he would be prepared to assume that the extent to which the value of the applicants' land would be enhanced would be one relevant factor in assessing compensation.

We were also referred to *Re Seaforth Land Sales Pty Ltd's Land (No, 2)* [1977] QR 317. The comparable Queensland statute provides that no order giving the statutory right of user is to be made unless the owner of the servient land can be adequately compensated in money for any loss or disadvantage which he may suffer and the order is to provide for payment by the applicant "of such amount by way of compensation or consideration as in the circumstances appears to the Court to be just". D M Campbell J, with whom Hanger CJ agreed, considered that the reference to "consideration" extended that which was payable beyond compensation stricto sensu, and that all the circumstances should be taken into account in arriving at compensation or consideration and not merely the diminution of the value of the land. Because of the different provisions of the Queensland Act the case provides little assistance.

Section 129B(8) of the Property Law Act provides as follows:

> "Any order under this section may be made upon such terms and subject to such conditions as the Court thinks fit in respect of –
>
> (a) The payment of compensation by the applicant to any other person; and

(b) The exchange of any land by the applicant and any other person; and
(c) The fencing of any land, and the upkeep and maintenance of any fence; and
(d) The upkeep and maintenance of any land over which an easement is to be granted; and
(e) The carrying out of any survey that may be required by the District Land Registrar before he will issue, in respect of any piece of land affected by the order, a certificate of title free of any limitations as to title or parcels within the meaning of Part XII of the Land Transfer Act 1952; and
(f) The time in which any work necessary to give effect to the order is to be carried out; and
(g) The execution, stamping, and delivery of any instrument; and
(h) Such other matters as the Court considers relevant."

Save for what is imported by the use of the word "compensation" and the particular reference to terms and conditions about fencing and the upkeep and maintenance of the land over which an easement is granted these provisions shed no light on how the amount of compensation is to be assessed. The ordinary dictionary meaning of compensation is counterbalance, requital, recompense or amends. When the word compensation is used in the Public Works Act 1981 in relation to the taking of land – s 60 refers to full compensation – what is meant is that when land is taken the owner receives its equivalent in money; there is no diminution in the amount of his property which changes form, by compulsion from land to money: see eg *New Zealand and Australian Land Company v Minister of Lands* (1895) 13 NZLR 714; *Russell v Minister of Lands* (1898) 17 NZLR 241 251; *Re Lucas and Chesterfield Gas and Water Board* [1909] 1 KB 16, 29. This essentially involves assessment of the worth of that which is taken; and the former landowner is also entitled to be compensated for the injury or damage caused by the taking. Those I think are the features involved in assessing compensation under s 129B.

In the case of an easement an obvious starting point is to ascertain the nature of the burden imposed on the servient land. In this case that raises at least two questions which are as yet unanswered. The first is whether the easement is, as the literal terms of the judgment may suggest, personal to the Drexels and their visitors and licensees, or whether, as is perhaps more likely, it is intended to run with their land for the benefit of their assigns. The second is whether the easement is for the benefit of the whole of the Drexel's land only or whether it is to benefit all parts of the whole separately so that if subdivided in the future each lot will have the benefit of the way. In other cases it may be material that the access way granted involves the use of vehicles or other forms of transport of a type or to an extent that adversely affect the user or enjoyment of other lands of the defendant.

Those features all touch on the real issue in this case which is the value or worth of the easement attached to the Drexel land. When land (which includes an easement) is taken under the Public Works Act its value is to be the amount which it would realise if sold in the open market by a willing seller to a willing buyer. No allowance may be made on account of the taking of the land compulsorily or of its special suitability for a purpose for which there is no market apart from the needs of a particular purchaser or the requirements of the Government or local authority. These rules are imposed by s 62 of the Public Works Act 1981 to overcome features which might inflate compensation beyond a level which is considered reasonable in the public interest.

The general object of s 129B is I think the striking of a reasonable compromise between two property owners who do not agree. This is achieved, in effect, by taking land or a right-of-way from the one in exchange for compensation from the other. In this it does not differ much from statutory provisions about the compulsory taking of land for public purposes. But s 129B has no such statements of principle or of restriction of the kind mentioned in s 62 of the Public Works Act or any statement at all about the manner of assessment of compensation.

Nevertheless so far as the value of land or easement is concerned I think the same general principle must apply under s 129B as applies to the compulsory taking of land. What has to be discovered is the value of the interest to the defendant owner with all its existing advantages, possibilities and potentialities. This must mean the market value; the price at which a willing seller would sell and

a willing buyer would buy. Thus far the process is akin to that under the Public Works Act.

There is however no reason at all to exclude from that market a purchaser who has special needs and who would therefore be willing to pay more than others. The normal rule, in the absence of statutory provision to the contrary is that the competition of special needs, or, as it was put in *Glass v Commissioners of Inland Revenue* 1915 SC 449, 465, "the known wants of a probable purchaser" are not to be excluded in ascertaining the value of the land. On this point, in addition to the *Glass* case, reference may be made to *Inland Revenue Commissioners v Clay* [1914]1 KB 339, per Scrutton J, and on appeal [1914] 3 KB 466, *Lambe v Secretary of State for War* [1955] 2 QB 612, *Vyricherla Narayana Gajapatiraju v Revenue Divisional Officer, Vizagapatam* [1919] AC 302, and *Cripps on Compulsory Acquisition of Land* (11th ed, 1962). What it comes down to in the end is that "compensation" and purchase money or price are the same thing under different names.

