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26, 1954

No. 47 of 1953.

In the Privy Council.

37659

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT OF NEW SOUTH WALES

UNIVERSITY OF LONDON
W.C.1.

23 FEB 1955

INSTITUTE OF ADVANCED
LEGAL STUDIES

BETWEEN

THE MINISTER *Appellant*

AND

CHRISTOPHER BOWES THISTLETHWAYTE
and REGINALD CLARK TURNER *Respondents.*

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Case for the Respondents.

RECORD.

1. This is an appeal brought by leave of the Supreme Court of New South Wales from the decision, dated the 28th September, 1953, of the said Supreme Court (Street, C.J., Owen and Herron, JJ.) in an appeal—by way of case stated—from the Land and Valuation Court of New South Wales (Sugerman, J.). pp. 45-47.

2. The question for decision in this appeal relates to the manner in which compensation is to be assessed where land is resumed under the Public Works Act, 1912, of New South Wales at a time when the price at which land may be sold and purchased is temporarily controlled by legislative enactment. pp. 7-9.

3. By notification published in the New South Wales Government Gazette dated the 20th September, 1946, the lands described in the Schedule thereto were resumed under Division 1 of Part V of the Public Works Act, 1912 (N.S.W.) and vested in the Council of the Municipality of Ku-ring-gai.

4. The Respondents, Trustees of the Will of William Moore deceased, were at all material times registered proprietors for an estate in fee simple of the said lands, and upon the publication of the said notification in the said Gazette the estate and interest of the Respondents in the said lands were, by section 45 of the said Act, converted into a claim for compensation. p. 2, ll. 14-18.

5. The procedure provided by sections 102 and 103 of the said Act having been complied with and no agreement having been arrived at as to the amount of compensation, the Respondents pursuant to section 104

of the said last-mentioned Act commenced an action in the Supreme Court against the Appellant, which said action, after issue had been joined therein, was remitted, pursuant to section 9 of the Land and Valuation Court Act, 1921 (N.S.W.), to the Land and Valuation Court for determination, and duly came on to be heard by the said Court.

pp. 10-11.

6. The only issue raised by the pleadings in the said action was the amount of compensation payable to the Respondents.

7. On the above-mentioned issue the following statutory provisions are material :—

PUBLIC WORKS ACT, 1912 (N.S.W.).

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39. The Governor may direct that any land required in his opinion for any authorised work may be acquired either by taking the same under the provisions contained in Division 1 of Part V of this Act or under the provisions contained in Division 2 of the said Part. Thereupon, subject to the provisions of this Act, the land so required may be acquired in the manner directed and the compensation for such land shall be ascertained and dealt with in all respects pursuant to the provisions of this Act applicable in either case respectively.

Provided that where any authorised work is a railway and the Commissioner for Railways as Constructing Authority certifies to the Governor that the land referred to in the certificate will be required for the purposes of the authorised work and is available for purchase by private treaty the Governor may authorise the purchase of such land notwithstanding that the map or plan and book of reference relating to such railway may not have been made or confirmed.

* * * * *

42. For the purpose of carrying out any authorised work, if the Governor directs that any land required for such work shall be taken under this Division of this Act, he may by notification to be published in the Gazette and in one or more newspapers published or circulated in the police district wherein is situated the land the subject of such notification declare that the land described in such notification has been appropriated (if Crown land) or resumed (if private property) for the public purpose therein expressed.

An abstract of the land so appropriated or resumed, together with the purpose for which the same is required shall in every case be laid before Parliament, if in session at the date of such notification, within seven days after its publication in the Gazette ; and if not, then within fourteen days after the commencement of the next ensuing session.

43. Upon the publication of such notification in the Gazette, the lands described or referred to in such notification shall forthwith be vested in the Constructing Authority on behalf of His Majesty for the purpose of this Act for an estate in fee simple in possession, freed and discharged from all trusts, obligations, estates, interests,

contracts, charges, rates, rights-of-way, or other easements whatsoever and to the intent that the legal estate therein, together with all powers incident thereto, or conferred by this Act, shall be vested in the Constructing Authority as a trustee.

