LEICHHARDT MUNICIPAL COUNCIL V. SEATAINER TERMINALS L

40 LGRA 353

Land and Valuation Court of NSW : Ash J
March/October 1979

*100 INTRODUCTION

For details of the Site see Hope JA's decision in the Supreme Court.

The fundamental contest was as to the basis of valuation which should be adopted.

Mort's Dock & Engineering Co L v VG (1924) 6 LGR 162.

In this case Pike J was assessing the value of parcels of land below HWM adjoining parcels of reclaimed land:-

"But the whole difficulty arises in this case from the fact that the VLA never contemplated a case of this description coming under S6 of that Act. That was intended to deal with ordinary freehold lands, not lands under water as these lands are and when the Act came to deal with leasehold apparently no one contemplated leaseholds of this description, the only leaseholds dealt with being leaseholds of agricultural and pastoral lands. I think the Act should be amended in some direction to meet a case of this description".

Seatainer Terminals Ltd v VG (1974) 29 LGRA 6

Else - Mitchell J :-

"At the outset of the matter difficulties were experienced by both the company and the Valuer - General in finding a conventional basis for the valuation of the terminal which would conform with the statutory specifications in the VLA".

"... the company has merely a leasehold interest in the subject land yet it is the entire fee-simple which is to be valued. Moreover, that interest in fee-simple is to be valued as if it were the subject of a transaction of sale in an open market, in spite of the fact that the land is vested in the MSB by statute and cannot be disposed of except under a lease for not more than 99 years.

Maritime Services Act, 1935, S 13L)

"It is also relevant that the lands of Sydney Harbour are vested in the board and that there are but limited areas of privately-owned foreshore land which can be developed for the purchase of container terminals. The board has complete control over the port and over the use of all wharf facilities and can make regulations for a wide variety of matters (S 38)".

*101 S6(1) HYPOTHESIS

Gollan v Randwick Municipal Co. (1960) 6 LGRA 275 at 278

"It is not in dispute that a formula of this kind requires the making of certain hypothesis. A sale of the fee simple has to be assumed whether or not the land in question can legally be sold, and the fact that there is some lawful impediment to sale cannot be allowed to enter into the assessment of value. Similarly it is irrelevant that the land may be so settled or encumbered that there is no single person or even conbination of persons who can at the relevant date effectively transfer the fee simple. All this follows from the fact that a sale of such an estate has to be assumed. Again, the valuer must not merely treat any improvements as not being there, he must proceed on the basis that they have never been there at all. See Toohey's Ltd. v VG".

Comm. for Transport v Mombasa Valuation Committee 17 Valuer 287
Edmonds J :-

"To apply these principles, on the basic premises which I have set out, must involve a mental exercise in unreality. That this is so is obvious and does not require any elaboration".

*102 COMPARABILITY - ZONING

His Honour rejected the argument that the sales used by Mr. F were not comparable because they were not zoned for port purposes. He held the view that there is not a "black-and-white" difference between harbour lands in Sydney being examined for port purposes and those being examined for industrial purposes.

*103 HYPOTHETICAL DEVELOPMENT METHOD
Sheath v VG ( ) 10 LGRA 20 at 26

Hardie J:

"I am satisfied that in the absence of any transactions involving the sale and purchase of freehold or other long term interests in space such as that now under consideration, the only sound and reliable approach to the problem is to determine the rental value of the site, and then capitalize it at a fair and proper percentage rate".

Roper J adopted the hypothetical development method for valuing land at Katoomba on which shop premises were erected in ESt. J G. James v V-G (1942) 15 LGR 110.

*104 CAPITALISATION OF RENTS APPROACH

The reasons which led Else-Mitchell J not to accept the capitalized rental approach in the earlier Seatainer appeal do not apply here. Under Mr. W's approach the rental value has been increased to reflect a market rental.

Therefore Ash J adopted this method as being sufficient to arrive at the value of the Glebe Island land but his main approach was the comparable sales method.

