Cat. No. 23-6

26, 1954

In the Privy Council.

No. 47 of 1953.

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

IN THE MATTER of an Appeal by the Minister by way of Stated Case in Cause No. 4216 of 1951 in the Supreme Court of New South Wales.

BETWEEN

THE MINISTER ... ... *Appellant*

AND

CHRISTOPHER BOWES THISTLETHWAYTE and REGINALD CLARK TURNER ... ... *Respondents.*

AND IN THE MATTER of an Order in Council of 2nd April, 1909.

AND IN THE MATTER of an Appeal from the Supreme Court of New South Wales to Her Majesty in Council.

RECORD OF PROCEEDINGS

INDEX OF REFERENCE.

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RECORD OF PROCEEDINGS

In the Full Court of the Supreme Court of New South Wales.

No. 1. Stated Case. 14th August 1953.

No. 1.

Stated. Case

IN THE SUPREME COURT OF NEW SOUTH WALES.

Term No. A.D. 1953.

In the Matter of an Appeal by THE MINISTER FOR PUBLIC WORKS.

Between

THE MINISTER ... ... *Appellant*

and

CHRISTOPHER BOWES THISTLETHWAYTE and REGINALD
10 CLARK TURNER ... ... *Respondents.*

In the Full Court of the Supreme Court of New South Wales.

No. 1. Stated Case. 14th August 1953— *continued.*

CASE STATED

By the Land and Valuation Court for the Decision of the Supreme Court thereon in Pursuance of Section 17 of the Land and Valuation Court Act, 1921–1940.

Pursuant to the requirement in writing of the Defendant in this action I DO STATE the following case for the decision of the Supreme Court on the questions of law hereinafter set forth :—

1.—By notification published in the Government Gazette of 20th day of September, 1946, certain land described in the Schedule thereto was resumed on behalf of the Council of the Municipality of Kuring-gai for the purposes of improvement and embellishment of the area and was vested in the said Council. A true copy of the said Notification is hereunto annexed and marked with the letter " A."

2.—The Plaintiffs Christopher Bowes Thistlethwayte and Reginald Clark Turner, trustees of the Will of William Moore, deceased, were at all material times the registered proprietors for an estate in fee simple of the land described in the Schedule to the notification mentioned in the preceding paragraph.

3.—The said land had been developed as a golf course and was being so used at the date of resumption but was at all material times suitable for development by sub-division into residential lots, with construction of such roads and drainage and other works as were necessary for that purpose, and by sale of the lots into which it should be subdivided.

4.—The said Christopher Bowes Thistlethwayte and Reginald Clark Turner on the 23rd day of August, 1951, made an application to the Valuer General for a fresh valuation as at the date of resumption of the subject land and the Valuer General made valuations as requested as follows :

(a) 31 acres 0 roods 24½ perches (being part of the subject land) Unimproved Value £7,500, Improved Value £7,650, Assessed Annual Value £383.

(b) 17 acres 2 roods 11¾ perches (being the balance of the subject land) Unimproved Value £12,000, Improved Value £12,350, Assessed Annual Value £618.

and on the 5th day of October, 1951, the Valuer General furnished the said Christopher Bowes Thistlethwayte and Reginald Clark Turner with two certificates as aforesaid covering the subject land. On the 24th day of October, 1951, the said Christopher Bowes Thistlethwayte and Reginald Clark Turner duly lodged objections in writing to the said valuations true copies whereof are hereunto annexed and marked with the letter " C " and " D." Upon consideration of these objections the Valuer General did not

alter the said valuations and thereupon the said objections were forwarded to the Registrar of this Court for hearing and determination by the Court pursuant to Section 37 of the Valuation of Land Act, 1916, as amended.

5.—Pursuant to the provisions of the Land and Valuation Court Act an action for the determination of compensation was commenced in the Supreme Court by the Plaintiffs by the issue of a Writ of Summons against the Defendant and when issue was joined therein the matter was remitted to the Land and Valuation Court for determination. A copy of the issues are hereunto annexed and marked with the letter " B."

6.—The action for the determination of compensation and the objections to the valuations duly came on for hearing before this Court and were by consent of the parties heard together.

7.—At the hearing it was submitted that at the date of resumption the National Security (Economic Organisation) Regulations made under the National Security Act, 1939 (Commonwealth) as amended and providing for Land Sales Control were in force and applicable to the subject land and that the said Regulations were terminated on the 20th day of September, 1948 ; and in relation to the control of land sales which replaced the control under the said Regulations, namely the control of land sales under the Land Sales Control Act, 1948 (New South Wales), the subject land was treated at the hearing as vacant land and therefore not subject thereto.

8.—At the hearing it was submitted on behalf of the Plaintiffs as follows :—

(1) that the decision of the High Court in *The Commonwealth* v. *Arklay* 1952 Argus L.R. 640 laid down the principles for the determination of compensation in respect of a resumption of land effected during the period of Land Sales Control, and that the principles therein laid down were not confined to an acquisition under the Lands Acquisition Act, 1906–1936, of the Commonwealth but were of general application, and that the said principles should be applied in determining the compensation in respect of this resumption ;

(2) that, on the principles laid down in that case, in the determination of compensation in respect of a resumption or of the value of land resumed during the period of Land Sales Control evidence was admissible to show that on the termination of controls there would be an enhanced price for the said land ;

(3) that for the purpose evidence was admissible of sales of comparable lands effected after the termination of land sales control and of opinions of expert valuers, founded *inter alia* upon such sales, as to the price which the subject land might be expected to have brought if offered for sale after the

termination of land sales control and more particularly if offered for sale at or about 31st December, 1948, or at or about the expiration of a period of six months from the termination of land sales control, and as to other matters necessary to be ascertained in order to found an opinion as to such price, more particularly the estimated costs, as at the periods mentioned, of road works, and drainage and other works, necessary for the development of the said land in subdivision ; and

(4) that the Plaintiffs could have retained the land and sold it at such enhanced price, that a purchaser from them could have done likewise, and that therefore the Plaintiffs as the dispossessed owners should be compensated for the value of the enhanced price which the purchaser might expect ultimately to obtain (" the retention value.")

9.—It was submitted on behalf of the Defendant as follows :—

(1) that the decision of the High Court of Australia in *The Commonwealth* v. *Arklay* (*supra*) was not applicable to a resumption under the Public Works Act of this State ;

(2) that evidence of sales of land effected after the date of resumption was not admissible unless it was shown that the circumstances as at the date of resumption and as at the date of sale were comparable, and accordingly that evidence of the sales effected after the termination of Land Sales Control was inadmissible ;

(3) that any method of determining the compensation or value of the land in which any such sales effected after the termination of Land Sales Control were considered or used as a guide or basis for such determination was wrong ;

(4) that evidence of the opinions of expert valuers founded upon such inadmissible sales as to what the subject land might be expected to have brought if offered for sale immediately, or at any time, after the determination of Land Sales Control, or of other matters referred to in paragraph 8 (3), was inadmissible ;

(5) that any determination which included " a retention value " as provided by the principles set out in *The Commonwealth* v. *Arklay* (*supra*) violated the assumption that the owner was " willing but not anxious " to sell at the date of resumption and was therefore wrong in principle ;

(6) that the proper method of determining the compensation or value of the land was by a consideration of sales of comparable lands effected prior to the date of resumption, or effected subsequently but only if the circumstances as at the date of

resumption and as at the date of sale were comparable, and on the assumption that the owner at the date of resumption was a " willing but not anxious " seller ;

(7) that in determining the Compensation or value of the land the principles set out in *Spencer* v. *The Commonwealth* (5 C.L.R. 418) should be adopted and applied ; and

(8) that on the basis of the foregoing submissions the measure of compensation was the price which the Treasurer or his delegate would have approved under the regulations referred to in paragraph 7 hereof in respect of 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.

10.—On behalf of the Defendant the further formal submission was made in order to preserve the rights of the Defendant in any appeal brought by him, namely, that the decision of the High Court of Australia in *The Commonwealth* v. *Arklay* (*supra*) was wrong in law.

11.—With respect to the principles upon which compensation should be determined I acceded to the submissions made on behalf of the Plaintiff, and rejected those made on behalf of the Defendant, as to the applicability of the principles laid down in the decision in *The Commonwealth* v. *Arklay* (*supra*). I accordingly determined compensation in accordance with those principles, and on the footing that, as stated in the reasons for Judgment in *The Commonwealth* v. *Arklay* (*supra*) at p. 644, and explained and elaborated elsewhere in the said reasons for Judgment, its measure was " 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 " reselling."

12.—As relevant to the determination of the amount of compensation on that footing, adopting for that purpose the method of determination adopted by the learned trial Judge in *The Commonwealth* v. *Arklay* (*supra*) with the modifications necessary for its application to the circumstances of the present case, I admitted evidence of the following matters, subject however to the limitations and qualifications indicated in my reasons for Judgment (hereinafter referred to) as to the legitimate purposes, effect, and use of such evidence :—

(A) Evidence of prices obtained on sales effected, after the termination of Land Sales Control, of individual residential lots situated in the neighbourhood of the subject land and comparable to those into which it would be subdivided on a proper mode of subdivision, to the extent that such evidence was a guide to the price which might be expected to be obtained for residential lots in a subdivision of the subject land if sold shortly after the termination of Land Sales Control, that is to say, on or about the 31st December, 1948,

or at or about the expiration of a period of six months from such termination.

(B) Evidence of the estimated cost, as at or about the periods mentioned in (A) above, of road construction, and drainage and other works, necessary for the development of the subject land in subdivision.

(C) Evidence of the opinions of expert valuers, founded upon, *inter alia*, the materials mentioned in (A) and (B) above, as to what price the subject land might be expected to have realised if sold *in globo* at or about the times mentioned in (A) above.

13.—I was of opinion that the principles laid down in *The Commonwealth* v. *Arklay* (*supra*) were not applicable in the determination of the improved and unimproved values in an objection to valuation under the Valuation of Land Act, 1916, but that they were applicable as hereinbefore stated in the determination of compensation under the Public Works Act, 1912. As to such first-mentioned determination, I was of opinion that the true measure of value was the price which the Treasurer or his Delegate would have approved under the regulations hereinbefore referred to in respect of 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.

14.—I determined the values in the hereinbefore-mentioned objections to valuation under the Valuation of Land Act, 1916, as follows :—

(i) Unimproved values :
£14,680 and £9,170, a total sum of ... £23,850

(ii) Improved values :
£15,590 and £9,660, a total sum of ... £25,250

The said total sum of £25,250 referred to in (ii) above is, therefore, my determination of the price which the Treasurer or his Delegate would have approved as stated in paragraph 13 hereof.

15.—In the action I determined the compensation for the resumption of the subject land in the sum of £35,000 being the said sum of £25,250, plus what was in effect " a retention value " as referred to in *The Commonwealth* v. *Arklay* (*supra*) of £9,750.

16.—The reasons for the conclusions hereinbefore stated, and the grounds for arriving at the said determinations, and the explanation of the difference in amount between the total of the determinations of the improved value in the two objections and the determination of compensation in the action, and the reasons for the conclusions at which I arrived with regard to the admissibility of evidence and as to the effect thereof when admitted, are set forth in my reasons for Judgment in the objections and the action delivered the 20th day of March, 1953, a copy whereof is hereunto annexed and marked with the letter " E," and in the reasons given by me on the 3rd day of October, 1952, with respect to my decision on a question

of admissibility of evidence which had been debated before me a copy whereof is hereunto annexed and marked with the letter " F."

17.—The questions of law stated as aforesaid for the decision of the Supreme Court are :—

(1) Was the measure of the compensation to which the Plaintiff was entitled in respect of the resumption of the subject land :

(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 I adopted following *The Commonwealth* v. *Arklay* (*supra*) ; or

(b) the price which the Treasurer or his Delegate would have approved under the National Security (Economic Organisation) 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 ?

(2) If the answer is " Yes " to 1 (a), was the method pursued in order to ascertain the said price of following the method adopted by the learned trial Judge in *The Commonwealth* v. *Arklay* (*supra*) with modifications necessary to apply it to the circumstances of this case, as more fully detailed in my reasons for Judgment hereinbefore referred to, a proper method in law ?

(3) If the answer is " Yes " to 1 (a), was the evidence referred to under the several heads in paragraph 12 of this Case, or under any, and if so which, of these heads, admissible ?

Dated this Fourteenth day of August, 1953.

B. SUGERMAN,
Judge of the Land and Valuation Court.

No. 1 (A).

Annexure, Notification of Resumption.

(Published in Government Gazette No. 106 of 20th September, 1946.)

LOCAL GOVERNMENT ACT, 1919.—PUBLIC WORKS ACT, 1912.

KU-RING-GAI MUNICIPAL COUNCIL : IMPROVEMENT AND EMBELLISHMENT OF THE AREA.

Acquisition of Land.

APPLICATION by The Council of the Municipality of Ku-ring-gai having been made that the land described in the Schedule hereto be appropriated

In the Full Court of the Supreme Court of New South Wales.

No. 1 (A) Annexure. Notification of Resumption. 11th September 1946—*continued.*

or resumed for the purpose of the improvement and embellishment of the area, IT IS HEREBY NOTIFIED AND DECLARED by His Excellency the Governor, acting with the advice of the Executive Council, and by the Minister for Public Works, that so much of the said land as is Crown land is hereby appropriated and so much of the said land as is private property is hereby resumed under Division 1 of Part V of the Public Works Act, 1912, for the purpose aforesaid; AND the Minister for Public Works hereby further notifies that the said land is vested in The Council of the Municipality of Ku-ring-gai.

Dated at Sydney this eleventh day of September, 1946.

J. NORTHCOTT, *Governor.*
J. J. CAHILL, *Minister for Public Works.*

SCHEDULE.

All that piece or parcel of land situate in the Municipality of Ku-ring-gai, parish of Gordon, and county of Cumberland, being lot B, deposited plan No. 17793—having an area of 17 acres 2 roods 11¾ perches or thereabouts, and said to be in the possession of C. B. Thistlethwayte and others.

