29/84

No. of 198

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)

TRANSCRIPT RECORD OF PROCEEDINGS

PART I

Volume III

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COLIN RAYMOND WEIR
CROSS-EXAMINATION

HEMMINGS: Q. (contd) ... of $3.15 million?
WEIR: A. Consequently it wouldn't have been subdivided.

Q. No, I'm not asking that question yet. I'm trying to check your valuation of thirty-five 25-acre blocks in this area and you're saying here that, if this block was divided up into 25-acre blocks, it would still be worth $3,500 an acre? A. I'm not saying it's worth that, I'm saying that that would be the gross realisation.

Q. Well that's what someone would pay for it, for these 25-acre blocks each. A. If they were given the opportunity, yes.

Q. So you're saying that it doesn't matter whether they're 25-acre blocks or whether there's one unsubdivided block of 884 acres, it's still worth $3,500 an acre? A. I'm saying that it is worth $3,500 per acre in an unsubdivided form.

Q. You're saying a 25-acre block is worth $3,500 an acre and you're also saying an 884 block is worth $3,500 an acre? A. Yes.

Q. Where's your difference for magnitude there? A. The difference in magnitude is that the 884-acre parcel had an additional potential.

Q. So a big block is worth more than a small block? A. A large block that is capable of being divided into smaller parcels than what the immediate subdivisional requirements were, was worth more than the actual gross realisation of dividing that physically into 25-acre --

Q. Why does that apply to urban development? A. Urban development - on this scale or on a smaller scale?

Q. I'll ask the question: Why doesn't it apply to urban development? A. I don't understand the question.

Q. I think you told me that an 884 acre block is worth something more than the individual parcels because you have the potential of subdividing the land? A. Yes.

Q. If you have a large block of land that you can subdivide into 25-acre blocks, and therefore the big block is worth more than the subdivided blocks, on your analysis, why doesn't that apply if you're cutting it up into smaller, say ¼-acre blocks? A. Because we have an optimum size. The 5-acre type subdivision is

probably an optimum size for this parcel of land because it can be subdivided up into a reasonable period and consequently the risks aren't as great, the interest rates aren't as great and it can be done in a reasonably short period, a period that can be foreseen. When you get into a residential subdivision and you're looking at a great period ahead, you have all sorts of problems.

Q. Mr. Weir, I must have misunderstood your evidence from pages 6 to 12 in which you were at pains to tell us that the boom in prices and the great demand for land was for residential blocks in the market place? A. Yes.

Q. So now you're comparing a large block of land being subdivided up into 25-acre blocks when the market place says that there are boom conditions, more buyers in the market than there is land available, for residential-sized allotments? A. Yes.

Q. Does your last statement really stand up to your own analysis of the market? A. I believe so.

Q. Now let's go back to the comparison; so that those first two exercises are in exhibit 12. Well then we go to exhibit 12A and I don't want to go over unnecessarily what Mr. Giles has dealt with but I want to compare your various approaches. In exhibit 12 you said that Kulnamock sale could not be used, did you not? A. Yes.

Q. You said that it must lead to erroneous conclusions, at the bottom of page 21? A. Yes.

Q. Unless the price has no elements of rezoning speculation? A. Yes.

Q. And on page 22: It is considered, bearing all these other circumstances in mind, that sale 17 offers little assistance in deriving an appropriate market value without potential for the subject land? A. Yes.

Q. When you come to the exercise in 12A, you used Kulnamock, you make an adjustment for the 5-acre area by knocking off $160,000, is that right? A. Yes.

Q. I'll come back to these items. Then you add 5 percent per month? A. Yes.

Q. You accept that the subject land is physically better than Kulnamock? A. Yes.

Q. How much better? A. It's superior.

Q. How much? Fifty percent better? A. No.

Q. Seventyfive percent better? A. No.

Q. How much better? A. I didn't put a figure on it but --

Q. Well, is it in the order of 50 percent? A. I would not think so.

Q. Forty percent? A. No.

Q. Thirty percent? A. Perhaps 25 percent.

Q. So you agree with Mr. Alcorn that, from a physical point of view, the subject land is about 25 percent better than Kulnamock? A. Did Mr. Alcorn say that?

HIS HONOUR: It doesn't matter whether he actually - I don't think it helps. His figure is the important one, not whether he agrees with Mr. Alcorn.

HEMMINGS: Q. But you don't allow that 25 percent because you say that it's closer to Penrith than Kulnamock? A. Yes.

Q. Then you say that Kulnamock has better access? A. Yes.

Q. So can we take it that you say that proximity to Penrith plus better access is 25 percent? A. Yes.

Q. How much of the 25 percent is the access? A. I find difficulty in quantifying the various differences.

Q. More than half? A. No, I'd say less than half.

Q. How much less? A. Perhaps 10 percent.

Q. Ten percent for access; 15 percent because it's closer to Penrith. A. Yes.

Q. How much closer is it to Penrith than the north-eastern corner of the subject property - I'm sorry the north-western corner? It would be a stone's throw, wouldn't it? A. It would be half a kilometre. It depends on what part of - which land you're looking at.

Q. You've Jeanette - Luttrell Street at the front? A. Yes.

Q. How far is that from the subject land? A. Which part of the Kulnamock site?

Q. The closest part of Kulnamock to the closest part

of the subject land? A. I would have thought perhaps a half a kilometre.

Q. So you would take off 15 percent of your analysis of Kulnamock, would you, for half a kilometre? A. It's not half a kilometre. You're talking of the closest points.

Q. Well, we'll come back to that again. Anyhow, you do that exercise - so it's compared to your first two exercises in exhibit 12, $3,500, no potential at all for urban development; $3,500 as an aggregation of 25-acre blocks; you can't use Kulnamock but when you do use Kulnamock and you make the adjustments you've just referred to you come up with $3,738 per acre? A. Yes, right.

Q. When you arrived at $3,738 per acre, did you know that was almost or within a few dollars of what Mr. Hyam had fixed for the valuation of the land?

HIS HONOUR: Mr. Hemmings, where's the $3,7--

HEMMINGS: That is on page 2 of exhibit 12A. That is $304,600 as the land value divided by 884, $3,738.

Q. The question was, when you arrived at that figure on your second exercise, did you know that that was within a few dollars of the figure that Mr. Hyam had used using this site? A. I had sighted Mr. Hyam's report at that time. I'm fairly certain that I did not make a direct comparison with my valuation and his valuation but I did at a previous date read his report.

Q. You were aware that he'd fixed a figure at about $3,700? A. Well I'm not aware of it now and I'm sure I wasn't aware of it then but I could have checked it because I had the report there.

Q. You then do a calculation on page 3 and you assign a land value, then you adjust it by .63 and you get $3.3 million? At the bottom of page 3. Do you not? Page 3 of exhibit 12A. A. Yes.

Q. Now that calculation is after you've done the complicated calculation involving five stages of development and assuming engineering costs, borrowing costs, stages of development, profit and risk factors and the like, is that right? A. Yes.

Q. A complicated calculation involving many many assumptions? A. Yes.

Q. And the result of your exercise is shown at the bottom of page A. Yes.

Q. Which is $3,734 per acre, I suggest. So having carried out that very complicated calculation on pages - to the annexures in the five stages, there are all those various assumptions involving millions of dollars, the difference between your calculation in page 3 derived from the Kulnamock and its hypothetical development calculation, is $4 per acre? A. No, that's not correct. It was explained in court earlier this morning that that was an observation comparing the two approaches.

Q. Isn't that calculation - and I'm sorry I wasn't here - but taking it as it reads; isn't that calculation $5,200,000 which is derived as a price you can pay, taking into account the hypothetical calculation which is set out in your annexures to the report? A. That's correct.

Q. Then I'll go back to my question. If the $5,200,000 is based on that calculation and then you show the present value of that, $3,301,000 is a valuation based upon your mathematical calculation, is it not? A. No, it was an observation trying to attempt to find a risk rate between the two answers that were obtained.

Q. Was it a check of your other calculation? A. It was nothing to do with a check; it was an observation only.

Q. Well, what's its purpose? A. The purpose was to show the Kulnamock sale was one that was related to a parcel of land without the benefit of release but with that potential. The second exercise was on the basis of it being immediately available for release. The observation was that, in comparing the two answers that were obtained, what was the risk factor relating to the difference or the risk of release.

Q. It's a risk factor assuming you're paying a certain price for the land? A. That's correct.

Q. And the certain price you pay for the land is deduced from your calculations at the back of the report? A. Yes.

Q. Well then, do we ignore completely your exercise on page 3 or does it form part of your valuation exercise? A. No, I said this morning that it could be ignored completely.

Q. We can ignore all of these various calculations? A. No, the last calculation was only an observation.

HIS HONOUR: What does he mean by that?

WEIR: A. Well, your Honour, I thought I explained it this morning that I was endeavouring to assist the court in providing a mathematical calculation between the two sums that were obtained from two separate exercises; one in analysing a smaller block of land with many of the characteristics of the subject land, the other by the assumption that the land was immediately available for release and, in coming to two separate figures, the one unknown between those two figures was the period of obtaining release; just an observation in using the interest tables I attempted to show what a risk factor was.

HIS HONOUR: Q. Yes but I have to ask again because I didn't understand it. What was the point of including it unless it was in some way to support your valuation, that's what I don't follow? I mean, there must be all sorts of interesting things that you've come across in the course of this valuation. Just so I get it clear, can I - do you say one doesn't even have to look at page 3? A. No, your Honour. The only thing that is of no great relevance is the bottom calculation there.

Q. $5.2 million and the relationship that bears to $3.301 million? A. Yes your Honour.

HEMMINGS: Q. In the last paragraph you said: The attached workings reveal that a hypothetical purchaser at the date of resumption, could have paid $5.2 million? A. Yes.

Q. Are you contending that that is a value of the land that you've taken into account in this case? A. Yes.

Q. And that's derived from your workings? A. Yes.

Q. But don't you say you shouldn't pay $5.2 million, you should reduce it, on this exercise, down to $3.3 million? A. The $5.2 million, yes. A valuation of it on the basis of immediate availability for release.

Q. Yes and you say --

HIS HONOUR: Q. Because this wasn't immediately available you reduce it?

HEMMINGS: Reduce it.

WEIR: A. Yes.

HEMMINGS: Q. So therefore the valuation is $3.3 million, that's what you're saying, isn't it? A. No, it's not what I'm saying at all. I have said that the

$5.2 million is a valuation of it being immediately available for release. My other analysis of the Kulnamock sale shows $3,335,000 including improvements. If those two methods were considered, a ratio of .634 or .635 was appropriate and by a reference to tables, it can be shown that, depending on the period that a hypothetical developer may have considered it would take to have those - that release take place, we get different interest rates but that calculation has not a great deal of relevance to the valuation I've made.

Q. Well, $3.3 million doesn't relate to Kulnamock, it relates to the whole of the Tatmar property because it's 884 acres, doesn't it? A. Yes.

Q. So that in the last paragraph on page 3, when you say: My original analysis of the Kulnamock sale, you mean as relates to the subject land, don't you? A. Yes.

Q. So what it means is that having used the Kulnamock purchase, if the land was available in 2 years' time for release, the land would be worth - the Tatmar that is, $3.3 million? A. That calculation there does not attempt to try to do that, that calculation is a comparison between a figure that has already been arrived at, at $3.3 million, from my previous analysis.

Q. The risk factor is the .6384 is it not? A. Yes.

Q. In that exercise, so the $5.2 million is the value of the whole property immediately available? A. Yes.

Q. Then going to the explanation as I said to you, it relates - it is relating to Kulnamock exercise, the whole of the Tatmar property you are saying that the whole of the Tatmar property is worth $3 million, if it had urban potential but delayed 2 years, aren't you? A. No, I'm saying that if we make a comparison, it would show a risk factor of 25.5 per cent.

Q. Your risk factor is already there in the .6, you've agreed with that, that is your risk factor isn't it? A. The risk factor, what I am trying to point out to the court, is the 25.5 per cent --

HIS HONOUR: Q. But isn't that reflected in .63482? A. That is just the ratio between the two figures that I've already arrived at, from page 2 and page 3, your Honour.

HEMMINGS: Q. And then you applied the $5.2 million, which is the whole property? A. Yes.

Q. You're saying applying a risk factor of 25 per

cent, because it mightn't be released for 2 years, the land is worth $3.3 million? A. That is what I've said in page 2, yes.

Q. That is what you are saying at page 3, isn't it? A. No, in page 3 I have used the analysis that I got from page 2, of $3,304,600 and I have brought it over to get a multiplyer, and have just used the actual interest tables to show that 25.5 per cent is very close to the figure that I originally arrived at.

Q. Well you've reduced $5.2 million by 25.5 per cent to get $3.3 million, what does the $3.3 million represent? A. It represents the analysis --

Q. It is the result, it's not an analysis. A. It is the result from the analysis of the Kulnamock sale.

Q. Correct, and it shows that if you were going to pay $5.2 million, immediately available, and you apply it to the whole 884 acres of the subject land, and you apply the 25 per cent risk factor, which represents a delay of 2 years, the land will be worth $3,301,000? A. 25.5 per cent, yes.

Q. Yes, and having done that exercise which involves, because you are using $5.2 million, complicated mathematical exercises in stages 1 to 5, having done that exercise, there is only a $4 difference per acre in your two exercises? A. Simply because it was meant to show up an interest rate not - I've tried to explain, it was to arrive at an interest rate, not to arrive at a value.

Q. Now can I go back to exhibit 12, I just want to deal shortly with your 25 acre check, which is at pages 18 and 19. Your 25 acre sales are 10 to 16 inclusive, is that right? A. Yes.

Q. And if you look at those, and I'm not suggesting you average them, if you look at those, the in-line valuation seems to be something about $50,000? A. Yes.

Q. With that sales evidence there you assign $90,000? A. Yes.

Q. Where do you get guidance to jump from something about $50,000 to $90,000 per acre? A. Well there were some --

Q. Per lot? A. The sales that you refer to, from 10 to 16, are sales of 25 acre lots, very far distant from the Penrith Centre, and consequently, they would have a fair lower value, simply because of the location. To assist in the escalation for location I would refer to sales 4 to 9.

Q. Which are 5-acre lots? A. Which are smaller blocks, but in the closer location.

Q. So that the jump from about $50,000 a lot to $90,000 a lot relates to location, and something you've deduced from your 5-acre blocks? A. Yes.

Q. And your 5-acre blocks are - at about $4,000 to $5,000 an acre? A. No, I wouldn't agree with that, I think you're referring to some of the very much larger blocks.

Q. Say $5,000 to $6,000 an acre? A. No, well I would consider that it is $7,000 to $7,500.

Q. All right, let us say $7,000 to $7,500 if you like.

HIS HONOUR: Q. Well that is only one of them is that isn't it?

HEMMINGS: Q. What guidance do you get from the 5 acres - A. Sale No. 8, your Honour, and sale No. 9.

HIS HONOUR: Well that is --

HEMMINGS: Q. Well they are 5 acre blocks aren't they? A. Yes.

Q. They are a fifth of the size of the 25 acre blocks? A. Yes.

Q. And your 25 acre blocks are selling for about $50,000 an acre-lot I'm sorry. A. Yes.

Q. What guidance do you get? A. I've attempted to look at smaller blocks in the same locality, 25 acre blocks in a more distant locality, and make a comparison of what a 25 acre block might sell for if available.

Q. Well anyhow, for those reasons you say you can assume $90,000 for a 25 acre block? In doing your valuation exercise at that page, you take 35 blocks? A. Yes.

Q. 35 blocks is almost an exact division into the 884 acres, isn't it? A. Yes.

Q. So you don't have any roads, you don't have any drains, you don't have any creeks, the whole of the 884 acres is divided up into 25 acre blocks? A. No, that is not correct, 25 by 35 would be 875, there is 9 acres of roads. As far as creeks and the like are concerned, they can form part of the actual lots on the 25 acre subdivision.

Q. Well you thought that was a proper exercise to carry out? A. Yes.

SHORT ADJOURNMENT

ON RESUMPTION

HEMMINGS: Before I proceed with cross-examination, I'm happy to say that we've agreed on something at last, without agreeing on liability, the parties have agreed on the amounts which would make up the abortive expenditure on plans, etcetera and the figure that has been compromised between the parties was $26,102.54.

HIS HONOUR: Yes.

HEMMINGS: And your Honour, I hand up the break-up of that, and that just removes the obligation of going to a great deal of evidence as to the proof of each matter, it doesn't resolve the submissions of course on liability.

HIS HONOUR: No, of course.

TENDERED, ADMITTED AND MARKED EXHIBIT AAX - ABORTIVE EXPENDITURE

HIS HONOUR: Well what do you say Mr. Officer, you say that you don't agree that any one of these items are owing, but if they are then the amount is not in dispute? Is that it?

OFFICER: Not owing by the Housing Commission. They've been paid.

HIS HONOUR: They've been paid, that's what I meant, there's no fight about the quantum of them?

OFFICER: No, your Honour.

HIS HONOUR: But you say that they're not owing --

OFFICER: They're not claimable --

HIS HONOUR: Claimable against the Housing Commission, yes, I follow that.

OFFICER: Either in whole or perhaps in some undisclosed proportion. Perhaps it should be noted, your Honour, but I understand - I wasn't in the discussion - but I understand from my learned friend, those are expenses up to the date of resumption.

HEMMINGS: Yes, your Honour.

HIS HONOUR: Yes, thank you. Yes, Mr. Hemmings.

HEMMINGS: Q. Exhibit 12, your value of $3,500 per acre is a result of your analysis of the ASL sale, the

Fleurs sale and the Rossmore sale? A. That is correct.

Q. Now I wasn't here this morning so I would like to clarify this point; at the time you wrote this report, and you relied upon sales evidence in reports, the only material that you had so far as reports were Mr. Alcorn's report, is that right? A. No.

Q. Well would you -- A. I had Mr.Alcorn's sales.

Q. Alcorn's sales? A. List.

Q. Yes. A. Mr. Hilton's sales.

Q. Yes. A. And some items relating to Mr. Alcorn's final determination.

Q. They were the ones that Mr. Giles queried you about this morning? A. Yes.

Q. Late in his cross-examination? A. Yes.

Q. That means that you say that you did not have Mr. Hyam's valuation report or his sales? A. No.

Q. Your report I assume was not typed by the same typist that typed Mr. Hyam's report? A. No.

Q. There was no exchange of material between the two of you in the preparation of the reports? A. No.

Q. Would you go to your report, at page 15, do you have a copy of Mr. Hyam's report? A. Yes, I think so.

Q. Exhibit 12, first of all page 14, Mr. Hyam's report page A7, or annexure 7.

HIS HONOUR: Annexure 7?

HEMMINGS: Yes, which is the ASL - I want to start at 14 if you don't mind.

HIS HONOUR: And Mr. Hyam's where?

HEMMINGS: A7, which is the sale No. 5.

Q. Now your report at the bottom of page 14, where did you get the description of the sale 1, the St. Marys Road - Berkshire Park; the material that you had was Mr. Alcorn's sales or Mr. Hilton's sales, please show us where you got that description? A. I think it is from Mr. Alcorn's --

Q. It doesn't appear anywhere in Mr. Alcorn's sales list, does it, that description? A. That description, no.

Q. No, and it doesn't appear anywhere in Mr. Hilton's material? A. I'm not aware.

Q. No but it is word for word of the description of the property of sale No. 5 at A7? A. Yes.

Q. Would you look down on page 15 under Property Sold Three Times? You have the property described as, in (a), Yekcim, spelt Y-e-k-e-i-m? A. Yes.

Q. And under (b) you have it spelt Y-e-k-e-i-m? A. Yes.

Q. That is not how it is spelt in Mr. Alcorn's list, is it? A. No.

Q. The only place it is spelt that way is in Mr. Hyam's report, isn't it? A. No I would say there is another place where it is spelt --

Q. Where is that? A. The Valuer-General's records.

Q. So you've got some - we have the Valuer-General's records to look at? A. Yes I enquired with the Valuer-General for additional sales.

Q. I asked you what sales evidence you had and you said Mr. Alcorn's sales and Mr. Hilton's sales. You now have - had access to some other records? A. I enquired at the Valuer-General's Department.

Q. Do you have your note of the -- A. No I wouldn't have that.

Q. You haven't got that? A. Not unless they are in - they were all the field notes that I retained.

Q. So even though Mr. Hyam has referred to it as Yekeim in two places, and you do the same, you say you didn't take that from Mr. Hyam's analysis? A. I certainly did not. I wasn't --

Q. All right. Now look, in sale (a) you spell in Lanham's, Lanham's Laundry. Have a look at the way in which it is described in Mr. Alcorn's list, it is spelt L-a-n-h-a-m with the apostrophe S. A. Yes.

Q. Mr. Hyam spells it with the apostrophe S. Why did you type it in here with an apostrophe S? A. I would imagine that I've got them from the Valuer-General's Department in that form.

Q. Do you have that material with you? A. No I don't.

Q. You assign $15,000 for the valuation of the

improvements on this site, $15,000. That is exactly the amount assigned by Mr. Hyam. Is that a coincidence as well? A. I would think so. I did not see his report.

Q. At page 15 under Description you say the land is gently undulating. I suppose that is a common term but it is precisely the same description at the bottom of the page of A7 of Mr. Hyam's report and you also say some low lying areas along South Creek, also exactly the same words? A. I used some low lying land.

Q. Land yes. Is that only coincidental, the comparison? A. Yes, coincidental.

Q. So that the use of the word Yekeim, spelt with an E, the apostrophe S in Lanham's Laundry, exactly the same description of the land, that is lot C at the top of the page, it is only coincidental together with the $15,000 of improvements, it is only coincidental that it is identical with Mr. Hyam? A. I would say the $15,000 is coincidental. The other items could easily be that information was obtained from the same source.

Q. But you don't have that material? A. No.

Q. There is one other sale. I want you to have a look at your sale 6 on page 18. See that there, sale No. 6, page 18? A. Yes.

Q. Where did you get that information from? A. That would have come from the Valuer-General.

Q. You see the true purchaser is Arnos, isn't it? A. Yes.

Q. But Mr. Hyam at page - sale No. 4 A6, puts Arons. Again it is a coincidence that you have the same misdescription of the property as Mr. Hyam? A. No. I believe it isn't a coincidence. I believe that the information came from the same source.

HIS HONOUR: What should it be?

HEMMINGS: Arnos.

HIS HONOUR: Q. And you say the same source, the Valuer-General? A. Yes.

HEMMINGS: Q. How do you know that? A. I don't know where Mr. Hyam got his information from. I only know where I got my information from.

Q. So that you didn't merely rely upon Alcorn's sales and Hilton's sales, you relied upon some material that you got from the Valuer-General? A. Yes.

OFFICER: He said that in chief.

HEMMINGS: Q. And it is also a coincidence that you came out - so far as the - I'll withdraw that. Going to your sales, and those sales are set out on pages 14 and 15, 16, you have the first sale October 1972, the last one, 1,450 acres $2,363 per acre --

HIS HONOUR: What page is this?

HEMMINGS: This is his analysis of the sales that he is using. Page 15 first sale, the last one, a sale of 1,450 acres, October 1972, $2,363 per acre.

OFFICER: 1,450 acres did you say?

HEMMINGS: 1,450 acres.

HIS HONOUR: 1,496.

HEMMINGS: 1,496 acres. $2,363 an acre, correct?

HIS HONOUR: Q. Got it? At the bottom, (c)?
WEIR: A. (c), yes.

HEMMINGS: Q. Then you go to the Fleurs property, again October 1972, that's 1,086 acres, is it not? A. Yes.

Q. $690 per acre? A. Yes.

Q. Then you've got the Rossmore 657, $1,520 per acre, 12 months later? A. Yes.

Q. You say that they are "the most comparable parcels"?
A. Yes.

Q. Neither of those three were connected to the sewer? Correct? A. Yes.

Q. None of the three had any potential for connection to the sewer? A. No.

Q. Nothing like the potential of the subject land?
A. No.

Q. None of the three were proximate to either actual or areas of potential urban development? A. In relation to the Shane Park sale, I believe that that was.

Q. Which one is that? A. The Stoney Creek Road, Shane Park, the Lanham's Laundry sales.

Q. The ASL sale? A. Yes.

Q. You say that is approximate to potential development?

A. It is approximate - it is adjacent to urban development.

Q. How far away? A. On the other side of the Telecommunications area.

Q. How far away? A. About a kilometre.

Q. Isn't this an area designated by the Department as being an area unsuitable for urban development? A. I'm not certain.

Q. Thirdly, none of those was close to a central business district such as Penrith? A. That is correct.

Q. A fact that you regard as most important in your other exercises? A. Yes.

Q. Fourthly, so far as the second sale is concerned, did you investigate the circumstances surrounding that sale?

HIS HONOUR: Which one is the second?

HEMMINGS: The Fleurs.

WEIR: A. When you say the circumstances --

HEMMINGS: Q. Did you hear my cross-examination with regard to this sale, of other witnesses? Do you regard that as an arm's length sale? A. I did yes.

Q. Do you know anything about the company - the formation of each company and as to whether there are similar shareholders? A. No, I don't.

Q. Do you know the zoning of that land? A. Non urban 25 acre minimum.

Q. Do you know whether it has any particular reference in the Sydney Region Outline Plan? A. It is outside the area for release.

Q. Do you know whether it is referred to as any Special Uses area? A. No.

Q. Fifthly, sale No. 1, you are aware that it is subject to flooding? A. Yes.

Q. Do you know how much? A. I have looked at the contour maps in Blacktown Council. It is difficult to say exactly how much.

Q. Between a half and a third? A. It is a difficult one because of the - the contour lines are naturally curved you know.

Q. More than a third but less than a half? A. No, I would think much closer to a third than a half.

Q. Closer to a third but more than a third? A. No, I would say a third would be a reasonable estimate.

Q. Did you take that into account? A. Yes.

Q. Sale No. 3 of Rossmore, you're aware that in order to achieve a 5 acre subdivision, 200 acres of it had to be dedicated free of cost to the Council? A. Yes I was.

Q. Did you take that into account? A. Yes.

Q. You looked at those, and you had figures ranging from as low as $690 an acre to $2,363 an acre. How do you get the $3,500 an acre using those sales? A. Well I have adjusted the ASL sales. If a rate of 5 per cent per month was calculated on --

Q. What's that for, the 5 per cent rate? A. Well that was my adjustment.

Q. For? A. For escalation.

Q. I thought you said in this report there was no escalation in this type of land. If you have a look at the top of page 16 this range of values is not in relation to escalation. Third last line. A. Yes well these sales are - I know more about these sales now than I did --

Q. Just a moment. When you did this report you took the view that there was no escalation in that type of land didn't you? A. Yes I did.

Q. What's changed your views? A. I have learnt a little more about the ASL development, sales. At the time those sales were not - I knew there was something wrong with them but --

Q. But you were prepared to say that there was no escalation when you wrote your report? A. I said the sales showed no escalation.

HIS HONOUR: Q. You did go a bit further than that didn't you, this range in value is not related to escalation in value due to the contractor. What you say now is that at all events, you did relate it, is that right, or not? A. Well I have applied a 5 per cent - in my later report on the Kulnamock sale and I have applied that since.

Q. You did apply that when you wrote this one though did you, exhibit 12? A. No I didn't your Honour.

Q. Oh I'm sorry, well you say you didn't. Right. Yes.

HEMMINGS: Q. I suggest to you that so far as the subject land is concerned because of its potential for the provision of sewer, its topography, its proximity to urban development and its proximity to Penrith makes those three sales of no use whatsoever in attempting to match the character of the subject land. A. I don't agree with that. The sewer is not an important ingredient in a rural subdivision.

Q. Well take page 16, the last bit, the paragraph at the bottom of the page. You say the above sales are considered to be the most comparable available sales to the subject 884 acres, each being a substantial area of undulating rural lands. Whilst the area might be the same the topography isn't the same is it, particularly with the ASL land? A. It is undulating but it's more level and --

Q. You couldn't compare the ASL land could you as far as topographical features with the subject land? A. Yes it is undulating land, there admittedly are some parts of it below the floodline area but --

Q. You say similar available services. That's just wrong isn't it. They don't have similar available services when you consider the sewer. A. The sewer is the only one that isn't, and I don't regard that as an important ingredient. There might be some doubt whether a sewer would be utilised in a rural subdivision.

Q. And your assessment is, their potential for future residential development being virtually equal to the subject land. Are you still suggesting that? That the ASL, the Fleurs land and the Rossmore land have similar urban potential to the subject land? A. Being that they are outside the Sydney Regional Outline Plan, yes.

Q. You would. Well then you then go to page 17, in the middle of the page you make your final assessment, $3,500 per acre. That right? A. Yes.

Q. With an overall value of $3,094,000 for the land? A. Yes.

Q. So acre for acre on the land, $3,500 overall? A. Yes.

Q. So that the land under the high-tension wires is worth $3,500 per acre? A. In a rural subdivision, yes.

Q. Now we go to exhibit 12A, page 2. The land of the high-tension easement of this property with urban

potential, under the high-tension wires is worth $1,300 per acre? A. Yes.

Q. Do you contend that in land with an urban potential, the land under the high-tension wires is only worth $1,300 per acre, but it's worth $3,500 as rural land with no potential whatsoever? A. Yes.

Q. You do. Can land under the high-tension wires be used for open space purposes in conjunction with residential development? A. Yes I believe so.

Q. And can it be used for roads? A. Yes. Roads that cross.

Q. So it can be used for part of the public reserve contribution from the subdivision, it can be used for roads, but you say in an urban subdivision - or urban potential land is worth $1,300 per acre but $3,500 per acre purely as grazing? A. Yes. The effect of the urban subdivision is more than just the actual land affected. It's going to have an effect on the purchase price of the residential blocks nearby. People don't like to live near it, if they're not living under it, whereas in a rural subdivision it has a far less effect.

Q. Now let's come to your exercise at page 1 of 12A. This is assuming the land has potential, in the eyes of a hypothetical purchaser, for residential rezoning.
A. Yes.

Q. And you use the Kulnamock sale. A. Yes.

Q. Now you take the purchase price and whilst you've got April 1973 I think you mean May 1973 don't you?
A. Yes.

Q. $649,089. However you reduce that, what would be a straight mathematical division of area into that price by making an adjustment taking a notional value of the 20 acres of land zoned for 5-acre subdivision? A. Yes.

Q. And then you get down to $5,654 per acre for the land that you're going to compare with the subject land?
A. Yes.

Q. And it's that reduced figure that you then escalate? A. Yes.

Q. You've now seen Mr. Hyam's report? A. Yes.

Q. And before you wrote this report you had Mr. Hyam's analysis? A. Yes.

Q. So you know from Mr. Hyam's report and his evidence

that when Kulnamock was negotiated and acquired, in fact the parties fixed the price at a rate of $6,000 per acre, don't you? A. Yes.

Q. So when the two minds came together and the deal was made it was for this at the rate of $6,000 per acre? A. Yes.

Q. You know that there was a house on that land? A. Yes.

Q. But you also know that the purchaser had to give away what, 2½ acres of land? A. Yes.

Q. Free of cost? A. Yes.

Q. It's almost an inescapable conclusion isn't it from that, that so far as the parties to that purchase were concerned the land was $6,000 per acre at that date, and whatever value the buildings had was set off against the land they were going to lose? A. Yes.

Q. Well then if you agree with that, the starting point of your analysis of that sale should be $6,000 per acre should it not, and not some notional or artificial division of the land up into parts? A. Well that was the basis that the purchaser and vendor took, it doesn't necessarily mean that that would be the only basis that would be adopted by any other two parties.

Q. No but your analysis is that even though the parties agreed at $6,000 an acre, by your assumption that he might have put a higher price on a small part of the land, you're saying he really only paid $5,654 an acre for land with urban potential, aren't you? A. Yes.

Q. And that really is purely an assumption on your part. A. It's an analysis on my part.

Q. But it's purely an assumption on your part that that's what went through the minds of the parties. A. I wasn't trying to get into the minds of the parties, I was trying to analyse a sale, and a sale where there was a variation between the zoning on parts of it and as against the subject land which did not have that variation.

Q. The parties, you aren't suggesting, bought it with a view to developing the 5-acre land as 5-acre parcels, as distinct from a whole parcel with urban potential are you? A. It was an alternative.

Q. It's not a question of that. You're not suggesting that it was purchased with a view to using part

of the land for 5-acre parcels and the balance with urban potential are you? A. I am not in a position to know on what basis it was purchased by the parties.

Q. You see on your assumption you're reducing the value of the land by about $400 per acre. A. Yes.

Q. Just by the stroke of a pen. A. No by an analysis in considering what this land could have been used for and trying to take out the differences that existed between this Kulnamock sale and the subject land.

Q. $400 an acre, if it's got to be escalated because the subject property is 25 per cent better than the other land, the Kulnamock land, and it has to be escalated for the time factor, your analysis becomes a very sizeable part of the valuation in comparison to the parcels doesn't it? A. Yes.

OFFICER: Your Honour there are lots of questions there, all sorts of assumptions wrapped up, some of which the witness has denied already.

HIS HONOUR: Yes I won't allow that question. But can I ask this.

