[SUPREME COURT OF VICTORIA (APPEAL DIVISION)]

STUDLEY DEVELOPMENTS PTY LTD v DEPARTMENT FOR PLANNING AND URBAN GROWTH

Brooking J, Southwell J and Teague J

18, 19 October, 10 November 1993

Town Planning — Compensation (Vic) — Land reserved for public purpose — When compensation available — Where financial loss caused by reservation — Previous owner compensated for full value — Purchaser refused development application — Same financial loss — No compensation payable — Planning and Environment Act 1987 (Vic), s 98(2).

The *Planning and Environment Act* 1987 (Vic), s 98(2), provides:

"The owner or occupier of any land may claim compensation from a responsible authority for financial loss suffered as the natural, direct and reasonable consequence of a refusal by the responsible authority to grant a permit to use or develop the land on the ground that the land is or will be needed for a public purpose."

Held: (1) To succeed in a claim for financial loss under s 98(2) of the *Planning and Environment Act* 1987, the claimant must establish:

(i) first, that he has suffered a real financial loss, then;

(ii) that the loss was suffered as the "natural direct and reasonable consequence" of the refusal of the permit.

(2) Accordingly, where a vendor of land had received compensation for the full value of land consequent on its reservation for public purposes (that is, a loss of potential for residential development), a subsequent purchaser could not claim that he had suffered the same loss on refusal of an application to develop the reserved land.

Decision of Gobbo J in *Studley Developments Pty Ltd v Department for Planning and Urban Growth* [1993] 1 VR 15; (1992) 76 LGRA 325, affirmed.

APPEAL

This was an appeal from a decision of Gobbo J in the Supreme Court of Victoria see: *Studley Developments Pty Ltd v Department for Planning and Urban Growth* [1993] 1 VR 15; (1992) 76 LGRA 325.

G S H Buckner QC and *J Delany*, for the appellant/plaintiff.

D Graham QC with *J A Bruce*, for the respondent/defendant.

Judgment reserved

10 November 1993

BROOKING J. I concur in the reasons for judgment of Mr Justice Southwell and Mr Justice Teague.

SOUTHWELL J and TEAGUE J. This is an appeal from a judgment of Gobbo J of 26 June 1992 (see *Studley Developments Pty Ltd v Department for Planning and Urban Growth* [1993] 1 VR 15; (1992) 76 LGRA 325)

dismissing a claim by the appellant for compensation pursuant to s 98(2) of the *Planning and Environment Act* 1987 (Vic) (the 1987 Act), which provides:

> "(2) The owner or occupier of any land may claim compensation from a responsible authority for financial loss suffered as the natural, direct and reasonable consequence of a refusal by the responsible authority to grant a permit to use or develop the land on the ground that the land is or will be needed for a public purpose."

On 30 June 1984, a company purchased for $1 million a parcel of 51.2 hectares of largely vacant land at Mill Park (the Studley land). The appellant, pursuant to a nominee clause, became the purchaser. Part of the land (some 7.6 hectares) (the reserved land) had been reserved for public purposes, namely for the construction of part of the Whittlesea freeway, a fact recited in the contract. The contract reserved to the vendor any rights to compensation in respect of the reservation, in these terms:

> "The vendor shall remain solely entitled to all such compensation no part of which shall be deemed any part of nor applied towards the purchase price."

The learned trial judge found as a fact that the purchase price of $1 million was "the market value of the entire land at the time of purchase and that no value was attributed to the reserved land in the total price". This finding was not the subject of any ground of appeal, although some argument was put for the appellant that the finding ought not to have been made. We should at once say that in our view, the finding was one which was clearly open to the judge.

Later, his Honour observed: "The vendors were deprived of the full value of the reserved land because of the presence of the reservation."

In August 1985, the vendor claimed compensation from the relevant minister, pursuant to s 42(5)(b) of the *Town and Country Planning Act* 1961 (the 1961 Act) in respect to the reduced price obtained upon the sale by reason of the reservation.

In July 1987 the claim for compensation was settled for the sum of $617,792, of which $294,930 represented loss attributable to the reserved land (its market value without the reservation), and $296,130 represented loss for severance and injurious affection in respect of the land not subject to the reservation.

