

Judgment 18, 1958

1958

In the Privy Council

No. of 1957.

ON APPEAL  
from the Court of Appeal of New Zealand

IN THE MATTER of Section 67 of  
the Maori Affairs Act 1953

AND

IN THE MATTER of an application  
by the Minister of Works to the  
Maori Land Court to ascertain  
the compensation payable to the  
owners of certain Maori freehold  
lands being part of the Whareroa  
Block situate in the Tauranga  
Survey District.

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# RECORD OF PROCEEDINGS

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CASE STATED BY MAORI LAND COURT FOR  
OPINION OF SUPREME COURT.

IN THE SUPREME COURT OF NEW ZEALAND  
NORTHERN DISTRICT  
(AUCKLAND REGISTRY)

In the  
Supreme  
Court of  
New Zealand  
No. 1  
Case stated  
by Maori  
Land Court  
for opinion  
of Supreme  
Court  
11th July  
1955

IN THE MATTER of Section 67 of 10  
the Maori Affairs Act 1953

AND

IN THE MATTER of an application  
by the Minister of Works to the  
Maori Land Court to ascertain  
the compensation payable to the  
owners of certain Maori freehold 20  
lands being parts of the Whareroa  
Block situate in the Tauranga  
Survey District.

Case stated by the Maori Land Court for the opinion of the Supreme Court  
upon a question of law

By a proclamation dated the 5th day of September 1952 and published  
in the N.Z. Gazette of the 11th September 1952, the lands described below com-  
prising a total area of 91 acres 1 rood 24 perches, together with other lands 30  
were taken and vested in Her Majesty for the purpose of better utilization  
under the provisions of the Public Works Act 1928 and its amendments.

			<i>Area</i>	<i>Block</i>	<i>Survey District</i>
Whareroa	2E 6B	1/2 (part)	19 3 25	VI and VII	Tauranga
"	2E 3A	"	12 0 0	VII	"
"	2E 2	"	11 2 5	"	"
"	2E 4	"	21 2 24	"	"
"	2E 5	"	26 1 10	VI and VII	"

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The said lands at the time of the taking were vested in the Waiariki  
District Maori Land Board as Trustee for the beneficial owners thereof, by  
virtue of a Vesting Order made by the Maori Land Court under the provi-  
sions of Section 8 of the Maori Purposes Act 1943, and approved by the  
Minister for Maori Affairs in the month of November 1951. This order

In the  
Supreme  
Court of  
New Zealand  
No. 1  
Case stated  
by Maori  
Land Court  
for opinion  
of Supreme  
Court  
11th July  
1955  
continued

vested in the Board an area of 242 acres 0 roods 25 perches being the whole of each of the blocks, of which the lands taken formed part. As from the 30th September 1952 the land became vested in the Maori Trustee as trustee, in place of the Maori Land Board, by virtue of Section 7 of the Maori Land Amendment Act 1952.

10 Upon the 18th September 1952, application was made to the Maori Land Court on behalf of the Minister of Works, under the provisions of Section 104 of the Public Works Act 1928, to assess the compensation which ought to be paid in respect of the said lands.

Upon the 29th September 1952 the said Waiariki District Maori Land Board gave notice to the Minister of Works that the said Board claimed the sum of £109,011 for compensation, made up as follows:

	91 acres 1 rood 24 perches of land taken at . . . . .	£95,711 0 0
20	Land injuriously affected as follows as per scheme above 150 acres 3 roods 01 perches	£13,300 0 0
	Total claim	<u>£109,011 0 0</u>

The claim for injurious affection relates to 150 acres 3 roods 01 perches, being adjacent to the land taken and being the balance of the blocks of land set out above.

30 The said application came before the Maori Land Court sitting at Tauranga commencing on the 6th day of April 1954, Morison, Chief Judge presiding.

40 At the time of the taking the land was in an undeveloped state. Prior to the making of the order of 1948 vesting the blocks in the Maori Land Board a plan was prepared for the subdivision into allotments for residential purposes of the whole of the blocks vested in the Board (of which the land taken forms part) together with some adjoining land belonging to Europeans. One of the objects for which the said order was made was to enable the Maori Land Board, as trustee for the beneficial owners, to proceed with the subdivision. The order could not become effective until approved by the Minister of Maori Affairs. Such approval was not given until November 1951, after a notice of intention to take the land under the Public Works Act 1928 and its amendments had been issued on behalf of the Minister of Works. This notice was gazetted on September 13th 1951. No action could be taken by the Maori Land Board to proceed with the sub-

division until the said order had been approved by the Minister of Maori Affairs, and it is evident that it would have been useless for the Board to have proceeded with the subdivision after the issue of the notice of intention to take the land.

No evidence was adduced to show when the subdivision would have been proceeded with if the Minister's approval had been granted at an earlier date. The evidence adduced did show that the carrying out of a subdivision would have involved a considerable outlay for roading, drainage and other development, and other costs of subdivision.

Upon hearing the evidence and submissions of counsel the Court has found that part of the land would have been immediately saleable at the date of the taking in lots upon a subdivision either for residential or industrial purposes, and that the balance would have been saleable in lots upon a subdivision for residential or industrial purposes from time to time over a period of years subsequent to the date of taking.

A question of law arises as to the basis upon which the value of the land should be assessed, including the question as to whether there should be any difference in the method of assessment of the value of, First that part of the land which would have been immediately saleable in lots at the date of the taking and Secondly that part which would have been saleable in lots from time to time over a period subsequent to the date of the taking.

The questions which are stated for the opinion of this Honourable Court are:—

- (1) Is the value of the land to be assessed upon the assumption that the claimant sold the land at the date of the taking in one undivided parcel to one purchaser desirous of acquiring it for the purpose of subdivision and sale in lots?
- (2) Is the value of the land to be assessed upon the assumption that the claimant sold at the date of the taking that part of the land which was then immediately saleable in lots to several purchasers in lots according to a subdivision made by him and sold the balance of the land to several purchasers in lots from time to time over a period subsequent to the date of the taking according to a subdivision made by him?

If the answer to each of the above questions is "No", then the following questions are submitted:—

- (3) As to that part of the land which would have been immediately saleable in lots at the date of the taking:—

In the  
Supreme  
Court of  
New Zealand  
No. 1  
Case stated  
by Maori  
Land Court  
for opinion  
of Supreme  
Court  
11th July  
1955  
continued

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In the  
Supreme  
Court of  
New Zealand  
No. 1  
Case stated  
by Maori  
Land Court  
for opinion  
of Supreme  
Court  
11th July  
1955  
continued

- (a) Is the value to be assessed upon the assumption that the claimant at the date of the taking sold the land to several purchasers in lots according to a subdivision made by him?
- (b) Is the value to be assessed upon the assumption that the claimant at the date of the taking sold the land in one undivided parcel to one purchaser desirous of acquiring it for the purpose of a subdivision and sale in lots?
- 10 (4) As to that part of the land which would have been saleable in lots from time to time over a period of years subsequent to the date of the taking:—
- (a) Is the value to be assessed upon the assumption that the claimant sold the land to several purchasers in lots from time to time over a period of years subsequent to the date of the taking according to a subdivision made by him?
- 20 (b) Is the value to be assessed upon the assumption that at the date of the taking the claimant sold the land in one undivided parcel to one purchaser desirous of acquiring it for the purpose of subdivision and sale in lots.
- (5) If the answers to questions 3 and 4 are “No” then how is the value of the land to be assessed?

As witness the seal of the Maori Land Court and the hand of David Gordon Bruce Morison, Esquire, Chief Judge, this 11th day of July, 1955.

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(L.S.)

D. G. B. MORISON  
Chief Judge

Pursuant to the provisions of Section 67 of the Maori Affairs Act 1953, I David Gordon Bruce Morison, Chief Judge of the Maori Land Court, do hereby sanction the stating of the foregoing case for the opinion of the Supreme Court.

Dated the 11th day of July 1955.

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D. G. B. MORISON  
Chief Judge.

ORDER FOR REMOVAL OF CASE STATED INTO COURT OF APPEAL

BEFORE THE HONOURABLE MR. JUSTICE FINLAY  
FRIDAY THE 19TH DAY OF AUGUST 1955

UPON READING the Notice of Motion dated the 16th day of August 1955 AND UPON HEARING MR. COONEY of Counsel on behalf of the Claimants AND SIR VINCENT MEREDITH of Counsel on behalf of the Respondent consenting hereto THIS COURT HEREBY ORDERS that the Case Stated by the Maori Land Court herein be and is hereby removed into the Court of Appeal for hearing AND HEREBY FURTHER ORDERS that the costs of and incidental to the said Notice of Motion and this Order be reserved.

