Appl Universal Land & Investment Ltd v Cth (1988) 80 ACTR 15
Foll Service Design v Commissioner of Highways 59 LGRA 176
Cons Redwood Court Pty Ltd v Roads Corporation (1992) 76 LGRA 358
Appl Claire Lock Gold Pty Ltd v State Planning Comission (1995) 14 SR(WA) 239
Cons 15 Lorimer Street Pty Ltd v Department of Infrastructure (1997) 97 LGERA 239
Appl Valentini v City of Salisbury (1997) 69 SASR 332
Refd to Vicgrain Assets Pty Ltd v Yarriambiack SC (1999) 102 LGERA 345
Appl Lake Macquarie CC v Luka (1999) 106 LGERA 94
Foll Adelaide CC v City of Port Adelaide Enfield (2000) 110 LGERA 153

[HIGH COURT OF AUSTRALIA.]

TURNER AND ANOTHER . . . . APPELLANTS;
PLAINTIFFS,

AND

MINISTER OF PUBLIC INSTRUCTION . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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1955, SYDNEY, *Nov.* 14-16;

1956, MELBOURNE, *Feb.* 29.

Dixon C.J., Williams, Fullagar, Kitto and Taylor JJ.

Valuation—Residential allotments—Land suitable for sale in sub-division—Resumption—Principles of valuation—Risk of realisation—Valuation of Land Act 1916-1951 (*N.S.W.*), *ss.* 5, 6, 68—*Public Works Act* 1912 (*N.S.W.*), *s.* 124—*Land and Valuation Court Act* 1921-1940 (*N.S.W.*), *ss.* 9 (1), 17.

A parcel of unimproved land, having no special value to the owner, was resumed under the *Public Works Act* 1912 (N.S.W.). The most advantageous method by which it might have been realised if it had not been resumed was sale in sub-division, but at the date of resumption it had not been sub-divided. In order to value it for compensation, the Judge of the Land and Valuation Court adopted the hypothesis of a sale *in globo* to a purchaser buying with a view to sub-dividing and selling in sub-division. To find the price it would fetch on such a sale, he estimated the probable gross proceeds of sale of the several lots into which it might be sub-divided, and deducted from the total the probable expenses of sub-division, the amounts of interest and rates which would probably be incurred before realisation would be completed, and the probable expenses of selling. Questions arose as to whether two further deductions should be made. One was a deduction for what was called "risk of realisation", that is to say the risk that the gross proceeds might have been over-estimated and the expenses under-estimated. The other was a deduction representing the amount of profit which a purchaser would expect to make by buying the land as one block and re-selling it in sub-division. The Judge held that the first of these deductions should be made but not the second. On a case stated, the Supreme Court of New South Wales held that both should be made. On appeal to the High Court,

Held, by *Dixon* C.J., *Fullagar*, *Kitto* and *Taylor* JJ. that in valuing upon the hypothesis above-mentioned it was necessary to make both the questioned deductions, in order that full allowance should be made for the fact that the

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potentiality of the land for sale in sub-division was not immediately realizable at the date of the resumption; by *Williams* J. that neither deduction should be made.

Whether questions arising in the application of a formula adopted for determining value may be a question of law, considered.

Decision of the Full Court of the Supreme Court of New South Wales: *Minister for Public Instruction* v. *Turner* (1955) 55 S.R. (N.S.W.) 310; 72 W.N. 195; 20 L.G.R. 85, affirmed.

APPEAL.

An objection to the valuation of certain land and an action against the Minister of Public Instruction for compensation for the resumption thereof were heard together before *Sugerman* J., Judge of the Land and Valuation Court of New South Wales. The objectors and plaintiffs were Christopher Bowes Thistlethwayte and Reginald Clark Turner, the trustees of the will of William Moore, deceased, and of whose estate the resumed land, being 4 acres 3 roods 11 perches in area, formed part.

In the objection *Sugerman* J. determined the improved and unimproved values at £6,000, and the assessed annual value at £300, and in the action his Honour determined the compensation at £6,000 (*Thistlethwayte* v. *The Minister* [*No.* 2] (1)).

In pursuance of s. 17 of the *Land and Valuation Court Act* 1921-1940 upon the written request of the defendant a case was stated on 12th April 1954, by *Sugerman* J. for the decision of the Full Court of the Supreme Court of New South Wales on the questions of law therein set forth.

The case so stated was substantially as follows:

1. By notification published in the Government *Gazette* of 3rd November 1950 certain land described in the schedule thereto was resumed for a public school at Bradfield and vested in the Minister of Public Instruction as constructing authority on behalf of His Majesty the King. A true copy of the said notification was thereunto annexed.

2. The plaintiffs Christopher Bowes Thistlethwayte and Reginald Clark Turner trustees of the will of William Moore deceased were at all material times the registered proprietors for an estate in fee simple of the land described in the schedule to the notification mentioned in the preceding paragraph.

3. The said Christopher Bowes Thistlethwayte and Reginald Clark Turner on 17th December 1951 made an application to the Valuer-General for a fresh valuation as at the date of resumption

(1) (1953) 19 L.G.R. 167.

of the subject land and the Valuer-General made valuations as requested as follows: improved value £4,150; unimproved value £4,150; assessed annual value £208, and on 8th January 1952 the Valuer-General furnished Christopher Bowes Thistlethwayte and Reginald Clark Turner with a certificate as aforesaid covering the subject land. On 31st January 1952 Christopher Bowes Thistlethwayte and Reginald Clark Turner lodged an objection in writing to the Valuer-General a true copy of which was thereunto annexed. Upon consideration of the objection the Valuer-General did not alter the valuation and thereupon the objection was forwarded to the Registrar of the court for determination by the court pursuant to s. 37 of the *Valuation of Land Act* 1916-1951.

(The notice of objection showed that the valuations of the subject land as made by the Valuer-General were: unimproved value £4,150; improved value £4,150; and assessed annual value £208. The trustees claimed that these valuations were too low and should be: unimproved value £8,500; improved value £8,500; and assessed annual value £405.)

4. Pursuant to the provisions of the *Land and Valuation Court Act* an action for the determination of compensation was commenced in the Supreme Court by the plaintiffs by the issue of a writ of summons against the above-named appellant and when issue was joined therein the matter was remitted to the Land and Valuation Court for determination. A copy of the issues was annexed.

(So far as material the issues alleged that the plaintiffs within ninety days of the publication of the said notification did serve upon the defendant as such constructing authority . . . and upon the Crown Solicitor a notice in writing setting forth the nature of the estate of the plaintiffs in the said lands together with an abstract of their title and the nature of the damage which they have sustained or will sustain by reason of the said resumption and the defendant duly caused a valuation of the said land to be made in accordance with the provisions of the said Act and informed the plaintiffs of the amount of the said valuation by notice in the form of the seventh schedule to the said Act . . . and more than ninety days have elapsed since the service upon the defendant and upon the Crown Solicitor by the plaintiffs of their said notice in writing and the plaintiffs and the defendant have not agreed as to the amount of compensation and the plaintiffs institute these proceedings for compensation accordingly. The plaintiffs claimed £8,500. The defendant pleaded that the plaintiffs' claim exceeded the amount to which they were entitled as compensation in respect of the premises. Issue was joined.)

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5. The action for the determination of compensation and the objection to the valuation duly came on for hearing before the court and were by consent of the parties heard together.

6. The subject land is an area of 4 acres 3 roods 11 perches situated at Bradfield. It formed part of an area of about 800 acres in that locality, belonging to the estate of the before-mentioned testator, who had died in 1911, and held by the plaintiffs upon the trusts of his will as varied by orders made by the Supreme Court in its equitable jurisdiction on 21st October 1927, 30th November 1928 and 13th December 1934 respectively. By the said trusts varied as aforesaid the plaintiffs were empowered to sell the trust lands or any part thereof in sub-division or otherwise. Before the time of resumption the plaintiffs had planned roads traversing the whole of the said area of 800 acres and had either themselves or in conjunction with the Ku-ring-gai Municipal Council constructed parts of the said roads. They had also dedicated parts of the said area for public recreation and from time to time had sold parts of the said area in sub-division.

7. The subject land is good building land. At the time of resumption it was surrounded by land which (including certain contiguous land belonging to the said estate) had mostly been sub-divided and sold in residential allotments and was itself ripe for development in that manner. But the plaintiffs had not yet taken any steps to sub-divide it.

8. Sub-division of the subject land by the plaintiffs would have involved having it surveyed, obtaining the approval of the Ku-ring-gai Municipal Council, and constructing a new road. About six months, and possibly nine or ten months, must have elapsed before the land could have been placed on the market.

9. As at the time of resumption the land might well have been expected to sell readily if promptly sub-divided and placed on the market in sub-division, and to have realised a gross amount of £10,300. The expenses of sub-dividing it, including allowances for interest and rates during the period of development, might well have been estimated at £2,835, and the expenses of selling it (that is auctioneer's or agent's commission and solicitor's costs on the transfers to the purchasers) at £383.

10. The figure of £10,300 is an estimate assisted to a substantial extent by evidence now available of sales of comparable land effected after the date of resumption and the guidance they afford as to values and tendencies as at the date of resumption and as to the opinions which prudent persons, competent to form an opinion and informed as to relevant circumstances, may be expected to

have formed at that time. I can now find in the light of the said evidence mentioned above as now available that in my opinion the subject land would have realised that gross amount if it had been sold in sub-division as soon as might be after the date of resumption. But as at the date of resumption the said evidence was not available and estimate, judgment, and conjecture were then necessarily involved in any attempt to assess what the subject land might be expected to realise if sold in sub-division. I was therefore of opinion that as at that date, a prudent owner, willing but not anxious to sell, would have agreed to accept less than he might have anticipated receiving on a sale in sub-division, in return for his being relieved of the risks and contingencies attached to realisation of that anticipation by an immediate disposal of the whole of the land.

11. I was also of opinion on the evidence that the return to himself which a purchaser buying *in globo*, with a view to sub-dividing and reselling in sub-division, would have expected to make out of his venture as representing an appropriate allowance for the risk of the venture and a profit to himself would have been substantially greater in amount than the amount of any reasonable and proper allowance in respect only of the risk of realisation referred to in the preceding par. 10 hereof.

12. It was submitted by counsel for the plaintiffs that in the circumstances stated in this case the "improved value" (within the meaning of s. 5 of the *Valuation of Land Act* 1916-1951) of the subject land, and the compensation for its resumption, should be determined as being the net amount which the plaintiffs could have realised on a sale of the land in sub-division, without deduction of an allowance for risk of realisation or on any equivalent basis, but subject to a deduction of ten per cent of the estimated expenses of sub-division to provide for the contingency of an increase in costs during the period referred to in par. 8 hereof. I did not accede to the said submission. But I accepted the correctness of the amount of the deduction contended for in respect of the particular contingency mentioned, and have taken it into account as part of the allowance for risk of realisation which I have made.

13. It was submitted by counsel for the defendant that in the circumstances stated in this case the "improved value" of the subject land and the compensation for its resumption should be determined by reference to a hypothetical sale of the subject land *in globo* to a purchaser buying with a view to sub-dividing it and reselling in sub-division and prepared to pay for the subject land such a sum as would return to him out of the transaction an amount

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representing an appropriate allowance for the risk of the venture and a profit to himself. I did not accede to that submission. But if it were correct I was prepared to accept twenty-five per cent of the purchaser's outlay as a reasonable estimate of the return to him as aforesaid which such a purchaser would have expected.

14. I was of opinion that in the circumstances stated in this case the " improved value " of the subject land and the compensation in respect of its resumption should be determined with due regard to the possibility of sub-division and sale in sub-division by the owner but with appropriate and reasonable allowance for the risk of realisation. I was therefore of opinion that the said " improved value " and the said compensation might properly be determined by reference to a hypothetical sale of the whole of the subject land at a price equivalent to the net amount which the owner might have expected to realise on sub-dividing it and selling in sub-division, less such an allowance. I determined the " improved value " and the compensation, in accordance with the said opinion, at £6,000.

15. My reasons for the said opinion and for not acceding to the submissions stated in pars. 12 and 13 hereof are set out in my reasons for judgment (a copy was annexed). In the said reasons I have referred to a previous case of *Thistlethwayte* v. *The Minister* (1), in which the relevant questions of law are discussed in more detail (2).

16. The questions of law stated as aforesaid for the decision of the Supreme Court are :—

(1) In the circumstances stated in this case, and on the true construction of s. 5 of the *Valuation of Land Act* 1916-1951, was I in error in law in determining the " improved value " (within the meaning of the said section) by reference to a hypothetical sale of the subject land at a price equivalent to the net amount which the owner might have expected to realise on sub-dividing it and selling in sub-division, less only an allowance for the risk of realisation ?

(2) If " Yes " to question (1) :—In the said circumstances and on the true construction of the said section was I bound in law to determine the said " improved value " :—(i) as the net amount which the plaintiffs would have realised on a sale in sub-division, less if any deduction, only a deduction for the contingency of an increase in sub-divisional expenses ; or (ii) by reference to a hypothetical sale *in globo* to a purchaser buying with a view to sub-dividing and selling in sub-division and prepared to pay for the subject land no more than such a sum as would return to him out of the transaction an amount representing an appropriate allowance for the risk of the venture and a profit to himself ?

(1) (1953) 19 L.G.R. 87.

(2) (1953) 19 L.G.R., at pp. 94-99.

(3) In the said circumstances, and on the true construction of s. 68 of the *Valuation of Land Act* 1916-1951, and s. 124 of the *Public Works Act* 1912, was I in error in law in determining the compensation payable in respect of the resumption of the subject land as being the value of the land ascertained as stated for determining the " improved value " in question (1) ?

(4) If " Yes " to question (3) :—in the said circumstances, and on the true construction of the said sections, was I bound in law to determine the said compensation as being the value of the land ascertained :—(i) as stated for determining the " improved value " in par. (i) of question (2), or (ii) as stated for determining the " improved value " in par. (ii) of question (2) ?

Christopher Bowes Thistlethwayte, one of the trustees and a party to these proceedings, died on 12th August 1954, and by deed of appointment of new trustee dated 14th September 1954, Alan Tasman Gurr was appointed a trustee of the subject estate to act jointly with the above-mentioned Reginald Clark Turner, and he became a plaintiff-appellant in these proceedings.

The Full Court of the Supreme Court (*Roper* C.J. in Eq., *Sugerman* and *Ferguson* JJ.) answered the questions as follows :— (1) Yes ; (2) (i) No ; (ii) Yes ; (3) Yes ; (4) (i) No ; (ii) Yes (1).

From that decision the plaintiffs-trustees appealed, by special leave, to the High Court.