Also, all that piece or parcel of land situate as aforesaid, being lot B shown in plan annexed to dealing No. C719078 and part of lot A, deposited plan No. 17793: Commencing on the south-eastern side of Bushlands-avenue at the northernmost corner of the said lot A; and bounded thence on the north-east by the northernmost north-eastern boundary of that lot bearing 158 degrees 29 minutes 40 seconds 2 chains 12.12 links; on the north-west by the easternmost north-western boundary of that lot and the north-western boundary of the said lot B bearing 59 degrees 58 minutes 20 seconds 2 chains 62.1 links; generally on the north-east by the north-eastern boundary of the said lot B and part of the generally north-eastern boundary of the said lot A, being lines successively bearing 159 degrees 15 minutes 17 chains 72.31 links, 243 degrees 17 minutes 17.2 links and 159 degrees 39 minutes 30 seconds 2 chains 47.96 links to the north-western side of Fitzroy-street; on the south-east and again on the north-east by that side and the south-western extremity of that street bearing 249 degrees 26 minutes 30 seconds 30.3 links and 159 degrees 39 minutes 30 seconds 1 chain respectively to the north-western boundary of the land shown in plan annexed to dealing No. C448970; again on the south-east by part of that boundary being lines successively bearing 249 degrees 26 minutes 30 seconds 6 chains 30.3 links and 204 degrees 33 minutes 64.39 links; again on the north-east by the south-western boundary of that land bearing 159 degrees 39 minutes 30 seconds 2 chains 49.19 links; again on the south-east by part of the south-eastern boundary of the said lot A bearing 249 degrees 26 minutes 30 seconds 10 chains 80.74 links to the southernmost corner of that lot; generally on the south-west by the generally south-western boundary of that lot being lines successively bearing 349 degrees 11 minutes 50 seconds 3 chains 11.1 links, 53 degrees 2 minutes 1 chain

No. 1 (A) Annexure. Notification of Resumption. 11th September 1946 – *continued.*

44 degrees 51 minutes 1 chain, 35 degrees 21 minutes 1 chain, 27 degrees 29 minutes 1 chain, 22 degrees 23 minutes 1 chain, 19 degrees 4 minutes 1 chain, 18 degrees 7 minutes 1 chain, 13 degrees 48 minutes 1 chain, 359 degrees 18 minutes 1 chain, 338 degrees 51 minutes 1 chain, 323 degrees 8 minutes 1 chain, 306 degrees 1 chain, 295 degrees 14 minutes 1 chain 30 links, 261 degrees 58 minutes 1 chain 30 links, 247 degrees 3 minutes 1 chain 30 links and 235 degrees 1 chain 57.4 links to the aforesaid south-eastern side of Bushlands-avenue ; and again on the north-west by that side of Bushlands-avenue, being 19 chains 16.4 links of the arc of a circle having a radius of 20 chains 18.18 links, the centre lying towards the south-east of the chord which bears 25 degrees 11 minutes 10 seconds for a distance of 18 chains 45.3 links and a line bearing 52 degrees 23 minutes 40 seconds 1 chain 25.95 links to the point of commencement—having an area of 31 acres 0 roods 24¼ perches or thereabouts, and said to be in the possession of C. B. Thistlethwayte and others.

NOTE.—Bearings are to Trigonometrical Meridian.

(Misc. 46-3,129). (9768)

No. 1 (C).

Annexure, Notice of Objection (Lot B).

No. 1 (C) Annexure. Notice of Objection (Lot B). 24th October 1951.

To the Valuer General,
5th Floor, Phillip House,
119 Phillip Street, Sydney.

OBJECTION is hereby made to the Certificate of Valuation No. 6289 relating to No. 349 as hereunder set out :
(Please quote this No.)

Valuation District : Kuring-gai. *Ward or Riding :* Killara. *Estate* · D.P. 17793. *Street :* Bushlands Ave. *House No. or Name* ..... *Sec.* ..... *Lot :* B. *Area or Dimensions :* 17a. 2r. 11¾p. *County :* Cumberland. *Parish :* Gordon. *Portion* ..... *Unimproved Value,* £12,000. *Improved Value,* £12,350. *Assessed Annual Value,* £618.

I contend that the Valuation should be altered as set out hereunder for the following reasons, viz. :—

That the values assigned are too low.

The Values contended for by us are as follow :—

Unimproved Value, £25,000. *Improved Value,* £29,000. *Assessed Annual Value,* £1,450.

C. BOWES THISTLETHWAYTE.
T. C. TURNER.
Trustees Est. William Moore decd.
C/- W. A. Gilder Son & Co.,
27 Hunter Street, Sydney.

24th October, 1951.

This Objection, to be valid, must be SIGNED by the Owner, Lessee, or Authorised Agent.

In the Full Court of the Supreme Court of New South Wales.

No. 1 (D).

Annexure, Notice of Objection (Portions G (B) and (A).)

No. 1 (D) Annexure. Notice of Objection (Portions G (B) and (A). 24th October 1951.

To the Valuer General,
5th Floor, Phillip House,
119 Phillip Street, Sydney.

OBJECTION is hereby made to the Certificate of Valuation No. 6290 relating to No. 318. as hereunder set out :
(Please quote this No.)

Valuation District : Kuring-gai. *Ward or Riding :* Killara. *Estate :* D.P. 17793. *Street :* Bushlands Ave. *House No. or Name* . . . . . *Sec.* . . . . *Lot :* Pts. G (B). and A. *Area or Dimensions :* 31a. 0rd. 24¼p. *County :* Cumberland. *Parish :* Gordon *Portion* . . . . . *Unimproved Value,* £7,500. *Improved Value,* £7,650. *Assessed Annual Value,* £383.

I contend that the Valuation should be altered as set out hereunder for the following reasons, viz. :—

That the values assigned are too low.

The Values contended for by us are as follow :—
Unimproved Value, £24,720. *Improved Value,* £26,000. *Assessed Annual Value,* £1,300.

C. BOWES THISTLETHWAYTE.
R. C. TURNER.
Trustees Est. William Moore Decd.
C/- W. A. Gilder Son & Co.
27 Hunter Street, Sydney.

24th October, 1951.

This Objection, to be valid, must be SIGNED by the Owner, Lessee, or Authorised Agent.

No. 1 (B) Annexure. Issues for Trial. Dated 23rd April 1952.

No. 1 (B).

Annexure, Issues for Trial.

IN THE SUPREME COURT OF NEW SOUTH WALES.

No. 4216 of 1951.

Between

CHRISTOPHER BOWES THISTLETHWAYTE and REGINALD CLARK TURNER ... ... *Plaintiffs*

and

THE MINISTER ... ... *Defendant.*

ISSUES FOR TRIAL.

WRIT issued 25th October, 1951
APPEARANCE entered 8th November, 1951.
DECLARATION dated 22nd November, 1951.

In the Full Court of the Supreme Court of New South Wales.

No. 1 (B) Annexure. Issues for Trial. Dated 23rd April 1952—*continued.*

SYDNEY TO WIT:

Christopher Bowes Thistlethwayte and Reginald Clark Turner by Telford Graham Gilder their attorney sue the Minister being the Constructing Authority within the meaning of the Public Works Act, 1912, for that application by The Council of the Municipality of Ku-ring-gai having been made that the land of the Plaintiffs described in the schedule to the notification hereinafter mentioned be resumed for the purpose of the improvement and embellishment of the area it was thereby notified and declared by His Excellency the Governor acting with the advice of the Executive Council and by the Minister for Public Works in the New South Wales Government Gazette and in one or more newspapers published or circulated in the police district wherein the said land is situated that the said land of the Plaintiffs was thereby resumed under Division 1 of Part V of the Public Works Act, 1912, for the purpose aforesaid and it was thereby further notified that the said land was vested in The Council of the Municipality of Ku-ring-gai and the Plaintiffs within ninety days from the publication of the said notification did serve upon the Defendant as such constructing authority as aforesaid and upon the Crown Solicitor a notice in writing setting forth the nature of the estate of the Plaintiffs in the said lands together with an abstract of their title and the nature of the damage which they have sustained or will sustain by reason of the said resumption and the Defendant duly caused a valuation of the said land to be made in accordance with the provisions of the said Act and informed the Plaintiffs of the amount of the said valuation by notice in the form by the seventh schedule to the said Act provided and more than ninety days have elapsed since the service upon the Defendant and upon the Crown Solicitor by the Plaintiffs of their said notice in writing as aforesaid and the Plaintiffs and the Defendant did not agree nor have they yet agreed as to the amount of compensation and the Plaintiffs institute these proceedings for compensation accordingly.

AND the Plaintiffs claim Sixty-six thousand pounds (£66,000).

PLEA dated 26th November, 1951.

The Defendant by Finlay Patrick McRae, Crown Solicitor, its Attorney, says that the claim of the Plaintiffs set forth in their Declaration herein exceeds the amount to which they are entitled as compensation in respect of the premises.

REPLICATION dated 7th December, 1951.

The Plaintiffs join issue upon the Defendant's Plea.

Dated this twenty-third day of April, 1952.

(Sgd.) T. GRAHAM GILDER,
Plaintiffs' Attorney,
27, Hunter Street,
Sydney.

In the Full Court of the Supreme Court of New South Wales.

No. 1 (F) Annexure. Judgment on Admissibility of Evidence. 3rd October 1952.

No. 1 (F).

Annexure, Judgment of Land and Valuation Court on Admissibility of Evidence.

HIS HONOR : It seems to me that confusion may be introduced into this question, as into the case generally, by speaking of the making of a valuation " as at December, 1948 " or " as at April, 1949," or " as at " any other date than September, 1946, which was the date of resumption.

The question which is posed in *Arklay's* case is not really a question of making a valuation as at some time later than the relevant date (being the date of acquisition or resumption). It is a question of making a valuation as at the date of acquisition or resumption, but on a particular basis. That basis is stated more than once in the judgment of the Full High Court in *Arklay's* case. It is stated at p. 5 of the roneoed copy which I have, in this form :

> " 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."

At p. 8 of the same copy of the judgment, the question is put in this way :

> " 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 reselling. To arrive at the result he is at liberty, if " on the evidence that seems the most satisfactory method, to " take into account both items under discussion."

What is posed in *Arklay's* case is a difficult question, but one nevertheless requiring to be determined as at the date of resumption or as at the relevant date, which in *Arklay's* case under the Commonwealth legislation, was something different from the actual date of resumption. We are required, as I understand the judgment, to envisage a hypothetical (hypothetical not merely in the sense that it is a hypothetical example of an ordinary class of transaction, but also in the further sense that the class of

transaction is unusual and unlikely to occur in practice) transaction as at that date in which the parties have regard not merely to the price which the controller would approve, but form an opinion as to the present value of the enhanced price which the purchaser might expect ultimately to obtain— in which the parties are, as it were, required to project their minds into the future for the purpose of taking into consideration the enhanced price which the purchaser might expect ultimately to obtain. That is a matter which, as at the relevant date, would necessarily be one of speculation. Since the mantle of Elijah could not be taken to have descended even upon hypothetical vendors and hypothetical purchasers, they could not at that stage be expected to foresee what the actual enhanced price would ultimately be, or to have anything more to go upon in the present than such information as they might possess as to the trend of the market or the likely trend of the market in the eventuality of the removal of controls, and their speculations about that particular subject matter.

In *Arklay's* case the Full High Court approved of the way in which the "retention value" had been calculated in two judgments to which it referred, namely the judgment of Mr. Justice Ligertwood in *W. H. Burford & Sons, Ltd.* v. *The Commonwealth of Australia* ((1949) S.A. S.R. 310) and the judgment of Mr. Justice Abbott in *Ellis* v. *The Commonwealth of Australia* ((1950) S.A. S.R. 30). *Arklay* v. *The Commonwealth* was itself an appeal from a decision of a single Justice of the High Court, Mr. Justice Webb, of which the only note I have at present available to me is in 25 Australian Law Journal at p. 622.

Referring to Mr. Justice Webb's decision, the Full High Court said at p. 9 of the roneoed copy which I have :

> " It would not be proper for this Court on an appeal of this " nature to substitute its own opinion of the amount that should " be allowed for that of the Court below unless it were satisfied " that the Court below had acted on some wrong principle of law " or that the value was entirely erroneous."

At p. 10 it was said that the Appellant, The Commonwealth of Australia, had failed to establish that His Honor acted on some wrong principle of law or that the value was entirely erroneous.

There was, therefore, in the judgment of the Full High Court in *Arklay's* case, an approval of the method which Mr. Justice Webb had adopted, at least to the extent of an indication (and this is all that is relevant for the present purposes) that His Honor had not acted on any wrong principle of law, or arrived at an entirely erroneous value.

How, then, had Mr. Justice Webb dealt with the matter ? He came to certain conclusions, and, for brevity, I need only refer to his conclusions with respect to the value per foot of the land. He came to the conclusions that as at the 1st January, 1946, which was, under the Lands Acquisition Act, the relevant date, that value was about £130 per foot ; and that within six months of the removal of controls that value was £175 per foot. How did His Honor arrive at those conclusions ? It would seem that he had

In the Full Court of the Supreme Court of New South Wales.

No. 1 (F) Annexure. Judgment on Admissibility of Evidence. 3rd October 1952— *continued.*

before him the evidence of valuers, and as I am informed from the Bar Table, he had also before him evidence of sales, evidence of sales on which he bases those three estimates, including evidence of sales which had occurred after the expiration of the period of controls.

It was on the basis of those three values, or rather of values of the whole of the resumed property derived therefrom, that His Honor arrived at his ultimate figure, a figure with which the Full Court declined to interfere as being neither founded on an acting on some wrong principle of law nor entirely erroneous.

I should, with respect, not take it that His Honor, in proceeding by that method, was attributing to the parties to the hypothetical transaction as at 1st January, 1946, a foreknowledge that the value of the land as at the time of removal of controls would be £160 per foot or that six months afterwards it would be £175 per foot, or a knowledge in advance of the later transactions on which His Honor's view as to those two values of £160 per foot and £175 per foot, or the views of the valuers before His Honor as to those two figures, was, wholly, or in part, founded. Nor would it appear that the Full High Court, in saying that His Honor had acted on no wrong principle of law and had not arrived at a value that was entirely erroneous, assumed or meant thereby that His Honor had gone through any such process as I have mentioned. Rather would it appear that what underlay this particular method of dealing with the problem was the throwing overboard of speculation in favour of facts as they were known and could be established at the time of hearing, notwithstanding, and, indeed, because, those facts had occurred between the relevant date (the date of the hypothetical transaction) and the time when the matter came before His Honor for hearing in October, 1951. Rather would it appear that what was done was to substitute, for an endeavour to speculate about the speculations of the hypothetical parties to a hypothetical transaction, a consideration of the actual events as they had since happened, as a practical method of endeavouring to solve this difficult problem. And, as I have said, the Full High Court said that the Appellant, the Commonwealth, had failed to establish that His Honor acted on some wrong principle of law or that the value was entirely erroneous.