*105 COMPARABLE SALES APPROACH; COMPARED TO EARLY CASE

"My acceptance of the applicability of the comparable sales method, and of the presence of adequate evidence for its use constitutes my main reason for non-adoption of the costs method; and my acceptance of the same matters in respect of the hypothetical development approach to the extent that I will indicate, constitutes a secondary reason".

In the early case the most important matter to be noted is that an agreement was reached at the outset of that hearing.

> "...that the site cannot be valued by using comparable sales - an unusual case - and neither party will as I apprehend ~~any~~ my friend's case, be attempting to support a case ~~leased~~ based on comparable sales".
>
> "...but, by common agreement, there were no sales or other transactions relating to land answering this description" (17). — Else Mitchell, J.

The important material not available to Else-Mitchell J:-

(1) Comparable Sales
(2) evidence based on estimated market rents
(3) that the V-G had valued land adjacent to port areas and had made special land valuations for the MSB's stage 1 Botany Bay.
(4) "for lease of cargo terminal for specialized ships", "at Botany Bay" at a rental of $28,000 per hectare.
(5) A document entitled "Proposed Lease of Glebe Island Container Terminal-Land Rent".

There was a case, with great deal of material and in which the objection to the V-G's figure was not established.

The evidence of the valuers in this case as to the cost approach revealed little support for it in that type of valuation.

Mr. S said he used the cost approach as he "could not see any alternative" where there is no other evidence to use.

*106 COST APPROACH

Mr. F said he would not value with the cost approach because:-

(1) the great difficulty in such a case as this of identifying the particular items which had to be costed, and

(2) the inadvisability of starting with an "unknown" and adding to it rather than as usually happens when a cost approach is used to "work back" by deduction from a "known".

Ash J did not accept Mr. M's cost approach because the starting point of his approach was Else-Mitchell's judgment and that in his view the MSB was to be regarded as the only hypothetical purchaser of the subject lands.

Further Mr. M had not considered the sales proffered by other expert witnesses, and a document entitled "Proposed Lease of Glebe Island Container Terminal - Land Rent" and his Honour rejected the application of the method "Depreciated Replacement Cost" from Dr. J. Murray:-

Barber v V-G (1969) 17 LGRA 408 at 411

"This is not to say, however, that depreciated replacement cost may never be employed as a means of ascertaining the value which an improvement had added to land but, as Dr. Murray has pointed out (p 220), that method of calculation can be validly employed only under certain conditions, one of which is that the value assigned to the improvements by that method is equal to their value as disclosed by sales".

Mr. W stated that by adopting a cost approach and applying escalation of costs over a period of time, "you could end up with very wrong results unless you checked it against value of land improvements".

Ash J rejected several cases in support of the application of the cost approach because they dealt with different facts, circumstances and situations and those observations of learned judges are not determinative of this case.

Further it was not argued as a matter of law that cost cannot be equivalent to value.

"There is no question that cost or adjusted replacement cost may in certain cases reflect value; and in fact adjusted costs of true improvements are at times used to reach a deduced unimproved value; and there are several other examples of the ascertainment and use of costs for consideration in

other types of valuations. In this case the contentions by the companies have been not only that the costs are not the value, or a portion of the total value, but also that the cost approach for valuation should not, for a number of reasons in fact be applied in this case, and with those contentions I fully agree".

His Honour also rejected overseas articles and judgments supporting the cost because:-

(1) As stated above for Australian cases
(2) The reported judgments deal with particular cases, but the articles deal with a wide range of matters and to or considerable extent the valuation of true improvements, and of lands in resumption and acquisition cases.
(3) They are based on legislation, circumstances, and judicial views which are primarily related to the countries concerned.
(4) It is generally unsatisfactory to isolate a particular passage from a judgment or article without full identification of its context and circumstances.

*107 SUPPORTING CASES

Barber v V-G (1969) 17 LGRA 408

Concerned the U.v of farm lands determined from the sales of improved land and making deductions from the price paid or depreciated cost of various improvements.

Else-Mitchell J stated that cost did. ~~does~~ not equal value:-

"to deduct the cost at current rates of effecting all such improvements would be improper".