Q. When you say your analysis, is that just another way of saying your assumptions? A. No your Honour.

Q. What did you assume assume about this, did you assume - I thought you - to have hived off 20 acres and given them $8,000, what did you assume to do that?
A. Your Honour I was trying to bring as many factors of equal note into the exercise. One of the factors that wasn't of equal note was this 20 acres that was already available and able to be sold off as 5 acres. I'm not to know what the purchaser had in mind but he could have decided to initially sell off all parcels --

Q. So you assumed it was an option open to him?
A. It was an option open to him.

HIS HONOUR: Yes.

HEMMINGS: Q. This was resolving in favour of the dispossessed owner was it, this approach? A. It wasn't resolving in any favour. It was a mere attempt to try to analyse what had happened.

HEMMINGS: Q. Then you say 20 acres at $8,000 an acre. By taking off that 20 acres and assigning $8,000 per acre, the inevitable result is it shows a lower value for the balance of the land, doesn't it? A. Yes.

Q. Do you have any idea as to where the zoning

boundary is between the 5 acre and the 25 acre in this land? A. I believe it is very close to the area that is actually already in subdivision.

Q. Do you have any idea? A. Yes, I'm just saying that I think it is the area --

Q. Do you have a plan showing the disposition?
A. No.

HEMMINGS: Maybe the witness can be shown exhibit Y1 or Y2 which shows - which is Mr. Moore's report which has plans next to it showing --

WEIR: A. I have a copy of Mr. Moore's report.

HEMMINGS: Q. I would like you to mark it exhibit Y1.

HIS HONOUR: Which map is this?

HEMMINGS: This is the Kulnamock property your Honour.

HIS HONOUR: That's what I mean, the map on that. This is the map, yes.

HEMMINGS: Q. Would you mark on that plan where you believe the area of land is located - the 20 acres that you say, the 5 acre area? A. In ink?

Q. Please do, yes. May I approach your Honour?

HIS HONOUR: Yes.

HIS HONOUR: Whereabouts? Show me. Yes.

HEMMINGS: Q. If you were informed that you were wrong, and that the 5 acre area is fragmented on the land and merely makes up a small part of a number of parcels in the area in which you have marked, would that affect the way in which you have analysed this property?
A. I believe that these were existing lots and I think in separate titles. Consequently they could have been sold off as 5 acre blocks irrespective of the zoning.

Q. The answer would make no difference at all to your valuation?

HIS HONOUR: Q. It makes no difference then, is that right? A. Yes.

HEMMINGS: Q. The zoning has got no difference at all?
A. Yes.

HIS HONOUR: Where do you say they are, these 5 acre --

HEMMINGS: It's a small triangle which makes up the

corner of Regent Road and Jeanette Street. We can have it marked on the map. It is actually marked on the exhibit which has the comparable sales on it, there's a dark hatching.

Q. Also you assign $8,000 per acre. Do you rely upon the sales which you have referred to in exhibit 12, your $8,000 an acre? A. Yes.

Q. There is only one sale anywhere near that, isn't there?

HIS HONOUR: Q. Sale 9, is it? I think you said earlier you relied on sales 8 and 9, didn't you?

HEMMINGS: Yes.

WEIR: A. I believe that the land in the Kulnamock area is superior to both of those parcels.

HEMMINGS: Q. Isn't there a large erosion area and creek cutting across near the road frontage along Jeanette Street? A. Yes.

Q. Did you take that into account? A. Yes.

Q. But you would still assign a higher value in your sales? A. Yes.

Q. Very well. Even though you know the parties negotiated this on the basis of $6,000 an acre, you reduce it for the reasons you have just given to $5,654 per acre? A. Yes.

Q. You escalated it 5 per cent per month? A. Yes.

Q. I have made a note and I hope my note is correct, you escalated that by reference to sales 2 and 3 in your first report? A. Yes.

Q. If we go back to sales 2 and 3, your 5 per cent per month runs from the Fleurs sale and your Rossmore sale? A. Yes.

Q. One sale at $690 an acre, another sale at $1,520 per acre? A. Yes.

Q. Do you say that the - I withdraw that. You didn't refer to either of those parcels when I questioned you earlier as a parcel of any urban potential, did you? A. No.

Q. So to get your escalation of land values assuming Kulnamock has urban potential, you select two sales without urban potential? A. Yes.

Q. Aren't you looking to parcels of land that have a different significance in the market place to the land with urban potential? A. Yes. Maybe I should have had a look at sales with residential potential.

Q. Anyhow, that's how you got your 5 per cent? A. Yes.

Q. You knew that Mr. Alcorn put 10 per cent per month? A. I don't recall it but I possibly read it.

Q. You rang Mr. Wood didn't you? A. Yes.

Q. What did you tell Mr. Wood was the purpose of your enquiry? A. That I was involved with the Tatmar case.

Q. Surely his reply was, well, I have done a couple of valuations of claims in this immediate area? A. No it wasn't.

Q. He didn't tell you that he had valued some of the claims? A. No.

Q. But he gave you some sales evidence? A. Yes.

Q. Did he tell you he was getting his sales evidence from his reports he prepared for compensation claims? A. No.

Q. He didn't mention at all that he had been personally involved in the assessment of claims? A. I don't think he was getting them from that direction. The reason why I rang Mr. Wood was that the evidence that I was seeking had been taken from the Penrith office into the Sydney office, so I was just following that line of enquiry out there.

Q. Did you tell him you were making a valuation of a compensation claim of the Tatmar land? A. Yes.

Q. Did you tell him that you were looking at the Kulnamock property? A. I don't think I did.

Q. In your notes, didn't he refer you to the Kulnamock property? A. I think I got that from the Penrith office of the Valuer-General's.

Q. When you spoke to Mr. Wood did he tell you that - what his opinion of escalation of land in this locality was at the time? A. No.

Q. He was the man on the spot, wasn't he? A. Yes.

Q. You didn't bother to enquire from him? A. No.

Q. You preferred to rely upon sales of land with no potential? A. Yes.

Q. At the bottom of page 1-12A thank you.

HIS HONOUR: Yes.

HEMMINGS: Q. If the subject land was 25 per cent better, as I think you told me earlier, than the Kulnamock property, you would normally escalate that figure by 25 per cent, would you? To compare it to the subject land? A. If it was 25 per cent better, yes.

Q. I thought you told me that earlier.

HIS HONOUR: Q. You did say that this morning but I wondered about that when you said that actually. A. It is better.

HEMMINGS: Q. Topographically it is 25 per cent better? A. Yes.

Q. So that would be the normal step in order to make the two properties - make the sale - adjust it for the subject property to increase that figure by 25 per cent, would it not? A. I hadn't even tried to quantify it until this morning. The thing was that one advantage --

Q. To set one up against the other. A. To its advantage, yes.

Q. But you did agree with me this morning that just taking that factor, apart from your set-off, that's 25 per cent better? A. Yes.

Q. So the answer is yes, isn't it, that if you were adjusting for that factor, you would increase its 6.5 by 25 per cent? A. Yes.

Q. That would mean, on that basis, compared to the Kulnamock property, 8 per acre, it would be 6.5 plus 25 per cent, 8 per acre? A. If you are only having regard to one factor, yes.

Q. You do not increase it by 25 per cent because you say it has better proximity to Penrith and better access? A. Yes.

Q. And you told me this morning that you knocked off about 10 per cent for the access? A. Yes.

Q. What is better about the access? A. It's got greater existing street frontage, made street frontage.

Q. On your analysis, now I want your analysis, what

the person has done, he's paid $8,000 an acre for 20 acres because of his ability to sell off the 5 acre parcels? A. Yes.

Q. If he sells off those 5 acre parcels, he has no access, does he from Jeanette Street? A. Not from Jeanette Street but he has from Mulgoa Road.

Q. Thank you, yes. If he sells those off he has no access from -- A. My analysis excluded that area of 5 acres.

Q. Assuming there is no access from Jeanette Street? A. Yes.

Q. So your 10 per cent that you have taken off, comparison, the 25 per cent, is because of the access to Mulgoa Road? A. Yes.

Q. Did you hear Mr. Talbot's evidence? A. No.

Q. Mr. Talbot was the engineer at the time being with the Council. I put it to you that the Council would not allow access from Mulgoa Road from both a traffic point of view and the drainage point of view on an urban subdivision of the Kulnamock land? A. I wasn't aware of that.

Q. If that was the fact, would you deduct the 10 per cent at all? A. No.

Q. You have deducted 15 per cent for its proximity to Penrith? A. Yes.

Q. That's a pretty large deduction, is it not? A. It is a very big advantage.

Q. How does one get to the Kulnamock property from Penrith as compared to getting to the Garswood area from Penrith? A. The Garswood Road --

Q. Area, that's the Tatmar land. I am trying to compare the two. You say it is very important and it is a very large factor. What is the difference so far as the routes of access, either to the Tatmar land or the Kulnamock land? A. The Tatmar land I would take it - the most direct way would be along Bringelly Road.

Q. Yes. Through South Penrith? A. Yes.

HIS HONOUR: Q. How far did you assume Tatmar would be at its nearest point from the central business district and how far Kulnamock? A. Kulnamock would be about 3 kilometres.

HIS HONOUR: Q. Tatmar? A. Tatmar at its nearest I've said there's only about half a kilometre difference, that's 3½ kilometres.

Q. About half a kilometre makes 15 per cent in the difference? A. No your Honour it's not the nearest point that I'm having regard to, it's the overall side and it's a far greater distance.

Q. What distance did you have in mind? A. Possibly the difference between about 3 and 5 kilometres.

Q. 5 for Tatmar, 3 for -- A. Yes.

HEMMINGS: Q. So far as the Tatmar land compared to the Kulnamock land, if they were being developed separately, independently -- A. Yes.

Q. Would it cost more to provide sewer to the Kulnamock land than the Tatmar land? A. This would depend I think on whether the existing system was sufficient to drain into the - for the Tatmar land or whether an alternate system may be required.

Q. Well what's your answer? A. Well I have no answer, I don't think it has been declared which way it would be finally - which way the authorities would have to make the sewer go.

Q. You haven't taken into account whether one would be more expensive than the other sewer? A. I've taken into account that the sewerage would be something similar but the Tatmar exercise is still very much undefined.

Q. Assuming that developers are looking for parcels of land in excess of 350 acres, looking to a rezoning, I want you to assume that. If that were a fact the subject land would meet that criteria whereas the Kulnamock would not? A. Yes.

Q. Well then you go over the page, the second paragraph. I think you told Mr. Giles this morning that there was a 15 per cent adjustment for size, did you not?

DISCUSSION

HEMMINGS: Q. Those instructing me tell me that somewhere along the line you said whilst it's 10 to 20 per cent, you'd adjust by 15 per cent. That was in chief was it? A. I think it may have been to Mr. Giles in cross-examination last Thursday.

Q. So you take off 15 per cent for size. What are the two parcels to which you are referring in that

paragraph? A. The two parcels are the Kulnamock land and the subject land, Tatmar.

Q. So it's a mere comparison with the Kulnamock land and the subject land? A. Yes.

Q. It's not relying upon any sales evidence? A. The Kulnamock sales evidence, yes.

Q. But the Kulnamock is just the one and only sale you're looking at isn't it? A. Yes.

Q. Do you have sales evidence referred to in your report, which justifies your 15 per cent reduction, or is that based upon your experience? A. No. That's an opinion.

Q. Purely a matter of opinion? A. Yes.

Q. Why not 5 per cent? A. I believe it was 10 to 20 per cent.

Q. Well why not 5 per cent? A. I don't think that it's adequate.

Q. Your valuation of the 25-acre blocks that I referred to earlier this morning, you assigned the same rate per acre for 25-acre blocks here as you did for an 884-acre block, did you not? A. Yes.

Q. Made no difference between the two? A. Yes.

Q. And the reason you gave them was because the large block had potential for subdivision into smaller blocks? A. Into smaller rural blocks yes.

Q. Well in this exercise you've got potential for subdivision into the size blocks which you've said has the greatest demand in the market at that time. A. Yes. but this is a - you have to look at an optimum sales of land for that particular purpose. A 5-acre block - subdivision will take a far greater area to get a similar number of rural blocks as compared to residential blocks. What I'm trying to say is that if we're looking at say 100 subdivided blocks, if it's a 5-acre parcel, we must start with a much larger parcel than for a residential subdivision.

Q. The Cambridge Credit land was over 600 acres wasn't it? A. Yes.

Q. That's with a view to cutting it up into quarter-acre blocks? A. Yes.

HEMMINGS: Your Honour before I move the next point I've

been told that Mr. Power is in the court. Mr. Power contacted me by phone this morning in relation to the subpoena for the Casula land. Mr. Power has informed me that, or has given me his assurance that in that file is information relating to the lightning release of land not yet identified for urban purposes, and it would not be in the public interest --

HIS HONOUR: No I don't think I'd make that - I wouldn't have made that available I don't think - if that's what's in it.

HEMMINGS: And on that assurance to me I've said that we don't press for --

HIS HONOUR: Well you're not asking me to look at it to check that, so --

HEMMINGS: No, I accept Mr. Power's assurance that --

HIS HONOUR: Very well Mr. Power, you don't have to produce the file. Yes.

HEMMINGS: Q. Well then having adjusted for size, or having taken into account 15 per cent for size, you then increase that fact to 40 per cent? A. Yes.

Q. The assumption is that the release is imminent is it? A. Not necessarily imminent but a distinct possibility.

Q. Doesn't it say so in the third sentence of the second paragraph? A speculator if he has the confidence to outlay a multi-million dollar price for the subject property on the assumption that release was imminent. A. Yes, I'm not assuming that but it's a speculator would be assuming it, yes.

Q. Well is this exercise on the basis that resumption is imminent or that there's a possibility that it might be released in 2 years? A. It's an assumption on the basis that a speculator would believe that a release is imminent, but imminent in planning years can be quite a long way off.

Q. The whole premise is the Kulnamock sale isn't it? A. Yes.

Q. Already built into the Kulnamock purchase is a factor that the person has paid the figure he has paid because he believes that the land has potential for urban release? A. Yes.

Q. And fixing his price wouldn't he have taken into account the risks that he shouldn't pay a higher price

than that, he should reduce it to take account of the risk that he mightn't have it released within a short period of time? A. Yes.

Q. So isn't there already a risk factor in the Kulnamock purchase which is the whole basis of this exercise? A. In the Kulnamock sale, but what I'm saying is that in a large parcel of land this has to be adjusted.

HIS HONOUR: Q. What, how long it's going to be before it's released? A. No your Honour, the additional risk involved in the size of the land and the outlay and the - if it isn't released --

Q. It's the size that we're talking about?
A. It's the size yes.

Q. This is 15 per cent? A. No --

Q. Well that's the distance is it?

HEMMINGS: That's 40 per cent. You take off nearly half of the value of the land --

HIS HONOUR: Q. Just a minute could I just - you say, early you've said you'd show a discount for size of 10 to 20 per cent. A. Yes.

Q. Is that what you're talking about now? A. No, well I'm saying that there is an additional discount for size because the land is not as yet available for --

Q. And you add that further to the Kulnamock, or rather you discount another figure? A. Yes.

Q. You say these risks that you've already dealt with, when related to two parcels of similar size to the resumed land and Kulnamock, of land suitably zoned, would show a substantial discount for size? A. Yes your Honour.

Q. That means because Tatmar is - whatever it is, 4 times, 10 times bigger or whatever it is than Kulnamock, but - yes, now you say there's a further discount for size related to the period within which it might be rezoned? A. Yes your Honour. There is a greater risk in purchasing a very large block of land in a non-released state than there is in purchasing a smaller parcel of land.

HIS HONOUR: I see, yes.

HEMMINGS: Q. Well would you agree with me in the Kulnamock purchase that sale would have a risk element involved in it? A. Yes.

Q. It's 106 acres and would be a risk as to when an area of that size might be released? A. Yes.

Q. So that you take off a further 15 per cent because the subject land is much bigger than that property? A. Yes.

Q. And you expand that to 40 per cent, again because it's bigger? A. Yes.

Q. So the risk that you've taken into account while analysing the Kulnamock property involves three separate considerations? A. Yes.

Q. None of those are based upon sales? A. Only the Kulnamock sale.

Q. Well have you studied it? A. Yes.

Q. The two remaining ones are based purely upon your opinion? A. Yes.

HIS HONOUR: Then what's it come back to - if your assumption is wrong about Mulgoa Road, should it then only be 30 per cent? Or not, my figures --

HEMMINGS: If he's wrong on Mulgoa Road --

HIS HONOUR: Q. Should that be less 30 per cent of $6,500? Or not. Follow what I mean? A. Yes I understand your Honour. Yes I think that would be right.

HEMMINGS: Q. And it would be wrong on proximity?

HIS HONOUR: Well he makes the appropriate - I just didn't follow that.

HEMMINGS: Q. By making those calculations and taking a third - I withdraw that. You take two-thirds of that value, that is the $6,500 less 40 per cent, you take two-thirds of the value off for the high-tension easement? A. Yes.

Q. Why take two-thirds of it off? A. Because it's land that not only can't be utilised for the residential use but it has a detrimental effect on the surrounding land that can be used.

Q. But you would take it off then shouldn't you?

HIS HONOUR: Q. Shouldn't you take it off that land then? A. Well that would be another way your Honour but this is a simpler way to adjust.

HEMMINGS: Q. Well anyhow, with all of those various adjustments that you start off at the middle of page 1, about half a dozen adjustments you come out to a figure which is almost identical to the figure that you already knew had been fixed by Mr. Hyam.

ON RESUMPTION

GILES: Your Honour, might we call the Planning and Environment Commission, the Department of Environment and Planning and the State Planning Authority on subpoena?

HIS HONOUR: Yes.

BLACKMAN: In that matter, if the Court pleases, I appear for the Secretary of the Department of Environment and Planning in response to a subpoena. The subpoena your Honour has a schedule to it setting out various documents, a schedule going into some numbers of pages. It is not possible for me to just say - well I can say your Honour, that some of those documents are produced and some are not produced, but it may --

HIS HONOUR: You mean some are here and some are --

BLACKMAN: Some are either not in existence or there is some objection to their being produced. Your Honour, it would probably be of use to my friend and hopefully to the Court if I could go through that document and explain to the Court what documents are produced and what documents are not produced and the reason for it not being produced. I don't know if it is convenient for that now.

HIS HONOUR: Just a minute. Have you got the subpoena there?

GILES: It was filed your Honour recently supplementary for - it is a fresh subpoena returnable today.

BLACKMAN: It's dated 2nd November your Honour. It has five pages of schedule. I am sorry I don't have a spare copy your Honour. Mr. Webster I think is going to produce one out of his hat.

HIS HONOUR: When was it filed?

BLACKMAN: 2nd November. Mr. Webster has a copy your Honour.

GILES: Can I hand up a copy your Honour? I'll just make sure it is the right one. Your Honour might note it substantially follows a letter which was delivered to the - or sent to the Department on 19th June last.

HIS HONOUR: Where is that letter?

GILES: Your Honour that is not part of the subpoena. It substantially follows that letter.

HIS HONOUR: But that letter is not with the file? Miss Blackman, what's - schedule?

BLACKMAN: The schedule your Honour. In paragraph 1, before we come to the subparagraph of that paragraph your Honour, I state in relation to paragraph 1 that nothing specific can be found of those matters in the first part of paragraph 1. Paragraph 1 subparagraph 1 your Honour.

HIS HONOUR: You are referring to?

BLACKMAN: Yes.

HIS HONOUR: There is nothing on file about that matter at all?

BLACKMAN: Your Honour nothing can be found. Whether there is a document that is in another file which cannot be identified, I don't know. Officers in the Department have made a search of files which have been referred to and have cross-referenced other files but without more particularity, we can find nothing and those in the Department have looked not only in the files that have been referred to in the subpoena but have made an endeavour to find it amongst general papers in the Department. Your Honour I make that statement in case, at some stage, the plaintiffs or the applicants may find a file number which will put us on to another trail. That trail can't be envisaged at this stage by my client.

HIS HONOUR: You have had since June to find them, you say by letter what's been said, and you can't find any?

BLACKMAN: That's right, your Honour.

HIS HONOUR: 2?

BLACKMAN: Your Honour those searches were produced on the previous occasion when I represented the Department in August of this year.

HIS HONOUR: Yes, where are they now then?

BLACKMAN: They were produced to the Court, I understand, your Honour. They weren't? Are these they?

HIS HONOUR: They are produced?

BLACKMAN: They are produced now. No objection to them being --

HIS HONOUR: 3?

BLACKMAN: Nothing can be found your Honour?

HIS HONOUR: Nothing?

BLACKMAN: Nothing your Honour.

HIS HONOUR: That means there has been a search and nothing --

BLACKMAN: That's so your Honour.

HIS HONOUR: 4?

BLACKMAN: In paragraph 1(4) your Honour that refers to two files - to two file numbers, your Honour will see. Those two files are actually one and the same number.

HIS HONOUR: That's 136M1/3, is that it?

BLACKMAN: Yes. It is the same file as file number 77/10591. Your Honour in relation to the documents sought there, we submit your Honour that those documents are not appropriate to be produced to the Court on the grounds of relevance. I understand your Honour that the date of resumption of this land is 31st August, 1973?

HIS HONOUR: Yes. I will have to determine that by seeing the documents, won't I?

BLACKMAN: Your Honour it is our submission that in order to make a document relevant, it would be necessary to indicate to your Honour that that document has something to do with the valuation of the property and your Honour I have come back to this case, flitting in again your Honour, without knowing the whole of the issues that have been aired before your Honour.

HIS HONOUR: Therefore it is the function of the Department, one would have thought, to have produced the documents and then let us determine whether they are relevant or not. Wouldn't that be the appropriate course?

BLACKMAN: Except your Honour that the documents that have been particularised as - the certain appears - they can be found quite easily, but your Honour they are all obviously the date after the resumption and in our submission they are irrelevant because they do not relate to the sale.

HIS HONOUR: I can understand that, I can understand that on the face of it, but I don't know what these documents contain and I must inspect them for myself, mustn't I, to determine whether they are relevant?

BLACKMAN: Your Honour it is our submission--

HIS HONOUR: What is the objection to the Department producing them?

BLACKMAN: The objection is that we have been forced to spend a lot of time finding files and because of the requirement of the subpoena, documents have been - some

documents have been found and it is our submission that what has been done by the applicant is a fishing expedition.

HIS HONOUR: But he said: The following correspondence, these letters, take these letters for example, they are sufficiently and precisely identified aren't they?

BLACKMAN: Copies of those letters can be produced your Honour but we submit that they are not relevant. Copies can be produced before it if the Court considers that it is appropriate for those documents to be produced for the Court to consider their relevance. I don't know whether or not the applicants have access to those documents from another source which would perhaps be the reason why they were able to be specified.

HIS HONOUR: Yes. As I say --

BLACKMAN: Can I perhaps go on your Honour, dealing with the various matters?

HIS HONOUR: No. We might as well finish this one first. The letters - I'm sorry, where are they?

BLACKMAN: They are in a file your Honour which is not in Court but copies of those letters can be produced to the Court if the Court --

HIS HONOUR: Yes, well what about the discussions and telephone conversation relating to South Penrith properties?

BLACKMAN: Your Honour, I understand that there was nothing on the files relating to those.

HIS HONOUR: So there is nothing produced there, is that right? What is the part that you say is so extensive as to amount to a fishing expedition? I thought there was some - you said they're --

BLACKMAN: Your Honour the situation is that there have been a lot of files in the Department which were made available to the applicant at the --

HIS HONOUR: And is included in that the matters referred to in 4?

BLACKMAN: I assume so your Honour. I wasn't at the Department when they were inspected. Your Honour there were a lot of documents which were inspected by the Department in order to find out if anything could be found and the applicant has been endeavouring to cover as wide a field as possible in the subpoena, bearing in mind that my client is not a party to these proceedings.

HIS HONOUR: No, I bear that in mind, but - anyway you

tell me that in respect to 1(4), there is nothing produced in relation to that, or not, I'm sorry?

BLACKMAN: In relation to the first part there is nothing produced.

HIS HONOUR: By that, I just want to get it clear. I am not suggesting - you are not saying you won't produce them, you are saying that there, in fact, are no documents in existence?

BLACKMAN: Apart from those which are particularised.

HIS HONOUR: And they are?

BLACKMAN: Those letters which are dated.

HIS HONOUR: And they are available?

BLACKMAN: They are available your Honour.

HIS HONOUR: And they can be produced?

BLACKMAN: They can be produced if the Court --

HIS HONOUR: I will direct that they do be produced. I will bear in mind this question of relevancy when they are produced.

BLACKMAN: Yes your Honour.

GILES: Does your Honour want to hear me on these individually?

HIS HONOUR: No I will go through them first I think. Well they will be produced. Yes.

BLACKMAN: In relation to No. 5 your Honour again there is nothing produced because it cannot be found. In relation to No. 6 again your Honour we submit that this is irrelevant but having found that it - having submitted that it is irrelevant, I state to the Court that a search was instituted and nothing could be found. In relation to subparagraph 7, again, your Honour, nothing can be found.

HIS HONOUR: Yes. Perhaps - will I deal with Mr. Giles now before you move on to 2, or is that --

BLACKMAN: Your Honour I think if I go through them all. There are other matters which are covered perhaps by the same comment. In relation to paragraphs 2 and 4 those documents are the same file --

HIS HONOUR: As?

BLACKMAN: Each other. In relation to those there are

two documents which have been found relating to correspondence between the Housing Commission and my client.

HIS HONOUR: I think you have been asked to produce the files at the moment, or the file, you tell me?

BLACKMAN: We would object to the production of those documents on that file on the grounds of relevance. I state to the Court your Honour that the documents which are - which relate to the subject land - your Honour that file relates to a lot of subjects.

HIS HONOUR: But is there a file in existence?

BLACKMAN: Of that --

HIS HONOUR: Of that description?

BLACKMAN: Yes your Honour.

HIS HONOUR: This subpoena is an order from the Court directing that file to be produced to the Court.

BLACKMAN: Yes your Honour. In relation to the whole of the file, we submit your Honour that it is irrelevant because there are no documents on that file, apart from two documents, which relate to the subject land. Your Honour we would object to producing documents which relate - it is our submission that documents on a file which have been ordered to be produced should not be produced to the Court in relation to this matter, bearing in mind that my client is not a party and they deal with a lot of other subjects. And your Honour --

HIS HONOUR: That doesn't excuse the party from producing them to the Court. Presumably what the Department wants is that the contents be not made available to other parties because they are not relevant, the Department will say, I suppose. That doesn't mean the Department can make that decision and just tell me that --

BLACKMAN: I understand what your Honour is saying. Your Honour that file is in existence.

HIS HONOUR: Very well. I will direct that that file be produced.

BLACKMAN: Yes your Honour. In relation to that file, I make the statement that there are two documents on it relating - and I make this despite the fact that those documents required and produced to the Court - I make this statement now. There are two documents on that dated 1977. Those are the only documents which relate to the subject land. It is our submission that they are irrelevant because of the time.

HIS HONOUR: I can't deal with this now. Until the

Department produces the documents, I can't determine the question of relevancy because I don't know what is in the documents.

BLACKMAN: Yes your Honour.

HIS HONOUR: So when will the file be produced.

BLACKMAN: Your Honour, can I perhaps just take instructions on that when I have come to the end of --

HIS HONOUR: Yes.

BLACKMAN: And I can have all the coals of fire heaped on my head at once. Your Honour paragraph 4, nothing is produced.

HIS HONOUR: Yes.

BLACKMAN: And that's a long paragraph. There is one matter which I can deal with when I come to paragraph 11.

HIS HONOUR: Nothing produced?

BLACKMAN: Except what is produced in relation to paragraph 11.

GILES: I take it your Honour that the statement: not produced, means documents not in existence?

BLACKMAN: That nothing can be found, your Honour, when I say not produced.

HIS HONOUR: Except in so far as some of them are in existence but are dealt with under paragraph 11. Yes 5?

BLACKMAN: Your Honour in relation to paragraph 5, again your Honour this is a very general requirement. In relation to that, there are some documents in existence which are dated 1980, 1981. There is first of all a claim that in relation to those documents which are, we submit, in answer to a very general subpoena, the documents we say are irrelevant because of the date. If your Honour is against us on that question, a claim for privilege will be made, but it has not been possible at this stage --

HIS HONOUR: What sort of privilege?

BLACKMAN: Crown privilege, your Honour. Your Honour that will be dealt with by an affidavit from the Director, if your Honour is against us on the grounds of relevance.

HIS HONOUR: But Miss Blackman I say again, I can't determine the question of relevance unless I see the

documents. It may very well be that some of the documents that are referred to in here, are of their very nature so obviously a matter of Crown privilege, as that term is properly understood, but without even inspecting them I couldn't conclude not other than that they should never be produced. But I find that very difficult to --

BLACKMAN: Your Honour I understand that.

HIS HONOUR: I can understand there may be grounds for claiming of Crown privilege in respect of certain matters in the course of preparation or the like - I don't know, particularly if it doesn't relate to the subject matter. But I've got to look at them to determine that. Unless as you say the material is such, so obvious on its face, that it appears as though the security of the estate will be threatened if - perhaps not that far, but anyway.

BLACKMAN: Your Honour there will be an affidavit. Your Honour in relation to the relevance of documents, your Honour has said that your Honour will need to see them before your Honour determines whether or not they are relevant. Your Honour it is our submission that any document that is required to be produced on subpoena, which is not in relation to the subject of the case before your Honour, has to be shown to be relevant; not that we should have to show that it's irrelevant.

HIS HONOUR: But what I don't understand here, are you saying you can't produce these documents, because it belongs to such a wide range, you haven't got the time to get them; or are you saying they're there in the office, you know about it, but you're not going to produce them, because you say they're not relevant? Because if it's the latter I'll direct they be produced.

BLACKMAN: Yes your Honour, it is the latter.

HIS HONOUR: Produce them, and then I'll have to determine.

BLACKMAN: Yes your Honour.

HIS HONOUR: I'm not ruling against this claim of relevance at all in advance, but equally I'm not going to determine they are irrelevant unless I've seen them.

BLACKMAN: Your Honour it may be of course that the applicant does not wish to pursue the subject, if the applicant hears the comments which I have to make about these documents.

HIS HONOUR: I don't know about that.

BLACKMAN: In relation to paragraph 6, your Honour --

HIS HONOUR: Now 5 you say, they're in existence but not relevant?

BLACKMAN: There are documents in existence, but not relevant, if relevant Crown privilege.

HIS HONOUR: I take it then that you could have the affidavit on I suppose this afternoon?

BLACKMAN: I think not your Honour. What happened was, I understood this case was coming on at 10 o'clock this morning. I had a conference yesterday with those instructing me, and it was not possible to get the affidavit this morning.

HIS HONOUR: Tomorrow then. And the reason I say it is this you see, because I'm not deliberately being - except Mr. Giles has told me that these documents were asked for in a letter, so there must have been some alerting to this. But the reason I make the statement that I want them on as quickly as possible is for this reason, that if when the documents are produced tomorrow, or not produced according to the affidavit - that will obviously dispose of the matter, but it may very well be that I will look at the documents and say these documents should be produced, and you will want to take the matter further.

BLACKMAN: Yes your Honour.

HIS HONOUR: Not an unknown step by the Department. In that event you'll have the opportunity on Friday to approach the Court of Appeal, because this matter is relisted for hearing next week. That's why I'd like the matter dealt with tomorrow.

BLACKMAN: I don't know whether or not your Honour would be prepared to sit at 9.30 a.m. to deal with this?

HIS HONOUR: Yes I will.

BLACKMAN: Your Honour in relation to the letter in June of this year, I might say your Honour that a subpoena was issued to my client, which was returnable in August of this year. Documents were produced.

HIS HONOUR: Including these?

BLACKMAN: Including the one that was handed up, I understood your Honour, that was in Court and available, but wasn't handed up. But your Honour it wasn't the same particularity.

HIS HONOUR: Not surely including this Crown privilege material.

BLACKMAN: No your Honour, the Crown privilege wasn't

covered. In relation to paragraph 6 your Honour - in relation to this your Honour, there are some documents which have been photocopied out of file number 77/10591, and which would appear to be those documents which are called for.

HIS HONOUR: I thought you said they belonged to a class of documents - I have written beside that nothing produced on page 1 of the subpoena, that is 1(iv).

GILES: I think your Honour there may be some misunderstanding. I think Miss Blackman said that the documents were in existence, but took the relevance point.

BLACKMAN: They're in existence your Honour, but on the ground of relevance.

GILES: I think it would be constant with your Honour's ruling, if your Honour would direct their production.

HIS HONOUR: Yes.

BLACKMAN: Your Honour in relation to paragraph 6, we produce photocopies of those documents which have been particularised. We haven't produced the whole file your Honour, we have produced the documents which are within that file - copies of documents which are in that file, and there is no objection to those being produced, in 6.

HIS HONOUR: Yes 7?

BLACKMAN: Your Honour in relation to paragraph 7, I produce to the Court some files, file No. R2/3/55, parts 1 and 2.

HIS HONOUR: Is there any objection to parties inspecting those files?

BLACKMAN: No, your Honour. But your Honour that is on the basis I understand it that they are not to leave the custody of the Court.

