

18, 1958

No. 12 of 1958

IN THE PRIVY COUNCIL

ON APPEAL
FROM THE COURT OF APPEAL OF NEW ZEALAND

UNIVERSITY OF
W.C.T.
28 JAN 1958
INSTITUTE OF
LEGAL ST.

IN THE MATTER of Section 67 of
the Maori Affairs Act 1953

and

IN THE MATTER of an Application
by the Minister of Works to the Maori Land
Court to ascertain the compensation payable
to the owners of certain Maori freehold
lands being part of the Whareroa Block
situate in the Tauranga Survey District

52125

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B E T W E E N

THE MAORI TRUSTEE
(Claimant) Appellant

- and -

THE MINISTRY OF WORKS
(Respondent) Respondent

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C A S E FOR THE RESPONDENT

RECORD

1. This is an Appeal from an order of the
Court of Appeal of New Zealand (Gresson,
F.B. Adams and Shorland, J.J.) dated the 19th,
December, 1956, whereby the said Court of
Appeal expressed its opinion upon a Case
stated by the Maori Land Court on the 11th
July 1955 for the opinion of the Supreme Court
of New Zealand pursuant to Section 67 of the
Maori Affairs Act 1953, the said Case Stated
having been removed into the said Court of
Appeal by order of the Supreme Court of New
Zealand dated the 19th August, 1955, pursuant
to the said Section 67.

pp.34-35

pp.3-6

p.7

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RECORD

2. The principal question for determination in this appeal is the proper basis of assessment in accordance with Section 29 of the Finance Act (No.3) 1944, of the compensation to be paid for land taken by the Crown under the provisions of the Public Works Act 1928 (as amended).

3. The main relevant provision of Section 29 of the Finance Act (No.3), 1944, is contained in paragraph (b) of subsection (1) of Section 29 and is as follows: 10

"The value of the land shall, subject as hereinafter provided, be taken to be the amount which the land if sold in the open market by a willing seller on the specified date might be expected to realize".

The specified date as defined by Section 29 was in this case the 15th September, 1952. 20

4. The land in question (hereinafter called "the land") was a little over 91 acres of Maori lands forming part of the Whareroa Block situate in the Tauranga Survey District. In 1948 an area of approximately 242 acres which included the land was the subject of a Vesting Order made by the Maori Land Court in favour of the Waiariki District Maori Land Board as trustee for the beneficial owners thereof under Section 8 of the Maori Purposes Act 1943. The Vesting Order took effect only upon its approval by the Minister of Maori Affairs in November 1951. 30

p.3
p.3,1.41-
p.4,1.29.
p.8,11.7-36.

p.4,1.41.
p.8,1.11.

5. On the 13th September, 1951, the Minister of Works gazetted notice of intention to take the land under the Public Works Act 1928 and by proclamation pursuant to the Public Works Act 1928, dated the 5th September, 1952, and published in the New Zealand Gazette of the 11th September, 1952, the land was declared taken as from the 15th September, 1952, for better utilization. The effect of the proclamation was to vest the land in the Crown on the 15th September, 1952. 40

p.4,11.43-45.
p.8,1.13.

p.3,1.27.
p.8,1.15.

6. On the 18th September, 1952, the Minister of Works applied to the Maori Land

p.4,11.7-10
p.8,1.17.

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- 10 Court under Section 104 of the Public Works Act, 1928, for assessment of the compensation which ought to be paid in respect of the land. On the 29th September, 1952, the Waiariki District Maori Land Board notified the Minister of Works that the Board claimed £109,011 for compensation (being £95,711 for the value of the land and £13,300 for injurious affection of other adjacent land). On the 30th September, 1952, the right to receive compensation for the land was by virtue of Section 7 of the Maori Land Amendment Act, 1952, transferred from the Waiariki District Maori Land Board to the Maori Trustee.
- 20 7. At the time of vesting in the Crown the land was in an undeveloped state, without access by road. Prior to the order of 1948 vesting the land in the Waiariki District Maori Land Board a plan had been prepared for subdivision into allotments for residential purposes of the whole of the said area of about 242 acres together with some other adjoining land. One of the objects of the said vesting order in 1948 was to enable the said Land Board to proceed with subdivision. The said Land Board could not proceed with sub-division until the said vesting order became effective upon its approval by the Minister of Maori Affairs in November 1951, by which date it had become useless for the said Land Board to proceed as the Minister of Works had on the 13th September, 1951, gazetted his notice of intention to take the land. Accordingly no subdivision of the land was made nor had the conditions precedent in law for subdivision been complied with before the Crown took the land, the necessary consent or approvals not having been received.
- 30 8. The said application by the Minister of Works came before the Maori Land Court (Morison, Chief Judge, presiding) sitting at Tauranga on the 6th April, 1954, and was heard by the said Court on that day and on the 7th, 8th, 9th, 12th and 13th April 1954 and the 15th, 16th, 17th, 18th, 21st, 22nd, 23rd and 24th June 1954. There was no
- 40
- p.4,11.11-28.
- p.8,11.21-29.
- p.4,1.32.
p.12,11.33-35.
- p.4,1.33-
p.5,1.4.
p.8,11.30-36
- p.4,1.38.
- p.9,11.16-22
p.12.11.42-45
- p.4,1.30.
- p.5,11.6-10