* * * * *

10 45. (1) The estate and interest of every person entitled to lands resumed under this Division of this Act or any portion thereof and whether to the legal or equitable estate therein shall by virtue of this Act be deemed to have been as fully and effectually conveyed to the Constructing Authority as if the same had been conveyed by the persons legally or equitably entitled thereto by means of the most perfect assurances in the law.

(2) Every such estate and interest shall, upon the publication of such notification as aforesaid be taken to have been converted into a claim for compensation in pursuance of the provisions hereinafter contained.

(3) Every person shall upon asserting his claim as hereinafter provided and making out his title in respect of any portion of the said resumed lands be entitled to compensation on account of such resumption in manner hereinafter provided.

* * * * *

20 101. (1) Where the land described in any such notification as in section forty-two hereof mentioned consists wholly or partly of land alienated by or not the property of the Crown, or is not Crown land, the owners thereof or the persons who, but for the provisions hereinbefore contained, would have been such owners, shall be entitled to receive such sum of money by way of compensation for the land of which they have been deprived under this Act as shall be agreed upon or otherwise ascertained under the provisions of this Division of this Act.

30 (2) In this section the expression "Crown land" means all lands vested in His Majesty, whether dedicated to any public purpose or not, and which have not been granted or contracted to be granted in fee-simple.

40 102. Every person claiming compensation in respect of any land resumed under any such notification, or in respect of any work or other matter done under the authority of this Act where there has been any such notification shall, within ninety days from the publication of such notification, or at any time afterwards within such time as a Judge of the Supreme Court shall, upon the application and at the cost of the claimant, appoint in that behalf, serve upon the Constructing Authority and upon the Crown Solicitor a notice in writing setting forth—

- (a) the nature of the estate or interest of the claimant in such land, together with an abstract of his title ; and
- (b) if he claims in respect of damage, the nature of the damage which he has sustained or will sustain by reason of such resumption or work or matter as aforesaid.

Such notice may be in the form in the Sixth Schedule hereto, but with any modifications required by the nature of the claim.

103. Within sixty days after the receipt of every such notice of claim by the Crown Solicitor he shall forward the same, together with his report thereon to the Constructing Authority, who shall thereupon (unless no prima facie case for compensation is disclosed) cause a valuation of the land, or of the estate or interest of the claimant therein, to be made in accordance with the provisions of this Act, and shall inform the claimant as soon as practicable of the amount of such valuation by notice in the form of the Seventh Schedule hereto. 10

Provided that any such notice of valuation may within one hundred and twenty days after service thereof be varied by notification to the claimant.

104. (1) If within ninety days after the service of notice of claim the claimant and the Constructing Authority do not agree as to the amount of compensation, the claimant may institute proceedings in the Supreme Court, in the form of an action for compensation, against the Constructing Authority as nominal defendant. 20

Provided that with the consent in writing of the Constructing Authority and the claimant any such action may be so tried at any time (to be mentioned in such consent) before the expiration of ninety days from service of the notice of claim for compensation, but not within fourteen days from service of the notice of valuation on such claimant.

(2) Any such action may be tried before a Judge of the said court or in any circuit court and a special jury of four persons.

Provided that upon application either of the Constructing Authority or of the claimant a special jury of twelve may be summoned for the trial of such action. 30

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124. For the purpose of ascertaining the purchase money or compensation to be paid, regard shall in every case be had by the magistrates, arbitrators, surveyors, valuers, or jury (as the case may be) not only to the value of the land to be purchased or taken, but also to the damage (if any) caused by the severing of the lands taken from other lands of the owner, or by the exercise of any statutory powers by the Constructing Authority otherwise injuriously affecting such other lands; and they shall assess the same according to what they find to have been the value of such lands, estate, or interest at the time notice was given, or notification published, as the case may be, and without being bound in any way by the amount of the valuation notified to such claimant, and without reference to any alteration in such value arising from the establishment of railway or other public works upon or for which such land was resumed. 40

Provided that the said magistrates, arbitrators, surveyors, valuers, and jury in ascertaining such purchase money or compensation shall take into consideration and give effect to by way of set-off or abatement any enhancement in the value of the interest of any such owner in any land adjoining the land taken or severed therefrom by the construction of the authorised work. But in no case shall this proviso operate so as to require any payment to be made by such owner to the Constructing Authority in consideration of such enhancement of value as aforesaid.

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VALUATION OF LAND ACT, 1916 (N.S.W.)