M. F. Loxton Q.C. (with him *H. A. Henry* and *A. J. Leslie*), for the appellants. By the doctrine referred to as the " risk of realisation " the Land and Valuation Court, in determining a measure of compensation, applied the rule as stated in *Spencer* v. *The Commonwealth* (2) and took as that measure the price that a sub-divider would pay, that being the most the owner could get. In determining what a sub-divider would pay the court always ascertained, by comparable sales if possible, what the individual blocks in the hypothetical sub-division would have reached, and, from the aggregate value of those blocks, determined what the gross proceeds of sale in hypothetical sale in sub-division would be. In so doing the court determined the value of the lands by reference to market value, deducting from those gross returns the costs of selling agents' commissions, and legal costs. The only issue that the Land and Valuation Court was asked to determine was purely and simply a question of value ; the matter of what an owner would accept is foreign to that issue. The Supreme Court

(1) (1955) 55 S.R. (N.S.W.) 310 ; 72 W.N. 195 ; 20 L.G.R. 85.

(2) (1907) 5 C.L.R. 418.

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erred in misapplying *Spencer's Case* (1). That case is regarded as the classic case for determining market values. Market values may, in many cases, be the measure of compensation, but not in all cases. It would not be the measure of compensation in a case such as *Pastoral Finance Association Ltd.* v. *The Minister* (2) where there was special notice to the owner. It is not the measure in such a case as this, where the value in the land is not the purposes to which it can be put but what can be done with it by converting it into cash. *Spencer's Case* (1) cannot be applied in any literal way to such a problem. If this compensation has to be dealt with on the basis of one purchaser, then that one purchaser cannot be a sub-divider. He must be some person who is prepared to pay the value to the owner and the sub-divider is not such a person. There is not any principle, in *Spencer's Case* (1) which requires the court to approach the question of compensation on the basis of a sale to a single purchaser. The principles of compensation have been repeated on numerous occasions: see, for example, *In re Lucas and Chesterfield Gas and Water Board* (3). Under the principles of compensation the dispossessed owner is entitled to an equivalent. The rights of ownership of the trustees in this case gave them the right to dispose of the land as they thought fit, including the right to sub-divide it themselves. The only logical way in which that right can be valued is by determining what the lands would have realised, in sub-division on a particular day, and deducting from that amount the costs of selling and putting it into the estate. That is the issue for consideration in this appeal. Values are questions of fact. Compensation is largely a question of fact. It becomes a question of law only in this case by virtue of certain coincidences. It was against the principles of law to make a deduction for profit and risk. The risk of realisation is not based on the realities of the matter at all. It is based on a fallacy. The judge having found the sum of £10,300 for gross realisation, that was a finding of fact which was equally binding on the hypothetical purchasers, as it was binding on the hypothetical vendor. He should not, in law, have stopped there, and the further question which he considered was unnecessary and not a relevant matter to be considered. *Pastoral Finance Association Ltd.* v. *The Minister* (2) raised a question entirely different from the question suggested by the judge. There are two groups of questions, one directed to the judge's findings as to the value of the land under the *Valuation of Land Act*, and the other directed to the judge's findings as to the

(1) (1907) 5 C.L.R. 418.
(2) (1914) A.C. 1083.
(3) (1909) 1 K.B. 16, at pp. 29, 30.

quantum of compensation. The questions, so far as they relate to the objections to the new assessment given under that Act are really academic to this matter. That matter is now precluded by the decision in *Minister for Public Works* v. *Thistlethwayte* (1). Any question directed to the method of assessing the value of land under the *Valuation of Land Act* is purely academic. The appellants are entitled to the proceeds of sale on sub-division. There was not any risk of realisation in *Spencer's Case* (2); there was not any profit there to anybody; the dispossessed owner was selling to people who were going to use the land, not selling to people who were going to sell the land. This Court's decision in *The Commonwealth* v. *Arklay* (3) was upheld by the Privy Council in *Minister for Public Works* v. *Thistlethwayte* (1). The Supreme Court based its judgment entirely upon *Spencer's Case* (2) and virtually held that that case lays down a code for determining questions of compensation; that in applying the principles in *Spencer's Case* (2) one must visualise a hypothetical sale to a single purchaser, and that single purchaser is purchasing the land to use it for its best advantage. So it said, in this case, with sub-divisible lands, the person who would use it to its best advantage would be a sub-divider. The trustees' contention is that the proper approach to the value to the owner of these lands was to find out, first of all, what he could have done with them. If he could have sold them on that date and that was the most advantageous use to which he could put them then that was the minimum to which he was entitled because he was certainly being deprived of the right to sell on that day. He was also being deprived of the right to hold them for a more advantageous market later on. That was the minimum—the net value on the hypothetical sale and sub-division on that day. The real issue between the parties is whether or not compensation must always be determined on the basis of a sale to a single purchaser. Land can be sold *in globo*, or can be sold in sub-division equally easily. On the basis accepted by the Supreme Court the value is what the sub-divider would pay him for the land before it was sub-divided. The land is worth to the sub-divider the profit he is going to make on the resale of it. It is worth more to him than the price he paid, and, in addition, he is forced to part with it by the Act on disadvantageous terms, so far as actual money is concerned. The Supreme Court approached the matter in a way which might well be correct,

(1) (1954) A.C. 475.
(2) (1907) 5 C.L.R. 418.
(3) (1952) 87 C.L.R. 159.

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where there is a potentiality which dispossessed owners themselves could not have developed; could not have implemented. *Vyricherla Narayana Gajapatiraju* v. *Revenue Divisional Officer, Vizagapatam* (1) was such a case as that. In this case the Supreme Court rested the whole of its judgment on *Spencer's Case* (2). Since the judgment in *Minister for Public Works* v. *Thistlethwayte* (3) the court has regard only to the value of the land as at the date of the notification of resumption, and that the compensation is in no way affected by market value. The measure of compensation is governed solely by s. 124 of the *Public Works Act* 1912, and it is not necessary to ascertain the improved value in accordance with s. 5 of the *Valuation of Land Act* 1916. This is a compulsory acquisition so what has to be ascertained is the highest value to the owner, that is the value to him as a sub-divider. On a resumption the owner is entitled to an equivalent, therefore he is entitled to be compensated for the right himself to sub-divide. The principle is stated in *Minister of State for Home Affairs* v. *Rostron* (4). The dispossessed are entitled to the full price for their lands and every element of value, so far as it increases the value to the owners, must be taken into account. The important element of value in this case is the right to sub-divide. The statement of principle which appears in *Vyricherla Narayana Gajapatiraju* v. *Revenue Divisional Officer, Vizagapatam* (5) governs all cases whether it is an unusual one or a usual one. If the owner of the land is the only person who can do so, the value to him must be ascertained by reference to what profit he might thereby be able to derive from the land in the future. Questions 1 and 2 are admitted. Question 4 (i) should be answered "would have been realised on a sale in sub-division without any deduction". *Cottages Ltd.* v. *Minister of Fuel and Power* (6) appears to be the only decision in which the principle of risk of realisation has been applied in any court outside New South Wales, to sub-divisible lands capable of being sold in sub-division at the time of the resumption. Although invited to do so, the principle was not applied in *St. John's College Trust Board* v. *Auckland Education Board* (7), which followed *Federal Commissioner of Land Tax* v. *Duncan* (8).

[DIXON C.J. referred to *Napier Harbour Board* v. *Minister of Public Works* (9).]

(1) (1939) A.C. 302.
(2) (1907) 5 C.L.R. 418.
(3) (1954) A.C. 475.
(4) (1914) 18 C.L.R. 634, at p. 637.
(5) (1939) A.C., at pp. 312-314.
(6) (1952) 1 All E.R. 80.
(7) (1945) N.Z.L.R. 507, at pp. 512, 514.
(8) (1915) 19 C.L.R. 551.
(9) (1941) N.Z.L.R. 186.

In the New Zealand cases the owner could not himself have sold in sub-division, and the decisions therein are in accordance with the principles laid down in *Vyricherla Narayana Gajapatiraju* v. *Revenue Divisional Officer, Vizagapatam* (1), but this case is one where the owner could have sold in sub-division. The resuming authority is entitled to resume on its willingness to pay compensation and if that compensation should, in effect, give to the dispossessed owners what they could only have obtained by an actual sale which had never taken place, that is no answer to their right to be compensated according to the value of the land on the basis of a sale in sub-division (*Eden* v. *North-Eastern Railway* (2)). The Supreme Court did not refer to the general principles of compensation but proceeded on the basis that the issue to be determined was one of market value which, it assumed, must be determined on the basis of a single purchaser. It was not suggested in *Spencer's Case* (3) that the amount awarded by the judge of first instance, which was on the basis now contended for, was too much or that there should have been any deduction for risk of realisation (4). The question was again before the Court in *Federal Commissioner of Land Tax* v. *Duncan* (5) which shows that in compensation cases the court has to be satisfied that the compensation is adequate so as to apply the necessary equivalent. Although the members of the Court in that case agreed in the result that the value had been correctly determined, they differed on the matter of principle. The correct view was held by *Isaacs* J. *Spencer's Case* (3) is not an authority that compensation must be assessed on the basis of what would be paid by a single purchaser but the Supreme Court rested the whole of its judgment upon that case as laying down the procedure which required the compensation to be determined upon that basis. Unless the compensation must, even in the case of sub-divisible lands, be determined on the basis of sale to a single purchaser, there is not any basis upon which this deduction of risk of realisation can be placed. The principles stated by *Fletcher Moulton* L.J. in *In re Lucas and the Chesterfield Gas and Water Board* (6) govern the matter. In this case the right to sub-divide was an element of value to the owner, and that right should not have been taken away without any compensation whatsoever. The question of whether the answers to the questions are directed to the proper determination of the improved value of these lands is academic.

(1) (1939) A.C. 302.
(2) (1907) A.C. 400, at pp. 409, 411, 412.
(3) (1907) 5 C.L.R. 418.
(4) (1907) 5 C.L.R., at pp. 422, 430-432, 442, 443.
(5) (1915) 19 C.L.R., at pp. 554, 556, 558, 559.
(6) (1909) 1 K.B., at pp. 29, 30.

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There were not any questions of law to be determined on these questions and the decision of the judge of first instance must stand. Questions 1 and 2 are based on s. 5 of the *Valuation of Land Act*, and therefore will raise only questions of fact. Alternatively with the answer previously suggested question 3 should be answered: No, he was not in error.

G. Wallace Q.C. (with him *E. T. Perrignon*), for the respondent. The judge of first instance had before him two separate and distinct matters, namely an objection to a valuation, the objection arising out of s. 29 under the *Valuation of Land Act*, the valuation having been given by the Valuer-General in pursuance of that Act, such giving of a fresh valuation being a precursor to the compensation case under s. 9 of the *Land and Valuation Court Act* heard simultaneously before the judge. It was his duty to award proper compensation for its resumption according to its potentialities. According to principle the judge had to arrive, as best he could on the evidence, at a sum which was the fair monetary equivalent of the property which had been resumed which, as was said alternatively, can in no case exceed the price which a purchaser would pay for it, subject only to special damage which does not arise in this case. By common consent the case was conducted by the parties on that basis. All that was resumed was a vacant block of land. All that followed throughout the evidence thereafter was that a method adopted which brought the charge back to the position which the plaintiffs would have had had he had the comparable sale of a block of land of that type. In order to achieve the proper objective, if this method is either of necessity or as a check adopted, then the gross realisations must be discounted. The principles variously enunciated in the decisions of the courts all lead to the same destination, namely that the owner has to be given full compensation for the property resumed, having regard to its potentialities. As stated in *Vyricherla Narayana Gajapatiraju* v. *Revenue Divisional Officer, Vizagapatam* (1) there are unusual or unique variations of the theme. In this case it is clear that there were not any special values, or severance, or feature whatever attracting special values. It is simply a case of a block of vacant land which has this potentiality. The decisions of the New Zealand courts should not be followed. The value to the owner is a very abstruse conception. What it means is that it is not the special value to the purchaser (*The Commonwealth* v. *Reeve* (2)). The best

(1) (1939) A.C. 302.

(2) (1949) 78 C.L.R. 410, at pp. 417, 418.

possible value is obtained for the subject land when it is dealt with on a sub-divisional basis. Omitting the passage in *Federal Commissioner of Land Tax* v. *Duncan* (1) it is correct to suggest that all the decisions show that the plaintiffs were not entitled to get, in the absence of some statutory provision, anything more than they would have got had they sold it on that particular day, that is, the day on which the property was resumed. The profit potential in the land is denied the owner whose land is resumed. This case is not very different from *Pastoral Finance Association Ltd.* v. *The Minister* (2). There is certainly an analogy in the issue to be gained from it because there they were asking for the capitalised value of the profits they would have made by buying the land for the express purpose of effecting economies and making profits. The owner is getting all that according to the decisions he is entitled to, by having the potentiality of this vacant land exploited in this way before the court, because, obviously, a purchaser who wanted to sub-divide would give him much more for the land than would someone who wanted it for some more solitary type of purpose. The fact is that the land was not sub-divided. The Court should adhere to the fundamental principles of translating, as at the moment of resumption, the property into a money equivalent, not something that might be done in the future: see *Closer Settlement Ltd. and Decentralization Ltd.* v. *The Minister* (3) and *Payne* v. *Federal Commissioner of Land Tax* (4). A person whose land has been resumed should not receive more by way of compensation for that land than the purchase price that would have been paid by a purchaser of the land in the ordinary way. The principle is that the owner should be compensated for what he has lost (*Bowman* v. *Muswellbrook M.C.* (5)). The position is analogous. "Risk of realisation" means all those things which make up the sum of money which the investor who wants to sub-divide regards as equivalent to his trouble, hazards and what reward he will get. The figure should be taken from comparable sales and then there should be made such allowance as thought proper by way of interest and rates; for the delay in realisation expected, etc., and a deduction for probable accidents, with a further deduction which will be the profit in the sense of the recompense the owner is going to have for the danger that the whole venture may collapse and he may lose his money.

(1) (1915) 19 C.L.R. 551.
(2) (1914) A.C. 1083.
(3) (1942) 17 L.G.R. 62, at p. 65.
(4) (1924) V.L.R. 231.
(5) (1922) 6 L.G.R. 14, at pp. 16, 17.

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[DIXON C.J. referred to *Wilson* v. *State Electricity Commission of Victoria* (1).

KITTO J. referred to *Garrett* v. *Minister for Public Works* (2).]