If that is a correct view of the matter, and it seems to me to be so, within certain limits I have difficulty in seeing where one is to draw the line or why one should draw the line precisely at December, 1948, or at April, 1949. I say " within certain limits " and I mean within certain limits, and I will indicate in a moment what those limits may be. If for the purpose of solving a difficult problem of this sort, it is proper, in the words of a well-known case *In re Bradleeny* ((1943) 1 Ch. 35 at p. 45), to prefer facts where they are available to prophecy, then I have difficulty in seeing why one should stop at either of those particular dates.

It may well be that the object of enquiry on this branch of the case is to ascertain what the land would have sold for some short and reasonable time after the expiration of controls, in order that one may ascertain the sum which would compensate the vendor for the present value of the

enhanced price which the purchaser might ultimately expect to obtain. It would seem that the enhanced price therein referred to is not the price which a purchaser might expect to obtain ultimately if he held the land for any length of time after the expiry of controls, e.g. 15 or 20 years, but within a reasonably short time after the expiry of controls. When I speak of ascertaining what the land might have been sold for, say, six months after the expiration of controls, I always have to have in mind that that is not in itself the question in the case. The relevant question in the case is " What sum as at September 1946 would have been considered by the " parties to the hypothetical transaction to be the enhanced price which " the purchaser might expect ultimately to obtain ? " The quantification of that sum by reference to a determination of what the land would have brought six months after controls on a consideration of sales which had occurred in the intervening period of six months is not answering the true question, which, in itself, is unanswerable, except as a matter of speculation. It is substituting facts which have become known between the relevant date and the date of hearing for an attempt to speculate about what the speculations of the parties would have been.

If you may lawfully, and without incorrectness in the result, carry the matter that afar in relation to a novel and difficult problem such as is posed by *Arklay's* case, I see no reason why you should not carry it the further step which Mr. Hardie seeks. It is indeed no great step ; and in stating what it is, I indicate the limits which I referred to a little earlier. What Mr. Hardie puts, as I understand him, comes to no more than this :—He proposes to place before the Court a number of transactions (some in the Spencer Road, Ridgeland Avenue, Highbridge Road, area, and one in the St. Johns Avenue, Lynn Ridge, Bushlands Avenue area) which did occur within a very short period after the expiration of controls. To the first group, which took place between 24th September, 1948, and 28th January, 1949, there might perhaps be added two further ones which took place in May, 1949 ; in the St. Johns Avenue, etc. area, there is but one, which occurred on the 30th March, 1949. Then what Mr. Hardie seeks to do, as I understand, is this :—He says these transactions are there ; they are facts indicative of the price which might have been expected to be obtained for the subject land shortly after the lifting of the control. He seeks to establish that this price was not merely some isolated or temporary phenomenon. He seeks to establish by subsequent sales, at the same or at higher prices, of the same or closely similar parcels of land, that the group of sales occurring within six months or thereabouts after the lifting of controls affords a reliable foundation for an inference as to what might have been obtained for the subject land within a short period, six months or thereabouts, after the lifting of controls. As I understand him, he says that that is particularly important in relation to the group of sales in St. Johns Avenue etc. where there is only one sale within six months after the lifting of controls.

The sole purpose of this evidence as to the later sales is to show that the substantial increase above controlled prices in the early post-control

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No. 1 (F) Annexure. Judgment on Admissibility of Evidence. 3rd October 1952— *continued.*

period was not merely temporary or restricted to a few isolated transactions and was maintained and not followed by a regression to the earlier level.

It may be a matter for discussion how much support this case derives from this evidence. It may be that there has to be taken into consideration the number of transactions and the extent of the subsequent increases. Those are matters which remain for consideration. But in point of principle I do not see how for the purposes of investigating this particular problem raised by *Arklay's* case and in following out the line of reasoning in *Arklay's* case, I can reject the evidence. Therefore I propose to admit it.

No. 1 (E) Annexure. Reasons of Sugerman, J. 20th March 1953.

No. 1 (E).

Annexure, Reasons of Mr. Justice Sugerman.

JUDGMENT.

HIS HONOR : Objections to valuation and action for compensation for resumption in respect of 48 acres 2 roods 36 perches of land, part of the estate of William Moore, deceased, of which the objectors and Plaintiffs are the trustees.

The subject land is situated at Gordon on the western side of the Pacific Highway with a boundary to St. John's Avenue. Its western portion may be said to lie in the general vicinity of that road and Bushlands Avenue, and its eastern portion in the general vicinity of Spencer Road. At the time of resumption the land was laid out as a golf course of which 14 holes were on the subject land and the remaining four holes on adjacent land of the estate across St. John's Avenue. The golf course, known as " Lynn Ridge," was let to a tenant under a lease expiring on 31st December, 1950, at a rental of £1,050 per year, the tenant paying rates and taxes. It was conducted by the tenant as a public golf course to which players were admitted for a fee for the round. The acquisition was by the Council of the Municipality of Kuring-gai through the machinery provided in Part XXV of the Local Government Act, 1919. Resumption was effected on 20th September, 1946.

The subject land is now part of an area coloured dark green on the scheme map under the County of Cumberland Planning Scheme Ordinance. It is therefore now subject to the restrictions contained in either clause 14 or Part II, Division 2, of the Ordinance, according to whether it is to be considered as " built-up " land or " vacant land " as defined in Clause 8. In either event the development of the land by subdivision for residential purposes is now, substantially, precluded by the restrictions in the Ordinance.

As at the time of resumption, viewed only as land and without regard to any possibility of restriction on use under Part XIIA of the Local

Government Act, 1919, or under any prescribed scheme which might thereafter come into operation, the subject land was suitable for subdivision into residential sites. No prescribed scheme affecting it came into operation until 27th June, 1951, when the Local Government (Amendment) Act, 1951, brought into force the County of Cumberland Planning Scheme Ordinance. The interim development provisions of Division 7 of Part XIIA had been in operation since 9th November, 1945. And, since before the time of resumption, a scheme had been in course of preparation by the Cumberland County Council.

The solicitor of that Council has given evidence and maps and other documents put out by the Council have been tendered. That evidence shows how the subject land was treated from time to time in the course of preparation of the scheme. At the time of resumption it had not been tentatively zoned but was in an undetermined area, treated however by the Cumberland County Council, in guiding itself and the Municipal Council on questions of interim development, as tentatively reserved for recreational use. Applications for interim development permission in undetermined areas were required to be referred by the Municipal Council to the Cumberland County Council.

In my opinion, a prudent prospective purchaser as at the time of resumption would have made inquiry of the Cumberland County Council or the Kuring-gai Municipal Council or both. And it is a proper inference from the evidence that the result of the inquiry would have been to convey to him, first, that permission for any form of interim development inconsistent with the preservation of the land for recreational use was unlikely and, secondly, that he must reckon with the possibility that any prescribed scheme which might result from the preparatory work then in progress would impose restrictions designed to secure preservation of the land for that use.

What I have said as to the situation at the time of resumption is applicable, and even with greater force, to the situation at any later period which may have to be considered. I refer, in particular, to a time at or about or shortly after the termination of the control of the sale of vacant land (20th September, 1948) which may have to be considered in applying the decision in the *Commonwealth* v. *Arklay* ((1952) Argus L.R. 640). Before 20th September, 1948, a draft ordinance and a scheme map had been prepared by the Cumberland County Council and exhibited for public inspection (see Local Government Act, 1919, Section 342F). The map showed the subject land as in an area reserved for open space, parks and recreational areas ; the draft ordinance (Clauses 11 and 12 and definition of " Reserved Land " in Clause 3) imposed restrictions on the use of land so reserved.

What was the effect of these prospects of restriction upon the value of the subject land ? In considering this question regard must be had to Section 342AC of the Local Government Act, 1919, which confers a right to compensation upon (so far as is here relevant) any person having an estate

or interest in land to which a prescribed scheme applies where such estate or interest is injuriously affected by, amongst other things, the coming into operation of any provision contained in a prescribed scheme or any restriction imposed by or under a prescribed scheme (subsection (1)).

Subject to certain provisions which have not been suggested to be relevant here, the measure of compensation is defined by subsection (4) (a) of Section 342AC. It is " a sum equal to the difference between the market " value of such estate or interest at the time of the coming into operation of " the provision of the prescribed scheme . . . or the prohibition or " restriction imposed by or under the prescribed scheme, as the case may be, " out of which the claim for compensation arose and what would have been " the market value of that estate or interest if such provision had not come " into operation . . . or such prohibition or restriction had not been " imposed, as the case may be." At the time of resumption the Plaintiffs had land which was suitable for subdivision. But, had it remained in their hands, they might thereafter have been prevented from subdividing it by the operation of a prescribed scheme. If and whenever this should have occurred, the Plaintiffs would, none the less, have been left with the full market value of the land as at the time of such occurrence and as unaffected thereby, made up partly of the value of the land itself as thus injuriously affected and partly of a claim for compensation. A purchaser from the Plaintiffs as at the time of resumption would acquire the land with the like risk of its subdivisibility being prevented. But, if that happened, he too would be placed in the like position of having the full and unaffected market value restored to him by the accrual to him of a claim for compensation.

(It has been suggested by counsel for the Defendant that Section 342AC (4) may not have the effect I have stated and that the words " what would have been the market value " etc., may refer to market value as affected by the interim development provisions of Division 7 of Part XIIA. I do not agree. The interim development provisions were operative only until either the scheme in preparation came into operation or the Minister notified his decision not to proceed with it (Section 342T (1)). The mere existence of the provisions on the Statute Book did not affect value. What may have affected value was the anticipation that they would be applied in aid, *ad interim*, of some particular restriction known to be contemplated under the provisions of a scheme in preparation. If the scheme containing that restriction in fact became operative, the depreciatory effect of apprehension of a restriction would be merged in the depreciatory effect of its actual existence. The language of the subsection is elliptical and something has to be supplied, e.g., the time as at which the secondly referred to " market value " is to be ascertained. But the language does not require a construction opposed to the dominant purpose of the scheme of compensation, which is to restore in the form of compensation the equivalent of the depreciation in value produced by the actual coming into operation of the restriction.)

Evidence has been led as to the value of the subject land on two different bases which I may refer to, broadly, as the golf course basis and

the subdivisional basis. The first attributes to the land only its value as a golf course on the view that the practical effect of such restrictions as were to be apprehended would be to limit use to use as a golf course. The second basis values the land as land subdivisible for residential purposes.

The evidence offers no foundation, and neither party has contended, for any basis of valuation intermediate between, or other than, these two. The Defendant's position is that the subject land should be valued on the golf course basis and on that basis only. This imports that the hypothetical purchaser should be regarded as having been prepared to pay no more for it than its value as a golf course notwithstanding that in the event no restriction might be imposed or that, if it were, it would be accompanied by a right to compensation such as I have described. The Plaintiffs' position is that in making a valuation as at the date of resumption, or as at any other time which may have to be considered, the subject land should be valued on a subdivisional basis. On this view it is not so much a matter of ignoring any prospect or possibility of restriction as of treating it as having no practical consequence, since whatever depreciatory effect it might have should be regarded as completely offset by the statutory provision for compensation in the event that restriction should in fact occur.

In considering which of these is the correct approach it has to be borne in mind that, viewing the matter as at any material time, this is a case of restrictions not as yet imposed by any prescribed scheme and of a claim for compensation not as yet accrued. At material times restrictions of this character were but in possibility or in prospect and the accrual of a right to compensation was dependent upon a later actual imposition of restrictions.

The valuation of land after events had happened which had given rise to a claim for compensation under Section 342AC might involve considerations other than those here involved. Such an accrued right to compensation might have to be regarded as a right personal to the owner of the land at the time of its accrual. The right might be assignable, i.e. by express assignment (cf. *Dawson* v. *Great Northern and City Railway Co.* (1905) 1 K.B. 260) but yet be independent of the land itself and not a factor in its valuation. Thus land might have to be valued subject to an existing statutorily imposed restriction upon use (as being a characteristic of the land itself binding it in the hands of any taker) but without regard to a corresponding accrued right to compensation (as being a separate and personal right not belonging to or running with the land itself).

On the other hand the owner as at 1946 or 1948 of land in the then situation of the subject land had land and nothing more. The land might thereafter have been affected by a prescribed scheme and, if the original owner had in the meantime parted with the land, the right to compensation would then have accrued not to him but to the new owner. Both the risk of such an injurious affection and the expectancy of a right to compensation in respect thereof were thus characteristics of the land itself passing with it into whosever hands the land might pass to by purchase or otherwise. (It is possible that a right to compensation may thus accrue even after resumption and to the resuming authority.)

Having regard to these considerations I am of opinion that of the two views of the matter already stated that put by the Plaintiffs is to be preferred. It would be unreasonable to attribute to a hypothetical vendor a willingness to sell his land at a price assessed with regard to the possibility of its being thereafter injuriously affected by a prescribed scheme but without regard to the complementary coming into existence in that event of a right to compensation conferred by statute in order to restore the market value to the then owner. It would similarly be unreasonable to consider a hypothetical purchaser as expecting to acquire the land at a price ascertained with regard only to the one factor and not to the other and countervailing factor.

It may be that the apprehension of restrictions on use, even though such restrictions would be accompanied by the accrual of a claim to compensation, would limit the field of actual purchasers ; it might, indeed, reduce the field to nil in some cases. Persons desiring land for some particular purpose may be unattracted by a property which is subject to some real prospect of a restriction preventing its use for that purpose, notwithstanding the existence of statutory provisions for compensation.