HIS HONOUR: Yes. If they are to be inspected, they can be inspected in my associate's room.

BLACKMAN: Your Honour in relation to paragraph 8, that I understand is the same file that has been produced to the Court in relation to paragraph 7. It's been given various numbers, but in neither case was it exactly the same.

HIS HONOUR: 9?

BLACKMAN: Your Honour in relation to this, again we object on the grounds of relevance. It is our submission, your Honour, that the applicant should state on what grounds those documents are relevant.

HIS HONOUR: Does that mean that you have a problem locating these documents, and you don't want to be put to all this trouble, unless they really have to be; or do you say they're there, but you say they're not relevant?

BLACKMAN: Your Honour I understand what has been asked for is a file relating to the positioning of the F4 Freeway. That, your Honour, is not a file; that is a very large amount of material, on my instructions, which it is not appropriate to search through, to find if there is anything relating to the subject land. And your Honour, I don't know that a search has been made through the whole of that file, or through the whole of those files. It's not a document that is, in our submission, something that my client ought to have to search through to find --

HIS HONOUR: I can understand that objection, but you say it's not located, it's too difficult and why should you do it, because how could it be relevant. I'll hear Mr. Giles on it.

BLACKMAN: Yes your Honour. Your Honour the same goes for paragraph 10. It is our submission that that does not relate to something that we should have to search through the whole of our records for. Your Honour in relation to paragraph 11, I produce to the Court a plan of the Sydney Region Outline Plan.

HIS HONOUR: May the parties have access to that?

BLACKMAN: Yes your Honour. And a booklet --

HIS HONOUR: I don't think you need bother with that. We've all got that.

BLACKMAN: This your Honour is indicative of what we've been asked to produce, everything. Also your Honour some booklets of explanation in relation to that. We submit your Honour that anything after the 31st August, 1973 is irrelevant, but your Honour those documents have been found and they are produced to the Court.

HIS HONOUR: Is there any objection to the parties seeing them?

BLACKMAN: No objection your Honour.

GILES: Do we have an answer to the balance of the paragraphs?

BLACKMAN: Your Honour we would object to the production of anything else, other than the documents which have been produced to the Court, on the basis of relevance and privilege.

HIS HONOUR: Yes, 12?

BLACKMAN: Your Honour, that's the same as 11.

HIS HONOUR: 13?

BLACKMAN: Your Honour my instructions are that in principle we don't object to these on the ground of relevance. We do say your Honour that they are irrelevant, and we would ask that the applicant show how files relating to McGraths Hill, South Richmond, Hornsby, Gosford, St. Hubert's Island, can be relevant. If your Honour, having heard Mr. Giles, or Mr. Hemmings, or Mr. Webster, whoever chooses to answer, is of opinion that they could be shown to be made relevant by the applicant, where we have a resumption of land at South Penrith, some of those files can be located; others cannot your Honour. They have not been particularised to an extent for my client to be able to locate them. Numbers 1, 2 and 7 can be located your Honour, those files, if your Honour is against me on a question of relevance.

HIS HONOUR: 1 which?

BLACKMAN: 1, 2 and 7.

HIS HONOUR: Yes. The others --

BLACKMAN: The others we cannot locate your Honour because they are not particularised. We don't say that they're not in existence, we can't put a figure on it.

HIS HONOUR: Yes. Yes Mr. Giles.

GILES: Your Honour I would firstly invite your Honour to say something with respect very clearly about the duties of parties - or this party in particular answering subpoenas.

HIS HONOUR: I must assume people know what their duties are.

GILES: Well your Honour with respect it's not apparent from my learned friend's submission. It seems to be a fundamental misconception as to the duty of a person receiving a subpoena. Your Honour the Court of Appeal in this State not very long ago in Waind -v- Hill examined this with a great deal of care and laid it out your Honour with a great deal of precision. The submissions which my learned friend - that your Honour will recall was reported in 1978 1 New South Wales Law Reports 372.

HIS HONOUR: I've got that, yes.

GILES: Now your Honour that decision - in that decision

the Court of Appeal very clearly said that a party receiving a subpoena either moved to set it aside as oppressive or answers it.

HIS HONOUR: Yes I would have thought - I wouldn't have thought it needed until 1977 or 1978 to be laid, I thought that that was pretty clear.

GILES: No. Having answered the subpoena by producing the documents to the court, the party, and we're dealing with third parties here, indicates whether it objects to the court making them available. At that stage the court rules whether the parties should see them or not.

HIS HONOUR: Yes.

GILES: The third party will rarely if ever put submissions about it because they do not know what the issues in the case are. I'm not saying that they can't be heard of course your Honour but --

HIS HONOUR: But questions can arise about confidentiality and the like I understand that.

GILES: Indeed. They can indicate why they don't want them seen by the other parties and indicate interests which exist. But in this case your Honour we don't have any of that and your Honour will have observed that my learned friend says that they - well I'll come to particular examples may I?

HIS HONOUR: Yes.

GILES: First of all your Honour the paragraph 1(iv). Your Honour has now ordered production of the particular file and the particular letters but we have no answer from my learned friend as to the balance of the paragraph.

HIS HONOUR: Which part are you referring to?

GILES: What we are concerned about or the subject matter are discussions and communications between the - relating to the South Penrith properties to the - relating to the Housing Commission activities in that area between officers of the SPA and the Penrith City Council. Your Honour that is a very specific topic. In other words, what went on between the SPA and the Council concerning this land and we say without limiting the generality of that, we call for a particular file. The assumption underlying the submission which is made is that unless the words Tatmar or Penrith Pastoral Company or the description of the land appear, then this Department simply refuses to produce the documents, making its judgment about relevance. Your Honour will readily appreciate that with a number of sales which are comparable sales and with a number of parcels of land in the immediately adjoining area, the development of which

is intimately related with ours, it may very well be that there is a communication concerning another parcel of land which would throw a great deal of light upon the true plans as they existed in relation to this land. Your Honour we do submit we are entitled to a proper answer to (iv).

Your Honour then I think down to the next questionable matter is that in paragraph 5.

HIS HONOUR: You mean (v)?

GILES: No, 5 your Honour. I'm assuming nil means nil and not just nil on a department sort of judgment of relevance.

BLACKMAN: Your Honour, it means nil, it cannot be found.

GILES: At 5 there was the claim for privilege and perhaps we can await that your Honour. 6 --

HIS HONOUR: When you finish I will come back to 5 though.

GILES: (vi) - sorry 6 --

HIS HONOUR: That's going to be produced apparently.

GILES: Your Honour what we have produced are three documents. We again don't get - and we haven't seen those yet - but what we ask for is all applications etc. by any private party to have all or part of the South Penrith properties rezoned for urban use.

HIS HONOUR: You mean up to the present time?

GILES: Yes your Honour, we do. The South Penrith properties are a very limited area your Honour and one can understand that it may well be that later applications are irrelevant. They may just as well be relevant because one could understand a report being in existence linking one property with another, so we do ask for a proper answer to the first part of 6, not just a combing through the files to --

HIS HONOUR: Yes.

GILES: Then your Honour paragraph 7 --

HIS HONOUR: That's answered, isn't it?

GILES: That's answered. Paragraph 8 is the same as 7. 9 your Honour is put on the basis of oppression, as I understood at the --

HIS HONOUR: Yes it is.

GILES: It was a difficult thing and may I quote what I recall my friend said about 9? He said that they had a lot of documents about it and they would have to go through those documents to see if the subject property is referred to. That your Honour is a complete misconception. It is not for a party who receives a subpoena to do that sort of exercise. If we haven't sufficiently specified the documents, then the subpoena is oppressive but here what we are interested in is the location of the F4 expressway. Your Honour heard cross-examination as late as yesterday afternoon.

HIS HONOUR: Yes, you needn't - yes.

GILES: By my learned friend Mr. Smart. Your Honour it is not for the Department to say: We'll go through and find this property listed. We are interested in the F4 expressway at a fairly narrow point in its length.

HIS HONOUR: Anyway it is not said that you point out it is oppressive. It is just said that - yes.

GILES: 10 your Honour. 10, 11 and 12 your Honour are directed to the Sydney Region Outline Plan as is 13. Your Honour hasn't yet seen the - none of us have heard the evidence to be led by the respondent in this case, but we know from the exchanged material that there will be a case made that the Sydney Region Outline Plan, contrary to what it says itself, became some inviolate document which permitted of no change. Your Honour we --

OFFICER: That is absolutely wrong, Mr. Giles.

GILES: That is what your exchange documents show, Mr. Kacirek and Mr. Ashton, that's then and now. Your Honour we believe that to be wrong and what we have been trying to do now for some considerable time is to obtain material which would show it to be either right or wrong. We will be confronted with Mr. Ashton in the witness box next Tuesday morning, presumably giving the evidence that he has been - that's been foreshadowed.

We cannot effectively cross-examine him nor will the truth come out unless we know in fact what took place in the delineation of the Sydney Region Outline Plan and what took place both before it was formulated, at the time of its formulation, and subsequent to its formulation, because it is being put this is the barrier to our client's case. I don't suppose there is any more important topic to us in the case than these paragraphs.

Your Honour, paragraph 11 for example, we do - Your Honour what we've got in relation to paragraph 11 is a map and a booklet which are public documents plus some other documents we haven't yet seen which presumably are public or semi-public.

BLACKMAN: They are.

GILES: What we haven't received any answer to is the call for any proposals to change that boundary.

HIS HONOUR: But say those - and I appreciate this, that they have got to be produced to the Court first - but let me assume there were proposals to change the boundary but they were top secret. Are you entitled to them then?

GILES: It may well be that we are not your Honour, if they are still current.

HIS HONOUR: And additionally even if they are still - leaving aside the question of Crown privilege, am I to assume that for the purpose of determining the value of this property, that developers have a way of knowing things?

GILES: One of our submissions will be that that is so but because of the evidence in this case, not because of any inference of secret knowledge by developers but because we know from this case what one of the parties to the transaction knew. Your Honour will in due course - your Honour hasn't seen the documents yet, but we have a fair idea what they knew although we are trying to find it out, and you can't have a --

HIS HONOUR: It is not so much what they know, it is what they conveyed that - or people would know them to know that is relevant, isn't it?

GILES: What the Housing Commission knew, your Honour.

HIS HONOUR: Is this to be tested by what the Housing Commission knew?

GILES: We would be submitting so, your Honour, yes, certainly. You can't have a one-sided transaction. It is a hypothetical transaction with both sides and all sides knowing all of the circumstances. That's the classical test your Honour and you can't have one with his eyes blinkered and the other with his eyes open. With a statutory authority like the State Planning Authority, it will no doubt tell --

HIS HONOUR: What if the State Planning Authority wanted to acquire the land?

GILES: They didn't in this case. That may raise an interesting question. We would say that the principles in the Authorities would require that there be equal knowledge but that's a --

HIS HONOUR: Anyway, that's a question later on for determination. It is a bit down the track.

GILES: Your Honour we are - 13 comes right down your Honour to successful applications for rezoning and release. We don't limit it to 1 to 7, they are just cases Mr. Moore happened to know about by coincidence because his firm was involved, but what we do ask is: Please let us know what, in effect - what effective changes there have been made - I withdraw that - what land outside the SROP has in fact been rezoned.

HIS HONOUR: Yes.

GILES: Well, not - zoned now as to permit urban development and we include in that land in which the release dates have been changed. Otherwise your Honour everybody will be in the dark as to the true position. Mr. Ashton and Mr. Kacirek will be allowed to go into the witness box and say what they like about the --

HIS HONOUR: Yes. Well I don't know that I'd infer from that --

GILES: Without proper testing, your Honour. I'm not suggesting any intention on their part to commit perjury but they will not have the discipline of being tested by looking at contemporaneous documents. Or, as my learned friend, Mr. Hemmings points out, nor will they have the advantage of it if this stance is maintained, one presumes.

HIS HONOUR: I suppose they can look at the document, can they? Without anyone else --

GILES: That's what we rather fear your Honour.

HIS HONOUR: I follow what you are saying. Can I go back to 5? I think that almost concludes your - yes.

GILES: It does your Honour.

HIS HONOUR: Go back to 5, it is a question of Crown privilege proposed to be raised. One matter - see, it says: All discussions, conversations, relating to the South Penrith properties from the date of release of the Sydney Region Outline Plan to the date of this subpoena. I suppose ultimately there must be some - I always thought the cut-off day would be August 1973 but both parties in this case seem to be keen on persuading me that one goes some distance into the future in all events, but I don't think one goes up to now, does one? I mean, leaving aside this question of - there is not much point in fighting out an academic question about this and I say that because one can foresee some possible Crown privilege in relation to the disclosure of a plan involving the outer Western Suburbs that is current.

GILES: Yes, quite.

GILES: Your Honour there have been public announcements about it.

HIS HONOUR: Yes.

GILES: I wouldn't have thought that there was any subsisting problem but the chances are probably fairly strong that what your Honour puts to me is quite right but one can't see a sufficient link between the 1981 proposals and the 1973. And we don't want to have to write back to the Court of Appeal without any real cause. On the other hand your Honour we must say with very great respect that a process which started off I think about last July has led to almost - well to the production of the pieces of paper your Honour sees here. We simply don't know what are in these reports.

HIS HONOUR: No.

GILES: And it may be, your Honour follows, that there's a policy decision made in 1981 about this land, there will be documents which recite the history of it.

HIS HONOUR: It's got to go beyond that though doesn't it, it has to go to what might be known - what could have been ascertained in 1973.

GILES: Your Honour yes, that is certainly so. It can only throw light on that. But we know your Honour from looking at such reports as we've been able to get from other sources that it's very common for there to be a resumé as to the history.

HIS HONOUR: That may be so. Yes I follow.

GILES: But your Honour I suppose the Crown privilege consent, we've got no desire to make or break any law on that topic.

HIS HONOUR: No, but the question - assuming you're right and I perhaps shouldn't say this but I find it difficult to see how 1981 proposals as to what's going to happen to Penrith have any bearing on the state of the market in 1973, but assuming you are right a further question then arises as to whether or not the public interest requirement is such that this matter must be kept secret.

GILES: Yes quite.

HIS HONOUR: But I don't want to get to that second one unless I'm first of all satisfied that the material is relevant.

GILES: As I understand it your Honour the stance my learned friend takes will assist that because they say, look we say they're not relevant. If they are relevant,

let us then make a claim for Crown privilege. We agree that that's a convenient course to take. That will involve your Honour looking at them but not us at this stage, bearing in mind the fact that the chances of relevance are not great unless there's something in there which turns up.

HIS HONOUR: Yes.

BLACKMAN: Your Honour in relation to Crown privilege paragraph 5 I think, the only document that is in existence came into existence in 1980.

GILES: Yes we understand that.

BLACKMAN: So that your Honour I'd rather than - happening to find out anything.

HIS HONOUR: But I can't do anything about that unless - I would have thought, unless you put on an affidavit saying --

BLACKMAN: Yes your Honour that's just physically wasn't possible.

HIS HONOUR: That even if I look at that document, the working of the government or some - a great public disaster is going to occur I would look at the document, with the purpose of determining whether or not you have sustained your --

BLACKMAN: That's right.

HIS HONOUR: And I suppose it must be right although I haven't gone into this, that the probative and useful value of the material must be always a factor taken into account in determining where the public interest finally lies, if something is only peripheral to the main issue one may be more disposed to say, well I won't - I'll just look at it. But if it's absolutely essential maybe one says, well then public interest would find that if non-disclosure has been over-ridden by --

GILES: Your Honour can I make a suggestion about these documents? That is that your Honour have a look at them and we'll completely be - as we are of course, but we wouldn't wish to even - your Honour will say whether the answer is yes or no and that's it. If your Honour thinks there is some relevance then there may be a question of then hearing a claim for Crown privilege.

HIS HONOUR: All right. Well now when can these documents be produced? Sorry is there something else you wanted to say?

GILES: Your Honour I was just going to make this plea. There are a number of - not many but there are some

particular files which have been identified this afternoon. They apparently are not physically here at the moment.

HIS HONOUR: Yes.

GILES: Because of the stage we're at of the case your Honour it would be very convenient to us to have those at Court this afternoon so we can look at them overnight your Honour. We've got to the stage where we are going to close our case tomorrow, or as soon thereafter as we can, we have got to cross-examine witnesses next week. If there are, as there are, two or three identified files your Honour surely they can be here by 4.

HIS HONOUR: Yes. Yes Miss Blackman?

BLACKMAN: Your Honour in relation to what my friend has submitted, we do point out your Honour that my client is not a valuer, the knowledge of my client has nothing whatsoever to do with the knowledge of the Valuer-General or of anyone in the employ of the Valuer-General.

HIS HONOUR: What I've been asked to remind your client, but I thought I didn't have to remind him, is his obligation to produce documents that are subpoenaed. It's not for the party who is subpoenaed to make an independent assessment of the relevancy of the documents.

BLACKMAN: Yes your Honour.

HIS HONOUR: As has been pointed out, if the subpoena is oppressive then it can be set aside or a proposal be made for it to be set aside. If it's claimed that the documents for one reason or other oughtn't be disclosed, application can be made to the court.

BLACKMAN: Yes. Your Honour I - there was some physical difficulty about bringing all documents to the court, some can be brought back this afternoon and their relevance can perhaps be tested this afternoon. Perhaps your Honour the sooner I set about that --

HIS HONOUR: Well that's about three of the ones that you say can be produced this afternoon?

BLACKMAN: Your Honour I don't know which ones they are, I'll have to take instructions on this, perhaps I can have the indulgence of the court to go away perhaps for half an hour?

HIS HONOUR: Yes.

BLACKMAN: And come back and tell the court.

HIS HONOUR: Yes. And would you please remember Miss Blackman that the view I take is, leaving aside questions

of Crown privilege which fall into a very special category, and I'm not suggesting for a minute that 1981 plans and the like may not fall into that category, but we're now basically talking about 1973, that I take the view and if I'm wrong you can test this matter on appeal; I take the view that it's not for the Department to determine whether the documents are relevant. It must be a question for the court. If you tell the other parties that the documents are not relevant and the other parties accept that, then I've no doubt one could proceed on the basis that nobody really wants the documents called. But there is in fact an obligation, a document has been issued by the court requiring these documents to be produced. I don't mind the parties agreeing in an informal way not to produce them because one doesn't require excessive formality, but when one party says: I want them produced, it's not for the other party to say they're not relevant.

BLACKMAN: Yes your Honour I understand that. There may be physical difficulties about getting them here this afternoon, particularly those relating to the F4 expressway. Perhaps your Honour ---

HIS HONOUR: Anyway if you mention it again in half an hour, and you can let us know what ones are available.

BLACKMAN: Yes your Honour.

HIS HONOUR: I'll leave it at that I think Mr. Giles for the time.

GILES: Yes thank you your Honour.

HIS HONOUR: Yes.

GILES: Your Honour Mr. Russell is here for the State Planning Authority. I am not sure --

HIS HONOUR: Yes what's happened?

RUSSELL: Your Honour some files are produced and others not. Perhaps if I could seek your Honour's leave to file them until our Notice of Motion arrives - the subpoena and that Notice of course. That Notice ... (inaudible) ... November.

HIS HONOUR: Yes.

RUSSELL: There is a copy of the subpoena annexed to the affidavit.

HIS HONOUR: All right. So 1, 2 is all right, is that right?

RUSSELL: That's so your Honour.

HIS HONOUR: 1, 4, 2, 3, 6, 7, and 8 - 2, 3, yes, 6, 7 and 8 - set aside. What is the difference between --

RUSSELL: Your Honour will note that the numbers in the two paragraphs don't coincide because it is a general objection to the statement in paragraph 1 of the Notice of Motion to the breadth of the subpoena and the relevance of the material appearing on the face of the subpoena itself to the matter before the Court which is a matter which your Honour could take into account when determining whether or not --

HIS HONOUR: Sorry, where is that stated?

RUSSELL: That is not stated in the subpoena nor in the Notice of Motion.

HIS HONOUR: You say that save and except for the numbered paragraphs which you nominate the subpoena should be set aside?

RUSSELL: That is so your Honour.

HIS HONOUR: So you are not asking me to set aside those paragraphs?

RUSSELL: That is so.

HIS HONOUR: What is the difference between that and paragraph 2?

RUSSELL: For instance that paragraph 1(i) --

HIS HONOUR: Is not --

RUSSELL: -- is not mentioned in either.

HIS HONOUR: What is the distinction between the two? It has just escaped me. In paragraphs I mean?

RUSSELL: In 1 I am saying: Please set aside all of the paragraphs of the subpoena apart from those numbered and then in paragraph 2 specifically set aside all those other paragraphs. A little bit of Irish your Honour. Perhaps it would assist your Honour if I were to go through each of the paragraphs in the subpoena?

HIS HONOUR: Just a minute. I had better have a look at the - yes.

RUSSELL: Your Honour I think it was foreshadowed yesterday that the question of Crown privilege would be argued. That matter will not be raised. In relation to paragraph 1(i) of the subpoena, those documents have been produced.

HIS HONOUR: 1(i) is produced, is that correct?

RUSSELL: Right. It is just your Honour that those documents - and it will appear from the face of the subpoena that those documents are irrelevant to the matter before the Court.

HIS HONOUR: I will come to that later. We are just talking about what documents are being produced now.

RUSSELL: If your Honour pleases. 1(ii) is also produced. They were produced in fact yesterday. 1(iii) we would submit is a proper matter for discovery between the parties and not a matter properly the subject of a subpoena to a third party.

HIS HONOUR: Why do you say that?

RUSSELL: Your Honour the subpoena calls for the production of documents relating to the - discussions between the State Planning Authority and its predecessor.

HIS HONOUR: I'll come back to this. I'm sorry, I shouldn't have - I'm just talking now about what you have produced. So you are not producing (iii) in the sense that you claim that the subpoena ought to be set aside so far as it relates to (iii) for reasons that I will come to. Yes, very well.

RUSSELL: Paragraph 4, the documents are produced there and it might be noted that file No. 163M13 which is described in the subpoena is identical with --

HIS HONOUR: Yes, that was stated yesterday I think, 77/10 - is that right?

RUSSELL: 10590, which is produced and also 901 is also

produced. Sorry, 91 is produced. The letters enumerated in that paragraph are in those files I understand.

HIS HONOUR: Yes, and 5?

RUSSELL: As to 5, 5, 6, and 7, there is nothing further the Department has in relation to those matters which is not produced under those two files mentioned before. As to paragraph 2 of the subpoena --

HIS HONOUR: Produced.

RUSSELL: That's produced and it is identical with that sought in paragraph 3.

HIS HONOUR: Yes, 4?

RUSSELL: Nothing is produced under 4.

HIS HONOUR: By that you mean nothing in existence?

RUSSELL: Your Honour, we are objecting to 4.

HIS HONOUR: You are objecting to that?

RUSSELL: 5.

HIS HONOUR: You are objecting to that?

RUSSELL: We are objecting to 5. Documents to be produced under 6.

HIS HONOUR: 6 are here?

RUSSELL: Yes your Honour. They are contained in that file, I'm instructed, file No. 77/10590 and some in the next file, the 91. Documents sought under paragraphs 7 and 8 were produced yesterday. There's objection taken to paragraphs 9, 10, 11 and the documents sought under 12 have been produced or is produced here today and objection is taken to 13.

HIS HONOUR: All right. Let's go back to - just to clear the air, no question of Crown privilege arises but there is a request that the documents that are produced to the Court be made available to parties and to no one else?

RUSSELL: To counsel.

HIS HONOUR: Counsel and no one --

RUSSELL: I am instructed your Honour the inspection of the documents should take place only in the presence of officers of the Department of Planning and Environment.

HIS HONOUR: If they are inspected in my chambers, you

still want the officer there?

RUSSELL: I am instructed to request that your Honour.

HIS HONOUR: What do you say about that? Leaving aside --

GILES: We don't accept that limitation your Honour. First of all your Honour I don't accept the limitation which excludes my instructing solicitor, that's the first point. The second point is that --

HIS HONOUR: Can I just ask this question? Mr. Russell, why does an officer of the Department have to be there? What is it, to prevent the possibility of someone stealing the files or documents from them? It is not very flattering to members of the profession to - but if there are reasonable grounds, I suppose I ought to hear them.

RUSSELL: The information contained in the files, I am instructed, is of a confidential nature and could be --

HIS HONOUR: I can understand that but why is the presence of the Department a - these documents will be seen by - leaving aside whether it is solicitors - they will be seen by counsel anyway.

RUSSELL: Yes that's appreciated.

HIS HONOUR: Why must an officer be there?

RUSSELL: Your Honour to be sure that from the Department's point of view the documents remain intact.

HIS HONOUR: No I don't think I will do that. They will be - my associate will be present when they're - they will be in my associate's room. They can only be inspected in my associate's room. She will be present.

RUSSELL: Your Honour I am certain that would be satisfactory to the Department if an officer of the Court --

HIS HONOUR: And I will have an assurance from the profession that none of the documents be removed from any of the files. I am not suggesting that anyone would take them but just so there could not be any mix-up.

RUSSELL: I am certain that that is not suggested.

HIS HONOUR: All right, well that will deal with that now. Mr. Giles then says that he would like if possible for his solicitor to see them. The reason for this I imagine is that it is somewhat difficult to cope with it by himself. Is there any real objection to the solicitor seeing them?

RUSSELL: No your Honour.

HIS HONOUR: Very well, I will make that available to the solicitors. So far as documents then that appear in the subpoena and that are numbered 1(i), 1(ii), 2 and 3, 6, 7 and 8, were they produced?

RUSSELL: Yes they were. And 4 should also be there I think your Honour.

HIS HONOUR: And 7 and 8, they were produced weren't they?

RUSSELL: Yes your Honour.

HIS HONOUR: 7, 8 and 12 are produced. It is noted that there is no claim in respect of Crown privilege and therefore the documents may be inspected in the associate's room by the counsel and solicitors. I take that that extends also to Housing Commission counsel and solicitor?

RUSSELL: Yes.

OFFICER: Your Honour I am concerned that the - if your Honour is putting a limitation to solicitor and counsel for the Housing Commission. Some of these files if they have not already been adequately inspected may need to be inspected by officers and former officers of the State Planning Authority itself to refresh their recollection. For example, Mr. Ashton, I understand is no longer on the permanent staff of the now equivalent of State Planning.

HIS HONOUR: What is your view about that? In case you don't know what has happened in these proceedings Mr. Russell, it is proposed to call members of the State Planning Authority and presumably ask them questions about events in 1973. Mr. Officer says that he would like witnesses who would have to refresh their memory from these files to be able to do that. What is your Department's view about that?

RUSSELL: I don't have specific instructions at this stage your Honour but I can see a nod from my instructing solicitor to the effect that that would be in order.

HIS HONOUR: Very well. They may be inspected - those people. Perhaps what you ought to do is present to Mr. Russell the names of the persons who you will be asking to inspect the files. If there is no dispute, they may be inspected in my associate's room. If there is a dispute, the matter can be mentioned before me.

OFFICER: Thank you your Honour.

GILES: Your Honour, could your Honour grant liberty to apply in relation to any extension on our side? It may be that Mr. Moore or Mr. Alcorn may be able to - we may wish them to just look at some of them your Honour.

HIS HONOUR: There is always liberty to apply. At the moment though it is limited to that. Well now let's have a look at the ones in respect of which it is said they are too wide. The subpoena is too wide. What is alleged Mr. Russell? That the - take for example - we have to go down to 3. What is your objection to this? Is it that you can produce these but that you don't think you ought to, or that you simply can't collect the material or you haven't --

RUSSELL: Your Honour the task of collecting the material is immense.

HIS HONOUR: Yes, well I am not saying - but which one is it? Is it that you haven't got the material or that you have but you still don't want to produce?

RUSSELL: We have the material. It would be an immense task to get it out.

HIS HONOUR: I'm sorry, I meant by that have you got the material out? That's what I meant. And the claim is that it is an immense task to get it out?

RUSSELL: That is part of the claim your Honour. The other claim is that that is a matter which would properly be - form part of the discussions between the parties to the proceedings, and not something which would be imposed on a third party.

HIS HONOUR: Yes but - well how for example? This is correspondence between --

RUSSELL: Your Honour, the Housing Commission is a --

HIS HONOUR: No but - yet it is a party but --

RUSSELL: And could have reasonably inspected its records.

HIS HONOUR: But they might not be, this is the point. It is true but is it a legitimate objection to - of itself, to producing documents under subpoena that the same documents could from another source have been located on discovery?

RUSSELL: Your Honour, from a party, yes, because the proper course in those circumstances would be for discovery to be availed of by the --

HIS HONOUR: But I am assuming in this case that the document can be located.

RUSSELL: I am instructed it is an immense task --

HIS HONOUR: I know that but we seem to be talking about two different issues. All right, I understand. You say paragraph 3, it is too big a task for you to undertake.

RUSSELL: And the cost to the Department.

HIS HONOUR: Yes very well. What about - the next ones are 4 and 5, seem to be the next.

RUSSELL: Again your Honour the task involved is immense.

HIS HONOUR: Yes, I can follow that. And 5?

RUSSELL: Sorry your Honour?

HIS HONOUR: Yes, 5 is the same is it?

RUSSELL: 5 is the same. I'd point out your Honour that the outline plan was first published in 1968 and the --

HIS HONOUR: Yes I know that. Very well then, the next one is --

RUSSELL: The next one is 9. The same applies to 9, 10, 11 and 13 your Honour.

HIS HONOUR: Yes. Yes Mr. Giles, what do you say about that?

GILES: I would like to ask Mr. Pincini some questions your Honour, not many I --

HIS HONOUR: Before we deal with this matter of - I would like to ask you some questions if I might. These paragraphs and take for example paragraph 4, all activities and work undertaken by the SPA and the Department of Environment and Planning on behalf of the Housing Commission and any other government department or agency in relation to the South Penrith properties from the publication of the Sydney Region Outline Plan to the date of this subpoena in relation to base plans, schematic plans, structue plans, etc. etc. etc.

GILES: That's the - sorry, big 4 your Honour here.

HIS HONOUR: Big 4?

GILES: Yes.

HIS HONOUR: And 5 goes along much the same lines. Now what is said in short is, leaving aside this question of discovery about which I - it appears earlier and it has escaped me - but it said that to answer this subpoena is simply too onerous. It is oppressive.

GILES: That is why I would like to ask some questions your Honour.

HIS HONOUR: Yes but what I want to know is this. These matters are all listed from May onwards. Why are we in the second week of the trial and this matter comes up for debate?

GILES: Your Honour the reason is this, the reason for these. There was a subpoena returnable before your Honour on 8th May, 1981. Objection was taken on the footing that it was too onerous and that a large number of documents were involved. There was also a foreshadowed Crown privilege and all the other problems. There was an offer made - there was an arrangement made that the solicitors would get together to see if they could be sorted out by the informal production of documents, identification of documents and the like. Your Honour there was no effective result from all that and so on June 19th, my instructing solicitors wrote to the solicitor for the Department and without limiting the generality of our main subpoena, listed a number of particular heads that would assist the departmental search. Those headings are your Honour not identical with - in substance the same points as are now objected to. Following that - the receipt of that letter, the matter came back before your Honour and on 8th - sorry, 3rd July when counsel then appearing for the Department said that they had found eight files which we could look at on an informal basis. That was taken by us to be files referred to in our letter. When a request was made to inspect them, there were I think four requests to inspect and they said that there had been a large number of documents being looked at but they hadn't gathered them together as yet. The matter came back before your Honour on 4th August. There was still no arrangements made your Honour to produce the files to us. Then on 25th September my learned junior and my instructing solicitor attended on the solicitor for the Department referring to particular matters of interest, particularly in reference to our letter of 19th June, and directing their attention to what we were after, in an endeavour again your Honour to isolate the real points at issue which are not very difficult to work out and were told to them. Following that conversation on 25th September, there were still no production of documents. On 13th October we were told that nothing further had been found. On 14th October there was one further letter that had been found and that, your Honour, was the result of it. In that state of circumstances, counsel advised that we should - we would unfortunately have to formalise the position and have clear answers given to a subpoena because the informal process envisaged on 8th May has totally failed to produce any documents.

HIS HONOUR: Yes I know but why couldn't this formal subpoena have been issued before the matter came on for hearing?

GILES: Your Honour there is no question but that the way in which the matter was dealt with by the solicitor for the Department lulled, if I could put it this way, my instructing solicitors into a false sense of security and has led to the result that - your Honour until last

week, we were hopeful that the process of informal discovery in effect would work but it hasn't, and indeed, your Honour saw the result yesterday. There was hardly a piece of paper produced to the Court. We have, in a situation in which they have claimed oppression your Honour because of the difficulty of identifying documents, we have consistently your Honour, both in writing and verbally, directed their attention to the relevant hearings over many months and we now have a claim that it is oppressive. In that setting, your Honour, I would respectfully submit that your Honour should hear the evidence of this witness to see really what is involved because --

HIS HONOUR: Yes. Well if you wish to cross-examine him, I suppose that's - you may. But I am just wondering --

GILES: We accept your Honour the criticism that we should have formalised this before the case started. Indeed it was before your Honour I think on three separate occasions with that in mind. I shouldn't be tempted into describing anything as a rearguard action but --

HIS HONOUR: No, but it is a pity the time of the Court has to be taken up on this matter now when - this is the whole point of pre-trial.