Somewhat similar principles were under consideration in *The Commonwealth* v. *Reeve* (3). Reliance is also placed on the principles enunciated in *Spencer's Case* (4) and in *Vyricherla Narayana Gajapatiraju* v. *Revenue Divisional Officer, Vizagapatam* (5). Questions 1 and 2, far from being academic are of great importance. It is of great consequence to the Valuer-General, valuing under s. 5 of the *Valuation of Land Act*, to know, as question 1 raises expressly whether, to all purposes to which these valuations are inclusive, such as rating, probate and the like, in valuing vacant land which is capable of sub-division, and there are not any comparable sales available, he has to leave in the profit which the notional purchaser might make. It is also important under s. 68 of the Act. The opposite viewpoint to the one now submitted appears in *Thistlethwayte* v. *The Minister* (6). Then in *Minister for Public Works* v. *Thistlethwayte* (7) argument was raised that ss. 5 and 68 of the *Valuation of Land Act* constituted the procedure for valuing compensation cases in New South Wales but the submission was rejected and it was said that when land is resumed under the *Public Works Act*, s. 124 of that Act is left unimpaired. If it is unimpaired it should be read with other statutory provisions which have been altered since the proviso. It means that the Valuer-General's certificate is conclusive subject to special damage as set forth in s. 68 of the *Valuation of Land Act* and s. 124 of the *Public Works Act*. " Unimpaired " means unimpaired in its full operation, that is, in its operation according to ordinary rules of construction. It has full operative effect. By having regard also to s. 68 one does not impair s. 124. It does not appear to have been pointed out to the Privy Council in *Minister for Public Works* v. *Thistlethwayte* (8) that s. 68 was amended at least twice subject to the proviso that s. 9 be enacted. It is immaterial whether the matter comes under s. 124 or s. 68 ; there is not any special damage. The submissions made on behalf of the respondent as to the proper method of arriving at the amount of compensation in this case include the questions which arise under s. 124 alone. There is not any difference between the phrase " value of the land " as used in s. 124 and any

(1) (1921) V.L.R. 459.
(2) (1882) 3 N.S.W.L.R. 237.
(3) (1949) 78 C.L.R., at pp. 418, 419, 428, 429.
(4) (1907) 5 C.L.R., at pp. 428, 429, 432, 437, 441.
(5) (1939) A.C., at p. 313.
(6) (1953) 19 L.G.R. 87.
(7) (1954) A.C., at pp. 477-479.
(8) (1954) A.C. 475.

consideration which arises under provisions like s. 5. In *Thistlethwayte* v. *The Minister* (1) *Sugerman* J. elaborates the difference between his view on profits and risk of realisation and the way he uses it.

M. F. Loxton Q.C., in reply. The doctrine of risk of realisation is not based upon the statement that compensation must be an equivalent. The principle of law governing compensation is based upon the sentence which rounded off the paragraph in the judgment of *Isaacs* J. in *Spencer's Case* (2) that " That is no more than any man may pay for it ". That final statement is not consistent with the main statement. The proper measure of the value of the land in this case is the value that it would have realised if sold in subdivision (*The Commonwealth* v. *Reeve* (3)). Since the decision in *Minister for Public Works* v. *Thistlethwayte* (4) the procedure that has hitherto been adopted in the Land and Valuation Court having objections and claims for compensation dealt with at the same time is now no longer necessary. Words similar to those used in s. 68 of the *Valuation of Land Act* were considered by the court in *Commissioners of Inland Revenue* v. *Glasgow and South-Western Railway Co.* (5). The business of the estate was disturbed. The lands, being the only lands belonging to the estate, had a special value. Section 68 is wide enough to enable the appellants to claim compensation at a figure in excess of the market value as determined in accordance with the true interpretation of s. 5. The value of the land is the same irrespective of whose hands it may be in.

Cur. adv. vult.

Feb. 29, 1956.

The following written judgments were delivered :—

DIXON C.J. This appeal is part of a litigation resulting from the resumption on 3rd November 1950 of a parcel of land forming portion of the estate of one William Moore deceased of which the appellants are trustees. The land was resumed under Div. 1 of Pt. V of the *Public Works Act* 1912, as amended. It consists of an area of 4 acres 3 roods 11 perches being part of a larger area of eight hundred acres situated in Bradfield in the Municipality of Ku-ring-gai near Sydney. The trustees commenced an action for compensation and at the same time objected to a valuation which apparently had been obtained under s. 70 of the *Valuation of Land Act* 1916-1951.

(1) (1953) 19 L.G.R. 87.
(2) (1907) 5 C.L.R., at pp. 438-444.
(3) (1949) 78 C.L.R., at p. 429.
(4) (1954) A.C. 475.
(5) (1887) 12 App. Cas. 315.

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The double proceeding came on for hearing before *Sugerman* J. in the Land and Valuation Court. It appeared that the parcel resumed was surrounded by land which for the most part had been sub-divided and sold in building allotments and that it too was suitable for the same treatment. In the language of the learned judge " it was itself ripe for development in that manner ". It seems to have been agreed or assumed on all sides that it might have been sub-divided into some nineteen blocks involving the construction of about nine chains of roadway and that to a sub-division of that kind municipal approval would have been obtainable. *Sugerman* J. regarded the case as one in which he should compute the value of the land by the application of a method based upon an estimate of the net returns which an owner who sub-divided the land and sold the blocks might expect to receive, reducing this estimated figure by appropriate deductions in order to find the value to the existing owner at the time of resumption. This method was described by *Roper* C.J. in Eq., as he now is, in *Closer Settlement Ltd.* v. *The Minister* (1). His Honour said : " In arriving at the value of land which is suitable for subdivision a familiar and appropriate method . . . is to estimate from whatever comparable sales of land in subdivision are available the price which would be realized by the land when sold ; then to estimate the costs involved in the subdivision and the length of time that the realization would take, making provision for the payment of rates and taxes and for interest on money outstanding ; and an estimated net return on the subdivision is obtained. It is of course clear that a person purchasing land *in globo* for the purpose of subdividing it would not pay the sum of money which is the present equivalent of that estimated return. Many factors in the calculation are speculative : the land in subdivision may not realize the prices which are at present expected, and the subdivision may take longer to realize than is at present anticipated. To compensate for the risk involved in the venture the purchaser would certainly discount the estimated returns " (2). It is this process of discounting that provides the source of the controversy in the present case. In the case before *Roper* C.J. in Eq. the landowners objected that it was inapplicable to the facts for reasons which are not here material. Their objection, however, led his Honour to refer to the nature and scope of the discounting and one or two of his remarks may be usefully quoted. His Honour said : " The discount involved is to cover the risk of the venture and provide a margin of profit because of that risk, but when the resumption is effected

(1) (1942) 17 L.G.R. (N.S.W.) 62. (2) (1942) 17 L.G.R. (N.S.W.), at p. 65.

the element of risk has disappeared" (1). After some references to the views of *Pike* J. which are more conveniently set out in a case presently to be cited, *Roper* C.J. in Eq. said that "the element of investor's risk is merely one of the elements which enter into the calculations involved in ascertaining the market value of the land by this method. This method is not the only, and in some cases not the best, method of ascertaining the market value of land suitable for subdivision" (1).

In the practical application of the method in that case his Honour deducted from the amount of the gross estimated realisations items consisting of estimated commission, cost of collection, advertising and legal expenses. From the balance remaining he then deducted a percentage for what was briefly denominated "risk of realisation". The percentage taken in that case was forty per cent of "the money laid out". Then were deducted, as part of "the moneys laid out", items representing costs of survey, construction of roads, supervision, rates, taxes and contingencies, and interest on purchase money and initial outgoings at five per cent per annum pending recovery in the gross realisations. The balance represented the hypothetical purchase money, forming of course the other part of "the moneys laid out".

The percentage allowance under the head of risk of realisation was dealt with by *Maxwell* J. sitting in the Land and Valuation Court in *Cranbrook Playing Fields Ltd.* v. *Valuer-General* (2). His Honour's observations, which were directed to the percentage rate to be fixed, were as follows:—"In considering this question, regard must be had to the fact that a buyer would give only such a sum for the land as would show him when sold in subdivision a percentage return on the purchase price and his expenditure in preparing and submitting it for subdivision. In *Estate of Kent* v. *The Valuer-General*, and the *Willoughby M.C.* v. *The Valuer-General* (3), *Pike* J., the then Judge of the Land and Valuation Court, said:—'I think that profit is not the proper term to use in such a case; it is the return that the sub-divider expects from his risks of realization, it is really not a profit. He takes on this proposition; he has to sell it, and he has to take all the risk of being left with a large portion of the sub-division area on his hands.' In *The Executors of the Will of Lady Hay* v. *The Valuer-General*, (1931), reported in *New South Wales Valuer*, vol. 2, p. 52, his Honour, in adverting to this question, said:—'This percentage allowance between the sale of lands *in globo* and lots in subdivision

(1) (1942) 17 L.G.R. (N.S.W.), at p. 65.
(2) (1936) 13 L.G.R. (N.S.W.) 62.
(3) (1935) 12 L.G.R. (N.S.W.) 41, at p. 43.

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is not a profit in the proper sense of the word, but is the amount which the purchaser of land considers that he ought to realize for the risk of his investment, and is very often termed the risk of realization.' Upon the land being resumed an owner does not face this risk, and one must endeavour to arrive at a proper percentage allowance therefor." (1).

In *Thistlethwayte* v. *The Minister* (2), *Sugerman* J. discussed the foregoing and other authorities and analysed in terms of economic conceptions the elements to be represented by the percentage allowance which, in his Honour's view, ought to be made (3). The passages are too long to set out but the conclusion and the ultimate basis for it may be seen from the following quotations: "Thus restricted to the risk element, the profit required by the purchase of the whole may also be considered as the measure of the discount necessary in order to reduce the estimated net return on subdivision to a present value which includes subdivisibility as a potentiality or possibility. What I have said is, I believe, implicit in the terms used by *Roper* J. in the passages already quoted from his judgment in *Decentralization Ltd.* v. *The Minister* (4). His Honour spoke of a 'discount to cover the risk of the venture' (5), and of discounting the estimated returns to compensate for the risk. I do not think it matters what word one uses in this connection—whether one speaks of risk, or of discount, or of profit—so long as, in using the last of these terms, one bears in mind that it is a '"pure" profit' in the sense above outlined which is in question and not a profit in the wider and more usual sense which includes other elements. If this were not borne in mind, if the discount were estimated as a profit in the wider sense, the result would be, in effect, to treat the owner as constrained to sell the whole to one buyer and as without the possibility of subdividing. He would be treated as desirous of relieving himself of the burden, as well as of the risk, of realisation. In reality, were a valuation on this basis used for resumption purposes, a compulsory risk-free middleman would be interposed between the dispossessed owner and the resuming authority, and the former would be treated as willing to pass over to this interposed person a portion of the proceeds which he might well have kept for himself . . . It is sometimes said in evidence or in argument in the course of these cases that, quite apart from risk, a buyer would not embark upon

(1) (1936) 13 L.G.R. (N.S.W.), at p. 64.
(2) (1953) 19 L.G.R. (N.S.W.) 87, at p. 95.
(3) (1953) 19 L.G.R. (N.S.W.), at pp. 97-99.
(4) (1942) 17 L.G.R. (N.S.W.) 62.
(5) (1942) 17 L.G.R. (N.S.W.), at p. 65.

the transaction of subdividing an area of land and placing it on the market unless there were something in it for himself. That is no doubt true as a matter of business, and refers to the type of dealer's profit which I have just mentioned. But what is sometimes argued as following from it is in my opinion not correct as a general proposition, namely that an estimate of the profit of this character must, as against the owner, be deducted from the estimated net realisation on subdivision in order to arrive at the value of the whole " (1).

It was upon the view expressed in the last passage, explained by what precedes it, that *Sugerman* J. acted in the present case. He fixed a rate of twelve and one-half per cent saying, " I am of opinion that the allowance for risk of realisation may fairly be taken at twelve and one-half per cent—that is twelve and one-half per cent of the total expenditure on land and subdivisional expenses of the hypothetical purchaser in the ' familiar and appropriate method ' of subdivisional valuation. This includes an allowance for increases of subdivisional expenses to be expected in a period of rising costs " : *Thistlethwayte* v. *The Minister* [*No.* 2] (2).

Had his Honour included in the elements, by reference to which he fixed the percentage, a notional reward to a hypothetical purchaser for resale in sub-division he would have fixed the rate at twenty-five per cent. This is explained in the following extract from his reasons for judgment :—" If, contrary to the view hereinbefore expressed, it were necessary to determine value on the footing that the owner must be regarded as selling the whole to a single purchaser purchasing for subdivision and resale, with allowance for the profit which such a purchaser would expect to make from the venture, and without regard to the possibility or potentiality of sale in subdivision by the owner himself, then I should conclude that a reasonable estimate of such profit, or ' profit and risk ' as the defendant's valuer has called it, would be the defendant's valuer's estimate of twenty-five per cent of the purchaser's total outlay " (3). His Honour estimated the gross receipts from realisation in sub-division at £10,300. The realisation expenses consisting of commission and legal costs he fixed at £383. From the difference, which is £9,917, he deducted twelve and one-half per cent of the total hypothetical outlay, a percentage amounting to £1,102. This left £8,815. From that he deducted for sub-divisional expenses upon roads, supervision, survey, rates and taxes for a notional period of nine months, advertising, more legal

(1) (1953) 19 L.G.R. (N.S.W.), at pp. 98, 99.
(2) (1953) 19 L.G.R. (N.S.W.) 167, at p. 171.
(3) (1953) 19 L.G.R. (N.S.W.), at p. 172.

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expenses, this time " on purchase " and loss of interest, sums aggregating £2,835. The residue of £5,980 formed the basis of a round £6,000, which the learned judge awarded. The inclusion of legal expenses on purchase may suggest the question whether it does not imply the conception of a sale by the owners to a hypothetical purchaser for resale in sub-division, not at first sight altogether consistent with the rejection of that imaginary figure in assessing the percentage deduction. But the item is not explained and it is not intrinsically material now. If to cover the notional demand of a hypothetical purchaser for remuneration as a reward for his enterprise in undertaking the hypothetical purchase and resale in sub-division, the rate of twenty-five per cent had been fixed, the result (having regard to certain consequential adjustments) would have been an award of £5,150.

