

Francesca the wife of Michele Aquilina - - - *Appellant*

v.

Doctor Vincenzo Depasquale - - - - *Respondent*

FROM

THE COURT OF APPEAL, MALTA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 10TH FEBRUARY 1971

Present at the Hearing :

LORD HODSON
LORD GUEST
VISCOUNT DILHORNE
LORD DONOVAN
LORD PEARSON

(Majority Judgment delivered by LORD HODSON)

This is an appeal from the Court of Appeal of Malta, reversing a judgment of the Civil Court, First Hall, on a question reserved by the judge of that Court sitting as Chairman of the Land Arbitration Board pursuant to section 24 of The Land Acquisition (Public Purposes) Ordinance of 1935.

The question relates to the compulsory acquisition of land belonging to the appellant which is part of a Special Development Area declared, pursuant to section 3 of the Ordinance, to be required for a public purpose.

The sums of £220 8s. 0d. and £12 5s. 0d. were offered by The Commissioner of Land as compensation for the purchase of the land. The appellant refused the offer and claimed compensation at the rate of £600 for every 68½ square canes (a considerably higher rate). The Commissioner having applied to the Land Arbitration Board for an order assessing compensation the question at issue in this appeal arose.

The land consists of two plots of "agricultural" land situated in an area of building development. This development is mainly due to the blocks of public buildings *e.g.* an University, which are being erected in the area and to the opening of a road likely to become one of the most important traffic arteries of the Island.

The market price of land in the neighbourhood has risen by reason of these circumstances and the Courts of Malta have given the matter careful consideration so as, to use the language of the Court of Appeal's majority judgment "not to disturb the equilibrium between the equitable compensation due to the owner whose property has been compulsorily acquired and the authority's need to make use of land for a public purpose".

The question was reserved in these terms:

“Whether for the purposes of the valuation of the land to be acquired compulsorily and in particular for the determination or otherwise of its potential value the provision of section 25 (1)(b) is to be considered by itself or whether it should be interpreted in conjunction with the provision of Section 16 of the same law and in particular whether this latter section should be exclusively applied in the sense that if the land to be acquired compulsorily is not a building site in terms of the law then the land should necessarily be considered solely as ‘rural or waste land as the case may be’ independently of its potential value as a building site—”

In order to explain the question it is necessary first to set out section 25 (1)(b) of the Ordinance and also two of the preceding sections namely sections 16 and 17.

Section 16 reads:

“Any land which is not a building site shall be valued for the purpose of determining the compensation payable in the case of its compulsory acquisition as rural land or as waste land, as the case may be.”

Section 17 reads:

“(1) Land shall be deemed to be a building site for the purposes of this Ordinance if it has a frontage on an existing street and is situate within a built-up area or, subject to subsection (2) of this section, within a distance of not more than one hundred yards of a built-up area, measured along the axis of the street.

(2) In determining whether land is a building site by reason of the fact that it is situate within a distance of not more than one hundred yards of a built-up area regard shall be had to the probable immediate expansion of the built-up area in the direction of the land in question.

(3) Land falling within the definition of subsection (1) or (2) of this section shall be deemed to be a building site to a maximum depth of twelve canes.”

Section 25 so far as material reads:

“(1) Without prejudice to any special provision contained in this Ordinance, in assessing compensation the Board shall act in accordance with the following rules:

.....

(b) 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 might be expected to realize: ”

Put shortly the main contention of the appellant is that the Court of Appeal were wrong in upholding the claim of the respondent (The Acting Commissioner of Land) that the land should be valued as directed by section 16 because in so doing the language of section 25 (1)(b) was in effect ignored without clear statutory justification.

Reliance was placed on the language of the Civil Code of Malta which from 1868 until the present time has enshrined a provision in similar language to that of section 25 (1)(b). Article 15 of Ordinance No. VII of 1868 provided:

“No one can be compelled to give up his property, or to permit another party to make use of it, except on the ground of public utility, and on payment of a just indemnity.”

At the present time Article 358 of the Revised Edition of the Laws of Malta 1942 is in force and reads:

“No person can be compelled to give up his property or to permit any other person to make use of it, except for a public purpose, and upon payment of a fair compensation.”

This revised edition came into existence pursuant to Ordinance No. XXVI of 1936 which gave power to a Commissioner, appointed for the purpose, to prepare the edition, but did not authorise him to make any alteration or amendment in the matter or substance of any Ordinance or Law. There is no question but that the legislature can without the employment of any specific procedure amend any part of the law whether or not such part embodies basic principles of the law or constitutional rights. Likewise it is clear that the various ordinances whether described as part of the Civil Code or not are to be read together so long as they are unrepealed.