5. The improved value of land is the capital sum which the fee-simple of the land might be expected to realise if offered for sale on such reasonable terms and conditions as a bona-fide seller would require.

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68. (1) The valuation under this Act in force for the time being, or under a fresh valuation, as provided for under section seventy of this Act, of the improved value of any land which may after the passing of this Act be resumed or given or taken in exchange or partly in exchange for other land under the following Acts, namely, the Public Works Act, 1912, the Crown Lands Consolidation Act, 1913, the Public Roads Act, 1902, the Sydney Corporation Act, 1932, the Local Government Act, 1919, the Closer Settlement Act, 1904, the Metropolitan Water, Sewerage and Drainage Act, 1924, the Hunter District Water Supply and Sewerage Act, 1892, the Government Railways Act, 1912, the Sydney Harbour Trust Act, 1900, the Water Act, 1912, and the Murrumbidgee Irrigation Act, 1910, shall, notwithstanding the provisions of any such Act, be held by all courts, tribunals and persons authorised to ascertain or estimate the said value, or to assess the amount of compensation for such land, to be the value of the land resumed or exchanged under the said Acts, and the improvements thereon and of the respective estates and interests referred to in such valuation, but shall not exclude the rights of a claimant for compensation for forced sale or disturbance of business or otherwise, or for any special value which the land may have to the owner, provided that where land has been resumed any person entitled to any estate or interest therein or the resuming authority shall be entitled notwithstanding any such resumption to require a fresh valuation to be made of the lands so resumed as at the date of such resumption.

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The valuation under this Act in force for the time being or under a fresh valuation of the improved value of any land agreed to be purchased under the Closer Settlement Promotion Act, 1910, after the passing of this Act and after the making of such valuation, shall be the valuation of such land for all purposes of the said Act.

Where the land resumed or exchanged or agreed to be purchased, is part only of land included in one valuation, separate

valuation shall be made under this Act in respect of such part, and such separate valuation shall be deemed to be the value of the said part.

- (2) Provided that nothing in this section shall—
- (a) affect the amount of compensation which in pursuance of a lease from the Crown is or may be payable on the resumption of such lease or part thereof, or on appropriation of any of the land so leased ; or
 - (b) affect the amount of compensation under section four of the Closer Settlement (Amendment) Act, 1912 ; or 10
 - (c) prevent a court, in determining the value of or the amount of compensation payable for land resumed in pursuance of any Act, from giving effect to the provisions of the said Act, and in particular—
 - (i) from excluding from such value or amount any added value accrued to the land from the construction or proposed construction of any public works ; or
 - (ii) from having regard to any damage caused by severance ; or
 - (iii) from having regard to the enhancement or 20 depreciation in value of other land by the construction of any public work.

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70. (1) The Valuer-General shall, on application made by any person interested and on payment of the prescribed fee, make a fresh valuation to determine the value of any land at a date prior or subsequent to the date of the making of the last valuation of such land under this Act.

(2) Any such new valuation shall be subject to objection in like manner as in the case of other valuations under this Act.

(3) Where such new valuation is made as at a date prior to 30 the date of the valuation entered on the roll it shall not be entered on the roll, but the Valuer-General may furnish a certificate thereof.

8. At the hearing it was admitted by the parties that, at the date when the said resumption was effected, the National Security (Economic Organization) Regulations made under the National Security Act, 1939 (Cth), as amended, and providing for land sales control, were in force and applicable to the said lands, and that the said regulations were terminated on the 20th September, 1948.

9. The following provisions of the National Security (Economic Organization) Regulations are material :— 40

6. (1) Except as provided by this Part, a person shall not, without the consent in writing of the Treasurer—

- (a) purchase any land ;
- (b) take an option for the purchase of any land ;

- (c) take any lease of land ;
- (d) take a transfer or assignment of any lease of land ; or
- (e) otherwise acquire any land.