This is perhaps a convenient point to make an observation about the basis of the deduction of a percentage for " risk of realisation ". To no small extent the " risk " is of the estimate of the net proceeds of sub-divisional sale proving too low. The reason may be found in the estimate of the prices for blocks being too high, the sale of the blocks being too slow, the estimated costs attending sub-division and sale proving too low or in any or all of such causes. It is therefore evident that the degree of faith felt in the estimates, whether by the court or the hypothetical purchaser, must bear upon the fixing or allowance of the percentage. In coming to a reliable determination there is no reason why it should not be done by fixing provisional figures and then reducing them, but it would seem that there is equally no reason why it should not be done by making definitive estimates in the first place. It must be borne in mind, of course, that while the estimate of the expenditure may prove too high and the estimate of the return may prove too low, the contrary is equally possible. At some point fixed reliance must be placed on the figures produced by the use of the hypotheses which the use of the formula requires. After all the purpose is to ascertain the full return which may reasonably be expected from the sale of the land, not the most conservative value. The ultimate purpose of the inquiry is to find a figure which represents adequate compensation to the landowner for the loss of his land. Compensation should be the full monetary equivalent of the value to him of the land. All else is subsidiary to this end.

The award of the higher figure of £6,000 instead of the lower of £5,150, or perhaps the basis upon which it was reached, appears to have left the Minister of Public Instruction dissatisfied. At all events he sought a case stated for the opinion of the Supreme Court

in pursuance of s. 17 of the *Land and Valuation Court Act* 1921-1940. That section provides that when any question of law arises in any proceeding before the Land and Valuation Court that court shall, if so required in writing by any of the parties within the prescribed time and subject to prescribed conditions, or it may of its own motion, state a case for the decision of the Supreme Court thereon. The decision of the Supreme Court is to be binding upon the Land and Valuation Court and upon all parties to the proceeding.

The exact form of the questions submitted as questions of law is not without importance but it is sufficient to say at this point that they appear to be directed to the basis of the percentage deduction adopted by *Sugerman* J., as opposed to that which he rejected, and to recognise the possibility of a distinction for the purpose between the standard set by law for assessing compensation under s. 124 of the *Public Works Act* 1912 as amended and that for fixing the improved value of the land as defined by s. 5 of the *Valuation of Land Act* 1916-1951. No doubt as the two proceedings were before the Land and Valuation Court it was necessary to provide for the distinction. But for the practical purpose of assessing compensation it is s. 124 of the *Public Works Act* that must prevail since the decision in *Minister for Public Works* v. *Thistlethwayte* (1), where the proviso to s. 9 (1) of the *Land and Valuation Court Act* 1921-1940 received a construction resulting in the unimpaired efficacy of any provision of an Act whereunder land is acquired if it prescribes a basis of compensation.

In the Supreme Court the questions submitted in the case stated were answered against the view adopted by *Sugerman* J. that no deduction should be made on account of the profit of a sub-divider and against the more extreme view on the other side which the landowners, the now appellants, put forward that even a percentage on account of " risk of realisation " ought not to be deducted from the estimate of the gross returns. Two passages may be quoted from the joint judgment of *Maxwell* J., *Roper* C.J. in Eq. and *Herron* J., who constituted the court, to make clear the basal ground of the decision. The first passage begins with a reference to special damage as the equivalent of special value to the owner referred to in s. 68 of the *Valuation of Land Act* 1916-1951. The passage then continues: " Here it is said that the special value is to be found in that the owner could have put the land into subdivision and sold it himself but for the resumption and could then reasonably have expected to have realized the estimated net return from the sale of this land in subdivision. This submission ignores

(1) (1954) A.C., at pp. 487, 488.

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the risk of realization which, of course, is a real factor and ignores the profit which a purchaser of the land would have expected to realize for his enterprise in subdividing it. It appears to us that it ignores the time-honoured test for ascertaining the value of land on resumption altogether. The risk of realization is a real risk, the owner is completely relieved of it by the fact of resumption, and it, as estimated, must be taken into account because of the fact that he no longer is subject to it. The subdivider's profit cannot be allowed to the owner because he in fact does not undertake the enterprise, and in our opinion no special damage or special value to the owner is shown in the circumstances of this case. As is pointed out in *Pastoral Finance Association Ltd.* v. *The Minister* (1), an owner is not entitled to receive compensation for the profits which he expected to make from the use of the land. He is entitled only to receive the value of the land to him, and that value, in the circumstances of this case, can only be ascertained as being what he would have received on selling it to a hypothetical purchaser at the date of resumption. He is not entitled also to receive an estimated profit which he might have made had he undertaken a course of dealing with the land which he did not undertake in fact" (2). The second passage states the reason why the hypothesis that the owners realised the land in sub-division and obtained the full net proceeds did not appear to supply an acceptable measure of value. Their Honours said: "Some reference has been made to the fact that neither s. 5 of the *Valuation of Land Act* 1916, nor the value of the land under s. 124 of the *Public Works Act* 1912, as ascertained according to the test to which we have referred, require that land should be valued on the basis of a hypothetical sale to one purchaser only. But in this case at the date of resumption the land was in one parcel, and a sale in its then state and circumstances is what must be considered. It was not then possible to sell this land in different lots to a number of purchasers because the land had not been subdivided. The distinction between this case and *Ellesmere (Earl)* v. *Inland Revenue Commissioners* (3), which was relied upon by the respondents, is obvious, because the land there comprised a number of different parcels and could, at the date for which the valuation had to be made, have been sold in different parcels. Here we think the only sale that could be considered is a sale of the land as it was at the date of resumption, that is un-subdivided, but having the clear potentiality that it was fit for subdivision" (4).

(1) (1914) A.C. 1083, at p. 1088.
(2) (1955) 55 S.R. (N.S.W.), at p. 321; 72 W.N., at p. 202.
(3) (1918) 2 K.B. 735.
(4) (1955) 55 S.R. (N.S.W.), at p. 322; 72 W.N., at p. 203.

The great difficulty I have felt in the case arises from the necessity which the form of procedure imposes upon us of sharply distinguishing between questions of fact and questions of law. There is no appeal from the Land and Valuation Court to the Supreme Court except insofar as the right to a stated case affords such a remedy. It is therefore only questions of law which the Supreme Court has jurisdiction to decide for the purpose of reviewing a determination of compensation or value. No doubt at the foundation of the present case lies the criterion of value for which *Spencer* v. *The Commonwealth* (1) has been so frequently cited. But it by no means follows that the modes of reasoning employed in applying the criterion are matter of law. Indeed *Spencer's Case* (1) itself does not provide the ultimate test of compensation. An observation made in *Minister for Public Works* v. *Thistlethwayte* (2) shows that it does not. " It must not be forgotten ", said Lord *Tucker* for the Privy Council, " 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 " (3). Further, when the test is applied the reasoning about it must for the most part relate to what the buyer would think and do whose existence and readiness to buy the land at a proper price are imagined: " . . . the all important fact . . . 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 ": per *Isaacs* J., *Spencer* v. *The Commonwealth* (4). It is not easy to suppose that the law determines what his opinion should be. The expression " intellectual automaton " has been used of a person notionally created for purposes like those of the hypothetical purchaser (see per *Cussen* J., *Melbourne Tramway & Omnibus Co.* v. *Tramway Board* (5)). But his automatic thoughts remain those of business life, not law.

There is still another consideration. One would suppose that a case will not often occur where there is no other evidence of value than the result of the method of computation invoked in the present case. More usually it will be possible, so it may be assumed, to find some light or basis of inference in actual sales made of comparable pieces of land that might be sub-divided. Some guidance

(1) (1907) 5 C.L.R. 418.
(2) (1954) A.C. 475.
(3) (1954) A.C., at p. 491.
(4) (1907) 5 C.L.R., at pp. 440, 441.
(5) (1917) V.L.R. 472, at p. 481.

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must often be obtainable from the prices which building land has realised even though it is not in the neighbourhood, if the circumstances and situation possess a sufficient similarity. The formula, the use of which apparently has become so familiar in valuing land suitable for sub-division, contains a number of factors all of which seem to depend on little or nothing more than opinion and it may be supposed that widely different results may be produced by variations in detail, though no given variation may itself seem considerable. It would appear natural therefore for a judicial valuer to seek to check his result by reference to as many sources of information and inference as may be found, even if he might consider that they would not provide him, had they stood alone, with a satisfactory independent basis for an ultimate conclusion. The case stated does not say that the evidence before the Land and Valuation Court was absolutely confined to the method employed. Perhaps one may guess that it was so : but it may also be permissible to guess that other facts or considerations might have been given in evidence fortifying or qualifying the faith felt in the formula, had the parties sought to use them.

But what matters for present purposes is first that valuation cannot be made to depend entirely on a logical process or formula and second that in any case questions of logical reasoning about considerations of fact are not to be confused with questions of law.

There is however one matter comprised within the questions submitted in the case stated which does involve the legal basis for valuing the land. Whatever else may be true as to the process of valuation employed, it is the entire land which must be valued as at the date of resumption. It is, of course, to be valued in cases of compensation with a view to ensuring that the actual value contained in the land is replaced in the hands of the owner by an equivalent amount of money. The value must therefore be the value to the owner which the land possessed to him in its condition at the date of resumption. That value was necessarily affected by all the advantages which the land possessed and these might be a matter of future or even contingent enjoyment. Future advantages or potentialities must not be excluded. At the same time the value of these things must be assessed according to the condition of the land as it stood at the time of resumption : " it is the present value alone of such advantages that falls to be determined " : *Cedars Rapids Manufacturing & Power Co.* v. *Lacoste* (1). You must not notionally bring what is only potential into actual being and value it as if it existed.

(1) (1914) A.C. 569, at p. 576.

In the case of the land in question no steps had been taken for sub-division. It was necessary to survey it, to prepare plans for sub-division, to obtain the consent of the local authority, to make streets or roads and then to place it upon the market. As the land stood it was incapable of sale in sub-division and it was necessary to make improvements or alterations in its physical condition before the sub-divisional prices could be obtained. In those circumstances it could not be sold in sub-division at the time of resumption. It was not therefore possible to ascribe to the owner possession of the present value of its sub-divisional potentialities on the footing that all you should do is to estimate what he would gain if he sub-divided the land at a future date and reduced the result to its then present value. This means too that the conclusion is clearly right which the learned judges of the Supreme Court expressed in the passage already quoted from their judgment, viz.: " . . . . the only sale that could be considered is a sale of the land as it was at the date of resumption, that is un-subdivided, but having the clear potentiality that it was fit for subdivision " (1).

It is now necessary to turn to the questions in the case stated and consider how far they may properly be answered as questions of law. The first is as follows: " In the circumstances stated in this case, and on the true construction of s. 5 of the *Valuation of Land Act* 1916-1951, was I in error in law in determining the 'improved value' (within the meaning of the said section) by reference to a hypothetical sale of the subject land at a price equivalent to the net amount which the owner might have expected to realise on subdividing it and selling in sub-division, less only an allowance for the risk of realisation? " It will be seen that the question is confined to the definition of " improved value " in the *Land and Valuation Act* 1916-1951. In the expression " which the owner might have expected to realise on subdividing it " etc. it is not quite clear that it is the plaintiffs who are meant. In the next question the owners are called " the plaintiffs ". But I take that to be the meaning. On that reading of the question it appears to assume sales in sub-division by the plaintiffs, although it is true that a little earlier it is " a hypothetical sale of the land " by reference to which the price is determined. Notwithstanding some uncertainty about the construction of the question, I think that the reasoning about which it inquires was erroneous and I am not satisfied that an error of law is not comprised in the reasoning. An examination of question (3), which it is unnecessary to set out, will show that this conclusion covers that question. Unlike

(1) (1955) 55 S.R. (N.S.W.), at p. 322; 72 W.N., at p. 203.

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question (3), question (2) is confined to improved value under s. 5 of the *Land and Valuation Act*. It is divided into two alternative questions and as to each of them the inquiry is whether the learned judge was "bound in law" to determine the improved value it describes. The first part asks whether the judge was bound to determine the improved value "as the net amount which the plaintiffs would have realised on a sale in sub-division, less if any deduction, only a deduction for the contingency of an increase in subdivisional expenses". On the view I have expressed, clearly the learned judge was not so bound. But a difficulty arises about the second part. It asks if the judge was bound to determine the improved value "by reference to a hypothetical sale *in globo* to a purchaser buying with a view to sub-dividing and selling in sub-division and prepared to pay for the subject land no more than such a sum as would return to him out of the transaction an amount representing an appropriate allowance for the risk of the venture and a profit to himself?" It appears to me that, if the valuation was to depend wholly and exclusively on the formula, the logic of the reasoning on which it is based would require the tribunal on the facts of this case to proceed in accordance with the course described by this part of the question. But I do not think that the law binds the tribunal to the formula in principle: other considerations may be taken into account and in any case I think that the reason why logic dictates the result, if nothing but the formula is used, is because it is the way a buyer may be presumed to reason. I am not prepared to say that it is a matter of law. I am therefore unable to answer this question in the affirmative and would prefer to leave it unanswered.

It is unnecessary to say more about the fourth question than that it falls in two parts which respectively follow the fate of the two parts of the second question.

For myself I would be disposed to vary the answers given in the Supreme Court to questions 2 (ii) and 4 (ii). Otherwise I would dismiss the appeal.

WILLIAMS J. On 3rd November 1950 certain land situate at Bradfield in the Parish of Gordon, County of Cumberland, and State of New South Wales, comprising 4 acres, 3 roods, 11 perches or thereabouts and forming part of the estate of William Moore deceased was resumed under the provisions of the *Public Works Act* 1912 for a public school at Bradfield and the land was thereby vested in the Minister of Public Instruction as constructing authority on behalf of His Majesty the King. The resumption gave rise to a

claim for compensation under s. 124 of that Act for the value of the land taken. The provisions of that section must, however, be read in conjunction with certain provisions of the *Valuation of Land Act* 1916-1951 and the *Land and Valuation Court Act* 1921-1940. Section 5 of the *Valuation of Land Act* provides that: "The improved value of land is the capital sum which the fee simple of the land might be expected to realise if offered for sale on such reasonable terms and conditions as a *bona-fide* seller would require". Section 6 provides that: "The unimproved value of land is the capital sum which the fee simple of the land might be expected to realise if offered for sale on such reasonable terms and conditions as a *bona-fide* seller would require, assuming that the improvements, if any, thereon or appertaining thereto, and made or acquired by the owner or his predecessor in title had not been made". Section 68 provides, so far as material, that: "The valuation under this Act in force for the time being, or under a fresh valuation, as provided for under section seventy of this Act, of the improved value of any land which may after the passing of this Act be resumed . . . under the following Acts, namely, the *Public Works Act* 1912, . . . shall, notwithstanding the provisions of any such Act, be held by all courts, . . . authorised to . . . assess the amount of compensation for such land, to be the value of the land resumed . . . under the said Acts, and the improvements thereon . . . but shall not exclude the rights of a claimant for compensation for forced sale or disturbance of business or otherwise, or for any special value which the land may have to the owner, provided that where land has been resumed any person entitled to any estate or interest therein or the resuming authority shall be entitled notwithstanding any such resumption to require a fresh valuation to be made of the lands so resumed as at the date of such resumption". In the present case the trustees of the estate of the deceased applied for a fresh valuation as at the date of resumption and the Valuer-General valued the land: improved value £4,150; unimproved value £4,150; assessed annual value £208. An objection by the trustees to this fresh valuation was overruled by the Valuer-General and the objection was forwarded to the Land and Valuation Court. At the same time the trustees commenced proceedings for compensation in the Supreme Court which were referred to the Land and Valuation Court and both proceedings were, in accordance with the usual practice, by consent heard together. Section 9 (1) of the *Land and Valuation Court Act* provides that where a claim for compensation by reason of the acquisition of land for public purposes is made under the *Public Works Act* 1912, and no agreement is

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come to, such claim, where the claim exceeds one hundred pounds, shall be heard and determined by the court without a jury ; provided that for the purpose of any such determination the judge . . . shall give effect to any provision of the Act, under which the land is acquired, which prescribes a basis for, or matters to be considered in, the assessment of compensation."

