[SUPREME COURT]

McEWIN, BROOKMAN, FISHER and GRASS TREE INC v THE VALUER-GENERAL

Mullighan J

25-28 January; 26 February 1993

Valuation of Land — Meaning of capital value and site value of land — Relevance of heritage listing — Transferable floor areas — Methods of valuation to be employed — Application to building of unique heritage value — Valuation of Land Act 1971, ss 5, 22b, 25c — South Australian Heritage Act 1978 — City of Adelaide Development Control Act 1976 — City of Adelaide Principles of Development Control.

The appellants as trustees of land and buildings situated at 165 North Terrace, Adelaide (and known as the Adelaide Club) appealed against a valuation made by the Valuer-General of such land and premises both as to site value and capital value. The premises upon the land were used as a club and were subject to major restrictions under heritage legislation. The Valuer-General had valued the land at $3,000,000 for its site value and $3,200,000 for its capital value. These valuations were reached on the basis, inter alia, that: (1) transferable floor areas (TFAs) as provided for by principle 17 of the City of Adelaide Principles of Development Control approved under s 7 of the *City of Adelaide Development Control Act* 1976 were to be included in each valuation; (2) the value of such TFAs in this case was $1,400,000, and (3) the improvements on the land were worth $200,000. In reaching his valuations the Valuer-General applied the comparison method of valuation. The appellants contended that the respondent had applied incorrect valuation principles and had erred in law.

Held: (1) When assessing the site value of land upon which there are buildings, a valuer cannot ignore any relevant restrictions upon the use or development of land even if such restrictions apply, as here, specifically to the building upon the land.

Tetzner v Colonial Sugar Refining Co Ltd [1958] AC 50; *Randwick Municipal Council v Valuer-General; Re Kensington Golf Links Ltd* [1960] NSWR 778, applied.

(2) TFAs are to be disregarded in valuing the site value of land.

Mathers and Gibson v Valuer-General (unreported, Land Court, Qld, Neate J, 18 September 1992), applied.

(3) On the facts of this case:

(a) the use of the comparison method of valuation was inappropriate and incorrect as there were no identifiable properties comparable to the subject land and building, having regard in particular to the significantly greater heritage restrictions applicable to it;

(b) the capitalisation method of valuation was more appropriate in the circumstances.

(4) Accordingly the valuations made by the Valuer-General were in error and could not stand.

(5) The appropriate valuations were to be determined initially by applying the capitalisation method, and in the present case were:

(a) as to improved value, to be reached by assessing the likely net annual rental, capitalising such sum and allowing for a yield of 9 per cent (as being a reasonable expectation of yield at the time), and then deducting from the resulting sum the cost of refurbishment to bring the premises into a tenantable condition;

(b) as to unimproved value, to be reached by assessing the total value of the building itself, deducting from such sum the cost of refurbishment to bring the premises into a tenantable condition so as to reach a sum representing total aded value of the building, and then deducting such sum from the improved value as reached.

(6) On the preferred valuation evidence using the capitalisation method, the improved value of the land and buildings was $965,000, that of the unimproved land was $924,000.

(7) The value of the TFAs attaching to the land and building were to be added to the improved land value in order to determine the capital value and in the circumstances such value amounted to $200,000.

(8) There was no basis in fact for increasing the valuations either on account of the alleged interest of an adjoining landowner as a potential purchaser of the land and premises or the TFAs attaching thereto or on the footing that the present appellants should be regarded as potential purchasers of the subject land.

Dictum of Wells J in *Colonial Sugar Refining Co Ltd v Valuer-General* (1977) 17 SASR 446 at 451-452, referred to.

(9) Accordingly the appeal should be allowed, and valuations should be set:

(a) as to capital value at $1,165,000 being the improved value of the land and premises as determined by the capitalisation method plus the value of the TFAs;

(b) as to site value at $924,000 being the unimproved value of the land without regard to the value of the TFAs.

The nature of an appeal under s 25c of the *Valuation of Land Act* 1971, considered.

Dicta in *Fenton Nominees Pty Ltd v Valuer-General* (1981) 27 SASR 258 at 263-264, per Wells J and (1982) 29 SASR 348 at 355-356, per Jacobs J, and in *Myer (SA) Stores Ltd v Valuer-General* (1986) 40 SASR 102 at 103-105, referred to.

APPEAL

B R Hayes QC, for the appellants.

C J Brooks, for the respondent.