(2) Nothing in this regulation shall prevent—

- (a) the taking of a lease of land (other than country land) to be used by the lessee where the term of the lease does not exceed three years and is to commence not more than three months after the date of the lease ;
- 10 (b) the taking of a transfer or assignment of a lease of land (other than country land) to be used by the transferee or assignee where the unexpired portion of the term of the lease does not exceed three years ;
- (c) the taking of an option for the purchase of any land where the period within which the option may be exercised is limited to one month after the taking of the option ;
- (d) the acquisition of land by way of gift ;
- 20 (e) any transaction to which the Commonwealth, a State, or an authority of the Commonwealth or a State, or to which any person acting on behalf of the Commonwealth, a State, or an authority of the Commonwealth or a State is a party, not being such a transaction by reason only of the fact that—
 - (i) the Public Trustee or Public Curator of the Estates of Deceased Persons, or any similar authority, of any State or Territory, of the Commonwealth is a party to the transaction ; or
 - (ii) the consent of the Commonwealth, a State or any person or authority is necessary to, or given in connection with, the transaction ;
- 30 (f) the acquisition of land on sale under a writ or warrant of execution issued out of any court ; or
- (g) any transaction by way of renewal or extension of a lease which was in existence prior to the twentieth day of February 1942, where the rent under the lease as renewed or extended does not exceed the rent payable under the lease prior to the renewal or extension.

(3) An application for the consent of the Treasurer under this regulation shall be in writing.

- 40 (4) The Treasurer may require any person who is a party to a proposed transaction in respect of which an application is made for the Treasurer's consent under this regulation to furnish in writing to the Treasurer such particulars of the proposed transaction as the Treasurer requires.

(5) In the case of an application for consent to purchase any land the application shall be accompanied by a valuation of the land by an independent approved valuer, unless, in special circumstances, the Treasurer dispenses with such a valuation.

(6) Where an application is made for the consent of the Treasurer to any proposed transaction, being the purchase of land, the taking of a lease of land, the taking of a transfer or assignment of a lease of land or any other acquisition of land, the Treasurer may, before giving consent, if a valuation has not been furnished under the last preceding sub-regulation, require to be furnished to him a valuation, by an independent approved valuer, of the subject-matter of the proposed transaction.

(7) A valuation under either of the last two preceding sub-regulations—

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- (a) if the proposed transaction is the purchase of any land— shall specify the amount which would have been a fair and reasonable price for the land as at the tenth day of February 1942, or, if the valuation is a valuation by the Valuer-General of a State, may be the last valuation of the land made by the Valuer-General ; and
- (b) in any other case—shall specify the value of the subject-matter of the transaction as at a date specified by the Treasurer.

(8) Where the Treasurer is not satisfied with any valuation furnished under sub-regulation (5) or (6) of this regulation, he may—

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- (a) require the valuer to furnish such information concerning the valuation as the Treasurer specifies ; and
- (b) require to be furnished to him a further valuation by an approved valuer nominated by the Treasurer.

* * * * *

(9) Where an applicant for consent to purchase any land on which is erected a dwelling-house has informed the Treasurer that he intends to live in the dwelling-house, the applicant shall not, without the consent in writing of the Treasurer, let the land.

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(10) Where a transaction prohibited by this regulation has been entered into subject to the consent of the Treasurer thereto being obtained, the transaction shall be deemed not to have been entered into in contravention of this regulation if an application for the consent of the Treasurer is made within three months after the date of the transaction, but the transaction shall not have any effect unless the Treasurer gives his consent thereto within a period of six months after the date of the transaction, or within such other period as is agreed on in writing, at the time the transaction is entered into or any time thereafter, by all the parties to the transaction, or where the agreement is made after the death of any party, by the surviving parties and the legal personal representative of the deceased party.

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(11) In this regulation—

“ approved valuer ” means—

- (a) the Valuer-General of any State ; or

(b) any other person who has had not less than ten years' continuous experience as a valuer immediately prior to the commencement of this regulation and is for the time being approved by the Treasurer as a valuer for the purposes of these Regulations ;

“country land” means land used for agricultural, pastoral, horticultural, viticultural, apicultural, dairy farming, poultry farming or other like purposes.