GILES: Your Honour I suppose it's - if your Honour wanted to have the history formalised, I could do it but it really is --

HIS HONOUR: Mr. Russell Mr. Giles wants to ask Mr. Pincini some questions. Would you call him?

RUSSELL: Yes your Honour.

HIS HONOUR: (contd) ... try and identify from the witness what documents you might get if you frame your subpoena correctly.

GILES: Well your Honour, I'm questioning this witness on his claim --

HIS HONOUR: Yes, I know.

GILES: And I respectfully put it, your Honour, well your Honour, the affidavit is put on and said --

HIS HONOUR: I appreciate that, but I am dealing with his claim that this subpoena is too wide, and I understand the problem you've got, but I also - and I understand this is an important case involving a lot of money, but I really can't allow these proceedings to be bogged down in this type of interlocutory matter. I would ask you to confine your questions to the generality of Mr. Pincini's --

GILES: I think, your Honour, in view of your Honour's remarks, and in view of the witness' lack of personal knowledge, I won't carry the matter any further.

HIS HONOUR: Yes, thank you. Re-examination?

RUSSELL: No.

HIS HONOUR: Yes, Mr. Giles?

GILES: Your Honour, I would submit that this claim is made by a person who cannot make it at all. His first knowledge of this case is this morning. In view of the history, your Honour, which has occurred before your Honour, let alone what has occurred out of court, it is contemptuous, with every great respect, to put forward such a person. Your Honour, since May it has been known, it was said on the transcript before your Honour, as clearly as may be, that we desire to know what alterations have been made to the Sydney Region Outline Plan. That is a public document, your Honour, this is a public authority, and we have not so far received any assistance whatsoever, nor has the court, as to that vital matter. Now your Honour, it may be - it unfortunately may be that in the course of the evidence led by the Housing Commission, that there will have to be an adjournment of this case --

HIS HONOUR: That may be so, I can understand that.

GILES: And your Honour sees the problem?

HIS HONOUR: I do.

GILES: I respectfully submit that the attack which is made on the subpoena is not as to the subpoena as drawn,

it is not said that we can't find the documents, we don't know what you are talking about, they know what we are talking about, they say it is going to be difficult to find them. Your Honour, that hardly sits in the mouth of this witness, who doesn't know what has happened, or what searches or enquiries have been made. We have been assured, your Honour, since May, that searches have been proceeding. I would respectfully submit that it is not right in those circumstances that we do not hear from the person who has conducted those searches, who can then say, it is a massive task, I have gone to all the files. Mr. Pincini, your Honour, knows, he has a very shrewd idea of where to look, and one would imagine he would have. We don't hear from anyone who says I have sought to find the documents, and they don't exist, or they are in 15 files. I would submit that the case for oppression is not made out, it is not a case where the drafting of the subpoena is attacked, it is a case where oppression is put. Having said that, your Honour, I do accept that having in mind the situation we now find ourselves, that a temporal limitation may have to be accepted by us, and so far as 1(iii) is concerned, your Honour, I would propose, with respect, from the 1st of July 1972, to the 30th of December, 1973, and your Honour I do that, believing as we do that there were discussions between Mr. Shearman and others, and the Housing Commission, possibly in the latter part of 1972.

HIS HONOUR: Yes, I understand you are saying, but let me say this, Mr. Giles, I don't think I can amend this subpoena. I appreciate what you say, but you may have to issue a fresh one.

GILES: Your Honour, I think I would have to look at your Honour's rules, but there is power to order the production of particular documents under the Supreme Court rules, and I'd be --

HIS HONOUR: Well there is, but --

GILES: Well that just may shortcut matters, your Honour.

HIS HONOUR: Well it might.

GILES: Well may I put my proposal and your Honour will then have the ability to rule on it.

HIS HONOUR: Yes.

GILES: So far as 4 is concerned, we would limit it your Honour to August 1977, and limit it at the beginning to the 30th of June 1972. June 1972, August 1977. Now may I make the same limitation in relation to 5.

HIS HONOUR: 1972 to 1977?

GILES: Yes. Now your Honour, so far as 9 is concerned, I could limit that, your Honour to the date of resumption, say August 1973.

HIS HONOUR: From?

GILES: From - your Honour I'm not sure - we don't know when the planning of that commenced - 1965 your Honour to August 1973 10 would again be restricted to the date of resumption, August 1973. 10 and 11.

HIS HONOUR: From?

GILES: 1968 to 1973. And your Honour, 13, we would not willingly your Honour, accept any limitation of 13. That is a topic we have consistently asked for, and that determination has been enhanced by our viewing of the evidence proposed to be called on behalf of the Housing Commission. But we are of course in your Honour's hands about that.

HIS HONOUR: Yes. Yes, Mr. Russell.

RUSSELL: Your Honour, with the greatest respect to my friend, my - I have been advised that, as you are probably aware, that until this time that Miss Blackman who was before your Honour on 5th August last - has told me that on that date documents were produced, files were produced, and there was no objection to access being given to the parties in the proceedings, and the note further reads that if the plaintiffs - she means probably the applicants - want other files, they notify the Department of Environment and Planning. Now your Honour, my instructions are that there hadn't been any other requests since that time, and the letter that my friend referred to does pre-date that hearing before your Honour. I mention it your Honour, only to perhaps correct any misapprehension that your Honour might have, as well as - other than my friend says - or perhaps there's been a mis-understanding of the true situation.

GILES: There was a conference on 25th September, I think with my junior, but I didn't --

HIS HONOUR: Well, just let Mr. Russell have a go. Yes?

RUSSELL: Your Honour, the subpoena in toto is an immense document, and it was served on 2nd November, requiring production, as your Honour said of files probably outnumbering those required in Small's case, two days later. And it is just not possible to comply with that, your Honour.

HIS HONOUR: Yes, thank you.

RUSSELL: There's immense public expense involved, and your Honour would be entitled to enquire as to what

purpose is - whether or not an appeal which is sought is for a new developmental enquiry on that basis, to strike out those parts of the subpoena which don't really relate to the matter before the court.

HIS HONOUR: Yes, thank you.

HIS HONOUR: In this matter the applicant is issued and served a subpoena directed to the Department of Environment and Planning, for the production of documents more particularly set out in that subpoena, which is in the file and is also annexed to the affidavit of Mr. Pincini, the secretary of the Department of Environment and Planning, who's sworn an affidavit in support of an application to set aside a portion of that subpoena as being oppressive. When the matter first came on before the Court, the Department made a blanket objection that some of the documents were irrelevant. There was a possibility that there would be a claim for Crown privilege and the like. I pointed out to Miss Blackman who was then appearing for the Department, that it was not for the Department to determine questions of relevance in advance of the Court determining, but that if there was a proper ground for setting aside the subpoena on the ground that it was oppressive, appropriate application ought to be made. At all events the matter came back before me today, when a number of the documents referred to in the subpoena were produced and it's been now indicated there will be no claim for Crown privilege. And in accordance with arrangements that I have announced, these documents may be inspected by all parties. I must now determine whether or not so much of the subpoena as is claimed to be oppressive, in fact meets the description of oppressive, as that word is relevantly understood.

It is unnecessary for me, I think, to set out in the course of this interlocutory judgment, the terms of the subpoena directed to the Department. In my opinion, the compliance with the relevant sections that have been discussed in argument here, would be onerous on the Department, and I think the Department is entitled to maintain its ground that the compliance with those directions would be oppressive. Now Mr. Giles, of Queen's Counsel, appearing on behalf of the applicant, has pointed to the history preceding the issue of this subpoena. And, if I understand him correctly, inherently acknowledges the breadth of this subpoena, but suggests that in fact the documents, the subject of it, that are required by the applicant are known to the parties. And he has invited me in effect therefore to order compliance with this subpoena, by limiting the area to certain times.

I don't propose to do that. It does seem to me it's inappropriate for me to make an order directing the Department to produce documents which have not been

the subject of a subpoena. In the event that the documents are more precisely and properly identified, the matter will be reviewed by me, after there is an issue of a fresh subpoena. I also add that not only is it clear to me that the compliance with this subpoena would be an onerous task. I must also state that it's not immediately apparent to me why many of the documents which would necessarily have to be produced, would have any bearing on the proceedings before the Court. But this question may be alive again once another subpoena is issued if it's to be issued, when more precise documents are nominated and periods of time are more precisely delineated. At all events, that's not a matter which I am concerned with at the present time.

Accordingly the orders I make - the order I make is that the subpoena served - so much of the subpoena served, as relates to paragraphs 1(iii), 4, 5, 9, 10, 11 and 13 - set aside. Yes, I make no order as to costs. And I formally order, in the event that I haven't, that the files that have been produced to the Court in compliance with the subpoena, so much of the subpoena that has not been set aside, may be inspected in my Associate's room, in her presence, by counsel and solicitors for the parties, and such other persons as receive the consent of the Department of Environment and Planning, and there is of course, liberty to apply.

13th November, 1981

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THE HOUSING COMMISSION OF NEW SOUTH WALES

HIS HONOUR: Yes.

HEMMINGS: Your Honour certain documents have been produced. The documents have been inspected. Those documents that are still outstanding for which we have made a claim and they haven't been produced mainly fall into the category of the files relating to the release of land from the Sydney Region Outline Plan and those lands were formerly non urban. I think three files have been produced and I think the claim is that the others are either not available or it is too great a job to produce those files.

HIS HONOUR: These are the files then, you say, the land that, where, have been produced?

HEMMINGS: It is quite a list of properties where we say they are shown as non urban on the Sydney Region Outline Plan, they in fact have been developed for urban purposes and those files either don't exist or it is too difficult to find them.

HIS HONOUR: I'd better get the subpoena back. Did you give a list of these properties? Were these your list of properties that were given?

DAVISON: Your Honour I am instructed that the subpoena is annexure A to Mr. Pincini's affidavit which was filed this morning.

HIS HONOUR: The subpoena is annexure A? I've got a copy of the subpoena anyway. The ones you wish to set aside - the motion is here to set aside, is it?

DAVISON: Yes your Honour. It is to set aside paragraphs 5, 6, 7 and 8 of the schedule to the subpoena, your Honour.

HEMMINGS: None of that category have been produced your Honour.

DAVISON: No. Mr. Giles did refer to three files in Court this morning that had apparently been referred to by Miss Blackman on an earlier occasion. My instructing solicitor is endeavouring to identify and have brought to Court those three files.

HIS HONOUR: Well I have them. Yes.

DAVISON: But your Honour the point remains the same. Those three files may be more easily capable of identification; so far as the subpoena itself is concerned, we say that in its terms it is oppressive to require compliance with it.

HIS HONOUR: I suppose if that is not accepted, Mr. Pincini will have to give evidence.

DAVISON: Yes your Honour.

HIS HONOUR: Would you call him?

RAYMOND LOUIS PINCINI

(Sworn, examined as under)

DAVISON: Q. Mr. Pincini, your full name is Raymond Louis Pincini? A. Yes.

Q. And you reside at 41 Boundary Road, Pennant Hills? A. Yes.

Q. You are the Secretary of the Department of Environment and Planning? A. Yes.

Q. You have sworn an affidavit in these proceedings dated 13th November, 1981? A. Yes.

Q. In that affidavit - does your Honour wish me to read the affidavit?

HIS HONOUR: No, I have read it. At least I am almost finished reading it.

DAVISON: Q. You, in that affidavit, refer to --

HIS HONOUR: Yes, all right, I have read it.

DAVISON: Q. In that affidavit, Mr. Pincini, you refer to the difficulties that you perceive in respect of compliance with that subpoena and you also depose to the efforts you have made to date to comply with it? A. Yes.

Q. By way of example, you have I think identified map 12 and in respect of map 12, one of the clerks you have had about this task which you have spread around your Department has identified a number of files? A. Yes.

Q. Is this the list? A. Yes.

Q. Mr. Pincini is map 12 giving rise to that list of files unusually voluminous in the propagation of files or do the other maps create similar problems? A. Each map does create a problem in itself. 12 is a good indication of the problems involved.

DAVISON: I tender that list of files your Honour.

HIS HONOUR: Yes, show it to Mr. Hemmings.

HEMMINGS: Yes, no objection.

TENDERED, ADMITTED AND MARKED - DEPARTMENT LIST OF FILES

HIS HONOUR: Yes.

DAVISON: Q. Mr. Pincini in order to satisfy the subpoena, as I understand it, what you have done is identified the street names in respect of each of the maps that are shown in paragraph 5 of the schedule and from that location of the street names, you then have to go through the mechanical process of extracting files related to street names from an index? A. Yes.

Q. That is necessarily so for every street that is referred to in the twelve maps that are identified in paragraph 5? A. Yes.

Q. And for map 12, those are the number of files that are identified. What you then have to do is to locate those files, some current, some not current? A. Yes.

Q. Some perhaps destroyed? A. Yes.

Q. That task would take some considerable time? A. Yes.

Q. That is so in respect of each of the maps that are identified in paragraph 5? A. Yes.

Q. So far as paragraph 6 is concerned, you don't have the advantage of the maps to give you that leg up, as it were, to identify what is sought? A. That's true.

Q. So that the task in respect of 6 is potentially harder? A. Yes.

Q. So far as 7 and 8 are concerned - I withdraw that. So far as 7 is concerned, you have compared the task in satisfying that requirement with the tasks that were required of you in paragraphs 9, 10, 11 and 13 of the earlier subpoena, have you not? A. Yes.

Q. What do you say as to a comparison between them? A. I would say that the task is no less onerous to what was sought in the initial subpoena.

Q. So far as paragraph 8 is concerned, do you have an idea of how many files there would be between 1968 and

1975 related to variations of phasing of releases of land for urban development? A. No I could not give a good estimate except to say that I would anticipate there would be quite a substantial number of files.

HIS HONOUR: Q. What does that mean, a substantial number mean though? A. I would say at least 50, perhaps 100, perhaps a little more than 100.

DAVISON: Q. Mr. Pincini is it - may it be that in respect of those files that project variations and phasing, there may be variations which have not yet been put into effect? A. True.

Q. Until you go through the task of identifying all of the files that are thrown up by this sort of enquiry, you wouldn't be in a position to say whether there is any material which you would wish to see withheld from the public gaze? A. That's true.

HIS HONOUR: Sorry, say that again.

DAVISON: The point I am making your Honour is that there may well be material in those files which relate to current planning considerations.

HIS HONOUR: I see, yes. Or there might not.

DAVISON: There might not, your Honour, we just don't know.

HIS HONOUR: Q. No. 7, how many files would be there? The difference between 7 and 8 is, 8 is concerned with phased land, land to be phased, 7 is rezoning or release?
PINCINI: A. I would anticipate there would be a lot more files under 7 than what would be under 8.

Q. More files relate to rezoning and release than there would be under phasing? A. Yes, there would be more in my estimation.

CROSS-EXAMINATION

HEMMINGS: Q. Mr. Pincini, were you with the Planning and Environment Commission prior to your appointment with the Department of Environment and Planning?
A. Yes.

Q. And the State Planning Authority before that?
A. Yes.

Q. In the period within which the areas have been identified in the plans --

HIS HONOUR: 13 sites, you mean?

HEMMINGS: Q. Have been released for urban purposes, there would have been an officer having a title of Divisional Planner, Urban Release, would there not? A. Yes I think there was such a title. Titles have changed many times over the years but there was something akin to that title.

Q. Was it his job to make recommendations to either the Authority or the Commission in relation to urban releases? A. He would have been involved in the formulation of recommendations which may well have been made by someone more senior to him.

Q. I think we all know some urban releases are made by the Minister? A. In the ultimate, yes.

Q. Whether or not the Authority agrees with them. Mr. Pincini, we appreciate the problem in identifying the various localities and files. But would not an officer such as the Divisional Planner, Urban Release, be in a position to identify the documents which give the reasons why land was released for urban purposes? A. I suggest that he would have the same difficulty as our present staff are having in endeavouring to comply with that subpoena. He certainly, because of his involvement with the matter under discussion, would perhaps be better fitted to assist in the location of those document but I wouldn't necessarily agree that he in fact could guarantee to find all the existing documents which relate to the matters covered in that subpoena.

Q. Each of the areas are identified by a plan, are they not? A. Yes.

Q. And each of the areas would have been released for urban purposes by way of an interim development order, would they not? A. Yes, generally, yes.

Q. When an interim development order is made, there is a report to the Minister recommending the release and giving the reasons for the release? A. Yes there is a report as required by the old legislation, yes.

Q. There is no problem in identifying the interim development order, is there? A. No.

Q. And there would be no problem in identifying the report recommending the making of that interim development order? A. No that would be available. A little searching may be required to find it.

HIS HONOUR: Q. Would that be too much of a problem though, just the interim development order and the report searched? Would that be a problem for the

thirteen? A. Certainly not a problem of the magnitude we are confronted with in the other areas.

HIS HONOUR: That's it. Any re-examination?

DAVISON: No your Honour.

HIS HONOUR: You may step down thanks Mr. Pincini. Yes.

HEMMINGS: As I understand, that request was made your Honour for that type of material at an earlier time and, in view of the affidavit and in view of the obviously immense amount of work required, we'd be satisfied with the report your Honour.

HIS HONOUR: I think you might have to be. I am satisfied for what it's - I will come to this other question later, but leaving aside for the moment this question of interim development orders and associated reports, I am satisfied that the subpoena is too onerous, particularly bearing in mind - I take into account, of course, as one must, the importance of the documents or the importance claimed for the documents, I take into account. I know sufficient about this case now to see how important they would be and although I think they would be important, I don't think they would warrant, notwithstanding the size of this claim, the immense amount of activity required to be undertaken by the Department. So accordingly generally I will uphold the Department's claim, but, Mr. Davison, why shouldn't - rather than issue a fresh subpoena, just to nominate these, why shouldn't I make an order now that the Department do produce the interim development orders, together with the reports accompanying them in respect of the thirteen nominated plans?

DAVISON: That's in paragraph 5?

HIS HONOUR: Paragraph 5.

DAVISON: Your Honour we would submit to that.

HIS HONOUR: Very well. It has been agreed that there is no need to issue a fresh subpoena but that the Department will furnish to the Court the interim development orders and the reports accompanying them in respect of the properties nominated in paragraph 5 to the schedule, and the order I make therefore is, other than that order, the claim by the Department is upheld and the subpoena is set aside.

DAVISON: Would your Honour also make an order for costs?

HIS HONOUR: What do you say about that?

HEMMINGS: Your Honour, a person gets costs when he is wholly or substantially successful your Honour. This has been a long drawn out --

HIS HONOUR: I think what I might do Mr. Davison, if you don't mind, I will do this and I think it is better for me to do it this way. I will give your client the opportunity to appear in Court later in the proceedings and argue this questions of costs because my recollection is that - I really don't remember enough about it. People have been coming and to-ing and fro-ing from your Department since these proceedings started and I think I would like to really sort out in my own mind just what has been ultimately produced and what the history has been. But I will reserve the question of costs and allow the Department leave to intervene later to argue that question.

ADJOURNED TO 16TH NOVEMBER, 1981

19th November, 1981

TATMAR PASTORAL COMPANY PTY LIMITED & ANOR

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THE HOUSING COMMISSION OF NEW SOUTH WALES

OFFICER: I apologise, I should have mentioned to your Honour yesterday, I did mention it yesterday to my learned friend that Mr. Hyam is in some professional problem this morning until 11.

HIS HONOUR: That's all right.

OFFICER: My learned friend said he had no objection if I dealt with other witnesses. We hope that they will take until 11. If they don't we would ask your Honour perhaps to take an early morning tea break.

HIS HONOUR: All right I'll do that.

OFFICER: And I mentioned to my learned friend the other day that there were several questions I should have put in cross-examination to Mr. Parkinson.

HIS HONOUR: Yes.

OFFICER: And I've spoken to him this morning and he has no objection but will meet your Honour's pleasure.

HIS HONOUR: Certainly.

OFFICER: There's some question of a subpoena I gather.

HIS HONOUR: Yes well just before - I'll deal with that but have you finished what you wanted to say?

OFFICER: Yes your Honour.

HIS HONOUR: Yes.

TAFFS: Yes your Honour Taffs for the Department in respect to the order of 13th November. The IDOs and the various Ministerial reports that you made an order for production of.

HIS HONOUR: Yes.

TAFFS: With respect to the - there are 13 maps on the order, I have over half of them that is before the court this morning. Perhaps if I could suggest some arrangement by which the rest of the material can be produced as it becomes available; there is some difficulty with regional officers of the department.

HIS HONOUR: Which ones are available?

TAFFS: Well if I could just go through the various maps and I can tell you which ones are and which aren't.

HIS HONOUR: And they're produced now are they, the ones you are about to nominate?

TAFFS: That's right your Honour.

HIS HONOUR: Yes which ones?

TAFFS: Well I have the material the subject of map No. 1.

HIS HONOUR: Wait a minute, what's that, where is that nominated on the --

TAFFS: These are the maps referred to in clause 5 of the subpoena.

HIS HONOUR: Yes.

TAFFS: They're annexed to the back of this plan.

HIS HONOUR: Well these are - where's the list Mr. Hemmings that you refer, the annexure to the affidavit?

HEMMINGS: Yes and then there's --

HIS HONOUR: All right then so you've got No. 1 --

TAFFS: Penrith/Emu Plains is referred to there, your Honour.

HIS HONOUR: Yes, so you've produced there the IDO is that --

TAFFS: The IDO and the Ministerial - the planning report to the Minister.

HIS HONOUR: Yes right, that one is right.

TAFFS: With respect to 2 your Honour I understand that all the files relating to those - to that matter has already been produced.

HIS HONOUR: All right it's produced, and that's here?

TAFFS: Yes that's file 76/20049 of which there are four parts.

HIS HONOUR: All right, well 3?

TAFFS: Yes I produce that your Honour.

HIS HONOUR: Right, 4?

TAFFS: With respect to 4 the re-zoning there was was part and parcel of the Windsor Planning Scheme, it wasn't a separate IDO.

HIS HONOUR: Yes.

TAFFS: I haven't obtained that as yet your Honour but I expect to have the material that I haven't got by the end of the week.

HIS HONOUR: Yes thank you. All right, 5?

TAFFS: 5 I produce your Honour. 6 and 7 I expect to have today but they aren't produced at this stage.

HIS HONOUR: Yes.

TAFFS: 8 I produce your Honour.

HIS HONOUR: Right. 9?

TAFFS: 9 is the Galston Village area which was re-zoned in the Hornsby Planning Scheme and I have not obtained any information of that at this stage.

HIS HONOUR: 10?

TAFFS: Nos. 10, 11 and 12 I haven't produced any information as yet your Honour, but I expect to have some information referring to those.

HIS HONOUR: 13?

TAFFS: And I produce No. 13.

HIS HONOUR: And you'll get the balance, well when will the balance be produced?

TAFFS: I expect to have - with respect to the two matters the subject of the planning scheme ordinances, I haven't anything definite today your Honour. I hope to have those, but the other matters not produced I expect to have by tomorrow.

HIS HONOUR: All right.

TAFFS: Does your Honour suggest that I informally produce those maps or --

HIS HONOUR: Well you can produce them, you needn't appear to produce them but you can just send them up to the court. But if you're not producing them you might come up and explain why.

TAFFS: Yes.

HIS HONOUR: And I think I told an officer from your department yesterday that next Thursday I'd like you to come up if you wouldn't mind and pick up your files because we will be moving.

TAFFS: Yes, does this just relate to this matter your Honour?

HIS HONOUR: Yes.

TAFFS: Yes your Honour.

HIS HONOUR: I think they're the only files.

DISCUSSION

HEMMINGS: Before my friend leaves your Honour, two matters, your Honour made an order with respect to the documents produced that they should be marked.

HIS HONOUR: Yes.

HEMMINGS: And the department might photograph those portions that have been marked. So far no arrangement or --

HIS HONOUR: Well I can't order the --

HEMMINGS: No machinery has been provided for that, I was wondering if it could be indicated whether that's possible fairly soon or whether --

HIS HONOUR: You mean to get copies of these reports.

HEMMINGS: We're happy to photograph them if they could be --

HIS HONOUR: Well I think that's something you'll have to sort out with the department. I can't order the department to photograph material.

HEMMINGS: The second matter your Honour is that the IDO's that my friend has just referred to, they're in 5 - paragraph 5, but they're also - a list in paragraph 6 which is the Casula land and the other parcels that are --

TAFFS: I understood your Honour that you made an order with respect to paragraph 5 and the 13 maps only.

HIS HONOUR: I did. That's all I did I remember. I didn't make any order about Casula. And are you suggesting Hornsby also Mr. - all those matters 1 to --

HEMMINGS: Well there were two groups. There's a group - I think one group that Mr. Moore referred to and one group that Mr. --

HIS HONOUR: Yes but I didn't make any order about 6.

TAFFS: No.

HIS HONOUR: Those files may be inspected by representatives. Yes. Thank you very much.

TAFFS: Thank you your Honour.

THE LAND AND ENVIRONMENT COURT
DEFENDANT'S EVIDENCE
NO. 3(v)
PINCINI Raymond Louis
EXAMINATION

RAYMOND LOUIS PINCINI
(Sworn, examined as under)

RUSSELL: Q. Mr. Pincini what is your full name?
A. Raymond Louis Pincini.

Q. You reside at 41 Boundary Road, Pennant Hills?
A. Yes.

Q. You are the Secretary of the Department of Environment and Planning? A. Yes.

Q. In that capacity, sir, do you have the custody of the files of the Department? A. Yes.

Q. Where are the departmental files kept? A. In the Remington Centre, 175 Liverpool Street, Sydney.

Q. Are all the files of the Department kept there?
A. Yes.

Q. In relation to files concerning the Sydney Region Outline Plan, are those files all connected together in some way? A. No they are not.

Q. How many files are you aware of that would be related to that plan and, in particular, to the Penrith area? A. I am not aware of the exact number of files. As I said in the affidavit, there would be many hundreds of files relating to the whole of the Sydney Region Outline Plan as it affects the whole of the Sydney Region which extends from of course Gosford down to North Wollongong and out as far as the Nepean River.

HIS HONOUR: Q. Is it possible to locate the - have you got a copy of that subpoena in front of you? A. Yes. No, not the subpoena your Honour.

Q. Can someone give Mr. Pincini a copy of the subpoena? I am now actually asking you to look at matters that have been more precisely identified than perhaps other matters, but I notice in paragraph 4 documents described as work undertaken by Mr. Flugel in relation to a diagrammatic structure plan of his and work undertaken by Messrs. O'Connell and Standen. Leaving aside their relevance as to 1977 but, as a matter of identity, could you locate those? A. Not readily. Are we talking about files here your Honour or what?

Q. I am not sure whether -- A. Or just the plans?

Q. The Department is asked to produce work undertaken by Mr. Flugel and work undertaken by Messrs. O'Connell and Standen I suppose whoever issued the subpoena, like me, wouldn't know what these --

GILES: No, but there is a preamble your Honour to the whole of the subpoena. If your Honour goes back to page 1, the preamble governs what follows.

HIS HONOUR: All files, file indices, memoranda, reports, correspondence, sale advices - all that, you mean?

GILES: Yes. You read that then you go to the individual paragraphs your Honour.

HIS HONOUR: All drafts - yes.

GILES: A4.

HIS HONOUR: Yes A4 and leaving aside the first bit but just the work of Mr. Flugel.

GILES: Including.

HIS HONOUR: I see. But what do you - you'd better tell what you intend by that? Do you mean every note that he might have written at any time, any index that he might have drafted?

GILES: Any one in relation to a diagrammatic structure plan --

HIS HONOUR: That's what I asked. Wasn't I asking Mr. Pincini just a shorthand way of asking him?

GILES: Yes.

HIS HONOUR: Could he not locate the work undertaken by Mr. Flugel?

GILES: Yes your Honour, in relation to this diagrammatic structure plan.

HIS HONOUR: Yes in relation to this diagrammatic structure plan and work undertaken by Messrs. O'Connell and Standen. I suppose that is also in relation, is it, to the structure plan?

GILES: Yes, to the diagrammatic structure plan. What the paragraph calls for - we are dealing your Honour only with the South Penrith properties.

HIS HONOUR: Yes, but over 10 years.

GILES: I am accepting that your Honour for the moment, but in relation to those properties, what plans have been drawn in relation to them.

RUSSELL: Perhaps if I could assist my friend your Honour, I understand - I am instructed that the

Department has no works undertaken by Mr. Flugel in its possession.

HIS HONOUR: That solved that one.

Q. Is that right, as far as you know, there are no works undertaken by Mr. Flugel in the custody of the Department? A. Yes. Except that any - in terms of definition of works, there's not. I presume we go back to the preamble to the subpoena. Any work which is recorded on a file done by Mr. Flugel should be on that file.

HIS HONOUR: Q. But you've already searched different files to locate it? A. That's right your Honour.

HIS HONOUR: Yes Mr. Russell.

RUSSELL: I've no further questions your Honour.

HIS HONOUR: Yes Mr. Giles.

CROSS-EXAMINATION

GILES: Q. Could I just ask you this? Have you been involved in the discussions between the parties to this litigation and your Department about the production of documents? A. No, only this morning.

Q. You first came into this matter this morning, did you? A. That's true.

Q. So you are not able to tell the Court from your own personal knowledge of the substance of the - I withdraw that. You haven't taken part in any endeavour to find material relevant to the case? A. Not physically.

Q. Or indeed at all until this morning? A. That's true.

Q. In particular, did you attempt to gather material in answer to a letter from Dare, Reed and Martin of 19th June? A. No.

Q. Just going to individual paragraphs, you appreciate that - do you know the files and the filing system which relates to the zonings and rezoning of the South Penrith properties identified in the subpoena? A. I know the general system for rezoning generally properties within the State and the same system would have applied for South Penrith properties.

Q. If you were told this that there were discussions between officers of the SPA as it then was, and officers of the Housing Commission about a parcel of

land or an area of land at a particular identified spot concerning the possibility of land being used for urban purposes. I take it that a man of your experience would have a pretty shrewd idea where memoranda would be kept in relation to that matter? A. Yes I would have a few ideas as to where I might find it.

Q. It wouldn't be a very difficult task to see if there were such documents, would it? A. I suggest it would be a difficult task because, with the filing system relating to the Sydney Region Outline Plan, there were a host of files created on the various facets of the plan. Just like any good filing system, any discussion relating to a particular file should be recorded on that.

Q. Cross-indexed. A. But given the overlap if you like in the various discussions which went on over many years relating to various features of the outline plan, it is conceivable that some discussion on a particular block of land which would be the subject of a particular file, it might be recorded in the general type file which so building would say Penrith-City as distinct from South Penrith, it could even be recorded in the general file relating to the whole of the Sydney region. There are a whole host of files which relate in a general sense to the Sydney Region Outline Plan.

GILES: Q. Right. Nonetheless a person with a good knowledge of the filing system would be able to, I suggest to you, work out which files to look at first and then be able to track down the point?

HIS HONOUR: I don't think he is saying that is impossible to do. He is just saying it is a massive task.

GILES: Well is it, your Honour? Let me just take this - take the example. Let me assume for a moment that these discussions took place, and we limited it to say a period of 18 months?

HIS HONOUR: Yes, well I was going to say - yes.

Q. What if you were asked could you produce any documents recording discussions about the rezoning of four stated properties in 6 months, in January to June 1973, I suppose you would be able to locate those, wouldn't you, for that much -- A. I would hope we could locate them, I couldn't guarantee it.

GILES: Q. No we understand that you say, look, there might be something which we could really have lost and predicted it would be on that file, but you could gather the main files reasonably quickly, could you not?
A. Yes.

HIS HONOUR: But I point out, Mr. Giles, that is not what this subpoena asks for.

GILES: No your Honour. I appreciate that.

Q. The main files are consecutive files in any event, are they not? A. No, not necessarily.

Q. As to 4 --

HIS HONOUR: Have you got 4 in front of you? You'd better keep them up - big 4.

GILES: Q. That's page 2 of the subpoena. There what the subpoena was looking for are actual base plans, schematic plans, structure plans or other plans for the urban development of the land, drawn up in the Department, and documents associated with that. Again they are very specific properties.

HIS HONOUR: Not really, that's true but you see you were the one that directed my attention to it. That's preceded by all files, file indices, memoranda, reports, correspondence, advice - relating to --

GILES: Your Honour that's true but either there are or there are not base plans, schematic plans, structure plans --

HIS HONOUR: This would make the subpoena in the Commissioner of Railways v. Small look quite modest by comparison, wouldn't it?

GILES: I don't think so your Honour, I don't think so. But your Honour, not for this reason. Either there are or there are not base plans, schematic plans, structure plans, or other plans for urban development. If the answer is that there are no such documents that is the end of it. If there are such documents, your Honour, then it is not oppressive within Small's case to ask for documents which relate to them. In other words if there is a structure plan that has been prepared within the Department, we would like to see the paper that goes with it.

HIS HONOUR: Yes, all right. 5.

GILES: Well 4, presumably actual plans would be something again that you'd have a pretty shrewd idea where to look for them? A. Yes.

