Privy Council Appeal No. 110 *of* 1913.

The Pastoral Finance Association, Limited - *Appellant,*

v.

The Minister - - - - - - *Respondent.*

FROM

THE SUPREME COURT OF THE STATE OF NEW SOUTH WALES.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 4TH AUGUST 1914.

Present at the Hearing.

LORD MOULTON.
LORD SUMNER.
SIR JOSHUA WILLIAMS.

[*Delivered by* LORD MOULTON.]

The Appellant, the Pastoral Finance Association, Limited, is a company which has for many years carried on a large business in wool at Kirribilli Point, on the north side of Port Jackson, in New South Wales, and has during late years added thereto the business of freezing meat for export. The business of the Association has grown considerably in recent years, and in 1910 that business was so large that it decided to move into new premises, and for that purpose it purchased in March 1910 a very suitable site, within the city boundary at Jones Bay, having a frontage on Darling Harbour.

Having acquired the land the Association procured plans and estimates for erecting thereon buildings adapted to the needs of the whole of

its business, which it proposed forthwith to transfer from Kirribilli to the new site. But before actually commencing the erection of these buildings the Association learned that Government intended to resume the land. On ascertaining that this was actually the case it desisted from actual building operations. The notice to resume was not in fact given until 29th March 1911, but some months earlier the Association had been informed by Government of their intention to resume the land. The Association duly served upon the Respondent and upon the Crown solicitor the usual statutory notice setting forth its claim. The Government refused to accept the claim as thus stated by the Association, and as the amount of compensation was therefore not agreed between the parties, the present action for compensation was brought by the Appellant to establish the amount to which it was entitled in respect of the land resumed. The amount claimed in the declaration is 24,235*l*. By his plea the Defendant alleged that he had caused a valuation to be made of the estate and interest of the Appellant in the lands, and that it amounted to 10,000*l*. No tender or offer of this sum seems to have been made, and in his plea he alleges that the sum exceeds the amount of compensation to which the Appellant is entitled in respect of the premises, so that it is probable that no such tender was made.

The case went to trial in the ordinary way before Ferguson, J. and a jury. Each side called evidence purporting to show the effect which the transfer of the business to the new site would have had on the prospective profits of the business, and that evidence referred more especially to the savings which would in future have been made in the new premises by reason of the alleged suitability of the site for carrying on a frozen meat business.

It may fairly be said to be common ground that the site had special suitability for the use to which the Appellant proposed to put it, the only question being the amount of the savings and increased profits that would result therefrom. The Judge went into the evidence with great care in his charge to the jury, and directed them with great fulness as to the law. When the jury retired to consider their verdict Counsel for the Respondent made an application to him to give certain rulings. This led him to recall the jury and add to his previous charge certain further directions on the lines of those he had thus been requested to give. The jury again retired and finally, after being absent some four hours, they returned with a verdict for the Appellant for 23,550*l.*, and of their own accord they added by way of rider that they valued the land at 9,950*l.* Upon this verdict the learned Judge entered judgment for the Appellant for 23,550*l.*, as he was undoubtedly bound to do.

On 27th December 1912 the Respondent gave notice of motion before the full Court asking that the aforesaid verdict should be set aside and a new trial granted, or that the amount of the verdict should be reduced on certain grounds. The motion was heard on 20th March 1913, and the Court by a majority reduced the verdict to 9,950*l.* The substantial ground on which the majority of the Court based their decision was that the Appellant was not entitled to anything beyond the market value of the land by reason of the fact that it had not as yet erected any buildings thereon, and therefore that the verdict should have been for the mere value of the land which they took to have been fixed by the jury at the above sum.