The land in the present case was compulsorily acquired under the provisions of the *Public Works Act*. There are, therefore, sections of three different Acts that relate to the assessment of the compensation. They are s. 124 of the *Public Works Act*, ss. 5, 6 and 68 of the *Valuation of Land Act* and s. 9 of the *Land and Valuation Court Act*. Read together these sections require the court assessing the compensation to commence with the improved value placed upon the land by the Valuer-General. For that purpose the owner of the land or the resuming authority can apply to the Valuer-General to have the land valued as at the date of resumption. The improved and unimproved values of land defined by ss. 5 and 6 of the *Valuation of Land Act* are in the same terms as those defined by s. 3 of the *Land Tax Assessment Act* 1910-1952 (Cth.). The meaning of the unimproved value of land in the latter Act was discussed by this Court in *Federal Commissioner of Land Tax* v. *Duncan* (1). It was there held that in estimating the unimproved value of land the estimate must be made on the basis that the whole of the land is sold on the day on which the valuation is made but that the probability of the land bringing a higher price if sub-divided before sale than if sold in one block is an element to be taken into consideration in determining the value but is no more. The land there in question was a parcel of 6,572 acres of land and as *Isaacs* J. said : " The whole of the land is for the purpose of the section assumed to be disposed of in fee simple by the vendor. But it does not connote that the only potentiality to be considered is one purchaser who is able and willing to take the whole of the land *uno ictu*. That would reduce the range of competition and very materially affect the unimproved value of the land " (2). He had just referred to cases in which it had been held that in compensation cases the test is the value of the land to the owner and had said : " I need not pursue those cases because, as far as the particular question raised here is concerned, the Act lays down the standard, and it is a mere question of interpreting that standard. Compensation cases may fall under the same rule, as I think they do, but it is an independent consideration " (2). In compensation cases the test that has always been applied is that the owner must be compensated

(1) (1915) 19 C.L.R. 551.

(2) (1915) 19 C.L.R., at p. 558.

for the value of the land to him. That is the basis upon which compensation has always been assessed under s. 124 of the *Public Works Act* (1921). That basis is preserved by s. 9 of the *Land and Valuation Court Act* and it is also, in my opinion, preserved by s. 68 of the *Valuation of Land Act* because that section simply prescribes the valuation of the Valuer-General of the improved value of the land as the starting point. It then specifically provides that where land is resumed the compensation shall not exclude the rights to compensation which a claimant for compensation, apart from claims for forced sale or disturbance of business or for special value, would otherwise have. In *Duncan's Case* (1), *Griffith* C.J. had said: "The hypothesis of a willing purchaser assumes, as I have shown, ability as well as willingness to buy. An hypothesis which assumes an indefinite number of purchasers able and willing amongst them to buy the whole of the land in separate parcels is quite a different thing, and is not the hypothesis made by the Act. A parcel of 6,000 acres of land is not substantially the same subject matter as (say) thirty parcels of land separated from one another by roads, and comprising together with the roads the original parcel. If, therefore, the owner can be treated for any purpose as a subdividing owner, he must be treated as one who has already gone to the expense of subdividing, and the value to him is no greater than it would be to a purchaser who had bought the land for the purpose of making such a subdivision, that is, not greater than the price such a purchaser would have given for it" (2). He said: "The statute, in my opinion, contemplates a sale of the whole of the land on the day as of which the valuation is made" (3). This is, I agree, the correct meaning of the unimproved (and improved) value of land occupied as a single parcel on the material date as defined in the Acts. It is the standard they lay down. It would be different if parts of the land were the subject of separate and independent enjoyment on that date: *Deputy Federal Commissioner of Taxation* v. *Gold Estates of Australia (1903) Ltd.* (4). I agree with *Macfarlan* J. when he said in *Payne* v. *Federal Commissioner of Land Tax* (5), that the words "such reasonable terms and conditions as a bona fide seller would require" do not refer to the question whether he should sell in sub-division or as a whole "but to the terms and conditions of sale in the ordinary sense". For the purpose of these statutory definitions of the improved and unimproved values of land, un-subdivided land must be regarded

(1) (1915) 19 C.L.R. 551.
(2) (1915) 19 C.L.R., at p. 555.
(3) (1915) 19 C.L.R., at p. 556.
(4) (1934) 51 C.L.R. 509, at p. 516.
(5) (1924) V.L.R. 231, at p. 235.

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as having been sold in one parcel on the day the valuation is made but this is not the correct principle for determining compensation for compulsory acquisition. In that case the task of the Court is, as I have already said, to discover the value of the land to the dispossessed owner if put to its best use. This may easily be a higher sum than the value placed upon it under the special provisions of an Act for rating purposes. For I am quite unable to see why the owner should not be able to claim as compensation the net amount that land suitable for immediate sub-division would be estimated to produce for the owner if he prepared the land for sub-division and sold it in sub-division himself. In *Minister for Public Works* v. *Thistlethwayte* (1), the Privy Council had occasion to consider the sections under discussion and said: "In the opinion of their Lordships, assuming ss. 5, 68 and 70 of the *Valuation of Land Act* 1916, standing alone might have resulted in some modification in the basis of assessment of compensation under the *Public Works Act* 1912, the effect of this proviso (in s. 9 of the *Land and Valuation Court Act*) is to restore that basis unimpaired" (2). In *The Commonwealth* v. *Arklay* (3) this Court said in reference to s. 28 (1) (a) of the *Lands Acquisition Act* 1906-1936 (Cth.) which is in the same terms as s. 124 of the *Public Works Act*: "It is established that 'value' in such a context means the value of the land to the owner. Where the amount for which a vendor may sell and a purchaser buy is not controlled the Court poses a hypothetical problem, the answer to which supplies this value. It is a familiar rule which in Australia was authoritatively formulated in *Spencer's Case* (4). Shortly stated what is required is 'an estimate of the price which would have been agreed upon in a voluntary bargain between a vendor and purchaser each willing to trade but neither of whom was so anxious to do so that he would overlook any ordinary business considerations': *Commissioner of Succession Duties (S.A.)* v. *Executor Trustee & Agency Co. of South Australia Ltd.* (5). It is simply an analysis of what in all the relevant circumstances would be the price that a willing purchaser would have to pay a vendor willing but not anxious to sell in order to obtain the land. Where land has no special suitability for some business or activity carried on by the owner and has no added potential value if put to some better use, the value on a free market is usually its market value. The best evidence of this value is that of comparable sales of other land either before or after the date of

(1) (1954) A.C. 475.
(2) (1954) A.C., at pp. 487, 488.
(3) (1952) 87 C.L.R. 159.
(4) (1907) 5 C.L.R. 418.
(5) (1947) 74 C.L.R. 358, at p. 367.

acquisition but this evidence is often not available" (1). In the Privy Council in *Thistlethwayte's Case* (2) their Lordships said: "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" (3).

Sugerman J., who heard both cases, determined the compensation at £6,000 and fixed the improved and unimproved values at this figure and the assessed annual value at £300. He was then required by the defendant, the Minister of Public Instruction, in accordance with s. 17 of the *Land and Valuation Court Act*, to state a case for the decision of the Supreme Court on certain questions of law arising in the proceedings before the court and he proceeded to state a case in which he asked the following questions:

(1) In the circumstances stated in this case, and on the true construction of s. 5 of the *Valuation of Land Act* 1916-1951, was I in error in law in determining the "improved value" (within the meaning of the said section) by reference to a hypothetical sale of the subject land at a price equivalent to the net amount which the owner might have expected to realise on sub-dividing it and selling in sub-division, less only an allowance for the risk of realisation?

(2) If "Yes" to question (1):—In the said circumstances and on the true construction of the said section was I bound in law to determine the said "improved value":—(i) as the net amount which the plaintiffs would have realised on a sale in sub-division, less if any deduction, only a deduction for the contingency of an increase in sub-divisional expenses; or (ii) by reference to a hypothetical sale *in globo* to a purchaser buying with a view to sub-dividing and selling in sub-division and prepared to pay for the subject land no more than such a sum as would return to him out of the transaction an amount representing an appropriate allowance for the risk of the venture and a profit to himself?

(3) In the said circumstances, and on the true construction of s. 68 of the said *Valuation of Land Act* 1916-1951, and s. 124 of the *Public Works Act* 1912, was I in error in law in determining the compensation payable in respect of the resumption of the subject land as being the value of the land ascertained as stated for determining the "improved value" in question (1).

(1) (1952) 87 C.L.R. 159, at pp. 169, 170.

(2) (1954) A.C. 475.

(3) (1954) A.C., at p. 491.

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(4) If "Yes" to question (3):—in the said circumstances and on the true construction of the said sections, was I bound in law to determine the said compensation as being the value of the land ascertained:—(i) as stated for determining the "improved value" in par. (i) of question (2)? or (ii) as stated for determining the "improved value" in par. (ii) of question (2)?

They were answered by the Supreme Court as follows: (1) Yes: (2) (i) No: (2) (ii) Yes: (3) Yes: (4) (i) No: (4) (ii) Yes.

The facts of the case as found by *Sugerman* J. can be briefly stated. At the relevant date, 3rd November 1950, the subject land was vacant land but it was land which was good building land. At the time of resumption it was surrounded by land which (including certain contiguous land belonging to the same estate) had mostly been sub-divided and sold in residential allotments and was itself ripe for development in that manner. But the plaintiffs had not yet taken any steps to sub-divide it. Sub-division by the plaintiffs would have involved having the land surveyed, obtaining the approval of the Ku-ring-gai Municipal Council, and constructing a new road. About six months, and possibly nine or ten months, must have elapsed before the land could have been placed on the market. As at the time of resumption the land might well have been expected to sell readily if promptly sub-divided and placed on the market in sub-division, and to have realised a gross amount of £10,300. The expenses of sub-dividing it, including allowances for interest and rates during the period of development, might well have been estimated at £2,835, and the expenses of selling it (that is, auctioneer's or agent's commission and solicitor's costs on the transfers to the purchasers) at £383. Deducting these expenses totalling £3,218 from £10,300 would leave a net figure of £7,082 and the plaintiffs contend that this is the amount at which his Honour should have determined the compensation. If his Honour had taken into account these deductions and no others, he must have determined the compensation at this figure. But he deducted from the £7,082 a further sum of £1,102, being twelve and one-half per cent of the total estimated expenditure on the land and the sub-divisional expenses of the hypothetical purchaser, in accordance with what he called "the familiar and appropriate method of sub-divisional valuation". He deducted this amount as an allowance to cover what he called "the risk of realisation", that is to say the risk of a possible increase in the sub-divisional expenses and of a possible decrease in the gross amount realised due to a possible slump in land sales and fall in prices. In this way his

Honour reached the net sum of £5,980 and determined the compensation at £6,000.

But the defendant contended that this amount was still too high. He contended that the compensation should be assessed on the basis that the resumed land was sold in one lot and that its value to the owner was what a single purchaser buying the land in order to sub-divide and sell it in lots would give for it and that all that such a purchaser could be reasonably expected to pay would be such a sum as would be likely to return him a profit of twenty-five per cent on his outlay. If this contention is sound the compensation on his Honour's findings should be reduced to £5,150. Although his Honour did not accede to this contention the Supreme Court did so and held that this sum of £5,150 was in law, on his Honour's findings of fact, the improved value of the land and the proper amount of compensation. The following excerpts from the joint judgments of their Honours indicate how this conclusion was reached. First they said: "The questions raised in the case involve consideration of the principles to be applied in the circumstances of this particular matter for the determination of the compensation payable. The land which was resumed has an area of 4 acres 3 roods and 11 perches. It is good building land, and at the time of resumption was suitable for subdivision into residential allotments. No steps had then been taken to subdivide it. Apart from this, the land had no special characteristics or potentialities. Any person owning it could, but for the resumption, have effected a subdivision of it and sold it as subdivided, and this would have been the most advantageous method of realizing its value" (1). They then proceeded to discuss the bearing upon each other of the sections of the three Acts to which I have referred and said: "Where unsubdivided land is suitable for subdivision and no proper guide to its value as unsubdivided can be obtained from sales of comparable land, a familiar method of valuation which has regularly been used in New South Wales for many years is to assume that the land was subdivided by the most suitable method of subdivision and to ascertain, by reference to comparable sales of allotments similar to those into which it was assumed to be subdivided, what it should be expected to bring on the market by sale in subdivision. An estimate is then made of the costs involved in effecting the subdivision and of the length of time which it would take to realize the land in subdivision. Provision is then made for charges such as rates and taxes which would be incurred during the time up till realization,

(1) (1955) 55 S.R. (N.S.W.), at p. 316; 72 W.N., at p. 199.