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8. Nothing in this Part shall prevent—

10 (a) any transaction to give effect to a contract or agreement in writing entered into prior to the twentieth day of February 1942 ;

(b) the exercise of any option in writing given before that date;

(c) any transaction—

(i) by way of mortgage or sub-mortgage ;

(ii) by way of discharge of a mortgage or sub-mortgage ;

20 (iii) by way of transfer or assignment of a mortgage to a guarantor who, in pursuance of the terms of his guarantee, has repaid the whole or part of the moneys due under the mortgage ;

(d) the vesting in the personal representative of a deceased person, in his capacity as such, of any property or any interest in property ;

(e) any transaction which vests any property or any interest in property, in any trustee of the estate of a deceased person, in a trustee in bankruptcy, or in any new trustee under any instrument, in his capacity as trustee ;

30 (f) any transaction which is without consideration in money or money's worth and the purpose of which is to vest any property, or any interest in property, in any person beneficially entitled thereto under or by virtue of any will or intestacy ; or

(g) the execution of any deed of assignment under Part XI of the Bankruptcy Act 1924-1933 or of any deed of arrangement under Part XII of that Act.

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40 10. (1) Where any transaction is entered into in contravention of this Part or of Part VI of these Regulations, or where any condition to which the transaction is subject is not complied with, the transaction shall not thereby be invalidated, and the rights, powers and remedies of any person thereunder shall be the same as if these Regulations had not been made.

(2) Nothing in this regulation shall affect the liability of any person to any penalty in respect of any contravention of these Regulations.

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10B. (1) The Registrar of Titles or other proper officer of any State or Territory of the Commonwealth may, upon submission to him for registration of any instrument relating to a transaction in connexion with any land, require such evidence as he deems necessary that the transaction to which the instrument relates is not in contravention of any provisions of these Regulations and may refuse to register the instrument until such evidence is 10 submitted to him.

10. The said Regulations were one of a series of wartime regulations enacted for the purpose of preventing inflation. Although the said Regulations did not fix the maximum price at which land could be sold or purchased at the values prevailing on 10th February, 1942, such regulation exhibited, as was stated in the judgment of the High Court referred to in paragraphs 11 and 12 hereof, "an obvious purpose of pegging prices in the vicinity of those values" and applications for consents thereunder were dealt with on that basis.

11. The resumption having been effected at a time when the said 20 Regulations were in operation and so during a period when there was no free market for land, it was an issue at the hearing before the Land and Valuation Court as to what was the proper measure of compensation, it being contended on behalf of the Respondents that compensation should be assessed on the basis and in accordance with the principles approved by the High Court of Australia in *Commonwealth of Australia v. Arklay* (1952), A.L.R. 640, and dealt with in paragraph 12 hereof, and on behalf of the Appellant that the amount of compensation should be determined at the figure at which the Treasurer or his Delegate would have consented under the said Regulations to a purchase of the said land. 30

12. In *Arklay's* case, the question was raised for determination by the High Court as to whether, in the case of land compulsorily acquired under the Commonwealth Lands Acquisition Act during the period in which the said Regulations were in force—such land possessing no special suitability for some particular business or activity carried on by the owner and having no added potential value if put to some other use, the assessment of compensation could exceed the highest price which the controlling authority might be expected to allow. The Full High Court (Dixon, C.J., Williams, J. and Kitto, J.) determined this question in the affirmative, and in its judgment pointed out that the matter depended primarily on 40 the construction of section 28 of the Commonwealth Lands Acquisition Act, 1906 to 1936. That section is in the following words :—

28. (1) In determining the compensation under this Act, regard shall be had (subject to this Act) to the following matters :—

(a) The value of the land acquired ;

- (b) The damage caused by the severance of the land acquired from other land of the person entitled to compensation ; and
- (c) The enhancement or depreciation in value of other land adjoining the land taken or severed therefrom of the person entitled to compensation by reason of the carrying out of the public purpose for which the acquired land was acquired.

10 (2) The enhancement or depreciation in value shall be set off against or added to the amount of the value and damage specified in paragraphs (a) and (b) of sub-section (1) of this section.

After stating that it was established that "value" in such a context meant "the value of the land to the owner," the judgment referred to the rule, which in Australia was formulated in *Spencer's case* (5 C.L.R. 418), for ascertaining that value in cases where the amount at which a vendor may sell and a purchaser may buy is not controlled, and shortly stated that rule in these terms :—

20 "What is required is an estimate of the price which would have been agreed upon in a voluntary bargain between a vendor and purchaser each willing to trade but neither of whom was so anxious to do so that he would overlook any ordinary business considerations."