Cur adv vult

26 February 1993

MULLIGHAN J. There are four appeals, pursuant to s 25c of the *Valuation of Land Act* 1971, against the Valuer-General's decisions whereby he, substantially, disallowed objections to his valuations of the subject land in each of four successive years. The appeals were called on for hearing together but it was agreed by the parties that only the appeal with respect to the valuation relevant to the year ending 30 June 1991 should proceed at this stage as it is likely that the resolution of the issues raised in that appeal will facilitate the resolution of the other appeals.

The subject land is situated at 165 North Terrace, Adelaide and is the land and improvements known as the Adelaide Club. The impugned valuation

was made as at 25 May 1990. Mr Butcher undertook the valuation on behalf of the Valuer-General. He valued the site value of the land at $3 million and the capital value at $3.2 million.

The appellants are the proprietors of the subject land, at relevant times, as trustees. They contend that the valuation is in excess of the full and fair value of the subject land and was made erroneously. The appellants engaged two valuers to value the subject land, Mr Fereday and Mr Fenwick. Both of them valued the land at substantially lower values than the subject valuation.

Mr Brooks, who appeared for the Valuer-General, contended that I must keep in mind the observations of Wells J in *Fenton Nominees Pty Ltd v Valuer-General* (1981) 27 SASR 258, as to the nature and purpose of valuations under the Act by, or on behalf of, the Valuer-General and the circumstances in which this Court will vary a valuation on appeal. He said (at 263-264):

> "A court should, in my opinion, regard all valuations as having the characteristics and significance revealed by the above analysis and appraisal, and should assume that the Valuer-General discharges his duties with a keen awareness of the weight of his responsibilities and of the implications of every determination of value under the Act. I am entitled — indeed, bound — to draw the inference that the legislature intends this Court to treat accordingly every valuation under challenge on appeal, and to decline to interfere unless error in principle or application is clearly demonstrated. This Court would not, I apprehend, have sufficient warrant for allowing an appeal under s 25 if it found itself able to say no more than that the value to which the appellant's expert testified is lesser than that fixed by the Valuer-General, and is not demonstrably wrong or inadequate. There is no such thing as an ideally correct value for a given piece of land; neither of two valuers may be incorrect in valuing land at a figure that differs from the figure arrived at by the other valuer.
>
> In short, the appellant faces the practical necessity of showing that the Valuer-General's value is too high for the subject land because the Valuer-General has made an error of law; has misapprehended, misused, or excluded, relevant material; has applied an incorrect principle of valuation or misapplied a correct principle; or is, in some other way, plainly guilty of error in discharging his statutory duties. I should add that, conformably with similar doctrine applicable to other appeals and reviews, an appellant will be entitled to succeed if he can show that the Valuer-General's value is excessive to such an extent that it is explicable only on the ground that the Valuer-General has committed an error, although it is not possible precisely to identify the point at which the error occurred."

Of course, those observations were made in the context of the former s 25(3) of the Act and not the present s 25c. They were not adopted on appeal and were questioned by Jacobs J on appeal: *Fenton Nominees Pty Ltd v Valuer-General* (1982) 29 SASR 348 at 355-356; and in *Myer (SA) Stores Ltd v Valuer-General* (1986) 40 SASR 102 at 103-105. I have not found it necessary to consider the true nature of an appeal under s 25c and the extent of the onus on the appellant. I am satisfied as to the outcome of the appeal even on the bases discussed by Wells J in *Fenton's* case (supra).

The appellants contend that the valuation has been made upon the application of incorrect principles of valuation and that Mr Butcher made errors in law. It follows that if the issues raised in the appeal are resolved in favour of the appellant, grounds for decreasing the valuation will have been established.

Before turning to the respective contentions of the parties, it is necessary to have regard to the evidence as to the nature of the building on the subject land and the significance of its listing as a heritage building, the implications of the Development Plan of the City of Adelaide and the provisions of the Act and the *South Australian Heritage Act* 1978 which bear upon the principles of valuation to be applied.