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and provision is made for interest on to the purchase price, and the outgoings required to put the land into subdivision and sell it. In this manner an estimated net return to a subdivider is ascertained. It is, however, quite clear that that estimated net return is not the value of the land as at the date of resumption. No purchaser would acquire land at the present money value of that figure. Reasons for this are set out in part in the judgment of the Judge of the Land and Valuation Court, which is annexed to the case stated, and also in other cases in the Land and Valuation Court, including *Closer Settlement Ltd.* v. *The Minister* (1). Shortly stated, they are that many factors in the calculation are speculative, the time taken to realize the land may be longer than was estimated, unforeseeable difficulties may arise in respect of the sales of particular lots or all lots in the subdivision, the prices are estimates only, conditions may change in some or all respects before the time for sale arises, and the costs involved in effecting the subdivision may prove to be greater than is estimated " (2). Their Honours then discussed the findings of *Sugerman* J. and said : " The findings can only mean that as at the date of resumption a purchaser purchasing this land *in globo* would not have been found who would pay more than £5,150 for it, and therefore mean that a willing seller at that date would have been bound to sell at that price because no higher price would have been available to him. In these circumstances the value of the land at the date of resumption must be ascertained as being £5,150 " (3). Later their Honours said : " Here it is said that the special value is to be found in that the owner could have put the land into subdivision and sold it himself but for the resumption and could then reasonably have expected to have realized the estimated net return from the sale of this land in subdivision. This submission ignores the risk of realization which, of course, is a real factor and ignores the profit which a purchaser of the land would have expected to realize for his enterprise in subdividing it. It appears to us that it ignores the time-honoured test for ascertaining the value of land on resumption altogether. The risk of realization is a real risk, the owner is completely relieved of it by the fact of resumption, and it, as estimated, must be taken into account because of the fact that he no longer is subject to it. The subdivider's profit cannot be allowed to the owner because he in fact does not undertake the enterprise, and in our opinion no special damage or special value to the owner is *shown* in the circumstances

(1) (1942) 17 L.G.R. (N.S.W.) 62.
(2) (1955) 55 S.R. (N.S.W.), at p. 318; 72 W.N., at pp. 200-201.
(3) (1955) 55 S.R. (N.S.W.), at p. 320; 72 W.N., at p. 202.

of this case. As is pointed out in *Pastoral Finance Association Limited* v. *The Minister* (1), an owner is not entitled to receive compensation for the profits which he expected to make from the use of the land. He is entitled only to receive the value of the land to him, and that value, in the circumstances of this case, can only be ascertained as being what he would have received on selling it to a hypothetical purchaser at the date of resumption. He is not entitled also to receive an estimated profit which he might have made had he undertaken a course of dealing with the land which he did not undertake in fact" (2). Finally they said: "Here we think the only sale that could be considered is a sale of the land as it was at the date of resumption, that is, un-subdivided, but having the clear potentiality that it was fit for subdivision" (3).

Before us counsel for the appellants has contested the correctness of the deduction of either the twelve and one-half per cent or the twenty-five per cent. If either sum is to be deducted he naturally desires that the former sum should be deducted in preference to the latter. The propriety of the deduction of the first sum only is based on the view adopted by *Sugerman* J. that the possibility of a sale in sub-division by the owner himself must be taken into account, so that the value to the owner of the land was its value to him if he sub-divided it and sold it in sub-division, and that a bona-fide seller willing but not anxious to sell the land could not be reasonably expected to sell it to a purchaser for less than the sum the land might be expected to realise if he sold it himself in sub-division, less a deduction which he would be prepared to accept to avoid the risk that this sum might not be realised because of rising sub-divisional costs or a slump in land sales and prices. The deduction of twenty-five per cent is based on the view that all that a reasonably willing seller of the land on 3rd November 1950 could have expected to obtain would have been what a reasonably willing buyer would have been likely to pay for the whole of the land on that date with a view to sub-dividing it and selling it at a profit. I cannot agree that either of these percentages is deductible. On *Sugerman* J.'s findings of fact he should, in my opinion, have determined the compensation at £7,082. The only appeal to the Supreme Court from his determination and from that court to us is on matters of law. But where the ultimate facts have been found, and there is only one conclusion flowing from them reasonably open in law, then a mistake in this conclusion is a mistake of law, and on the

(1) (1914) A.C. 1083, at p. 1088.
(2) (1955) 55 S.R. (N.S.W.), at p. 321; 72 W.N., at p. 202.
(3) (1955) 55 S.R. (N.S.W.), at p. 322; 72 W.N., at p. 203.

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facts as found by his Honour £7,082 was in my opinion the lowest sum at which he could in law have determined the compensation.

The general principles upon which compensation is assessed when land is resumed under compulsory powers are, as I have said, well settled. They have already been set out in the passage cited from *Arklay's Case* (1). They were summed up by *Isaacs* J. in *Minister of State for Home Affairs* v. *Rostron* (2). He said: "In 1908, in *In re Lucas and Chesterfield Gas and Water Board* (3), Lord *Moulton* (then *Fletcher Moulton* L.J.) said:—'The principles upon which compensation is assessed when land is taken under compulsory powers are well settled. The owner receives for the lands he gives up their equivalent, i.e., that which they were worth to him in money. His property is therefore not diminished in amount, but to that extent it is compulsorily changed in form. But the equivalent is estimated on the value to him, and not on the value to the purchaser, and hence it has from the first been recognized as an absolute rule that this value is to be estimated as it stood before the grant of the compulsory powers. The owner is only to receive compensation based upon the market value of his lands as they stood before the scheme was authorized by which they are put to public uses. Subject to that he is entitled to be paid the full price for his lands, and any and every element of value which they possess must be taken into consideration in so far as they increase the value to him.' His Lordship's judgment was adopted by the Privy Council, first in *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste* (4), and again in *Corrie* v. *MacDermott* (5)" (6). The correct application of these principles to facts very similar to the present facts will be found in *St. John's College Trust Board* v. *Auckland Education Board* (7). That case has since been followed and applied in New Zealand in *Tollemache* v. *Valuer-General*; *Tilby* v. *Valuer-General* (8), and *Marshall* v. *Minister for Works* (9). It was held in the first-mentioned case, to quote from the headnote, that where on the relevant date for assessing compensation the land is suitable and intended for sub-division into allotments for building purposes, the compensation court, if the claimant shows that there was a market for the sub-divisions as on that date and that the sub-divisions could then have been sold, may award compensation upon the assumption that, on that date, the claimant sold the land to several purchasers in lots accordingly. The first

(1) (1952) 87 C.L.R., at pp. 169, 170.
(2) (1914) 18 C.L.R. 634.
(3) (1909) 1 K.B. 16, at p. 29.
(4) (1914) A.C. 569.
(5) (1914) A.C. 1056.
(6) (1914) 18 C.L.R., at p. 637.
(7) (1945) N.Z.L.R. 507.
(8) (1948) N.Z.L.R. 307.
(9) (1950) N.Z.L.R. 339.

two questions asked in the case stated were: (1) Is it lawfully open to the compensation court to award compensation upon the assumption that on 15th December 1942, the claimant board sold the land to several purchasers in lots according to a sub-division made by it? (2) Is the compensation court compelled to assess compensation upon the assumption that on 15th December 1942, the claimant board sold the whole land in one undivided parcel to one purchaser desirous of acquiring it for the purpose of sub-division and sale as building sites? The Full Court of New Zealand answered the first question "Yes" and the second "No". They adopted the statement by *Williams* J. in *New Zealand & Australian Land Co.* v. *Minister of Lands* (1): "All that we have to do is to ascertain the fair selling-value of the land taken, assuming it to be sold in one lot or in parcels, as might be most advantageous to the owner at the time the value has to be estimated" (2). These principles appear to me to be completely in line with what was said by Lord *Romer* delivering the judgment of the Privy Council in *Vyricherla Narayana Gajapatiraju* v. *Revenue Divisional Officer Vizagapatam* (3): ". . . it has been established by numerous authorities that the land is not to be valued merely by reference to the use to which it is being put at the time at which its value has to be determined (that time under the Indian Act being the date of the notification under s. 4, sub-s. 1), but also by reference to the uses to which it is reasonably capable of being put in the future. No authority indeed is required for this proposition. It is a self-evident one. No one can suppose in the case of land which is certain, or even likely, to be used in the immediate or reasonably near future for building purposes, but which at the valuation date is waste land or is being used for agricultural purposes, that the owner, however willing a vendor, will be content to sell the land for its value as waste or agricultural land as the case may be. It is plain that, in ascertaining its value, the possibility of its being used for building purposes would have to be taken into account. It is equally plain, however, that the land must not be valued as though it had already been built upon, a proposition that is embodied in s. 24, sub-s. 5, of the Act and is sometimes expressed by saying that it is the possibilities of the land and not its realized possibilities that must be taken into consideration.

"But how is the increase accruing to the value of the land by reason of its potentialities or possibilities to be measured? In the case instanced above of land possessing the possibility of being used

(1) (1895) 13 N.Z.L.R. 714.
(2) (1895) 13 N.Z.L.R., at p. 716.
(3) (1939) A.C. 302.

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for building purposes, the arbitrator (which expression in this judgment includes any person who has to determine the value) would probably have before him evidence of the prices paid, in the neighbourhood, for land immediately required for such purposes. He would then have to deduct from the value so ascertained such a sum as he would think proper by reason of the degree of possibility that the land might never be so required or might not be so required for a considerable time " (1). Later on his Lordship, after mentioning a particular form of potentiality available only to the owner, and referring to other potentialities like the present one, where the owner is merely one of the persons to turn it to account, said : " The value to him of the potentiality will not be less than the profit that would accrue to him by making use of it had he retained it in his own possession " (2). A similar question arose in England in the Court of Appeal in *Horn* v. *Sunderland Corporation* (3). There the relevant Act provided that in assessing compensation the value of the land shall . . . be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise. It was held that where land being used for agricultural purposes was ripe for building purposes, and the latter was the best use to which it could be put, compensation might be determined on the basis of its value as building land. The principal point that arose in the case was as to whether, if the owner claimed compensation on this basis, he could also claim compensation for the disturbance of the agricultural business he was carrying on, and it was held that he could not because in order to sell the land as building land he would have either to discontinue this business or go to the expense of removing it to other land. But the court clearly considered that the owner could claim compensation on a hypothetical sale in the open market as building land. Sir *Wilfrid Greene* M.R. said : " In the present case the respondent was occupying for farming purposes land which had a value far higher than that of agricultural land. In other words, he was putting the land to a use which, economically speaking, was not its best use, a thing which he was, of course, perfectly entitled to do. The result of the compulsory purchase will be to give him a sum equal to the true economic value of the land as building land, and he thus will realize from the land a sum which never could have been realized on the basis of agricultural user " (4). His Lordship said : " It is true that, while he is using the land for farm purposes, and notwithstanding that user, the land has its building value which

(1) (1939) A.C., at pp. 313, 314.
(2) (1939) A.C., at p. 314.
(3) (1941) 2 K.B. 26.
(4) (1941) 2 K.B., at p. 35.

he can realize at any moment that he chooses to do so, but this is beside the point. The extra price which he could realize could only be realized by ceasing to farm the land and would more than compensate him for what it would cost him as a farmer to move to another farm if he were minded to do so" (1). *Scott* L.J. said: "But now suppose that his land has potential building value. As a result of the statutory compulsion he is forthwith put, by the notice to treat, in a position where he is entitled as at that moment to be paid the present building value of the land. If the land is 'ripe for development' that value will represent a sum of money many times as much as the agricultural value . . . How can it be said that, by the compulsory acquisition, he has been caused a loss which is not fully compensated by the present payment of full building value?" (2).

The crucial question is, it seems to me, whether the value of the land to the seller includes a right to elect to sub-divide and sell the land himself and realise its full value, or only includes the right to receive the lower price which a buyer would pay with a view to his making a profit which would otherwise be included in the full value of the land to the seller if he retained it and sold it himself. There is, in my opinion, no principle which requires the Court to assess compensation on the basis that because land, although ripe for sub-division, has not been actually surveyed and sub-divided, any necessary roads made, and the consent of the local council to the sub-division obtained at the date of resumption, the value of the land must be ascertained on the basis that it is sold in one lot to a sole buyer and that buyer is a person who is purchasing the land with a view to a resale. It is sufficient if at the date of resumption the land has that potentiality and that is the best use to which the land could then be put. If the most feasible way of realising the value of the land on that date would be for the seller to sub-divide and sell it in the immediate future himself, the value to the seller is the present value of the amount he would receive on that basis. As Lord *Romer* said: "The value to him of the potentiality will not be less than the profit that would accrue to him by making use of it had he retained it in his own possession" (3). There is no necessity to confine the pool of fictitious buyers to a person who would purchase the land in one lot. Buyers of one or more separate lots can just as easily be conjured up from out of the "vastie deepe" of such a pool as a sole buyer and they could be buyers who would purchase a lot or lots with a view to building either a

(1) (1941) 2 K.B., at p. 36.
(2) (1941) 2 K.B., at p. 50.
(3) (1939) A.C., at p. 314.

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shop or a home for themselves or with a view to reselling land that had been built on. Such buyers would be persons willing to pay the full value of the lot or lots they bought and not merely to pay the sum which would enable them to sell the lot or lots as vacant land at a profit. If such willing hypothetical buyers can be imagined, as they can be, the owner of the land could not reasonably be expected to be willing to sell the land otherwise than in sub-division and to such buyers.

To hold otherwise would be to deny to the owner the real potential value of his land. There is in every case where an owner wishes to sell his land, be it land that has been built on or is vacant, be it a small building or a large one, or be it a small block of vacant land or a large one, a risk that it might not realise, if actually sold, what its value to the owner had been estimated to be, but there is equally a risk that this estimation might be less than the purchase price which an owner would have received on an actual sale. But risks of this sort are risks that have to be taken in all cases where the value of property for which there is not an active market has to be estimated, and I can see no reason why, in assessing compensation, this deduction should be made to the detriment of the dispossessed owner in the one case where the most appropriate method of determining the value of the land to him is to hold that the best use to which the land could have been put at the date of acquisition would have been to sell it in sub-division. In such a case the compensation should be the present value of the estimated gross proceeds of sale less the estimated expenses to which the owner would be put in order to realise those proceeds and these estimates must all be made as best they can. In the present case *Sugerman* J. deducted from the gross proceeds of realisation estimated at £10,300 what he called realisation expenses, namely commission £288 and legal costs on sale £95, totalling £383. He also deducted what he called the sub-division expenses, namely : roads (including pathway) £2,150 ; supervision £129 ; survey £76 ; rates and taxes (nine months)—municipal, say £90 ; water, say £10 ; advertising £75 ; legal costs on purchase £75 ; and loss of interest (a) on sub-divisional expenses, six months at four per cent, say £50, (b) on purchase price, nine months at four per cent, say £180 ; totalling £2,835. The only item that need be queried in these amounts is the loss of interest on the purchase money because an owner who sold his own land would not have to purchase it. But he would not be entitled to more than the present value at the date of acquisition of the net proceeds of sale he would ultimately receive and in the present case, since this Court is concerned only with

questions of law, it is unnecessary to strike out the small item in question and substitute an alternative item for it. Where an owner is carrying on a business on land of which he is dispossessed and there is no other suitable land available to which he could remove it, so that the loss of the land necessarily results in the closing down of the business, the owner is entitled to be compensated as an element in the value of the land to him for the loss of the value of the goodwill of the business. But it has never been suggested to my knowledge that, such value having been estimated on the then state of the business, a percentage should be deducted from this amount because the owner had by the resumption been relieved of the risk that some future catastrophe might make the business less profitable. As *Dixon* J. (as he then was) said in *Moreton Club* v. *The Commonwealth* (1): "An attempt should be made to arrive at a figure which does not go beyond the sum which certainly was contained in the asset as at the date of acquisition but otherwise fairly represents the value to the owner" (2).

