HIGH COURT OF AUSTRALIA

McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

ANTHONY PHILLIP MAURICI APPELLANT

AND

CHIEF COMMISSIONER OF STATE REVENUE RESPONDENT

Maurici v Chief Commissioner of State Revenue [2003] HCA 8
13 February 2003
S107/2002

ORDER

1. *Appeal allowed.*

2. *Orders 2 to 5 of the orders of the Court of Appeal of New South Wales made on 20 June 2001 be set aside, and in their place, order that the appeal from the orders of Cowdroy J of the Land and Environment Court made on 23 December 1999 be dismissed with costs.*

3. *Respondent to pay the costs of the appeal to this Court and the Court of Appeal of New South Wales.*

On appeal from the Supreme Court of New South Wales

Representation:

B W Walker SC with I McN Jackman SC for the appellant (instructed by Speed & Stracey)

B J Preston SC with J B Maston for the respondent (instructed by the Crown Solicitor for the State of New South Wales)

CATCHWORDS

Maurici v Chief Commissioner of State Revenue

Land tax – Valuation of land – Improved residential property in Sydney – Assessment of unimproved value of land – Whether s 6A(1) *Valuation of Land Act* 1916 (NSW) includes use of improved land sales – Relevance of "scarcity" – Valuation by reference substantially or exclusively to sales of unimproved land invalid.

Practice and procedure – Appeals – s 56A *Land and Environment Court Act* 1979 (NSW) – Question of law – Principles of assessment of land value – Relevance of scarcity.

Land and Environment Court Act 1979 (NSW), s 56A.
Land Tax Management Act 1956 (NSW), s 56.
Valuation of Land Act 1916 (NSW), ss 4(1), 5, 6A(1).

1 McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ. The question in this appeal is whether, in fixing the unimproved value of an improved parcel of land under the *Land Tax Management Act* 1956 (NSW) in accordance with s 6A of the *Valuation of Land Act* 1916 (NSW) as the former requires, it is right to have regard exclusively or virtually exclusively to sales of scarce unimproved parcels of land in the same locality as the relevant land.

Facts and previous proceedings

2 The appellant is the owner of a parcel of waterfront land at Hunters Hill, a long settled residential suburb of Sydney in which there are very few, vacant, residential sites. An assessment of land tax was made on 8 September 1998 on the basis of the unimproved value of the appellant's land of $2,440,000 as at 1 July 1997. The appellant objected to the valuation. The Chief Commissioner of State Revenue disallowed the objection. In doing so he said this:

> "The Court has held that the best method of determining land value is by direct comparison with sales of vacant land. Sales evidence does not need to be perfectly comparable to be valuable to the analysis of the market. It is the task of the professional land valuer to examine the available evidence, interpret the *vacant* land market as at 1 July each year and establish value levels for each type of property liable for land tax. The valuers are well aware that substantial increases to previous levels will be questioned and all values must be well supported by sales evidence." (emphasis added)

3 On 26 August 1999 the Valuer General informed the appellant that the valuation would be reduced to $2,000,000.

4 The appellant appealed to the Land and Environment Court against the Chief Commissioner's decision pursuant to s 38 of the *Valuation of Land Act*. The appeal, which was heard by Commissioner Nott, was on several grounds of which only one remains live in this appeal. The appellant contended that the valuation should be reduced to $1,250,000. He argued that the appropriate method of valuation required that an estimation be made of the value of the improvements, consisting mainly of a substantial house, and that that estimate be deducted from the notional selling price of the property in its fully improved state to derive the unimproved value.

5 The respondent relied on the evidence of a valuer, Mr Croker. His opinion as to the appropriate method of valuation echoed what the Chief Commissioner had said in his rejection of the appellant's objection. He compared

the appellant's notionally unimproved site with two other vacant sites which had recently been sold, and another vacant site which had been sold and resold after a relatively brief period. He said that he relied on the sale and the resale as evidence of value to a much lesser extent than the two other sales. That he was effectively disregarding sales of improved lands, and that he considered he was obliged to do so by the Act, was made clear from a passage in his evidence during cross-examination:

