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# COMPENSATION ON RESUMPTION IN PRE-WAR NEW GUINEA

by

F.B. Phillips, C.B.E., LL.M.

The general principles governing the assessment of compensation have long since been laid down by Courts of the highest authority. Sometimes those general principles have been modified by legislation (as has happened in Australian States) but this has not happened in the Territory of New Guinea: all that is said in our Land Ordinance is that "compensation" shall be paid for land acquired or resumed "under Section 69 of the Ordinance" and nothing further is said about the principles on which such compensation shall be assessed. It will be noted that the word "compensation" is used and it may here be said that it

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* This statement was read by the Chief Judge of New Guinea at Rabaul on 8th August, 1939 in his capacity of arbitrator to assess compensation for the resumption (on 14th January, 1939 after Notice of Intention dated 15th October, 1938) of seven and a half hectares of land on the eastern shore of Talili Bay, New Britain. In regard to the resumption itself, the Author, (later Sir Beaumont Phillips, Chief Justice of Papua and New Guinea) said :-

> "It appeared that after the proposed resumption had become an accomplished fact, these Natives had continued to protest to the Administrator and to Canberra against it, on the ground that the resumed land was necessary to them and their descendants, and that there were other Native-owned land or non-Native-owned lands in the same locality which could be resumed without inflicting so great a hardship upon their owners as the hardship the present resumption was inflicting on the former Native owners of the land now resumed. Now these Native representations may be perfectly true and, from my view of the locality, I should say they very probably are true; but, as I see the matter, such representations are irrelevant in an arbitration such as this because once a resumption has taken place and while the resumption stands, the inexorable fact is that no matter how harsh and ruthless the resumption may appear from the point of view of the persons dispossessed, such representations are of no avail before an arbitrator because of the over-riding force of the statutory power of resumption for the purposes mentioned in Section 69 of the Land Ordinance 1922-1939."

((Ed.))

is established that the word "compensation" in such a context does not include compensation for injured feelings or soreness or disappointment because of the over-riding and compulsory nature of a resumption, but means compensation for the loss (perhaps one might call it the material loss) suffered by a person dispossessed by the resumption. The former Chief ((Judge of New Guinea, Mr.)) Justice Wanliss put it thus in his award in the Mortlock Islands Arbitration in 1930: he said (as reported in the "Rabaul Times"):

> "By compensation, I take it, is meant such a sum as will prevent him from being at a pecuniary loss because of the resumption: it does not mean, necessarily, the value of the land resumed but the value together with the amount of damage he has sustained by the loss of the land."

Though the compulsory acquisition or resumption is the fons et origo from which these arbitration proceedings spring, I must, when considering the amount of compensation, not allow my mind to be influenced by the fact that resumption is a compulsory and peremptory proceeding because it is well settled that (special legislation apart) the mere fact that the land is compulsory resumed must not be allowed to enhance the amount of compensation as against the resuming body or to diminish it as against the person dispossessed: in other words, the person dispossessed may make no special capital out of the mere fact that the resuming body "has to have" or has to resume a particular piece of land of his, or because that piece of land has been taken from him in a compulsory and peremptory manner, nor may the resuming body make any special capital out of the fact that the person dispossessed is forced and has no option but to part with his land because of the compulsory character of the resumption. See, e.g., In re Wilson and the State Electricity Commission of Victoria (1921) V.L.R. 459, a decision of the full Court of the Supreme Court of Victoria.

In the authorities I am about to cite, the general principles governing the assessment of Compensation are very clearly expressed: In The Queen v. Brown (1867) L.R.2 Q.B., at 630, p.631, Cockburn, C.J., said:

> "A jury, whether the dispute be as to the value of land required to be taken by the company, or as to the compensation for damages by severance, in assessing the amount to which the landowner is entitled, have to consider the real value of the land, and may take into account not only the present purpose to which the land is applied, but also any other more beneficial purpose to which in the course of events at no remote period it may be applied, just as an owner might do if he were bargaining with a purchaser in the market."