In the years between 1984 and 1989, the appellant developed and sold the Studley land, other than the reserved land and another small parcel (the remnant land) by way of residential subdivision.

On 6 March 1989, the appellant applied to the responsible authority for a planning permit for residential subdivision of the reserved land into eighty-seven lots, which (it was at least implicitly agreed, and the judge so found) represented its highest and best use.

On 31 July 1989, the authority refused to grant a permit on the ground that "the proposed subdivision is largely in a proposed main road reservation for the Whittlesea freeway".

The appellant relies upon s 99(d) of the 1987 Act, which provides that the right to compensation under s 98(2) arises on the refusal of the permit. Also relevant are s 102 and s 104 of the 1987 Act which read:

> "102. In determining the compensation to be paid under this Part, regard must be had to any amount already paid or payable in respect of the land by way of compensation under—

(a) this Part, or any corresponding previous enactment; and
(b) any other Part of this Act or any other Act.

...

104. The compensation payable for financial loss under section 98 must not exceed the difference between —

(a) the value of the land at the date on which the liability to pay compensation first arose; and
(b) the value that the land would have had at the date if the land had not been affected by any circumstance set out in section 98(1) or (2) or 107."

It was agreed between the parties that the value of the reserved land and the remnant land at the refusal date, disregarding the reservation and the prior payment of compensation, was $2,226,000, and that the value of the reserved land and remnant land at that date was $5,000 and $14,000 respectively. As the judge found, the condition of the reserved land did not alter between 1984 and 1989, and "the increase in value of the reserved land from approximately $294,930 on 30 June 1984 to $2,226,000 on the date of refusal was due to the effluxion of time and inflation and to an increase in value because of the completed residential development around the reserved land on the other land formerly owned by the (appellant)". His Honour was not able to apportion the increase between these contributing factors.

After referring to some relevant principles of law and the authorities establishing them, the learned trial judge went on to say (at 330):

> "It has been the settled practice in claims for loss and damage suffered as a result of the operation of a planning scheme to approach the assessment of loss by a 'before' and 'after' exercise. This involves valuing the land as if it was not affected by the relevant planning restriction in the 'before' exercise and then considering its value as affected by the restriction in the 'after' exercise. Where the land is reserved for a main road and would but for this reservation have been ripe for a residential subdivisional development, its value would have been almost nil in the after exercise and the assessment would result in a loss figure almost, if not wholly, equivalent to the full value of the land upon a fee simple basis.
>
> This practice was understandable for how else, it might be said, could one assess the effect of a public purpose reservation unless one considered first, in the before exercise, the land without the reservation. It was a practice that was assisted by the previous legislation which directed that the *Valuation of Land Act* 1960 (Vic) was to apply to such claims for loss 'as if the claim were a claim with regard to the purchase or taking of land and notice to treat had been served at the time liability to pay compensation first arose': see s 41(2) of the *Town and Country Planning Act* 1961.
>
> Where an owner of land had land rendered wholly sterile for development because of a reservation for a public purpose and thereby effectively suffered the loss of the entire value of his land, it was fair and logical that he should be compensated for such loss. But where the previous owner had already been compensated for such loss and the next owner purchased the land upon the basis that there was a reservation on the land which reduced the price he paid for the land, is it fair and logical that the second owner should recover compensation

upon the 'before' assumption that the land was free of the reservation? The present case raises the question clearly since the claimant purchased the land for a discounted price that reflected the presence of the reservation and the presence of the term in the contract that the vendor was entitled to recover compensation in respect of the reservation and the consequent loss on sale suffered by the vendor."

In this Court, no criticism was directed at those observations.

It is appropriate to note two matters. The first is as to differences in the meaning of words used to qualify "value". The second is as to what is meant by expressions such as "wholly sterile for development".

In the passage quoted, his Honour referred to the full value, the entire value, the value as if not affected, and the value as if affected by a planning restriction.

The "full" or unaffected value is arrived at by valuing the land as if the presence of the reservation was disregarded. It is a notional value.

The blighted or affected or carcass value is arrived at having regard to the presence of the reservation. It is a realistic rather than a notional value.

