29/84

No. of 1984

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL
FROM THE SUPREME COURT OF NEW SOUTH WALES
COURT OF APPEAL

IN PROCEEDINGS CA 113 of 1982

BETWEEN:

TATMAR PASTORAL CO. PTY. LIMITED
and
PENRITH PASTORAL CO. PTY. LIMITED
Appellants (Plaintiffs)

AND:

HOUSING COMMISSION OF NEW SOUTH WALES
Respondent (Defendant)

CASE FOR THE RESPONDENT

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1. This Appeal arises out of the determination by the Land and Environment Court of New South Wales of the Appellants' application for compensation on the resumption (or compulsory acquisition) of a pastoral property named "Tatmar" near Penrith, New South Wales. The First Appellant owned a parcel of 700 acres being Lot 5 in Deposited Plan 222785 and the Second Appellant owned a contiguous parcel of 184 acres which was Lot 6 in the same plan. The land was resumed on 31 August 1973 by notification published in the New South Wales Government Gazette, under powers conferred by Section 4 of the Housing Act 1912 and in accordance with procedures prescribed by the Public Works Act 1912. The Appellants are entitled to compensation assessed in accordance with Section 124 of the Public Works Act 1912.

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2. On 17 March 1982 the Land and Environment Court (Cripps J.) ordered the Respondent to pay compensation of $6,530,058.00 to the First Appellant and $1,785,000.00 to the Second Appellant. All parties appealed to the Court of Appeal, which dismissed the Appeal and Cross Appeal on 29 August 1983. The Respondent does not appeal from the dismissal by the Court of Appeal of its appeal. p.754 (Vol III) p.781 (Vol III)

3. Appeal from the Land and Environment Court lay to the Court of Appeal but only on a question of law. This appears clearly by the terms of Section 57(1) of the Land and Environment Court Act 1979:

> "S.57(1) A party to proceedings in Class 1, 2 or 3 of the Court's jurisdiction may appeal to the Supreme Court against an order or decision of the Court on a question of law."

See too section 19(e) (which places claims for compensation on resumption of land in Class 3) and section 58 (which creates a general appeal for Class 4 matters - civil enforcement of environmental planning and protection). See too section 48 of the Supreme Court Act 1970 - assignment to the Court of Appeal.

4. Appeal lies as of right to Her Majesty in Council having regard to the amount in issue. In the Court of Appeal the Appellants contended that their compensation should have totalled $13,702,000.00, that is, 884 acres at $15,500 per acre.

5. Before the Court of Appeal the Appellants contended to the effect of the following:

(1) Cripps J. ignored, misunderstood or misapplied the principle of assessment involved in the use of comparable sales for judging urban potential.

(2) Cripps J. ignored or misunderstood or misapplied the principle of discounted present value.

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(3) Cripps J. declined, for no rational reason, to apply undisputed evidence which had been admitted as to the principles of assessment.

(4) Cripps J. ignored or misunderstood or rejected for no rational reason the evidence of transactions and values relating to properties in North Orchard Hills and Terrace Drive; and they were relevant.

(5) Alternatively to (1) to (4), Cripps J. ignored the relevant principles of valuation and evidence without giving any proper reasons for so doing.

6. The highest and best use of Tatmar was to develop it for residential uses, but its potential to be developed in that way depended on obtaining approval from town planning authorities. The significance of alleged comparable sales is largely affected by the known or ascertainable attitude of town planning authorities to the grant of development consent - whether and when consent for residential development would be forthcoming.

7. In 1968 the State Planning Authority of New South Wales produced "The Sydney Region Outline Plan" which made public the Authority's proposals for phased release of land from zoning controls which then required non-urban use and the substitution of controls allowing urban or industrial uses in phases between 1970 and 2000. In The Sydney Region Outline Plan Tatmar was shown as non-urban land; it was not phased for release for urban purposes under the plan between 1970 and 2000. Valuers and others in this case have spoken of land which, according to the plan was to be released in some phase by the year 2000 as "phased land" and other land including "Tatmar" as "unphased land". The Sydney Region Outline Plan did not have statutory force but was indicative of what the Authority thought should be the future land uses and release dates.

p.764 lines 12-23 (Vol III)

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8. The State Planning Authority has been reorganized twice since 1968 and its successors were also statutory corporations called "The New South Wales Planning and Environment Commission" and more recently "Minister Administering the Environmental Planning and Assessment Act 1979".