In the Spencer v. The Commonwealth of Australia (1907), 5 C.L.R., 418, the High Court of Australia had to consider on what basis the value of land resumed should be assessed. Sir Samuel Griffith, C.J., said (at p.432):

> "The test of value of land is to be determined ... by inquiring 'what would a man desiring to buy the land have had to pay for it on that day to vendor willing to sell it for a fair price but not desirous to se[illegible] ?' ".

And Sir Edmund Barton, J., said (at p.435):

> "The Court must take into consideration all the circumstances and to quote the admirable judgment of the Supreme Court of New Zealand in Russell v. The Minister for Lands, (17 N.Z.L.R., 241 at p.253) must 'see what sum of money will place the dispossessed man in a position as nearly similar as possible to what he was in before'."

In the same case, Sir Isaac (then Mr. Justice) Isaacs, after observing that the relevant date, in assessing the value of the land resumed, was the date of the resumption and that the facts existing at the date were the only relevant facts, went on to say (at p.440):

> "The all important fact on that day is the opinion regarding the fair price of the land, which a hypothetical prudent purchaser would entertain, if he desired to purchase it for the most advantageous purpose for which it was adapted. The plaintiff is to be compensated; therefore he is to receive the money equivalent to the loss he has sustained by deprivation of his land, and that loss, apart from special damage not here claimed, cannot exceed what such a prudent purchaser would be prepared to give him. To arrive at the value of the land at that date, we have, as I conceive, to suppose it sold then, not by means of a forced sale, but by voluntary bargaining between the plaintiff and a purchaser, willing to trade, but neither of them so anxious to do so that he would overlook any ordinary business consideration. We must further suppose both to be perfectly acquainted with the land, and cognizant of all circumstances which might affect its value, either advantageously or prejudicially, including its situation, character, quality, proximity to conveniences or inconveniences, its surrounding features, the then present demand for land, and 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. ---------
> (The) question for the tribunal is,----------what is

the sum the one would be willing to give and the other to take? That is practically the same as asking what is the highest sum such a purchaser would give, because we must assume the owner would be willing to take the best he can get. The best he can get in those circumstances is the test of ((441)) what he loses, and it is his loss which must be replaced."

Then there is the oft-quoted passage from the judgment of Fletcher-Moulton, L.J.(as he then was) in re Lucas and The Chesterfield Gas and Water Board (1909) I K.B. 16 at p.29:

"The principles upon which compensation is assessed when land is taken under compulsory powers are well settled. The owner receives for the lands he gives up their equivalent, i.e., that which they were worth to him in money. His property is therefore not diminished in amount, but to that extent it is compulsorily changed in form. But the equivalent is estimated on the value to him, and not on the value to the purchaser, and hence it has from the first been recognised as an absolute rule ((30)) that this value is to be estimated as it stood before the grant of the compulsory powers. The owner is only to receive compensation based upon the market value of his lands as they stood before the scheme was authorised by which they are put to public uses. Subject to that he is entitled to be paid the full price for his lands, and any and every element of value which they possess must be taken into consideration in so far as they increase the value to him." This passage was approved by the Privy Council in Cedars Rapids Manufacturing and Power Co. v. Lacoste (1914, A.C.569) and Corrie v. McDermott (1914 A.C.1056): cf. another Priv-

Council case .... Pastoral Finance Association v. The Minister (1914 A.C. p.1083) (an appeal from New South Wales).

NOTE: The Privy Council, in Raja Vyricherla Narayana Gajapatiraju v. The Revenue Divisional Officer, Vizagapatam, 1939, A.C.302, declined to follow Fletcher Moulton's dictum at p.319 and held at p.323 that "even where the only possible purchaser of the land's potentiality is the authority that has obtained the compulsory powers, the arbitrator in awarding compensation must ascertain ... the price that would be paid by a willing purchaser to a willing vendor of the land with its potentiality in the same way as he would ascertain it in a case where there are several possible purchasers..." ((Author's note: The transcript shows that this note was added after the final typing in 1939 of the statement of which this article forms part. Ed.))