However these considerations do not seem to me to require any departure from the view which I have expressed. " The all important " fact . . . is the opinion regarding the fair price of the land which " a hypothetical prudent purchaser would entertain . . ." (*Spencer* v. *The Commonwealth,* 5 C.L.R. 418, at p. 440). " The theory of the " hypothetical purchaser does not therefore assume the existence of " a person actually willing to buy " (*Federal Commissioner of Land Tax* v. *Duncan,* 19 C.L.R. 551, at p. 554). " The existence of a person desirous " of buying the land at a fair price must be assumed " (*Deputy Federal Commissioner of Taxation* v. *Gold Estates of Australia (1903) Ltd.,* 51 C.L.R. 509, at p. 515). And it is the ascertainment of a " fair " price which I have been discussing.

Since the prospect of restriction, on the one hand, and the prospect of compensation, on the other, are factors which in the light of the statutory prescription of the amount of compensation notionally cancel each other out, the Plaintiffs' approach should be adopted. The other approach ignores altogether this cancelling out of the prospective disadvantage of restriction by the complementary prospective benefit of compensation. The approach of the Plaintiffs furnishes a practical method of arriving at a correct result by ignoring both factors (since they are precisely counterpoised) and therefore valuing the land as if the possibility or prospect of injurious affection by a prescribed scheme did not exist.

These proceedings include both an objection to valuation and an action for compensation. It is, therefore, necessary to decide whether an amount ascertained as I have stated represents the " improved value of the land " as defined by Section 5 of the Valuation of Land Act, 1916–1951, or whether the improved value as thus defined should be arrived at on some different basis, leaving the full measure of compensation to the operation of the saving provisions of Section 68.

In my opinion, in determining the improved value as defined by Section 5, the two countervailing factors before referred to should be taken into consideration in the manner which I have mentioned, that is by regarding one as setting off the other and therefore ignoring both. As, I have said earlier, these proceedings are not concerned with the effect upon value of an already existing restriction on use and, if it has any effect, an already accrued right to compensation which may be of a personal character. Nor are they concerned with an uncompensatable restriction, actual or prospective, or with one for which the compensation proposed by law is inadequate. To the extent that the " fee simple of the land " referred to in Section 5 was diminished in value by the possibility or prospect of injurious affection by a prescribed scheme and the capital sum which it might be expected to realise correspondingly diminished, to that extent such diminution must be regarded as offset by the prospective accrual of an equivalent right to compensation as being equally a factor affecting the value of the fee simple and the capital sum which it might be expected to realise. The section means " business terms from both standpoints, and the " Act assumes the seller will not sacrifice his own interest, or insist on " the purchaser sacrificing his. The land is, by hypothesis, to be " transformed into its fair equivalent in money " (*Federal Commissioner of Taxation* v. *Duncan*, *supra*, at p. 559).

In case the contrary opinion to that expressed above should prevail, I shall indicate the view which I have formed on the evidence with respect to the value of the subject land on what I have called, broadly, the golf course basis. Two approaches have been put forward. The Plaintiffs approach the matter from the standpoint of a sale of the subject land to a golf club purchasing with a view to using the land as its golf course to be played upon by its members. The Defendant's approach contemplates the continued use of the subject land as a public golf course, and, accordingly, the sale to a purchaser who would, as the Plaintiffs did, derive revenue from it by letting it for use for that purpose.

Valuation of land as a golf course on the first mentioned approach presents certain difficulties, especially if the value has to be considered in the light of actual or prospective statutory restrictions on the use of the land whose practical effect is to confine its use to use as a golf course. The Plaintiffs have sought to employ a summation method, that is to say to place a value on the land as unimproved land and to add to that unimproved value the estimated cost as at the material date of effecting the various improvements on the land—the fairways, greens, etc.—as they then stood.

It is conceivable that such a summation might in appropriate circumstances lay a foundation for the valuation of land as a golf course. It would be necessary, of course, to meet the initial difficulty of ascertaining the unimproved value of the land considered as land burdened or threatened with a statutory restriction confining its use to use as a golf course. On this point it is open to question whether the opinion as to the unimproved value which has been expressed in this case really derives support from the matters on which it is founded.

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However that may be, this approach to valuation as it is put forward by the Plaintiffs cannot, in my opinion, be accepted without more. What they put is that the summation mentioned represents, without any qualification or modification, what would be paid for the land by a golf club proposing to use it not commercially as a public golf course but for the enjoyment and recreation of its members. If that is correct in appropriate circumstances, it is not correct as a matter of course and without more. It is at least essential to its correctness that the course as it stands should be reasonably suitable for the purposes of a club of the type which would desire to purchase its own course and that its purchase, at a price arrived at by a simple summation of the kind mentioned, should be as attractive and advantageous to the club as the construction of a new course on unimproved land acquired for that purpose.

That proposition is implicit in the submission that the value may be arrived at by a simple summation. But here the evidence, both of a golf-course architect called by the Plaintiffs and generally, far from supporting this proposition shows that the course would not be likely to be attractive to a golf club seeking a course for the use of its members but is suited rather to the different and less exacting requirements of a public course, for which purpose it was constructed and has been used. In these circumstances it appears to me that if the land is to be valued on a golf course basis it must be valued as a public golf course or, as it has been put, on a " commercial basis," i.e. on the evidence, by appropriate capitalisation of the anticipated return.

Since the resumption took place during the period of land sales control, it is necessary to consider another general question, namely, the applicability of the recent decision of the High Court in *The Commonwealth* v. *Arklay* (*supra*). It was submitted on behalf of the Defendant that the decision in *Arklay's* case is applicable only to an acquisition under the Lands Acquisition Act, 1906–1936 (Commonwealth), and is not applicable to a resumption under the Public Works Act of this State.

I have already had occasion to decide this question in *Milgate* v. *The Minister* (8/8/1952, unreported). I there said :—

> " The first matter on which I have to express an opinion is
> " Mr. Hooke's submission that the recent decision of the High
> " Court in *The Commonwealth* v. *Arklay* is applicable only to an
> " acquisition under the Lands Acquisition Act, 1906–1936, of the
> " Commonwealth. *Arklay's* case was a case of such an acquisition.
> " The answer to the question raised is stated in the judgment to
> " depend primarily upon the meaning of the particular Act
> " providing for compensation, which there was the Lands
> " Acquisition Act, and it is said in the judgment that the meaning
> " of ' value ' in Section 28 (1) (a) of that Act ' must be interpreted
> " ' against the background of the Constitution which in Section
> " ' 51 (xxxi) requires that legislation for the acquisition of
> " ' property shall afford just terms.'

" However, under Section 124 of the Public Works Act, as under " Section 28 (1) (a) of the Lands Acquisition Act, for the purpose " of ascertaining the compensation to be paid, regard must be " had to the ' value of the land taken.' The statement in the " judgment in *Arklay's* case that the willing vendor-willing " purchaser test ' requires considerable adaptation when the " ' compulsory acquisition occurs in a period of controls,' and the " reasoning upon which that statement is based and with respect " to the mode of effecting the adaptation, appear, when the " judgment in *Arklay's* case is read as a whole, to be independent " of constitutional considerations and as applicable to the " ascertainment of ' value ' under Section 124 of the Public Works " Act as to its ascertainment under Section 28 (1) (a) of the Lands " Acquisition Act. I believe that I should be reading the High " Court's judgment in an unduly restrictive fashion were I to read " it as of no more force than as a decision limited to the " construction of the Lands Acquisition Act."

In *Milgate's* case it was unnecessary to consider whether the decision in *Arklay's* case is to be applied in determining " improved value " as defined by Section 5 of the Valuation of Land Act, 1916–1951, or whether effect is to be given to it under the saving provisions of Section 68 of that Act. On the first limb of this question nothing was decided, in my opinion, in *Arklay's* case which would require a departure from the previous decisions of this Court in *O'Donohoe* v. *The Valuer-General* (17 L.G.R. 112) and other cases. These decisions were on the construction of legislation different from anything which was in question in *Arklay's* case, that is, on the definition of " improved value " in Section 5 of the Valuation of Land Act, 1916. The element of value over and above the controlled price (the " retention value "—*Arklay's* case at p. 643) is an addition to " the " capital sum which the fee-simple of the land might be expected to realise " if offered for sale " on the relevant date, since that capital sum could be no more than the Treasurer approved (*O'Donohoe* v. *The Valuer-General, supra*). However, it is in my opinion an ingredient in " the value of the " land to be . . . taken " which, under Section 124 of the Public Works Act, 1912, is the measure of the compensation to be paid on resumption.

Section 68 (1) of the Valuation of Land Act provides that the valuation under that Act of the improved value of land which may be resumed under the Public Works Act, 1912, shall, notwithstanding any provisions of that Act, be held to be " the value of the land resumed." It recognises, at the same time, that " the valuation of the unimproved value " under the Act is not necessarily " the value of the land resumed " and makes provision accordingly :—" but shall not exclude the rights of a claimant for forced " sale or disturbance of business or otherwise, or for any special value " which the land may have to the owner." These are words which can refer only to ingredients in " the value of the land " (*Commissioners of Inland Revenue* v. *Glasgow and South Western Railway Co.*, 12 A.C. 315) (other elements in compensation under Section 124 of the Public Works Act are provided for in Section 68 (2) (c) of the Valuation of Land Act).

They can refer only to such ingredients since " the rights of a claimant "can only mean rights conferred by one of the Acts mentioned in the sub-section.

The words which I have quoted from Section 68 (1), if in some respects not clear, are wide. They are apparently intended to embrace elements which, by judicial interpretation of the phrase " the value of the land " when used as defining a measure of compensation, have been held to fall within that phrase but which may not fall within the formula set out in Section 5 of the Valuation of Land Act.

The determination of compensation for resumption under the conjoint operation of the Public Works Act and the valuation of Land Act is not free from complexity, and the construction of Section 68 of the last mentioned Act is not free from difficulty, particularly when regard is also had to the words " notwithstanding the provisions of any such Act " in subsection (1) and to the terms of subsection 2 (c). Whether the Legislature intended to alter the basis of compensation for resumptions under the Public Works Act, or whether it intended no more than a virtual supersession in many cases of existing procedural methods of assessing value, is a problem which in general terms it is not here necessary to solve I merely draw attention to the second sentence of Section 2 of the Valuation of Land Act, and to the question whether it was likely that the Legislature intended that compensation for resumption under the Public Works Act should be governed by one principle in one district or part of a district and by another principle in another district or part, the demarcation depending upon executive action under Section 2 which itself would probably depend upon the progress made by the Valuer-General in performing the great task imposed upon him by Section 14. (An example of the practical results of that would be that for many years compensation for a resumption in Redfern would have been governed by a different principle from compensation for a resumption in Sydney.) For present purposes it is sufficient that, in my opinion, the " retention value " pursuant to *Arklay's* case is either a " special value which the land may have to the owner " (that is, as founded on the dispossessed owner's loss of *his* liberty to retain the land until he should be free to dispose of it for more than the controlled price), or a form, appropriate to the peculiar circumstances and authoritatively held to be included in the " value of the land " in those circumstances, of " compensation for forced sale."

Thus, in my opinion, the principles laid down in *Arklay's* case do not affect the determination of the " improved value " as defined by Section 5 of the Valuation of Land Act, 1916–1951. But they are relevant to the determination of " the value of the land " under Section 124 of the Public Works Act, 1912, for the purpose of determining the compensation to be paid in respect of a resumption effected under that Act. And their operation for that purpose is preserved by the saving provisions of Section 68 of the Valuation of Land Act.

I quote the following statements of principle from the judgment of the High Court (Dixon, C.J., and Williams and Kitto, J.J.) in *The Commonwealth* v. *Arklay* (*supra*) :—

> " 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." (p. 643.)

" The amount added to the fixed price would depend partly " upon the extent to which the valuer considered the existence " on controls was depreciating the price which could otherwise be " obtained in the market and partly upon the nature of the " control and the probability of its continuance." (p. 643.)

" To assess the fair value to the owner of the 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." (p. 644.)

". . . and 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 " reselling. To arrive at the result he is at liberty, if on the " evidence that seems the most satisfactory method, to take into " account both items under discussion." (p. 644.)

Evidence has been given in these proceedings of what the subject land would have brought if sold *in globo* at the time of resumption to a person purchasing with a view to subdivision and resale of the individual lots. This is evidence of what I have called value on the subdivisional basis, no regard being had to any prospect of restrictions on use. Its foundation is the anticipated gross realisation from the resale of the individual lots in subdivision at prices estimated by a consideration of the prices obtained with the approval of the Treasurer on sales of similar lots during the period of control and thus themselves likely to be approved if the individual lots of the subject land were sold during that period.

On the evidence the *in globo* valuation as at the time of resumption arrived at on this foundation may be accepted as an estimate of the price

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which the Treasurer would have approved in respect of an *in globo* sale on the subdivisional basis at that time. It represents the first item referred to in *The Commonwealth* v. *Arklay*—" the price fixed by the Controller " or " 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 must be assessed." I shall refer to this as the controlled price.

Evidence has also been given of what might have been expected to be obtained for the subject land, similarly ignoring any prospect of restriction, if retained and sold after the expiry of the control. The Plaintiffs' witness founded their estimate of post-control gross realisation on a consideration of uncontrolled sales up to April, 1949, and the Defendant's only witness on this branch of the case founded his opinion on a consideration of uncontrolled sales up to December, 1948. Outgoings were based on estimates of costs in or about December, 1948.

On the evidence, the controlled price is, in my opinion, £25,250 arrived at as follows :—

Gross realisation		£58,750
Less :		
Commission	£1,762	
Legal costs on sales	720	
Advertising	150	
	£2,632	2,632
		56,118
		9,353
Risk of Realisation 20 per cent.		46,765
Less Subdivisional expenses :		
Road construction (including contribution)	£15,700	
Drainage	2,100	
Supervision	1,068	
Survey	375	
Valuation (L.S. Control)	100	
Legal costs on purchase	65	
Stamp duty	251	
Rates (1½ years)	385	
Land Tax (1½ years)...	65	
Interest (1½ years at 4 per cent.)	2,805	
	22,914	22,914
		23,851
or in round figures		£23,850
Add Building		1,400
		£25,250

I state the following conclusions as to various of the ingredients in a valuation of the subject land as at a period after the expiration of the control, having regard to uncontrolled sales up to 31st December, 1948, or April, 1949, and to estimated costs prevailing in or about December, 1948 :

Gross realisation	£102,500
Commission on sales	2,950
Legal costs on sales	1,116
Advertising	300
Cost of Road construction (including contribution) ...	20,300
Drainage	2,700
Supervision	1,380
Survey	540
Legal costs on purchase	130
Rates (1½ years)	385
Land Tax	65
Value of building	2,000

I have taken three years as the estimated period of realisation but have omitted interest and stamp duty as being matters of calculation which cannot be worked out unless the allowance for risk of realisation is ascertained. I have omitted a conclusion as to that allowance, and therefore of any final figure for land value, for reasons to be stated later.