The subject land was acquired for the establishment of the Adelaide Club. The building was designed in 1861 by the former colonial architect, Edward A Hamilton. It was designed in the Victorian version of the Italian Renaissance Palazzo which was an unusual style of building in Adelaide at the time. It has always been used for the purpose for which it was constructed. There were significant extensions to the building in 1891. It is comprised of a basement, ground floor and two upper stories. The basement contains essential facilities for the operation of the club, including a cellar and storage areas, the main kitchen, storerooms, offices and areas in which necessary service equipment is housed. Also there is a courtyard and changing and wash rooms for the members. The ground floor contains the dining room, smoking or lounge rooms, a bar and a billiard room. Residential accommodation for members, including bathrooms, and a card room and library comprise the first floor. The second floor contains a kitchen, some facilities for staff and a dining room and annex and lounge for ladies.

I accept the evidence of Ms McDougall, an historian and architectural and heritage consultant, that the building is, historically and architecturally, one of the most significant buildings in the State. The historical significance, including the importance to the State and the city of the club itself, is described as the result of the "transfer and nurturing of particularly English social customs of the mid nineteenth century in the South Australian colony". It is a major landmark building on North Terrace and is "a relic and reminder of an earlier scale of building and streetscape". It is unnecessary to repeat the evidence given by the various expert witnesses as to the significance of the building. It is common ground that the building is unique. It has great historical and heritage significance. I expect that there is no other building within the City of Adelaide of such significance which is owned privately.

The *South Australian Heritage Act* came into operation on 6 July 1978. It provides for the entry on the Register of State Heritage Items of items, including buildings, which are of significant architectural, historical and cultural interest. The club was entered upon that Register in 1980 and has remained on the Register. It was one of the first buildings to be so entered. It has also been entered upon the Register of the City of Adelaide Heritage Items pursuant to the *City of Adelaide Development Control Regulations* 1987 and is also included on the Register of the National Estate. It is unnecessary to describe the legislative scheme in relation to heritage items, such as the club. It is sufficient to say that a consequence of the entry of the club upon

the Register of State Heritage Items and the City of Adelaide Heritage Items is that there are strict controls as to any development, renovation or refurbishment of the building. It cannot be demolished. Any work undertaken within or outside the building must be in accordance with directions of an authority established under the *South Australian Heritage Act*. The nature of such directions is so as to preserve the architectural, historical and cultural interest of the building and its appointments. It may be readily accepted that such controls have a considerable impact upon the owner not only financially but also by way of restriction as to what use may be made of the building or any part of it.

There has been some renovation and refurbishment of the building which has involved the installation of "modern" equipment and facilities. Some of that occurred prior to the heritage legislation which I have mentioned. That which has occurred since has been necessary to comply with legislative requirements as to fire and occupational safety and to provide essential modern cooking facilities. The work undertaken since has been carried out strictly in accordance with directions from appropriate heritage authorities.

The heritage listing and the consequential restrictions have posed problems in valuing the subject land. It has been readily acknowledged by all of the expert valuers that the task is especially difficult.

The Valuer-General is obliged to determine, or cause to be determined (inter alia) the capital value and the site value of the subject land: s 11 of the *Valuation of Land Act*. Capital value and site value are defined in s 5 of the Act as follows:

> "'capital value' of land means the capital amount that an unencumbered estate of fee simple in the land might reasonably be expected to realize upon sale, but if the value of the land has been enhanced by trees planted thereon (other than commercial plantations), or trees preserved thereon for the purpose of shelter or ornament, the capital value shall be determined as if the value of the land had not been so enhanced:
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> 'site value' of land means the capital amount that an unencumbered estate in fee simple in the land might reasonably be expected to realize upon sale assuming that any improvements on the land, the benefit of which is unexhausted at the time of valuation, had not been made; for the purposes of this definition —
>
> (a) 'improvements' means —
>
> (i) buildings and structures (but not including structures in the nature of site works);
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> (ii) wells, dams and reservoirs; and
>
> (iii) the planting of trees for commercial purposes."

The valuation of the subject land was made for the purpose of levying rates, taxes or imposts by various authorities. Consequently, and in view of the entry of the club on the Register of State Heritage Items, Mr Butcher was obliged to have regard to s 22b(1) and (2) of the *Valuation of Land Act* which at the time of the valuation provided:

> "(1) The owner of land that forms part of the State heritage is entitled to the benefit of this section in respect of the valuation of that land by a valuing authority.
>
> (2) Where a valuing authority is satisfied that a person is entitled to

the benefit of this section, it may, and shall at the request of that person, value the land —

(a) taking into account the fact that the land forms part of the State heritage;

and

(b) disregarding any potential use of the land that is inconsistent with the preservation of the value of the land as part of the State heritage,

and any such valuation shall operate for the purposes of any rating or taxing Act under which rates, taxes or imposts are levied or imposed on the land on the basis of the valuations of that valuing authority.

