

29/84

No. of 198

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

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

IN PROCEEDINGS CA 113 OF 1982

BETWEEN:

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

AND:

HOUSING COMMISSION OF NEW SOUTH WALES  
Respondent (Defendant)

**CASE FOR THE APPELLANTS**

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RECORD

1. This is an appeal by leave of the Supreme Court of New South Wales of Appeal, granted finally under Order in Council of 1909 on 12 December, 1983 from a decision dated 28 August, 1983 of that Court (Hutley, Samuels and Mahoney JJ.A.) dismissing a cross appeal from a decision given in the Land & Environment Court (Cripps J.) on 17 March, 1982.

Vol.III P.786

Vol.III P.781

Vol.III P.754

RECORD

2. The Respondent is a corporation constituted by the Housing Act 1912 (as amended). Section 4(1) so far as is relevant provides as follows:-

"For the purposes of and subject to the provisions of this Act, the Governor may under the Public Works Act 1912 resume any land ... Such resumption shall be deemed to be for an authorised work, and the Commission shall be deemed to be the Constructing Authority".

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3. The Public Works Act 1912 (as amended) provides, inter alia, for the procedures involved in the compulsory acquisition of land, including Part IV which deals with compensation. Section 101 of the Act provides that the owners of resumed land shall be entitled to receive such sum of money by way of compensation for the land of which they have been deprived as shall be agreed upon or otherwise ascertained under the provisions of the Act. Sections 102 and 103 make provision for the service of a Notice of Claim, and Section 104, so far as is relevant, provides:

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"If within 90 days after the service of Notice of Claim the Claimant and the Constructing Authority do not agree as to the amount of compensation, the claimant may institute proceedings in the Land and Environment Court against the Constructing Authority as Nominal Defendant."

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4. The basis upon which compensation is ascertained is set forth in Section 124 of the Public Works Act which provides, so far as is relevant:

"For the purpose of ascertaining the purchase money or compensation to be

RECORD

paid ... .. the same shall be assessed according to what is found to have been the value of such lands, estate or interest at the time notice was given, or notification published, as the case may be, and without the amount of the valuation notified to such claimant being binding in any way in relation to the assessment, and without reference to any alteration in such value arising from the establishment of railway or other public works upon or for which such land was resumed".		10
5. The Land & Environment Court is constituted by the Land & Environment Court Act 1979 as a superior court of record.		20
6. The Appellants, each of which was controlled by the same directors, owned two adjoining parcels of land totalling 884 acres situated in a developing area on the western outskirts of the Sydney Metropolitan Area. On 31 August, 1973 the Respondent compulsorily acquired this land (to be hereinafter known as "the Tatmar land") pursuant to Section 4 of the Housing Act 1912 (as amended) for housing purposes.	Vol.III P.678.11 to 678.12	
	Vol.III P.680.6 to 680.9	30
7. The proceedings at first instance were for compensation for the land of which they were deprived by virtue of the compulsory acquisition pursuant to Section 104 of the Public Works Act 1912 (as amended).	Vol.III P.680	40
8. The proceedings commenced on 16 October, 1981 and proceeded over 35 hearing days concluding on 11 February, 1982. On 17 March, 1982 Cripps J. assessed compensation at \$9,500 per acre for all the land except that portion affected by a Transmission line.	Vol.III P.680  Vol.III P.752.25  Vol.III P.753.8	

RECORD

9. The principal issue which arose at the hearing was assessment of the "urban potential" of the subject land.

10. At the date of resumption the use to which the subject land could be put was governed by a planning instrument known as the Penrith Planning Scheme Ordinance prescribed under the Local Government Act 1919 (as amended). The land was zoned as "non-urban" under this Scheme. The principal consequence of this was that development could only take place on allotments having a minimum size of 25 acres.

Vo.III P.679.26 to  
679.29

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11. Under the Local Government Act 1919 (as amended) Part XIIA, there were several procedures by which changes to the zoning of land could be effected, all requiring the approval of the Minister for Local Government. Responsibility for advising the Minister on matters such as these rested with the State Planning Authority, a statutory body constituted by the State Planning Authority Act 1963 (as Amended) (hereinafter referred to as "The SPA").