Land which is affected by a reservation might or might not retain some value. If, for example, the prospective liability for rates, problems relating to the escape of water onto neighbouring land, or the requirement to eliminate or contain recurring growth of noxious weeds, put the owner at risk of considerable expense, it might not be possible to sell the land. If the blighted value is nil or almost nil, as was found by his Honour to be the case, it is not inappropriate to refer to such land as having had its potential for development destroyed, or to it having been rendered wholly sterile for development. Such references are consistent with it having a very low blighted value.

His Honour then referred to some of the submissions put for the appellant as to the proper method of determining whether the refusal of a permit has caused loss — or, to use the words of s 98(2) of the 1987 Act, whether there has been established "financial loss suffered as the natural, direct and reasonable consequence of a refusal . . . to grant a permit . . .". Included were submissions that there should be a "two step process", the first of which was to consider whether there was an entitlement to claim compensation under s 98 and s 99, it being then irrelevant, so it was said, that there had been a previous refusal of a permit, and an award of compensation. It seems to have been then suggested that the refusal of a permit founded on a reservation for public purposes by itself established financial loss. It was said that the fact of a previous award only became relevant to the second stage, to be found in s 102, wherein regard should be had to previous payments of compensation. It was further submitted that "if an owner was refused a permit in respect of reserved land in 1984 and received $1 million in compensation upon the basis that he had been deprived of the full value of the land, it was open to him to make another permit application for the same use in 1990. Assuming the land was now worth $3 million simply because of inflation he could . . . claim the $3 million as financial loss but with regard being had to the $1 million paid in 1984". Substantially similar propositions were advanced in this Court.

The learned judge rejected these propositions, stating (at 332) that:

> "They appear to be founded on a fallacy, namely they proceed on the basis that the second application is one that creates a new loss. They

rest on the convention that compensation, even where there was no acquisition, is assessed by means of a 'before' and 'after' exercise that assumes that the 'before' land is not affected by any reservation. But the first step before all that is to ascertain whether there has been any financial loss at all caused by the operation of the reservation.

It was argued that the only enquiry that should be made once there was a refusal in respect of reserved land was as to what was the amount of the loss and not as to the character of the loss. I do not accept this argument.

In my view, in the above example, the loss suffered as a result of the first refusal was the deprivation of a permit to develop the land for its highest and best use. Another way to put it is that the first refusal was in respect of the maximum development of the land. The result of the second refusal is exactly the same. In these circumstances, the owner has not in my view suffered any financial loss at all. He cannot again be deprived of the potential for a highest and best use development for he has already been deprived of that."

Counsel for the respondent submitted that the judge was correct. It was said that no loss was suffered, or if it was, it had not been shown to have been suffered as a "natural direct consequence" of the refusal of the permit, within the meaning of s 98(2); alternatively, it was said that having regard to the compensation earlier paid to the vendor, then s 102 of the 1987 Act operates to require that the amount of compensation should be determined to be nil.

In order to succeed in its claim for financial loss under s 98(2) it is necessary, in our view, that the claimant first establish that he has suffered such loss, and then to show that the loss was suffered as the "natural direct and reasonable consequence" of the refusal of the permit. In considering these questions, (as his Honour put it, correctly, as we think) (at 332):

"... It is important to remember that the recovery for loss and damage is drawn very much from common law principles and is not based on any statute derived from resumption law."

In the present case, the findings of the trial judge show that the reserved land was by force of the reservation stripped of its development potential for residential subdivision. That is not to say that there could never be any prospect of some development which might become possible by reason of changes in planning schemes. But there had here been no such changes.

The authority had paid the full value of the land, a value arrived by considering its potential for residential subdivision; the authority had, in other words, paid the fee simple price for residential land, upon the basis that its reservation had destroyed the land's potential for residential subdivision. We repeat the judge's rhetorical question: "Why should the authority pay the value of the land as 'financial loss' when it has already paid out that value for the same land?"

It was then argued for the appellant the fact that, as the judge found, the value of the land, were it not for the reservation, would by the refusal date have increased in value, establishes some financial loss. We cannot accept that argument. The commencing point in the proof of loss is not notional value. The fact is that the loss of value to the owner of the reserved land was here caused not by the refusal of the permit, but by the reservation. Full compensation had been paid in respect to that loss, which was a loss of the

potential for residential development. The refusal of the permit did not again cause such a loss by again destroying that potential.