For these reasons I would allow the appeal and set aside the answers of the Supreme Court to questions (3) and (4). In lieu thereof I would answer both these questions in the negative because they do not appear to me to raise the real point. I would therefore give a general answer that his Honour should have determined the compensation at £7,082 or in round figures at £7,100. The respondent Minister should pay the costs of the appeal to this Court and of the proceedings in the Supreme Court.

FULLAGAR J. In this case I have had the advantage of reading the judgment of my brother *Kitto*, with which I agree. Reading the questions in the case stated in the sense in which he has read them, I think that the appeal should be dismissed.

KITTO J. Two proceedings came before *Sugerman* J. in the Land and Valuation Court of New South Wales and were heard together. One was an action by the present appellants against the respondent for compensation for a resumption of land under the *Public Works Act* 1912 (N.S.W.), and the other was an objection by the appellants to a valuation in respect of the same land, which had been made by the Valuer-General as at the date of the resumption under s. 70 of the *Valuation of Land Act* 1916-1951. There being no suggestion of any advantage accruing to the land from the scheme for which the resumption was made, and the land having had no special value to the appellants which it would not have had in the

(1) (1948) 77 C.L.R. 253. (2) (1948) 77 C.L.R., at p. 259.

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hands of any other owner, the compensation to be determined under the *Public Works Act* was the value of "the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities": *Fraser* v. *City of Fraserville* (1); *Vyricherla Narayana Gajapatiraju* v. *Revenue Divisional Officer Vizagapatam* (2). For the purposes of the objection to the Valuer-General's valuation it was necessary, having regard to the definition of improved value in s. 5 of the *Valuation of Land Act*, to determine the capital sum which the fee simple of the land might have been expected to realise if offered for sale on the resumption date on such reasonable terms and conditions as a bona-fide seller would require. No doubt the objection was brought to a hearing because of an apprehension, based upon s. 68 of the *Valuation of Land Act*, that so long as the Valuer-General's valuation stood it would be held conclusive of the value of the land for the purposes of compensation. Apparently this apprehension must be regarded as ill-founded: *Minister for Public Works* v. *Thistlethwayte* (3). But nothing turns on the point now, for the appeal relates only to questions which are common to both proceedings.

The land to be valued consisted of an area of 4 acres 3 roods and 11 perches of vacant land. It was suitable for subdivision into nineteen residential allotments but it had not in fact been subdivided, and indeed no steps had been taken towards subdivision. Consequently a sale on the actual date of the resumption could only have been of the entirety of the land as one block. But the probability at that date was that if a subdivision were effected the allotments would sell readily, and the most remunerative method of dealing with the land would have been, not to sell it as one block, but to proceed promptly to subdivide it and sell individual allotments by auction.

It was necessary for *Sugerman* J., in accordance both with the statutory definition of improved value and the accepted test of value for the purposes of compensation as stated by this Court in *The Commonwealth* v. *Arklay* (4), and approved by the Privy Council in *Minister for Public Works* v. *Thistlethwayte* (5), to suppose that on the date of the resumption a sale had resulted from voluntary bargaining between a vendor and a purchaser each willing to trade but neither so anxious to do so that he would overlook any ordinary business consideration. In the situation which has been described, the hypothetical sale had necessarily to be a sale of the subject land

(1) (1917) A.C. 187, at p. 194.
(2) (1939) A.C., at p. 321.
(3) (1954) A.C., at pp. 478, 479.
(4) (1952) 87 C.L.R., at pp. 169, 170.
(5) (1954) A.C., at pp. 490, 491.

as a whole, but it would have to be a sale at a price which contained a full allowance for the special potentiality of the land which consisted in the advantage to be got by selling it in subdivision. In setting out to find what that price would have been, it was essential to remember that the advantage was one which could not be reaped unless and until a considerable process had been gone through. The land would have to be surveyed, the approval of the local council obtained, and nine chains of roadway constructed. A delay of possibly nine or ten months would have to be faced because of the need to attend to these matters and to await a season of the year suitable for auction sales. And of course what had to be taken into account in this connection was "the present value alone" of the potentiality, as the Privy Council pointed out in *Cedars Rapids Manufacturing & Power Co.* v. *Lacoste* (1).

The method of valuation which his Honour adopted as that which in all the circumstances of the case seemed most likely to produce a reliable result was as follows. The first step was to decide what gross total price the allotments might fairly have been expected, at the date of resumption, to produce if sold with such promptness as the situation allowed. There was evidence which included information concerning later sales of comparable allotments, and upon consideration of all the material before him his Honour fixed the gross figure at £10,300. From this he deducted what he thought would have been the probable expenses of subdivision (including road construction), the amount of interest and rates which would probably have been incurred during the interval between the date of resumption and the disposal of the allotments, and the probable expenses of selling (including commission and costs). These deductions amounted to £3,218. The net figure reached was therefore £7,082. But two questions then arose. The first was whether a further deduction should be made for what was called the risk of realisation, i.e., the possibility which necessarily existed at the date of the resumption that the gross proceeds of realisation might prove to be less than £10,300, and that the amounts included in the £3,218 might prove to be under-estimates. The second was whether a deduction should be made of an amount equal to the profit which a purchaser buying the land at the date of the resumption would expect to make by reselling it in subdivided allotments. *Sugerman* J. held that the first deduction should be made, and he found on the facts that this would reduce the figure of £7,082 to £6,000. The second, however, he held should not be made, though he would have deducted a further £850, bringing

(1) (1914) A.C., at p. 576.

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the amount of compensation down to £5,150, if he had been of the opposite opinion.

The two questions which his Honour thus decided were then carried to the Supreme Court by way of case stated. There the Full Court, consisting of *Maxwell* J., *Roper* C.J. in Eq., and *Herron* J., held (1) that the first deduction was rightly made but that the second should also have been made. From this decision the present appeal is brought by special leave. In my opinion the decision was right, and I should gladly adopt as my own the reasons which were given for it. In view, however, of differences of opinion in the case, I shall state my reasons as briefly as I can in my own words.

It is essential to recognise at the outset, as I have already pointed out, that what has to be valued is a single unsubdivided parcel of land, and not nineteen separate allotments capable of separate sale at the date of the resumption. If the process of subdivision had been completed before the resumption was made, it would have been very relevant to observe that the hypothesis of a willing but not anxious buyer does not necessarily import only one buyer for the entirety of the allotments. But the observation is not relevant in a case like the present, where the land to be valued was in fact at the relevant date an unsubdivided whole, which could be sold as a whole but could not be sold otherwise. Its potentiality for subdivisional sale must, as I have said, be allowed for. No sensible buyer or seller would omit to give it weight. But neither would such a buyer or seller suppose for a moment that because that potentiality existed the present value (i.e., at the date of resumption) would be equal to the net amount likely to be produced by sales of allotments effected at a then future date after time, trouble and money had been expended in creating the conditions necessary to make sales in subdivision possible. To hold that compensation for the resumption of a parcel of land, as to which all that can be said is that it is suitable for immediate subdivision, should be the net amount which the land would be estimated to produce to the owner if he were to subdivide it and sell the allotments himself is, in my opinion, to fall into the precise error which the Privy Council condemned in *Vyricherla's Case* (2), by approving the saying that it is the possibilities of the land and not its realised possibilities that must be taken into consideration. It is true that *Isaacs* J. said in *Federal Commissioner of Land Tax* v. *Duncan* (3) that the definition in the Act there in question, which was the same as that in the *Valuation of Land Act*, did not mean " necessarily a sale of

(1) (1955) 55 S.R. (N.S.W.) 310; 72 W.N. 195.

(2) (1939) A.C., at p. 313.

(3) (1915) 19 C.L.R., at p. 558.

the whole of the land in one block ", and added that it said nothing about one purchaser. But the rest of the passage in which these remarks are found shows clearly enough that in a case where land is not in a subdivided condition on the relevant date it is the then existing possibility of future sales in subdivision, and not the non-existing possibility of immediate sales in subdivision, which must be considered. The unanimous decision in the case was, as the headnote says, that the probability of the land bringing a higher price if subdivided than if sold in one block was an element to be taken into consideration, but was no more. In my opinion a passage in the judgment of *Griffith* C.J. applies in a compensation case as clearly as in a case requiring the application of the statutory definition : " A parcel of 6,000 acres of land is not substantially the same subject matter as (say) thirty parcels of land separated from one another by roads, and comprising together with the roads the original parcel. If, therefore, the owner can be treated for any purpose as a subdividing owner, he must be treated as one who has already gone to the expense of subdividing, and the value to him is no greater than it would be to a purchaser who had bought the land for the purpose of making such a subdivision, that is, not greater than the price such a purchaser would have given for it " (1).

This, I am bound to say, strikes me as self-evident, and its application in this case is, I think, quite clear once the precise problem in respect of each of the questioned deductions is apprehended. In respect of the first deduction it is essential to bear in mind that the figure of £7,082 is only the net amount which, at the date of resumption, the land " might well have been expected " (these are the words of the case stated) to produce if and when the process of subdivision and sale of allotments should be carried through. Having regard to the way in which the gross figure was arrived at, it could not have any greater title to certainty than those words of description convey. It was, as the learned judge says in the case stated, only an estimate formed with such guidance as he had available to him as to values and tendencies and as to the opinions which prudent persons, competent to form an opinion and informed as to relevant circumstances, might be expected to have formed at the relevant date. It could not be more. A person considering the matter on the relevant date, whether as a potential vendor or as a potential purchaser or as an owner wishing to decide whether he would sell the land as it stood or subdivide it, would have been acutely aware that the figure of £7,082, or whatever figure he arrived at for himself, would be subject to all the doubts inevitably

(1) (1915) 19 C.L.R., at p. 555.

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flowing from its being founded in "estimate, judgment and conjecture". As the Full Court observed, "many factors in the calculation are speculative, the time taken to realize the land may be longer than was estimated, unforeseeable difficulties may arise in respect of the sales of particular lots or all lots in the subdivision, the prices are estimates only, conditions may change in some or all respects before the time for sale arises, and the costs involved in effecting the subdivision may prove to be greater than is estimated" (1). The net return which the land "might well have been expected" at the relevant date to produce at a period possibly nine or ten months later, and after the expenditure of sums uncertain in amount, is therefore not a figure upon which a person concerned not to overlook ordinary business considerations could prudently accept as a basis for a decision to buy or sell the land as a whole or to keep it for sale by a more advantageous method. He would not need to be reminded that what may well be expected, on the basis of such intelligent prophecy as the known facts permit, and what can fairly be counted upon, are two very different things. Any or all of the assumptions that are reflected in his final figure might easily be falsified by events. Inevitably he would base his thinking upon a figure somewhat lower than the net sale price which he had reached on paper. It was therefore right in principle for *Sugerman* J. to allow the first of the challenged deductions.

The question as to the second deduction arises upon his Honour's finding on the evidence that the return to himself which a purchaser buying *in globo*, with a view to subdividing and reselling in subdivision, would have expected to make out of his venture, as representing an appropriate allowance for the risk of the venture and a profit to himself, would have been substantially greater in amount than any reasonable and proper allowance in respect only of the risk of realisation. His Honour was, of course, envisaging a purchaser willing but not anxious to buy, and the finding must mean that such a purchaser would be overlooking an ordinary business consideration if he paid a price equal to his estimate of the probable net proceeds of sale in subdivision less only a due allowance for risk of realisation. Even apart from evidence, it seems obvious that no one is going to buy an area of land to sell it in subdivision if he has to pay as much for it as he thinks he can prudently count on getting back. Why should he bother, if he is not going to make a profit? But although this is conceded by everyone, it is said that there is no need to consider such a purchaser; the owner may subdivide the land himself, thereby

(1) (1955) 55 S.R. (N.S.W.), at p. 318; 72 W.N., at pp. 200-201.

getting the whole of the net proceeds of sale; and if he does so he will not lose the amount which a purchaser would want by way of a profit. To look at the matter in this way is to desert the established test; but let it be deserted. In a case where land has no special value to any particular person, how is it possible to say in one breath that the land is not worth more than £x to a purchaser who is likely to get £x + y if he resells in subdivision, and to say in the next breath that it is worth the full £x + y to the existing owner on that date? If a purchaser would not pay the £y because that is the profit which he would need to see in the venture before he would put his money into it and go to all the trouble and expense it requires, why should not the existing owner, who is envisaged as considering what the land is worth to him, reflect that he needs a like inducement to leave his money in the land and go to the same trouble and expense?

It all comes back to the one point: at the date of resumption the land was simply incapable of immediate sale in subdivision, and it would necessarily remain incapable of sale in subdivision until time, trouble and expense had been laid out upon it; and no one, present owner or incoming owner, is likely to be so completely unbusinesslike as to make these outlays unless he believes that he can reasonably count on getting from the subdivision sales an amount which will exceed the present value of the land by such a sum as will make it all worth his while. The deduction is therefore not condemned by calling it the profit which a purchaser would require. It would have to be allowed for even by an existing owner, in working out what was the money equivalent of the land to him at the date of resumption, as distinguished from the money which it could be made to produce in nine or ten months' time provided that he set about dealing with it in the right way. There simply cannot be a difference between the price which would be agreed upon between a businesslike purchaser and a businesslike vendor and the amount which a businesslike owner would treat himself as leaving invested in the land in the event of his deciding to retain it. It is said that for compensation purposes it is not the value of the land simply, but its value to the expropriated owner that must be given, and that the value to the expropriated owner in this case must include what he would have got by selling in subdivision. I must reiterate, however, that this is not a case where there is a difference between the value of the land in general and its value to the expropriated owner in particular. The suitability of the land for subdivision was one of its inherent characteristics; it was available to be exploited by the owner whoever he might be; the

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land had no special value for the appellants. But I cannot forbear to add that if the test of value which has been approved for cases where there is special value to the owner be applied here, the question must be asked in the familiar words of Lord *Moulton* in *Pastoral Finance Association Ltd.* v. *The Minister* (1): what would a prudent man in the position of the appellants have been willing to give for the land sooner than fail to obtain it? And the answer must be: precisely what any other prudent purchaser would have been willing to give for it.

I should perhaps add a word concerning a sentence which the appellants' counsel picked out of Lord *Romer's* judgment in *Vyricherla's Case* (2). It reads: "The value to him of the potentiality will not be less than the profit that would accrue to him by making use of it had he retained it in his own possession" (3). In the context of the whole judgment this can only mean that the value of the land to such an owner must include the value of the potentiality to him, and that that cannot be less than the amount by which, on the assumption that the land was to remain his, the potentiality would have made him better off at the relevant date than he would have been if it had not existed. To read the sentence as if it meant that the present value of a future profit is the full amount of the future profit is to ignore the whole tenor of the judgment, and is to attribute to Lord *Romer* a view at variance both with good sense and with much authority, including the *Pastoral Finance Association Case* (4).