9. Five valuers gave evidence and Cripps J. did not accept the methods or conclusions of four of them. All valuers regarded the Kulnamock sale as the most appropriate comparable sale for the purpose of establishing the value of Tatmar. On 25 May 1973 Kulnamock Pastoral Co. Pty. Limited sold 108 acres to Federal Valuation Agency Co. Pty. Limited for the sum of $649,087.00 (including buildings). After an analysis which excluded part of the price which he attributed to the buildings Mr. Valuer Alcorn, the one valuer accepted by Cripps J., treated this sale as indicating $5,925.00 per acre. He made adjustments for advantages which the Tatmar land had over the Kulnamock land, and for the escalation in land values by the resumption date in August 1973, and assigned a value of $9,500.00 per acre to Tatmar (except for 54 acres affected by a transmission line easement which he valued at 75% of $9,500.00 per acre). Cripps J. accepted this valuation.

p.744 line 6 - p.745 line 8 (Vol III)

10. One very important respect in which Kulnamock was comparable with Tatmar was that it was unphased but had potential for urban redevelopment. Mr. Alcorn's adjustments included the physical advantages for residential development which Tatmar enjoyed over Kulnamock, relevant advantages with respect to shape and access,which contribute to the expected development yield, the availability of services and the advantage that Tatmar was of a size which would qualify it for release for urban development in its own right.

p.744 line 6 - p.745 line 8 p.746 lines 27-31 (Vol III)

11. The Appellants asked Cripps J. to accept Mr. Alcorn's valuation and

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alternatively but preferably to adopt a value of $15,000.00 per acre for Tatmar. In so doing the Appellants asked Cripps J. to adopt a value indicated by sales of land at Orchard Hills and Terrace Drive which was phased for release in The Sydney Region Outline Plan, so as to indicate that it would be rezoned for urban development between 10 and 15 years from the resumption date. Cripps J. said:

> "I must reject this approach. I am asked, as it were, to pluck estimated values and calculations from one valuer and apply to them discounting factors of another valuer on the basis of questionable assumptions of fact. The result would be that I would arrive at a figure considerably in excess of any figure advanced by any valuer in these proceedings and one which was never investigated during the course of the proceedings. One immediate consequence of such an approach would be that the Kulnamock sale, relied on by every valuer, could not sensibly be regarded as a comparable sale at all - a proposition never suggested until final address."

p.748 line 22 - p.749 line 6 (Vol III)

12. That is to say, Cripps J.'s expressed reasons for rejection were that the figure of $15,000 per acre was not advanced by any valuer, but considerably exceeded any figure so advanced and that the figure was inconsistent with treating the Kulnamock sale as a comparable sale.

13. It is submitted that the Appellants should not succeed because it was not an error of law (or an error at all) for Cripps J. to accept Mr. Alcorn's valuation of $9,500.00 per acre and to decline to accept a line of reasoning and a conclusion which were not adopted by any valuer. Cripps J.'s adoption of Mr. Alcorn's valuation was a finding of fact which was not "... such that no person acting

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judicially and properly instructed as to the relevant law could have come to ..." (Edwards v. Bairstow 1956 A.C. 14 at 36 per Lord Radcliffe). Cripps J.'s decision to accept the Kulnamock sale as a comparable sale was supported by the evidence of every valuer witness; and Cripps J. adopted the steps taken by Mr. Alcorn to analyse the land value indicated by that sale, the quantum of the adjustments for advantages in comparability in favour of "Tatmar", the escalation in value over time and the resulting figure of $9,500.00 per acre.