The history of the legislation concerning compulsory purchase is relied upon by the appellant as supporting the contention that section 25 (1) (b) of the Ordinance must be followed strictly notwithstanding the opening words of the section “without prejudice to any special provision contained in this Ordinance”. This phrase is said not to contain any or any sufficiently clear direction that the protection afforded by the principle embodied in section 25 (1) (b) should be disregarded.

Their Lordships cannot accept this contention. It is unnecessary to see whether there are other special provisions in the Ordinance which may be contemplated for it is impossible to avoid the conclusion that section 16 is a special provision contained in the Ordinance relating to the assessment of compensation which would be prejudiced by the literal acceptance of the sub-paragraph 25 (1) (b). Section 16 has no meaning unless it is given an independent interpretation even though its language may conflict with the last sub-paragraph of section 25. To give it no meaning would be in effect to repeal it judicially a result not lightly to be reached.

In their Lordships' opinion there is a clear indication in the language of section 16 which takes away the larger measure of protection to be found in section 358 of the Code and the last sub-paragraph referred to.

The next point to be taken by the appellant was that section 16 is not concerned with the assessment of compensation but only with the categorisation of land as a preparatory step to the assessment of compensation referred to in section 25 (1). It should be explained that by amendment in an ordinance of 1962 “compensation shall be assessed” was substituted for “in assessing compensation the Board”.

The change of language from “determining the compensation” in section 16 to “in assessing compensation” in section 25 (1) does not in their Lordships' judgment affect the construction of the two sections nor does it seem that any effective purpose could be served by a preliminary examination of land leading to an assumption as to its existing use which might later be displaced.

Section 16 provides that any land which is not a building site shall be valued for the purpose of determining the compensation payable in the case of its compulsory acquisition as rural land or waste land as the case may be. “Rural” land appears to be the equivalent of “agricultural land” referred to in section 23 (1) of the Ordinance which gives the Board power to assess compensation.

By section 2 of the Ordinance as it now stands “agricultural or rural land” does not include (*inter alia*) a building site or waste land

but includes farmhouses buildings intended mainly for the keeping of store cattle or other domestic animals and other structures of a kindred nature.

Section 16 begins by referring to any land which is not a building site and classing such land for valuation purposes as either rural land or waste land. Section 17 is important because it defines a building site in unusually meticulous terms, no doubt appropriate to local conditions, by means of a deeming provision. As has been said "deem" may change its meaning according to the context *St. Aubyn (L.M.) and others v. Attorney General (No. 2)* [1951] 2 All E.R. 473 per Lord Radcliffe. In their Lordships' judgment in agreement with that of the majority of the Court of Appeal of Malta the definition of building site in section 17 is in its context an exclusive definition of a building site describing it specifically by reference to its situation and thereby limiting the definition to that which the section in terms describes.

It has been suggested that the reference to building site in the opening words of section 16 does not exclude "potentiality of development for building purposes". Their Lordships do not accept this distinction. A building site is a place upon which a building may be placed at some time in the future and it is the potentiality of future building which gives a special value to a building site. Reference has already been made to the definition of agricultural land which involves that such land has a limited potential as a building site but only for farming purposes. Apart from this limited exception there is no room for the assessment of compensation for a potential building site in section 16 for "waste land" carries no implication of building potential.

Their Lordships agree with the majority judgment of the Court of Appeal of Malta that giving effect to section 16 does not involve that Article 358 of the Civil Code has no effect. The Article still provides for the expropriation of things which do not fall within the Ordinance. It is cut down by section 16 but not abrogated.

The words of section 16 are clear in their terms and the question brought should be answered as demanded by the Land Commissioner so that the provisions of section 25 (1) (b) are to be interpreted as subject to the provisions of section 16 and therefore the amount of compensation shall be the sum which the plots of land, which are not "a building site" but "rural" or "waste land" might have realised in a free transaction in the market according to law. The appellant's land cannot be valued as a building site nor as a potential building site although other factors which may eventually in the open market have bearing on the value of the land as rural land may be taken into consideration.

Their Lordships will accordingly humbly advise Her Majesty that this appeal be dismissed.