With respect to the above figures I make the following observations :

(i) On the evidence I conclude that a purchaser could not have relied with any confidence upon alteration of the existing residential district proclamation such as would enable the area of the land set aside in the hypothetical subdivision as shop sites to be sold as such. The above estimate of 1946 gross realisation is derived from Mr. Dimond's and Mr. Bird's valuations and the estimate of post-control gross realisation from Mr. Litchfield's and Mr. Bird's. Putting aside increased prices for shop sites, these are pairs of almost identical figures in each case, differing by no more than about 2 per cent. in the one instance and 3 per cent. in the other. In the circumstances, it has seemed proper to take the average figure in each case with a small addition to allow for the possibility that some shops might be allowed. On the evidence Mr. Litchfield's 1946 figure appears to me to be too low. Mr. Raine's figure approaches and supports the conclusion at which I have arrived. Mr. Dimond's post-control figure is, in my opinion on the evidence too high ; Mr. Raine did not undertake a post-control valuation.

(ii) Prices in the period 21st September, 1948—April, 1949, were in advance of those during the period of control and later sales show a subsequent further advance. But neither the sales nor the experts' opinions afford any clear ground for concluding that there were significant variations within the period 21st September, 1948—April, 1949, itself, that is to say once the short " lull " referred to in evidence had passed and a new post-control price level had been established. Mr. Bird has said that after the commencement of 1949 there was an increase, not very high, which he puts

at 10 per cent., but the sales supply no very clear picture of an increase and, leaving shop sites out of account, Mr. Litchfield's valuation, taking sales up to April, 1949, into consideration, exceeds Mr. Bird's, taking sales only up to December, 1948, by no more than about 3 per cent.

(iii) As to the costs of road construction and drainage, it is a difficult matter to fix upon what sum the parties would have contemplated at the relevant time as a reasonable estimate of their probable cost. Very little work of the kind was then being undertaken and, because of the shortage of surveyors available for private work and difficulty in securing the labour and plant necessary for constructional work, difficulties and delays were likely to be experienced. Widely varying estimates have been given in evidence. For the road construction and drainage work (including the contribution agreed to be made to the Council, but excluding survey and supervision) Mr. West's estimate was £14,350, Mr. Jackson's £20,900 and Mr. Brown's, on a comparison of his unit costs with Mr. Jackson's, some 15–20 per cent. higher. I have arrived at a figure in respect of these items totalling £17,800. On a consideration of the evidence on this question it appears to me that the parties are not likely to have arrived at as high an estimate as Mr. Brown's, and that, of the three estimates, Mr. Jackson's furnishes the best guide to the parties' probable estimate of what work would be required and its probable cost. What I said, however, is subject to certain qualifications which account for the difference between Mr. Jackson's estimate and the figure which I have arrived at. The first relates to a substantial part of this difference and concerns the piping of the main drainage channel, the entire cost of which is cast by Mr. Jackson upon the subdivider. It may be granted, and I think the evidence establishes, that the piping of that channel would add to the amenities of the district as compared with leaving the council with an open drain. However, this channel is only to a minor extent concerned with the drainage of the subject land. It is very much more concerned with carrying away the drainage from a substantial area roughly to the north of the subject land, and this greatly exceeds any drainage which would find its way into the channel from the subject land when subdivided. It seems to me that it would be imposing an excessive burden upon the subdivider to require him to provide pipes adequate to carry the whole of this drainage. While it might be reasonable to require him to bear the cost of pipes under his newly constructed roads, for the rest he should be limited to a contribution based on the cost of such pipes as would suffice to carry the water from the subject land, of which Mr. Alderton gave an estimate. This accounts for a little over £1,300 of the difference between the figures I have given and Mr. Johnson's estimate. The residue of that difference is attributable to my consideration of certain evidence given by Mr. West and his partner Mr. Alderton, which has satisfied me that adjustments of Mr. Brown's figures are required in order to arrive at an estimate which is reasonable in the light of all the evidence. The matters involved relate to questions of rock excavation and the use of the resulting material, or portion of it, in construction, the method of estimating drainage costs in order to arrive

at the cost of the job and more particularly in relation to allowing for sumps, and the rate of increase of costs during the period 1946–1949 in relation to the use of later costs as foundations for an opinion as to those at an earlier time. I should add that with respect to estimated costs as at or about the termination of controls there is no very substantial difference between Mr. Jackson on the one hand and Mr. West and Mr. Alderton on the other. I should also add that the whole matter is one of arriving at a reasonable estimate, and of arriving at such an estimate in relation to circumstances of some difficulty, and that one of the grounds for the allowance for risk is the possibility of error in estimates of this character (see the discussion of that subject later in these reasons).

(iv) On the evidence, I have taken a period of three years for subdivision and realisation in making provision for interest and rates and for other purposes.

(v) As to the value of the buildings, there are differences of opinion amongst the valuers. The only building of which it can be said with any assurance that it would be of any real value on subdivision is so much of the main building, as, in Mr. Raine's words, might be used as the beginning of a bungalow. It seems to me that Mr. Raine's estimate of cost may be taken as the best guide available in the evidence and such other factors as there may be, which are not readily reducible to any figure, may be treated as balancing each other out.

(vi) On other items I have formed the best opinion which I could on the witnesses' estimates and any foundations which were stated for them. Risk of realisation remains for later consideration.

(vii) The estimate of £23,850 for land value which I have arrived at as representing the controlled price for the land is not greatly different from Mr. Litchfield's estimate of £24,660 arrived at on a lower estimate of gross realisation and a lower estimate of sub-divisional expenses. If certain adjustments were made to their figure it would also be found not to differ greatly from the estimates of Mr. Bird and Mr. Raine. Thus Mr. Bird's figure of £19,543 would have been very close to the £23,850 if a risk of realisation of 20 per cent. had been allowed for instead of an allowance for " profit and risk " of 35 per cent. (see later). Similarly Mr. Raine's figure of £21,580 becomes very close if his allowance of £2,000 for " Emergency " is excluded ; and Mr. Raine would have been content to omit that allowance if he had had information on which to form an estimate of the probable cost of roads and drainage. Mr. Dimond's final figure of £33,203 is substantially higher. But here too a good deal of the difference is accounted for by Mr. Dimond's allowance for risk of 15 per cent. and by his calculation of interest and certain outgoings on the hypothesis of a period of realisation of one year. It appears from Mr. Dimond's evidence that, while that was an hypothesis which he used in making a valuation, for which purpose he felt obliged to adopt some fixed period, his real view was that in 1946 no one could have known how long realisation would take. The residue of the difference, so far as Mr. Dimond's valuation

is concerned, appears to be attributable mainly to a difference in the estimated costs of road construction and drainage.

The subject of an allowance for the risk of realisation has been considered in many cases in this Court. It has commonly been referred to as an allowance for risk, and not as profit in the ordinary sense. Thus, it " is not a profit in the proper sense of the word, but is the amount which " the purchaser of the land considers that he ought to realise for the risk " of his investment, and is very often termed the risk of realisation " per Pike, J., in *Executors of Will of Lady Hay* v. *The Valuer General* (noted The Valuer, Vol. 2, at p. 53) Roper, J. (as he then was) referred to it as " the discount . . . to cover the risk of the venture and provide a margin " of profit " but qualified these last words by adding " because of that risk " (*Decentralization Ltd.* v. *The Minister*, 17 L.G.R. 62 at p. 65). In the same case His Honor said, at p. 65 :—

> " In arriving at the value of land which is suitable for " subdivision a familiar and appropriate method, and one which " was used by witnesses in these cases, is to estimate from whatever " comparable sales of land in sub-division are available the price " which would be realised by the land when sold ; then to estimate " the costs involved in the subdivision and the length of time that " the realisation would take, making provision for the payment " of rates and taxes and for interest on money outstanding ; and " an estimated net return on the subdivision is obtained."

and continued :—

> " It is of course clear that a person purchasing land *in globo* " for the purpose of subdividing it would not pay the sum of " money which is the present equivalent of that estimated return. " Many factors in the calculation are speculative : the land in " subdivision may not realise the prices which are at present " expected, and the subdivision may take longer to realise than " is at present anticipated. To compensate for the risk involved " in the venture the purchaser would certainly discount the " estimated returns."

In *Federal Commission of Land Tax* v. *Duncan* (*supra*) there are observations here relevant, although it may be that in strictness they were *obiter*, upon the construction of Section 3 of the Land Tax Assessment Act, 1910. That section is indistinguishable in its terms, so far as it is here necessary to consider them, from Section 5 of the Valuation of Land Act, 1916–1951. In particular, consideration was given in *Duncan's* case to the question whether the section means necessarily a sale of the whole of the land to one buyer, a view of its meaning which did not prevail (see per Isaacs, J., as he then was, at p. 558 and per Rich, J., at p. 561). But at the same time it was made plain that sale in subdivision is but a " potentiality " or a " possibility."

It seems to me that practical effect is given to the decision in *Duncan's* case, and account taken of the possibility of a subdivisional sale by the

owner, by valuing the land by the " familiar and appropriate method " as on a sale to a single purchaser buying for subdivisional purposes, provided that, in so valuing the land, allowance is made for a " risk of realisation " which is not " a profit in the proper sense of the word." To make no allowance for the risk—to treat the " estimated net return " on the subdivision as the value of the land—would be to take into consideration not a possibility but a " realised possibility," and that would be wrong (*Raja's* case (1939) A.C. 302 at p. 313). On the other hand, to allow for a " profit in the "proper sense of the word" instead of for "risk of realisation" would seem to import that the owner must be regarded as unable to do anything with his land except sell it in one line to one purchaser, a view which did not prevail in *Duncan's* case. (I shall return to these questions.) What I have said does not exclude the possibility that in particular circumstances the risk may be " nil for all practical purposes " (see *McMahon* v. *Housing Commission of New South Wales*, 16 L.G.R. 54 at p. 57). Where the risk is for all practical purposes nil as to some particular portion of the property, it may be proper and convenient to consider that portion separately from the residue as to which there is a significant risk—cf. *St. John's College Trust Board* v. *Auckland Education Board* ((1945) N.Z.L.R. 507).

There has been no such argument in this case on the question of principle as would call for a re-opening of the matter and departure from principles which have been applied in many cases by every Judge who has sat in this Court. Several circumstances have been mentioned by counsel for the Plaintiffs in support of the contention that there should be no allowance for risk of realisation. These, so far as they are relevant, are relevant, in my opinion, to the extent of the risk, and therefore to the quantum of the allowance, rather than to the question of principle. Assessment of the risk and of the allowance which should be made therefor may be difficult questions, which may be affected by different considerations in varying circumstances and on which different minds may come to different conclusions. If any of the matters adverted to on behalf of the Plaintiffs were to have the practical consequence that in the circumstances of this case no allowance should be made, that would be because it indicated that in those particular circumstances the actual risk is " nil for all practical purposes " and not because it demonstrated that the general principles must be departed from.

Certain circumstances must be considered in relation to the allowance for risk of realisation in arriving at an estimate of the controlled price as at the date of resumption. The price at which the whole area might be sold, and the prices at which individual lots in the subdivision might be sold, were then both subject to the control of the Treasurer. It is on an estimate of a gross realisation at these last-mentioned prices that the Treasurer would require the valuation of the whole, for the purpose of arriving at a price for the whole, to be based. The level of the controlled prices of individual lots was not likely to fall and might have been permitted to increase. The demand for residential lots on the North Shore line was strong. Although

individual lots in older subdivisions were being sold from time to time, little was being placed on the market in the form of new subdivisions.

It is these circumstances, with others which I shall later refer to, which are relied upon as requiring that no allowance for the risk of realisation should be made. They are circumstances which must be taken into consideration, but it does not follow that they have the effect that the risk is nil for all practical purposes. None of the expert valuers who gave evidence has thought so. And, in any event, the evidence is that the Treasurer would have made such an allowance in assessing the controlled price of the whole on the basis of a realisation of the subdivision at controlled prices for the individual lots.

Mr. Litchfield, who gave evidence for the Plaintiff, after giving some consideration to lower figures, ultimately assessed the risk at 20 per cent. His evidence shows that he was aware of the true character of the allowance to be made ; he looked upon it as an insurance against loss rather than as a profit.

Mr. Raine, who gave evidence for the Defendant, allowed a lump sum, which is practically equivalent to the same percentage. His approach was much the same as was put by Pike, J., in Exors. of *Lady Hay* v. *The Valuer-General* (*supra*, at p. 531, right hand column). He would have advised an owner in 1946 to accept an offer of the amount of his valuation (which allows for this risk) rather than undertake the subdivision himself. And in support of his opinion he invited consideration of the vendor's position if he re-invested the proceeds of sale in industrial shares.

Mr. Dimond, who gave evidence for the Plaintiff, assessed 15 per cent. as the amount an investor would be satisfied with, buying in 1946. He, however, based his valuation on a period of realisation of one year, whereas the weight of evidence points to a period of three years as a sounder estimate. Indeed, it may be fairly said, as I have already pointed out, that Mr. Dimond's period of one year was merely an hypothesis adopted for the purpose of making a valuation and that his opinion was that in 1946 no one could have known how long realisation would take.

Mr. Bird, who gave evidence for the Defendant, adopted a percentage of 35 per cent. But that is not put forward as purely an allowance for risk of realisation. It is an allowance for " profit *and* risk." This, I think, is not a mere matter of words, but the allowance made by Mr. Bird was intended to fulfil that description and to refer to more than the risk of realisation itself. For risk alone the allowance appears to me to be too high in the circumstances. The percentage was based upon a study of a number of purchases of larger areas with a view to subdividing. But although the study seems to have been a careful one, there are many reasons not the least of which is its own foundation very largely in estimate, which deprive it of value as a guide.