By the Court,

L. P. GAVIN,

*Deputy Registrar.*

L.S.

In the  
Supreme  
Court of  
New Zealand  
No. 2  
Order for  
Removal of  
Case stated  
into Court  
of Appeal  
19th August  
1955

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REASONS FOR JUDGMENT

CORAM:

Gresson J.

Adams J.

Shorland J.

(a) Gresson J.

This was a Case stated by the Maori Land Court seeking the opinion of the Supreme Court (pursuant to Section 67 of the Maori Affairs Act 1953) upon questions arising in respect of a valuation of land required to be made by the Maori Land Court. The case was by consent removed into the Court of Appeal. The questions to which answers were sought were,—

- (1) Is the value of the land to be assessed upon the assumption that the claimant sold the land at the date of the taking in one undivided parcel to one purchaser desirous of acquiring it for the purpose of subdivision and sale in lots?
- (2) Is the value of the land to be assessed upon the assumption that the claimant (1) sold at the date of the taking that part of the land which

In the  
Court of  
Appeal of  
New Zealand  
No. 3  
Reasons for  
Judgment  
19th  
December  
1956  
(a)  
Gresson J.

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was then immediately saleable in lots to several purchasers in lots according to a subdivision made by him and (2) sold the balance of the land to several purchasers in lots from time to time over a period subsequent to the date of the taking according to a subdivision made by him?

10 and in the event of these questions being answered "no" certain other questions were propounded. The land in question comprised an area of a little more than 91 acres. Its history was that in 1948 it was included in a Vesting Order made by the Maori Land Court in favour of the Waiariki District Maori Land Board, but such vesting could have no effect until approved by the Minister. Before such approval was given (which was not until November 1951) the Minister of Works on the 13th September 1951 gazetted notice of intention to take the land under the Public Works Act 1928 Section 22. By Proclamation dated 5th September 1952 (N.Z. Gazette 11th September 1952) the land was declared taken as from 15th September 1952 "for better utilization". On the 18th September 1952 the Minister applied to the Maori Land Court to have the amount of compensation ascertained.

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The Case Stated relates that as from the 30th September 1952 the land became vested in the Maori Trustee in place of the Maori Land Board by virtue of Section 7 of the Maori Land Amendment Act 1952. But that is erroneous since the land, by virtue of the Proclamation, had become vested in the Crown on the 15th September 1952. It was the Waiariki District Maori Land Board which on the 29th September 1952 asserted a right to receive compensation though it would seem that the right to compensation (though not the land) had become vested in the Maori Trustee.

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Prior to the vesting order of 1948 a plan had been prepared providing for subdivision into allotments for residential purposes of a larger block of which the land taken formed part; this subdivision or project embraced also some adjoining land belonging to Europeans. After the notice of intention to take the land was given on the 13th September 1951 it became useless to proceed. The carrying out of the project by the Board (or by the Maori Trustee) was therefore completely frustrated.

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The facts in regard to the block of land which the Maori Land Court is called upon to value are very badly and inadequately stated. The Court is told that at the time of the taking the land was in an undeveloped state; there is an absence of evidence as to when the subdivision would have been proceeded with if the Minister's approval had been earlier obtained; evidence adduced showed that the carrying out of a subdivision would have involved considerable outlay for roading, drainage and other development, and other costs of subdivision. The Case states that "Part of the land would

have been immediately saleable at the date of the taking in lots upon a subdivision either for residential or industrial purposes.” and that,—“The balance would have been saleable in lots upon a subdivision for residential or industrial purposes from time to time over a period of years subsequent to the date of taking.”

Upon this very unsatisfactory, and it would appear incorrect, statement of facts the Court is asked generally the basis upon which the value of the land should be assessed, and in particular whether there should be any difference in the method of assessment of the value of first “that part of the land which would have been immediately saleable in lots at the time of taking”, and secondly, “that part which would have been saleable in lots from time to time over a period subsequent to the date of taking”. The allusion to “that part of the land which would have been immediately saleable in lots at the time of the taking” implies that some of the land was in that state. But it was contended by the Crown that in as much as the subdivision plan, though it had been prepared, had not received such consents or approvals as were necessary, there were in fact no sections legally saleable. That the facts were as stated by the Crown was not challenged and the position is therefore that though the case stated asked for directions as to “that part of the land which would have been immediately saleable in lots at the time of the taking” in truth and in fact there were no such lots. There was no more than an area of land which possessed the potentiality of being subdivided into allotments. That, of course, enhances its value. But, nevertheless, “the amount which which the land if sold in the open market by a willing seller on the specified date might be expected to realise”—Finance (No. 3.) Act 1944 Section 29 is necessarily less than would be the case if it consisted of sections immediately saleable. I think, therefore, that in this case the land with its potentiality must be valued as land capable ultimately of disposal by subdivision at some future time but not in that state at the time of valuation. It was otherwise in *Marshall's* case (1950 N.Z.L.R. 339) as to part of the land there dealt with; as to that part it was practicable to arrive at the value in the aggregate of a number of sections, but as to the other part it has no more than a potentiality for subdivision. It was held as to the other part that a method of valuation that was open to the Court (though not the only course which might have been adopted) was to value that part as it would be after subdivision had been effected making an appropriate deduction for the cost of subdivision and allowances on account of the period of time that must necessarily elapse before realisation and other factors proper to be considered. The whole of the land in this case is in the latter category since the owner could not on the date upon which the valuation had to be made have sold the land in individual allotments; that was a course which could not as the law stood have been taken.

The position is therefore, in my opinion, that the whole of the land

must be valued as one entity with regard, of course, to its potentialities. As was said in *Raja Vyricherla Narayana Gajapatiraju v. Revenue Divisional Officer Vizagapatam* (1939 A.C. 302,316) "The vale of the potentiality must be ascertained . . . on such materials as are available . . . without indulging in feats of the imagination."

10 The opinion here expressed might seem to be not in accord with the decision of the full Court in *St. John's College Trust Board v. Auckland Education Board* (1945 N.Z.L.R. 507), in as much as in that case it was held "lawfully open to the Compensation Court to award compensation upon the assumption that on December 15th, 1942, the claimant Board sold the land to several purchasers in lots according to a subdivision made by it." But the decision should not be regarded as enunciating principles of general application. It was decided upon an assumption which was a departure from reality. There was an agreement made between counsel for the parties and accepted by the Compensation Court, not only that the land was suitable for subdivision into suburban residential building sites, but as well that that was the proper basis upon which to value. Disposal by subdivision was accepted as the basis of valuation even though the land had not in fact  
20 been subdivided. The subdivision was one strictly speaking in contemplation only, but the land was such that it was easily subdivisible without further roading and the sections would have been eagerly sought after. The Court, satisfied that there was a market for sections, assumed a subdivision which in fact had not been made and treated the land as comprising sections, though in fact that was not the case. The only test the Court adopted was whether there was a market for such sections on December 15th, 1942, and satisfied as to that, held that it was 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. The contest upon which the  
30 Court was asked to adjudicate was (on an assumed basis that the land comprised saleable sections) was the valuation to assume one sale by the claimant on December 15th, 1942, to a purchaser, who, having purchased, marketed the land as building allotments, or was the method of assessment to be on the basis that had the claimant decided on December 15th, 1942, to sell the land it would have not disposed of it to one purchaser but would itself have marketed it in sections direct to numerous purchasers. The Court was satisfied that the compensation proper to be awarded would have to be substantially greater if the basis which the claimant contended for were adopted. In the case with which we are concerned, though a sub-  
40 division was, and may still be, in contemplation, it cannot be assumed since it does not exist; no such assumption as was made in the *St. John's College* case is permissible in this case. The Crown is insistent that at the relevant date the land was not subdivided; and that is true in the sense that at the date there could not have been a valid sale of a single section since the sections were as yet only in contemplation. Valuation must perforce be

of the land as a whole—but as land suitable for subdivision and on that account having a higher value than would otherwise be the case. There is required this gloss upon the enunciation of principle in the *St. John's* case that it is lawfully open to award compensation upon the basis of a sale to several purchasers in lots according to a subdivision but only if in fact there is such a subdivision as would permit of this course being adopted at the relevant date. There must be in existence an actual subdivision, not merely a prospective one or an assumed one. A subdivision is not an actual subdivision unless all such formalities have been complied with as to permit of the sale of each and every lot to particular purchasers and the completion of such sales by transfer. That is not the position as regards the land that in this case has to be valued.