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12. In 1968 the SPA produced and distributed a document entitled "Sydney Region: Outline Plan" (hereinafter referred to as "the SROP") which was described as being a "strategy for development between 1970 and 2000". It was not a statutory plan to the Local Government Act, nor did it have the force of law. It was a broad statement of the objectives and principles. It contained proposals for release of land from the then non-urban use to proposed urban or industrial use at various stages between 1970 and 2000. The Tatmar land was within the general area of the SROP but was designated "non-

Vol.III P.680.31 to  
681.21

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RECORD

urban land", i.e. was not land designated for release for urban purposes under the plan.

13. Allowing for differences in quality of land and other technical matters, land with urban potential varied in value according to the anticipated date of release for urban purposes. In making this assessment the market took account of the views of officials and official bodies, particularly the SPA, amongst other factors. Thus, as it was public evidence of the views of the SPA, the SROP had a significant effect upon the market value of land - land designated for release was more valuable than land not so designated, and land designated for release declined in value as the period of deferral of release increased.

Vol.I P.152.12 to 152.51  
Vol.I P.164.14 to 164.31  
Vol.I P.147.42 to 148.34

Vol.IV P.842 10

Vol.III P.684.14 to  
684.33

Vol.I P.86.32 to  
87.29

Vol.II P.340.19 to  
340.23 20

14. There were a number of parcels of land in the Penrith vicinity at and prior to resumption which were then immediately available for residential development, or, alternatively, designated for release under the SROP at various times in the future, including release between ten and fifteen years.

Vol.I P.147.42 to 153.13

Vol.IV P.842 30

15. Mr. Alcorn, the Appellants' principal valuer, in his valuation made before the commencement of the case, chose as the best guide to value, two sales of a parcel of land adjoining the subject land (the Kulnamock land) which was dealt with by the SROP in the same fashion as was the Tatmar land. Analysis of this sale, according to the evidence, showed that the parties to it were anticipating release in approximately nineteen years time

Vol.I P.117.48 to  
118.31

Vol.IV P.824.27 to  
827.29 40

Vol.II P.440.41 to  
441.18

RECORD

16. During the course of the hearing, documents were produced and witnesses called which brought to light written and oral negotiations between the Respondent and the SPA prior to the resumption which were not known of by the Appellants before the hearing, and which it was anticipated might have lead the Judge to find that an hypothetical purchaser, fully informed with the details of those negotiations in addition to the material which was public, would have anticipated that the land would certainly be released for housing well before 2000 - in other words, that the land in truth had urban potential, and thus a value, at least equivalent to parcels of land designated for release under the SROP.

Vol.III P.685.16 to  
690.14

Vol.III P.699.15 to  
699.33

Vol.III P.623 to 677

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17. Therefore the valuers called by the Appellants, including Mr. Alcorn, gave evidence as to the valuation of the land if, in the light of new evidence, the Judge did make findings of fact as to a reasonably certain release date, including a release date of between ten and fifteen years.

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18. The evidence from valuers called was that two alternative approaches to, or principles of, valuation could be applied in this event:

Vol.II P.436.39 to  
436.40

(a) to have regard to the value of other parcels of land in the vicinity identified by the SROP for release at a time coinciding with the finding of the Court as to the time of expected release of the subject land; or

Vol.II P.340.19 to  
341.11

Vol.I P.149.31 to 149.50  
Vol.IV P.842

Vol.II P.495.28 to  
498.14

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RECORD

- (b) The value of other parcels of land in the vicinity presently available for release could be taken as the starting point, and then discounted for deferred release at the period found, the discount factor being calculated by reference to an analysis of the market evidence (the discounted present value basis). Vol.I P.152.20 to 154.10  
Vol.I P.235.19 to 236.26  
  
Vol.I P.244.29 to 256.50  
Vol.I P.300.37 to 301.26  
Vol.IV P.852 10  
Vol.IV P.855  
Vol.II P.435.36 to 441.30
19. If these alternative methods of valuation were applied to a hypothetical release date between ten and fifteen years, the minimum value would have been \$13,500 per acre and the maximum value \$15,600 per acre, compared with the amount of \$9,500 per acre which was Mr. Alcorn's original valuation made without the benefit of the new evidence. 20
20. In the event, His Honour found that an assumption of release within ten to fifteen years with minimal risk was a reasonable hypothesis upon which to base the valuation. Vol.III P.706.24 to 706.32
21. His Honour, however, proceeded to determine value in accordance with the original valuation made by Mr. Alcorn, accepting him as a witness in all respects. His Honour made no adjustment of the analysis of the sale of the Kulnamock land to take account of his finding of fact as to date of release, and ignored the alternative bases of compensation put forward by Mr. Alcorn and the other valuers in evidence if this hypothesis were to be adopted. 30  
Vol.III P.746.15 to 746.31  
Vol.III P.747.23 to 749.6 40
22. His Honour thus ignored undisputed evidence as to the value of parcels of land in the vicinity phased for release at the time His Honour found that the subject land would be released.