RECORD

pp.3-6 evidence to show when subdivision of the land would have been proceeded with if the approval of the Minister of Maori Affairs had been granted at an earlier date. The evidence adduced showed that the carrying out of a subdivision of the land would have involved a considerable outlay for roading, drainage and other development, and other costs of sub-division. After hearing evidence and argument the Maori Land Court stated a Case for the opinion of the Supreme Court. 10

p.5,11.12-17 9. The Case states that the Land Court found that "part of the land would have been immediately saleable at the date of the taking in lots upon a sub-division either for residential or industrial purposes, and that the balance would have been saleable in lots upon a subdivision for residential or industrial purposes from time to time over a period of years subsequent to the date of taking". It further states that a question of law arose as to the basis upon which the value of the land should be assessed, including the question whether there should be any difference in the method of assessment as between that part of the land which would have been immediately saleable in lots at the date of the taking and that part which would have been saleable in lots from time to time over a period subsequent to the date of the taking. 20

p.5,11.19-24 that a question of law arose as to the basis upon which the value of the land should be assessed, including the question whether there should be any difference in the method of assessment as between that part of the land which would have been immediately saleable in lots at the date of the taking and that part which would have been saleable in lots from time to time over a period subsequent to the date of the taking. 30

p.5,1.26-
p.6,1.25. 10. The questions stated by the Case for the opinion of the Supreme Court were:

"(1) Is the value of the land to be assessed upon the assumption that the claimant sold the land at the date of the taking in one undivided parcel to one purchaser desirous of acquiring it for the purpose of subdivision and sale in lots? 40

(2) Is the value of the land to be assessed upon the assumption that the claimant sold at the date of the taking that part of the land which was then immediately saleable in lots

to several purchasers in lots according to a subdivision made by him and sold the balance of the land to several purchasers in lots from time to time over a period subsequent to the date of the taking according to a subdivision made by him?

10 If the answer to each of the above questions is "No", then the following questions are submitted:-

(3) As to that part the land which would have been immediately saleable in lots at the date of the taking:-

(a) Is the value to be assessed upon the assumption that the claimant at the date of the taking sold the land to several purchasers in lots according to a subdivision made by him?

20 (b) Is the value to be assessed upon the assumption that the claimant at the date of the taking sold the land in one undivided parcel to one purchaser desirous of acquiring it for the purpose of a sub-division and sale in lots?

30 (4) As to that part of the land which would have been saleable in lots from time to time over a period of years subsequent to the date of the taking:-

(a) Is the value to be assessed upon the assumption that the claimant sold the land to several purchasers in lots from time to time over a period of years subsequent to the date of the taking according to a subdivision made by him?

40 (b) Is the value to be assessed upon the assumption that at the date of the taking the claimant sold the land in one undivided parcel to one purchaser desirous of acquiring it for the purpose of subdivision and sale in lots?

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(5) If the answers to questions 3 and 4 are "No" then how is the value of the land to be assessed?"

p.7.

11. By order of the Supreme Court of New Zealand dated the 19th August, 1955, the Case Stated was by consent of the parties ordered to be removed into the Court of Appeal of New Zealand for hearing, pursuant to the provisions of Section 67 of the Maori Affairs Act, 1953.

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pp.34-35

12. The Case Stated was heard by the said Court of Appeal on the 11th and 12th April 1956, and judgment was delivered on the 19th December, 1956, when the opinion of the said Court upon the questions stated (and set out in paragraph 10 hereof) was expressed as follows:-

"(1) In accordance with Section 29(1)(b) of the Finance Act (No. 3) 1944, and subject to the other provisions of that section the function of the Maori Land Court is to ascertain as the value of the land "the amount which the land if sold in the open market by a willing seller on the specified date might be expected to realise". The specified date is the 15th September, 1952.