> "Q Yes, well that's what I'm saying to you, you're saying that what the Valuer-General does is that in considering each block, if, for example, one's dealing with a largely built-up suburb, he notionally imagines that has the only or one of the very few vacant blocks available in the area, and he attributes the scarcity value that it would have if it were actually vacant on the market to its value for the purposes of s 6A?
>
> A That's right, *we must by the way the Act's worded*.
>
> Q And he goes on and he does that for each block, one after the other?
>
> A That's correct.
>
> Q So every single block has got a notional component for scarcity value?
>
> A That's right.
>
> Q Even though in fact they're all built on, and even though, if they were all vacant at the same time, they obviously wouldn't possess that premium?
>
> A That's correct.
>
> …
>
> Q And so therefore one either had to do one of two things, one had to go to sales of vacant land further from the range, or one had to use improved properties and engage in some form of deduction of notional--
>
> A Well I disagree with that. In evidence I've already given to the Court I've made the statement that in my view, and the Court's

> upheld that too, it's not just my isolated opinion, it is far better to analyse sales remote in time and even in place of vacant land than it is to attempt to analyse improved sales." (emphasis added)

6 Commissioner Nott accepted, subject to some minor adjustments, Mr Croker's method of valuation as the correct one by reducing the unimproved value of the land by $50,000 only, to $1,950,000.

7 In doing so he rejected a submission by the appellant made on the basis of the exchanges in cross-examination that we have quoted[1]:

> "A novel submission was made by Mr Birch of counsel for the applicant: if a vacant land sale, such as of 30B Viret Street (having no house on it) was used to derive the land value, then an (unspecified) deduction should be made from the land value, because of the general scarcity of vacant land in the Hunters Hill Municipality. It was further submitted that such a deduction would not have to be made if sales of improved properties were used, as the improved sales (of which there were many) would not include a premium for scarcity."

8 An appeal lay, and was taken from that decision to a judge of the Land and Environment Court on a question of law pursuant to s 56A of the *Land and Environment Court Act* 1979 (NSW). We do not doubt that the question argued there, and again here, as to the relevance of scarcity, was a question of at least mixed law and fact. The making of a valuation will frequently involve an application of legal principle or principles. Questions of law, fact and opinion do not always readily and neatly divide themselves into discrete matters in valuation cases and practice[2]. The Privy Council took this view, with which we respectfully agree, of what may constitute a point, or question of law in relation to a valuation of land, in *Melwood Units Pty Ltd v Commissioner of Main Roads*[3]:

---

1 *Maurici v Chief Commissioner of State Revenue* unreported, Land and Environment Court of New South Wales, 6 October 1999 at [72].

2 *Boland v Yates Property Corporation Pty Ltd* (1999) 74 ALJR 209 at 266 [276]; 167 ALR 575 at 651.

3 [1979] AC 426 at 432 per Lord Russell of Killowen. See also *The Commonwealth of Australia v Arklay* (1952) 87 CLR 159 at 174-175 per Dixon CJ, Williams and Kitto JJ citing *Commissioner of Succession Duties (SA) v Executor Trustee and*

(Footnote continues on next page)

"If it should appear that the Land Appeal Court ignored a principle of assessment of compensation for compulsory acquisition (resumption), such as for example that commonly known as the *Point Gourde* principle, that in their Lordships' opinion would be an error in law. So also if the Land Appeal Court rejected as wholly irrelevant to assessment of compensation a transaction which prima facie afforded some evidence of value and rejected it for reasons which were not rational, that in their Lordships' opinion would be an error in law. And as will be seen, it is on those lines that the developer contends that the Land Appeal Court erred in this case."

9 Cowdroy J accepted the appellant's argument as to the relevance of the scarcity of vacant allotments and allowed the appeal. His Honour said this[4]:

"The appellant submits that the sales of the vacant parcels of land were unduly inflated and therefore unreliable as comparable sales due to a 'scarcity factor'. Such argument is based upon an answer in cross-examination of the respondent's valuer in which he acknowledged that a scarcity factor was a known component of vacant land sales in the Sydney metropolitan area and that such factor might be incorporated in the valuations of the Valuer General made pursuant to s 6A of the [*Valuation of Land Act*].

Commissioner Nott declined to make any deduction in the comparable sales of vacant land because of the scarcity factor. With the exception of one property which had erected upon it a derelict but substantial house, all of the comparable sales relied upon were of vacant lots.

To this challenge the respondent submits that the selection of properties by the Commissioner is not unreasonable within the *Wednesbury* sense and that no error of law is demonstrated.

Whilst there is nothing to suggest that such sales do not represent a comparable sale for use in assessing the value of the appellant's land, it is

---

Agency Co of South Australia Ltd (1947) 74 CLR 358 at 367 per Latham CJ, Rich and Williams JJ.