The learned Justices then proceeded :—

30 "This test requires considerable adaptation when the compulsory acquisition occurs in a period of controls. The test presupposes that a vendor can ask any price which it would be reasonable to expect the purchaser to pay. This price would usually exceed the price fixed by a Controller ; for there would be no necessity to fix prices if they were intended to represent market prices. It would be unreasonable to impute to a vendor a willingness to sell his property at the controlled price to a purchaser who was likely, if he held the land until controls were abolished, to be able to sell the land at an enhanced price. An owner, though otherwise willing to sell, would himself prefer to wait, if guided by ordinary prudence, in the hope that the regulation of land sales requiring the consent of the Controller would terminate."

40 After pointing out that the figure at which the Treasurer might have sanctioned a purchase of the land "is far away from a measure of the value to the owner," the learned Justices indicated their view that regulation of land sales would be calculated to affect what a buyer would be prepared to give and so must be taken into account in determining the amount of compensation. Their judgment proceeds :—

"What has to be ascertained as a measure of value is what the willing seller would demand, on the assumption that the consent of the Controller would be forthcoming, and what a willing buyer would give, on the like assumption, on the footing that he is a

buyer who must himself submit to the controls if and when his turn came to sell, should they not in the meantime be terminated. The least price at which a vendor could be reasonably expected to sell in these circumstances would be a price which would include, in addition to the price fixed by the Controller if it could be ascertained, a sum to compensate him for the present value of the enhanced price which the purchaser might expect ultimately to obtain. This would be an ordinary business consideration which no vendor could be expected to overlook ” :

Later in the judgment it was stated as follows :—

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“ To assess the fair value to the owner of land compulsorily acquired under the Lands Acquisition Act during these controls it is open to the Court in our opinion, aided by any available evidence of what appeared to be the practice of the Treasurer, to estimate the price at which the Treasurer would have consented to a sale if the resumed land had been sold on the date on which its value for the purposes of compensation had to be assessed. To that estimated price an addition would be necessary representing the increased value of the land which must arise, if from nothing else, from the fact that, when controls terminated, it would sell in a free market and might be expected to realise a greatly enhanced price.”

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The question raised on the appeal and which has already been mentioned was then answered in these words :—

“ On this question we have no doubt that, under the Lands Acquisition Act, in estimating the value of land to an owner dispossessed during controls, the valuer should estimate the price which a vendor willing but not anxious to sell would agree to, if he were allowed, and a willing purchaser would give to obtain the land although in his turn he would be subject to the controls in re-selling.”

After pointing out that the Appellant resuming authority had failed to make out any ground for setting aside or interfering with the decision of the Justice of first instance, the Justices expressed their considered view that—

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“ His Honour was right in allowing a substantial addition to the estimate of the price the delegate from the treasury would sanction.”

13. At the hearing of the instant case the Land and Valuation Court, on an objection to evidence taken by Counsel for the Appellant, ruled in favour of the contention made on behalf of the Respondents that compensation should be assessed on the basis approved by the High Court in *Arklay's* case, holding that the principles laid down in that decision should not be limited to claims for compensation under the Lands Acquisition Act, but were equally applicable to claims for compensation under the New South Wales Public Works Act.

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14. In the course of the hearing of the action, evidence was given by a number of witnesses, including two valuers called on behalf of the Respondents and one valuer (from the Valuer General's Department) on behalf of the Appellant; in addition, evidence was tendered of a number of sales of comparable parcels of land in the vicinity of the resumed property, some of such sales having been made before and some after the date of the expiration of the said regulations.

15. The valuers called gave evidence of the controlled price or value of the subject land on the assumption of a sub-divisional sale effected during controls and also of the value of the subject land, again on a sub-divisional basis, assessed in accordance with the formula or method enunciated in *Arklay's* case.

16. In his reserved judgment, the learned Justice of the Supreme Court, who exercises the jurisdiction conferred on the Land and Valuation Court (Sugerman, J.), reviewed the relevant statutory provisions, the principles established by the authorities and the oral and documentary evidence. After an examination of the judgment in *Arklay's* case His Honour stated:—

“ The primary assumptions appear to be that on the termination of controls there would be an enhanced price, that the dispossessed owner could have retained the land and sold it at that price. that a purchaser from him could do likewise, and that therefore the dispossessed owner must be compensated for the present value of the enhanced price which the purchaser might expect ultimately to obtain (the retention value).”