In my opinion in this case the land must be valued for what it in fact was on the specified date—a tract of land capable as to some, perhaps all of it, of subdivision into building allotments, and of being sold at some time and over some period in that form. That circumstance would influence a purchaser in his determination of price. In estimating what price a purchaser would be willing to pay recourse may be had to an examination of the estimated gross yield from a subdivision as yet notional only; and the estimated deductions that a purchaser would have to take into account; but that is the extent to which a notional subdivision can be regarded. There must be excluded from the Court's contemplation retention by the claimant and an assessment of what in his hands it would yield if subdivided because that course is not open to him. At the time value has to be determined the land was in fact not—legally speaking—subdivided so as to permit of sale piecemeal. A good deal requires to be done before there can be disposal in that manner, and as well as expenses there will be risk and delay.

Since writing the foregoing my attention has been drawn to the decision of the High Court of Australia in *Turner v. Minister of Public Instruction* (1956 A.L.R. 367) in which the questions which arise in this case were discussed. I think the view I have expressed is in consonance with the decision of the High Court; as that decision has been examined and adopted by the other two members of the Court I do not propose further to allude to it.

I think therefore that the opinion of this Court should be expressed as hereunder,—

- (1) In accordance with Section 29(1)(b) of the Finance Act No. (3) 1944, and subject to the other provisions of that Section the function of the Maori Land Court is to ascertain as the value of the land "the amount which the land if sold in the open market by a willing seller on the specified date might be expected to realise". The specified date is the 15th September 1952.

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- (2) The valuation must be of the land in the state in which it is on the specified date; any potentialities shall be taken into account in assessing its value.
- (3) The Court must contemplate the sale of the land as a whole unless on the specified date there could have been separate sales of particular portions, and there was a market for such separate portions. Only if the land had been legally subdivided at that date so that particular lots might have been sold and title given can it be said that there could have been separate sales of particular portions.
- (4) If the land has to be valued as a whole, the Court in assessing the potentialities may take into account the suitability of the land for subdivision, the prospective yield from a subdivision, the costs of effecting such a subdivision, and the likelihood that a purchaser acquiring the land with that object would allow some margin for unforeseen costs, contingencies and profit for himself.

20 As regards costs in this Court, since the view contended for by the Crown has prevailed the Crown should be allowed costs on the higher scale, with an allowance of an additional fifty per cent. as on a case from a distance, a sum of twenty guineas for second day and ten guineas for each of the two days for second counsel.

*Solicitors for claimant*—COONEY, JAMIESON, LEES & MORGAN,  
TAURANGA.

*Solicitors for Minister of Works*—MEREDITH, MEREDITH, KERR &  
CLEAL, AUCKLAND.

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(b) F. B. ADAMS J.

40 According to the Case Stated, the land in question was in an undeveloped state when taken, and counsel informed us that there was not even access by road. There was, moreover, evidence to the effect that the carrying out of a subdivision would have involved considerable outlay. The statement in the Case that certain parts of the land "would have been immediately saleable in lots . . . "upon a subdivision," must be understood as meaning that the lots would have been immediately saleable if any necessary consents or approvals had been given in respect of proposed subdivisional plans, and if all other conditions precedent to subdivision had been fulfilled; or, in other words, that the sales could have been made if it had been legally permissible to sell by way of subdivision. It was common ground at the hearing before us that this was not in fact permissible at the time.

At the hearing we experienced considerable difficulty in grasping the precise nature of the actual controversy. Counsel on both sides were agreed that subdivisibility is a relevant consideration; but counsel for the Minister maintained that proper allowance should be made for the fact that a purchaser would discount his price in order to allow himself some margin of profit, and also to protect himself against risks of market fluctuations and the like; while Mr. Cooney contended, as a matter of law, that no such "profit-and-risk" allowance is permissible in regard to such portions of the land as could supposedly have been sold immediately on the specified day in subdivided lots, and that these must be assessed at their saleable values, subject only to the deduction of necessary expenses. In answer to questions addressed to him from the Bench at the close of his argument, he agreed, however, that the element of profit and risk must be taken into account in regard to such portions of the land as could not then have been regarded as immediately saleable in subdivided lots. Thus the controversy was narrowed down in substance to the question of the propriety of an allowance for profit and risk in the case of the supposedly immediately saleable subdivisions, with a subsidiary question as to what constituted immediate saleability. As to the latter, it was contended on behalf of the Minister, not only that there must be a market on the specified day for the subdivided lots, but also that the stage must have been reached at which it was legally possible to sell the subdivisions separately, all necessary consents and approvals having been obtained, and all other conditions precedent having been complied with; whereas Mr. Cooney, while not denying that marketability must be shown, maintained that a contemplated or a notional subdivision will suffice, and that it might be assumed, if the circumstances rendered the assumption a proper one, that any necessary consents or approvals had been or would be given and other conditions complied with.

The nature of the problem and its practical bearings are made plain in the recent decision of the High Court of Australia in *Turner v. Minister of Public Instruction* 1956 Argus L.R. 367. In essence the question is whether the expropriated owner of land that is subdivisible but not yet subdivided is entitled to be compensated on such a basis as will give him the profit that might have been reaped by selling in subdivided lots. In the case cited the majority of the Court held—and I respectfully agree—that, if the tribunal assessing the compensation proceeds on the basis of the estimated probable proceeds of subdivision, there must be deducted, not only the probable expenses of subdivision, but also an appropriate allowance for what is described as "risk of realisation" and a further allowance representing the profit which a purchaser might expect to make by reselling in subdivision. If one were to add to this a statement to the effect that, where the land is "not yet subdivided," there are no such things as "immediately saleable subdivisions," the proposition as a whole would settle the entire controversy in this case.

In the  
Court of  
Appeal of  
New Zealand  
No. 3  
Reasons for  
Judgment  
19th  
December  
1956  
(b)  
F. B.  
Adams J.  
continued

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The proposition is consistent with the answer proposed by my brethren, and is, I believe, what their answer is intended to affirm when applied to the particular facts of this case. To that extent I am happy to say that I am in complete agreement with their view.

10 But the proposed answer goes further in that it envisages the application of a different rule in cases where the land has already been "legally subdivided" on the relevant date. On that point I am, with respect, unable to agree. There is a suggestion to similar effect in the judgment of Kitto J. in *Turner v. Minister of Public Instruction* (above, 388)—a judgment which was concurred in by Fullagar J., and with which I am in all other respects entirely in agreement. What the learned Judge there envisages is "separate allotments capable of separate sale at the date of the resumption," on the footing that "the process of subdivision had been completed before the resumption was made." Taylor J., in a judgment to which I would otherwise take no exception, sees no "difference in principle" between his views and those expressed in *St. John's College Trust Board v. Auckland Education Board* 1945 N.Z.L.R. 507—the decision which is the source of the argument that a different principle applies in cases where  
20 subdivided sections are "immediately saleable."

The difficulty I feel is two-fold. In the first place, the argument in the present case has arisen from the ambiguity or uncertainty, whether real or imaginery, of the formula adopted in the *St. John's College* case; and, according to what we were told by counsel, it appears that the decision has in fact led to much uncertainty and confusion in the practical handling of compensation claims. Apparently the notion of "immediate saleability" has been too elastically interpreted by claimants for compensation, as was  
30 certainly the case in the argument before us. I suspect that similar ambiguity or uncertainty might be found in the other formulae referred to above; and, as for the expression "legally subdivided," which my brethren adopt, I am by no means clear as to its precise meaning. Does it import *de facto* as well as "legal" subdivision? Is preparation and approval of a plan all that is required?