4 *Maurici v Chief Commissioner of State Revenue* (1999) 105 LGERA 318 at 322-323 [22]-[26].

not clear from the judgment whether the Commissioner paid any regard to the remaining valuations and if he did, the extent of such consideration. The learned Commissioner said that he reached his conclusion 'principally' upon the first six valuations.

Had it not been for the acknowledgment by the respondent of the existence of the scarcity factor, this ground would be rejected. However as it is acknowledged to exist and as it is not clear whether such factor has caused the sales of vacant parcels of land to be inflated, this issue must be addressed. I uphold this ground of appeal."

10 The Court of Appeal of the Supreme Court of New South Wales to which the respondent then appealed took a different view from Cowdroy J. There, Handley JA with whom Beazley JA and Giles JA agreed, said this[5]:

"There can be no doubt that the result contended for by the Chief Commissioner is artificial and leads to higher land values. He contends that the statutory assumption in s 6A(1) ('assuming that the improvements … had not been made') must be applied property by property. By doing this each developed parcel in Hunter's Hill municipality attracts the scarcity premium commanded by the few vacant parcels which would not exist if every parcel was undeveloped. This method of valuation is also said to be unfair because the taxpayer could not realise this scarcity premium on a sale of his developed block.

…

The taxpayer's argument for excluding the effect of the scarcity factor when determining the land value is contrary to the text of s 6A(1). The land value is the price that the land would realise on sale 'assuming that the improvements … other than land improvements … had not been made'. The hypothetical sale is of vacant land, and if vacant land commands a premium in the market, the hypothetical sale would realise that premium. No such assumption is required to be made about any other land. The result therefore is that the subject land is to be valued as vacant, but located in the neighbourhood as it exists in the real world.

---

5 *Maurici v Chief Commissioner of State Revenue* (2001) 51 NSWLR 673 at 681 [20], 682-683 [28]-[30].

The question is actually covered by the decision in *Tetzner v Colonial Sugar Refining Co Ltd*[6] where Lord Keith of Avonholm, speaking for the Judicial Committee said, in relation to similar legislation:

> '… What … is required … is that the physical improvements, with any value which they attach to the land on which they are situated, be excluded from the valuer's computation. The land will then be valued as land void of buildings but situated in the community with the amenities and facilities which have grown up around it. Their Lordships see no objection in the process of valuation to regarding the land as land situated in a sugar town. The valuer need not shut his eyes to the fact that there is a sugar manufacturing industry in existence.'

Equally it may be said in the present case that the valuer need not shut his eyes to the fact that Hunter's Hill exists as a developed residential suburb. The taxpayer's third challenge to the valuation adopted by Commissioner Nott must also be rejected. Leave to appeal from the decision of Cowdroy J in this respect should be granted and the appeal should be allowed."

11 The appellant repeated the arguments in this Court that he raised in the Land and Environment Court and the Court of Appeal.

The applicable legislation

12 Section 56[7] of the *Land Tax Management Act* relevantly provided that s 6A of the *Valuation of Land Act* applied to the determination of land value for the purposes of the former. That does not mean however that other sections of the latter not expressly so applied are irrelevant: they may, for example, assist in construing s 6A itself. The definition of "land improvements" in s 4(1) of the *Valuation of Land Act* should first be noticed:

> "***Land improvements*** means:
>
> (a) the clearing of land by the removal or thinning out of timber, scrub or other vegetable growths,

---

6 [1958] AC 50 at 57.

7 Repealed by the *Valuation of Land Amendment Act* 2000 (NSW), Sched 3.

(b) the picking up and removal of stone,

(c) the improvement of soil fertility or the structure of soil,

(d) the restoration or improvement of land surface by excavation, filling, grading or levelling, not being works of irrigation or conservation,

(d1) without limiting paragraph (d), any excavation, filling, grading or levelling of land for the purpose of the erection of a building, structure or work, not being for the purpose of irrigation or conservation,

(e) the reclamation of land by draining or filling together with any retaining walls or other works appurtenant to the reclamation, and

(f) underground drains."

13 It is plain that the definition is of improvements effected on and to an actual parcel of land itself, and not improvements external to the land. This appears from, among other things, the reference to "excavation, filling, grading or levelling of land for the purpose of the erection of a building" and the absence of any reference to any externalities to the land, such as roads and other services.

14 Section 5 of the *Valuation of Land Act* defines improved value of land.

"(1) 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.