The questions in the stated case, to describe them shortly, are whether his Honour was in error in law in making only the first deduction and whether he was bound in law to make neither or both. The Supreme Court, I gather, read them, and I too have read them, as implying the hypothesis that the method of valuation which is being followed is that which supposes sales in subdivision effected as soon as practicable after the date of resumption. The intention of the questions seems to be simply to inquire whether a figure arrived at by the method of a hypothetical subdivision at a date subsequent to the date of resumption can be taken, without error of law, as a guide to the value of the land at the date of resumption, if in making the calculation no account is taken, firstly of what has been referred to as the risk of realisation, and, secondly, of the profit which would be expected by a purchaser buying on the date of resumption for the purpose of reselling in subdivision. For the reasons I have stated I am of opinion that the method becomes

(1) (1914) A.C., at p. 1088.
(2) (1939) A.C. 302.
(3) (1939) A.C., at p. 314.
(4) (1914) A.C. 1083.

unsound and inadmissible unless both factors are taken into consideration and appropriately allowed for. Unless they are, there is a failure to take properly into account a cardinal feature of the case, namely that at the date of resumption the conditions did not exist in which sales in subdivision by the expropriated owner could be made, and the value which is being ascertained is therefore the value of the land considered as the potential subject of a future enterprise, namely the enterprise of creating the conditions which will enable sales in subdivision to be made and effecting the sales thus made possible.

With the warning that the questions have been understood in the sense mentioned, I should be in favour of affirming the answers given by the Supreme Court. I would therefore dismiss the appeal.

TAYLOR J. As appears from the case stated by *Sugerman* J. for the decision of the Supreme Court of New South Wales the appellants, as the trustees of the estate of Christopher Bowes Thistlethwayte deceased, were the owners of a parcel of land, some 4 acres, 3 roods and 11 perches in area, which was resumed pursuant to the provisions of the *Public Works Act* 1912, as amended. Thereafter *Sugerman* J., in an action for the determination of compensation, held that the appellants were entitled to the sum of £6,000, but at the request of the respondent he stated the case referred to.

Upon the hearing of the action the learned judge found that the land in question, which was part of an area of eight hundred acres owned by the appellants, was good building land, that because of its situation and character it was suitable for sale in sub-division and, indeed, that it was "ripe" for development in this manner. He further found that the appellants had planned, and in part constructed, roads traversing the area of 800 acres, that parts of it had been dedicated for public recreation, and that portions had already been sold in sub-division. The appellants, however, had not taken steps to sub-divide the subject land or, indeed, any substantial part of the area, and before it could have been sold in sub-division a number of steps were necessary. Before this could have been done a complete survey was necessary and it could not have been done until the local council had given its approval. Moreover, the construction of a new road was necessary and, in all, a sub-divisional sale would not have been possible until six months, or possibly nine or ten months, after the date of resumption.

His Honour further found that at the date of the resumption the land might well have been expected to sell readily, if promptly

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sub-divided, for the sum of £10,300 and that, after making appropriate allowances for the expenses of sub-division amounting to some £2,835, the net return which might have been expected was some £7,465. In the circumstances of this case this figure did not, however, represent the value of the land at the date of the resumption for at that date the land had not been sub-divided and it could not then have been sold in sub-division.

Some difference of opinion is discernible between the views expressed by *Griffith* C.J. and *Isaacs* J. in *Federal Commissioner of Taxation* v. *Duncan* (1) concerning the basis upon which the value of land suitable for sub-division should be assessed. Both learned justices agreed that the fact that a parcel of land is suitable for sub-divisional sale is a material factor, but the former stressed the point that this factor was, merely, " an element to be taken into consideration " in assessing the value of the parcel. It was, he thought, no more than this. In his Honour's view the value of such land at any particular time should be determined by inquiring, " What would a man desiring to buy the land have had to pay for it on that day to a vendor willing to sell it for a fair price but not desirous to sell ? " According to his Honour, " The hypothesis of a willing purchaser assumes . . . ability as well as willingness to buy " but " a hypothesis which assumes an indefinite number of purchasers able and willing amongst them to buy the whole of the land in separate parcels is quite a different thing ". The suitability of an area of land for sub-division would be reflected in the answer to the inquiry posed by his Honour and the degree to which it would play a part in the determination of the value of the land would, of course, depend, *inter alia*, upon estimates of what price the sub-division would bring, the degree of risk involved and the period during which a purchaser's capital outlay would be idle. *Isaacs* J., on the other hand, was of the opinion that, in determining the value of such land, the possibility of a sub-divisional sale by the owner should not be excluded. He said :—" This case must in any event be governed by the Act, and the standard put by the Act is that the ' unimproved value ' means ' the capital sum which the fee simple of the land might be expected to realize if offered for sale on such reasonable terms and conditions as a *bona fide* seller would require, assuming that the improvements (if any) thereon or appertaining thereto and made or acquired by the owner or his predecessor in title had not been made.' The interpretation put upon that by the learned Judge from whom this appeal comes was that it does not include a possible subdivisional

(1) (1915) 19 C.L.R. 551.

sale by the owner. He thought that it meant necessarily a sale of the whole of the land in one block. In my opinion, that is a wrong construction. There is one vendor, but the interpretation section says nothing about one purchaser. The whole of the land is for the purpose of the section assumed to be disposed of in fee simple by the vendor. But it does not connote that the only potentiality to be considered is one purchaser who is able and willing to take the whole of the land *uno ictu*. That would reduce the range of competition and very materially affect the unimproved value of the land " (1).

I should think that where all the necessary steps to enable an expropriated owner to sell a parcel of land in sub-division have been taken before resumption, and the whole of the expenses necessary for that purpose have been incurred, compensation should be assessed by reference to the amount which the sale of the several sub-divisions might have been expected to produce at the time of the resumption. For although, in such a case, there has been, in form, a resumption of but one parcel of land, in substance there has, in those circumstances, been a resumption of a number of individual sub-divisions. But if the land has not been sub-divided or if for some other reason the hypothesis of a sub-divisional sale on the relevant date is excluded, compensation cannot be assessed on this basis. The fact, however, that the land is suitable for sub-division and that it may be sold in separate parcels at some future time is a material factor. Accordingly, estimates of the prices which individual parcels will bring at some future time may be taken into consideration in determining the value of the land at the date of resumption though the importance of this factor will, of course, depend upon assessments of the risk and of the time element involved.

In *St. John's College Trust Board* v. *Auckland Education Board* (2) the Full Court of the Supreme Court of New Zealand gave some consideration to this problem and expressed the following views: " If then the claimant is able to show that there was a market for the subdivisions as on December 15, 1942, and that the subdivisions could then have been sold, it is open to the Compensation Court to award compensation upon the assumption that, on that date, the claimant sold the land to several purchasers in lots accordingly. If however land taken is suitable and intended for subdivision, but there is no market for the sale of the allotments on the material date, then the assessment by the Court must be made on the basis of what the land might be expected to realize if sold in the open

(1) (1915) 19 C.L.R., at p. 558. (2) (1945) N.Z.L.R. 507.

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market as one undivided parcel to one purchaser desirous of acquiring it for the purpose of subdivision and sale as building sites. That was the position in *Napier Harbour Board* v. *Minister of Public Works* (1) " (2). I do not observe any difference in principle between the views expressed in these observations and those which I have already expressed. Both make it clear that the hypothesis of a number of individual sales of sub-divisions on the relevant date is excluded unless the land could then have been sold in that manner. But cases where everything necessary for the sale of a parcel of land in sub-division has been done before resumption of the parcel are unusual and this is not one of them. Accordingly, it is clear that the appellants were not entitled to require the payment to them, as compensation, of the net amount which subdivisional sales might have been expected to produce at some future time, namely the sum of £7,465 above-mentioned.

The learned trial judge did not think otherwise and, in the circumstances of the case, it became necessary for him to determine the value of the land as one parcel and this he proceeded to do. In doing so, however, he experienced a difficulty which seems to have arisen from some misapprehension of a method of valuation commonly used where, in the case of land suitable for sub-division, " no proper guide to its value as unsubdivided land can be obtained from sales of comparable land ". The method is stated in the following passage in the judgment of the Full Court :—". . . a familiar method of valuation which has regularly been used in New South Wales for many years is to assume that the land was subdivided by the most suitable method of subdivision and to ascertain, by reference to comparable sales of allotments similar to those into which it was assumed to be subdivided, what it should be expected to bring on the market by sale in subdivision. An estimate is then made of the costs involved in effecting the subdivision and of the length of time which it would take to realize the land in subdivision. Provision is then made for charges such as rates and taxes which would be incurred during the time up till realization, and provision is made for interest on to the purchase price, and the outgoings required to put the land into subdivision and sell it. In this manner an estimated net return to a subdivider is ascertained. It is, however, quite clear that that estimated net return is not the value of the land as at the date of resumption. No purchaser would acquire land at the present money value of that figure. Reasons for this are set out in part in the judgment of the judge of the Land and Valuation Court, which is annexed

(1) (1941) N.Z.L.R. 186. (2) (1945) N.Z.L.R., at pp. 513, 514.

to the case stated, and also in other cases in the Land and Valuation Court, including *Closer Settlement Ltd.* v. *The Minister* (1). Shortly stated, they are that many factors in the calculation are speculative, the time taken to realize the land may be longer than was estimated, unforeseeable difficulties may arise in respect of the sales of particular lots or all lots in the subdivision, the prices are estimates only, conditions may change in some or all respects before the time for sale arises, and the costs involved in effecting the subdivision may prove to be greater than is estimated. A purchaser considering buying land for the purpose of subdividing it would necessarily require a margin between the purchase price of the land and the expected or estimated net return on realization of it in subdivision, and this fact was recognized in this case. The extent of the margin, that is the difference between the purchase price which a purchaser would be prepared to pay for land *in globo* and the net return expected to be derived from it on sale in subdivision is a matter to be ascertained from the opinions of experts based upon their experience and their analyses of transactions of this type. It is frequently referred to as the allowance for risk of realization, although that expression is sometimes, as in this case, used in a more restricted and different sense. The margin required by a purchaser may be regarded as comprising two distinct elements firstly an evaluation of the risks involved in the process of obtaining the net return, that is the risks that the estimated net return will not be realized, and secondly, a provision for the purchaser to make a profit on the whole transaction. The purchaser would require that if the net return less the provision for the anticipated risk were realized he should make a profit on the transaction, that is, that his enterprise in risking his money in a venture that contains many elements of speculation should be rewarded" (2).

In proceeding to estimate what adjustment or adjustments should be made for the purpose of determining the value of the land the learned trial judge considered that a purchaser of the land would not pay for it a sum in excess of that amount, which upon an estimated net return from future sub-divisional sales of £7,465, would show a margin of twenty-five per cent on the amount expended on the purchase of the land and on necessary sub-divisional expenses. I use the expression "margin" rather than "profit" advisedly and in view of some remarks which, bearing in mind some of the observations made in the course of argument, should be made concerning the expression "risk of realisation".

(1) (1942) 17 L.G.R. 62.

(2) (1955) 55 S.R. (N.S.W.), at pp. 318, 319; 72 W.N., at pp. 200-201.

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The allowance of twenty-five per cent which his Honour thought proper to take into account in determining the amount which a prospective purchaser would pay for the land—and indeed the amount which the owner, " willing to sell it for a fair price but not desirous to sell ", would be prepared to accept—was an allowance for " profit and risk ". It included an adjustment for " risk of realisation " which, upon other evidence, his Honour assessed at twelve and one-half per cent. But the basis upon which a percentage adjustment is made for " risk of realisation " is not that the purchaser is entitled to expect to make that or any other rate of profit on his deal. In endeavouring to assess the value of a parcel of land by reference to the amount which a sub-divisional sale will realise at some future time the estimated cost of sub-divisional expenses must be taken into account. But they are only estimates and other factors, more or less speculative, such as the state of the market, must also be taken into account. The allowance for risk of realisation is made by way of overall adjustment with respect to the contingencies involved in these matters and though, if a purchaser's estimates prove correct, the making of the allowance will be reflected in his ultimate profit, it is an allowance which is made, in the first instance, not with that end in view, but as a contingency against possible losses. Over and above an appropriate allowance for this purpose a purchaser is, of course, entitled to look for a profit.

As I have already said, the learned trial judge estimated the risk of realisation, in terms of money, at twelve and one-half per cent of the amount of the expenditure above referred to and, ultimately, in assigning a value to the land, he made an adjustment only in respect of that factor, being of the opinion that in the circumstances of the case " the improved value of the subject land and compensation in respect of its resumption should be determined with due regard to the possibility of sub-division and sale in sub-division *by the owner* ". The italics are mine and serve to indicate why the learned trial judge excluded from consideration the margin of profit which a purchaser of the land might reasonably be entitled to expect. But when considering what a purchaser, with a view to sub-division, would be prepared to pay his Honour took this factor into consideration and arrived at a valuation of £5,150. This figure was arrived at after accepting evidence that the estimate of twenty-five per cent " for profit and risk " was " a reasonable estimate of what a speculative purchaser of the whole would require as distinct from an estimate of a proper allowance for risk of realization ". These two findings are quite clearly inconsistent,

for the land at the relevant time was worth no more in the hands of the appellant than it would have been in the hands of some other owner who had acquired it with a view to sub-division. Each owner would be called upon to assume precisely the same degree of risk and to embark precisely the same capital upon the proposal to carry out the sub-divisional scheme. There is no reason to suppose that the inducement to undertake that risk and to embark precisely the same capital should be different in either case; on the contrary it is clear that the considerations which would be relevant in the case of a hypothetical purchaser are precisely the same as those which are relevant to a consideration of the expropriated owner's position. Each would be entitled to look forward to precisely the same estimated profit. To ignore the latter factor when assessing the value of the land in the hands of the expropriated owner would be to give to him the value of the land plus the amount of profit which upon a sale and sub-division he might reasonably be expected to make. This is the course which the learned trial judge took and I agree with the Full Court that, upon the figures accepted by him and which are not in question on this appeal, it resulted in a determination in excess of the value of the land at the date of the resumption. In these circumstances I am of opinion that the Full Court correctly answered the questions raised by the case stated and that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellants, *W. A. Gilder, Son & Co.*

Solicitor for the respondent, *F. P. McRae*, Crown Solicitor for New South Wales.

J. B.