The appellant submitted that support for the claim was to be found in the opinion of the Privy Council in *Melwood Units Pty Ltd v Commissioner of Main Roads* [1979] AC 426. There, a developer purchased 37 acres of land in respect of 25 acres of which (the north land) planning permission was given for a shopping centre. Across the whole of the land was a strip of land reserved and later resumed for a road; the developer sold the north land, and claimed compensation for the strip and for the remainder of the land (the south land) in respect of diminution of its value by reason of severance. compensation was assessed upon the basis that the strip and the south land never had any potential as part of a 37 acre shopping centre. The Privy Council found this to be a wrong approach, applying in reverse *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* principle [1947] AC 565) stating (at 434):

> "A resuming authority cannot by its project of resumption destroy the potential of the whole 37 acres for development as a drive-in shopping centre, and then resume and sever on the basis that that destroyed potential had never existed."

In our view, the issues there were quite different from those in the present case. Here, the authority never contended that it was not required to pay full compensation for the consequences of the reservation. As has been said, it paid both the full value of the land, and compensation for severance. It did not reserve the land and then compensate upon the basis that "the destroyed potential had never existed". It does no more than say that it has paid once, but should not pay twice, for that destroyed potential.

For the reasons given, we are of the view that the learned judge was correct, and that the principal contentions of the respondent should be upheld.

We would add that our conclusion appears to us to accord with ordinary principles of compensation, with the justice of the case, with the policy of the legislation, so far as it can be gleaned from a consideration of s 104, and, as the learned trial judge observed, with commonsense.

We should mention another of the appellant's criticisms of the decision appealed from. It was said that the trial judge wrongly treated the claim as having been made under s 98(1) of the 1987 Act, rather than s 98(2). Section 98(1) is concerned principally with claims for loss caused by reservation of land, while s 98(2) deals with loss caused by a refusal of a permit to use or develop land. It is true that there are references in his Honour's reasons to a claim under s 98(1), in terms which suggest, on one occasion at least, that the reference was not merely a slip. However, when the whole of the reasons are examined, we are satisfied that his Honour did not misunderstand the basis of the application, or misdirect himself concerning the principles to be applied. In the circumstances of this case, it was, of course, as we have endeavoured to show, the reservation of the land, and not the refusal of the permit, which destroyed the potential of the land for residential subdivision.

It was said that the conclusions of the judge were inconsistent with the principles enunciated by him in his own previous decision in *Cape Developments Pty Ltd v City of South Barwon* [1982] VR 1011; (1981) 49 LGRA 268. In the relevant passages, his Honour was there concerned with

the construction of, inter alia, s 41(2) of the 1961 Act, and the determination of the question when "liability to pay compensation first arose", and s 42(6) of that Act, the progenitor of s 104 of the 1987 Act. His Honour, before noting that there may be more than one claim in respect to the same land, observed (at 1,015):

> "It is in my view a severe straining of language to treat the reference to liability to pay compensation first arising as going back to the moment when any liability at all under any claim arose. It is more logical to treat the reference to liability as being in respect of the claim in question that is sought to be pursued through Part III of the Valuation of Land Act."

There is, we think, nothing in the quoted or other observations in that case which is inconsistent with the views his Honour expressed of the present case, or indeed with the conclusions reached.

As to the submission earlier referred to that the judge erred in not undertaking the task in a two step process — first, assessing the amount of compensation payable in consequence of the refusal of the permit, disregarding the prior payment of compensation, and secondly, applying s 102 of the 1987 Act so as to "have regard" to that payment: in our view, the fallacy in this approach is that the process commences by assuming that which must be proved, that is, the fact that financial loss was caused by the refusal. As we have endeavoured to demonstrate, the appellant failed to prove such loss.

We should note also the submissions for the appellant as to the meaning and effect of s 102 of the 1987 Act, the terms of which have already been set out.

Section 102 indicates what is to be done but contains no indication of how it is to be done.