In the second place, I can see no valid ground for any difference in legal principle depending on the stage to which an intended subdivision may have proceeded. If the land is still a single holding, it must always  
40 be valued as a whole. I respectfully agree with the views expressed by Dixon C. J. in *Turner's* case (above 373-5), where he distinguishes between questions of law and questions of fact, and, while pointing out that the reasoning by which the hypothetical purchaser may arrive at his opinion of value is not a matter of law, and that valuations cannot be made to depend entirely on a logical process or formula, concludes that, whatever else may be true as to the process of valuation employed, it is the entire

land that must be valued as at the date of resumption, that is to say, the land "undivided but having the clear potentiality that it was fit for subdivision." I do not propose to repeat the reasoning of the learned Chief Justice, and rely on it merely as confirming an opinion which I had already put into writing before reading his judgment. Dixon C. J. felt a difficulty as to how much might be law and how much fact. I feel the same difficulty, but need not discuss it. I am satisfied that, as a matter of law, the land must always be valued as a whole. I think also that it is a matter of law that every relevant consideration affecting the value must be taken into account, including in particular the subdivisibility of the land and the stage (if any) to which the process of subdivision has been carried on the date of resumption.

There are, however, two points on which it is necessary to guard against misunderstanding. Firstly, I am not suggesting that separate awards may not be made, or separate sums assessed in the same award, in cases where different blocks of land have been taken separately, or where, even though included in the same proclamation, they are really separate holdings. I express no opinion on any of those matters except to say that, where lands are contiguous, the mere fact that a subdivision of the land may have been prepared and approved, with or without delimitation by survey, will not in my opinion suffice to constitute separate holdings. A good illustration of separate holdings is to be found in *Ellesmere v. Inland Revenue Commissioners* 1918 2 K.B. 735. The lands in question in the present case are in fact described in the proclamation as if they comprised five separate blocks, and there may conceivably be more than one separate holding here. In the argument before us the land was treated as one block, and for present purposes I assume this to be correct.

Secondly, I am not suggesting that the tribunal may not have regard to the present or future values of subdivided lots, or that the stage to which subdivision has proceeded is irrelevant. If the process has been carried to a point that would affect the value in the eyes of the hypothetical purchaser, then it must be duly taken into account. There may even be rare cases in which the value of the entirety can be properly ascertained by adding up the values of subdivided lots, subject only to such deductions (if any) as may be necessary in respect of the trouble and expense of selling and of completing sales.

So far as I am aware, there is as yet no actual decision, except the *St. John's College* case which conflicts with the views expressed above. The distinction between such portions of the land as are immediately marketable in subdivided lots and such portions as are not so immediately marketable rests, as I have said, on that judgment. I refer, of course, not to the practical distinction, about which there is no question, but to the suggested



distinction in point of law. While entitled to the utmost respect, the *St. John's College* decision is not binding on this Court. My brethren are content to construe it as meaning what they say in paragraph (3) of their proposed answer. I am unable so to construe it, and, with all deference to the learned Judges who took part in the decision, consider it should not be followed. The land in question in that case had not in fact been legally subdivided, and the decision is therefore incompatible with the law as now laid down by this Court in paragraph (3) of its answer. Moreover, the *ratio* of the decision is to the contrary of paragraph (3), the purport of the judgment being that subdivided sections may be valued separately even though, as was clear on the facts of that case, no subdivision had yet been made. I agree with my brethren in their view that in such circumstances the land must be valued as a whole—which is in itself in my opinion a departure from and rejection of the *St. John's College* decision.

For these reasons I am of opinion that the *St. John's College* case was wrongly decided. I see no advantage in attempting to explain the decision as applicable only to a state of facts which did not there exist. In my opinion the land has to be valued *in globo* even in the circumstances to which my brethren would now confine that decision, and the only logical course is to revert to that principle even if this involves a departure from the earlier decision.

I proceed now to state my reasons for the view that, except where there are separate holdings as aforesaid, the land must always be valued as an entirety. The statutory measure of the compensation is to be found in S. 29 of the Finance Act (No. 3) 1944, the relevant provision being:

29(b): "The value of land shall, subject as hereinafter provided, be taken to be the amount which the land if sold in the open market by a willing seller on the specified date might be expected to realize:"

It is, I think, clear that what the subsection contemplates is, not a piecemeal disposal, but a hypothetical sale of the entirety. It is one undivided sum that is to be ascertained, and that sum is to represent the price which the land in its entirety might be expected to realise. In the words of Greene M.R. in *Horn v. Sunderland Corporation*, 1941 2 K.B. 26, 32 and 34, it is a "global sum", and "in essence one sum". In *Minister of Public Works v. Thistlethwayte* 1954 A.C. 475, Lord Tucker, in delivering the judgment of the Privy Council on the question whether certain evidence was properly admitted on a claim for compensation in respect of land suitable for subdivision into residential lots, tested the question of relevancy by reference to the fact that the evidence had only been admitted for the following purpose:

“... for the purpose of establishing one step in the process of ascertaining the sum which might be expected to have been obtained for the land if sold *in globo* at the date of resumption . . . ”

Being relevant to that issue, the evidence was held to be admissible, and it is clear, I think, that their Lordships regarded that issue as defining the proper measure of compensation; and I respectfully so regard it.

In ascertaining the global sum, the potentialities of the land have to be taken into account, including suitability for subdivision where that factor exists. Subdivisibility, whether for residential purposes or otherwise, is nothing but a potentiality; and this is so no matter how far the claimant may have proceeded towards actual subdivision—short of actual sales, of course, which are not an exception to the rule but merely substitute the purchasers as claimants. It is well established that, where potentialities are in question, the compensation is to be based on them as such, and not on realised potentialities. On principle, it is plain that this must apply to subdivisibility as much as to any other potentiality; but, if authority be needed, there is a relevant passage in the judgment of the Privy Council in *Raja Vyricherla v. Regional Divisional Officer of Vizagapatam* 1939 A.C. 302, 313. 10

When it comes to valuing land that can be turned to better account by subdivision, the fundamental problem remains unchanged, and no new principle intervenes. The question always is, “what is the present value of the land in its present state and condition?”—taking into account, of course, its suitability for subdivision—and never, “What will be its value when subdivided, or when sold by way of subdivision?” What has to be ascertained in all cases, and whether the land is subdivisible or not, is the figure that the land might, in the terms of the statute, have been expected to realise if sold on the open market on the relevant date. That figure will be affected by all the potentialities of the land, but only in so far as they would influence a buyer in fixing the price that he would then be prepared to pay for the land as it stands (*i.e.*, “in its actual condition at the time of expropriation,” *Fraser v. City of Fraserville* 1917 A.C. 187, 194; “as it is when it is acquired—in its then ownership and in its then physical state regard being had to all its actual and potential uses,” *Grace Brothers Proprietary Ltd. v. Commonwealth* 1946 72 (C.L.R. 269, 281). 30

The difficulty always lies in determining the extent to which subdivisibility or any other potentiality would influence the hypothetical buyer. The solution of that problem necessarily involves speculation as to the ways in which the potentiality may be turned to account; and, in the case of subdivisibility, the tribunal is entitled, for the purpose of solving the problem, to consider every factor that bears on the question. If some of the land is 40

10 already subdivided into suitable lots for which there is a ready market, the prices at which those lots could be immediately sold would naturally influence the buyer, and would therefore be a legitimate subject for consideration by the tribunal, though not on the footing that those particular lots had in some way become separate entities dis severed from the remainder of the land and so requiring to be dealt with on a different principle, but solely on the footing that their immediate saleability would affect the price that a buyer would then be prepared to pay for the whole. The probable prices of other lots which cannot be sold immediately are relevant in exactly the same way. The tribunal may therefore consider the prices at which sections may be expected to sell, whether immediately or in the more or less remote future, and may use those prices in its calculations. The way in which that is to be done is a question of fact for the tribunal—20 one of the processes in the reasoning by which the ultimate goal is reached and a value placed upon the entirety. Of course, there is a debit side of the account, and all expenses and losses that are likely to be incurred, and every other factor that may diminish the profit derivable from such sales, whether immediate or deferred, must be duly regarded as the circumstances of the case may require. But the ultimate goal is always the same, namely, to arrive at the figure which the land as a whole might have been expected to realise on the given day.