"...for cost is not always reflected in value and expenditure on an improvement does not necessarily result in an increment of the same amount to the value of land: sometimes it will be more and sometimes it will be less depending upon a variety of factors... There is, I think, only too well established by decisions of this Court and elsewhere to admit argument: cf. In Re Stobie (1924) 3 LVR 28 - In Re McHugh (1937) 16 LVR 35; Stennett & Ainsworth v (V-G (1965) 12 LGRA 269; Thornton v Warren S. Co. (1968) 15 LGRA 328; Trust & Agency Co. of Aus. v Ryan (1894) 4 LCC 228; Greene v Hargrame (1897) 7 LCC 18; Hopkins v Min for Lands (1912) 12 SR (NSW) 215 at 228; Campbell v Dep Comm Land Tax (NSW) (1915) 20 CLR 49 at 52/3; McDonald v Dep Fed Comm of Land Tax (NSW) (1915) 20 CLR 231.

Borg-Warner (A) L v V-G (1978) Unreported
S 58 (2) Allowances: Rath J

"I do not think it would be proper to infer from the evidence given in respect of the site improvements that the value of the subject land was increased proportionately to the expenditure of those improvements. Still less could it be inferred that the value of the land as at 1st January, 1973, was increased in proportion to the escalated cost of the works at that date".

His Honour then quoted evidence to the contrary indicating that the measures taken by the appellant had been "to meet the needs of their business rather than measures taken by them to improve the value of their land as a market commodity". He quoted an extract from Booth v V-G (1930) 10 LGR 50 at 52 where Pike J said "...I say 'value' because cost is not always the value..", his Honour held that the value added to the land by the site improvements was not the cost but only the difference between the value of the land unimproved and of comparable lands to the site-improved lands.

*108 OTHER REASONS FOR NOT ADOPTING THE COST APPROACH

(1) Acceptance of the opinions of the valuers in the case
(2) There were found to be no rise in industrial land values between 1973 and 1975.
(3) Where costs were escalated, the differences which resulted mathematically between the figures for the 2 base dates were quite extraordinary.
(4) There is no evidence from the V-G to support the figures contended for, and the bases of reaching those figures are not relied upon.

The above matters do not themselves justify a non-adoption of a cost approach in principle nor do they affect the case put forward on behalf of LMC. But the application of the approach to valuation put forward by the V-G could have been more strongly supported if there were cost figures to support the relevant component of the contended figures.

His Honour did not set out the several examples put forward in submissions of extraordinary figures which could result from adoption of the cost approach, particularly in relation to offsite improvements.

His Honour then referred to exhibit A17 which was the Board's directive that the "land valuation be $400,000 per ha" and that the "land rental be calculated at the rate of $28,000 per ha p.a." which although not values would be a factor taken into account by the hypothetical purchaser. "At all events the MSB did not apparently take cost of reclamation into consideration when fixing the value and the rent". The

potential purchaser would also take cognizance that the MSB was developing the new port area in Botany Bay and that there was a real risk of container operations "being driven down to Botany Bay".

He pointed out that this was another difference between the early case and the subject one.

*109 SPECIAL VALUE TO THE MSB

(1) Ownership as such in a rating valuation does not preclude the owner from being considered as a hypothetical purchaser.
(2) The principles for determining value in resumption or compensation cases (except insofar as they may refer only to market value as such) are different from those in rating and taxing cases.

Early Seatainer Case: Else-Mitchell J:-

"It is now accepted, in spite of the optimism of the framers of the VLA, that a single value could be deduced and recorded for all purposes - rating compensation, etc. - that the statutory valuations under SS5, 6 & 7 are for rating and taxing purposes only so that their artificial basis may deprive them of general application: Gollan v Randwick Mun Co. (1961) 6 LGRA 275; BHP Co L v V-G (1969) 16 LGRA 334)

The Privy Council in Gollans case at 279:-

"It will clear the ground if their Lordships say at this point that in their view the principles which determine questions of compensation for property resumed or expropriated are not of assistance on questions of rating assessment...."