The before-mentioned circumstances as to price-control, demand, and supply, at the time of resumption undoubtedly have a bearing on the element of risk and, consequently, on the quantum of any allowance for risk of realisation. However, they do not mean that the matter was free

of speculative elements; and considerable delay was likely, the area was a large one with some 180 lots to be disposed of, the total investment required was of a very substantial sum of money, and the Treasurer's assessment of the controlled price would have allowed for risk of realisation. All the expert valuers agree that an allowance for risk should be made. There is room for difference of opinion as to the amount, which is not a matter of precise estimation but one for the application of judgment and experience to a study and assessment of the factors affecting the risk. Two experts are in virtual agreement on 20 per cent.; the estimate of a third would very likely have approximated to that figure if he had allowed for the much longer period of development and realisation which would have been required. Other minds might arrive, perhaps, at a higher or a lower figure. I have, in the calculation above set out, adopted the figure which the weight of expert evidence supports as the correct figure. And I also have to have in mind that the experts were directing their attention to the price which the Treasurer was likely to approve and the percentage for risk of realisation which he would adopt for that purpose.

It was submitted that the circumstance that the subject land was laid out as a golf course, and leased and capable of being leased as such, precludes any risk of realisation. I do not agree. It may be conceded that those circumstances require consideration of their effect as providing a partial indemnity against one of the lesser contingencies included in the risk of realisation. Should it become necessary or appear prudent that the commencement of subdivision be postponed, leaving the golf course intact for the time being, and should the estimated period of realisation be thereby increased, the purchaser would have an indemnity against the further rates and a partial indemnity against his further loss of interest. But that is far from destroying the risk of realisation.

It has also been submitted that there should be no allowance for risk of realisation because the subject land was part only of the lands of the estate, the Plaintiff had planned an orderly course of development of the whole of the estate lands which included the interim use of part of them as a golf course as a means of promoting the sale of other parts, and under the Plaintiff's planned development the subject land was intended to be realised at a late stage which was considered to be the most advantageous stage for its realisation. Disturbance, by the taking of portion, of a project for the orderly and most advantageous development of a larger area might possibly be shown to have, in one way or another, a bearing on the compensation—cf., for example *Cowper Essex* v. *Acton Local Board* (14 App. Case, 153, at pp. 162–163). If that may be so in proper cases, it has not been shown here and no foundation for ascertaining the extent of any such bearing on compensation has been attempted to be laid. It seems clear that the matters mentioned do not amount to a factor which can be given effect to simply by omitting any allowance for risk of realisation; cf. the remarks of Roper, J., on a similar proposition in *Decentralization Ltd.* v. *The Minister* (*supra*, at p. 65): " If land resumed has some special value

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" to the owner over and above its market value, that has to be shown and " ascertained, and in my opinion it is not satisfactorily ascertained simply " by omitting one of the elements involved in arriving at the market value " of the land." Nor am I able to follow how they support another contention for which they were at one stage relied upon but which, as I understand it, was afterwards abandoned, namely the admissibility of evidence of the market value of the subject land as at the date of expiry of the lease (31st December, 1950, more than four years after resumption and more than two years after the termination of the control) and of sales which had taken place up to that time to be used for the purpose of establishing that market value.

Since I have referred earlier in these reasons to the distinction between an allowance for the risk of realisation and " profit in the proper sense of the word," and since the point is one which frequently crops up, I should indicate what, as it appears to me, that distinction amounts to for relevant purposes. It is a distinction which is more easily stated than defined or applied. " Perhaps no term or concept in economic discussion is used " with a more bewildering variety of well-established meanings than "profit" (article on "Profit" by Frank H. Knight in Encyclopædia of the Social Sciences, Volume XII, 1934, p. 480).

" In an analysis of the ordinary profits of a business returns to some " or all of the following elements may be found— . . .

" (ii) Payment for Organisation or Management. . . .

" (iii) Payment for Risk. . . ." (and other elements are mentioned which are not relevant here) (Silverman, The Substance of Economics, 8th English edition edited for Australian use by Clunies Ross, pp. 132–133). The element numbered (iii) has also been termed " ' profit ' in the narrower " and somewhat technical sense " or " ' pure ' profit " attributable to uncertainty and the consequent risks of business and related in magnitude to the magnitude of the risk (Benham, Economics, 3rd edition, p. 173).

These and similar analyses have been put forward as analyses of the profits of a continuing business. But it seems to me that they may properly and usefully be employed in the analysis of the desired or expected profit of a single transaction which amounts in essence to a purchase by wholesale, a division into smaller parcels, and a sale by retail. A person engaging himself in such a transaction will expect something for himself, independently of the risk and whether there is a risk or not, as payment for organization, management, superintendence or whatever it may be called. This may include something for what has been called " invention " (i.e., the " business idea " which underlies the transaction; Gide, Principles of Political Economy, 2nd English edition, p. 624), and there may also be involved the amount which purchasers are prepared to pay for the convenience of being able to obtain parcels suitable in size to their requirements (which may amount wholly or in part to a restatement from another viewpoint of the elements already mentioned).

These elements—payment for management, etc.—are part of profit in the ordinary, undifferentiated sense. They are, however, distinct from the provision for risk or realisation, which is the equivalent, rather, of the " payment for risk " or " ' pure ' profit " which I earlier referred to. Thus restricted to the risk element, the profit required by the purchase of the whole may also be considered as the measure of the discount necessary in order to reduce the estimated net return on sub-division to a present value which includes subdivisibility as a potentiality or possibility.

What I have said is, I believe, implicit in the terms used by Roper, J., in the passages already quoted from his judgment in *Decentralization Ltd.* v. *The Minister* (*supra*). His Honour spoke of a " discount to cover the risk " of the venture," of a " margin of profit *because of* that risk," and of discounting the estimated returns to compensate for the risk. I do not think it matters what word one uses in this connection—whether one speaks of risk, or of discount, or of profit—so long as, in using the last of these terms, one bears in mind that it is a " ' pure ' profit " in the sense above outlined which is in question and not a profit in the wider and more usual sense which includes other elements.

If this were not borne in mind, if the discount were estimated as a profit in the wider sense, the result would be, in effect, to treat the owner as constrained to sell the whole to one buyer and as without the possibility of subdividing. He would be treated as desirous of relieving himself of the burden, as well as of the risk, of realisation. In reality, were a valuation on this basis used for resumption purposes, a compulsory and risk-free middleman would be interposed between the dispossessed owner and the resuming authority, and the former would be treated as willing to pass over to this interposed person a portion of the proceeds which he might well have kept for himself. In this connection it must be remembered that, although it is convenient and common to use such terms as payment for organisation, management, etc., in describing this element of profit and to describe it as resembling in a sense the remuneration of a paid manager, the wages which would be paid to an employee for the labour involved are not necessarily its measure (see Silverman, op. cit. at p. 132). The correct approach to its ascertainment is to envisage what may be termed a dealer's profit, in the sense of the reward which a dealer would require for engaging in the transaction independently of any elements of risk and even if there were no risk.

It is sometimes said in evidence or in argument in the course of these cases that, quite apart from risk, a buyer would not embark upon the transaction of subdividing an area of land and placing it on the market unless there were something in it for himself. That is no doubt true as a matter of business, and refers to the type of dealer's profit which I have just mentioned. But what is sometimes argued as following from it is in my opinion not correct as a general proposition, namely that an estimate of the profit of this character must, as against the owner, be deducted from the estimated net realisation on subdivision in order to arrive at the

value of the whole. In what I have said I do not wish to be taken as excluding the possibility of exceptional cases.

Assessment of the " ' pure ' profit "—the risk of realisation—or its segregation from the other elements which may go to make up a profit in the ordinary sense, may present difficulties. Perhaps it might be most easily approached by directing the mind first to that element which I have called dealer's profit—the profit which a person embarking on the transaction would expect as his " payment for organisation or management," or whatever it may be termed, even if the risk were nil for all practical purposes. If that is first considered and put aside, it may be easier to separate out from the total amount which is ordinarily called profit the portion attributable to risk.

In this discussion I have omitted reference to another element often included in analyses of profit, namely " Net Interest " on the capital employed (see Silverman, op. cit., p. 132). I have made this omission because in the " familiar and appropriate method " of subdivisional valuation separate provision is made for interest, during the estimated period of realisation, upon the capital employed or so much of it as may from time to time remain outstanding. One of the contingencies covered by the allowance for risk is the risk that this interest provision may prove insufficient because, for example, of failure to realise within the estimated period.

In this action it is necessary, in order to determine compensation in respect of the resumption, to determine the value of the subject land as at 20th September, 1946, and to have, in doing so, regard to the principles laid down in *Arklay's* case (*supra*) with the added element, in applying those principles, that the land was subdivisional land.

I have admitted evidence, and earlier in these reasons I have stated certain conclusions, on matters relevant to a valuation of the land as at the time when the control of land sales expired and, in particular, I have admitted evidence of sales after the termination of the control. I believe that I have the authority of *Arklay's* case (*supra*) for so doing. There, as I have been informed from the Bar table, evidence of post-control sales was admitted by the learned trial Judge and his judgment sets forth conclusions as to post-control values. These seem to form the foundation of his assessment of compensation. The High Court held, on appeal, that the Appellant had " failed to establish that His Honour acted on some " wrong principle or that the value was entirely erroneous " (p. 645).

While the admissibility of such evidence in these cases is thus authoritatively established, it is necessary to consider the true effect of such evidence when admitted. Because of the added subdivisional element the question here, as will be seen, is more complex than that in *Arklay's* case itself. Let me take for consideration first the most important item in the conclusions before referred to, namely the estimated post-control gross realisation of £102,500. The true significance of such a figure should not be mistaken. It has not the character of a prophecy fulfilled. The parties to a hypothetical transaction as at 20th September, 1946,

cannot be considered as having predicted post-control price standards with the assurance with which astronomers calculate the future movements of the heavenly bodies. The £102,500 is merely the reduction to a precise figure of the result of what in September, 1946, would have been essentially a speculative process, liable, as are all economic speculations about the future, not only to risks of error in estimating the probable effects of known or foreseeable factors but also to the possibility of the intervention of new and unforeseeable factors.

It is possible that in September, 1946, experienced persons, familiar with current transactions and negotiations and with what (but for the controls) would-be buyers would be prepared to pay and would-be sellers would expect to receive, could venture an opinion as to the probable effect on price levels of a removal of the controls. Such an estimate, however, as an attempt to estimate what prices would be after such removal would have involved the risks of error which I have mentioned and would not necessarily have been borne out by the result. Indeed, an experienced valuer, Mr. Raine, has given evidence that the post-control rise in prices which in fact occurred after an initial short " lull " turned out to be greater than was anticipated in 1948.

On a " free " market, the establishment of an adequate number of contemporary sales may dispense with the necessity for any such separate speculation about what prices the future might bring. The prevailing prices which they disclose may themselves be expected to reflect " the " likelihood as then appearing to persons best capable of forming an " opinion, of a rise or fall for what reason soever in the amount which one " would otherwise be willing to fix as the value of the property " (*Spencer* v. *The Commonwealth*, 5 C.L.R. 418 at p. 441). As I have pointed out in earlier decisions, prices obtained on controlled sales are unlikely to have that characteristic. It was said in *Arklay's* case that the test formulated in *Spencer's* case " requires considerable adaptation when the compulsory " acquisition occurs in a period of controls " (p. 643). The admission of evidence of sales after the termination of the period of controls may perhaps be taken as an instance of such adaptation.

Some of the heads of claim referred to in Section 68 of the Valuation of Land Act (e.g. disturbance of business) may be peculiarly dependent upon events happening after resumption and thus lend themselves to a preference for facts, when available, over prophecies on the same footing as that on which regard was had to the actual events in *Williamson* v. *John I. Thornycroft and Co.* ((1940) 2 K.B. 658). The claim here in question is, however, founded (in the same way as is determination of " improved value " under Section 5) upon a hypothetical transaction assumed to have taken place at the date of resumption, and the evidence here admitted was not limited to subsequent sales made in comparable circumstances or demonstrating the operation of an existing tendency, such as were referred to in *Daandine Pastoral Company Proprietary, Ltd.* v. *Commissioner of Land Tax* (noted in The Valuer, Vol. 7, p. 299 at p. 304). The admission of evidence such as was here admitted, and reliance upon a gross realisation

figure estimated on the basis of such evidence, requires that the status of such evidence as a substitute for speculation be constantly kept in mind.

If that is not done there is risk of grave error. The bargaining in September, 1946, on the *Arklay's* case hypothesis, of parties who *knew* that in and after September, 1948, the subject land would realise £102,500 in subdivision would be quite different from that of parties who arrived at that conclusion only as a matter of attempting to assess future probabilities, and in particular the question of risk of realisation would be materially affected. We can all be wise after the event, but the extent to which *ex post facto* wisdom can affect the assessment of values as at some earlier time has limits dictated by the character of the enquiry.

In September, 1946, it was not certain that post-control price levels would support £102,500 or any other particular figure as an estimate of gross realisation. That they might do so could then be only a matter of speculation about the future. Realisation of the possibility was subject to such risks as I have mentioned and those engaged in speculating on the subject must be taken to have been aware of this.

And, in practical application for the purposes of a subdivisional valuation, the risk involved was not solely of the character of that which I have mentioned. It was not confined to risk of economic fluctuations during the period preceding the removal of controls. It was a compound risk. According to evidence which I accept, prudent realisation after the expiry of controls would have been spread over at least three years. (I say " at least " because Mr. Raine's evidence suggests that on his experience four years might be a more prudent period). Superadded, then, to the risk I have mentioned was the further risk of what might happen during those three years.

Would price-levels flatten out at the immediate post-control level ? Would they continue for some time at that level and then decline ? Or would there be a rise followed by a rise followed by a return to that level or by a decline, or a continual rise ? What would be the effect, *qua* the subject land, of the placing on the market of other available subdivisional areas ? Would the demand remain constant, increase, or decline ?

These are examples of questions to which it may have been possible to return an answer with some confidence in September, 1948, with knowledge of the circumstances then existing and the probabilities as then appearing to persons best capable of forming an opinion. It is another matter when one comes to consider the position as at September, 1946. And that is the material date.