30 In my opinion, it is not open to doubt that this view, and no other, accords with the statute. It involves no injustice to the claimant, and gives him the full value of his land. What he has lost is exactly what the hypothetical purchaser would have in his hands for disposal, and the latter has every facility for disposal that the claimant himself possessed. Where immediate sales of subdivided lots are possible, the hypothetical purchaser can effect such sales just as readily as the claimant could have done, and his price will be influenced accordingly. As to more remote sales, he is faced by the same problems, expenses, losses delays and uncertainties as faced the claimant. The suggestion—for which there is only the authority of the *dictum* of Isaacs J. referred to below—that the view under discussion eliminates competition by narrowing the circle of hypothetical bidders has no real foundation. It is not to be supposed that the hypothetical market will not include a sufficiency of persons who are prepared to step into the claimant's shoes as owners of the entirety, and who possess the necessary means. The promotion of a company to exploit the land is a possibility that may be considered (the *Raja's* case, above, p. 314 and *per* Myers C. J. in *Napier Harbour Board v. Minister of Public Works* 1941 N.Z.L.R. 40 186, 188-9).

The decision in *St. John's College Trust Board v. Auckland Education Board* (above) rests on two *dicta*. The first is that of Williams J. in *New Zealand and Australian Land Co. v. Minister of Lands* 1895 13 N.Z.L.R. 714, and reads as follows:

“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.”

This was clearly *obiter*, as no question of subdivision arose in the case; and the plural “we” was used by the learned Judge as referring to himself and his assessors in a Compensation Court. Now, the possibility of sale in one lot or in parcels is certainly relevant, and, with respect, I do not think that the learned Judge meant more than this involves. But, in strictness, it is the possibility of such sales in the hands of the hypothetical buyer that has to be considered, and nothing is gained, and there is, I think, a clear departure from the true principle, if the *dictum* be treated as meaning that the tribunal is to regard the claimant as if he were himself the hypothetical purchaser and therefore in a position to make the actual sales.

The second *dictum* quoted in the judgment, that of Isaacs J. in *Federal Commissioner of Land Tax v. Duncan* 1915 19 C.L.R. 551, goes much further in the following passage:

“The interpretation put upon that by the learned Judge from whom this appeal comes was that it does not include a possible subdivisional sale by the owner. He thought that it meant necessarily a sale as a 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.”

While no one can doubt the relevancy of a possible subdivisional sale, the rest of that passage was unnecessary to the actual decision, and would indeed, as the learned Judge stated, have led to allowance instead of dismissal of the appeal had not other considerations led to its dismissal. Moreover, though no reference is made to the fact in the *St. John's College* case, the passage is directly contrary to what was said by Griffith C.J. in the same case (pp. 553-6), as the following extracts show:

“The theory of the hypothetical purchaser does not therefore assume the existence of a person actually willing to buy. The contention for the Commissioner now is that that theory does not connote a single purchaser, but that you must take into considera-

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tion the possibility of there being a number of persons,—two, five, ten or a hundred—who would have been willing amongst them to buy the whole of the land. The two hypotheses are entirely different. 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 purposes 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 . . . For instance, in the case of city property a reasonable man might expect to obtain a higher price by selling in two parcels instead of in one, and, if an ordinary vendor would do so, that fact might very fairly be taken into consideration, not as a matter of law, but as a matter of fact, in considering the value of the land. But this only shows that the possibility of subdivisional sale and the probability of there being a number of purchasers who amongst them would buy the whole of the land are relevant, but not conclusive, circumstances. The Statute, in my opinion, contemplates a sale of the whole of the land on the day as of which the valuation is made.”

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The only other authority referred to in the *St. John's College* case—it is merely mentioned, and not discussed—is *Kiddle v. Deputy Federal Commissioner of Land Tax* 1920 27 C.L.R. 316. It is a decision of Knox C.J. under the same statute as was in question in *Federal Commissioner of Land Tax v. Duncan* (above), and the learned Chief Justice's view appears to have been the same as that of Griffith C.J. in the earlier case. He said (pp. 318-9):

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“ . . . The question to be decided is what is the unimproved value of this parcel as a whole . . . I think it is unsound to regard a parcel of land, the unimproved value of which has to be ascertained, as consisting of a number of parcels, the unimproved value of each of which may be ascertained separately.”

Mr. Cooney conceded, and I think rightly, that the passage I have quoted from Griffith C. J. accords with the current of English authority, and told us, but without citing cases, that in Australia the opinion of

Griffith C. J. has been generally followed in preference to that of Isaacs J. I have been unable to verify this statement adequately, but, on the material available to me, have found nothing to the contrary, and it seems to be borne out by *Kiddle v. Deputy Federal Commissioner for Land Tax* (above), and to some extent by *Payne v. Federal Commissioner of Land Tax* 1924 49 V.L.R. 231, and perhaps more fully, by *Suburban Property Investments Ltd. v. City of Brisbane* 1926 11 Q.C.L.L.R. 188. But the views of Griffiths C. J. seem to me to accord exactly with the views I have ventured to express above, and, upon meticulous and anxious consideration, and with the utmost respect, I find no escape from the conclusion that those views are in conflict with the decision in the *St. John's College* case (above). The questions there answered were:

"1. Is it lawfully open to the Compensation Court to award compensation upon the assumption that on December 15, 1942, the claimant Board sold the land to several purchasers in lots according to a subdivision made by it?"

"2. Is the Compensation Court compelled to assess compensation upon the assumption that on December 15, 1942, the claimant Board sold the whole land in one undivided parcel to one purchaser desirous of acquiring it for the purpose of subdivision and sale as building sites?"

Question 2 was answered "No," and Question 1 "Yes," but subject to a qualification to the effect that allotments not immediately saleable were to be valued "upon the assumption that on that date the claimant sold the whole of such portion of the land in one undivided parcel to one purchaser desirous of acquiring it for the purposes of subdivision and sale as building sites." On the view I take, Question 1 should have been answered "No," and Question 2 "Yes," with, if one chose to add it, the qualification that, in arriving at the value, the fact that the hypothetical purchaser would be able to make almost immediate sales of some allotments must be duly taken into account. From a practical point of view there is not much difference between this formula and the one adopted by the Full Court. In each case the valuation proceeds on exactly the same practical basis, and, if calculations are properly made, the results should be identical. The difference is the purely theoretical one that exists between finding the value of the land on the given date (a) in the hands of the claimant, as if there had been no expropriation, and (b) in the hands of the hypothetical purchaser, who necessarily stands in exactly the same position with regard to the exploitation of the land as the claimant would have occupied had there been no expropriation. Notwithstanding the Compensation Court's statement in the *St. John's College* case that the compensation would be "substantially greater" on the one basis than on the other (p. 509), I fail to see how

differing figures could be arrived at upon a proper application of either formula to the facts of the particular case, unless indeed the formula adopted by the Full Court were wrongly treated as authorizing the compensation tribunal to disregard such matters as the trouble, expense and risk that would have to be incurred before allotments "immediately saleable" could be converted into money at their full saleable value. If it were true that something in the nature of a "profit" would be made in the selling of the immediately saleable sections—a matter not adverted to in the judgment—such profit was, at the relevant date, no more than an unrealised potentiality, and the authorities show clearly that unrealised potentialities are not to be dealt with as if realised, but only as affecting the price which the hypothetical purchaser would be willing to pay. What is relevant is the value of the prospective profit to that purchaser, and the value to him would be precisely the same as its value would have been to the claimant if there had been no expropriation. To award the claimant a value into which that profit enters *ex hypothesi* is not to deprive him of the profit. The reasoning of this paragraph is, I think, in full accord with the similar views expressed by Kitto J. in *Turner's* case (above, p. 389-390) and concurred in by Fullagar J. and those expressed by Taylor J. (p: 395). I respectfully adopt their reasoning without repeating it.

In the course of the argument of the *St. John's College* case, counsel had referred to *Napier Harbour Board v. Minister of Public Works* 1941 N.Z.L.R. 186. That was a decision of Myers C. J., but the learned Chief Justice commented, in the *St. John's College* case (p. 510), that it was not an authority for any statement of law, and Callan J. said (p. 511) that the particular issue with which the Court was concerned was not considered in that case. Nevertheless I would respectfully accept as an accurate statement of the law the following words of Myers C. J. in the earlier case:

"What the Court has to consider is the sum which the land as freehold might be expected to realise in the open market if the claimant had been willing to sell to a person or company desirous of acquiring the land for subdivision and sale as building sites."

The only material difference between the two cases is that, in the *St. John's College* case, subdivisional sales might be expected to be earlier and to be more easily accomplished; but this can scarcely be regarded as a difference in principle.