In In re Lucas and The Chesterfield Gas and Water Board one of the questions considered by the Court of Appeal was this:- where land, possessing a special value or adaptability, of which the owner has not been making any use, is compulsorily resumed, is the owner entitled to have the special value or adaptability (even though it be adventitious or useless to him himself) taken into consideration in the assessment of his compensation? It was held that he is entitled to have that taken into account in his compensation, except where the special value exists only for the resuming part or body (in which case any allowance to the owner of compensation for the special value that exists only for the resumer would be a violation of principle that the mere fact of resumption is not allowed to enhance the compensation for land resumed): (see especially the judgment of

Fletcher-Moulton, L.J. at pages 30 and 31, where he also points out that "there is ... nothing strange or abnormal in this"). Compare the case, In re Smith and The Minister for Home & Territories, 1920, 28 C.L.R. 513: in that case the Commonwealth, pursuant to statutory powers, had entered upon South Australian Crown Lands that had been leased and the Commonwealth had taken large quantities of water from these lands for railway purposes: it was held that compensation to the lessees for the water taken should be based on the values, to the lessees, of the water either for use or for sale, at the time it was taken, whether the lessees were using the water at the time or not, but should not include the special value the water had to the Government for the purposes of its railway. In the same case, after a review of the authorities, it was again laid down that an arbitrator, in assessing compensation to be paid for land compulsorily acquired, had "to consider the value of the land to

> the claimants and what a willing and a prudent purchaser would have paid, and a not unwilling seller would have accepted, for the land acquired with all its potentialities and its existing advantages including the use of it and the right to use it for the most advantageous purposes"

at the appropriate date. As Lord Dunedin said in the case, already cited, of Cedar Rapids Manufacturing & Power Co. v. Lacoste:-

> "The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that calls to be determined."

(See also Frazer v. City of Fraserville: (P.C.): 1917, A.C. at p.194.)

It is sometimes thought (and I fancy that one or two of the witnesses in this arbitration thought) that the market value alone of the land resumed fixed the amount of compensation that

should be paid. But this is not always so. Though the market value is something the arbitrator must certainly consider, it is not necessarily the only thing he must consider in the awarding compensation. As it was put by the Full Court of the Supreme Court of Victoria in In re Wilson and the State Electricity of Victoria, already cited (1921) V.L.R., p.459, at p.464:

> "In cases of compulsory acquisition the value to the owner may, according to the circumstances, be proved in more ways than one, but a very common way is to base it upon, though not necessarily to confine it to, the market price - that is, the price which a willing buyer would give to a willing seller who was desirous of getting rid of the property and had made his preparations accordingly. In cases of compulsory acquisition, however, an owner may be able to show that the value to him is something more than such market price, and in such cases he may adopt one of two courses. He may either set out in detail all possible elements making up the value to him, or he may with regard to some incidental expenses and claims give general evidence indicating that a lump sum should be allowed in respect of a number of matters with relation to which it would be difficult or an unnecessary waste of time to go into details."

Again, in Spencer v. Commonwealth, (already cited), Sir Edmund Barton, dealing with the question of the loss sustained by the person dispossessed by compulsory acquisition, said, at p.435:

> "His loss is to be tested by the value of the thing to him: ---------and the loss he has sustained is not necessarily to be gauged by what the land would realise if peremptorily brought into the market on a day named .... The value to the loser of land

compulsorily taken is not necessarily the mere saleable value."

There is another question to which I should refer. The authorities that have been cited related to compensation on compulsory acquisition as between non-Native parties, and the question arises whether in this Territory the same principles as were enunciated in these authorities should apply when compensation to Native owners dispossessed by compulsory proceedings is being considered. Mr. Woodhill, for the Administration,* has stated that it was not contended by the Administration that there should be any distinction as between Natives and non-Natives and that he could see no logical basis for such a distinction, as between Natives and non-Natives. I am in agreement with the view expressed by Mr. Woodhill on this question; and, as I have been dealing with the principles governing the assessment of compensation generally and am desirous that there be no misunderstanding about what appears to me to be the principles governing this particular question, I shall briefly set out the reason for my agreement with the views expressed by Mr. Woodhill. The question is this:- Should an arbitrator, when awarding compensation to Native owners for land resumed from them, value the land on a different basis from that which he would adopt when valuing similar land resumed from a non-Native? It would be easy to obscure the issue in that question by pointing out that in practice a non-Native owner would usually receive a much greater sum in compensation (e.g. for improvements) than a Native would; but that is simply because non-Native improvements are usually of much greater value than those effected by Natives; e.g. a timbered bungalow is worth much more than a leaf hut. To put the question again in another form:- "Where two pieces of