Q. Now 5, again relates to - all of this relates to just these particular properties you see, 5, it calls for discussions between the PEC or the Department, its predecessors, and Housing Commission officers. Now

that included a possible variation of the Outline Plan. Again I'd suggest that you'd have a pretty shrewd idea of where to look for those file notes if there are any in existence, is that not right? A. Yes, if they are in existence.

Q. Yes. Now 9, 10, 11 and 13 are objected to. So far as 9 is concerned, that is the F4 expressway, and I understand that there would be a great deal of paper concerning the F4 expressway. Would not the geographical delineation of the area of interest assist the task of locating the correspondence? A. Yes, the geographical identification always does assist in locating --

HIS HONOUR: And the temporal location as to time too, which they are talking about, as well as the geographic location, just east of the Nepean River in August 1973, or whatever it is.

GILES: Yes.

Q. Now 10, 11 and 13 relate to the boundaries, if I could put it that way, of the Sydney Regional Outline Plan, right? A. Yes.

Q. Now we can take it that documents which have been produced delineate an outline of the plan, a geographic outline, right? A. When you say the documents produced, who by?

Q. By you, or by - these are public documents?
A. Yes.

Q. Right, now what - if I can encapsulate it in a few words, what these paragraphs are concerned about is to look at the contemporaneous documents which relate to the positioning of the plan in the western sector, that is the limits of it I should say, and seeks contemporaneous documents which relate to the subsequent variations of the plan, both as to geographic area, and as to acceleration of releases of land within the plan.

HIS HONOUR: Over what period of time?

GILES: The subpoena calls for it, your Honour, from the commencement of the plan onwards.

HIS HONOUR: Yes, to date.

GILES: Q. Now if you were asked a question, would you please let us know the respects in which the Sydney Region Outline Plan has been varied, that is a question capable of answer, no doubt? A. Yes, but not necessarily by me.

Q. I'm not asking you in the witness box. No, but that is something which with your resources you could work out? A. Yes.

Q. Now are you personally familiar with records on the Sydney Region Outline Plan? A. You say personally familiar, would you qualify that personal?

Q. Well do you know what is actually kept about it? Can I make myself clear, I would imagine, and you can correct me if I'm wrong, that somewhere, somebody has a Sydney Region Outline Plan with amendments as they have occurred, something cross-hatched, released so and so, this done, that done, do you follow what I mean? A. Yes.

Q. An updated plan showing its sequence over the years? A. I follow what you mean, but I am not answering yes to the fact that there is such a document, because I'm not aware of such a document.

Q. Well it is quite conceivable there is such a document I suppose? A. It is conceivable but I don't necessarily agree there is one.

Q. No, but is there not within your system some series of documents which enable that question to be answered, do you know? A. The question being how has the Sydney Region Outline Plan been altered?

Q. Yes? A. There would be a series of documents which would eventually show the total alterations.

Q. Yes, and you yourself have not the personal knowledge to tell us what the true position is about those documents? A. True.

HIS HONOUR: Mr. Giles, I don't want to take too much time about it but I would ask you to remember that you are cross-examining this witness on his assertion that the subpoena as drawn is too wide. I'm really rather reluctant to allow you to use this opportunity to try and identify from the witness what documents you might get if you frame your subpoena correctly.

GILES: Well your Honour, I'm questioning this witness on his claim --

HIS HONOUR: Yes, I know.

GILES: And I respectfully put it, your Honour, well your Honour, the affidavit is put on and said --

HIS HONOUR: I appreciate that, but I am dealing with his claim that this subpoena is too wide, and I

understand the problem you've got, but I also - and I understand this is an important case involving a lot of money, but I really can't allow these proceedings to be bogged down in this type of interlocutory matter. I would ask you to confine your questions to the generality of Mr. Pincini's -- 10

GILES: I think, your Honour, in view of your Honour's remarks, and in view of the witness' lack of personal knowledge, I won't carry the matter any further.

HIS HONOUR: Yes, thank you. Re-examination?

RUSSELL: No.

THE LAND AND ENVIRONMENT COURT
NO. 4
REASONS FOR JUDGMENT OF HIS
HONOUR, MR. JUSTICE CRIPPS
17 MARCH, 1982

IN THE LAND AND
ENVIRONMENT COURT
OF NEW SOUTH WALES

No. 30115 of 1980

Coram: Cripps J.

JUDGMENT

TATMAR PASTORAL COMPANY PTY. LTD. &
PENRITH PASTORAL COMPANY PTY. LTD.

v.

THE HOUSING COMMISSION OF NEW SOUTH WALES

HIS HONOUR: In 1973 Tatmar Pastoral Company Pty. Ltd. and Penrith Pastoral Company Pty. Ltd., both owned and controlled by the Satara family, owned land south of the Western Freeway and just east of the Nepean River at Penrith. Tatmar Pastoral Company Pty. Ltd. was the owner of 700 acres being Lot 5 in Deposited Plan 222785 and Penrith Pastoral Company Pty. Ltd. was the owner of 184 acres being Lot 6 in the same Deposited Plan. Both blocks form a rectangle and Lot 6 is situated in the south-eastern corner of the block.

The land owned by Tatmar Pastoral Company Pty. Ltd. was subject to an easement in favour of the Electricity Commission (which I will refer to as the "T.L.E." - transmission line easement) which was 300 feet wide and which ran east and west through the length of that land and just to the north of the northern boundary of the land owned by Penrith Pastoral Company Pty. Ltd. Members of the Satara family lived in a homestead on the land owned by Penrith Pastoral Company Pty. Ltd.

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The subject land (which I will refer to as "Tatmar" to include, unless otherwise stated, the whole of the land) was described by Mr. Alcorn as:

> "Commencing at a high point of twin knolls in the south east corner, the property sweeps away to the north, north east and north west in a series of gentle undulations, through low hills, knolls and low ridges ... to a low point, in the north-west corner ... Wide sweeping views of urban and rural countryside (with mountain ranges in the middle and far distance) are available from a large portion of the holding. Two shallow depressions, converging to one, at about the northern boundary, run in a general north/south direction across the land and slightly to the east of the central line of the property. There are two similar depressions, again converging to one, in the north western corner. These two sets of depressions are the vehicles by which the property is naturally drained".

Tatmar was in an area zoned "non-urban - A" in the relevant environmental planning instrument (in force since 1960) which restricts development to allotments having a minimum size of 25 acres. The land is a little to the west of Bringelly Road, a major road connecting Penrith to the Hume Highway via Bringelly. There was access to the block from Bringelly Road via Bradley Street (running along the southern boundary of the land) and Wentworth Road (to the north-east portion of the block). There was also road access, via Luttrell Street, to the north-west corner of the property. As well, the property enjoyed two additional access points from properties owned by the Satara family and fronting Garswood Road (a road to the north running parallel to the northern boundary of Tatmar) and Bringelly Road.

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On 31 August 1973, the subject land was resumed by the Housing Commission pursuant to s.4 of the Housing Act, 1912 (as amended) by notification in the State Government Gazette. The notification provided, inter alia, that in accordance with the Housing Act, the land was resumed under the Public Works Act "for the purposes of the Housing Act, 1912". Thereafter the estate or interest of the owners was converted into claims for compensation, entitling them to have their compensation assessed in accordance with s. 124 of the Public Works Act, 1912 (as amended). Section 124 requires compensation to be assessed having regard to the value of the land.

Proceedings for compensation were commenced in the Land and Valuation Court by the two companies against the Housing Commission claiming the sum of $11,758,000. In accordance with the Miscellaneous Acts (Planning) Repeal and Amendment Act, 1979, the proceedings are to be disposed of by this Court.

In 1972 the Government resolved to permit the Housing Commission to expand its traditional role and enter the land development field. Accordingly, in 1973 the Housing Act was amended to give effect to this resolution and it was by authority of that Act that the subject land was resumed.

In 1968, the State Planning Authority of New South Wales (the S.P.A.) produced the "Sydney Region:

Outline Plan" hereafter referred to as the S.R.O.P. which it described as being a "strategy for development between 1970 and 2000". The S.R.O.P. consisted of 110 pages together with accompanying maps and diagrams. It was a document with which councils and persons concerned with the development of land in 1973 were well acquainted. It was not a statutory plan, nor did it have the force of law. It covered an area from Wyong in the north to Wollongong in the south and west to the Blue Mountains. Importantly, for the purpose of these proceedings, it contained proposals for phased release of land from the then non-urban use to the proposed urban or industrial use between 1970 and 2000. Tatmar was within the S.R.O.P. and was designated "non-urban land", i.e. it was not land phased for release for urban purposes under the Plan.

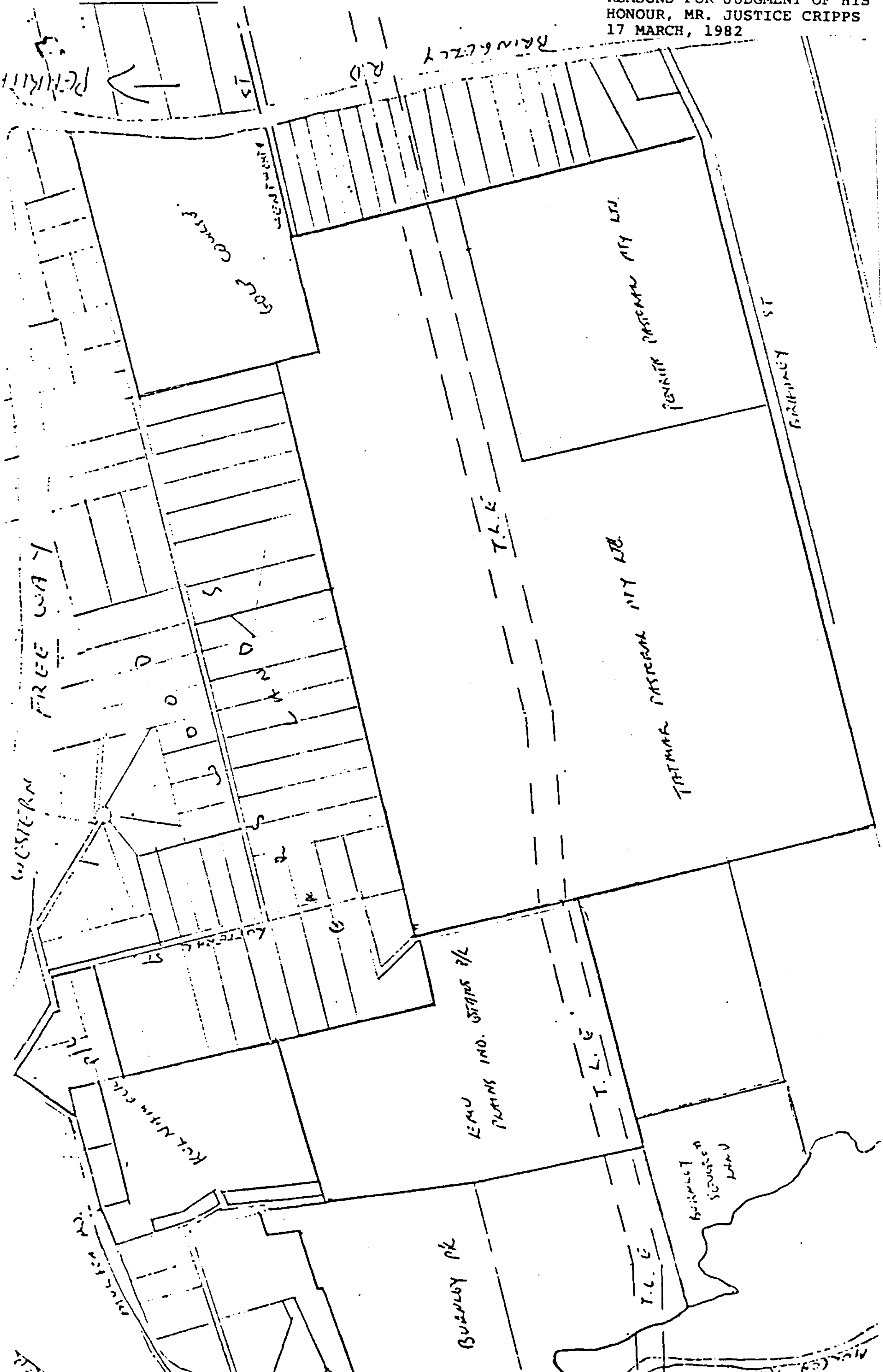
Originally, it was proposed that most of the urban land in the western sector would be situated between two proposed roads - the Western Freeway to the south and the proposed Castlereagh Freeway to the north. However, for reasons that are not important in these proceedings, the original location of the Western Freeway was moved further to the north. The southern boundary of the area phased for release under the S.R.O.P. in the western sector then became, in part, a transmission line easement to the south of the Western Freeway and running approximately parallel to it as far west as Bringelly Road. Thereafter, the Western Freeway became the boundary.

In the S.R.O.P. it was anticipated that an additional 310,000 people would move to the Mt. Druitt - Penrith area over the next 30 years and huge population increases were anticipated in the Penrith area. It was proposed that the plan be reviewed every five years and that it should be regarded as a "broad statement of the objectives and principles, a strategy for urban development, and a phasing plan for development". The Plan attempted to co-ordinate proposed public and private development but did not purport to deal with "local detail". In 1973 and 1974, the Housing Commission resumed an area in excess of 2,000 acres south of the Freeway. This area was made up of four large parcels and a number of smaller parcels which were:

1. Tatmar - 884 acres (resumed August 1973)
2. Burnley - 200 acres (resumed September 1973)
3. Emu Plains - 200 acres (resumed September 1973)
4. Kulnamock - 100 acres (resumed July 1974)
5. a number of smaller parcels - "The Garswood Road land" (resumed July 1974).

I include a sketch of the resumed lands. It can be seen that the T.L.E. continues beyond Tatmar, across Emu Plans and Burnley. The "Garswood Road" land is the land to the north of Tatmar and to the east of Emu Plains and Kulnamock.

SKETCH MAP


WESTERN
FREE WAY
T.L.E
TATMAR PASTORAL PTY LTD
T.L.E
T.L.E
BURNLEY PK

From 1969 onwards there was considerable demand for broadacre land by major development companies in the Sydney area generally and in the western sector in particular. The development companies were concerned that their "land banks" were running down and pressure was being exerted for early release of suitable land. Seminars were held and representations made by various bodies including the Institute of Real Estate Development.

In December 1972 the Premier announced that steps were being taken to release land so as to ensure the availability of ample home sites with essential services. The press statement announced that it was the intention of the Government to expand "the role of the Housing Commission into the land development field in addition to its primary function as a housing authority, with the objective of Government involvement in large scale subdivisional development".

More precisely, and in a letter sent to the Institute of Real Estate Development, the Deputy Premier and Minister for Local Government informed the Institute that the Government would "where suitable propositions were advanced, be prepared to consider favourably advancing the release of the lands under the Sydney Region Outline Plan". The letter acknowledged the difficulties confronting the land development industry and established guidelines for major development proposals which included, inter alia, the requirement of a minimum area of 350 acres.

Prior to the Premier's announcement, the Housing Commission had investigated lands south of the Freeway. Mr. McDermott, the Chief Lands Officer, Mr. Flint and Mr. Hyam, were concerned with the valuation and acquisition of this land. Mr. McDermott played the major role and Mr. Flint was his immediate subordinate. Neither Mr. Flint nor Mr. McDermott gave evidence. Mr. Hyam did but his evidence was limited to that of an expert valuer and he appeared to have only a hazy recollection of the events of 1973.

For the applicants it was submitted that the Housing Commission had consulted with the S.P.A. and it was agreed between the two Departments that it was appropriate for the Housing Commission to resume the subject land and that when the land was required for the Commission's housing purposes (which would be in about five to ten years) the S.P.A. would permit a re-zoning. For the Housing Commission, it was submitted that there was no such agreement. Rather, it was submitted, the Housing Commission was at all times asserting that it was inevitable that the land would be re-zoned and the S.P.A. at all times maintaining the posture that under no circumstances could it agree to the acquisition of land by the Housing Commission because it intended the land would always remain non-urban. As I have said, neither Mr. McDermott nor Mr. Flint was called. Mr. Bourke, Chairman of the Housing Commission and Mr. Ashton,

Chairman of the S.P.A. at the relevant time, gave evidence. Mr. Shearman, an officer of the S.P.A. also gave evidence. Mr. Shearman was the officer who was appointed to liaise with the Housing Commission for the selection of various sites. Indeed, it was Mr. Shearman who, sometime in 1972, nominated the area south of the Freeway to the Housing Commission and, on behalf of the S.P.A., consulted with the Housing Commission about its acquisition. Mr. Crockett was Mr. Shearman's immediate superior. Mr. Crockett was not called.

In May 1973, Mr. McDermott prepared a report regarding an area of land referred to as site 7770. This site number with the plan annexed makes it clear that Mr. McDermott was not only referring to Tatmar but also to Burnley, Emu Plains and Garswood Road. He was discussing an area of 2,100 acres and it was described as being bounded on the south by Bradley Street (see sketch). Later, it was made clear by Exhibit AAB that file 7770 referred to the land the subject of the Housing Commission acquisition in 1973 and 1974.

In his report, the following statement appeared:

> "Confidential discussions with senior staff of the State Planning Authority and Penrith City Council indicate that all lands north of the transmission line, i.e. an area of approximately 1520 acres could be developed if so required in the short term. Water is available and it is physically possible to get the main trunk sewer lines into the area within the next year or two if necessary with the co-operation of the Penrith City Council, who are the authority for sewerage in the area. At the above discussions it was indicated that this Council was generally in

agreement with the Housing Commission proposals for the Penrith area.

> "The balance of the land i.e. 580 acres south of the transmission line, falls outside the area designated for development in the Sydney Region Outline Plan. Discussions with the State Planning Authority reveal that any suggestion of development of this land at present could be embarrassing to the Authority and it can only be viewed as a longer term proposal at this stage, until such time as the State Planning Authority amends the Regional Outline Plan".

The report recommended that the whole of the area be acquired and went on:

> "Having regard to the zoning and the prices being paid for land with limited or no potential for development in the same area, it is considered that the asking price is too high. On the other hand, because the land has distinct advantages in regard to location and physical characteristics it cannot be ignored as a medium to long term development venture ...".

It is clear that the "confidential discussions" were discussions, in part at least, with the S.P.A. On 23 May, 1973, Mr. McDermott reported:

> "It would seem that the State Planning Authority when preparing its original outline plan felt there were good reasons why the land south of the proposed freeway should remain 'non urban'. It is important that I should point out however that at that time it was believed that the freeway would be constructed somewhat further south than the final location determined by the Main Roads Department. This fact is well-known and it is clear that private interests currently seeking to acquire the land (at non urban prices) intend to argue in due course that the greater part of the area at least was intended for urban development in the outline plan; that essential services including sewerage can be very readily made available; and that there are no real planning or technical reasons why the land should not be used for residential purposes, provided, of course that the effectiveness of the freeway as a transportation corridor is fully protected".

It was made clear that when the proposal was discussed with the S.P.A. two matters were taken into account, viz., the likely embarrassment to the Housing Commission which might result from resuming land not earmarked for urban development and the possible embarrassment to the S.P.A. as a consequence of any Commission resumption.

The report continued:

> "The areas involved have been discussed at length with the Chairman (Mr. Ashton), Associate Chairman (Mr. Wickham) and Chief Planner (Mr. Kacirek) of the Authority. There have also been discussions with representatives of the Penrith Municipal Council. All parties agreed as to the realities of the situation.
>
> "No matter how desirable it may be that the land be retained for non urban use there would appear to be grave doubts as to whether this will be practicable in the light of pressures that will be mounted for its release. In this connection at least one developer is known to be negotiating purchases and in fact to have engaged the services of a Planning Consultant to prepare a development plan".

On 15 June, 1973 and after the Housing Commission had recommended acquisition of the subject land, a further report was prepared dealing with the balance of the land in file 7770. This report again referred to the belief that the Freeway was constructed further north than originally intended, to the adequate provision of services and to pressure from developers. Further, it continued:

> "that there are no real planning or technical reasons why the land should not be used for residential purposes, provided, of course, that the effectiveness of the Freeway as a transportation corridor is fully protected",

and when referring to the S.P.A.:

> "The Authority has indicated in discussions that in time there would be no valid reason for refusing an application and it is imperative that the Commission consolidate its holdings as quickly as possible".

On 23 May 1973, Mr. Bourke prepared a report (Exhibit X) which repeated most of what Mr. McDermott had said, including that lengthy discussions had been held with the S.P.A., the Metropolitan Water Sewerage and Drainage Board and other authorities. Mr. Bourke also referred to the fact that:

> "All parties (i.e. the S.P.A., the council and the Housing Commission) agreed as to the realities of the situation".

It is fairly clear that, in May 1973, Mr. McDermott was mistaken as to his understanding as to the location of the southern boundary of the S.R.O.P. - he seemed to think that it stopped at the T.L.E. However, in a report by Mr. Shearman (Exhibit AAT) 7 June, 1973, it is clear that the S.P.A. was not mistaken. In this report it was stated:

> "Whilst this land is not indicated as proposed urban in the Plan, it falls within the concept of corridor growth which is one of the basic principles underlying the Plan and is partly within the same catchment for sewerage purposes as land already released for urban purposes. When the Outline Plan was being formulated it was intended to be included as proposed urban, bounded on the south by a transmission line easement (which now marks the southern limit of future urban development for the rest of the Western Sector) and a proposed southward relocation of the route of the Western Expressway. ... It is, however, closer to Penrith than other lands proposed for future urban development and, in the circumstances, it was decided not to oppose the Commission's

> acquisition of this land, particularly since interest has been shown in the land by developers and it would be difficult to resist pressures for the land to be developed".

Annexed to this report was a list of "advanced land acquisition programs" which made it clear that the whole of the land proposed for resumption (of which Tatmar was a part) was outside the area phased for release under the S.R.O.P.

After resumption, the owners of Tatmar took proceedings for a declaration that the acquisition was invalid and in those proceedings, Mr. McDermott swore an affidavit setting out a number of reasons why he regarded Tatmar, in early 1973, as being especially suitable for urban development. In addition to referring to the favourable topography, he referred to the fact that water could be made available and it was possible to get main, trunk and sewer lines into the area:

> "within the next year or two if necessary with the co-operation of the Penrith City Council, who are the authority for sewerage in the area".

He saw the land as being suitable for urban development and considered that it was likely that all necessary approvals, including those of the S.P.A., the Metropolitan Water Sewerage and Drainage Board, the local council, the Electricity Commission, the Main Roads Department, etc., would be forthcoming in due course.

In December 1972, the Housing Commission made an inquiry of the Metropolitan Water Sewerage and Drainage Board concerning the subject land and was told that the

Board would raise no objection to the council extending its sewerage system outside the boundary and that water supply was readily available from the Bringelly Road reservoir. The report concluded:

> "The Housing Commission should be advised to approach the Penrith Council re extension of sewerage system to serve the area. They might also inform the council they have approached the Board who would not raise an objection to this extension of their system".

On 18 February, 1975, Mr. Bourke sworn an affidavit in which he referred to the meeting of the Commission on 28 May, 1973, when he told the Commission that in his opinion the investigations by the Housing Commission made it clear that:

> "despite the existing zoning the land was attracting considerable interest by land speculators who were apparently confident that a re-zoning for urban use could be achieved".

He expressed the view (apparently which was accepted by all members of the Housing Commission except Professor Shaw) that on the basis of all the material before him it was inevitable that the zoning would change and that, having regard to the Commission's desperate need for land for its normal activities and to fulfil its function as a "land development authority", it should acquire the land. The Commission agreed to the acquisition with Professor Shaw dissenting.

In early 1974, when considering the land referred to in file 7770, the Housing Commission on 5 March, 1974, wrote to the S.P.A. seeking confirmation that, before

acquisition of Burnley, Emu Plains and Garswood Road land, they:

> "might appropriately be acquired by the Commission for future residential use. It will also be appreciated if you would advise regarding the proposed timing for the provision of water and sewerage facilities".

To which the S.P.A. replied:

> "2. As you are aware, the subject land is not included within the areas proposed for future urban development under the Sydney Region Outline Plan. However in view of the difficulties confronting the Commission in the acquisition of reasonably priced land for future urban development, it was agreed in discussion between the Chairman and Associate Chairman of the Authority, and the Chairman of the Commission, that the land at South Penrith should be acquired as part of the Commission's advanced land acquisition program.
>
> "3. The Metropolitan Water, Sewerage and Drainage Board has advised verbally that water can be made available. The provision of sewerage is the responsibility of the Penrith City Council and preliminary investigations indicate that it may be necessary to construct a new sewage treatment works rather than expanding the existing works. The new works would also serve the lands already released for urban development north of the Freeway at South Penrith".

In November of 1973 Mr. McDermott in a memorandum said:

> "On 8 November, 1973 Mr. Shearman, State Planning Authority, confirmed the understanding previously reached between the officers of the Commission and the Authority that, in view of the early proposals to vary the boundary of the outline plan, the Authority would have found it most difficult to resist any application by private interests to have either the whole of the sites or a substantial part thereof developed for urban purposes, possibly on a piecemeal basis which would not have been in the public interest, the more preferable course being for the land to be acquired by the statutory authority thus safeguarding the future use and orderly development of the sites".

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HONOUR, MR. JUSTICE CRIPPS
17 MARCH, 1982

In these proceedings a statement by Mr. Kacirek (Chief Planner at the S.P.A.) was tendered. Due to illness Mr. Kacirek did not give evidence. In his statement he said he would have told a developer in 1973 that the subject land would not be re-zoned in the "near future". He believed, however, that in 1973 a purchaser would have had regard to the migration outwards from the inner-city areas and would have assessed that the land set aside for urban development within the S.R.O.P. would be used and that he might be required to wait "perhaps one or two decades". He said a purchaser would have taken into account the Metropolitan Water Sewerage and Drainage Board's priorities. He believed a purchaser would have thought that in 10 years' time a great deal of the land in the S.R.O.P. would have been committed for development and there would be relatively little surplus land available. Such a purchaser would have believed, therefore, that a case could be made for moving into areas adjacent to those phased for release under the S.R.O.P. He said a purchaser would have relied on the trend outwards, the then continuing strength of household requirements and the upward pressure of prices. Faced with all the circumstances, he believed a developer might conclude that it had good prospects for achieving a re-zoning in about 10 years. He referred to the Housing Commission in the early '70s concentrating on building up a bank of land for use in about 10 to 15 years' time.

A number of other documents were tendered evidencing, it was said, an agreement between the Housing Commission and the S.P.A. that the S.P.A. would raise no objection to the releasing of the land when required by the Housing Commission. Representations were made by the Housing Commission which, on their face, would tend to support the submission that the S.P.A. had earlier agreed to make the land available when required. But because of their remoteness from 1973 I do not think they assist me in resolving the relevant questions, viz., what, in August 1973, was the understanding of the Housing Commission and what was the information being supplied by the S.P.A.?

Mr. Bourke, the former Chairman of the Housing Commission gave evidence. He referred to the importance in 1973 of the Housing Commission building up a "land bank". He believed land acquired ought be available for use within 10 to 15 years. He said he believed that re-zoning was inevitable but that Mr. Ashton, Chairman of the S.P.A., was maintaining that he would never agree to it. Mr. Bourke said he never persuaded Mr. Ashton to agree to his viewpoint and that he and Mr. Ashton had "agreed to disagree". He was referred to Exhibit AAA, a letter in December 1973 to Mr. Hills following a representation to Mr. Hills from the Penrith City Council in which the Council expressed concern that resumption by the Housing Commission might have the

effect of restricting or inhibiting proper development in the area. Mr. Bourke wrote:

> "Whilst it has since been stated that a private developer was preparing plans for the area in question - which incidentally is not yet zoned for residential development - the Commission actually moved to resume the area in the public interest generally, only after discussions with the State Planning Authority, the Metropolitan Water, Sewerage & Drainage Board and other appropriate Authorities. In acquiring the land the Commission was anticipating overtures for the re-zoning of the land in question and aimed at a future development of the area with effective balance of normal Commission accommodation for low income earners, the setting aside of some areas for sale or lease to young home seekers with limited financial resources and, an overall plan which would provide ample open space, recreation areas, school facilities and all essential community amenities. There is not the slightest justification for a statement by Council to the effect that 'there is a disregard of the welfare of people housed in Commission estates'".

Mr. Bourke said he could point to no documents contradicting the inferences arising from documents I have previously referred to or any documents supporting his understanding that, as between Mr. Ashton and Mr. Bourke, both had "agreed to disagree". He was referred to Mr. McDermott's memorandum of June 1973 in which it was stated that the Housing Commission had been told by the S.P.A. that, in time, there would be no valid reason for refusing a re-zoning application. Mr. Bourke said, "I think that is a purely personal opinion at that level". It must be remembered that in 1973 Mr. McDermott was the Chief Lands Officer at the Housing Commission and the person responsible for the acquisition of the whole of the land south of the Freeway.

Mr. Ashton said that in 1973 he took the view the S.R.O.P. boundaries were designed to "hold the line" against developers and that development was intended to be in the corridor between the Western Freeway and the proposed Castlereagh Freeway. Although, as Mr. Ashton knew, this was changed, he was keen, he said, to ensure that there would be no further breaking of the boundaries. He said he told Mr. Bourke that he did not think there could be any reason capable of persuading him to change the zoning and he said "As far as I know I adhered to that view that we were not proposing to change the boundary".

He said he would have told a developer that there would be no chance of re-zoning. He was aware that the subject land had been referred by Mr. Shearman to the Housing Commission. When asked whether he could explain why, if his now recollection was accurate, there was no recorded statement addressed to the Housing Commission making it clear that the Housing Commission's assertion that the S.P.A. had agreed that re-zoning was inevitable was quite wrong. He said:

> "No I can't except to say that I must have been persuaded to some degree that there was a case for it but I - it is certainly different from the earlier view that I took I will agree".

He agreed that the land (including Tatmar) was acquired by the Housing Commission with "full knowledge and approval" of the S.P.A. but he denied that the Authority had taken upon itself an obligation to make

land available to the Housing Commission for public housing when the Housing Commission required it. He said Mr. Shearman had nominated the land for the Housing Commission not in his capacity as agent for the Housing Commission but in his capacity as an officer nominated by the S.P.A. to liaise with the Housing Commission in the general acquisition of land.

Mr. Shearman gave evidence and referred to a meeting with Mr. Bourke, Mr. Ashton, Mr. Kacirek and Mr. Wickham (from the S.P.A.). He said he thought this meeting took place about mid-1973, although there was no record of it either in the S.P.A. or the Housing Commission files. He said it was his clear recollection that there was discussion about the land but the parties were only talking about the land north of the T.L.E. He said he agreed that the S.P.A. "acquiesced" in the acquisition of the land. This he interpreted as meaning that the S.P.A. "knew" the Housing Commission was going to buy the land. He denied the S.P.A. agreed with the proposal in the sense that they were persuaded that a good case for re-zoning could be made out. In my opinion he gave no satisfactory explanation for the S.P.A.'s response to the letters requesting confirmation of the S.P.A.'s stand. He said it was unnecessary for him to set out the S.P.A.'s opposition to the re-zoning proposal because the Housing Commission already knew it. He said the words "it was agreed in discussion that the

land should be acquired as part of the Commission's land acquisition policy" were understood by all parties as confirming a clear understanding that the Housing Commission wished to acquire the land and the S.P.A. opposed it.

Also he denied that the correspondence referred to above referred to any land other than land north of the T.L.E. He agreed that although the map, part of the file 7770 (which was the subject of all this correspondence) drew no distinction between land north and south of the T.L.E., he, Mr. Shearman, had a clear recollection that he was only referring to land to the north. He believed he had marked a map and sent it to the Housing Commission but did not keep a copy himself. No such map was produced by the Housing Commission. He agreed he spoke to the Sataras and Mr. Contencin, who was employed by a development consultant company retained by Messrs. Satara, and although both of them discussed the possibility of redeveloping the land so as to permit subdivision, neither was told that the land was not suitable for re-zoning or that if it were to be re-zoned, it would only be re-zoned to the T.L.E.

In June 1973, and without authority from the Satara family, a Mr. Lindenburg presented a submission to the S.P.A. in which he proposed, inter alia, that a large area of land, including Tatmar, Burnley and Emu Plains, be developed for residential purposes. This

proposal referred to the Premier's announcement in 1972 and claimed that it met the requirement of a minimum of 350 acres and the four major stages of consideration referred to in the letter. Mr. Lindenburg made it clear that he understood that the land was not planned for release for urban purposes under the S.R.O.P. but believed that there were good reasons for making a formal approach to the Authority for favourable consideration. This file contained a note by Mr. Shearman "For urgent report, please Mr. Armstrong". In the same file was a further note as follows:

> "Because of the Housing Commission's involvement in this area I feel we cannot reject this proposal outright as this could lead to criticism later. I propose to recommend along the lines that because the area is outside the S.R.O.P. the Authority will have to make a policy decision before agreeing to any such proposal. This will have the delaying effect on the matter and should permit the Housing Commission time to finalise the matter. Mr. Armstrong".