As I have said, I do not think that the practical application of the view adopted in the *St. John's College* case would lead to any real difference in result, and I would not have deemed it necessary to criticise the decision in point of theory had it not been that the arguments we heard, coupled with the statement of counsel that similar arguments based on this decision

are being regularly advanced at hearings of compensation claims throughout New Zealand, seemed to render a critical examination necessary. I respectfully believe that adherence to the principle enunciated by Myers C.J. in the last quotation made above would serve to obviate such misunderstanding in the future.

I emphasise again that, while the land in question in any assessment must be valued as a single entity, its possible suitability for subdivision is always a legitimate matter for consideration. So long as the compensation tribunal bears in mind that its primary duty is to value the entirety and not the subdivisions, the precise way in which it proceeds to determine how far subdivisibility affects the value seems to me to be in general a question of fact for that tribunal.

In discussing the *St. John's College* case in *Marshall v. Minister of Works* 1950 N.Z.L.R. 339, 351 my brother Gresson sensed a possible conflict between it and a passage in the *Raja's* case (above, p. 314), where it was said, in discussing the way in which a potentiality should be valued, that "the value to him" (*i.e.* to the owner) "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." But, as Sir Vincent Meredith pointed out, that passage had reference to the peculiar case of a potentiality in regard to which normal measures of value were not available; and in such a case the profit that might be made from it is necessarily the only guide to value. Lord Romer had already dealt differently with other potentialities, and had made it clear that it is "possibilities," and not "realised possibilities" that are to be considered. Where the possibility is subdivision, the owner is not to be awarded the profit that would have arisen therefrom if he had been allowed to continue in possession. To do so would be to give him the benefit of the realised possibility. The prospective profit goes to, and is paid for by, the hypothetical purchaser, and the question is merely one as to the extent to which his price will be affected thereby, he, of course, being required to give full value for all he gets. As was said in *Cedar Rapids Manufacturing and Power Co. v. Lacoste* 1914 A.C. 569, 576:

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

Some incidental points call for brief discussion. Mr. Cooney informed us that the Crown valuers had made deductions of from 25% to 33 1/3% by way of allowance for "profit and risk". We are in no way concerned with figures, but the propriety of making due allowance for such matters is not open to question (*Turner's* case above). A claimant is not "entitled

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to a hypothetical and speculative value which has no real existence, and therefore any remote future value must be adequately discounted" (*per* Tascherau J. in delivering the judgment of the Court in *R. v. Elgin Realty Co.* 1943 1 D.L.R. 497, 499). In his closing address, Mr. Cooney conceded that "profit and risk" must be taken into account with reference to deferred sales, and limited his contention to the case of "immediately saleable" allotments. But there is no difference in principle, and it is for the tribunal to make, both with regard to "immediately saleable" lots and with regard to lots which cannot be sold at an early date, all such allowances as are proper for the purpose of arriving at the price which a purchaser might be expected to pay for the entirety. Mr. Cooney's claim that all potentialities must be valued "as if the claimant had been allowed to develop them" is clearly unsustainable for reasons already given, as is also the contention that the assessment should be based on "the present value of ultimate realisations." To estimate the gross total of expected realisations, deducting expenses therefrom and converting all into present values, would clearly be a wrong method of valuation unless many other factors were taken into account; and the result of such a calculation, even if every relevant point were considered, might be far removed from the statutory measure of realisable market value of the date of expropriation. As Mr. Sandford expressed it, the value of a subdivisional potentiality is different from the profit arising later from the successful exploitation of that possibility.

Mr. Cooney objected to "the interposition of a hypothetical third party who takes a percentage for 'profit and risk' ". But it is the statute that impliedly interposes the hypothetical third party in the form of the hypothetical buyer, vesting in him theoretically all the future profits and risks arising from the use of the land. The prospective profits, qualified by the risks, are the very things for which he is supposed to pay. As for the possibility of his making a profit from his bargain, all purchasers, real or hypothetical, presumably contemplate so doing, and the argument is beside the point. The realisable value, which is the measure of the compensation, is merely the price that people may be expected to pay for the opportunity of making whatever profit can be got from the land.

As for the contention that the land must be regarded as notionally subdivided, and that all necessary consents and approvals must be assumed to have been given, there is no such rule. On the contrary, it is for the tribunal to determine, as questions of fact, whether subdivision may be expected to take place, and whether consents and approvals may be expected to be given.

I would return an answer in accordance with the view expressed above. I concur in the proposed order as to costs.

*Solicitors for the Claimant:* Messrs. COONEY, JAMIESON, LEES & MORGAN, TAURANGA.

*Solicitors for the Minister of Works:* Messrs. MEREDITH, MEREDITH, KERR & CLEAL, AUCKLAND.

(c) SHORLAND J.

The opinion of this Court is sought upon questions of law as to the basis of assessment of compensation under Sec. 29 of the Finance Act (No. 3) 1944 in respect of land taken by the Crown under the provisions of the Public Works Act 1928.

The matter originally came before the Maori Land Court which, after hearing evidence, stated a case for the opinion of the Supreme Court; but that Court, acting on the consent of the parties, moved the case stated into this Court.

The relevant facts are that by Proclamation dated 5th September 1952 the Crown, acting under the provisions of the Public Works Act 1928, took portion of each of five blocks of land situate in the Tauranga Survey District.

The land was in an undeveloped state, but in November 1951 the whole of the five blocks from which the land was taken were by order of the Maori Land Court vested in the Waiariki District Maori Land Board as Trustee for the beneficial owners, one of the objects for which the order was made being to enable the Trustee to proceed with subdivision of the land. The order was approved by the Minister of Maori Affairs in November 1951, and became effective from that date.

By Section 7 of the Maori Land Amendment Act 1952 the land became vested in the Maori Trustee who is the present claimant.

The case stated shows that no actual subdivision of the land had been effected at the "specified date referred to in Sec. 29 (1) (b) (of the Finance Act (No. 3) 1944, but a subdivisional plan had been prepared, and the Maori Land Court found that on the specified date part of the land taken would have been immediately saleable in lots "upon a subdivision" either for residential or industrial purposes, and that the balance would have been saleable in lots upon a subdivision for residential or industrial purposes from time to time over a period of years subsequent to the date of taking.

The words "upon a subdivision" are taken from the case stated, but they require some amplification. I construe the words "upon a subdivision"

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as meaning upon a subdivisional scheme having received the approval of the appropriate Minister of the Crown, and having been completed to the stage at which the owner could in fact and in law sell the subdivided allotments to separate purchasers.

10 The substance of the argument advanced on behalf of the claimant was (as I understood it) that compensation under the Section must be assessed as the value of the land with all its potentialities to the owner on the relevant date: That the basis of valuation and assessment of compensation was identical with that provided in Sec. 23 of the Land Acquisition Act 1894 considered by the Privy Council in *Vyricherla Narayana Gajapatiraju v. The Revenue Divisional Officer, Vizagapatam* 1939 A.C. 302: That in the course of the judgment in that case the Court had laid it down that in cases where the owner is not the only person, but merely one of the persons who would be able to turn the potentiality to account, that "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." (See p. 314).

20 It was therefore claimed that the method of assessment of value to be adopted in respect of land possessing the potentiality of being suitable for subdivision into allotments and sold to several purchasers should be to determine what would be the profit or nett return to the owner if he retained the land and so dealt with it, reduced solely by arithmetical process to the fair present value of that theoretical future sum of money. Such process excludes a theoretical purchaser on the relevant date who would pay something less than the present value of the ultimate nett return which he anticipated the land would ultimately yield to him when subdivided and sold to several purchasers in allotments. It was contended that a stream of  
30 authority which included *inter alia Vyricherla Narayana Gajapatiraju v. The Revenue Divisional Officer, Vizagapatam* (supra), and the New Zealand decisions of *New Zealand and Australian Land Co. v. Minister of Lands* 13 N.Z.L.R. 717, and *St. John's College Trust Board v. Auckland Education Board* 1945 N.Z.L.R. 507 and other cases supported this conclusion.

40 The Crown on the other hand argued that as the land was not subdivided on the relevant date and could not therefore be sold in allotments on that date, the value to the owner on the relevant date was the sum which a willing purchaser would pay to a willing vendor on that date for the land in one undivided lot with all its potentialities.

The method of assessment of compensation under Sec. 29 of the Finance Act (No. 3) 1944 was considered by the Full Court in *St. John's College Trust Board v. Auckland Education Board* (supra). The matter came before the Full Court on case stated by the Compensation Court.