14. Cripps J. found the value in the application of the best-established valuing method of proceeding by reference to comparable sales, and his conclusion was a factual one and is not assailable by either party. If the Appellants were to succeed it would have to be established (and in the Respondent's submission is not established) that it was wrong in principle to determine value by comparison with the Kulnamock sale (which all valuers did), that no person acting judicially and properly instructed would have done so, and that a valuation by reference to the North Orchard Hills and Terrace Drive sales was "the true and only reasonable conclusion on the facts" (per Lord Cooper in Inland Revenue Commissioner v. Toll Property Co. Limited, 1952 S.C. 387 at 393; 34 T.C. 13 at 18-19). p.746 lines 15-17 (Vol III)

15. Every valuer treated the Kulnamock sale as a comparable sale and as the best available comparable sale. It cannot be said that in adopting this view, Cripps J. went outside the range of the conclusions to which a reasonable person could come. This is no less true if there were another reasonably available conclusion or several others.

16. It would not be enough for the Appellant to show that in support of $15,000.00 per acre a line of reasoning is available, even if at each factual step

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it were supportable by some evidence from some valuer. The Appellant would have to show that the valuation by Mr. Alcorn which Cripps J. accepted was one which could not reasonably be accepted. Mr. Alcorn's support of $15,000.00 per acre was always conditional on the rezoning of Tatmar being absolutely certain in his sense, in that it was publicly phased or that one had it in writing from the Authority that they would release it within the appropriate time span. Merely to believe even on reasonable grounds that the Authority would release the land within the relevant time span would not in Mr. Alcorn's view justify looking to phased land sales. Mr. Alcorn explained this in his evidence in chief.

p.153 line 38 - p.155 line 31 (Vol I)

17. Mr. Alcorn believed that the Tatmar land had a potential for development within a period in the order of 10 years. He stated this period variously - "10, 12 or 8 years"; "5 to 10 years". His view involves that land of which the reasonable purchaser with knowledge of the relevant facts would believe this did not have the same value as land as to which there was absolute certainty (in his sense) that the land would be released for development within a particular specified time span.

p.155 line 16 p.164 lines 32-36 (Vol I)

18. The Appellants must establish that on Mr. Alcorn's evidence the only comparable sales reasonably open to Cripps J. were the phased land sales. If on Mr. Alcorn's evidence the phased land sales were not open to Cripps J. as comparable sales there was no error at all. Even if on Mr. Alcorn's evidence the phased land comparables were open, still Kulnamock as a comparable sale never having been withdrawn by Mr. Alcorn, it remained as a permissible comparable, and it was no error of law to adopt the Kulnamock sale rather than sales of phased land.

19. There were passages in the evidence of Mr. Alcorn and other valuers which bore on the valuation for which the

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Appellants now contend and Cripps J. did not refer to them all in his judgment. It is submitted that it should be readily understood that as Cripps J. accepted Mr. Alcorn's valuation at $9,500.00 per acre, he did not in fact accept any of the other bases. On Mr. Alcorn's evidence, the valuation which Cripps J. accepted accommodates an expectation that Tatmar would be rezoned, but it also accommodates the fact that such rezoning was reasonably to be expected, but was not absolutely certain in the only sense in which Mr. Alcorn would have looked to sales of phased land. The distinction expresses inherent probabilities about differences in the behaviour of purchasers; they are inherently likely to pay more where there is absolute certainty in Mr. Alcorn's sense of favourable rezoning than they are when it can be seen, but only as a deduction, that favourable rezoning is likely.