On 7 November 1973, the following notation appeared on the file, "Now resumed by the Housing Commission. No further action required". The significance of this material is that there was no recorded statement that there was no possibility of a re-zoning or that if there were such a possibility, re-zoning would be limited to an area north of the T.L.E.

I accept that initially Mr. Ashton was opposed to any use of the subject land for urban purposes and that he wished it to be retained as non-urban land. It is however clear that Mr. Bourke, on information supplied

to him and after proper investigation, concluded that it was inevitable this land would be re-zoned and that Mr. Ashton's views, however soundly they may have been based on planning considerations, would not prevail over the requirement for more land for housing. Further, I am of the opinion that, although Mr. Ashton never resiled from his opposition on planning grounds, he accepted that the land would indeed be re-zoned in the future and that it was in this sense that he agreed to the "realities of the situation".

Mr. Shearman not only accepted that re-zoning would occur but actually gave some encouragement to the Housing Commission. I do not think that the Housing Commission was ever told that if any land were to be released it would only be land to the north of the T.L.E. Mr. Shearman could furnish no good planning reason why this should be so beyond the desirability of maintaining a line. All other planning experts were of the view that the boundary ought be the limits of the catchment area and that these limits would include the whole of Tatmar. In my opinion, the Housing Commission believed, and believed on reasonable grounds, that the land would be re-zoned within 10 to 15 years. It was supported in this view by its understanding of the general market, by investigations made by it and by the representations made to it by officers of the S.P.A. I do not think the Housing Commission ignored the risk that the land

might never be re-zoned or that it might not be re-zoned within the 10 to 15 years but that it viewed such risks as minimal.

As I have said, I have not paid attention to the correspondence between the Housing Commission and the S.P.A. from 1975 onwards. I have not done so because, in my opinion, it is too remote in time. If however, I am required to pay attention to it, it would merely confirm the view I have already formed. The letters are consistent with an agreement in 1973. Mr. Bourke conceded in his evidence that the letters he signed in the later '70s were inconsistent with the oral evidence he had given and he agreed that probably the letters had been signed "carelessly". Further, he said one reason why the Housing Commission did not proceed as speedily as it had earlier anticipated was because of different circumstances after the fall of the Labor government in 1975.

Contemporaneously with the Housing Commission's interest, and to some extent, in competition with it, the Satara family made representations to relevant authorities for a re-zoning of the land. In 1972 and 1973 they consulted A.A. Heath and Partners Pty. Ltd., a firm of development consultants, and incurred expenditure of thousands of dollars in the production of maps, plans, a model and a lengthy report (Exhibit T) for the proposed development of Tatmar. Much of the work was

done by Mr. Contencin and Mr. Orr, both of whom gave evidence.

Meetings were held with the S.P.A. and the council in 1973. The council was asked to support a re-zoning and the S.P.A. was asked to re-zone the land. Mr. Contencin kept contemporary notes. He met with Mr. Crockett and, probably, with Mr. Shearman. His contemporary note of his meeting in June 1973 with officers of the S.P.A. at which reference was made to the plan, the model and the lengthy report (Exhibit T) for a re-development to accommodate some 10,000 persons was that the prospects of re-zoning "appear good providing we can show good case for rezoning to S.P.A. Sydney Outline Plan indicative of S.P.A. policy only & is meant to be flexible. Suggested school be together with Shopping Centre and Playing Fields". The note continued: "Generally reception was encouraging & prospects seem good". Mr. Contencin's evidence was corroborated by Mr. Orr. In July 1973 a meeting was held with the Penrith Council and a contemporaneous note referred to officers of the Council maintaining that the onus for re-zoning was on the S.P.A.

Mr. Contencin gave evidence, which I accept, that in the discussions with the S.P.A. he was never told there was no prospect of re-zoning. Indeed, although he was certainly not told the land would be re-zoned, he was informed that if a good case was made out it

could be considered. He was never told that, in the event of land being re-zoned, the southern barrier would be the T.L.E. He regarded the subject land as being particularly suitable for large scale development and that the boundaries, in the event of any re-zoning, would be the limits of the catchment area. He referred to helpful suggestions made by officers of the S.P.A. in the preparation of a submission for consideration for re-zoning.

At the conclusion of Mr. Contencin's cross-examination, I observed that Mr. Contencin had not been cross-examined to the effect that anything he said that he was told by officers of the S.P.A. was in fact not said to him. Because Mr. Contencin was returning to Malaya and I did not want there to be any doubt about the matter, I informed counsel that the impression I had from his evidence was that he obtained a considerable amount of encouragement from the S.P.A. about the proposed development and that it was not suggested to him that he did not get information which he said he got from the S.P.A. I was informed by counsel that no such suggestions were being advanced.

Mr. Contencin's evidence was corroborated by Mr. Orr and Mr. Satara. Mr. Satara saw the Minister in July of 1973 and after explaining his proposals for integrated communities for low and high income earners was told to continue his representations. At this time Mr. Satara

knew, of course, that the Housing Commission had recommended that the land be resumed but it was never suggested to him that the land would never be re-zoned or, if re-zoned, its residential use would be limited to north of the T.L.E. The effect of the representations made by the Sataras and the work carried out by the development consultants together with the consultations with the S.P.A., led the Sataras to the view that, provided a proper case was made to the S.P.A., the land would be favourably considered to be re-zoned. As I have said, Mr. Shearman actually gave advice on a better way to prepare the application.

What the S.P.A. told Mr. Satara and his representatives is the same, in my opinion, as the information given to the Housing Commission. And it is agreed by Mr. Officer, Q.C., that if the Housing Commission was the only authority or person having the chance to have the land re-zoned, the land must be valued in accordance with that potential. He conceded, in other words that if I were to assume it was the Housing Commission and only the Housing Commission that had the chance of re-zoning, I must value the land in accordance with that chance.

It must be borne in mind that the Housing Commission had entered the development field and was a competitor with the major developers for lands suitable for urban development. The highest and best use of this

land in 1973 was its potential for subdivision for residential purposes. It was for this purpose that the Housing Commission wanted the land. It may therefore appear somewhat artificial to investigate what developers might generally have thought about this land and the assumptions they might have made in 1973 because it is sufficient for the applicants' purposes to establish what it was the Housing Commission knew and what were the assumptions made by the Housing Commission. It was for this reason, of course, that much time was spent on behalf of the Housing Commission in an attempt to persuade me that although the documentary evidence might lead to the conclusion that there were prospects for rezoning, this, in fact, was not so. At one stage it was submitted that I should conclude that a "prudent" developer would have ascertained Mr. Ashton's views and would have concluded that, whatever else he was told by other officers of the S.P.A., the land would not be re-zoned and would never be re-zoned in the future. Further, it was submitted that even if such an inquirer could not know Mr. Ashton's view, it was, nonetheless, a fact which I must take into account as being one which the hypothetical vendor and purchaser are deemed to know. Authority for this proposition is said to be found in Royal Sydney Golf Club v. Federal Commissioner of Taxation 97 C.L.R. 379 (as to which see later).

In my opinion, Mr. Ashton's view was that although

he opposed re-zoning on planning grounds he was persuaded as to its inevitability by Mr. Bourke. Such a view is consistent with the written material from the Housing Commission and the S.P.A. files, accords with most of Mr. Ashton's oral evidence and was the view generally held in the development industry in 1973. In 1973 Mr. Bourke and the Housing Commission believed that the land would become available for housing which, obviously, is why the Housing Commission acquired it.

It is in this sense, I think, that the acquisition by the Housing Commission was with "the full knowledge and approval" of the S.P.A. Mr. Bourke wanted the land for housing purposes and, as his advisers had informed him, it was an area which had already been the subject of a considerable amount of interest by developers. Mr. Shearman's participation in the events; the views expressed by Mr. Kacirek; the fact that, in any event, there had been some departures from the S.R.O.P.; the fact that Tatmar was peculiarly suitable for large scale development (which was needed in the area) and the land's ready accessibility to infrastructure services lead me to the view that in 1973 the Housing Commission believed and believed on reasonable grounds, that the land would be available for re-zoning when it was required in about 10 to 15 years' time, and that although it would not have ignored the risk of the land not becoming so available, it regarded that risk as minimal.

As I have said, in one sense, therefore, it becomes somewhat academic to assess what the hypothetical purchaser might have assumed. It has not been suggested that the acquisition by the Housing Commission was the result of an imprudent investigation of the site or a negligent appreciation of the land's potential. I cannot accept Mr. Shearman's statement that he would have told a potential developer that there were no prospects of re-zoning or that if there were it would be limited to the area north of the T.L.E. He did not tell the Housing Commission this nor did he tell the Sataras. Moreover, the Lindenburg proposal, to which I have referred earlier, was passed for assessment with no suggestion of these limitations. I cannot accept, as I have been asked by Mr. Officer, Q.C., to conclude that his failure to inform the Sataras or Mr. Lindenburg was due to an embarrassment on his part. His conduct was, in my opinion, perfectly consistent with the posture he had adopted for the Housing Commission. It was suggested that he refrained from telling the Sataras the land would be re-zoned because he knew the Housing Commission had already resolved to resume. In my opinion, he refrained from telling the Sataras that the land would never be re-zoned because he did not believe it to be the fact. He believed that re-zoning was inevitable. It follows that I reject the submission that if an inquiry had been made of Mr. Shearman he would have said

there would be no re-zoning but if any re-zoning took place it would stop at the T.L.E. He told the Housing Commission that there were good prospects for re-zoning and he did not suggest to it the re-zoning would stop at the T.L.E.

It was suggested that although everyone who made inquiries concerning this land in 1973 was satisfied that there were no abnormal problems associated with water, sewerage and drainage, I should conclude that any decision to develop the land for residential purposes would have involved technical and financial problems for the council. This fact, if true, was, apparently, not known to the council in 1973. It was not known to the Housing Commission, not appreciated by the Metropolitan Water, Sewerage and Drainage Board and not known to anyone else who made an inquiry. Gutteridge Haskins and Davey were the engineering consultants to the Penrith City Council. It was said that if inquiries had been made of Mr. Smyth of that firm, he would have said (provided Penrith Council had permitted him to disclose the information) that there would be technical and financial problems associated with the provision of these services.

This is another fact which, it is submitted, I am required to assume the hypothetical purchaser and vendor would know. In my view it is unrealistic to expect that anyone would have consulted the council's

consultants after being told by the council there were no abnormal problems. The information I am asked to infer would have been given, was contrary to information that was in fact being made available by all statutory authorities including the council. But, in my opinion, in any event Mr. Smyth said no more than it would be expensive (but not abnormally so) and that there would be some technical matters to overcome. Importantly, however, it was, as he said, a matter for the council to decide its priorities. The developer had always accepted the cost of sewerage would be a cost to the developer (as it would to the Housing Commission) and it was for the council to determine its priorities.

I have already referred to the Housing Commission's other acquisition in 1973-1974. In the course of preparing valuations, all valuers referred to some or all of these lands, and, as well, to lands outside this area. In due course, I shall refer to the "Kulnamock sale" in May 1973 which is a sale relied on by all valuers as the most appropriate starting point to begin the assessment of the value of Tatmar.

Before dealing with the evidence of the valuers, however, there are two further matters to which reference should be made and about which there is a conflict of evidence. First, for the applicant it was contended that the value of land in 1972 and 1973 was increasing at a fairly rapid rate. This has been referred to as

"escalation". All valuers agreed that land prices were escalating in 1972 to 1973. For the applicants, it is submitted that the escalation figure between May 1973 (the date of the Kulnamock sale) and August 1973 (the date of the resumption of Tatmar) was 8% per month (Mr. Parkinson) or 10% per month (Mr. Alcorn). Although "escalation" was conceded by the valuers retained by the Housing Commission to be evident in the years 1972 to 1973, in respect of the period May 1973 to August 1973, it was said to have ceased (Mr. Hilton), to be limited to 3.3% per month (Mr. Hyam) and to be limited to 5% per month (Mr. Weir).

Second, the Housing Commission submitted that when comparing the Kulnamock sale (approximately 100 acres) with Tatmar (approximately 884 acres) there must be a substantial discount for magnitude, i.e. the analysed rate per acre of the Kulnamock land must be substantially reduced in its application to Tatmar. All valuers regard the Kulnamock sale as being the most reliable guide to the value of Tatmar, notwithstanding that they differ as to how that sale ought to be analysed and what adjustments ought be made when applied to Tatmar. For the applicant it was submitted that not only should there be no "discount for magnitude" but that because Tatmar was a "key" property (in the sense that it was sufficiently large and topographically suitable for a major development in itself) it was worth more per acre

than the Kulnamock land because a purchaser was spared the need to accumulate a large number of separate sites. The valuers called by the Housing Commission applied the following percentage factors as a "discount" for magnitude":

Mr. Hilton, at least 25% (Exhibit 2(b) p.11);

Mr. Weir, between 10 and 20% (Exhibit 12(a) p.2), and

Mr. Hyam, between 20 and 50% (Exhibit 5).

In his address, Mr. Officer adopted more moderate percentages, being, in the case of Mr. Hilton, 10%, Mr. Weir, 15%, and Mr. Hyam, 15%. The approach of the valuers will be dealt with in detail later.

As to Escalation

I have concluded that there was escalation in value between May 1973 and August 1973 at the rate of approximately 10% per month. Sales of land (referred to by Mr. Alcorn (as to which see later)) during 1972 and 1973 confirm that escalation was, on average, somewhat higher than this. For reasons which I will shortly give, I reject Mr. Hilton's evidence that escalation ceased in May 1973. Such a view is inconsistent with his earlier report, with every other valuer and with the Annual Reports of the Housing Commission and the Valuer General's Department. I accept Mr. Alcorn's assessment of escalation. He referred to the Leagues Club sale in Jamison Road which he analysed and which,

after making allowance for inferiority of the land and the requirement for filling, he used to confirm his opinion.

In its report in June 1974, the Housing Commission said:

> "Until the end of 1973 the market in land in the Metropolitan Areas of Sydney, Newcastle and Wollongong and major country centres remained particularly buoyant and considerable competition was evident for the acquisition of sites suitable for future urban use. Unhappily, speculators and large investment organisations dominated the scene. The Commission found it necessary, therefore, to invoke its resumption powers in respect to the acquisition of a number of areas. The sites in question had all been the subject of very extensive prior investigations, in association with the Planning and Environment Commission, the Metropolitan Water, Sewerage and Drainage Board and other appropriate authorities".

These views of the Housing Commission were confirmed in its 1975 Report and were supported by the Annual Reports of the Valuer General. In 1973 the Valuer General reported:

> "Property values continued to rise throughout the year with the rate of increase generally outstripping the rise in wages and commodities".

The Report confirmed a rapid rate of increase in property prices "at a very high level". It concluded that at the close of the year (1973) there was no sign of an early easing of the urban market - "indeed indications were to the contrary". In the Valuer General's Report in 1974 and dealing with the year 1973-1974, it was reported under the heading "Sydney, Hunter and Illawarra Districts":

> "From a buoyant start land prices continued to escalate rapidly during the first four months of the last fiscal year with high volumes of transactions. Thereafter, it became apparent that the market was feeling the effects of the tighter credit controls, the reduced availability of investment funds from overseas and of the expensive money market at home, and by April the volume of sales had dropped markedly".

In his Report of 1975, the Valuer General likened the boom in land prices in 1973 to the boom years which preceded the Depression in the early 1930s.

Discount for Magnitude

I am not satisfied that I should make any discount for magnitude when applying the analysed rate per acre of the Kulnamock sale to Tatmar. I accept, as I have said, the evidence of Mr. Moore, Mr. Contensin and Mr. Parkinson, together with the written opinions expressed by the Housing Commission in 1973, that the subject land was a good "key" property. Beyond mere opinion, no acceptable material was placed before me supporting the assertion that I should make such a discount. The only support for it is said to come from Mr. McDermott's Exhibit AZ, which was, in my opinion, nothing more than a passing reference to big and small blocks which were not described and about the zoning of which I was not informed. Mr. McDermott, as I have already observed, was not called.

In assessing compensation under s. 124 of the Public Works Act I have had regard to the well-known passage in Spencer v. The Commonwealth 5 C.L.R. 418 at 440:

> "All circumstances subsequently arising are to be ignored. Whether the land becomes more valuable or less valuable afterwards is immaterial. Its value is fixed by Statute as on that day. Prosperity unexpected, or depression which no man would ever have anticipated, if happening after the date named, must be alike disregarded. The facts existing on 1st January 1905 are the only relevant facts, and 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".

It was submitted that I am required to take into account not only such facts as would be available to a prudent purchaser and vendor, but any facts that were in existence which, if known, would affect value. Thus, it was submitted, that what have been referred to as "secret facts" must be assumed in the application of the test formulated in Spencer's case. Support for this proposition is said to be found in Royal Sydney Golf Club case, in which Kitto J. observed at p. 385:

> "And in doing so I must take into account not only all that was then generally understood or ascertainable but the situation as it actually was in respect both of fact and of law; for the supposition must be made, in order properly to apply the test of value laid down in Spencer v. The Commonwealth, that a price is arrived at in bargaining between a hypothetical prudent purchaser and vendor each of whom is equipped with knowledge of the existing circumstances".

Thus, it was submitted on behalf of the Housing Commission that I ought to take into account that the hypothetical vendor and purchaser were both aware of what I am asked to assume was Mr. Ashton's view, viz., that the land would not be re-zoned. I am asked to assume this notwithstanding that a developer, acting reasonably, would have accepted Mr. Shearman's advice that there were prospects for re-zoning.

It is also submitted that I should impute to the hypothetical purchaser and vendor knowledge of the difficulties with sewerage and drainage, notwithstanding that inquiries in 1973 and made to the council, the S.P.A. and the Metropolitan Water, Sewerage and Drainage Board, would have revealed there would have been no abnormal problems. It is submitted that the supposed difficulties, referred to by Mr. Smyth, must be deemed to be facts in the possession of the hypothetical purchaser and vendor.

In this case, in my opinion, there were no "secret facts" and so I need not resolve the question of whether "secret facts" must be taken into account in the exercise the Court is required to undertake. In accordance

with the findings I have made there were no facts withheld from the Housing Commission which would have affected the value of the land.

It has been submitted that, when applying the test in Spencer's case, I should ignore what has been described as "speculative sales". It is a submission of the Housing Commission that I should therefore ignore the Kiawaka sale (at Casula) and the A.S.L. sale (at St. Marys). At one stage it was submitted that I should disregard the Kulnamock sale; or at least treat it with great caution. It was, it was submitted, a "speculative transaction". Authority for this proposition is said to be found in Blefari v. The Minister 8 L.G.R.A. 1 at p. 4. In that case Else-Mitchell J. rejected use of a sale which was described as being of a "speculative character only". It was submitted by the Housing Commission that any person who buys land on the chance that it will become available for development for residential or other purposes is buying land as a "speculator" and as a matter of law such a transaction can not be used as a comparable sale. Transactions were excluded in Blefari's case, in my opinion, because they were of no assistance to the Court in arriving at the value of the plaintiff's land. The excluded sales were in fact "out of line" with other transactions and, because this could not be explained, they were ignored. Else-Mitchell J. was not, in my opinion, seeking to

maintain a proposition of law that the Court must ignore a market in which persons and institutions were acquiring land having residential development potential. Indeed, in Blefari's case Else-Mitchell J. remarked on the absence of evidence that persons or institutions required substantial areas of land such as the plaintiff owned for the purpose of any prospect of obtaining development approval under the County of Cumberland Planning Scheme Ordinance. In the instant case, there was evidence that there was a demand for non-urban land in the relevant areas and that the major institutions (including Stocks and Holdings, Parkes Developments, A.S.L., Lend Lease and, indeed, the Housing Commission) required substantial areas of land such as Tatmar for the purpose for which there were prospects of obtaining development approval for subdivision. (See also Hurdis v. The Minister 2 L.G.R.A. 132 at 138.)

As will become apparent, I pay no attention to the Kiawaka sale at Casula. I do, however, pay attention to the A.S.L. sale. It was relied on by Mr. Alcorn but its significance, as will be apparent when I come to Mr. Alcorn's evidence, is slight. In the event I was required to ignore it, it would not affect my acceptance of Mr. Alcorn's evidence.

As I have said, however, the effect of Mr. Officer's submission was that I should either reject, or at least treat with great caution, the Kulnamock sale in May 1973.

This sale was relied on by every valuer including the three called by the Housing Commission. It was never suggested to any of them in the course of the proceedings that this sale could not be relied on because it was a sale of a "speculative character".

For reasons which I will make clear later, I have concluded that I ought not rely on the "resumption settlements". I should, however, add that should I conclude, conformably with the Housing Commission's submission, that the sales of land south of the Freeway in the years 1972 to 1973 were "speculative sales" it would require me to reassess my conclusions concerning the use of the resumption settlements. As will become apparent, I have rejected the resumption settlements, not because I am required to do so as a matter of law, but because, in the circumstances of this case, I think, in the exercise of my discretion, it is better that they be excluded. (See Woollams v. The Minister 2 L.G.R.A. 338.)

In the course of addresses, there was some debate as to the extent, if at all, I am entitled to take into account events subsequent to the date of resumption. This matter has been discussed in a number of cases (see Housing Commission of New South Wales v. Falconer [1981] 1 N.S.W.L.R. 547, Trustees Executors and Agency Company Ltd. v. Commissioner of Taxes (Vic) 65 C.L.R. 33, Minister for Army v. Parbury Henty & Co. Pty. Ltd.

70 C.L.R. 459). In my respectful opinion, a helpful statement of principle is to be found in Longworth v. Commissioner of Stamp Duties 53 S.R. (N.S.W.) 342 at p. 348, per Owen J.

It has always been accepted that the Court may admit evidence of subsequent sales. (See Minister for Public Works v. Thistlethwayte [1954] A.C. 475 at 494.) The danger, of course, in admitting facts subsequent to the date of resumption is that a tribunal might be unduly influenced by the subsequent fact and thus be diverted from its task of determining what the contingency really was at the relevant day. I have already given reasons why I prefer to disregard the zoning history of the land after the date of resumption and the correspondence passing between the S.P.A. and the Housing Commission, from the middle of 1975 onwards.

I have earlier referred to the resumptions of the Kulnamock, Burnley and Emu Plains land. In addition, many of the holdings in the Garswood Road area were resumed. Following resumption, settlements were effected between the Housing Commission and the various dispossessed owners. Details of these settlements were introduced in the proceedings and were admitted subject to the objection by Mr. Officer, Q.C. In particular, Mr. Parkinson, a valuer, sought to rely on the settlement sum paid to the owner of Kulnamock as well as to the sum payable consequent upon the resumption of

Burnley, Emu Plains and the Garswood Road lands. Mr. Hilton, a valuer retained by the Housing Commission and an officer in the Valuer General's Department, specifically referred to the Burnley and Emu Plains resumption settlements as being his sale 4 and sale 5 and said that these resumptions were part of the material used by him. In the course of preparing his valuation for use in these proceedings, Mr. Hilton referred to the valuations of Burnley and Emu Plains carried out by Mr. Hardy and Mr. Wood, officers of the Valuer General's Department. These valuations were for the purpose of settling the compensation claims made by the owners of Burnley and Emu Plains. Mr. Officer, Q.C., submits that these transactions should be completely disregarded and he relies on Re Gorman 29 W.N. 196, Harris v. The Minister 12 S.R. 149, Beard v. Director of Housing [1961] Tas. S.R. 141 and Woollams v. The Minister 2 L.G.R.A. 338. In Woollams' case Hardie J. reviewed the early authorities (including Harris's case and Re Gorman) and condluded that there was no principle of law requiring a court to reject sales to a resuming authority of comparable property before and after the resuming date. In Beard's case Crisp J. rejected evidence of "amounts agreed upon for compensation by the Director of Housing with other land owners in the same area in respect of other acquisitions of comparable land". Crisp J. took the view that the

transactions could not be regarded as "voluntary sales" and after expressing some doubt as to whether the objection to the evidence went to relevance or discretion, considered that probably it was the former. However, in purported exercise of the Court's discretion, and because comparable sales were available, the evidence was excluded.

In Woollams' case, Hardie J. referred to Royal Sydney Golf Club v. The Federal Commissioner of Taxation and noted that part of the material relied upon by the Court was a sale from the Royal Sydney Golf Club to the Council against the background of the statutory power of resumption which was ultimately exercised to complete the transaction.

Mr. Officer, Q.C., submits that should I conclude (as I do) that Woollams' case establishes that the Court is not bound to reject resumption settlements, such a proposition is limited to settlements effected before resumption and can have no application to settlements effected after resumption (as in the case of Kulnamock, Burnley, Emu Plains and the Garswood Road land). In my opinion, there is no difference in principle between resumption settlements effected before resumption and those effected after resumption. What is important is that in both cases there is absent the element of voluntariness which is required to be assumed. It is for this reason, as Hardie J. pointed out in

Woollams' case, that such settlements, if used, must be used with considerable caution and this would be so, in my opinion, even though such settlements were intended to be relied on, as in the instant case, by the dispossessed owner. In Woollams' case the defendant tendered evidence of these transactions and they were used by Hardie J. "for the limited purpose of putting a check on certain of the opinions expressed by the defendant's valuer". In that case, of course, there was no comparable sales evidence available. As was pointed out in Thistlethwayte's case at p. 491:

> "It must not be forgotten that it is the value of the land to the owner that has to be ascertained and that the willing seller and purchaser is merely a useful and conventional method of arriving at a basic figure to which must be added in appropriate cases further sums for disturbance, severance, special value to the owner and the like".

In the instant case all valuers accept that the Kulnamock sale is the appropriate starting point. In these circumstances I have decided, in the exercise of my discretion, to exclude from consideration, the resumption settlements. I would add that if there were no other comparable sales I would have regard to the resumption settlements albeit with considerable caution. Mr. Parkinson on behalf of the applicants and Mr. Hilton on behalf of the Housing Commission both relied on these settlements. Mr. Alcorn had regard to the Burnley and Emu Plains resumptions for the purpose of putting a check on his escalation estimation; an exercise not

dissimilar to that undertaken by Hardie J. in Woollams' case. Although I disregard the resumption settlements in the exercise of my discretion and because I am asked so to do by the Housing Commission, it should be remembered that the Housing Commission's chief expert valuer, Mr. Hilton, did take them into account for the purpose of his valuation exercise. I will, however, endeavour to assess Mr. Hilton's evidence without regard to his use of this material.

Authority has established that compensation payable to the dispossessed owner of land is to be assessed on the value of the land to him (see Pastoral Finance Associated Ltd. v. The Minister [1914] A.C. 1083). Lord Moulton said at 1088:

> "Probably the most practical form in which the matter can be put is that they (the owners) were entitled to that which a prudent man in their position would have been willing to give for the land sooner than fail to obtain it".

In this case very little turns on the difference between "market value" and "value to the owner". The Housing Commission required the land for its highest and best use which was the same use as that for which a hypothetical purchaser would have acquired it and the same use for which the owners intended to use it. However, the applicants claim an additional sum to compensate them for the "abortive expenditure" incurred in preparing maps, plans, reports etc. for the purpose of persuading the S.P.A. to give consideration to re-zoning the land.

I shall deal with this submission later.

The Kulnamock Sale

On 25 May, 1973, Kulnamock Pastoral Company Pty. Ltd. sold 108 acres to Federal Valuation Agency Company Pty. Ltd. for the sum of $649,087 (including buildings). The transaction was analysed by Mr. Parkinson at $6,094 per acre, by Mr. Hilton at $5,956 per acre, by Mr. Alcorn at $5,925 per acre, by Mr. Hyam at $5,910 per acre and by Mr. Weir at $5,654 per acre. Mr. Weir's analysis is somewhat out of line with the other four valuers, but for reasons which appear later, nothing turns on this. What is important is that all valuers regard the Kulnamock sale in May 1973 as the most appropriate comparable sale for the purpose of establishing a value for Tatmar. In earlier valuation exercises by officers of the Valuer General's Department, the Kulnamock sale was used for the purpose of assigning a value to the Burnley and Emu Plains resumptions and analysed at $5,880 per acre.

Generally speaking, Kulnamock was inferior to Tatmar. As is evident from the sketch Kulnamock had an irregular and unusual shape. It was greatly damaged by reason of a dam at the confluence of School House Creek and the main water course from Lot 2. It had low lying land to the north. The cost of repairing Kulnamock per acre would have greatly exceeded that of Tatmar. Tatmar had superior access potential and was a regular shaped

block. All these matters are dealt with in detail in a report by Mr. Moore of the firm of Wallis and Moore Pty. Ltd., Engineers, Surveyors and Planners. I accept his evidence.

Mr. Hilton is a senior valuer employed in the Department of the Valuer General. Presently, he is the Supervising Valuer and Chief Rural Valuer of the Department. Until 1975 he was employed as a District Valuer at Gosford. He first valued the land on behalf of the Housing Commission in 1975 and assigned to it a value of $3,768,000 (considerably more than his present valuation). In his valuation exercise for these proceedings (Exhibit 2(b)) he regarded Tatmar as being suited for urban purposes by reason of its "inherent natural features" but concluded that in 1973 it was not available for such purposes and was unlikely to become available. Included in his reasons were the following; that Tatmar was outside the land phased for release under the S.R.O.P., other land in Penrith area was in the area phased for release, that the boundary of the areas phased for release had remained unaltered and that there were difficulties related to the provision of infrastructure services. In his valuation exercise he also concluded that the boom conditions had ended by May 1973 and that a substantial discount had to be made when comparing Kulnamock and Tatmar because Tatmar was 884 acres compared to Kulnamock's 108. He also assumed that if

there were to be re-zoning, it would be limited to the area north of the T.L.E.

After taking these matters into account he valued the land as follows.

Tatmar Pastoral Company Land	
275 acres north of T.L.E. - $5,500 per acre	1,512,500
54 acres subject to the T.L.E. - $2,000 per acre	108,000
371 acres south of T.L.E. - $3,000 per acre	1,113,000
Total	$2,733,500
Penrith Pastoral Company Land	
184 acres - $3,000 per acre	552,000
Value of house and cottage	7,000
	559,000
+ Tatmar Pastoral Company Land	2,733,500
Total	$3,292,500

In addition to the Kulnamock sale, Mr. Hilton relied on two other sales, viz., the Colony Town Estates sale - a sale of 236 acres at St. Marys on 2 March, 1973, and the Bansar sale - a sale of 40 acres situated three miles north of Kingswood on 10 July 1973. Mr. Hilton also relied on the resumption settlements of the Burnley and Emu Plains land (these lands were resumed, as I have said, in September 1973). Further, in the course of preparing his report, he referred to earlier reports of officers of the Valuer General, Mr. Hardy and Mr. Wood, both of whom considered the sales of land in Jamison Road and, in particular, the "Leagues Club sale"

in January 1973 and who thought prices were escalating at the rate of 8.3% per month through the year up to August 1973. Mr. Hilton said that he considered this information and rejected it. For reasons which I shall shortly give, I am of the opinion that Mr. Hilton was wrong in rejecting this material.

Mr. Hilton, in my opinion, was wrong in assuming that the S.R.O.P. had remained unaltered since 1968 and that there were no prospects of re-zoning the subject land, or that if there were it would be limited to the north of the T.L.E. and that there were any unusual problems associated with the provision of infrastructure services. All these assumptions were contrary to the information supplied at the relevant time by all relevant authorities to inquirers (including the Housing Commission).

Mr. Hilton accepted some escalation in price during the year 1973. He concluded, however, that it did not continue after July 1973 and, as a result, made no allowance for it in his valuation of Tatmar. He concluded that the Kulnamock sale in May 1973 evidenced the peak of the market. I do not accept his opinion. Not only is it contrary to the opinion of every other valuer who gave evidence, but, as I have said, it is also inconsistent with publications of the Valuer General's Department and the Housing Commission. The reason why Mr. Hilton was not prepared to find

"escalation" after May 1973 was because, he said, there were no other sales to which he could look for assistance. He rejected the Jamison Road transactions (in my opinion, erroneously) and also ignored the fact that the reason why there were no other transactions south of the Freeway was because potential purchasers were either warned off by the Housing Commission or concerned that any acquisitions would shortly be resumed - a matter referred to in Mr. Hardy's report and proved by Mr. Gibson in these proceedings.

In his report, Mr. Hilton made a discount of 25% for "magnitude for size". He concluded that because Kulnamock was 100 acres and Tatmar 884 acres, he was entitled to reduce the rate per acre of the Kulnamock land in its application to Tatmar by 25%. In support of this he relied on two transactions in 1973. In February 1973 Cambridge Credit purchased 623 acres for $7,485,720 and in March 1973 Peter Kent Pty. Ltd. purchased 62 acres for the sum of $1,017,660. Mr. Hilton used these transactions to justify a 25% discount. He made no attempt to analyse these sales. He divided the purchase price by the number of acres in each case and he concluded that, because the Cambridge Credit land sold for $12,000 per acre and the Peter Kent land for $16,316 per acre, he was able to deduce a discount for size in the order of 25% which he then applied to the value per acre of Kulnamock in its application to

Tatmar. Later, and during these proceedings, Mr. Hilton purported to analyse the above mentioned sales but did so incorrectly. In the course of his address, Mr. Officer, Q.C., stated he no longer relied on these analyses but, nonetheless, asked me to accept a discount factor of approximately 10% based on Mr. Hilton's general experience.