(Dissenting Judgment by VISCOUNT DILHORNE)

The appellant is the owner of two plots of agricultural land in Malta and the question for determination in this appeal is as to the compensation payable to her on their compulsory acquisition for public purposes. The respondent contends that under the law of Malta she is only entitled to the existing use value and that no regard is to be had to the potentialities. It is common ground that on a voluntary sale by a willing vendor to a willing buyer the land would fetch a far higher price than if its use was restricted to agriculture. The appellant contends that she is entitled

to a fair price for her land and that that means the price it would realise if sold by a willing vendor to a willing buyer, that is to say, a price which takes account of the land's potentialities. If the respondent is right, it follows that the law of Malta in relation to compulsory acquisition is in some instances confiscatory in character.

So long ago as 1868 it was provided by Article 15 of Ordinance VII of Malta that:

“No one can be compelled to give up his property or to permit another party to make use of it except on the ground of public utility and on payment of a just indemnity.”

In 1930 this Ordinance was amended by ‘The Ordinance No. VII of 1868 Amendment (Expropriation) Act 1930’ (No. III of 1930). By this Act new Articles were inserted in the 1868 Ordinance and in particular Article 15 *a* which was in the following terms:

“15 *a*. The above mentioned indemnity will consist of a fair price which in the opinion of duly appointed civil engineers and architects or other experts, the property expropriated would have obtained in a voluntary sale by a willing vendor to a willing buyer with the addition of eight per centum”

So if the appellant's land had been compulsorily acquired after the passing of this Act in 1930 and before the enactment of the Land Acquisition (Public Purposes) Ordinance 1935 the appellant would have been entitled to receive as compensation the open market value of her land plus 8 per cent.

The respondent contends that the Land Acquisition Ordinance 1935 altered this to the disadvantage of owners of agricultural and waste land. By this Ordinance a Board was created with the functions specified in Article 23. One of its functions was

“to assess the amount of compensation payable under any of the provisions of this Ordinance and for that purpose to declare whether any area is a building site or agricultural or waste land.” (Article 23 (1) (e)).

Article 25 which has the marginal note “Assessment of compensation by the Board” reads as follows:

“Without prejudice to any special provisions contained in this Ordinance, in assessing compensation the Board shall act in accordance with the following rules

(a) no allowance shall be made on account of the acquisition being compulsory;

(b) the value of the land shall, subject as hereinafter provided, be taken to be the amount which the land if sold on the open market by a willing seller might be expected to realise.”

What was thereafter provided is not relevant to this appeal.

This Ordinance repealed Article 15 *a* inserted into the 1868 Ordinance, that Article being replaced by Article 25 which commences with the important words ‘Without prejudice to any special provisions contained in this Ordinance’.

Article 12 provides that the amount of compensation payable may be agreed between the competent authority and the owner.

Article 19 provides when the land acquired is subject to a lease, no compensation for the termination of the lease shall be paid to the

tenant or occupier if a full years' notice to quit is given and that in any event the compensation shall not exceed the fair rent of the land for the period of two years.

It would seem that these two Articles are 'special provisions' to which Article 25 refers. The respondent contends that Article 16 is also a special provision. It is in the following terms:

"16. Any land which is not a building site shall be valued for the purpose of determining the compensation payable in the case of its expropriation as rural land or as waste land as the case may be."

The word 'expropriation' was later changed to 'compulsory acquisition'.

The respondent contends that the requirement that land which is not a building site, shall be valued as rural land or waste land means and can only mean that all that is to be valued is its existing use value. If this argument is right, it would seem to follow either that no compensation would be payable on the acquisition of waste land or only a purely nominal amount as the description of that land as waste indicates that it has no existing use. In that case in relation to waste land the Land Acquisition Ordinance is wholly or almost wholly confiscatory.

Before considering the respondent's contentions further two more provisions must be referred to.

The definition of 'building site' in the Ordinance of 1935 was later replaced by the following definition:

"17(1). Land shall be deemed to be a building site for the purposes of this Ordinance if it has a frontage on an existing street and is situate within a built up area, or, subject to subsection (2) of this section, within a distance of not more than one hundred yards of a built up area measured along the axis of the street.

(2) In determining whether such land is a building site by reason of the fact that it is within a distance of not more than one hundred yards of a built up area regard shall be had to the probable immediate expansion of the built up area in the direction of the land in question.

(3) Land falling within the definition of subsection (1) or (2) of this section shall be deemed to be a building site to a maximum depth of twelve canes."

The Ordinance as enacted in 1935 did not contain a definition of agricultural or rural land. The following definition was later inserted:

"'agricultural or rural land' does not include the domestic garden of a house or building or any other land within the precincts of a house or building or building site but includes farm houses, buildings intended mainly for the keeping of store cattle or other domestic animals and other structures of a kindred nature."

The words 'agricultural' and 'rural' were apparently used in this Ordinance as if they had the same meaning for in Article 23 (1)(e) the word used was 'agricultural' and in Article 16 the word is 'rural'.