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(2) The valuation must be of the land in the state in which it is on the specified date; any potentialities shall be taken into account in assessing its value.

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(3) The court must contemplate the sale of the land as a whole unless on the specified date there could have been separate sales of particular portions, and there was a market for such separate portions. Only if the land had been legally subdivided at that date so that particular lots might have been sold and title given can it be said that there could have been separate sales of particular portions.

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RECORD

10 (4) If the land has to be valued as a whole,
the Court in assessing the
potentialities may take into account
the suitability of the land for
subdivision, the prospective yield from
a subdivision, the costs of effecting
such a subdivision, and the likelihood
that a purchaser acquiring the land
with that object would allow some
margin for unforeseen costs,
contingencies and profit for himself."

20 13. Before the Court of Appeal it was
contended by the Respondent and not
challenged by the Appellant that at the
relevant date, namely the 15th September,
1952, there was in fact no part of the land
which it was legally permissible to sell in
lots, in as much as the subdivision plan had
not received such consents or approvals as
were necessary in law.

p.9,11.16-22
p.12,11.34-46.

30 14. The leading judgment was delivered by
Gresson, J. The learned Judge based his
judgment on the fact that sale of the land in
lots was not in fact possible, because not
legally permissible, at the specified date
After referring to the fact that at the
relevant date there were no sections of the
land which were legally saleable, he
observed that, although the Case Stated asked
for directions as to "that part of the land
which would have been immediately saleable
in lots at the time of the taking", there
were in truth no such lots, but only an area
of land possessing the potentiality of being
subdivided into allotments. It was his
opinion that the land with its potentiality
must therefore be valued as land capable
ultimately of disposal by subdivision at some
future time but not in that state at the time
of valuation and that the whole of the land
must be valued as one entity.

pp.7-12.

p.9,11.16-24

p.9,11.28-31.

p.9,1.45-
p.10,1.1.

40 Compensation could not lawfully be
awarded on the basis of a sale to several
purchasers in lots, unless there was in
existence an actual and not merely a
prospective or assumed subdivision.

p.11,11.2-12.

RECORD

p.11,11.14-22. 15. He thought that the potentiality of future subdivision would affect the price which a purchaser of the land would be willing to pay. In estimating that price it was permissible to consider the estimated gross yield to the purchaser from future subdivision and the estimated deductions which such purchaser would take into account. It was not permissible to have regard to the yield which might have accrued to the existing owner if he had retained the land and subsequently himself sold it in lots after subdivision. The learned Judge stated that a good deal required to be done before the land could be sold piecemeal in lots, and that as well as expenses there would be risk and delay. 10

pp.12-24 16. F.B. Adams, J., was of opinion that whether or not the land could legally have been sold in lots on the relevant date, it must as a matter of law be valued as a whole if it was then still a single holding. After stating that at the relevant date sale of the land in lots by way of subdivision was not legally permissible, the learned Judge said that in essence the question was whether the expropriated owner of land that was subdivisible but not yet subdivided was entitled to be compensated on such a basis as would give him the profit that might have been reaped by selling in subdivided lots. He agreed with the decision of the High Court of Australia in Turner v. Minister of Pensions (1956 Argus L.R.367) that if the tribunal assessing compensation proceeds on the basis of the estimated probable proceeds of subdivision, there must be deducted, not only the probable expenses of subdivision, but also an appropriate allowance for "risk of realisation" and a further allowance representing the profit which a purchaser might expect to make by reselling in subdivision. 30

p.14,1.36-
p.15,1.12. p.12,11.34-46. p.13,11.32-35. p.13,11.30-45. p.15,1.40-
p.16,1.22. The alleged distinction in point of law between such portions of land as were immediately marketable in subdivided lots and such portions as were not so immediately marketable rested on St. John's College Trust Board v Auckland Education Board (1945 N.Z.L.R.507), which he thought was wrongly decided. 40

17. The learned Judge was of opinion that p.17,11.9-39.
while the suitability of the land for
subdivision was a relevant factor in
ascertaining the compensation, it was, like
other potentialities, to be treated as a
potentiality and not a realised potentiality.
The question was always, "What is the present
value of the land in its present state and
condition, taking into account its
10 suitability for subdivision"?, and never
"What will be its value when subdivided, or
when sold by way of subdivision?". The sum
to be ascertained was the figure that the
land might have been expected to realise if
sold on the open market on the relevant date,
that figure being affected by all the
potentialities of the land, but only in so
far as they would influence a buyer in
fixing the price that he would then be
20 prepared to pay for the land as it stood.
The owner was not to be awarded the profit p.23,11.27-40.
that would have arisen from subdivision if he
had been allowed to continue in possession,
for that would be to give him the benefit of
the realised possibility. The prospective
profit went to, and was paid for by, the
hypothetical purchaser, the question being
the extent to which his price would be
affected thereby. He was further of the
30 opinion that the propriety of making due
allowance for such matters as "profit and
risk" was not open to question. p.23,1.41-
p.24,1.11.

