

BETWEEN :

HIS MAJESTY THE KING..... PLAINTIFF;

1951
}
Sept. 25
Nov. 7

AND

MARY ANN BERGER DEFENDANT.

Expropriation—Refusal to accept offer of Crown—Compensation money awarded by Court less than amount offered by Crown—Defendant not entitled to costs.

Held: That where the owner of property expropriated by the Crown is awarded by the Court a sum less than that offered by the Crown during the course of negotiation to purchase the property he is not entitled to recover his costs of the action from the Crown.

INFORMATION by the Crown to have the amount of compensation payable to the owner of expropriated property determined by the Court.

The action was tried before the Honourable Mr. Justice Hyndman, Deputy Judge of the Court, at Yorkton.

V. P. Deshaye and K. E. Eaton for plaintiff.

W. B. O'Regan K.C. and D. A. McKenzie for defendant.

The facts and questions of law raised are stated in the reasons for judgment.

HYNDMAN D.J. now (November 7, 1951) delivered the following judgment:

The information herein discloses that the lands herein-after described were taken under the provisions and authority of the Expropriation Act, ch. 64, of the Revised Statutes of Canada, 1927, for the use of His Majesty the King, in the right of Canada, for the purposes of the Public Works of Canada by depositing of record on the 1st day of April, 1950, under provisions of sect. 9 thereof, a plan and description of such lands in the Land Titles Office for the Regina Land Registration District in the province of Saskatchewan, in which registration district the said lands are situated, whereby the said lands have become and now remain vested in His Majesty the King.

The lands so taken are described as follows:

All of lots 25 and 26 in block 16 in the village of Langenburg, province of Saskatchewan, according to a plan of record in the Lands Titles Office, for the Regina Land Registration District as No. 4266.

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Up to the time of expropriation, the said defendant, Mary Ann Berger, was the registered owner in fee simple of the said lands.

His Majesty the King was willing to pay to the defendant or to whomsoever may be judged entitled thereto, the sum of \$2,000 by way of compensation for the estate or interest of the defendant and of any other person in the said lands at the time of the taking thereof, and for any loss or damage that may be occasioned to the defendant by reason of the taking of the said lots.

The defendant refused to accept the sum of \$2,000 and claimed the sum of \$3,300 as proper compensation. This having been refused by the Crown, the present action resulted.

The village of Langenburg is located on both sides of the Canadian Pacific Railway, in the heart of a fine agricultural district in Saskatchewan, and has a population of about 600 people, having increased in the last ten years from about 350 people to its present population. It was agreed that it is a progressive and growing community and composed of enterprising citizens.

The principal street in the village is King William Avenue, which is part of the provincial highway and runs on the south of, and parallel and opposite to, the Canadian Pacific Railway and station. The leading businesses are situated on and along this street. On the same street the defendant is the owner and operator of the Imperial Hotel which she inherited from her deceased husband.

The lots in question in this action are in the same block across the lane, nearly, but not quite opposite the Imperial Hotel, and have been used by the defendant as a vegetable garden. There is situated thereon only, a small garage, which she has the privilege of removing at an estimated cost of about \$75. The defendant contends that the garden is valuable to her for supplying vegetables to the hotel, and her family, and she estimated the value of the garden at about \$150 per year, less taxes—\$12; plowing—\$2; seeding—\$2.

The lots are somewhat low, especially lot 26. Before this portion of the property could be used to advantage, there would have to be considerable filling-in.

Each lot has 50 feet frontage and 120 feet in depth. The adjoining lots, 23 and 24, are owned by the Reliance Lumber Company, which is the only lumber company in Langenburg. In 1946, that company offered the defendant \$500 for 20 feet of the easterly portion of lot 25, which offer was refused.

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The evidence discloses that lot 25 is higher and more valuable than lot 26.

The lots in question front on what is known as Karl Avenue. Second Street runs north and south along the easterly boundary of block 16. On the opposite side of the street, on lot 5, block 19, there is a cold storage plant, and on lots 8 and 9, a garage. There are other small buildings on lots 1, 2 and 3, 7 and 10. On lot 22, in block 16, one Richard A. Popp, carries on an insurance and real estate business.

There is no question but that the principal street in the village is King William Avenue, business on which has grown and extended over the years, but it was submitted by the defence that there is now a trend down Second Street towards Karl Avenue, which tends to increase the value of the property in question. In my opinion, this feature of the case was somewhat exaggerated by the defendant's witnesses. I am unable to visualize Karl Avenue as a busy street for a long time to come, if ever.

