

Privy Council Appeal No. 14 of 1915.

Edward Odlum and others - - - - *Appellants,*

v.

**The City of Vancouver and The Canadian
Northern Pacific Railway Company** - *Respondents.*

FROM

THE COURT OF APPEAL OF BRITISH COLUMBIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 3RD JUNE 1915.

Present at the Hearing:

THE LORD CHANCELLOR.

LORD DUNEDIN.

LORD ATKINSON.

[*Delivered by* LORD DUNEDIN.]

This is an appeal against a judgment of the Court of Appeal of British Columbia, by which that Court by a majority of four to one reversed a judgment of Morrison, J., and set aside an award pronounced by Frederic Buscombe as sole arbitrator in an arbitration between the parties to the case.

The appellants are the owners of certain lots of ground in the city of Vancouver, which front Westminster Avenue and are bounded at the back by an arm of the sea called False Creek.

In 1911 an Act was passed in British Columbia entitled "The False Creek Reclamation Act," which empowered the Corporation of the City of Vancouver to reclaim the False Creek by filling it up, and in connection with this undertaking allowed them to acquire compulsorily *inter alia* the various lots belonging to the appellants. It is unnecessary to set forth the provisions of the statute as it empowered the Corporation to serve notice to treat, and to acquire the whole rights of the appellants in the lots specified upon payment of the value of all rights so acquired, with arbitration in default of agreement as to the amount to be paid—all in ordinary form.

The parties by agreement appointed Frederic Buscombe as sole arbitrator. He inspected the properties, heard witnesses, and delivered an award, in which he set forth the various elements which he had taken into consideration and awarded certain sums in respect of each of the properties taken.

The appellants applied to the Court of British Columbia for an order to enforce the award on an order of court. This was met by a motion on behalf of the respondents to set aside the award. These counter motions came to depend before Morrison, J.

That learned Judge refused to set aside the award, though remitting it to the arbitrator to deal with some minor matters which need not be mentioned.

Appeal was taken by the first respondents to the Court of Appeal, who, by a majority as before stated, set aside the award.

The question before this Board is whether that judgment was right.

The grounds on which the award was set aside were four in number—being all matters

which appear on the face of the award and were alleged as follows:—

- (1) The arbitrator allowed a value over and above the value of the land taken for the chance which the owner would have had of getting leave from the Crown to extend some *opus manufactum* such as a pier head over the foreshore.
- (2) In respect of lots 5 and 6 he valued upon the assumption that they might have got an additional piece of ground behind to make up for what had been taken from them in front in a street-widening operation, whereas, in point of fact, they did not get this additional piece.
- (3) The arbitrator allowed interest on the sums awarded from the date of the notice to treat.
- (4) The arbitrator awarded himself fees in excess of the scale allowed by the statute.

Their Lordships will deal with these points in reverse order.

(4) It is clear that the fees are in excess. This, however, could easily be dealt with by remit.

(3) In ordinary cases interest on the price of land taken runs from the date of taking possession. But in this case there seems no room for argument as to when possession was or might have been taken.

Sections 6 and 7 of the False Creek Reclamation Act are as follows:—

“ Section 6.—In arriving at the value of any lands, rights, or interests expropriated or to be expropriated, the arbitrators shall take the value of the lands, rights, or interests at the date of the service of the notice as hereinbefore provided.

“ *Section 7.*—Upon payment or legal tender of the
 “ amounts so awarded or agreed upon to the person, body
 “ corporate, or party entitled to receive it, or upon payment
 “ into the Supreme Court of British Columbia of the amount
 “ of such compensation under the award or agreement, the
 “ lands, rights, or interests so expropriated shall vest in the
 “ Corporation, and there shall vest in the Corporation power
 “ to forthwith take possession of the lands or interests the
 “ subject of the award or agreement.”

It is clear that interest in this case can therefore only run from date of award, and not from date of notice as fixed by the arbitrator. This also, however, could easily be set right by remit.

2. Previous to the events of the arbitration a street widening had been effected, for which ground had been taken on the street side from lots 1, 2, 3, and 5 and 6. All these lots are bounded behind by high-water mark. As part of the arrangement for compensation the Corporation gave to lots 1, 2 and 3 a piece of the foreshore (which, as will be afterwards set forth, they had acquired from the Crown) sufficient to make the total depth of the lots 120 feet. This was not done as part of the arrangement with the proprietors of lots 5 and 6. It seems therefore clear that the arbitrator had no right to award a value based upon the supposition that 5 and 6 might have had a depth of 120 feet, when as a matter of fact they had not such depth. Had he merely said that the value of 5 and 6 per frontage foot was the same as that of the other deeper lots, his view could not have been touched. But he has explained the ground on which he went, and that ground is on the face of it erroneous. This point, however, would only affect the award as regards lots 5 and 6.