From the case stated it is clear, (a) that it was agreed between Counsel for the parties and accepted by the Compensation Court that the relevant date at which value should be ascertained was 15th December 1942; (b) That it was agreed between Counsel for the parties and accepted by the Compensation Court that the land in question was suitable for subdivision into suburban residential sites. All the witnesses before the Compensation Court agreed that as at the specified date a period of time would be required for realisation.

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The claimant contended that the proper approach to assessment was for the Court to find as a fact that had the claimant decided to sell on the relevant date it would have subdivided the land and sought to sell the resultant sections direct to purchasers. The respondent Board, however, contended that the only lawful basis upon which compensation for the value of the land might be assessed was to assume one sale by the claimant on the relevant date to a purchaser who, having purchased, subdivided the land into building allotments and marketed them; and that the appropriate value was the amount which the Court was of opinion such a purchaser would have been willing to pay on the relevant day.

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Two of the questions submitted in the case stated were:—

“(1) Is it lawfully open to the Compensation Court to award compensation upon the assumption that on December 15, 1942, the claimant Board sold the land to several purchasers in lots according to a subdivision made by it?

(2) Is the Compensation Court compelled to assess compensation upon the assumption that on December 15, 1942, the claimant Board sold the whole land in one undivided parcel to one purchaser desirous of acquiring it for the purpose of subdivision and sale as building sites?”

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In delivering the judgment of the Court, Sir Michael Myers, C.J., at p. 513 said:—

“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.”

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The statement postulates as conditions of its application not only that there was a market for allotments on the relevant date, but that they could

then have been sold. The statement was referring to economic factors which might preclude sale on the relevant date, but in my view the nature of the factors which might prevent sale in allotments on the relevant date is immaterial, the point being that if for any cause sale in allotments was not, in truth, possible on that date, the principle enunciated would not apply.

Plainly, intended subdivisional allotments which could not, whether for reasons of fact or of law, have been sold on the relevant date, would not come within the principle there laid down.

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The judgment then proceeds:—

“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 realise if sold in the open market as one undivided parcel to one purchaser desirous of acquiring it for the purpose of subdivision and sale as building sites.”

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This statement plainly covers so much of the land taken as does not come within the first principle quoted.

It is true that the judgment returned the answer “Yes” to Question (1) posed in the case stated, and it is this fact, no doubt, which is relied upon for the submission that the decision supports the contention of the claimant. The judgment makes it clear, however, that the answer “Yes” returned to Question (1) must be taken subject to a qualification expressed in the following extract from the judgment at p. 514:—

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“As we understand the position, therefore, the Compensation Court is of opinion that many of the allotments forming a particular portion of the land or with a certain particular frontage could have been sold at the material date. If that is so, then so far as those allotments are concerned the assessment should be made upon the basis of the sums at which each such allotment would have sold while so far as concerns that portion of the block which was unsaleable in allotments on the material date the assessment should be made upon the assumption that on that date the claimant sold the whole of such portion of the land in one undivided parcel to one purchaser desirous of acquiring it for the purpose of subdivision and sale as building sites.”

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The qualification thus added to the answer makes it clear, in my opinion, that the affirmative answer returned to Question (1) is expressly restricted

in its application to allotments which could in truth have been sold by the owner to separate purchasers on the material date.

In *New Zealand and Australian Land Co. v. Minister of Lands* 13 N.Z.L.R. p. 714, at p. 716, Williams J. said:—

“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 advantageous to the owner at the time the value has to be estimated.”

The statement, in my opinion, necessarily implied that the assumption made that the land might with advantage to the owner be sold in parcels was one which could validly and properly be made in the particular case under consideration.

In *Marshall v. Minister of Works* 1950 N.Z.L.R. 339, the Compensation Court was called upon to determine the compensation to be paid by the Crown for land taken at Titahi Bay, portion of which had already been subdivided into allotments, and some of which had been sold before the “specified date”. Some part of the remainder of the land taken possessed the potentiality of being suitable for subdivision and sale in separate allotments to separate purchasers within a reasonable time from the specified date. The balance of the remainder did not possess this potentiality.

At the time of decision the determination of the compensation was governed by Sec. 29 of the Finance Act (No. 3) 1944, but limited to “basic value” as fixed by the Servicemen’s Settlement and Land Sales Act 1943 (which no longer applies).

The President of the Court (Gresson J.) at p. 350 discussed the decision of the Privy Council in *Vyricherla Narayana Gajapateraju v. Revenue Divisional Officer, Vizagapatam* (1939 A.C. 302), and the decision of the New Zealand Full Court in the *St. John’s College* case, and at p. 351 said:—

“In this case, subdivision of part of the land has already been completed. There are three separate blocks, two of which have been partially subdivided, and different purchasers of the balance of two and the whole of one of the respective blocks must be considered as possible. That the unsubdivided land has potentialities for further subdivision is not disputed, even though it may be some time yet before the market can absorb the large number of allotments which would be produced by such further subdivision, and even though

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some portions (exactly how much being a matter of controversy) may never be profitably or usefully subdivided. The claimant is entitled to have this potentiality considered in the fixation of value. One course, as contended for by respondent, is to fix the value of the land independently and add something on account of its potentiality for subdivision. The other is to value the properties as they would be after subdivision had been effected, making an appropriate deduction for the cost of subdivision, and allowances on account of the period of time that must necessarily elapse before realisation, and other factors proper to be considered. The difference between the value before subdivision and the value afterwards (after the necessary adjustments) would be the monetary equivalent of the potentiality."

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It appears to me that land which possesses the potentiality of being subdivisible into allotments which will be capable of sale to individual purchasers within the reasonable foreseeable future obviously possess an enhanced value over and above undeveloped land. If on the specified date matters so stand that the owner could have sold to individual purchasers in several allotments, the value of the land on the specified date is to be measured by the ascertainment of what aggregate sums the owner could have realised for the land in the open market on that date, assuming it to be sold in one lot or in parcels as might be most advantageous to the owner, and deducting therefrom the cost of subdivision and sale and any other proper expenses incurred.

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If matters so stand that the owner could not on the specified date have sold the land in individual allotments either because sale in individual allotments was forbidden by law or because some other operative factor prevented sale in separate allotments, then plainly "the amount which the land if sold in the open market by a willing seller in the open market might be expected to realise" (to quote the words of Subclause (b) of Subsection (1) of Sec. 29 of the Act is, in my view, restricted to the amount which a willing seller could be expected to obtain by the only method of realisation available to him on the specified date, namely by sale in one piece with all its then existing potentialities. Such amount cannot, in my view, include the hypothetical profit which the purchaser might at some future date expect to realise upon the completion of subdivision and sale in allotments to several purchasers.

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The matter of valuation of land possessing the potentiality of being suitable for subdivision and sale in allotments was discussed in the *Vyri-cherla Narayana* case, and at p. 313 Lord Romer in delivering the judgment of the Board said:—

“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 realised possibilities that must be taken into consideration.”

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It is true that at p. 314 Lord Romer said:—

“The same considerations will apply to cases where the owner is not the only person but merely one of the persons able to turn the potentiality to account. 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.”

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This latter statement was strongly relied upon by Counsel for the claimant in support of his argument, but the statement must be read in its context. Lord Romer had earlier in his judgment dealt specifically with land possessing the potentiality of being suitable for subdivision, and his remarks thereon have already been quoted. Consideration of the context in which the words of Lord Romer just quoted were used shows, in my opinion, that Lord Romer was dealing with a potentiality which the owner himself, as well as others, could turn to account by actual realisation on the specified date. The owner of land can himself turn the potentiality of suitability for subdivision to account (in this sense) on the specified date if, and only if, he can in fact and in law sell in separate allotments on that date; and Lord Romer's earlier statement and not the one last quoted must be taken as expressing Lord Romer's views relevant to the potentiality arising from suitability for subdivision which on the relevant date is not a realised possibility.

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The conclusion at which I have arrived is, I think, supported by the recent (majority) decision of the High Court of Australia in *Turner v. Minister of Public Instruction* 1956 Argus L.R. 367, in which (*inter alia*) the assessment of compensation for land possessing the potentiality of suitability for subdivision but not actually subdivided at the time of taking was considered.