...

(6) For the purposes of this Act, land forms part of the State heritage if —

(a) the land, or any building or structure that is on the land, is an item of the State heritage;

(b) ..."

The club is an item of State heritage as defined in subs (7).

The section was amended by *Valuation of Land (Miscellaneous) Amendment Act* 1991 and now provides:

"22b(1) Where land forms part of the State heritage, a valuating Authority that values the land for the purpose of levying rates, taxes or imposts must, in making the valuation —

(a) take into account the fact that the land forms part of the State heritage;

and

(b) disregard any potential use of the land that is inconsistent with its preservation as part of the State heritage."

Section 22b(6)(a) was not amended.

The changes in the section do not, in my view, have any bearing upon the issues raised by the appeal as Mr Butcher did have regard to the matters set out in the former s 22b(2) when making his valuation. These provisions have caused difficulty in the valuation of the subject land, a difficulty which is compounded by the concept of transferable floor area (TFA) contained in the Principles of Development Control approved by s 7 of the *City of Adelaide Development Control Act* 1976 and published in the *South Australian Government Gazette*, 23 December 1987, p 1. The principles provide that the City of Adelaide is divided into five districts of distinctive purposes, including the core district and frame district: principle 2. The club is situated within the core district. There are restrictions upon the nature and height of buildings which may be erected within the core district. Plot ratios are provided to regulate the density of development within the core district and the frame district.

Pursuant to principle 17 the Adelaide City Council may, in accordance with the principles therein stated, and subject to principle 19, permit owners of a conservation site to transfer floor area from that site for use on another site, obviously not a conservation site, to enable the floor area for the purposes of development on that site to be increased. Principle 19 provides that development of heritage items must conserve the substantial whole of the item. Principle 17 provides the method for calculation of TFA and, for

present purposes, it is unnecessary to set out that method. Because the club is a conservation site and the total floor area of building is less than would be permitted for a development on the subject land if it was not a conservation site, there is a TFA which may be transferred by the club to a developer of other land within the core district subject to the permission of the Adelaide City Council.

Mr Butcher prepared a written valuation report of the subject valuation in which he set out the reasons for his various conclusions and the valuation itself. He took the view that the most suitable method of valuation was the consideration of comparable sales. He had regard to various sales of heritage listed properties and other properties in the core district and regarded them as sufficiently comparable for valuation purposes. He also had regard to the TFA available for sale. He concluded that the site value was $3 million which included the value of 5,160 m² of TFA. If TFA is to be disregarded, then, according to him, the site value was $1.6 million. He ascribed a value of $200,000 to the improvements on the subject land, and, consequently valued the capital value at $3.2 million, taking into account TFA, and $1.8 million if it is disregarded.

The two principle issues which arise on this appeal are, first, whether the TFA should be included or disregarded when determining site value and how it should be valued if it is included in site value and capital value and, secondly, whether Mr Butcher erred in adopting the comparison method.

In the present context the site value of the subject land is to be determined on the assumption that the building does not exist. The subject land is to be regarded as, in effect, unimproved land for this purpose. Issues arise as to how the Valuer-General is to give effect to that assumption. If he did so absolutely and without regard to significance of the heritage listing, then he would be valuing vacant land in a prime location within the core district suitable for development in accordance with the zoning regulations which permit various commercial uses for development. Approaching his task on that basis and having regard to the highest and best use of the land, a site value of $3 million would probably be easily justified. None of the valuers approached valuation on that basis and, correctly so, in my view. It is well-established that there must be a sense of reality in the valuation process. The valuer cannot ignore any relevant restrictions upon the use or development of land when assessing the site value: *Tetzner v Colonial Sugar Refining Co Ltd* [1958] AC 50 and *Randwick Municipal Council v Valuer-General; Re Kensington Golf Links Ltd* [1960] NSWR 778. True it is that it is the building that has the heritage significance, and not the unimproved land per se, but it would be unreal to ignore the significance of the restrictions caused by the heritage listing when assessing the site value. In view of those restrictions the land will never become vacant land, unless there is some unforeseen disaster which must be ignored for present purposes, and cannot be developed inconsistently with the heritage significance. Consequently, the restrictions caused by the heritage listing must be considered when determining the site value. Such a conclusion is also in accordance with the former s 22b(2) and the present s 22b(1) of the *Valuation of Land Act* which gives expression to the principle which I have mentioned.