Else-Mitchell J in Parramatta City Co v V-G (1965) 10 LGRA 160 at 172 indicated that for rating and taxing purposes the owner of the subject land should not be considered:-

"Mr L's basis of valuation also, I think, wrongly had regard to the potentiality that the STC would be purchaser of the subject land. As the Privy Council pointed out in Gollan v Randwick M Co. the concept of UV has been evolved solely for rating purposes and the principles which determine questions of compensation for property resumed or expropriated are not of assistance on questions of rating assessment. To treat the STC as a potential buyer of its own land is merely another way of saying that value is represented by what an owner would pay to retain his own land rather than lose it to an acquiring authority, but that is a principle of resumption law evolved for the purpose of providing some just measure of compensation to an expropriated owner: PFA case".

CSR L v V-G ( ) 17 SASR 446 Wells J took a similar view.

The owner is .." to be treated for a rating valuation as willing to pay the price which he would be prepared to pay if entering the market for land to meet his requirements or would be willing to expend to acquire a suitable alternative site to that being valued for rating purposes".

CITY OF MONTREAL V SUN LIFE ASS CO OF CANADA
13 The Valuer 116

A rating case in respect of a building in Montreal:-

"What that sum would be is, as the authorities have pointed out, best ascertained either by regarding him as one of the possible purchasers or by estimating what he would be willing to expend on a building to replace that which is being valued. But the owner must be regarded like any other purchaser and the price he would give calculated not upon any subjective value to him but upon ordinary principles: ie. what he would be prepared to pay, if he was entering the market, for a building to meet his requirements, or would be willing to expend in erecting a building in place of that which is being assessed."

"In these observations their Lordships are in no way acceding to a suggestion that the subjective valuer to the owner of the premises is to be regarded. Cases such as Gt Central Rlwy v Banbury Union/1909/ AC 78 show that such a consideration is inadmissible".

(That case also supported a valuation of land partly by one method and partly by another).

IRC v CLAY /1914/1KB 339 /1914/3 KB 466: Scrutton J

"In other words I cannot exclude from the 'open market' the principal buyer though for a genuine business reason he will pay a price higher than others".

Other supporting cases were The Raja case; and Luton v V-G (1971) 23 LGRA 180

His Honour did not think these cases were appropriate as they involved resumption of land (IRC & Raja cases) and the assessment of UV for grazing purposes over a number of separate parcels:-

"To say that a small farm in the middle of a wealthy landowner's estate is to be valued without reference to the fact that he will probably be willing to pay a large price, but solely without reference to its ordinary agricultural values, seems to me absurd".

Ash J did not see this as a general statement that a "special value" of land to a hypothetical purchaser assumed to be an adjoining owner is an essential or normal content of valuation in rating and taxing valuations.

> "But an extract from a judgment, though directly applicable to the case in which the judgment is made, must always be reconsidered before being directly applied to other cases with different facts and circumstances".

His applied the law as expressed by Sugerman J in SCC v V-G (1956) 1LGRA 229 at 234/5:-

> "Ss 5 & 6 of the VLA are thus an integral part of a system of rating, whose character, in my opinion, postulates a uniform basis of assessment of rates which are payable by a class of ratepayers whose estates or interests permit of considerable variation inter se, that is to say, a basis which has no regard to the quantum of incidents of any particular ratepayer's estate or interest. The system is a system of rating, not upon the value of the ratepayer's estate or interest, but upon the value of the 'fee simple of the land', ascertained by reference to a hypothetical sale thereof defined in terms which make it independent of the personality of any actual owner for the time being..."
>
> (The emphasis is Ash J's)

Supported by the Privy Council in Gollans Case, and BHP v V-G:

> "That was stated in relation to the iv but it was approved and applied to the UV by their Lordships' Board in Gollan v RM Co (1961) 6 LGRA 275."

*110 "HYPOTHETICAL SALE" in "DEFINED ... TERMS"

This basic consideration has been applied in relation to the selection of comparable sales, and expert valuers declined to consider the sales comparable because of a special feature.