20. The indications of this distinction in Mr. Alcorn's evidence appear throughout.

A. Mr. Alcorn would only value by regard to prices currently being paid for land indicated in The Sydney Region Outline Plan for future phased release if the future release of the subject land were absolutely certain.

p.153 line 44 - p.155 line 26
p.155 lines 20-25 (Vol I)

B. Mr. Alcorn did not so regard the prospects of rezoning of the subject land. Though he thought it would be rezoned in 5, 8, 10 or 12 years, because this was merely belief and not based on Tatmar having been phased or on written assurance from the Authority as to a time span for release he would not use phased land as a comparable, but Kulnamock.

p.164 lines 32-36
p.225 line 45 - p.226 line 10
p.228 line 23 - p.229 line 9
p.299 line 34 - p.300 line 6 (Vol I)

21. Cripps J. found that while the Respondent believed on reasonable grounds that the land would be rezoned in 10 to 15 years, there was still a risk, not ignored by the Respondent even though thought to be minimal, that the land

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might never be rezoned or that rezoning might not occur within that time span.

p.700 line 26 - p.701 line 8 p.706 lines 17-32 (Vol III)

22. The Respondent was never told in writing by the Authority that the Authority would release the land in 10 to 15 years and there was no finding that there was an agreement that it would be released within this time span, but at most a recognition by the Authority that pressures would build up such as were likely to compel them to rezone within that period.

23. Mr. Valuer Parkinson, who was called by the Appellants and used a valuing method based on resumption settlements which Cripps J. did not accept, said to the effect that he would have been inclined to disregard sales and resumption settlements in the neighbourhood and look to prices being paid for land phased for release if, and only if Tatmar had been shown to have a clearly identified time of release.

p.340 line 20 - p. 342 line 29 (Vol II) p.801 (Vol IV)

24. Mr. Parkinson gave the adjustments which should be made to the Kulnamock sale - physical differences and creep in land prices. Subject to these adjustments, (and if he were unable to use resumption figures), he would have used the Kulnamock sale.

p.388 lines 35-44 (Vol II)

25. Cripps J. made findings as to the beliefs held by the Respondent. Those figures did not take the matter to certainty; they recognized the existence of a risk that the land might never be rezoned or that it might not be rezoned within 10 to 15 years. Cripps J. did not find an agreement for release, and certainly found no statement in writing to the Respondent that the Authority would release Tatmar in 10 to 15 years and he also found that the belief held by the Respondent was that which would have been entertained by any intelligent developer in 1973.

p.700 line 26 - p.701 line 8 p.706 lines 17-32 p.746 lines 23-26 (Vol III)

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26. Any contention that Cripps J. erred in law in not finding that Tatmar had the same certainty of rezoning as the North Orchard Hills and Terrace Drive or that Tatmar would certainly be rezoned within 10 years, suffers these disadvantages:

A. Cripps J. made a clear finding that there was a risk even though minimal. He found nothing to equate to the element of public statement of the Authority's intentions or written assurance that it would release Tatmar within any defined span of years.

B. His findings were well within the findings available after a very elaborate examination of the facts relating to the expectation of the Respondent, and in relation thereto, of officers of the State Planning Authority.

C. His adoption of the Kulnamock sale accorded precisely with the views of the Appellants' valuer witness Mr. Alcorn, the witness whom Cripps J. wholly accepted.

Accordingly it is submitted that Cripps J.'s finding even if it could be shown to be factually erroneous (which is not conceded) does not constitute an error of law.

27. In his judgment Cripps J. did not refer to all evidence relevant to the Appellants' contention. This was not an error. His adoption of Mr. Alcorn's valuation is itself both an implied statement that Cripps J. declined to adopt any other valuing method contended for, and an express statement of a reason which when read with Mr. Alcorn's evidence explains why the method now contended for was not adopted - in substance, the absence of absolute certainty in Mr. Alcorn's sense. There is nothing to suggest that Cripps J. refused or omitted consideration of what is now contended for. In fact the passage quoted in

paragraph 11 above when read in the light of the evidence does disclose his reasons for rejecting the approach now pressed.