What then is the significance of the TFA? It exists only because of the heritage listing. The concept of TFA is relatively new. In Queensland it is

called "transferable site area" and in New South Wales "transferable air space". Whilst each of the concepts may not be absolutely identical, they are sufficiently similar to be equated for present purposes.

The appellants contend that TFA, whatever its value, must be disregarded when assessing site value. There can be no TFA unless there is a heritage building within either the core distict or the frame district. The TFA cannot exist independently of the building. In *Uniting Church in Australia Property Trust (NSW) v Immer (No 145) Pty Ltd* (1991) 24 NSWLR 510, Meagher JA, with whom the other members of the court agreed, held that air space rights were proprietary rights in the same way as goodwill, patents or company shares. He agreed with McLelland J in *Depsun Pty Ltd v Tahore Holdings Pty Ltd* [1990] NSW Conv R 58,902 that "air space" is not "a legal or equitable estate or interest" in land within the meaning of s 74F of the *Real Property Act* 1900 (NSW). In *Mathers and Gibson v Valuer-General* (unreported, Land Court, Qld, 18 September 1992), Neate J held that transferable site areas are to be disregarded in valuing the unimproved value of land. His reasoning is summarised (at p 20):

> "... the rights can be exercised only if the Heritage Building exists and the Council is satisfied that its conservation is ensured. If the Heritage Building did not exist there would be no such rights. If the Heritage Building is actually removed or destroyed (or even if it deteriorates significantly), no rights for transferable site area can be exercised."

Consideration of the principles which establish TFA lead to the same conclusion.

It remains to consider whether the former s 22b(2) of the *Valuation of Land Act* has any relevance to the resolution of this issue. There is no similar provision in the *Valuation of Land Act* 1944 (Qld). The obligation to take into account the fact that the land forms part of the State heritage must be understood as meaning the improved land, that is, the building, where it is the building which has been entered on the heritage list: see s 22b(6). Of course there may be undeveloped land of sufficient historical or cultural interest which is entered on the heritage list, for example, sand dunes, wet lands or natural forests or scrub. But in the context of buildings, s 22b uses the word "land" in the context of developed land. Mr Brooks contended that it follows that the requirement in s 22b(2) to take into account that the land forms part of the State heritage necessarily means that the valuer must have regard to all of the consequences including the existence of TFA.

I can see no warrant in s 22b(2) to include TFA as part of the site value of land. I accept the reasoning of Neate J. Section 22b(2) requires TFA to be brought to account in valuing capital value, but as it cannot exist independently of the heritage building, it cannot be regarded as part of the site value. It is not an interest in land but an interest of the nature discussed by Meagher JA in the *Uniting Church* case (supra). It may be transferred wholly or in part and independently of the land and upon such transfer "attaches" to other land. Finally, the ability to transfer TFA depends upon the council exercising its discretion favourably to the transaction. These matters are inconsistent with the TFA being part of the "unencumbered estate in fee simple in" the subject land.

In my view Mr Butcher erred in law in having regard to TFA in the assessment of the site value.

The next major issue is whether he was correct in adopting the comparison method in the circumstances. In considering this issue, it is necessary to have regard to the approach taken by Mr Butcher in his valuation. He inspected the club and familiarised himself with the building. He analysed all sales of land in the core district of the City of Adelaide and selected sales which he considered could be regarded as comparable. Some of the properties were heritage listed properties, others were not. He considered relevant zoning. The experience of the Valuer-General's office of sales in the core district over a relevant temporal range has permitted valuers to ascribe a site value to each parcel of land on the basis of a particular sum per metre depending upon the location and dimensions of the land. That value was the starting point. Mr Butcher then had regard to the sales of heritage properties. In doing so he also had regard to sales of properties which had not been entered on either of the heritage lists and concluded that the heritage listing of those sold had not had any impact upon value. He then brought to account the available TFA. In his consideration of value he had regard to the highest and best use of the subject land and to possible uses which a purchaser might make of the property. In that regard he consulted Mr Pettman, a conservation architect employed by the Department of Housing and Construction. He has worked extensively as a conservation architect with respect to various historic and heritage buildings. He acknowledged that the best conservation of heritage buildings is to use them for the purpose for which they were designed and built, however, there has been adaptation of many such buildings to modify all functions or to accommodate new uses. Having inspected the subject building, he expressed the opinion that possible uses for the whole building could be as an embassy or corporate headquarters, a corporate site attached to an adjacent development, another exclusive club, an annex to Parliament House, serviced offices or professional consulting rooms or a small hotel. He ascribed a possible specific use to each of the floors of the building. Other expert witnesses, Ms McDougall, Mr Park and Mr Bone, also expressed opinions about various uses which could be made of the building by a purchaser in conformity with likely directions of heritage authorities. I do not consider it necessary to reach any conclusions about the differences of opinion between some of these experts or as to the soundness of various specific proposals suggested by some of them. The evidence of all of these witnesses has been helpful in enabling me to better understand the difficulties facing the valuers in adopting the correct approach to valuation of the subject land. I trust that I am not doing a disservice to the evidence and opinions of these witnesses when I express my conclusions and findings in brief terms.