RECORD

23. His Honour also completely ignored the discounted present value principle of valuation, and the evidence of its application in circumstances where a ten to fifteen year release could be assumed.

24. It is respectfully submitted that, having found the primary facts as to date of release as he did, His Honour was bound in the circumstances to apply one of the relevant valuation principles and the relevant evidence relating to that principle, and that not to do so, but rather to choose another valuation based on inapplicable hypotheses, was an appellable error of law.

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25. It is submitted in particular that the valuation principles ignored, misunderstood or rejected by His Honour, for no, or no rational reason were:

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(i) the discounted present value method;

(ii) the analysis and application of the value of comparable land with identifiable likely release date for urban development similar to that of the subject land.

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26. It is further submitted that His Honour ignored, misunderstood or rejected for no, or no rational, reason, evidence of the value of the comparable land.

27. The Respondent appealed to the Supreme Court of New South Wales pursuant to Section 57 of the Land and Environment Court Act 1979 and the Appellant cross appealed. Appeals under the Section are limited to questions of law, and on the hearing of an appeal the Supreme Court has power to:

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RECORD

- (a) Remit the matter to the Court for determination by the Court in accordance with the decision of the Supreme Court; or
- (b) Make such other order in relation to the appeal as seems fit.

28. In the Court of Appeal, Hutley J.A. (with whom Samuels J.A. agreed) concluded that:

Vol.III P.767.20-  
767.23

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"... I cannot see that His Honour was disentitled, as a matter of law, to treat sales of unphased land as comparables, making the appropriate adjustments for early release".

With respect to their Honours, however it is submitted that they overlooked the fact that the valuation of Mr. Alcorn, which was chosen by His Honour as the appropriate valuation, did not make appropriate adjustments for early release.

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29. His Honour went on to conclude that:

Vol.III P.768.7 to  
768.13

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"As Tatmar remained technically unphased, though likely to be released within ten to fifteen years of 1973, it cannot, in my opinion, be said that he acted irrationally, or failed to give effect to any principle of valuation in not basing his assessment on estimates of the value of comparable phased land".

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RECORD

In this respect the Appellants repeat the submission that in so finding Cripps J. ignored, misunderstood or rejected for no, or no rational, reason, the relevant evidence given by the valuers based upon the hypothesis found by His Honour.

30. It is further submitted that their Honours did not address the submission that Cripps J. ignored, misunderstood or rejected for no, or no rational, reason the discounted present value method of valuation, which was dealt with by Messrs. Alcorn and Parkinson called for the Appellants and Mr. Hilton called for the Respondent.

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31. Mahoney J.A. took a different view, concluding:

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"His Honour was, I think, of the view that the purchaser of the Kulnamock land, in fixing the price for it, had acted on an assumption as to the release of that land comparable to that to be made in respect of the subject land. This being so, I do not think that the learned Judge was wrong in adopting, as Mr. Alcorn did, the Kulnamock sale as comparable sale".

Vol.III P.780.31 to  
780.37

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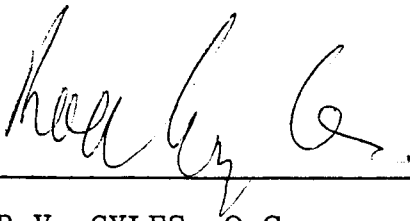
32. It is respectfully submitted that Mahoney J.A. was in error in thinking that Cripps J. was of this view. Cripps J. did not say so, and there was, in any event, simply no evidence which could support such a finding. It was not an issue investigated at the hearing.

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33. It is thus submitted that this appeal should be allowed with costs and that in lieu of the judgment and order of the Court of Appeal of 29 August, 1983 dismissing

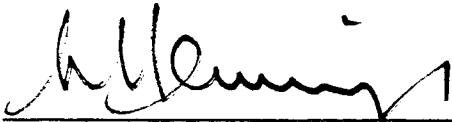
RECORD

the Appellants' cross appeal, the cross appeal should be allowed, and the matter remitted to the Land & Environment Court in accordance with the reasons for Your Lordship's Board - for the reasons set forth in paragraphs 22 to 26 inclusive of this case amongst other reasons.



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ROGER V. GYLES, Q.C.



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NOEL A. HEMMINGS, Q.C.



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