It is for this reason that I have not stated a conclusion as to what would have been a reasonable allowance for risk of realisation in making a valuation as at the termination of controls, on the basis of circumstances as then known and probabilities as then appearing. Such a conclusion would, in my opinion, be irrelevant. The relevant matter is, rather, the extent of the compound risk of realisation as at September, 1946. And the doctrine of preferring facts, when available, to prophecies (*Re Bradverry* (1943) 1 Ch. 35 at p. 43) has limits which are reached, I think, when it comes to

putting an estimate of future risk, made as at 21st September, 1948 (on the basis of circumstances as then known and probabilities as then envisaged in the light of those circumstances) in the place of an estimate on 20th September, 1946, of what the risk was likely to be in September, 1948.

Those of the expert valuers who gave evidence on the question expressed different opinions as to the amount to be determined pursuant to *Arklay's* case (namely : " 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 reselling." p. 644) and as to the method of determining this amount. In applying that test of value, and in endeavouring to assess a sum which would compensate the vendor " for the present value of the enhanced price " which the purchaser might expect ultimately to obtain," where subdivisional lands are in question I think it must be contemplated that that enhanced price will be, primarily, the net realisation on a post-control subdivisional sale.

Mr. Bird's approach, based on a sale in subdivision partly during the period of control and partly thereafter, seems to me to miss that point. His main approach was by way of a sale of the perimeter land during controls and of the interior land thereafter, so that the question of retention value would arise only in relation to the interior land, the most speculative portion of the transaction because its subdivision would account for much the greater portion of the outgoings. His figure was £24,000.

It may well be that in considering subdivisional land in relation to *Arklay's* case one has to contemplate the possibility that the purchaser may have to sell off part of the land during control, as well as (and perhaps as more likely than) the possibility that he may have to resell the whole (and if he had to do so he would very likely sell perimeter land first because the cost of road construction might be disproportionate to the controlled prices of the interior lots). But, as I understand *Arklay's* case, that is only a secondary possibility. The primary assumptions appear to me 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). However, in determining this retention value it must be borne in mind as a possibility that the purchaser might have to resell during the control period. Mr. Bird has treated sale of portion, and the most remunerative portion (in the sense that it would require the least outlay), during the control period not as having the secondary character of this last mentioned possibility but as the primary basis of his valuation.

Mr. Litchfield's figure was £40,000, being an increase of 50 per cent. on his estimate of the controlled price. Mr. Litchfield's approach was that the hypothetical vendor would be content with an immediate 50 per cent. over the controlled price and the hypothetical purchaser would be prepared

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to pay a figure such as would leave an approximate 50 per cent. margin for resale at a post-control in globo price which Mr. Litchfield estimated at £61,768. That his figure of £40,000 fulfils both requirements is however, an accident, attributable to the relationship between his estimates of the controlled price and the post-control price (£26,660 and £61,768), the latter being approximately $2\frac{1}{4}$ times the former.

Mr. Dimond adopted a method which, when his evidence is considered as a whole and the true function of evidence of the estimated post-control realisations as a quantification of September, 1946, anticipations is appreciated, is intelligible and straightforward, suggesting what may be a useful rule of thumb even if requiring some refinement for theoretical correctness. He increased his estimate of the controlled price as at the date of resumption by between 60 per cent. and 70 per cent., adopting that range of percentages as being about one-half of the percentage increase of the post-control gross realisation over the controlled gross realisation, as he estimated them respectively.

The problem presented by this case is one of great difficulty. It involves consideration of a transaction which is in the completest sense hypothetical. It is not merely a hypothetical example of a customary form of dealing. The transaction, *qua* its character as a transaction, is hypothetical. Nevertheless the problem must be solved with such approximation to accuracy as is possible by the best practical means which may be found at hand.

Mr. Dimond's evidence suggests one practical approach to its solution. The first step in that is to treat the parties to the hypothetical transaction as aware of the current price level, capable of estimating the controlled price, acquainted with the anticipated extent of a rise above the current price level on the removal of controls, aware of the speculative elements involved (i.e. of the risk of realisation compounded of the risk attached to the remainder of the control period and the risk attached to the period of realisation after controls), and having in mind that the purchaser may have to resell the whole or part of the land during the period of controls. Treating the comparison of the two estimates of gross realisations as an index of the anticipated increase in prices, the vendor is then to be regarded as content to abandon the possible advantage of that increase in return for an immediate sum of one-half the amount thereof (being thereby freed from the risk that the possibility might not be realised and from other attendant risks). And the purchaser is to be regarded as content to give that one-half for the benefit of the possibility and to assume the risk. On this footing and on the above stated estimates of gross realisation the amount to be added in the present case to the controlled price of £25,250 is approximately 40 per cent. thereof and the result may be expressed in round figures as £35,000.

A possible variation of this approach is one which employs the percentage of increase in estimated net realisation on subdivision rather than on estimated gross realisation. The reason for such a variation

would be that certain factors in arriving at net realisation, e.g., constructional costs, would not necessarily vary at the same rate as gross realisation. Thus, in the estimates I have set out earlier in these reasons, estimated gross realisation increases by about 80 per cent. as between the date of resumption and the termination of controls but the estimated net return to the subdivider (after deducting subdivisional expenses, provision for interest, etc., and realisation expenses) increases by about 100 per cent. On this footing, 50 per cent. should be added to £25,250, giving, in round figures, £37,500.

Another possible, and, I believe preferable, approach is to view the problem as one of risk of realisation, as at the relevant date, in both its aspects, allowing also for a possibility of resale by the purchaser during the period of control. The difficulty here is that there is very little to go on for the purpose of estimating the proper allowance for this compound risk. With such guidance as may be obtained on this aspect of the case from Mr. Litchfield's approach to the *Arklay's* case question and from Mr. Bird's views as to risk of realisation, and also paying regard to the 20 per cent. allowance for risk in the estimation of the controlled price, a figure of from 50 per cent. to 60 per cent. may be suggested for application to the post control estimates already set forth. The former percentage, after interest and stamp duty had also been appropriately provided for, would give a final amount of £37,500 in round figures. Taking a 60 per cent. risk of realisation, the final figure would be approximately £33,500. Consideration of the possibility that the purchaser might have to resell during the period of control, and of Mr. Raine's opinion that the price increase after controls should terminate, as anticipated in September, 1946, was not as high as that which in fact occurred, may suggest a figure towards the lower, rather than the higher, of these amounts.

I shall now approach the matter in another way which is not inconsistent with what I have already said as to determining a risk of realisation as at the date of removal of controls. It is not a question of estimating a risk of realisation as at the expiration of controls on the basis of circumstances and probabilities as then existing and envisaged. It is a question of endeavouring to form a judgment as to what persons in September, 1946, would anticipate that the risk of realisation as at the expiration of controls might be, or (a less difficult task) within what range of percentages they would expect it to lie.

If in September, 1946, such an estimate could be made it would also be possible to estimate the limits within which, as at that date, it would be anticipated that the post-control *in globo* price would lie.

On the one hand, not less than the risk as at 20th September, 1946, and, on the other hand, not more than twice that risk (having regard to the new factor to which Mr. Bird referred of competition with other lands) might well be taken as the extremes. The mean between these extremes is 30 per cent., which also happens to approximate closely to an adjustment of the September, 1946 risk (20 per cent., as determined earlier in these

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reasons) proportionately with the adjustment which Mr. Bird made of his estimate of the September, 1946, risk to allow for the extra factor of competition in the post-control period. The post-control estimates already set out, with this 30 per cent. allowance for risk of realisation and appropriate provision for interest and stamp duty, would lead to an anticipated *in globo* value at the expiration of controls, of £47,000.

It is impossible to apply to £25,250 (controlled price as above determined) and £47,000 (this estimate of anticipated post-control value) both Mr. Litchfield's estimate of the margin a vendor would be content with and his estimate of the margin a purchaser would expect. The figures are not in the correct proportion for that, as were his figures of £26,660 and £61,768. It is, however, possible to apply each of these margins separately. Thus, applying the vendor's margin of 50 per cent., the result is in round figures £37,500. If the purchaser's expected margin is applied, the result is, in round figures, £31,250. If the parties to the hypothetical transaction are to be envisaged as meeting half-way, the resultant figure is approximately £34,500.

The 20 per cent. lower limit of the anticipated risk mentioned in the last paragraph but one is clearly too low, and may be ignored. Taking the upper limit of 40 per cent., the figures corresponding with those I have just given are :—

Anticipated post-control *in globo* price—£42,000 ;

Controlled price plus vendor's margin—£37,500, as above ;

Anticipated post-control *in globo* price of £42,000, less purchaser's expected margin—£28,000 ;

Figure at which parties to hypothetical transaction would meet half-way—£32,750.

Now, of all these suggested approaches, none has of itself any very compelling force. Each contains elements of speculation such as are unavoidable in an inquiry so essentially speculative. Taken together they reinforce each other considerably since the results lie for the most part within a range which, having regard to the degree of speculation involved, may be taken as reasonably narrow. In so far as these approaches may be arranged in order of reliability (and it is primarily an order of the theoretical soundness of the method rather than of the correctness of the conclusion in every case) they may be set out thus :—

1. Approach by estimation of compound risk of realisation as at date of resumption £33,500 — £37,500

2. Approach on footing of comparison of estimated net returns to subdivider ... £37,500

3. Approach on footing of comparison of estimated gross realisations £35,000

4. (a) Approach on footing of adding vendor's margin to controlled *in globo* price or subtracting purchaser's margin from estimated post-control *in globo* price—anticipated risk of realisation 30 per cent.	£31,250 —	£37,500
(b) Same as 4 (a) but with anticipated risk of realisation 40 per cent.	£28,000 —	£37,500
(c) Figure at which parties would meet half-way in 4 (a) and 4 (b)	£32,750 —	£34,500

The fourth of these approaches suggests another and more direct approach founded on the same hypothesis of a risk of realisation as at the expiration of controls (as it might be anticipated looking at the matter as at the date of resumption) and hence on an anticipated post-control *in globo* price based on the anticipated risk of realisation. The parties to the hypothetical sale as at the date of resumption may be envisaged as coming together half-way between the controlled *in globo* price and this anticipated post-control *in globo* price. The result would be a figure within the range already referred to, i.e. :—

(a) If anticipated risk of realisation be taken at 30 per cent. a figure of, in round terms	£36,000
(b) If anticipated risk of realisation be taken at 40 per cent. a figure of, in round terms	

Arklay's case requires that regard be had not only to the depreciatory effect of the control but also to the probability as to its continuance. This depreciatory effect has been considered paying regard, *inter alia*, to the level of prices actually prevailing at the termination of the control. If that is right, it would appear to be equally correct to regard the parties to a hypothetical transaction on 20th September, 1946, as negotiating on the footing of an anticipation that the control would terminate on 20th September, 1948 (the date of its actual termination).

It is desirable on a difficult question of the present character to approach the matter by as many paths as appear to be available (cf. per Dixon, J., in *Minister for Navy* v. *Rae* (70 C.L.R. 339, at p. 344)). As I have pointed out in another case, " inconclusive results reached by one route may gain " in force from the correspondence, or reasonably close approximation, " of the results of some different and independent approach involving " different elements of a speculative character " (*A. G. Robertson Ltd.* v. *The Valuer-General*, 18th December, 1952, unreported). What is of importance in the various other approaches which I have set out is that, while each in itself is inconclusive although not unreasonable, taken together they have a cumulative effect in corroborating in a general way the result arrived at by approaching the problem through the method of a compound risk of realisation estimated as at the date of resumption.

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And that last-mentioned method appears to me to be the most correct in principle of such approaches as have been made by the witnesses in this case or as have occurred to me in the course of its consideration. It is the " familiar and appropriate method " of arriving at the value of land suitable for subdivision with the modifications necessary to adapt it to the difficult problem posed by *Arklay's* case. The estimates of gross realisation, expenditures, etc., are based on anticipations as at the date of resumption of what these will amount to on the termination of controls, with the assistance of that substitution of available facts for prophecies which *Arklay's* case appears to me to authorise in the exceptional circumstances. The allowance for risk of realisation is founded on an estimate as at the date of resumption of the speculative elements involved not only up to the anticipated time of removal of controls but also thereafter. That allowance also has regard to, or separate provision is made for, possible resale by the buyer during the remaining period of controls. The function of the valuer is to put himself in the position of the hypothetical parties as at the date of resumption, to take into consideration facts and circumstances as then known and probabilities as then appearing to persons best capable of forming an opinion, to apply his knowledge, skill and experience to these matters, and to make his estimate of the proper allowance thereon.

" When the assessing tribunal . . . has to make its own valuation in " a contested case . . . the tribunal, not being itself professionally skilled " in valuation, must necessarily act on evidence, including expert evidence, " and that evidence must be relevant." *Robinson Brothers (Brewers) Ltd.* v. *Houghton and Chester-le-Street Assessment Committee* ((1937) 2 K.B. 445, at p. 469). However, the question may be so novel and difficult that competent valuers whose experience has been in more familiar fields may find difficulty in forming and expressing an opinion upon it. But the Court must not be deterred by the difficulty of estimation (*Arklay's* case, at p. 643). " In this debateable region where so much was new, where so " much was prophetic only, nothing but the broad axe " (may) " serve to " clear the way "—*Hazeldell Ltd.* v. *The Commonwealth* (34 C.L.R. 442, at p. 445). " A merely mechanical adherence to calculation " may be impossible as well as unwise (*The Moreton Club* v. *The Commonwealth*, 77 C.L.R. 253, at p. 259).

Coming to the best conclusion which I can on the material before me, and having regard in particular to the results of the various approaches above set out, 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 as already determined and an added " retention value " of £9,750.

The orders and determinations which I make are as follows :—

In the Objections :

Allow objections.

DETERMINE :

Unimproved value of the whole of the land at £23,850 to be apportioned between the two parcels in proportion to the unimproved values set upon the respective parcels by the Valuer-General and objected to.

Improved value of the whole at £25,250 with consequential apportionment.

Assessed annual value of the whole at £1,263 and consequential apportionment.

As to the before-mentioned apportionments, I observe that for all purposes at the hearing the subject land was treated as a whole and no attempt was made by anyone to value either parcel separately.

IN THE ACTION :

DETERMINE : compensation at £35,000.

COSTS :

Costs of the *action* will be governed by the statute.

Costs of the *objections* to follow costs of action as to incidence and proportion.

No. 2.