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The relevant Statutory provision was Sec. 124 of the Public Works Act



1912 (as amended). The words "the value of the land" in Sec. 124 have been judicially construed as requiring the assessment of the price which would have been agreed upon between a vendor and purchaser each willing to trade, but neither of whom was so anxious to do so that he would overlook ordinary business considerations. (See *Minister for Public Works v. Thistlethwayte* 1954 A.C. 475). The Section is accordingly, for practical purposes, not materially different from the Section under consideration in the present case.

10 In *Turner v. Minister of Public Instruction*, Dixon C.J. at p. 374 said:—

“You must not notionally bring what is only potential into actual being and value it as if it existed.

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In the case of the land in question no steps had been taken for subdivision. It was necessary to survey it, to prepare plans for subdivision, 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 subdivision, and it was necessary to make improvements or alterations in its physical condition before the subdivisional prices could be obtained. In those circumstances it could not be sold in subdivision at the time of resumption. It was not possible to ascribe to the owner possession of the present value of its subdivisional potentialities on the footing that all you should do is to estimate what he would gain if he subdivided the land at a future date and reduce the result to its then present value.”

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Kitto J., (in whose judgment Fullagar J. concurred) at p. 390 said:—

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“To hold that compensation for 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 nett 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 1939 A.C. 302 at 313, 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 interesting to note that Taylor J. who expressed similar views to those expressed by Dixon C.J. and Kitto J., (Concurred in by Fullagar J.) at p. 393 referred to the decision in *St. John's College Trust Board v. Auckland Education Board*, and after quoting in full the extracts from

the judgment of Sir Michael Myers C.J. at p. 513 quoted earlier in this judgment in two separate extracts, said:—

“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 subdivisions on the relevant date is excluded unless the land could then have been sold in that manner.”

It was contended in this Court that Sec. 3 of the Land Subdivision in Counties Act 1946 forbade the selling or the offering or advertising for sale of any allotment in any possible or proposed subdivision of the land in question on the specified date, with the result that any purported contract for sale made on or before the specified date would be void for illegality on the principles discussed and applied by Hay J. in *Concrete Buildings of New Zealand Ltd. (in Liq.) v. Swaysland* 1953 N.Z.L.R. 997, and by the High Court of Australia in *George v. Greater Adelaide Co. Ltd.* 43 C.L.R. 92.

There is insufficient material in the case stated to enable this Court to determine whether or not the Land Subdivision in Counties Act 1946 applies to the land in question, and the question of the effects of such legislation upon an owner's ability to make valid sales of separate lots to several purchasers before subdivision is completed was not really argued before this Court, and for these reasons I purposely refrain from offering any comment upon the two decisions just referred to; but I am not to be taken as questioning the correctness of either decision.

The immediate point is that the potentiality of being suitable for subdivision is to be valued for what it is worth to the owner viewed as a willing seller on the specified date. If on that date it is a realised possibility in that the owner could, if he chose, sell his land in separate allotments to separate purchasers, he is entitled to have his land valued at what it would bring in the open market on that date, whether sold in one lot or in several lots as would be most beneficial to him; but if on that date the owner could not—whether for reasons of law or fact—sell otherwise than in one lot to one purchaser, the value of the potentiality is restricted to the value thereof to him to be ascertained by the determination of what he as a willing seller would be likely to obtain for the land in the open market on that date, selling the land in the only manner then open to him, namely to a purchaser or purchasers who buy the land in one lot.

Since writing the above I have had the benefit of reading the judgment prepared by Gresson J., and I concur in the conclusion that the opinion of this Court should be expressed as stated therein.

In the  
Court of  
Appeal of  
New Zealand  
No. 3  
Reasons for  
Judgment  
19th  
December  
1956  
(c)  
Shorland J.  
continued

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In the  
Court of  
Appeal of  
New Zealand  
No. 3  
Reasons for  
Judgment  
19th  
December  
1956  
(c)  
Shorland J.  
continued

I concur also in the order as to costs proposed therein.

*Solicitors:* COONEY, JAMIESON, LEES & MORGAN, TAURANGA.  
for Plaintiff.

CROWN SOLICITORS, AUCKLAND, for Defendant.

No. 4

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FORMAL JUDGMENT OF COURT OF APPEAL

In the  
Court of  
Appeal of  
New Zealand  
No. 4  
Formal  
Judgment  
of Court  
of Appeal,  
19th  
December  
1956.

BEFORE

THE HONOURABLE MR. JUSTICE GRESSON  
THE HONOURABLE MR. JUSTICE F. B. ADAMS  
THE HONOURABLE MR JUSTICE SHORLAND

WEDNESDAY THE 19TH DAY OF DECEMBER, 1956

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THIS Case stated coming on for hearing on the 11th and 12th days of April 1956 UPON HEARING Mr. Cooney and Mr. Lees of counsel for the claimant and Sir V. R. Meredith and Mr. Sandford of counsel for the respondent THIS COURT DOTH ORDER that the opinion of this Court be expressed as follows:—

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(1) In accordance with Section 29 (1)(b) of the Finance Act No. (3) 1944, and subject to the other provisions of that section the function of the Maori Land Court is to ascertain as the value of the land "the amount which the land if sold in the open market by a willing seller on the specified date might be expected to realise". The specified date is the 15th September, 1952.

(2) The valuation must be of the land in the state in which it is on the specified date; any potentialities shall be taken into account in assessing its value.

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(3) The Court must contemplate the sale of the land as a whole unless on the specified date there could have been separate sales of particular portions, and there was a market for such separate portions. Only if the land had been legally subdivided at that date so that particular lots might have been sold and title given can it be said that there could have been separate sales of particular portions.

(4) If the land has to be valued as a whole, the Court in assessing the potentialities may take into account the suitability of the land for

subdivision, the prospective yield from a subdivision, the costs of effecting such a subdivision, and the likelihood that a purchaser acquiring the land with that object would allow some margin for unforeseen costs, contingencies and profit for himself.

AND this Court doth further order that the respondent be allowed costs on the higher scale with an allowance of an additional 50% as in a case from a distance and a sum of £21 for the second day and £10.10.0 for each of the two days for second counsel.

By the Court,

L.S.

T. A. JACOBSON,

*Deputy Registrar.*

No. 5

ORDER GRANTING FINAL LEAVE TO APPEAL TO  
PRIVY COUNCIL

BEFORE

THE HONOURABLE MR. JUSTICE HUTCHISON  
THE HONOURABLE MR. JUSTICE NORTH  
THE HONOURABLE MR. JUSTICE TURNER  
THE HONOURABLE MR. JUSTICE McCARTHY

THURSDAY THE 10th DAY OF OCTOBER 1957.

UPON READING the Notice of Motion filed herein and the Affidavit of L. M. Greig filed in support AND UPON HEARING Mr. Dalgety of counsel for the claimant and Mr. Bain of counsel for the respondent THIS COURT DOTH ORDER that the claimant do have final leave to appeal to Her Majesty in Council from the judgment of this Honourable Court delivered herein on Wednesday the 19th day of December 1956.

By the Court,

L.S.

T. A. JACOBSON,

*Deputy Registrar.*

In the  
Court of  
Appeal of  
New Zealand  
No. 4  
Formal  
Judgment  
of Court  
of Appeal,  
19th  
December  
1956.  
continued

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In the  
Court of  
Appeal of  
New Zealand  
No. 5  
Order  
Granting  
Final Leave  
to Appeal to  
Privy  
Council  
10th October  
1957

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CERTIFICATE OF REGISTRAR OF COURT OF APPEAL  
AS TO ACCURACY OF RECORD

10 I, GERALD RONALD HOLDER Registrar of the Court of Appeal  
of New Zealand DO HEREBY CERTIFY that the foregoing 35 pages  
of printed matter contain true and correct copies of all the proceedings  
judgements decrees and orders had or made in the above matter so far as  
the same have relation to the matters of appeal and also correct copies of  
the reasons given by the Judges of the Court of Appeal of New Zealand  
in delivering judgment therein such reasons having been given in writing  
AND I DO FURTHER CERTIFY that the appellant has taken all the  
necessary steps for the purpose of procuring the preparation of the record  
and the despatch thereof to England and has done all other acts matters  
and things entitling the said appellant to prosecute this appeal.

20 AS WITNESS my hand and the Seal of the Court of Appeal of  
New Zealand this ~~Twenty sixth (26th)~~ day of ~~February~~ One thousand nine  
hundred and fifty-eight (1958). *10<sup>th</sup>* *April*



G. R. HOLDER,

*Registrar.*