18. He thought that the Appellant's p.24,11.11-23.
contention that all potentialities must be
valued as if the claimant had been allowed
to develop them was clearly unsustainable,
as was also the contention that the
assessment should be based on the present
value of ultimate realisations. The
40 measure of compensation was the price that
a purchaser might be expected to pay for
the opportunity of making whatever profit
could be got from the land, and not the
estimated gross total of expected
realisations converted into present values
after deducting expenses. The latter
calculation might produce a result far
removed from the statutory measure of
realisable market value at the date of
50 expropriation.

pp.25-34. 19. Shorland, J., thought that when the Case Stated included a finding that on the specified date part of the land would have been immediately saleable in lots "upon a subdivision", the words "upon a subdivision" meant upon a subdivisional scheme having received the approval of the appropriate Minister and having been completed to the stage at which the owner could in fact and in law sell the subdivided allotment to separate purchasers. It appeared to him that if on the specified date the owner could have sold to individual purchasers in several allotments, the value of the land was to be measured by ascertainment of the aggregate sums obtainable in the open market on that date, assuming it to be sold in one lot or in parcels as might be most advantageous to the owner, and deducting therefrom the cost of subdivision and sale and any other proper expenses incurred. But if the owner could not on the specified date have sold the land in individual allotments either because sale in individual allotments was forbidden by law or because some other operative factor prevented sale in separate allotments, "the amount which the land if sold in the open market by a willing seller on the specified date might be expected to realise" was, in his view, restricted to the amount which a willing seller could be expected to obtain by the only method of realisation available to him on the specified date, namely by sale in one piece with all its then existing potentialities. This amount could not include the hypothetical profit which the purchaser might at some future date expect to realise upon the completion of subdivision and sale in allotments.

p.25,1.35- p.26,1.4. 10

p.30,11.15-40 20

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p.35. 20. By order of The Court of Appeal of New Zealand dated the 10th October, 1957, the Appellant was granted final leave to appeal from the said judgment of the said Court of Appeal to Her Majesty in Council. The Respondent will contend that this appeal should be dismissed with costs for the following among other 40

R E A S O N S

- 10 (1) BECAUSE the duty of the Court determining the amount of compensation to be awarded in accordance with Section 29 of the Finance Act (No.3) 1944 for land the legal estate in which at the specified date (as defined by the said Section) is vested in one owner is to ascertain the sum which the owner as a willing seller might be expected to have obtained by sale in the open market of the land as whole in its existing state on that date, whether or not the owner could in fact or in law have sold the land and given title on that date in separate allotments to separate purchasers.
- 20 (2) ALTERNATIVELY, because the duty of the Court determining the amount of compensation as aforesaid, if on the said specified date the owner could in fact and in law have sold the land or part of it and given title in separate allotments to separate purchasers, is to ascertain the sum which the owner as a willing seller might be expected to have obtained by sale in the open market of the land, or, as the case may be, such part of it, in its then existing state either as a whole or in separate allotments as would be most advantageous to the owner; whereas
- 30 if on the specified date the owner could not in fact and in law have sold the land or part of it and given title otherwise than in one lot, the said duty of the Court is to ascertain the sum which the owner as a willing seller might be expected to have obtained by sale in the open market of the land or, as the case may be, such part of it, in its then existing state.
- 40 (3) BECAUSE the said Court must take into account, in so far as they would influence a buyer in fixing the price he would pay for the land in its existing state on the specified date, all the potentialities of

the land (including its suitability for subdivision), and, where suitability for subdivision is a potentiality, the costs of effecting a subdivision and of doing all such things as may be necessary or proper to enable the land to be sold and title given in separate allotments, and the margin which a purchaser acquiring the land would allow for unforeseen costs, risk of realisation, delay and other contingencies and profit for himself.

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H.R.C. WILD

J.D.F. MOYLAN.

No. 12 of 1958

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BETWEEN
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- and -
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