It was common ground before his Honour that a purely arithmetical approach of subtracting the amount earlier paid for compensation, whenever it was paid, from the amount later assessed as appropriate, would not be appropriate.

For the appellant it was said that the only alternative to an arithmetical approach was a form of proportional approach as adopted by the valuers called by the appellant.

The valuers, whose evidence indicated that they adopted their approach upon instructions from the lawyers representing the appellant, worked on a proportional approach which treated the value of the reserved land as if it would have risen in value in proportion with the adjoining developed lots.

It is true that more than one option was open under the umbrella of that approach, and that the valuers adopted the approach which produced a result less favourable to the appellant. Put shortly, the rejected option was to look at the reserved land as if subdivided into lots and as if part of a discrete subdivision. The preferred option was to treat the reserved land as if subdivided into lots and as if part of the 51 hectares developed by the appellant.

For the respondent it was submitted that the exercise engaged in by the valuers was a pointless one. His Honour analysed the formula advanced by the appellant and adopted by the valuers and concluded that it was not satisfactory, stating (at 335):

> "... No reason in principle is put forward for the formula nor is it suggested that the approach is one that springs from a principle that

provides the basis for operation of s 102 in all or most cases. It is a formula fashioned with some ingenuity for this case. It does not represent any notion of proportional adjustment for major factors such as inflation or real price movements. I am not persuaded by it. At the same time I have to confess that s 102, unless it is given a mere arithmetical operation, is extremely difficult to apply. In view of my finding that there is no loss within s 98(1), I do not need to decide this question of the meaning of s 102. I propose not to attempt an extensive statement of the principles to be applied and a working description of its proper operation. That will have to await another case, though the preferable course is for Parliament to amend s 102 as part of a review of Pt 5 of the *Planning and Environment Act* 1987."

We agree with those observations. For the reasons given by his Honour, we also refrain from expressing any concluded view as to the operation in other circumstances of s 102.

Finally, we refer to an argument from the appellant that his Honour had failed to address at all one submission which had been made to him.

That submission was based on a letter dated 5 July 1990, not headed "Without Prejudice", sent by the solicitor for the respondent to the solicitors for the appellant. The first paragraph reads:

> "I have obtained my client's instruction to offer your client in settlement the sum of $36,000 together with reasonable legal and valuation fees incurred. Please advise me of your client's response to this offer in due course."

We were told that it had been submitted on behalf of the appellant to his Honour that the letter ought to have been treated by him as an admission of liability on the part of the respondent to pay compensation to the appellant.

The letter was the subject of submissions to this Court. It was put that his Honour erred in not referring to it, that it ought to have been treated as an admission, and that it ought to have been treated as a basis for our allowing to the respondent compensation of $36,000 together with reasonable legal and valuation fees.

It is correct that there is no reference to the letter in the reasons for judgment. The letter was admissible. It is another matter whether any weight ought properly to be given to it. It was not, of course, in terms an admission of liability. It was an offer of settlement of a disputed claim.

There was minimal evidence led at the trial as to the context in which the letter came to be sent. The letter was before him simply as an attachment to a chronology. Without more evidence, it seems appropriate to conclude that the learned judge considered that no, or no significant, weight ought to be given to the letter, in so far as it contained an admission. That conclusion is consistent with the clear view of his Honour that the appellant was not liable to pay compensation because it had suffered no loss. That is our conclusion. We see no acceptable reason for giving the letter any weight.

Legal and valuation expenses:

For the appellant it was argued that his Honour should have allowed $25,253 claimed on behalf of the appellant for legal and valuation expenses. His Honour addressed submissions made to him based on the terms of s 101 of the 1987 Act which provides:

> "If compensation is payable under section 98, the owner or occupier

of any land may also claim from the planning authority or responsible authority any legal, valuation or other expenses reasonably incurred in preparing and submitting the claim."

His Honour's conclusion was that as no compensation was payable under s 98, there could be no recovery of expenses. Notwithstanding the letter of 5 July 1990, we consider that position unassailable.

In our opinion the appeal should be dismissed with costs.

Appeal dismissed

Solicitors for the claimant: *Sly & Weigall.*

Solicitor for the authority: Victorian Government Solicitor.

NJH