Reasons for Judgment.

Coram : STREET, C.J.
OWEN, J.
HERRON, J.

STREET, C.J. : In our opinion this Appeal fails. The learned trial Judge held that in ascertaining the value of the land in question he was constrained to follow the decision of the High Court in *The Commonwealth* v. *Arklay* (1952 A.L.R. 650), and if *Arklay's* case applies, then this Court is equally bound. Some argument was addressed to us suggesting that this case could be distinguished and was not applicable to the facts of the present case. The High Court in its reasons pointed out that the section of the Act then under consideration had to be interpreted against the background of the Constitution, which requires that legislation for the acquisition of property shall provide for just terms ; but the same words, namely, " the value of the land," are used in the relevant section of the Public Works Act, and under that Act the owner of the land resumed is entitled to compensation based on the fair value of the land in question.

In the Full Court of the Supreme Court of New South Wales.

No. 2. Reasons for Judgment. 28th September 1953— *continued.*

It appears to us that the suggested distinction is not a valid one, and that the value of the land must, therefore, be ascertained by applying the principles laid down by the High Court in *Arklay's* case. That being so, the questions in the stated case must be answered :

Question 1 (a) Yes.
Question 1 (b) No.
Question 2. Yes.
Question 3. Yes.

The Appellant must pay the costs of the stated case.

No. 3. Rule on Stated Case. 28th September 1953.

No. 3.

Rule on Stated Case.

IN THE SUPREME COURT OF NEW SOUTH WALES.

No. 4216 of A.D. 1951.

In the Matter of an Appeal by THE MINISTER.

Between

THE MINISTER ... ... (*Defendant*) *Appellant*

and

CHRISTOPHER BOWES THISTLETHWAYTE and REGINALD CLARK TURNER ... ... (*Plaintiffs*) *Respondents.*

Monday, the 28th day of September, 1953.

This Stated Case coming on to be heard this day WHEREON AND UPON READING the Case Stated by the Land and Valuation Court wherein the following questions of law are set forth for the opinion of this Court—

(1) Was the measure of the compensation to which the Plaintiff was entitled in respect of the resumption of the subject land :—

(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 I adopted following *The Commonwealth* v. *Arklay* (*supra*); or

(b) the price which the Treasurer or his Delegate would have approved under the National Security (Economic Organisation) 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 ?

(2) If the answer is " Yes " to 1 (a), was the method pursued in order to ascertain the said price of following the method adopted by the learned trial Judge in *The Commonwealth* v. *Arklay* (*supra*) with modifications necessary to apply it to the circumstances of this case, as more fully detailed in my reasons for judgment hereinbefore referred to, a proper method in law ?

(3) If the answer is " Yes " to 1 (a), was the evidence referred to under the several heads in paragraph 12 of this case, or under any, and if so which, of these heads, admissible ?

AND UPON HEARING what was alleged by Mr. J. D. Holmes of Queen's Counsel with whom was Mr. E. J. Hooke of Counsel on behalf of the Appellant and by Mr. M. F. Hardie of Queen's Counsel with whom was Mr. M. F. Loxton of Queen's Counsel and Mr. H. A. Henry of Counsel on behalf of the Respondents THIS COURT DOTH ORDER that the aforesaid questions be answered as follows :—

(1) (a) Yes.
(b) No.
(2) Yes.
(3) Yes.

AND THIS COURT DOTH FURTHER ORDER that the costs of and incidental to this Stated Case be taxed by the proper officer of this Court and when so taxed and allowed be paid by the Appellant to the Respondents or to their Attorney, Telford Graham Gilder.

By the Court,

For the Prothonotary,

R. T. BYRNE,
Chief Clerk.

In the Full Court of the Supreme Court of New South Wales.

No. 4. Affidavit of Arthur James White in support of Motion for Conditional Leave to Appeal. 28th September 1953.

No. 4.

Affidavit of Arthur James White in support of Motion for Conditional Leave to Appeal.

IN THE SUPREME COURT OF NEW SOUTH WALES.

No. 4216 of 1951.

In the Matter of an Appeal by THE MINISTER.

Between

THE MINISTER ... ... (*Defendant*) *Appellant*

and

CHRISTOPHER BOWES THISTLETHWAYTE and REGINALD CLARK TURNER ... ... (*Plaintiffs*) *Respondents.* 10

And in the Matter of an Order in Council of the 2nd April, 1909.

And in the Matter of an application for Leave to Appeal from the Supreme Court of New South Wales to Her Majesty in Council.

On the 28th day of September, One thousand nine hundred and fifty-three ARTHUR JAMES WHITE, of 237, Macquarie Street, Sydney, being duly sworn makes oath and says as follows :

1.—I am a Solicitor of this Honourable Court and employed in the office of the Crown Solicitor and I have the conduct of this matter.

2.—By a notification published in the Government Gazette of the twentieth day of September, 1946, certain land described in the Schedule thereto was resumed on behalf of the Council of the Municipality of Ku-ring-gai. 20

3.—The Plaintiffs are Trustees of the Will of William Moore deceased and were at all material times the Registered Proprietors of an estate in fee simple of the land described in the Schedule to the said notification.

4.—On the 25th October, 1951, the Plaintiffs commenced an action against the Defendant being the constructing authority within the meaning of the Public Works Act, 1912, for the determination of compensation and when issue was joined therein the matter was remitted to the Land and Valuation Court for determination. The action for the determination of compensation came on for hearing, before His Honour, Mr. Justice Sugerman sitting as the Land and Valuation Court together with certain objections to valuations of the said lands by the Valuer General. The objections and the hearing of the action were heard together on the 30th September, 1952, the 1st, 2nd, 3rd, 7th, 8th, 9th, 10th, 13th, 14th, 15th, 16th and 17th days of October, 1952, and on the 3rd, 4th, 5th and 6th days of November, 1952, 30

on which last mentioned date His Honor Mr. Justice Sugerman reserved judgment and on the 20th March 1953 His Honour Mr. Justice Sugerman delivered judgment.

5.—His Honour determined the compensation to be awarded in the action at £35,000 applying the principles of the decision of the High Court of Australia in *The Commonwealth* v. *Arklay* (1952, Argus, L.R. 640). His Honor found that if he did not apply the principle of *The Commonwealth* v. *Arklay* (*supra*) he would have determined the compensation in the sum of £25,250. The matter in dispute on this appeal therefore amounts to or is of the value of £A9,750, that is to say is upwards of £500 sterling.

6.—On the fourteenth day of August, 1953, His Honour Mr. Justice Sugerman stated a case in pursuance of Section 17 of the Land and Valuation Court Act, 1921–1940 for the opinion of the Supreme Court.

7.—On the 28th September, 1953, the Supreme Court answered the questions in the said Stated Case and delivered a judgment thereon.

8.—It is submitted that the question involved in the appeal is one which by reason of its great general and public importance ought to be submitted to Her Majesty in Council for decision and that the said judgment was given in respect of a matter at issue above the amount or value of £500 sterling and involves directly or indirectly a claim demand or question to or respecting property amounting to or of the value of £500 sterling and upwards.

9.—There are outstanding claims for compensation in respect of lands resumed during the period of Land Sales Control and upon inquiry it is clear that the application of the decision in *Commonwealth* v. *Arklay* would involve the payment of not less than £500,000 as " retention value."

Sworn by the Deponent on the day and year first abovementioned at Sydney before me } A. J. WHITE.

L. E. STUBBINGS, J.P.

No. 5.

Order granting Conditional Leave to Appeal.

Thursday, the first day of October, One thousand nine hundred and fifty-three.

UPON MOTION made this day to this Honourable Court on behalf of the Appellant (Defendant) pursuant to Notice of Motion filed herein on the

In the Full Court of the Supreme Court of New South Wales.

No. 5. Order granting Conditional Leave to Appeal. 1st October 1953– *continued.*

twenty-eighth day of September last WHEREUPON and UPON HEARING READ the said Notice of Motion and the affidavit of Arthur James White sworn herein on the said twenty-eighth day of September last and filed herein AND UPON HEARING what was alleged by Mr. J. D. Holmes of Queen's Counsel with whom was Mr. E. J. Hooke of Counsel for the Appellant and Mr. Martin Hardie of Queen's Counsel with whom Mr. M. F. Loxton of Queen's Counsel and Mr. H. A. Henry of Counsel for the Respondents (Plaintiffs) AND UPON Mr. J. D. Holmes undertaking to the Court on behalf of the Appellant that Counsel appearing for the Appellant will on the hearing of the appeal before Her Majesty's Privy Council give to the said Privy Council an undertaking not to press for the costs of the appeal to Her Majesty's Privy Council irrespective of the issue of the appeal AND UPON Mr. Hardie requesting that it be noted that the Respondents desire to reserve the right to argue before Her Majesty's Privy Council that the Appellant should pay the Respondents' cost of appeal in any event THIS COURT DOTH ORDER that leave to appeal to Her Majesty in Her Majesty's Privy Council from the Judgment and Order of this Court be and the same is hereby granted to the Appellant UPON CONDITION that the Appellant do within fourteen days from the date hereof give security to the satisfaction of the Prothonotary in the amount of Five hundred pounds (£500) for the due prosecution of the said Appeal and the payment of all such costs as may become payable to the Respondents in the event of the Appellant not obtaining an order granting him final leave to appeal from the said judgment and order or of the Appeal being dismissed for non-prosecution or of Her Majesty in Council ordering the Appellant to pay the Respondent's costs of the said Appeal as the case may be AND UPON FURTHER CONDITION that the Appellant do within fourteen days from the date hereof deposit with the Prothonotary the sum of Fifty pounds (£50) as security for and towards the costs of the preparation of the transcript record for the purposes of the said Appeal AND UPON FURTHER CONDITION that the Appellant do within twenty-one days from the date hereof take out and proceed upon all such appointments and take all such other steps as may be necessary for the purpose of settling the index to the said transcript record and enabling the Prothonotary to certify that the said index has been settled and that the conditions hereinbefore referred to have been duly performed AND UPON FURTHER CONDITION finally that the Appellant do obtain a final order of this Court granting it leave to Appeal as aforesaid AND THIS COURT DOTH FURTHER ORDER that the Respondents' costs of this motion be Respondents' costs in the Appeal and that the costs of all parties of the preparation of the said transcript record and of all other proceedings hereunder and of the said final order do follow the decision of Her Majesty's Privy Council with respect to the costs of the said Appeal or do abide the result of the said Appeal in case the same shall stand or be dismissed for non-prosecution or be deemed so to be subject however to any orders that may be made by this Court up to and including the said final order or under any of the Rules next hereinafter mentioned that is to say Rules 16, 17, 20

and 21 of the Rules of the Second day of April One thousand nine hundred and nine regulating appeals from this Court to Her Majesty in Council AND THIS COURT DOTH FURTHER ORDER that the costs incrured in New South Wales payable under the terms hereof or under any order of Her Majesty's Privy Council by any party to this Appeal be taxed and paid to the party to whom the same shall be payable AND THIS COURT DOTH FURTHER ORDER that so much of the said costs as become payable by the Appellant under this order or any subsequent order of the Court or any Order made by Her Majesty in Council in relation to the said Appeal may be paid out of any moneys paid into Court as security as aforesaid so far as the same shall extend AND that after such payment out (if any) the balance (if any) of the said moneys be paid out of Court to the Appellant AND all parties are to be at liberty to apply as they may be advised.

In the Full Court of the Supreme Court of New South Wales.

No. 5 Order granting Conditional Leave to Appeal. 1st October 1953—*continued.*

By the Court,

For the Prothonotary,

R. T. BYRNE,
Chief Clerk.

No. 6.

Order granting Final Leave to Appeal.

No. 6. Order granting Final Leave to Appeal. 29th October 1953.

IN THE SUPREME COURT OF NEW SOUTH WALES.

No. 4216 of 1951.

In the Matter of an Appeal by THE MINISTER.

Between

THE MINISTER ... ... (*Defendant*) *Appellant*

and

CHRISTOPHER BOWES THISTLETHWAYTE and REGINALD CLARK TURNER ... ... (*Plaintiffs*) *Respondents.*

And in the Matter of an Order in Council of the 2nd April, 1909.

And in the Matter of an application for Leave to Appeal from the Supreme Court of New South Wales to Her Majesty in Council.

In the Full Court of the Supreme Court of New South Wales.

No. 6. Order granting Final Leave to Appeal. 29th October 1953—*continued.*

Thursday, the Twenty-ninth day of October, One thousand nine hundred and fifty-three.

UPON MOTION made this day to this Honourable Court on behalf of the Appellant (Defendant) WHEREUPON AND UPON READING the Order for Conditional Leave to Appeal made herein on the first day of October instant and the Certificate of the Prothonotary dated the twenty-eighth day of October instant of due compliance on the part of the Appellant with the terms and conditions imposed by the said order filed herein AND UPON HEARING what was alleged by Mr. J. D. Holmes, of Queen's Counsel with whom was Mr. E. J. Hooke of Counsel on behalf of the Appellant and by Mr. H. A. Henry of Counsel on behalf of the Respondent THIS COURT DOTH ORDER that the Appellant have final leave to appeal to Her Majesty in Her Majesty's Privy Council from the Judgment and Order of this Court of the twenty-eighth day of September, One thousand nine hundred and fifty-three AND THIS COURT DOTH FURTHER ORDER that upon payment by the Appellant of the costs of preparation of the transcript record and dispatch thereof to England the sum of Fifty pounds (£50) deposited in Court by the Appellant pursuant to the said Order of the first day of October instant as security for and towards the costs of the preparation of the transcript record for the purposes of the said appeal be paid out of Court to the Appellant or to its Solicitor Mr. Finlay Patrick McRae.

By the Court.

For the Prothonotary,

R. T. BYRNE,
Chief Clerk.

In the Privy Council.

No. 47 of 1953.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

IN THE MATTER of an Appeal by the Minister.

BETWEEN

THE MINISTER ... ... *Appellant*

AND

CHRISTOPHER BOWES THISTLETHWAYTE and REGINALD CLARK TURNER ... ... *Respondents.*

AND IN THE MATTER of an Order in Council of the 2nd April, 1909.

AND IN THE MATTER of an Appeal from the Supreme Court of New South Wales to Her Majesty in Council.

RECORD OF PROCEEDINGS

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