(Tucker v V-G (1962) 7 LGRA 380; Barber's Case)

In this case there was no dispute as to the suitability of land for a particular purpose and that is different from a special value of land to a particular purchaser or vendor:-

Anderson v V-G (1966) 11 LGRA 385 Else-Mitchell J:-

> "I should reject also the sale Brown to O'Dell because the purchaser owned land to the North and South of the land sold and I am not sure what allowance should be made for this fact".

Rumble v Comm of Aus (1974) 31 LGRA 244

Concerned the compulsory acquisition by the Comm of 288 acres of a grazing property which the Comm acquired to serve as part of a catchment area. Stephen J:-

> "Although there was no expert evidence supporting or seeking to quantify such a submission, counsel for the plaintiff did submit, in reliance upon the Raja case, that some unspecified margin over and above its market value as grazing land should be attributed to the acquired land because it lay within the catchment area of the reservoir to be created downstream on the Queanbeyan River at Googong. The Commonwealth is in fact acquiring this land to serve as part of this catchment area and it was said that it should be regarded as having a potentiality for this purpose which confers upon it what plaintiff's counsel described as a "squeezing value", by which was meant an ability conferred upon its owner to extract more for the land than its ordinary market value because without it the reservoir proposed might be frustrated or delayed. To accept this submission would, in effect, be to treat the Commonwealth not as a willing purchaser but as a purchaser under compulsion to buy regardless of cost."

Ash J held that even if it had been decided as a matter of law that the type of "Special Value" was to be considered it would in fact have no effect upon the values because:-

(1) There was no evidence of a special value to MSB Scrutton J in Clay's case:

> ".. in my view here anyone knowing the facts beforehand would anticipate that 1000 might be obtained, if the owner was willing to sell, from the nursing home who wanted the home for a particular purpose, though not from other people who wanted it for a different purpose... He "(the referee whose assessment was being considered in that case)" was right in this not because of the sale for 1000 but because of the reasonable expectation that a willing seller could get 1000 or more from the nursing home".

In this case the claim of 'special value' emanates from the nature and the characteristics of the MSB. There was no evidence that the MSB would ever wish to purchase the lands, "enter the market" or would wish to "acquire a suitable alternative site to that being valued".

(2) The evidence that it would not accord with a market value. His Honour then examined the cross-examination of the appellant's valuers his conclusion is that from their answers the MSB would not pay more than market value.

*111 ADVANTAGE OF COMPARABLE SALES

"The great advantage of using comparable sales when evidence is available is that they capture in the mind of an experienced valuer all the various factors which affect the value of the land. The presence of offsite factors, in this case particularly of services and dredging is very important for the enhancement of the value of the subject lands in comparison (384)".

His Honour then recommended Mr. F's evidence and expertise. For these reasons his Honour relied on Mr. F's adjustments.

*112 COMPARABLE RENTAL APPROACH AND OTHER METHODS

His Honour considered that if he did not adopt the comparable sales approach (ie if he did not consider the sales to be at all comparable) then he would have accepted Mr. W's method of capitalising adjusted rentals - "though some adjustments would have to be made, particularly in respect of that matter of access".

Further he considered that a valuation the "hypothetical development" approach was still superior to the cost method.

> "Mr. W's valuation by the hypothetical development method, when so used as a check, gives far more support to a value reached by the comparable sales basis than to one reached on a cost basis".

*113. "SITE IMPROVEMENTS" S.4

His Honour relied upon the judgment of Pike J in the Mort's Dock case to support the view that the drafters probably had in their minds "ordinary freehold land" rather than water-front lands in Sydney Harbour.

"Reclamation"

Earth and rock of selected choice were simply placed on the seabed until it reached a particular height and displaced other waters.

"Retaining walls"

Caissons were part of a wharf supported by selected filling indicated that any retaining function was incidental and secondary.

His Honour did not consider these definitions and evidence in detail because of his rejection of the cost method as the primary method.