(2) In determining the improved value of any land being premises occupied for trade, business, or manufacturing purposes, such value shall not include the value of any plant, machines, tools, or other appliances which are not fixed to the premises or which are only so fixed that they may be removed from the premises without structural damage thereto."

15 Section 6A of the Act provides as follows:

"(1) The land 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, other than land improvements, and made or acquired by the owner or the owner's predecessor in title had not been made.

(2) Notwithstanding anything in subsection (1), in determining the land value of any land it shall be assumed that:

(a) the land may be used, or may continue to be used, for any purpose for which it was being used, or for which it could be used, at the date to which the valuation relates, and

(b) such improvements may be continued or made on the land as may be required in order to enable the land to continue to be so used,

but nothing in this subsection prevents regard being had, in determining that value, to any other purpose for which the land may be used on the assumption that the improvements, if any, other than land improvements, referred to in subsection (1) had not been made.

(3) Notwithstanding anything in subsection (1), in determining the land value of any land, being land in relation to which, at the date to which the valuation relates, there was a water right:

(a) the land value shall include the value of the right, and

(b) it shall be assumed that the right shall continue to apply in relation to the land."

16 The first step to be taken under s 6A is to identify what is capable of being regarded as improvements, "other than land improvements". The second step is notionally to remove the improvements from the land. It is at the third point that difficulties arise. How is the land in its notionally unimproved state to be valued? The traditional, and usually unexceptionable method is to seek out relatively contemporaneous sales of comparable properties between parties at arm's length, unaffected by special circumstances, such as, for example, a strong desire by a purchaser to buy an adjoining property, and to use those sales as a yardstick for the valuation of the relevant land.

17 The method adopted by the respondent suffered, in our opinion, from these defects. It was unduly selective. It looked, on a fair reading of Mr Croker's

evidence, effectively exclusively to four sales (including a resale) only. Those were sales of vacant or substantially vacant land. They were not representative of sales in Hunters Hill. That must be so, because, as both sides accept, vacant land in Hunters Hill is scarce, if not to say, very scarce. The approach of the respondent, taken to its ultimate conclusion would mean that if there were one only (reasonably comparable, in location, outlook and other relevant features) vacant parcel of land left in a district, the likely or actual recent sale price of that parcel would effectively set the value for each and every improved parcel of land in that district. The respondent accepted that the valuer called on his side, not only valued the subject land as if its improvements had been shorn from it, but also as if it, now, a notionally unimproved, and therefore vacant site, was as scarce as the vacant sites the subject of the sales to which he said he had primary, but to which he effectively had exclusive regard. No attempt, it may be observed, was made by the respondent, to resolve the inherent paradox that as every improved parcel of land would be required to be treated in an equivalent way, the consequence would be that all parcels were notionally vacant and that there would no longer be any scarcity of vacant land. The respondent further submits that the exercise he undertook is the one that s 6A(1) requires be undertaken. And it was that exercise and the result which it produced which were approved by Commissioner Nott and the Court of Appeal.

18 Section 6A certainly does not dictate that that exercise be undertaken. In valuing the land, the respondent's valuer, to use the language of the Privy Council in *Melwood*, "ignored a principle of assessment of [value]", the principle being, that sales to be treated as comparable sales need to be truly comparable; or, to put it another way, in valuing the land the respondent's valuer did not proceed rationally, in that he was unreasonably selective in ultimately confining himself to two sales of scarce vacant land for the purposes of the comparison. The respondent could not, and did not suggest that he would be performing his statutory duty if he made other than a fair estimate of the value of the subject land. A fair estimate could only be made here on the basis of a fair, that is to say, a reasonably representative group of comparable sales. A group of comparable sales cannot be representative if it does not go beyond sales of scarce vacant land. That is not to say that sales of comparable vacant land may not provide useful evidence of value. But as J F N Murray observes in *Principles and Practice of Valuation*[8] in discussing valuations under federal land tax legislation of land in its notionally unimproved state, "sale evidence *[must be] relevant and sufficient in volume*" (emphasis added). So too, sales relied on, such as of scarce

---

8 4th ed (1969) at 120.

vacant land, are likely to be to a special and different class of buyer from buyers of improved land. As Waddell J said in *Sher v The Commissioner for Main Roads*[9], sales of properties of a different character are likely to attract a different class of buyer and are unlikely to provide a reliable indication of value.