His Honour then examined the evidence of the valuers given on this branch of the case and concluded in the following words:—

“ I am of opinion that applying the principles of *Arklay's* case in the determination of compensation in the action, a reasonable figure at which to assess the amount of compensation is £35,000 representing a controlled price of £25,250 . . . and an added ‘ retention value ’ of £9,750.”

His Honour accordingly determined the compensation payable by the Appellant to the Respondents at the figure of £35,000.

17. Pursuant to section 17 of the Land and Valuation Court Act, 1921, the Land and Valuation Court at the request of the Appellant stated a case for the decision of the Supreme Court upon certain questions of law, the material one for the purposes of this appeal being as follows:—

Was the measure of compensation to which the Plaintiff was entitled in respect of the resumption of the subject lands—

(A) the price which a vendor willing but not anxious to sell would agree to, if he were allowed, and a willing purchaser would

give to obtain the land, although in his turn he would be subject to the control of land sales in reselling, that is to say the measure which was adopted by the Land and Valuation Court following *Arklay's* case; or

(B) the price which the Treasurer or his Delegate would have approved under the National Security (Economic Organization) Regulations on a sale of the subject land on the date of resumption subject to the control of land sales then in force under the said Regulations ?

pp. 45-46.

18. On the said stated case coming on to be heard before the Full Court of the Supreme Court of New South Wales, the said Court (Street, C.J., Owen and Herron, JJ.) held that *Arklay's* case was not distinguishable from the present case and, applying the principles stated in that case, answered said question (A) in the affirmative and question (B) in the negative. 10

19. The Respondents respectfully submit that—

(A) The said decision of the Supreme Court was correct in law.

(B) *Arklay's* case was correctly decided by the High Court.

(C) The method approved by the High Court of Australia in *Arklay's* case for determining the amount of compensation where a resumption had been effected during the period of land sales control under the said Regulations was based upon the principles stated in *Spencer v. The Commonwealth* (5 C.L.R. 418), and was an accurate adaptation or application of those principles to circumstances in which legislation of a temporary nature created conditions inconsistent with the existence of a free market. 20

(D) The said method determined the value of the land in the circumstances of land sales control at the time the said notification was published in the said Gazette and was applicable to the resumption in this case. 30

(E) The principles established by the decision of the High Court of Australia in *Arklay's* case are not restricted to resumptions under the Lands Acquisition Act, 1906-1936 (Commonwealth), but apply equally to resumptions under the Public Works Act 1912 (N.S.W.).

(F) The principle of "a willing vendor" does not impute to a dispossessed owner of land a willingness to sell at the controlled price.

(G) The price at which the Treasurer or his Delegate would have consented under the said regulations to a purchase of the said lands on the date of resumption was not based upon, nor did it reflect, the value of the said lands as at that date, but was based upon matters of policy and was rightly rejected as the proper measure of compensation. 40

(H) The said price did not establish or prove the market value of, or determine the amount of compensation payable for, land resumed during the continuance of the said Regulations.

(I) The said Regulations did not prescribe nor purport to prescribe the measure or amount of compensation for land resumed during the continuance of the said Regulations.

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(J) The said Regulations constituted at most a factor or circumstance to be taken into account in determining the amount of compensation, but were not the determining or decisive factor or circumstance.

(K) The right of retention and the right of sale on the termination of controls at an enhanced price constituted part of, or were incidental to, the estate or interest of the Respondents in the said lands, and were rightly taken into account in determining "the value of the said lands to the owner."

20. The Respondents respectfully submit that this appeal should be dismissed with costs, for the following, amongst other,

REASONS.

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- (A) BECAUSE the decision and order of the Full Court of the Supreme Court of New South Wales are correct in law and should be affirmed.
- (B) BECAUSE the Land and Valuation Court assessed the compensation payable to the Respondents in accordance with the relevant statutory provisions and the principles of law applicable thereto.
- (C) BECAUSE of the other reasons set forth in paragraph 19 hereof.

M. F. HARDIE.

J. G. LE QUESNE.

In the Privy Council.

ON APPEAL

*from the Full Court of the Supreme Court
of New South Wales.*

BETWEEN

THE MINISTER *Appellant*

AND

**THISTLETHWAYTE and
Another** *Respondents*

Case for the Respondents

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