In Mr. Hilton's first report in these proceedings (Exhibit 2(a)) he did not refer in terms to making any discount for magnitude at all. He said in evidence that although it was not mentioned it was, in effect, taken into account. He agreed that in his original report (Exhibit 2(a)) he assigned a difference in value to land north and south of the T.L.E. because of his then understanding of sewerage costs. Later, and after receiving the consulting engineer's report, he realised his assumptions were wrong. It was suggested to him that it was at that time he decided to adjust his earlier valuation (2(a)) so as to introduce the concept of a discount for magnitude (as appeared in his second valuation, Exhibit 2(b)). Whether he made the discount for this reason or not I do not know. I am of the opinion, however, that his discount for magnitude whether it be 25% (as originally stated in 2(b)) or 10% (as it became in the course of giving evidence) must be rejected. In a valuation report in 1975 he wrote: "Any discount for magnitude?" and answered it "Little

evidence available". In his valuation exercise relied on in these proceedings (Exhibit 2(b)) he sought to justify it by reference to sales which were not analysed. I do not, for reasons I have given, accept Mr. Hilton's opinion. In his exercise and for valuation purposes, Mr. Hilton divided the subject land into land north of the T.L.E. and land south of it. For reasons which I shall endeavour to give later, I do not think Mr. Hilton was entitled to do this. Nonetheless, and on the assumption that he was entitled so to treat the land, any discount for magnitude would need to be applied, not on the basis of comparing 106 acres to 884 acres, but of comparing 106 acres (Kulnamock) with 275 acres (land north of the T.L.E.) and again to 555 acres (land to the south of the T.L.E.). Further, it would be necessary to take into account that of the land to the north of the T.L.E. 54 acres were under the T.L.E. and as to the land south of the T.L.E. 184 acres was in the ownership of Penrith Pastoral Company Pty. Ltd. Mr. Hilton made no attempt to carry out these exercises.

As I have said above and as is evident from the summary of his valuation, Mr. Hilton attributed a lower value to land south of the T.L.E. than to land north of it. His justification for doing this was an assumption that:

> "If the area within the S.R.O.P. were to include land south of the expressway, it would be natural to think that the extension would stop at the electricity transmission line".

I have already given reasons why I regard this assumption as incorrect. It was not an assumption that would have been made by an inquirer nor was it an assumption made by the Housing Commission. There is ample evidence, which I accept, that the transmission line easement would not have been the boundary. Viewed as a planning matter, the limits of the catchment area would be the logical boundary and this would have included Tatmar. I have already referred to the absence of any documentary evidence supporting the assertion that in 1973 it was believed that the boundary would stop at the T.L.E. It is clear from the material before me that the Housing Commission did not think that the boundary would stop there. Mr. Bourke did not think so and, significantly, the Housing Commission resumed the whole of the land. I have no doubt that in so doing the Housing Commission was influenced, not only by the fact that the natural boundary would be the limit of the catchment area, but by the fact that the land south of the T.L.E. was much better land for residential purposes than the land to the north.

In addition to Kulnamock, Mr. Hilton analysed two other sales and applied them to Tatmar. This exercise, he said, supported his valuation. I cannot accept this opinion. In the case of the Colony Town Estates land, Mr. Hilton deduced a figure of $6,525 per acre for application to the Tatmar land. The Colony Town

Estates land consisted of 236 acres, 118 of which could only be used for a corridor and was subject to flooding. To this land Mr. Hilton assigned the sum of $2,500 per acre with the result that he was able to attribute the sum of $6,525 per acre for the remaining 118 acres. I have difficulty accepting this somewhat arbitrary approach. But, as was pointed out, if he were wrong in his refusal to accept escalation after May 1973 (as I think he was) the Colony Town Estates sale (in March 1973) would need to be escalated to $10,400 (at 10%) or $9,700 per acre (at 8%) in its application to Tatmar in August 1973. I do not, however, propose to adopt the submission that I should use the Colony Town Estates sale and apply an escalation factor to it to arrive at a rate per acre of Tatmar at $10,400 in August 1973.

Mr. Alcorn investigated this sale and rejected it. In my opinion, he was right. Further, in my opinion, the Bansar sale was a most unhelpful transaction. This land was outside the area phased for release under the S.R.O.P. not because of some arbitrary boundary, but because the land was, in fact, unfit for any urban development.

Mr. Hilton also relied on the resumption settlements following upon the resumption of Burnley and Emu Plains. Should I be wrong in rejecting the resumption figures, I indicate why, in my opinion, Mr. Hilton's analyses of these cannot be sustained. Mr. Hilton

divided 203 acres of Burnley land into land under the T.L.E., land south of the T.L.E., unsuitable land to the west and 146 acres of good land to the north. To these different parcels he arbitrarily assigned sums of $3,250, $5,000 and $6,500 respectively. He applied $6,500 to Tatmar. He then conducted a similar (though not identical) exercise in respect of Emu Plains. Were I to have regard to the resumption settlements, I would not accept Mr. Hilton's approach. In the case of Burnley, for example, it is not explained why $5,000 per acre was attributed to what was unusable land in the west and in the case of Emu Plains, why such a small allowance was made for the paucity of access and less valuable land.

Mr. Hyam gave evidence on behalf of the Housing Commission. He is a qualified valuer and between 1972 and 1973 was the Senior Lands Purchasing Officer employed by the Housing Commission of New South Wales. After 1973 he became Manager of Lands. In 1981 he resigned from the Housing Commission to commence practice at the Bar of New South Wales. He gave evidence as an expert valuer. He referred to the Housing Commission's policy to refer compensation claims following upon resumption to the Valuer General. This was why Mr. Wood and Mr. Hardy prepared valuations for the Housing Commission in 1973 in respect of the Burnley and Emu Plains resumptions and why Mr. Hilton was asked to prepare a valuation in

1975 in respect of the acquisition of Tatmar. Mr. Hyam was present at the various meetings in 1973 and claimed an understanding of the real estate market in the Western Sector in 1973. Notwithstanding his participation in the Housing Commission's activities in regard to the land south of the Freeway in 1973, he made no attempt to retrieve any written material or notes that might have been made at the relevant time by him. He said this was a deliberate decision because he thought it better to make inquiries in 1981 rather than make reference to contemporaneous notes of investigations which he had made in 1973. When asked why access to his contemporaneous notes would be other than of assistance to him, he replied: "I don't think it occurred to me".

In 1973 Mr. Hyam was the Senior Purchasing Officer. He said, however, that he had never seen File 7770 (part of which became Exhibit AAB) which referred to the proposal for the acquisition of the large area of land south of the Freeway, including Tatmar, and which made no reference to the T.L.E. being the southern boundary. He was unaware of Mr. McDermott's report (Exhibit AAB). He was shown a document (Exhibit AAJ) which purported to be an instruction addressed to him to carry out valuations and to negotiate acquisitions of the land south of the Freeway. He said that, although the document was in his own handwriting, it did not mean what it said. He said that he, Mr. Hyam, was to carry out valuations

and that it was for Mr. McDermott to negotiate acquisitions. I must conclude, I think, that Mr. Hyam, after a lapse of ten years, has simply forgotten his participation in the events of 1973.

There is no record of any valuations carried out by Mr. Hyam in 1973. It was suggested to him that he was responsible for the original figure of $3,500 adopted by Mr. McDermott in late 1972 or early 1973. He said he had no recollection of Mr. McDermott ever contemplating a figure of $3,500 (that Mr. McDermott did, however, is evident from Exhibit AAK). Further, he said he had no recollection of discussing a figure with Mr. McDermott and that he was not aware of Mr. Bourke's memorandum (Exhibit X) in which it was stated that many people were showing considerable interest in the area. As I have said, I think Mr. Hyam has forgotten much of what happened in 1973. I find it difficult to accept that a person in Mr. Hyam's position would not have been aware, in 1973, of Mr. Bourke's views in respect of the land south of the Freeway in general and Tatmar in particular.

In his lengthy report, Mr. Hyam attributed a value of $3,540,000 to the subject land (including an amount of $40,000 for buildings on the Penrith Pastoral Company Pty. Ltd. land). In the course of his report, Mr. Hyam assumed that consideration would only be given for release of resumed land in 1973 if it were

held in public ownership and that if any inquiry had been made of an officer more senior than Mr. Shearman, it would have elicited the information that the S.P.A. opposed the release of the resumed land regardless of who owned it. This is a reference, I suppose, to Mr. Ashton's evidence. I do not accept that such a reply would have been given and, as I have already indicated, I do not accept that the Housing Commission received such a reply. Mr. Ashton may not have been as enthusiastic as Mr. Shearman, but he had, in my opinion, accepted the inevitability of an eventual re-zoning. Moreover, Mr. Kacirek made it clear that if he were asked, he would not have responded in a manner assumed by Mr. Hyam. Had Mr. Crockett been asked, I believe he would have given the same information as that given by Mr. Shearman and Mr. Kacirek. Mr. Shearman also assumed that had an inquiry been made of the S.P.A., the inquirer would have been told that any re-zoning would have stopped north of the T.L.E. I have already indicated why, in my opinion, this assumption is wrong and, in any event, it is not the information that was received by the Housing Commission. Mr. Hyam also relied on the fact that some years after 1973 it was proved that the population growth had been greatly overestimated and that it became evident in the mid-1970s that A.S.L. had over-extended itself and was therefore regarded as having made an imprudent acquisition in 1972. Mr. Hyam

made the mistake, in my opinion, of applying hindsight. He ought to have had regard only to what was understood in the market in 1973 to be the population forecast. The fact that by 1977 a forecast which was accepted in 1973 was proved to be wrong, was, in my opinion, irrelevant.

Mr. Hyam was of the opinion that although there was escalation of prices "beyond all prior expectation" in 1972 and 1973, the "boom" was nearing its end in 1973, and accordingly, he attributed an escalation rate of 3.3% per month. He was reluctant to increase the percentage figure above this because he believed that by August there would have been a "degree of apprehension" on the part of investors. It is clear to me that Mr. Hyam arrived at this conclusion, not by reference to what was understood in the market in 1973, but by what he thought ought to have been the state of the market when later events were taken into account.

Mr. Hyam did accept, however, that "the only sale found that was sufficiently comparable to be relied upon with any confidence was Sale No. 1". He believed that Tatmar was "topographically ... marginally better than Kulnamock ...". I have already given reasons why I think that Tatmar was more than "marginally better" than Kulnamock. Mr. Hyam believed, however, that the better quality of Tatmar was offset by a number of factors in favour of Kulnamock. He then assumed that boom conditions were ending and applied an escalation rate of 3.3% and concluded:

> "I consider the superior location and access of the Kulnamock land offsets the better topography of the resumed land, therefore I do not propose to make any allowance for these factors".

In my opinion he was wrong in assuming that Kulnamock had either superior location or better access than Tatmar.

When adjusting rate per acre disclosed by his analysis of the Kulnamock sale in its application to Tatmar, Mr. Hyam took into account four factors which he said would require a discount of between 25% and 50%. The first and most important of these was what he described as a "discount for size". Others included the lesser affectation by downstream drainage, better prospect of sewering in Kulnamock and the provision of town water to Kulnamock. His assumptions concerning the last three matters were, as I have indicated above, erroneous. This, however, became somewhat academic because, in the opinion of Mr. Hyam, the major component in the discount was the "discount for size", i.e. the discount because Tatmar was eight times as large as Kulnamock. Later, in the course of his oral evidence, the figure was reduced to between 20% and 45%. Mr. Hyam has not convinced me that a discount ought be made. His opinion is not supported by any sales evidence. Further, as with Mr. Hilton, no attempt was made to apply the discount to the actual, or even assumed, facts. For example, no attempt was made to apply the discount to lands north and south of the T.L.E. or to land under the T.L.E. or to the 184 acres of land owned by the

Penrith Pastoral Company Pty. Ltd. In my opinion, Mr. Hyam's evidence as to escalation and "discount for size" must be rejected. Mr. Hyam also applied a higher rate per acre to land north of the T.L.E. than to land south of the T.L.E. The assumptions upon which this exercise was based were, in my opinion, wrong. It follows that I reject his assessment that land to the north of the T.L.E. was more valuable than land to the south.

Mr. Weir also gave evidence on behalf of the Housing Commission. He carried out two exercises. In the first, he attributed a value of $3,125,000 and in the second $3,304,600 (less improvements). In respect of his second valuation exercise (Exhibit 12(a)) he referred to the Kulnamock sale and, after analysis, established a rate of $5,654 per acre. He was of the opinion that between May 1973 and August 1973 land prices were increasing at a rate of 5% per month and applying that factor to his analysis of the Kulnamock sale, he established a rate per acre of $6,500. Mr. Weir acknowledged that Kulnamock was inferior to Tatmar but considered that this was compensated for by Kulnamock's closer proximity to Penrith and better access. I have already given reasons why, in my opinion, Tatmar's access was better. Further, I do not think any allowance would have been made for the fact that Kulnamock was closer to Penrith than Tatmar. Mr. Weir was of the opinion that when applying the Kulnamock rate per acre to Tatmar a

discount of between 10% and 20% for size should be made. He further concluded that the size of the investors' outlay together with the fact that such a release, if it occurred, would not extend to lands south of the T.L.E., required him to apply a discount figure of 40% in the application of the Kulnamock rate per acre to the Tatmar land.

Both Mr. Weir's exercises were subject to much criticism. Mr. Officer, Q.C., announced that he did not intend to rely on them except in so far as those opinions supported the Housing Commission case that there was less escalation of land prices in 1973 than that for which the applicants contended and that a discount for size ought to be made in the application of the analysed Kulnamock sale to Tatmar. Mr. Weir purported to rely on two sales to justify an escalation figure of 5% per month. In fact, neither of these sales had any urban potential and, for this reason, I reject his assessment. Further, he produced no evidence at all to support his percentage figures for "discount for size", nor did he seek to confirm or test his opinions in any way. Accordingly, I reject his opinion that there should be a discount for size and, although I accept his view that there was some escalation in 1973 I reject his assessment of it at the rate of 5% per month between May 1973 and August 1973.

Mr. Parkinson gave evidence on behalf of the

applicants. Because I have rejected the "resumption settlements" I propose dealing only briefly with his evidence. He considered that the value of the subject land could be derived from prices paid on resumption (particularly to the price paid on the Kulnamock resumption in 1974) by the resuming authority to owners of immediately surrounding lands. He relied on the resumption settlements in respect of the resumption of Kulnamock (in July 1974), of Emu Plains and Burnley (September 1973) and of the Garswood Road lands (July 1974). Accepting that these figures evidenced true value as at the date of resumption, Mr. Parkinson was of the opinion that there was no need to prove actual monthly escalation in the market place prior to the date of resumption of the subject land because the resumption prices paid by the Housing Commission took this factor into account and were assessed after a levelling off of the real estate market. He asserted that an analysis of these transactions demonstrated a consistency of values which, he said, was confirmed when checked against private sales.

Mr. Parkinson drew no distinction between land north and south of the T.L.E. It was his view (which I accept) that the T.L.E. would not have presented a barrier to the urban potential of the land and that the area south of the T.L.E. was better for residential purposes than the area to the north.

He was further of the opinion that it was unnecessary to define the likely time of urban release of the subject land because the value to be attributed to it by reason of this factor was reflected in the "market evidence", i.e. the resumption settlements. It was his opinion that if it were proposed to determine the likely timing of urban release in respect of the resumed lands (all of which were outside the area phased for release under the S.R.O.P.) it would be:

> "necessary to convert the price (as released) of the resumed land artificially by means of interest tables or some other form of arbitrary discount".

In his opinion, the evidence of prices paid on resumption supported by the market evidence overcame the need for this exercise and was therefore more reliable.

Mr. Parkinson regarded Kulnamock as the most comparable sale. Conformably with his approach he was not interested in price escalation from March 1972 to May 1973 (during which the Kulnamock land escalated at the rate of 8.31% per month). He began with the sale in May 1973 and compared it with the resumption settlement agreed after resumption in July 1974. In 1973 the rate per acre was $6,094 and in 1974 $7,183. He considered that escalation had almost ceased towards the end of 1973 and that the resumption price could be taken therefore as including in it an escalation factor. He then made an adjustment for open space and added a figure for "remedial costs" of $1,568 per acre (being the

difference between the quality of the Kulnamock and Tatmar land) and established a rate per acre for Tatmar of $9,018.

He analysed the settlements following the resumptions in respect of Emu Plains and Burnley and, after making allowances for unsuitable residential land, remedial costs and access, arrived at a rate per acre for Tatmar of between $8,656 and $8,875. Emu Plains and Burnley were each approximately 200 acres. There were, in my opinion, some difficulties in Mr. Parkinson's exercise, particularly in the attribution by him of $6,000 for 40 acres of open space land and T.L.E. land of Emu Plains and $5,000 per acre in respect of 90 acres of very poor "passive open space land" of Burnley. Further, it is not clear to me why he raised the value of Emu Plains from $6,500 to $8,600 (in its application to Tatmar land) for "access" problems.

Because of the view I have taken, namely that I ought not pay any regard to these transactions in the light of the availability of comparable sales, I do not intend further dealing with this evidence. I accept, however, Mr. Parkinson's opinion that during 1972 and 1973 the price of land was escalating sharply.

I have not overlooked that Mr. Parkinson, in the course of giving evidence, did refer to sales evidence. But he did this to test or confirm the conclusions he drew from the resumption settlements and not as an independent exercise.

Mr. Alcorn was a valuer called by the applicants. Prior to 1973 he had had a considerable amount of experience with the Valuer General's Department and during 1972 and 1973 he was closely associated with large development companies including the Bond Corporation Ltd., A.V. Jennings Ltd., Parkes Developments Ltd. and Lend Lease Ltd. Conformably with all other valuers, he took as his best comparable sale the Kulnamock transaction in May 1973. This was the last major sale of significance south of the Freeway prior to the resumption of the subject land. He regarded Tatmar as a "key property" because of its size. He concluded it was superior to Kulnamock to the effect that Tatmar was 25% better than Kulnamock. His view was supported by Mr. Moore. He therefore increased the value of Tatmar as at May 1973 from $5,925 per acre (being his analysis of the Kulnamock sale) to $7,304 per acre.

Further, Mr. Alcorn was of the opinion that land prices were escalating at the rate of 10% per month between May 1973 and August 1973. He was of the opinion, which I accept, that there was no reason to suggest that large parcels were not increasing at the same rate as small parcels. He made allowance for the "rising market and also the greater value attributable to the subject land because of its size" and concluded that a conservative approach was to escalate by not less than 30%. He was of the opinion that Tatmar's size gave it added

value because it was large enough for urban release in its own right. After applying a factor of 30% he assigned a rate per acre of $9,500 for Tatmar. He did not attribute different values to the lands north and south of the T.L.E. but did attribute a lower value to land (54 acres) under the T.L.E., about which no criticism was made on the assumption that I otherwise accept his valuation. His valuation was therefore:

830 acres at $9,500	$7,886,235
Area under T.L.E. - 54 acres $9,500 x 75%	383,823
Buildings	35,000
Total	$8,305,058

For the purpose of confirming his opinion that land prices were escalating at the rate of 10% per month, Mr. Alcorn took cognisance, inter alia, of the differences in land prices between 1972 and 1973. In Exhibit K3 he set out these differences. For example, Kulnamock was sold in March 1972 for $300,000 and resold in May 1973 for $649,087. He also referred to other sales of land of smaller blocks in the Garswood Road area between August 1972 and June 1973. These sales demonstrated an escalation, in the case of Kulnamock, of 8.31% per month, and in the case of the Garswood Road lands (being 13 acres, 11 acres and 5 acres) of between 10% and 16%. Further, and as confirmation of his assessment, Mr. Alcorn looked at four transactions in the Jamison Road area. These, incidentally, were the

transactions looked at by Mr. Hardy and Mr. Wood when carrying out their valuations on behalf of the Housing Commission in respect of the Burnley and Emu Plains lands in 1973 and from which they deduced an escalation factor of 8.3%. In particular, Mr. Alcorn had regard to the "Rugby Leagues Club" sale of 196 acres in July 1973 for $1,960,000. In my opinion, Mr. Alcorn was entitled to look at these sales and Mr. Hilton was in error in rejecting them.

I was impressed by Mr. Alcorn's approach. He adopted the traditional approach of applying a comparable sale. His analysis of the Kulnamock sale led him to a number of assumptions. As it turned out, almost all of these were accepted and acted on by the Housing Commission itself in 1973. I have already referred to the various memoranda and opinions of senior officers of the Housing Commission (including the Chairman, Mr. Bourke) and members of the S.P.A. The assumptions made and opinions held by the Housing Commission were those that would, in Mr. Alcorn's view, have been made and held by informed and intelligent developers in 1973. Further, I accept Mr. Alcorn's evidence (supported as it is by almost everyone else) that nobody would have considered that there would have been any problem in relation to water, sewerage and drainage in the sense that there would have been any abnormal expense.

Mr. Alcorn's assessment of the impact on the

development industry of the Premier's announcement and the letter to the Institute is very little different from what I find to have been the view held by the Housing Commission. Finally, and for reasons I have already given, Mr. Alcorn's assumption that there should be no difference in value between land north and south of the T.L.E. was correct. Accordingly, I accept Mr. Alcorn's valuation.

I will now deal shortly with two other submissions. First, it was submitted on behalf of the applicants that, for reasons which I shall outline, I should adopt a valuation of $13,260,000. Second, it was submitted on behalf of the Housing Commission that Mr. Alcorn's evidence, when viewed in the light of an assumption that land to the south of the T.L.E. was less valuable than land to the north, ought lead to a valuation of $6,440,393. I reject both submissions and briefly set out my reasons.

It was submitted on behalf of the applicants that in 1973 a purchaser would have been told, as was the Housing Commission, that the land would be re-zoned for urban development within 10 years. On this assumption, it was submitted, the land was worth $15,000 per acre and, it was submitted, I ought conclude that there was an agreement between the S.P.A. and the Housing Commission that the subject land would be available for housing purposes when required. It was submitted that the Housing Commission would have required the land within

10 years and the land ought be valued on that basis. In the course of advancing his submission, Mr. Gyles, Q.C., submitted that I ought to conclude that the land would have been available for urban purposes within a matter of months in which event the land would have to be valued on that basis, thus further increasing its value. I have already expressed my view as to the information given by the S.P.A. and the assumptions made by the Housing Commission. In the course of giving evidence, Mr. Hilton was asked by me to prepare certain figures on the assumption that in 1973 the land would have been re-zoned in nine years' and 12 years' time. I was invited in the submission to pursue a complicated valuation exercise incorporating in it some assumptions and calculations made by Mr. Hilton and some of those made by Mr. Alcorn and Mr. Parkinson.

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 facts. 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.

On behalf of the Housing Commission, I was asked to adopt Mr. Alcorn's evidence but to make an assumption that land south of the T.L.E. would have been regarded by a developer as having less potential for re-zoning than land to the north. It was submitted that I should conclude that Mr. Alcorn in fact attributed a value of $7,900 per acre to land south of the T.L.E. to which he then added $1,600 per acre in arriving at the value of land to the north, i.e. $9,500 per acre. I was asked to accept the evidence of Mr. Talbot and to exclude the repair differential with the result that the land north of the T.L.E. became worth $9,016. I was then asked to adopt Mr. Alcorn's estimation that there would be a re-zoning within five to ten years of land to the north and that land to the south would be re-zoned in approximately 20 years. It was submitted that if land to the north (excluding repair) was worth $9,016 per acre, the land to the south, when applying a deferral discount factor of 4.5%, was worth $6,479 per acre. In the result, the total value of the applicants' land, it was submitted, was $6,440,393.

Mr. Alcorn's valuation proceeded on an assumption that Kulnamock was a suitable comparable sale and it is for this reason that I have accepted his valuation. The above exercise was not Mr. Alcorn's valuation exercise at all. In the course of giving evidence, he made

an assumption, when asked, that land to the north could be re-zoned within five to ten years. He said, however, that on that assumption the land would not be worth $9,500 per acre, but $15,500 per acre. When asked to carry out this separate exercise, he said:

> "I looked at the difference in value of land zoned for release in the not too distant future, that is the Orchard Hills area and I looked at lands that were zoned for further release in say 15 years or so away, looked at those and took an arbitrary division between the two and said, well it was the area south of the high tension easement attracted some potential from the area north. I didn't place a time period on it".

Mr. Alcorn was not assigning values based on a projection of time for release of land north and south of the T.L.E. What he was there saying was that lands that were adjacent to lands had some potential and had some added value. To construct from this evidence an elaborate valuation exercise is in my opinion to misunderstand what was being said. In any event, as I have said above, the basic premise is wrong in that it assumed Mr. Alcorn put a value on land north of the T.L.E. and available for release in 10 to 15 years with no risk at $9,500 per acre, whereas on these assumptions, Mr. Alcorn believed the proper figure would have been $15,500 per acre.

Finally, I must determine whether, in the sense I have outlined above, this land had any added value to the Sataras by reason of the expenditure incurred by the two companies. I have already referred to the

activities of the Satara family and of the consultants retained on behalf of their companies during 1972 and 1973. In all, an amount of $26,102.54 was claimed in these proceedings. It is now not in dispute that expenditure incurred prior to May 1973 was $17,417. Thereafter an additional $3,500 was spent. For the Housing Commission it was submitted none of these expenditures was recoverable because none of them added to the "value of the land". Alternatively, it was submitted that should it be that any are to be allowed, such allowance should terminate in respect of expenditure incurred prior to 31 May, 1973, because that was the date the Housing Commission informed the Sataras of its intention at some time in the future to resume the land. In my opinion, and in the event it adds value to the land, such expenditure as was incurred by the Sataras should not be limited to expenditure incurred before 31 May, 1973. It was not until 8 August, 1973 that the Housing Commission formally notified the Sataras that the land would be resumed. The land was not in fact resumed until 31 August, 1973. I think, however, that it would not have been reasonable for the Sataras to expend any further money after 8 August, 1973.

Expenditures of monies for subdivision approval can, in the appropriate case, add value to the land in the relevant sense. (See Yarn Traders Pty. Ltd. v. Melbourne and Metropolitan Board of Works 1967 V.R. 427

and Kennedy Street Pty. Ltd. v. The Minister 8 L.G.R.A. 221.) The work done in the instant case and for which expenditure was incurred was for the purpose of persuading the S.P.A. to consider a proposal for re-zoning. It was the first step. Mr. Officer, Q.C., submits that the work would add little, if anything, to the land because the subdivision was, on any view of the matter, many years away. Nonetheless, the money was expended for the purpose of having the land re-zoned. Some of it was, however, expended for the purpose of persuading the Minister not to allow the Housing Commission to acquire it and, although it might have been reasonably expended for this purpose, it would not add "value to the land", in the relevant sense. Doing the best I can, I make an allowance in the sum of $10,000 in respect of "abortive expenditure". I assess the value of the buildings at $35,000.

I assess compensation to the Penrith Pastoral Company Pty. Ltd. as follows:

184 acres at $9,500 per acre	$1,748,000
Buildings	35,000
Expenditure	2,000
Total	$1,785,000

I assess compensation payable to Tatmar Pastoral Company Pty. Ltd. as follows:

646.13 acres at $9,500 per acre	$6,138,235
53.87 acres (under T.L.E.) at $9,500 per acre x 75%	383,823
Expenditure	8,000
Total	$6,530,058

I HEREBY CERTIFY THAT THIS AND THE PRECEDING 75 PAGES ARE A TRUE COPY OF THE REASONS FOR JUDGMENT HEREIN OF THE HONOURABLE MR JUSTICE J.S. CRIPPS

J.K.
Associate to
Mr. Justice Cripps

17 March, 1982

THE LAND AND ENVIRONMENT COURT
NO. 5
MINUTES OF ORDER OF LAND AND ENVIRONMENT COURT
17 MARCH, 1982

IN THE LAND AND ENVIRONMENT COURT

OF NEW SOUTH WALES

30115 of 1980

TATMAR PASTORAL CO. PTY. LIMITED (First Applicant)

PENRITH PASTORAL CO. PTY. LIMITED (Second Applicant)

Applicant

THE HOUSING COMMISSION OF NEW SOUTH WALES

Respondent

Order

THE COURT ORDERS:

1. That the Respondent pay compensation to the First Applicant in the sum of six million five hundred and thirty thousand and fifty eight dollars ($6,530,058).

2. That the Respondent pay compensation to the Second Applicant in the sum of one million seven hundred and eighty five thousand dollars ($1,785,000).

3. That the question of costs be reserved.

4. That the exhibits be returned twenty eight (28) days after the date of this order.

ORDERED: 17th March, 1982.

Assistant Registrar

THE SEAL OF THE LAND AND ENVIRONMENT COURT NEW SOUTH WALES

IN THE SUPREME COURT OF NEW SOUTH WALES
COURT OF APPEAL
SYDNEY REGISTRY

C.A. 113 of 1982
L. & E. 30115/1980

HOUSING COMMISSION OF NEW SOUTH WALES

Appellant

TATMAR PASTORAL CO. PTY. LIMITED and PENRITH PASTORAL CO. PTY. LIMITED

Respondents

TATMAR PASTORAL CO. PTY. LIMITED and PENRITH PASTORAL CO. PTY. LIMITED

Cross-Appellants

HOUSING COMMISSION OF NEW SOUTH WALES

Cross-Respondent

IN THE COURT BELOW:

TATMAR PASTORAL CO. PTY. LIMITED and PENRITH PASTORAL CO. PTY. LIMITED

Applicants

HOUSING COMMISSION OF NEW SOUTH WALES

Respondent

NOTICE OF AMENDED CROSS APPEAL

The proceedings to which the Cross-Appeal apply were heard on 26, 27, 28, 29 and 30 October, 1981, 2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 16, 17, 18, 19, 20, 23, 24, 25 and 26 November, 1981, 1, 2, and 3 December, 1981, 2, 3, 4, 5, 8, 9, 10, and 11 February 1982 and decided on 17 March, 1982 and are the subject of an Appeal by the Appellants filed 14 April, 1982. The Respondent Cross-Appeals from the decision of Mr. Justice Cripps of the Land and Environment Court of New South Wales.

GROUNDS:

(a) That his Honour, having found that the Housing Com-

(LS) mission believed on reasonable grounds that the land would be rezoned within 10 to 15 years and it having been conceded that (if found) the land should be valued on that basis, erred in law in disregarding the evidence given by the valuers as to the value of the land on that

assumption, and instead taking as the basis of valuation a sale the parties to which would not have had, or may not have had the same reasonable belief because they would not have had access to the facts known to the Housing Commission or alternatively, that his Honour erred in law in failing to give any or any adequate reasons for not adopting the principles of valuation referred to by the said valuers applicable to the facts as found and their evidence as to those principles at valuation in the instant case.

(b) That his Honour erred in law in excluding from consideration the resumption settlements in a case where the respondent was a party to those settlements and in failing to take into consideration the settlements not as comparable sales but as evidence against the respondent as to the value of comparable land.

ORDERS SOUGHT:- That the matter be remitted to the Land & Environment Court for a further assessment of compensation taking into account the foregoing matter and limited to the evidence already given and costs. Appeal papers will be settled on the ~~17th~~ day of ~~June~~ 1982 at ~~10.15 a.m.~~ in the Registry of the Court of Appeal (L.S.)

To the Cross Respondent: Housing Commission of New South Wales,

THE SUPREME COURT OF NEW SOUTH WALES
COURT OF APPEAL
NO. 6
AMENDED NOTICE OF CROSS-APPEAL
4 JULY, 1983

	C/- H.K. Roberts, Crown Solicitor, Goodsell Building, Chifley Square, Sydney. Tel. 238-7363
Cross Appellants:	Tatmar Pastoral Co. Pty. Limited and Penrith Pastoral Co. Pty. Limited.
Solicitor:	Dare Reed, Solicitors, 25 Bligh Street, Sydney, Phone: 232-1111
Cross Appellants' Address for Service:	C/- Dare Reed, Solicitors, 25 Bligh Street, Sydney, Phone: 232-1111
Address of Registry:	Court of Appeal Registry, Supreme Court, Law Courts, Queen's Square, Sydney.

DATED: ~~4th May, 1982.~~
4 July 1983

(sgd) R V Miller

Russell Victor Miller a partner ~~A solicitor employed in the~~ ~~office~~ of Dare Reed, solicitors for the Cross Appellants.

Filed: ~~4/5/82~~

THE SUPREME COURT OF NEW SOUTH WALES
COURT OF APPEAL
NO. 7
REASONS FOR JUDGMENT OF HIS HONOUR, MR. JUSTICE HUTLEY
28 AUGUST, 1983

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

C.A. 133 of 1982
L. & E. 30115 of 1980

CORAM: HUTLEY, J.A.
SAMUELS, J.A.
MAHONEY, J.A.