Conclusion and disposition of the appeal

19 Improved sales are used daily for the purposes of statutory valuations under provisions similar to s 6A(1) of the *Valuation of Land Act*, by subtracting the added value of the improvements to them from their sale prices to derive unimproved values. It may be that in such a desirable area as Hunters Hill where there are apparently many mansions, their presence and the presence of lesser houses may add little, or much less than replacement value to the sale prices of the land on which they stand. But that does not mean that the respondent is entitled to ignore reasonably contemporaneous sales of comparable improved land. Such sales, particularly in the case of a scarcity of vacant land cannot be disregarded. The contrary approach is required by the Act.

20 The Court of Appeal was of the opinion that the question raised in this appeal was governed (adversely to the appellant) by the decision of the Privy Council in *Tetzner v Colonial Sugar Refining Co Ltd*[10], particularly by the observations of Lord Keith of Avonholm[11] to which Handley JA referred.

21 Nothing that was said by his Lordship in *Tetzner* bears upon the way in which a valuer should go about the task of selecting and applying comparable sales under the applicable legislation. The appellant does not suggest, to borrow his Lordship's words, that the valuer should close his eyes to any relevant fact. Indeed the contrary is the case. It is, the appellant submits, the respondent's valuer who closed his eyes to relevant matters. He should have had regard to all of the relevant facts including the scarcity of vacant land, the possibility of a particular and limited class of persons in the market for it, the scarcity or otherwise of improved land, the added value of the improvements to comparable lands, and in particular, truly comparable sales, which ideally would include like land similarly improved to the subject land. And whilst it is true that s 6A is

---

9 (1975) 24 *The Valuer* 150 at 151.

10 [1958] AC 50.

11 [1958] AC 50 at 57.

intended to apply to each valuation made under it, its statutory operation in relation to all valuations, that is, all pieces of land to be valued, is another factor which cannot be ignored, and requires that a scarcity of vacant sites not be the determinant factor in valuations made under the Act.

22 The Court of Appeal erred in upholding the respondent's appeal to it by approving the respondent's flawed method of valuation. However, a question arises as to how in view of the state of the evidence adduced before Commissioner Nott this matter should now be disposed of. The respondent wishes the valuation to be determined according to the reasoning and decision of this Court notwithstanding any deficiencies in the evidence adduced so far, that includes evidence on behalf of the appellant which in part at least may assume, and wrongly so, that replacement cost necessarily equals added value. He also accepts that if Mr Croker's approach to scarcity value is, as it has been, rejected, the matter should be remitted to the Commissioner for determination in accordance with the judgment of this Court. We would accordingly so order. It will be a matter for the Commissioner to determine whether, in the light of the clarification of the legislation and the proper approach to its application, he may, and should receive further evidence.

23 These conclusions should be implemented by orders that (1) the appeal to this Court be allowed with costs; and (2) orders 2-5 of the orders of the Court of Appeal be set aside and in place thereof it be ordered that the appeal from the orders of Cowdroy J of 23 December 1999 be dismissed with costs.

24 Costs orders in favour of the appellant should be made in respect of the appeals at both levels because the appellant has substantially succeeded and the case is of importance to, and is in the nature of a test case for, the respondent.

Orders

25 The restoration of the orders of Cowdroy J will give the appellant his costs in the Land and Environment Court, and provide for the remitter to Commissioner Nott for rehearing. As indicated above, it will be for Commissioner Nott to determine whether he may and should receive further evidence. Having regard to the provisions of s 69[12] of the *Land and Environment*

---

12 "(1) In this section, ***costs*** includes:

(a) costs of or incidental to proceedings in the Court,

(Footnote continues on next page)

Court Act, it will be for the Land and Environment Court (if it thinks fit) to make any order for costs of the proceedings before the Commissioner.

(b) in the case of an appeal to the Court, the costs of or incidental to the proceedings giving rise to the appeal, as well as the costs of or incidental to the appeal, and

(c) in the case of proceedings transferred or remitted to the Court, the costs of or incidental to the whole proceedings, both before and after the transfer or remittal.

(2) Subject to the rules and subject to any other Act:

(a) costs are in the discretion of the Court,

(b) the Court may determine by whom and to what extent costs are to be paid, and

(c) the Court may order costs to be assessed on the basis set out in Division 6 of Part 11 of the *Legal Profession Act 1987* or on an indemnity basis.

…

(8) A Commissioner or Commissioners may not make an order under this section except with the concurrence of the Chief Judge.

…"