* i.e. on the hearing of the question of the award of compensation in regard to the resumption of 14th January, 1[illegible] of 7 1/3 hectares of land on the eastern shore of Talii Bay. (Ed.)

land, similar in all respects except that one is owned by a non-Native and the other is owned by a Native, have been resumed, should the Native be awarded an amount of compensation different from that awarded to the non-Native? A discrimination of that sort would, of course, be contrary to elemental principles of logic and justice, and, at the moment, I know of no legal decision and know of no legislative provision in force in this Territory that authorises such a discrimination. (The provision in Section 71 of the Land Ordinance 1922-1939 relates to the special case of resumption from Natives of land for the purpose of a Native reserve and where these Natives are afterwards allowed to exercise the same right and privileges - other than ownership - over the resumed land as they did before.)

Let us suppose that there were no restrictions on the sale of land by Natives to non-Natives and that a block of land owned by Natives was sold by them to non-Natives at noon on a certain day: how could any arbitrator honestly find that the compensation payable, if that land had been resumed before noon that day (when it was owned by the Natives) should differ in amount from the compensation payable if the land were resumed in the afternoon of that day (when it had become owned by non-Natives)? Again, for example, if the compensation awarded to Native owners for a piece of land resumed from them were assessed, because they were Natives, at some fraction of its real value, it could well happen that it might be found, if an effort were made to acquire another exactly similar piece of land for them in view of the land they had lost, that the amount asked for that other similar piece of land was the same as the real value of the piece they had lost, i.e. an amount greater than the fractional compensation they had received for exactly similar land. Can it be rightly said that compensation, assessed at a fraction of the real value, would be just? But might some argument as this be adduced? Suppose that a Native

has continued to use his land in his primitive and, to a European view, thoroughly uneconomic, way; and suppose that through no effort of his but for some extraneous reason, the land all around his had appreciated in value and his has appreciated in value too: why should he reap the benefit, if his land is resumed and compensation is being awarded, of what, so far as he is concerned, is an adventitious appreciation in the value of his land? Non-Natives, of course, are not in the habit of rejecting adventitious appreciations or windfalls of that kind; and I can see no logical reason for denying such to Native owners. In any case, the argument suggested is not, I think, now tenable because of a long line of decisions of which The Queen v. Brown and In re Lucas and the Chesterfield Gas and Water Board (already cited) are but two. Then may it be argued that, where two pieces of land are resumed which are similar in all respects except that one is owned by a European and the other by a Native, the Native should receive a less amount than the European, in compensation, because £1 means more to a Native than it does to a European? On the same reasoning (if it be reasoning) it would follow that where two pieces of land were resumed which were similar in all respects except that one was owned by a struggling planter and the other by a wealthy Company, the struggling planter should receive less compensation than the Company because £1 means more to him than the Company. And in any case, I think such an argument is unsound because it introduced a personal element into what should be an impersonal matter, viz., compensation for land resumed. Compare the observation of Fletcher Moulton, L.J. in the case of In re Lucas and the Chesterfield Gas and Water Board:- "The compensation

> for lands depends on the nature and circumstances of those lands themselves .... and has nothing to do with the personal views or wishes of the individuals who may chance at the moment to be

the owners of those lands." In my opinion, it has nothing to do with their personal status or colour either.

(( End ))

Edited and published by

P.J. Quinlivan, Barrister-at-law

The article begins at the fifth page of the Arbitrator's Decision.