MONDAY, 29TH AUGUST, 1983

HOUSING COMMISSION OF NEW SOUTH WALES -v- TATMAR PASTORAL CO. PTY. LIMITED and PENRITH PASTORAL CO. PTY. LIMITED

TATMAR PASTORAL CO. PTY. LIMITED and PENRITH PASTORAL CO. PTY. LIMITED -v- HOUSING COMMISSION OF NEW SOUTH WALES

JUDGMENT

HUTLEY, J.A.: This is an appeal and cross-appeal from a judgment of Cripps, J., in the Land and Environment Court given on 17th March, 1982. The appeal is a Class 3 Appeal and the appellant and cross-appellants each have to find a question of law relevant to the challenge which each wishes to make. The respondents and cross-respondent each challenged the other's alleged question of law.

The facts from which the appellant sought to extract its question of law may be summarised as follows:

The valuers called by the respondents, Messrs. Alcorn and Parkinson, began their analyses of the proper value of the resumed property, Tatmar, by taking the sale of an adjoining property called "Kulnamock", which had taken place on 25th May, 1973, a short time prior to the resumption of the subject property in August, 1973.

"Kulnamock" was a smaller property and, from the point of view of residential development, an inferior property to Tatmar and it was necessary to make a number of adjustments. Before either property could be available for residential development, considerable drainage works were required; creeks flowed through both properties, their banks were eroded and the silt needed to be removed from the bed. Relatively, the amount of work of this nature required for Kulnamock was greater than the work required for Tatmar. At the time of the sale of Kulnamock, none of this work had been done.

The price fixed for Kulnamock was not on the basis of its use as a grazing property, but had regard to its potential for residential development, even though the existing zoning precluded such development. It was, therefore, assumed by the valuers that any purchaser would, in fixing the price, have had regard to the restoration work which would have been needed. As the quantity of such work on an area basis was higher for Kulnamock than would be required for Tatmar, the valuers made a differential in favour of Tatmar to allow for the lower expenditure which would be required.

The appellant called an expert witness, a Mr. Talbot, who gave evidence to the effect that it was the policy of the Penrith Council, when land was to be released for residential purposes, to carry out a portion of this work itself and to spread the cost for the whole

of the released area at so much per lot expected to be made available by the release, irrespective of the actual cost in respect of any one block. This, he explained, was a Council policy and at the time of hearing it had not been departed from.

The effect of this evidence, if accepted, would have to considerably reduce the advantages of Tatmar and improve the position of the owners of Kulnamock. Assuming that this Council policy was known to the purchasers of Kulnamock, they must be taken to have made a lower allowance in deciding to fix their purchase price for works than had been provided in the estimates of the valuers called by the respondents. The exact amounts involved in this adjustment do not appear, but counsel for the appellant assured the Court that the amount was substantial and the issue could not be dismissed as merely trivial.

The above summary over-simplifies the factual situation but it is sufficient to raise the issue urged by the appellant. It submits that in failing to deal explicitly with the issues so presented, Cripps, J., produced a judgment which contains an error of law. For this, the appellant relies principally upon the judgments of the Court of Appeal in the case of Pettitt v. Dunkley (1971) 1 N.S.W.L.R. 376. The facts of that case were very special. It had one similarity to this case, namely, the only appeal from the decision of the

trial Judge in the District Court was on a question of law. The Judge gave no reasons for finding for the defendant, despite the fact that on any view of the facts there must have been a verdict for the plaintiff as a victim of a traffic accident, albeit, reduced for contributory negligence. It was indeed a hard case and appeared to deprive the appellant of her statutory right to appeal for error of law. Asprey, J.A., said at p. 382:-

> "... the authorities to which I have referred and the other decisions which are therein mentioned establish that where in a trial without a jury there are real and relevant issues of fact which are necessarily posed for judicial decision, or where there are substantial principles of law relevant to the determination of the case dependent for their application upon findings of fact in contention between the parties, and the mere recording of a verdict for one side or the other leaves an appellate tribunal in doubt as to how those various factual issues or principles have been resolved, then, in the absence of some strong compelling reason, the case is such that the judge's findings of fact and his reasons are essential for the purpose of enabling a proper understanding of the basis upon which the verdict entered has been reached, and the judge has a duty, as part of the exercise of his judicial office, to state the findings and the reasons for his decision adequately for that purpose. If he decides in such a case not to do so, he has made an error in that he has not properly fulfilled the function which the law calls upon him as a judicial person to exercise and such a decision on his part constitutes an error of law."

His Honour's judgment would appear to confine the principle to the deliberate withholding of reasons by a Judge which does not apply here.

Manning, J.A., who agreed with Moffitt, J.A., said:-

> "... if it can be established that a judge has failed or declined to give any (my emphasis) reasons for his decision in circumstances where there was a judicial duty, express or otherwise to do so, there has been an error of law."

Moffitt, J.A., based the duty of a Judge upon the existence of a right of appeal, saying:-

> "Although some observations made may suggest that reasons are desirable for the information of parties (Brittingham v. Williams (1932) V.L.R. 237 at p. 239), I do not think there is any judicial duty to give reasons except so far as such duty can be related to a right of appeal."

Conceding that there were cases where no reasons need be given, he said:-

> "... if a case involves mixed questions of fact and law and is such that once the facts are determined in a particular way or ways its resolution will involve some considerations of law, it is the duty of the judge, unless there are exceptional circumstances, to give some indication of the basis of his decision. The purpose of so doing, of course, is directed to indicating his decision on the law either directly or by inference from the facts he has found."

and concluded that a new trial should be ordered:-

> "Where it has been a failure for whatever reason to perform the judicial duty to give reasons, so that a litigant is denied the right which he has to correct on appeal an error of law, there has been a miscarriage of justice and an error of law which, in an appropriate case, can provide the ground in the Court of Appeal for ordering a new trial." (p. 392).

It was submitted that the appellant had the right to have findings so explicit that it would know whether the decision was based on fact or law. This is an extension of the principles enunciated in Pettitt v. Dunkley and, in my opinion, that case should be confined

to the special case where there are no reasons, or a mere caricature of reasons, on an issue depending upon a view of the law. Cripps, J.'s detailed judgment is sufficiently voluminous for any purpose. The extent to which a Court must go in giving reasons is incapable of precise definition. A Court must not nullify rights of appeal by giving no or nominal reasons, but there is no duty to expound reasons so as to facilitate appeals. This applies particularly to the situation where a Judge has to decide between conflicting witnesses, including experts. The choice between conflicting experts may have to be a matter of judgment, not of detailed reasoning.

I am unable to see what issue of law the appellant was deprived of having dealt with by this Court by the fact that his Honour did not specifically pronounce on whether he accepted the evidence as to the policy of the Penrith Council or not. If he accepted the evidence, it could have diminished the compensation payable, but would not necessarily have done so, as he would have had to give weight to the possibility that the policy might be changed or not survive scrutiny on review. The material having been admitted into evidence, what was done with it was a decision of fact. I am unable to see how any question of law could be extracted from any decision that might be made.

It must be shown, in my opinion, that the finding

of fact which it is submitted was not made, if made, would have given rise to a question of law upon which an appellate Court would have ordered a new trial of the proceedings. The appeal should be dismissed with costs.

The subject land was affected by the Sydney Region Outline Plan (SROP) prepared in 1968, as a guide for the release of land zoned for non-urban purposes for urban purposes up to the year 2,000. This plan had no statutory force, but, as a guide for the authorities concerned with the release of land for urban purposes, it had a vital effect upon the value of land at the time of resumption. Having no statutory force, it appears to have been relatively easy to bend. At the time of resumption, according to the SROP, Tatmar was what was called "unphased" land, that is, according to the plan, not intended to be released before 2,000. It was, however, in 1973, recognised as land suitable for subdivision for residential purposes, in that its physical condition and proximity to necessary services, such as power and water, made it relatively easy to develop it for this purpose. The Housing Commission, a body with political power and land hungry, began to take an interest in it. Its owners and others were pressing for its release so that they could develop it.

The cross-appellants, like the appellant, have the task of finding an error of law upon which to found

their cross-appeal. It is submitted on their behalf that the error consists in the failure to consider alternative methods of valuation which were open on the evidence. It is an error in law to choose a wrong principle of valuation or to reject without rational reasons relevant evidence.

The cross-appellants invoke the statement of Lord Russell of Killowen in Melwood Units Ltd. v. Main Roads Commissioner (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."

It is alleged that the trial Judge rejected a transaction as irrelevant. The valuers of all parties initially based their valuations on the sale of a property known as Kulnamock, which was unphased land, as was Tatmar. In the course of the proceedings, it became clear that as between the Housing Commission and the S.P.A. there was an understanding that the release of Tatmar could be expected as development could not be resisted, his Honour found:-

> "In my opinion, the Housing Commission believed and believed on reasonable grounds, that the land would be rezoned within 10 to 15 years. It was supported in this view by its understanding of the general market, by investigations made by it

and by the representations made to it by officers of the S.P.A. I do not think the Housing Commission ignored the risk that the land might never be re-zoned or that it might not be re-zoned within the 10 to 15 years but that it viewed such risks as minimal."

Even if the Housing Commission was the only body which had the opportunity to effect re-zoning, it was accepted by the trial Judge that he must value in accordance with that chance. This meant that for the valuation of the resumed land it was in a position akin to some degree to phased land, though not fully assimilated to it.

It was contended that this confidence of the Housing Commission only came to light in the course of the hearing and that, therefore, the reliance upon the Kulnamock sales by the cross-appellants' valuers should have been disregarded and that the proper comparable values were provided by values of land at North Orchard Hills, land which was phased land and which had a higher value than Kulnamock. One of the valuers, Parkinson, gave the following evidence:-

"HEMMINGS: Q: You say an investigation of sales located in nearby areas proposed for urban release under the Sydney Region Outline Plan indicate a relative higher rate per unit of area than sales of land near the subject resumed land?

"PARKINSON: A: Yes.

"Q: What do you mean by that?

"A: The Orchard Hills area which is shown as proposed for release in the 1980/1990 period, showed when I looked at them about $14,000, $15,000 per acre; whereas the sales in this area showed a lower level of value.

"Q: If the subject land had a clearly identified time for release for urban purposes, would you have assigned a different value than the one that you deduced from the exercise that you carried out and applied in this case?

"A: Yes, I would have been inclined to disregard the resumption of prices and look more closely at the Orchard Hills prices."

Within limits, the decision as to what sales are comparable is a question of fact. There will rarely be an absolutely comparable sale. The position of Tatmar was anomalous. It was not phased, but, also qua the Housing Commission, not truly unphased land. As such, I cannot see that his Honour was disentitled, as a matter of law, to treat sales of unphased lands as comparables, making the appropriate adjustments for early release.

The trial Judge had to weigh competing factors - the effectiveness of the SROP, the effectiveness of the pressures for the release of the subject land for residential development in spite of the classification of the SROP, the adjustments to be made to actual sales of land, both phased and unphased, and the estimates of valuers as to the time at which Tatmar and lands which were produced as comparable could be expected to be released. The sale price of phased land might be relevant to the valuation of unphased land and vice versa. Though he did not rely on the estimates of value of phased land (North Orchard Hills) to the extent which the cross-appellants desire, there is nothing to suggest

that he rejected consideration of it. As Tatmar remained technically unphased, though likely to be released within 10 to 15 years of 1973, it cannot, in my opinion, be said that he acted irrationally, or failed to give effect to any principle of valuation in not basing his assessment on estimates of the value of comparable phased land.

The cross-appeals should be dismissed with costs, costs to be set off. For the information of the Taxing Officer, the times devoted to the appeals and cross-appeals were approximately equal.

I certify that this and the preceding 10 pages are a true record of his Honour's Reasons for Judgment.

K. Carron
Associate

29/8/83

THE SUPREME COURT OF NEW SOUTH WALES
COURT OF APPEAL
NO. 8
REASONS FOR JUDGMENT OF HIS HONOUR
MR. JUSTICE SAMUELS
28 AUGUST, 1983

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

C.A. 133 of 1982
L. & E. 30115 of 1980

CORAM: HUTLEY, J.A.
SAMUELS, J.A.
MAHONEY, J.A.

MONDAY, 29TH AUGUST, 1983

HOUSING COMMISSION OF NEW SOUTH WALES v. TATMAR PASTORAL CO. PTY. LIMITED and PENRITH PASTORAL CO. PTY. LIMITED

TATMAR PASTORAL CO. PTY. LIMITED and PENRITH PASTORAL CO. PTY. LIMITED v. HOUSING COMMISSION OF NEW SOUTH WALES

JUDGMENT

SAMUELS, J.A.: I agree in the judgment of Hutley J.A. and with the orders he proposes.

I Certify that this is a true copy of the reasons for judgment herein of The Honourable Mr. Justice Samuels.

M. Anderson

Date 29/8/83 Associate

THE SUPREME COURT OF NEW SOUTH WALES
COURT OF APPEAL
NO. 9
REASONS FOR JUDGMENT OF HIS HONOUR, MR. JUSTICE MAHONEY
28 AUGUST, 1983

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

C.A. 133 of 1982
L. & E. 30115 of 1980

CORAM: HUTLEY, J.A.
SAMUELS, J.A.
MAHONEY, J.A.

MONDAY, 29TH AUGUST, 1983

HOUSING COMMISSION OF NEW SOUTH WALES v. TATMAR PASTORAL CO. PTY. LIMITED and PENRITH PASTORAL CO. PTY. LIMITED

TATMAR PASTORAL CO. PTY. LIMITED and PENRITH PASTORAL CO. PTY. LIMITED v. HOUSING COMMISSION OF NEW SOUTH WALES

JUDGMENT

MAHONEY, J.A.: Certain land owned by the respondent companies was resumed for the purposes of the Housing Commission of New South Wales. The hearing before the Land and Environment Court was concerned with the quantification of the compensation to be paid upon the resumption. Cripps J. quantified the compensation. The Commission has appealed against his Honour's judgment and the companies have cross-appealed. There is a right of appeal only in the case of an error of law.

1. The Commission's appeal:

The appeal has been confined to one point: whether the learned judge erred in law because, as it is submitted, he did not deal in appropriate terms with one of the matters relevant to his determination. The submission is based upon Pettitt v. Dunkley (1971) 1 N.S.W.L.R. 376.

The question with which, as it is submitted, the learned judge did not properly deal may be stated in the following way. The learned judge was required to determine the value, at the relevant time, of the land which was resumed. Each party called expert witnesses as to valuation. The learned judge accepted, in substance, the evidence of a valuer called by the companies, Mr. Alcorn. Mr. Alcorn approached the question of valuation of the land by reference to the sale of, as it has been conveniently described, the Kulnamock land. That land was sold in 1973. Mr. Alcorn adopted the sale price of the land as a comparable sale, made adjustments to it, and from that fixed the value of the subject land. One of the adjustments made was in respect of a repair factor. This adjustment was required because the subject land was valued upon the basis that its best and highest use was for residential purposes. A purchaser for that purpose would have taken into account, inter alia, the cost to be incurred in putting the land in a condition appropriate for the purpose. There is no issue between the parties but that, in valuing the land upon the basis adopted by Mr. Alcorn, it was necessary to take this matter into account.

The difference between the parties, in respect of which the appeal is brought, relates to the way in which that matter was taken into account. A valuer called by the Commission, Mr. Talbot, gave evidence as to the

suggested "policy" of the local council. Mr. Talbot said that it was the policy of the council in certain circumstances not to allow development of land of the relevant kind unless certain drainage work was done on it by the council at the developer's expense. The effect of the application of that "policy" might be that the cost of the work to be borne by a developer might be less than if he himself had to carry it out. Mr. Talbot was of the view that this difference should, as such, be taken into account in valuing the land.

The learned judge did not deal in terms with the way in which the repair factor should be taken into account. He determined the value of the land by adopting the valuation made by Mr. Alcorn. Mr. Alcorn did not deal with the repair factor in the way in which it was dealt with by Mr. Talbot and, in particular, he did not deal with it in a way which involved a separate assessment of the likely effect of the "policy" which, as Mr. Talbot suggested, the council had. It was on this that the Commission relied to ground its appeal.

The Commission conceded that the learned judge could, as he did, adopt Mr. Alcorn's evidence in preference to that of Mr. Talbot and that, in general, he gave appropriate reasons for doing so. But, it was submitted, Mr.Alcorn and Mr. Talbot differed upon this aspect of the repair factor. In adopting Mr. Alcorn's evidence, the judge adopted his way of dealing with this

in preference to Mr. Talbot's. But, it was submitted, it is not merely enough to adopt the one rather than the other: the judge should have said why he did so. His failure to do so was, it was submitted, an error of law.

In order to determine this submission, it is necessary to consider what is the duty of a judge in this regard and whether the learned judge, in this case, discharged that duty.

There is, in my opinion, an established course of decision in this State that, in certain circumstances, it is the duty of the judge to state his reasons for deciding as he does and that his failure to do so may constitute an error of law: see, for example, Wright v. Australian Broadcasting Commission (1977) 1 N.S.W.L.R. 697; McCarroll v. Fitzmaurice (1979) 2 N.S.W.L.R. 100. The view that such a duty may exist has been adopted in other States: see, for example, Watson v. Anderson (1976) 13 S.A.S.R. 329; and in the Federal Court of Australia; Australian Timberworkers Union v. Monaro Sawmills Pty. Limited 42 F.L.R. 369 at 374, 380. Counsel have informed the court that there is no decision of the High Court of Australia in which the question has been considered. The matter has been referred to in the English courts: see, for example, The Queen v. Immigration Appeal Tribunal, ex parte Khan (1983) 2 W.L.R. 759 at p. 762-3.

See generally the cases collected in University of Toronto Law Journal (1983) 1.

However, such a duty does not exist in respect of every matter, of fact or of law, which was or might have been raised in the proceeding. It is not the duty of the judge to decide every matter which is raised in argument. He may decide a case in a way which does not require the determination of a particular submission: in such a case he may put it aside or, as Lord Scarman said, merely salute it in passing: The Queen v. Barnet London Borough Council, ex parte Shah (1983) 2 W.L.R. 16 at p.32. A judge will, of course, appreciate the possibility of points being taken or decided on appeal which were not taken or decided below and for this reason he may decide, and give reasons for his decision on, matters which in strictness he need not decide.

However, the decision of a particular submission may be an essential part of the judge's reasoning to his final conclusion. This may be so because it is necessarily so, i.e., because he cannot come to his final conclusion without deciding it; or because the reasoning which in fact he follows makes it so. In such a case, the duty of the judge will vary according to the way in which the case has been conducted and according to the reasoning which he has followed. Ordinarily he may confine his attention to the points which have been taken and the submissions made in relation to them.

(I put aside cases involving, for example, constitutional

or jurisdictional issues, where special considerations may apply). In my opinion, it is not open to a party on appeal to complain that reasons were not given for the decision of a matter of fact or law which was, or must have been, decided, if the matter was not the subject of submissions made to the court below in a way which called for a reasoned consideration of them.

In determining whether, in a particular case, there is a duty to give reasons and the extent of it, regard should, in my opinion, be had to the function to be served by the giving of reasons. Thus, the statement of reasons may be necessary to enable a party to exercise his right of appeal or such other rights as he may have to contest the decision: this is one of the conventional functions of the requirement: see Pettitt v. Dunkley (supra) at p.387-8. But, in my opinion, the requirement that reasons be given should not be limited to cases where there is an appeal. There is as yet no finally authoritative decision on this question. I think that the requirement should be seen as an incident of the judicial process. However, the fact that the function of the requirement is, at least in part, to allow a party to exercise appeal rights is of significance in determining the extent of the duty and what will be a discharge of it. Thus, in some cases where ordinarily an appeal is not contemplated, there may not be a need for reasons. Thus, in England, it has been

said that reasons need not be given in certain procedural applications: see Capital and Suburban Properties Ltd. v. Swycher (1976) Ch. 319 at p. 325-6. In such cases, and in cases of, e.g., application for leave, where the considerations of fact and law are clear, reasons need not ordinarily be given.

Nor is it necessary for a judge who is exercising a discretionary judgment to detail each factor which he has found to be relevant or irrelevant, or to itemise, for example, in the assessment of damages for tort, each of the factual matters to which he has had regard: see O'Hara v. Evans, Court of Appeal, 23rd September, 1976, not reported; Colacicco v. Colacicco, Court of Appeal, 15th March, 1977, not reported. The Privy Council has said that, in criminal matters, it is not necessary for a judge to refer in his judgment to every possible defence: he may, for example, consider a defence "too plain for argument" and put it aside: see Mohamad Kunjo v. Public Prosecutor (1979) A.C. 135 at p.142. Nor is a judge required to make an explicit finding on each disputed piece of evidence. It will be sufficient if the inference as to what is found is appropriately clear: see Selvanayagam v. University of the West Indies (1983) 1 W.L.R. 585 at p. 587-8.

But, subject to matters such as these, the basis of the decision of a trial judge or of an intermediate court of appeal should be made apparent. This does not

mean that the reasons given need be elaborate: an elaborate argument may not require an elaborate answer. Reasons need be given only so far as is necessary to indicate to the parties why the decision was made and to allow them to exercise such rights as may be available to them in respect of it.

I come now to consider whether the learned judge discharged this duty in the present case. To do this it is necessary to refer again to the course he followed in deciding the issues placed before him. The learned judge adopted the approach taken by Mr. Alcorn to the valuation of the land. Mr. Alcorn's approach did not, I think, involve that the effect of the suggested "policy" of the council upon the cost of the work to be done on the land be determined with precision. Mr. Alcorn took the sale price of the Kulnamock land, decided that the subject land was "better than" that land by twenty-five per cent, and with certain adjustments arrived at the value of it accordingly.

The difference between Mr. Alcorn and Mr. Talbot was a difference in methods of valuation, not a difference in respect of the adoption or non-adoption of the calculations to which Mr. Talbot referred. On Mr. Alcorn's approach, they did not arise for consideration.

Mr. Officer, in his argument in reply on this point, suggested that if this was so, Mr. Alcorn's approach was wrong in law. I do not think that this is

so. Mr. Alcorn was required to determine how the repair factor would or might be taken into account by the hypothetical vendor and purchaser in fixing the price each would give or take. In a context such as the present, it was, in my opinion, open to him to conclude, as I think he did, that they would not, in fixing that price, calculate in detail the difference in the cost of the relevant work if done by the council or by the developer and then discount that difference for the uncertainties affecting it. I do not think that any error of principle was involved in concluding, as I think he did, that they would approach the matter in the broader fashion adopted by him. Even if Mr. Alcorn's approach was wrong in principle, it is, of course, not that error in respect of which the present appeal is brought.

In my opinion therefore the appeal should fail.

2. Cross-Appeal:

The cross-appellant's submission was, in substance, that the learned judge made an error of law in the principles of valuation which he adopted. The argument took its starting point from the different principles which, as it was suggested, should be applied in respect of land phased for release for residential purposes and land not so phased. "Phased land", as it was described, was land in respect of which a date had been fixed for its release for residential use. It was said

that two approaches could properly be adopted to the valuation of such land. An assessment could have been made of its value when released and that value discounted to obtain its value at the time of the resumption of the subject land; or a market value could be determined for comparable "phased land" as at the date of that resumption. As to "non phased land", it was submitted that the proper basis of valuation was to determine the market value of similar non phased land at the date of the resumption.

The learned judge held that the relevant parties knew that the subject land, though not formally phased for release, would probably be released within ten to fifteen years and that the risk of their being wrong in this was small. This being so, it was submitted that the land should have been valued as if it was "phased land". His Honour did not do that: he valued it as "non phased land". He took the market value of the Kulnamock land as the basis of his valuation and the Kulnamock land was not, at the time of its sale, phased for release. It was submitted that his Honour was therefore wrong in law.

I do not think that there was involved in this any error of law. In particular, I do not think that the fact that, as his Honour held, the hypothetical vendor and purchaser would at the relevant time have thought that the subject land would have been released

in ten to fifteen years had the result that the Kulnamock sale was not a comparable sale or a proper basis from which to derive the value of the subject land. His Honour dealt with this matter in his judgment. He said:

> "I was impressed by Mr. Alcorn's approach. He adopted the traditional approach of applying a comparable sale. His analysis of the Kulnamock sale led him to a number of assumptions. As it turned out, almost all of these were accepted and acted on by the Housing Commission itself in 1973. I have already referred to the various memoranda and opinions of senior officers of the Housing Commission (including the Chairman, Mr. Bourke) and members of the S.P.A. The assumptions made and opinions held by the Housing Commission were those that would, in Mr. Alcorn's view, have been made and held by informed and intelligent developers in 1973. Further, I accept Mr. Alcorn's evidence (supported as it is by almost everyone else) that nobody would have considered that there would have been any problem in relation to water, sewerage and drainage in the sense that there would have been any abnormal expense."

His Honour was, I think, of the view that the purchaser of the Kulnamock land, in fixing the price for it, had acted on an assumption as to the release of that land comparable to that to be made in respect of the subject land. This being so, I do not think that the learned judge was wrong in adopting, as Mr. Alcorn did, the Kulnamock sale as a comparable sale.

I agree with the orders which have been proposed.

I hereby certify that this and the preceding 10 pages are a true copy of the reasons for judgment herein of His Honour Mr. Justice Mahoney.

J. Mitchell
Associate

Date: 29/8/83

IN THE SUPREME COURT OF NEW SOUTH WALES

SYDNEY REGISTRY

COURT OF APPEAL DIVISION

C.A. 113 of 1982
L. & E. 30115/1980

HOUSING COMMISSION OF NEW SOUTH WALES

Appellant

TATMAR PASTORAL CO. PTY. LIMITED and PENRITH PASTORAL CO. PTY. LIMITED

Respondents

TATMAR PASTORAL CO. PTY. LIMITED and PENRITH PASTORAL CO. PTY. LIMITED

Cross-Appellants

HOUSING COMMISSION OF NEW SOUTH WALES

Cross-Respondent

O R D E R

THE COURT ORDERS THAT:

1. The Appeal be dismissed with costs.

2. The Cross-Appeal be dismissed with costs.

3. The costs be set off.

Ordered: 29th August 1983

Entered: 24 November, 1983

By the Court

(SGD.) G.J. BERECRY (L.S.)

Acting Registrar

THE SUPREME COURT OF NEW SOUTH WALES
COURT OF APPEAL
NO. 11
CONDITIONAL ORDER GRANTING LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL
19 SEPTEMBER, 1983

IN THE SUPREME COURT OF NEW SOUTH WALES

SYDNEY REGISTRY

COURT OF APPEAL
DIVISION

C.A. 113 of 1982
L. & E. 30115/1980

HOUSING COMMISSION OF NEW SOUTH WALES

Appellant

TATMAR PASTORAL CO. PTY. LIMITED and PENRITH PASTORAL CO. PTY. LIMITED

Respondents

TATMAR PASTORAL CO. PTY. LIMITED and PENRITH PASTORAL CO. PTY. LIMITED

Claimants

HOUSING COMMISSION OF NEW SOUTH WALES

Cross-Respondent
Opponent

ORDERS

THE COURT ORDERS THAT:

1. Conditional leave to appeal to Her Majesty in Council from part of the judgments and order of this Court given and made on 29th August, 1983 be granted to Tatmar Pastoral Co. Pty. Limited and Penrith Pastoral Co. Pty. Limited (the Cross-Appellants), subject to the following conditions:

(a) that Tatmar Pastoral Co. Pty. Limited and Penrith Pastoral Co. Pty. Limited do, within three (3) months of the date hereof, give security to the satisfaction of the Registrar in the amount of $1,000 for the due prosecution of the said appeal and the payment of all such costs as may become payable to the Housing Commission of New South

Wales in the event of Tatmar Pastoral Co. Pty. Limited and Penrith Pastoral Co. Pty. Limited not obtaining an order granting them final leave to appeal from the said judgment and order or of the appeal being dismissed for non prosecution or of Her Majesty in Council ordering Tatmar Pastoral Co. Pty. Limited and Penrith Pastoral Co. Pty. Limited to pay the Housing Commission of New South Wales costs of the said appeal, as the case may be;

(b) that Tatmar Pastoral Co. Pty. Limited and Penrith Pastoral Co. Pty. Limited do within fourteen (14) days of the date hereof deposit with the Registrar the sum of $50.00 as security for and towards the costs of the preparation of the transcript record for the purposes of the said appeal;

(c) that Tatmar Pastoral Co. Pty. Limited and Penrith Pastoral Co. Pty. Limited do within three (3) months of the date hereof take out and proceed upon all such appointments and take all such other steps as may be necessary for the purpose of settling the index to the transcript record and enabling the Registrar to certify that the said index has been settled and that the conditions herein

before referred to have been duly performed.

(d) finally that Tatmar Pastoral Co. Pty. Limited and Penrith Pastoral Co. Pty. Limited do obtain a final order of this Court granting it leave to appeal as aforesaid.

2. The costs of all parties to this application of Tatmar Pastoral Co. Pty. Limited and Penrith Pastoral Co. Pty. Limited and of the preparation of the said transcript record and of all other proceedings hereunder and of the said final orders do follow the decision of Her Majesty's Privy Council with respect to the costs of the said appeal or do abide the result of the said appeal in case the same shall stand or be dismissed for non-prosecution or be deemed so to be subject however to any orders that may be made by this Court up to and including the said final orders or under any of the Rules next hereinafter mentioned that is to say Rules 16, 17, 20 and 21 of the Rules of the 2nd Day of April, One Thousand Nine Hundred and Nine regulating appeals from this Court to Her Majesty in Council.

3. The costs incurred in New South Wales payable under the terms hereof or under any order of Her Majesty's Privy Council by either party to this Appeal be taxed and paid to the party to whom the same shall be payable.

THE SUPREME COURT OF NEW SOUTH WALES
COURT OF APPEAL
NO. 11
CONDITIONAL ORDER GRANTING LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL
19 SEPTEMBER, 1983

4. So much of the said costs as become payable by Tatmar Pastoral Co. Pty. Limited and Penrith Pastoral Co. Pty. Limited under this order or any subsequent order of the Court or any order of the Court made by Her Majesty in Council in relation to the said appeal may be paid out of any moneys paid into Court as such security as aforesaid so far as the same shall extend AND that after such payment out (if any) the balance (if any) of the said moneys be paid out of Court to Tatmar Pastoral Co. Pty. Limited and Penrith Pastoral Co. Pty. Limited.

5. Each party to be at liberty to restore this matter to the list upon giving seven (7) days' notice thereof to any other party for the purpose of obtaining any necessary rectification or modification of this order.

ORDERED: 19th September, 1983 and

ENTERED: 10 October 1983.

By the Court

(SGD.) G.J. BERECRY (L.S.)
.....
~~Deputy~~ Registrar
Acting

THE SUPREME COURT OF NEW SOUTH WALES
COURT OF APPEAL
NO. 12
ORDER GRANTING FINAL LEAVE TO APPEAL
TO HER MAJESTY IN COUNCIL
12 DECEMBER, 1983

IN THE SUPREME COURT OF NEW SOUTH WALES

SYDNEY REGISTRY

Court of Appeal Division

C.A. 113 of 1982
L. & E. 30115/1980

HOUSING COMMISSION OF NEW SOUTH WALES

Appellant

TATMAR PASTORAL CO. PTY. LIMITED and PENRITH PASTORAL CO. PTY. LIMITED

Respondents

TATMAR PASTORAL CO. PTY. LIMITED and PENRITH PASTORAL CO. PTY. LIMITED

Claimants

HOUSING COMMISSION OF NEW SOUTH WALES

Cross-Respondents Opponent

ORDER

THE COURT ORDERS THAT:-

1. Final leave to appeal to Her Majesty in Council from the Judgment of this Court on 29th August, 1982, be and the same is hereby granted to the Claimants.

2. Upon the payment by the Claimants of the costs of preparation of the Transcript Record and despatch thereof to England the sum of Fifty Dollars ($50.00) deposited in the Court by the Claimants as security for and towards the costs thereof be paid out of Court to the Claimants.

Ordered: 12th December 1983

Entered: 15 December 1983

By the Court

(SGD.) G.J. BERECRY (L.S.)

Acting Registrar

THE SUPREME COURT OF NEW SOUTH WALES
COURT OF APPEAL
NO. 13
CERTIFICATE OF REGISTRAR OF THE COURT OF APPEAL OF THE SUPREME COURT OF NEW SOUTH WALES VERIFYING THE TRANSCRIPT RECORD OF PROCEEDINGS

CERTIFICATE OF THE ACTING REGISTRAR OF THE COURT OF APPEAL OF THE SUPREME COURT OF NEW SOUTH WALES VERIFYING THE TRANSCRIPT RECORD OF PROCEEDINGS

I, GRAHAME JAMES BERECRY, Acting Registrar of the Court of Appeal of the Supreme Court of New South Wales DO HEREBY CERTIFY as follows:-

That this transcript record contains a true copy of all such Orders, Judgments and documents as have relation to the matter of this Appeal and a copy of the reasons for the respective Judgments pronounced in the course of the proceedings out of which the Appeal arose.

That the Respondent herein has received notice of the Order granting Final Leave to appeal to Her Majesty in Council AND has also received notice of the dispatch of this transcript record to the Registrar of the Privy Council.

DATED at Sydney in the State of New South Wales this 22nd day of March One thousand nine hundred and eighty-four.

G.J. Berecry

Acting Registrar of the Court of Appeal of the Supreme Court of New South Wales.