Their Lordships have no hesitation in deciding that the principle underlying this

decision is erroneous. In fact Counsel for the Respondent did not attempt to support it. The Appellant was clearly entitled to receive compensation based on the value of the land to it. This proportion could not be contested. The land was its property and, on being dispossessed of it, the Appellant was entitled to receive as compensation the value of the land to it whatever that might be. The question whether that value had as yet been developed by the actual erection of the buildings necessary to enable the Appellant to realise the special value it thus possessed was no doubt one of the circumstances which was material for guiding the jury to assess its value in the Appellant's hands, but it by no means prevented the land having this special value, nor did it interfere with the Appellant's right to have that special value duly assessed by the jury, as the amount of the compensation due. Their Lordships have great difficulty in arriving at the meaning of the rider which the jury affixed to their verdict to the effect that they estimated the land at 9,950*l.*, but they are satisfied that it was not in law the verdict of the jury, and that therefore no legal effect can be given to it. It was merely a voluntary statement made by them as to the figure at which they had arrived in the course of their deliberations with regard to some matter, the nature of which cannot be ascertained from the language used by them. It was probably intended to refer to the full market value of the land but whether that was or was not its meaning is a question of mere guess.

Their Lordships have therefore felt no difficulty in arriving at the conclusion that the decision appealed against must be set aside.

But the argument of Counsel for the Respondent raised difficulties with regard to the Judgment at the trial which were of a most serious character. It would appear that the evidence of prospective savings and additional profits given at the trial was put forward in support of a claim that the capitalised value of the increase in the profits of the business due to them should be added to the market value of the land in arriving at the compensation. This view of the law seems to have been accepted by all parties. The evidence on behalf of the Respondent related only to the quantum of this addition and the Judge in his summing up said to the Jury :—

> " Then you will consider what capital amount fairly
> " represents those savings and those profits and you
> " will add that to the amount that you consider
> " fairly represents the market value of the land
> " independently of these special questions."

Their Lordships are of opinion that this direction is seriously at fault. That which the Plaintiff was entitled to receive was compensation not for the business profits or savings which he expected to make from the use of the land, but for the value of the land to him. No doubt the suitability of the land for the purpose of his special business affected the value of the land to him, and the prospective savings and additional profits which it could be shown would probably attend the use of the land in his business furnished material for estimating what was the real value of the land to him. But that is a very different thing from saying that he was entitled to have the capitalised value of these savings and additional profits added to the market value of the land in estimating his compensation. He was only entitled to have them taken into consideration so far as they

might fairly be said to increase the value of the land. Probably the most practical form in which the matter can be put is that he was entitled to that which a prudent man in his position would have been willing to give for the land sooner than fail to obtain it. Now it is evident that no man would pay for land in addition to its market value the capitalised value of the savings and additional profits which he would hope to make by the use of it. He would no doubt reckon out these savings and additional profits as indicating the elements of value of the land to him, and they would guide him in arriving at the price which he would be willing to pay for the land, but certainly if he were a business man that price would not be calculated by adding the capitalised savings and additional profits to the market value.

If, therefore, the case had been conducted on behalf of the Respondent on different lines at the hearing, or if objection had been taken on the Appeal to the charge of the learned Judge at the trial on the above grounds their Lordships would have felt constrained to set aside the verdict and direct a new trial. But in view of the fact that the whole trial was conducted by both sides on the basis that the correct estimate of the compensation was the addition of the properly capitalised savings and additional profits to the market value of the land, that no exception was taken to the ruling of the learned Judge in this respect at the trial, that the point was not raised on the Appeal to the full Court or in the Respondent's case on the Appeal to their Lordships and that it was first taken in the argument of the Respondent's Counsel at the hearing of this Appeal, their Lordships feel that they would be doing a grave injustice to the Appellant if

they were to allow the point to be raised at so late a moment and to permit the Respondent to recommence the proceedings after they have thus proceeded to their latest stage. Their Lordships therefore will humbly advise His Majesty that the Appeal be allowed and that the order of the full Court be set aside with costs and the judgment of the Judge at the trial restored. The Respondent will pay the costs of this Appeal.

In the Privy Council.

THE PASTORAL FINANCE ASSOCIATION, LIMITED

v.

THE MINISTER.

DELIVERED BY LORD MOULTON.

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