1. This is the only important matter. Their Lordships do not propose to repeat as to the general principles of valuation what was

recently said by them in the case of *The Cedars Rapids Manufacturing and Power Company v. Lacoste* (1914, A.C., p. 569), the gist of which is quoted by McPhillips, J. A., in the present case. It is evident that while all opportunity of employment for a certain purpose in regard to the position of land to be acquired is to be taken into account, there must come a point where the opportunity becomes so remote as to be negligible.

It is here that their Lordships are constrained to come to the opinion that the arbitrator went wrong.

The lots in question were bounded by the high-water mark. The owners of the lots had no right in the solum of the foreshore. They had the right of going over the foreshore whether covered by water or not, and so obtaining access to the sea. If the arbitrator had only added something to the value of the land itself for that privilege nothing could have been said—that was the principle on which allowance was made in the case of the Duke of Buccleuch. L.R., 5 E. & I., App. 418.

But the arbitrator has done more than that. For after dealing with the right of access to the sea, he goes on thus:—

“While the riparian rights carries with it no definite legal right to build upon, or extend the property abutting upon the water, to or upon the land under the water, the actual right of access to the water has in common practice carried with it the privilege of applying to the Crown for a grant to extend the property affected out to deep water, or to an established pier head-line, and this right or privilege, is, I believe, rarely, if ever, withheld where the rights of others are not interfered with.”

Now that a proprietor who abutted on the foreshore might apply to the Crown—proprietor of the foreshore, for such a grant may be conceded. But it is quite different if the foreshore does not belong to the Crown. And in this

case the foreshore did not belong to the Crown. For by a grant of 1901 the whole of the bed and foreshore of False Creek had been conveyed to the Corporation. This grant contained certain restrictions, and was supplemented by an ampler grant in 1911. Now the effect of these grants was to deprive the Crown of the right of the solum. The allowance by the Crown to construct *opera manufacta* is rendered necessary apart from the common law by the provisions of the Navigable Water Protection Act. In respect of these provisions the Department of Public Works has issued regulations dealing with applications for permission to erect such works. One of the regulations is as follows :—

“The applicants must furnish proof that they own or have a sufficient interest in the land or land covered with water upon which the works are to be constructed. It is not sufficient to hold the riparian interests alone, if the work extends beyond the limits of the shore, but a sufficient portion of the harbour, river or lake must also be held by the applicants. The statute has reference to the erection of structures on lands owned by the applicants, and is designed to provide for due protection to navigation. It cannot be used as a means of acquiring title to lands upon which the structure is to be erected.”

It seems therefore abundantly clear that the appellants here were not *in titulo* to apply to the Government for any permission. To enable them to do so they would first be bound to acquire from the Corporation so much of the foreshore and bed of False Creek as was to bear the *opus manufactum*.

Now there is not a tittle of evidence that the Corporation would ever have consented to sell. It is obvious that the Arbitrator really mistook the true position; for he says in another passage :—

“For while the city occupied the position of being able to block or prevent these owners from obtaining these

“ foreshore grants or leases it manifestly was not their
 “ intention so to do prior to the agreement with the Canadian
 “ Northern Railway, as the weight of evidence plainly
 “ shows.”

Now, while he is quite right in considering the situation as it was prior to the agreement with the railway company—or, in other words, the Reclamation Act under which the land is taken from the claimants—yet he is radically wrong when he speaks of the city being able to “ block the owners from obtaining a foreshore grant.” The Crown could not give a foreshore grant—not because the city “ blocked ” it, but because the foreshore no longer belonged to the Crown to give. And the right to ask for an *opus manufactum* did not exist except in some one who had the foreshore. That meant conveyance from the city to the claimants, and there is not a jot of evidence to show that there was a chance of any such conveyance. In other words, their Lordships agree with McPhillips, J.A., who says, “ the arbitrator has palpably “ erred in allowing values which did not attach “ to the lands ” (taken); and with Irving, J.A., who says, “ I do not question that the present “ potential value may be a factor, but the “ potential values may be too remote at this “ date to enhance the value of the land, which “ at present is practically unproductive.” These observations are, in their Lordships’ opinion, strictly in accordance with the principles laid down in the *Cedars Rapids* case already cited.

Their Lordships are therefore of opinion that the award as it is cannot stand. There remains the question of whether it should be set aside or remitted for reconsideration. This seems to their Lordships a question of discretion for the Judges in the whole circum-

stances of the case, and unless that discretion has been obviously misused they do not feel inclined to interfere with it.

Their Lordships will humbly advise His Majesty to dismiss the Appeal with costs.

In the Privy Council.

EDWARD ODLUM AND OTHERS

v.

THE CITY OF VANCOUVER AND
THE CANADIAN NORTHERN PACIFIC
RAILWAY COMPANY.

DELIVERED BY LORD DUNEDIN.

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