28. It is submitted that there is no divergence between the law applied in Australia and in England with respect to the circumstances in which a finding or a failure to make a finding of fact constitute an error of law. The statement of Lord Radcliffe in Edwards v. Bairstow 1956 A.C. 14 at 36 referred to at paragraph 13 above is part of a passage which has been repeatedly cited in England. It is submitted that Lord Russell of Killowen expressed substantially the same idea in the following passage in Melwood Units v. Commissioner of Main Roads (Queensland) 1979 A.C. 426 at 432. "If it should appear that the Land Appeal Court ignored a principle of assessment of compensation for compulsory acquisition (resumption), such as for example that commonly known as the Point Gourde principle, that in their Lordships' opinion would be an error in law. So also if the Land Appeal Court rejected as wholly irrelevant to assessment of compensation a transaction which prima facie afforded some evidence of value and rejected it for reasons which were not rational, that in their Lordships' opinion would be an error in law." See too per Hope J.A. in Leichhardt Municipal Council v. Seatainer Terminals Limited and Anor (Court of Appeal New South Wales unreported 3 July 1981 at page 18).

29. In the High Court of Australia there has been a special reluctance, even in cases where appeal lies generally, to re-examine the exercise of judgment and discretion by a primary judge in valuation cases; see The Commonwealth v. Reeve 1949 78 C.L.R. 410 at 423 per Dixon J. (as he then was); Commissioner of Taxation of the Commonwealth v. St. Helen's Farm

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(A.C.T.)Pty. Limited 1981 146 C.L.R. 336 at 363 and 364 (per Gibbs J. (as he then was); 381 (per Mason J.) and 397 and 398 (per Aickin J.).

30. Hutley J.A. said, in the Court of Appeal in this case, "Within limits, the decision as to what sales are comparable is a question of fact." It is submitted with respect that this is correct and the relevant limits are the limits of what could rationally be found. The treatment of the Kulnamock sale as a comparable sale was well within the limits. p.767 lines 15-16 (Vol III)

31. It is submitted that no error of law is constituted by the terms in which Cripps J. disposed of the contentions now made by the Appellants. He did not ignore any principle of assessment or reject for non-rational reasons a matter which prima facie afforded evidence of value. It is true that Cripps J. could have stated more fully (in the passage quoted in paragraph 11 above) his reasons for rejecting the approach contended for. He could have specified what he had in mind at each stage as "the estimated values and calculations from one valuer", "the discounting factors of another valuer" and "the questionable assumptions of fact." However when his judgment is read it is abundantly clear that he accepted Mr. Alcorn's valuation of $9,500.00 per acre and the supporting reasons, and that he regarded that acceptation, including the treatment of the Kulnamock sale as a comparable sale, and Mr. Alcorn's reasons for not adopting phased land sales as comparables, as inconsistent with the approach now pressed.

32. Cripps J.'s judgment, it is submitted, is quite unlike any in respect of which it could be held that there was a refusal or failure to give reasons at all. In the Court of Appeal Mahoney J.A. considered extensively the duty of a Judge to say why he adopted one valuer's approach rather than another's. pp.773-778 (Vol III)

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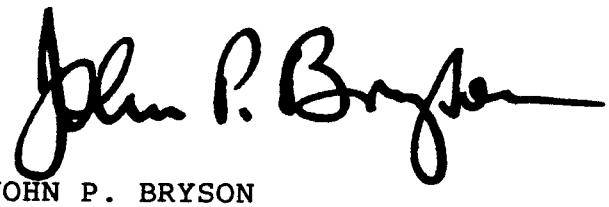
(Mahoney J.A's references to Mr. Talbot would appear to be mistaken references to Mr. Hilton). For the reasons stated by Mahoney J.A. and having regard to the authorities which he cited, it is submitted that a Judge is not required to make any explicit finding on each disputed piece of evidence, nor to deal in detail with every submission. It is sufficient if the reasons for the Judge's conclusion are appropriately clear. This may appear by deduction from the terms of the judgment or by reading the judgment in the light of the evidence.

p.771 line 33 (Vol III)

33. The Respondent respectfully submits that for the above reasons Your Lordships will advise Her Majesty that this Appeal should be dismissed with costs.

FORBES OFFICER, Q.C.



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