So in this case an inquiry into compensation must include consideration of the sum which a reasonable purchaser placed in the position of the Drexels would be willing to pay for the right-of-way. This will no doubt reflect the need for the way and the increase in value which it gives the landlocked area. But the hypothesis also includes a reasonable seller so that no case of "blackmail", of a price forced to unreasonable heights by necessity, can arise.

There is no sufficient material before this Court to enable any assessment to be made. There was evidence from the valuer called by the Drexels that a right-of-way would add about $2000 to the value of their land. This was the sum of land value estimated at $500 plus surveying and other costs (which presumably would be paid by the Drexels in any event) and seems clearly an artificial method of computation. As well as that difficulty there are other matters about the terms of the right-of-way which require to be settled before an assessment of compensation can be confidently made. On the face of it the figure of $2000 fixed by the Judge seems a low sum for the advantages which the right-of-way will confer.

As it is clear that no account was taken of the value of the easement to the Drexels and that the very nature of the way is still not settled I am of opinion that the award of compensation made cannot stand. The order for compensation should be set aside and the case remitted to the High Court for further consideration.

Casey J: I am in agreement with the conclusions reached by the President and Somers J and offer some further views on compensation, about which there are obvious differences of opinion in some of the judgments cited to us. On one approach, the term is thought to cover nothing more than a payment to the affected owner of sufficient to make amends for the loss or detriment to his property and the expense and inconvenience suffered as a result of any order made. On this basis the value of his land is assessed at its market worth, unaffected by any special needs or requirements of the landlocked owner. This is the view that commended itself to Prichard J. On the other hand, in *White v Barnett* (Wellington, M 565/83, 20 February 1985) Eichelbaum J was prepared to assume that the extent to which the value of the applicant's land would be enhanced would be one relevant factor in assessing compensation.

Compensation for the compulsory acquisition or interference with land usually arises as a result of action taken under the Public Works Act 1981, and s 62 contains the well known provisions basing its value on a sale in the open market by a willing seller to a willing buyer, with no allowance because the taking is compulsory. Paragraph (d) precludes the land's suitability or adaptability for any purpose from being taken into account, if that purpose is one for which there would be no market apart from the special needs of a particular purchaser. The compensation provisions of its predecessors were in very general terms with no such limitations, these being introduced in 1936 and 1944. Early New Zealand cases accepted that it was to be measured by the loss of the person from whom the land was taken, not the gain to or loss of him who takes it. This was stated by Williams J to be the well recognised principle in England, and one founded on commonsense: *New Zealand and Australian Land Company v Minister of Lands* (1895) 13 NZLR 714, 716 He also rejected what he

understood to be the practice of making an extra allowance for the fact that the land is compulsorily taken, pointing out that "All that we have to do is to ascertain the fair selling-value".

In *Re Lucas and Chesterfield Gas and Water Board* [1909] 1 KB 16, 31, Fletcher Moulton LJ said that the decided cases had hit upon the correct solution and laid down the principle that where the land has special value existing only for the particular purchaser who has obtained powers of compulsory purchase it cannot be taken into consideration in fixing the price. Vaughan Williams and Buckley LJJ (the other members of the Court) did not reflect this view in their judgments, and in 1939 the Judicial Committee rejected his opinion and criticised suggestions to the same effect in other cases (*Vyricherla Narayana Gajapatiraju v Revenue Divisional Officer, Vizagapatam* [1939] AC 302). They concluded that the owner was entitled to the value of the potentialities of the land, even when the acquiring authority was the only possible purchaser. A broad approach to compensation was also taken by Dixon J in *Nelungaloo Pty Ltd v The Commonwealth* (1948) 75 CLR 495, 571, dealing with acquisition of wheat:

> "Compensation prima facie means recompense for loss and when an owner is to receive compensation for being deprived of real or personal property his pecuniary loss must be ascertained by determining the value to him of the property taken from him. As the object is to find the money equivalent for the loss or, in other words, the pecuniary value to the owner contained in the asset, it cannot be less than the money value into which he might have converted his property had the law not deprived him of it."

Because of the special limiting provisions introduced into the Public Works Act 1981, it is largely irrelevant to the meaning of compensation in s 129B of the Property Law Act. The last two cases remove any doubt that the owner of land affected by an order under the latter can expect to have its value assessed on the basis of a sale of the interest involved on the open market between a willing vendor and purchaser, that market including the person in whose favour the order is made. As noted by Lord Romer in *Vizagapatam*, the ascertainment of value in those circumstances may be an exercise of some difficulty, but he accepted that it is to be the price paid by a willing purchaser to a willing vendor, not the price that would be paid by a "driven" purchaser to an unwilling vendor.

As a possible approach it might be helpful in this case to ask what a purchaser contemplating buying the landlocked area (as it existed before the improvements made by the first respondents) might have been prepared to pay for the easement on the assumption that the appellant was a willing (but not anxious) vendor, and taking into account the background and all the surrounding circumstances of its use. In making his assessment Prichard J appears to have paid regard only to its value as agricultural land and to the detrimental effect on the owner.

I agree that the order for compensation should be set aside and remitted to the High Court for further consideration, in the light of any more detailed provisions of the easement eventually decided upon.

Appeal allowed in part: case remitted to High Court.

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