If the club was for sale, there would be a purchaser. That purchaser would be influenced in his decision to purchase and in the purchase price by the use which he could make of the building. That use is not only constrained by zoning but by the heritage listing. No doubt it is possible that an effect of heritage listing upon the value of some buildings could be to increase value. That is not the case with the club. The building is so unique as a heritage item, that any purchaser would have to comply with very strict and onerous directions by the appropriate authorities which would restrict uses of the building as well as development. These matters would have a considerable influence upon the two essential questions for a purchaser, whether to

purchase and, if so, the purchase price. It has not been established that the possible uses for the building are any more than theoretical possibilities. Some of them appear to me to be highly unlikely in view of the present design of the building and the likelihood that those giving directions would not permit any significant structural alteration. Nevertheless it must be accepted that there would be a purchaser should the subject property be offered for sale but, in terms of price and saleability, there would be the negative influences which I have mentioned. There are matters of importance when determining whether a sale of another property is sufficiently comparable.

The heritage listed properties selected by Mr Butcher as comparable sales are described, to some extent, in his written valuation report. Photographs of them are annexed to his report. A relevant, but trite, proposition is succinctly stated in D Brown, *Land Acquisition* (2nd ed, 1983), p 188:

> "The onus is upon the party submitting evidence of the value of the land to prove that the sales are in fact comparable. Having established that there are grounds for comparability, the onus moves to the other party to show that the sales referred to were of an unusual nature, were too distant in time, had different features, were of a forced nature, for example, due to bankruptcy, or for some other reason did not account to a comparable sale."

Mr Butcher identified eight properties which had been entered on a heritage list and which were sold within a sufficiently proximate time of the date of the valuation. Each property was within the core district, two on North Terrace and the others in nearby retail and business areas. He selected four of these properties as of particular importance as comparable sales. I hesitate not to accept the opinions and conclusions of Mr Butcher in view of his qualifications and extensive experience in valuing property in the City of Adelaide on behalf of the Valuer-General. However, I accept the evidence of Mr Fereday and Mr Fenwick that none of these properties was sufficiently comparable for the sales of them to be used as a satisfactory basis to determining the market value of the subject property. I do not propose to repeat the evidence relevant to this question. It points only in one direction. The so-called comparable properties were heritage listed, but there the similarity ends. None of them upon redevelopment, renovation or refurbishment would attract the restrictions which would be applied to the Adelaide Club. The evidence establishes that a developer of each of the properties would have considerable freedom as to the use of them with very little restriction as to the structural alterations, renovation or refurbishment of the interior. In the main, the heritage significance is in the basic architecture and construction of the building fabric. The heritage significance of the club is much greater and involves every aspect of the building, including its interior. The club is so unique that not only were there no comparable sales, but there are no comparable properties within the City of Adelaide and I accept Mr Fenwick's evidence in that regard.

Both Mr Fereday and Mr Fenwick, having rejected the comparative sales approach, and correctly so in my view, adopted the capitalisation method of valuation. Even that approach poses difficulties in view of the heritage listing and the strict directions which would be imposed upon any purchaser of the property not only as to renovation and refurbishment but also the use which

could be made of the building. Nevertheless in view of the uniqueness of the club, which I have attempted to describe, the capitalisation method is, in my view, the more appropriate. Mr Butcher did not undertake a valuation on this basis. Excluding consideration of TFA, Mr Fereday assessed the capital value at $965,000 and the site value at $924,000. On that basis Mr Fenwick assessed the capital value at $1,115,000 and the site value at $891,500.