The lots are assessed by the village at \$170 each. However, I am not influenced by this assessment and consider it entirely out of line with the true value of the property.

A great deal of so called expert evidence was adduced with regard to the value of these lots, ranging from around \$1,600 to \$2,500. Comparisons were made between prices of lots on King William Avenue and Karl Avenue, the selling price of some of the lots on King William Avenue varying greatly, some having buildings thereon and others vacant land. My opinion, based on the evidence, is that property on King William Avenue is much superior in value to that on Karl Avenue, in the block in which the lots in question are situated. I do not think a proper comparison can be made.

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During negotiations, which were carried on between representatives of His Majesty and the defendant, I find the following letters:

July 14, 1949, to Mrs. Berger from the Real Estate Advisor, Department of Public Works, and reads as follows:

Reference is made to your letter to the District Resident Architect at Saskatoon in which you offered for sale lots 25 and 26, block 16, in the village of Langenburg, for the sum of \$2,000. Would you please advise if the amount of \$2,000 would be accepted by you in full and final settlement of all claims.

An undated letter to the District Resident Architect, Saskatoon, reads as follows:

I, Mrs. Berger, agree to accept the sum of \$2,000 for lots 25 and 26, block 16, in the village of Langenburg, for a site for a proposed federal building.

On July 25, the defendant wrote the said agent the following:

Re your letter of July 14, 1949, file 14543-1, re lots 25 and 26, block 16.

I am willing to accept the amount stated in your letter as final settlement.

If possible I would like to retain the east 25 feet of lot No. 25 as my son is anxious to erect an electric shop on this part of the property. Please let me know if this is possible.

In answer to the last mentioned letter, Mr. Cherry wrote on August 10, as follows:

This will acknowledge receipt of your letter of July 25, 1949, concerning lots 25 and 26, block 16, Langenburg, Saskatchewan. In reply we may say that the whole of lots 25 and 26 will be required. It will therefore not be possible for you to retain the east 25 feet of lot 25.

Negotiations seemed to have lagged following this, and subsequently, on July 26, 1950, the solicitor for the Department of Justice wrote to Mrs. Berger in part as follows:

As you have been advised, the sum of \$2,500 has now been authorized to be paid to you for this property and I am positive, Mrs. Berger, that this offer will not be increased. As I previously pointed out to you, this property had already been sold by you for the sum of \$2,000, and the Government of Canada increased the consideration to \$2,000 when they actually were not required to do so, as the property has already been expropriated to His Majesty the King in the right of the Dominion of Canada. I would strongly recommend to you that you accept without further delay the offer of \$2,500 because it is quite possible, in my opinion, that the Government may, if you continue to refuse to accept this latest offer of \$2,500 exercise its rights under your original offer of \$2,000, which is the offer that was accepted and pay you no more.

This offer not having been accepted action was proceeded with and was heard by me at the city of Yorkton.

I have given the evidence very careful consideration, and have come to the conclusion that the sum of \$2,000 was a fair, and I might almost say, generous offer for the property expropriated, as the value to her, but I would add to that 10 per cent of the value on account of compulsory taking, and \$75 cost of removing the shed.

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The principles upon which claims of this character should be adjudicated have been laid down in many decisions of this Court, the Supreme Court of Canada and the Privy Council. It is the value to the owner, and not to the taker, which must be considered together with compensation in appropriate instances for disturbance or loss of business consequent in the compulsory taking, and a percentage usually not exceeding 10 per cent, though not a matter of right, for such compulsory taking. See *Diggon-Hibben Ltd. v. The King* (1); *Irving Oil Company v. The King*, (2); *Pastoral Finance Association v. The Minister*, (3); *Woods Manufacturing Company Limited v. The King*, (4).

There will therefore be judgment declaring that the property described in paragraph 2 of the Information is vested in His Majesty the King as from the 1st day of April, 1950; that the amount of compensation money to which the defendant is entitled, subject to the usual conditions as to all necessary releases and discharges of claims, is the sum of \$2,275, together with interest at the rate of 5 per cent per annum on \$2,200 from 1 April 1950 to this date; but, I think, as the defendant foolishly refused the offer of \$2,500 when she might reasonably have accepted same, there should be no costs of the action to either party.

Judgment accordingly.

(1) (1949) S.C.R. 714.
 (2) (1946) S.C.R. 551.

(3) (1914) A.C. 1083.
 (4) (1951) S.C.R. 504.