The Board is thus under a duty to declare whether the land sought to be acquired is a building site, agricultural or waste land for the purpose of assessing compensation. There is no appeal from its decision (Article 23 (4)). If it classifies the land as rural or waste, then Article 16 requires it to value the land as such.

A building site is usually a piece of land ripe for development. Agricultural land is usually quite distinct from a building site. But agricultural land though not a building site and not ripe for development may have its value enhanced to some degree by the possibility that in time it may become ripe for development.

If land which is clearly agricultural land is sold in the open market, the price it will fetch will reflect any such possibility and that price is the value of that agricultural land.

To require that land is to be valued as agricultural land does not in my opinion necessarily involve disregard of factors which would be taken into account if agricultural land is sold on the open market and that only its existing use is to be valued.

Land is to be classified in one of the three categories at the start of the process of valuation. The Ordinance does not specify the object of the classification but as normally there is a considerable difference in the value of a building site and of agricultural land, the classification may assist in the process of valuation. It determines the existing use but the Board is not required to classify any buildings (other than farm houses and farm buildings as they are covered by the definition of agricultural or rural land). On the acquisition of other buildings and of building sites the compensation payable is the market value (Article 25 (b)).

In *Hartnell v. The Minister of Housing and Local Government* [1965] A.C. 1134 Lord Reid said at p. 1156:

"The question in this case is whether they" (the planning authority) "can under section 17" (of the Caravan Sites and Control of Development Act 1960) "impose conditions which are not so onerous as in effect to amount to a refusal but are so onerous as materially to cut down the pre-existing right of the existing site owner. In effect the appellant's argument is that, while section 17 does not enable the planning authority to take away the whole value of the existing site owner's right—that must be done if at all by discontinuance and payment of compensation—it does enable the authority to take away without compensation anything short of the whole value by imposing conditions which stop short of being so onerous as in effect to be equivalent to a refusal of permission."

That Parliament should have intended such a result seems to me so improbable that it is necessary to scrutinise with some care the provisions on which the appellant relies, and they must be scrutinised in light of 'the well-known principle that a statute should not be held to take away private rights of property without compensation unless the intention to do so is expressed in clear and unambiguous terms' (*per* Lord Warrington, giving the opinion of the Board in *Colonial Sugar Refining Co. Ltd. v. Melbourne Harbour Trust Commissioners* [1927] A.C. 343 at p. 359)."

That in 1935 it should have been intended in Malta to deprive some owners of agricultural and waste land of part of the value of their property on compulsory acquisition and to differentiate between the owners of buildings, other than farm houses and farm buildings, and of building sites who will get the market value on the one hand and the owners of agricultural and waste land on the other hand appears to me so improbable that the provisions of the Ordinance require not only to be scrutinised with care but also in the light of the words of Lord Warrington.

It cannot be said that the intention to do so is expressed in Article 16 in clear and unambiguous terms. If that had been the intention it could easily have been expressed by the insertion in that Article in relation to agricultural and waste land of some such words as "without regard to its potential uses".

Merely to provide that land classified as agricultural or waste land is to be valued as such does not in my opinion suffice to establish that it is to be valued differently from other agricultural land where the valuation would take account of any possibilities there might be of future development; and does not establish that all that has to be paid is the existing use value.

Further, if the respondent is right either there is a conflict between the Land Acquisition Ordinance and paragraph 358 of the Civil Code of Malta or the words 'fair compensation' in that paragraph have different meanings according to the description of the land acquired.

That paragraph reads as follows:

"No person can be compelled to give up his property or to permit any other person to make use of it except for a public purpose, and upon payment of a fair compensation."

The 1868 Ordinance used the words 'a just indemnity'. In Article 15a the meaning of a just indemnity was made clear. When pursuant to Ordinance No. XXVI of 1936 the laws of Malta were codified, paragraph 358 of the Civil Code replaced Article 15 of the 1868 Ordinance. It would, I think, be very odd if in paragraph 358 the words 'fair compensation' were intended to have a different meaning to that given by Article 15a to 'a just indemnity'.

If they have the same meaning, then if the respondent is right there is a conflict between the Ordinance and the paragraph. I am wholly unable to accept the view that fair compensation means market value when a building site or a building, other than farm houses and farm buildings, is being acquired and something less than market value when agricultural or waste land is being acquired.

For these reasons in my opinion the appeal should be allowed.

In the Privy Council

**FRANCESCA the wife of MICHELE
AQUILINA**

v.

DOCTOR VINCENZO DEPASQUALE