It was agreed by the parties that the net lettable floor areas of the building are: basement 402.63 m², ground floor 402.63 m², first floor 240 m² and second floor 173.44 m². It was further agreed that on the basis that a tenant pays all rates and taxes and fit-out costs and the owner pays the cost of putting the building into good tenantable repair and pays other outgoings such as land tax, insurance and repairs to, and maintenance of, the building, the fair market land rentals for a licensed club in the City of Adelaide at the date of the valuation were per square per annum — basement $80, ground floor $180, first floor $140 and second floor $115 and that if net rentals are capitalised, then the rate of 9 per cent is reasonable at the time of the valuation.

I now turn to the valuation of Mr Fereday. He expressed the view that it is costly to maintain the building. The opinion was confirmed by the observations made during the view of the building. Mr Fereday had regard to the actual expenditure for major refurbishment since 1988, including major expense in 1990 and 1991. He calculated, from these figures, that the anticipated refurbishment cost, at the time of the valuation, for the purpose of rendering the building tenantable, was $680,000. In so far as the capitalisation method of valuation is appropriate, there was no challenge to this calculation. Mr Fereday assessed the rental value at $158,229, in accordance with the agreed facts, and after deducting land tax, calculated on the basis of his valuation, assessed the net annual rent at $148,084, which he capitalised, to show a yield of 9 per cent, at $1,645,378. From that amount he deducted the anticipated refurbishment cost of $680,000 and thereby obtained the capital value which he rounded off to $965,000. To arrive at the site value, he deducted the added value of the building which he assessed at $41,000. His method was to calculate the gross building area, 2,403 m² at a value of $300 per square metre, $720,900 and deduct the cost of refurbishment at $680,000. Consequently, he valued the site value at $924,000.

Mr Fenwick assessed a reasonable rental at an overall annual rate of $100 per square metre and the total lettable area at 1,294 m² metres. On that basis, the annual rental would be $129,400 which he capitalised at 9.5 per cent to obtain the amount of $1,362,105. He deducted $300,000 being an estimate of the cost to upgrade the fire safety facilities and arrived at a capital value of $1,062,000. He added $53,837 for TFA, making a total capital value of $1,115,000. In order to arrive at the site value, he estimated the gross building area 2,235 m² which he assessed had a "notional" value of $100 per square metre. Consequently, to arrive at the site value, he deducted the value of the building, $223,500, from the capital value to arrive at the value of $891,500.

It may readily be seen that the bases of Mr Fenwick's calculations do not accord with the agreed facts and Mr Fereday's calculations. He was recalled to explain the significance, if any, of the difference. He expressed the view

that it was unnecessary to change his valuation for that reason. According to him, the agreed rental values were adopted assuming a refurbishment cost of $680,000 whereas his rental valuation was made on the assumption of an expenditure of $300,000. Also the difference in capitalisation rate and the difference in rental results in a difference in value of $122,128, which he did not regard as significant.

Despite that evidence and the undoubted expertise of Mr Fenwick, I consider that a valuation on the capitalisation of rent basis should be made in accordance with the agreed facts. Consequently, I prefer the valuation of Mr Fereday. There has been no challenge to the deduction of the notional expenditure to put the building in tenantable condition being deducted from the capitalised rent. Both Mr Fereday and Mr Fenwick adopted that approach and it has not been suggested that such expenditure should be amortised over a period of years. Consequently, there is no basis in the evidence to approach the capitalised value on a different basis.

It has not been suggested that the method adopted by Mr Fereday for the valuation of the building, to be deducted to ascertain the site value, was incorrect. He deducted $41,000 on that account. Mr Fenwick valued the building at $223,500. Mr Butcher valued it at $200,000. I do not think either of those higher amounts should be transported into Mr Fereday's valuation. He has made his valuation using the notional refurbishment cost in a consistent way. I accept Mr Fereday's valuation of the site value and the subject valuation of the Valuer-General must be decreased to $924,000.

I have not overlooked the contention that, in valuing the subject property, the appellants, as trustees for the members of the club, could be regarded as a potential purchaser. Mr Butcher had regard to that concept, as part of the checks and balances in his valuation process. In doing so, it would appear that he had regard to observations of Wells J in *Colonial Sugar Refining Co Ltd v Valuer-General* (1977) 17 SASR 446 at 451-452. That is a concept which is applied in appropriate circumstances, particularly where "the subject land is so extraordinary in character or topography that no-one but the present tenant could find a use for it . . .": see Wells J (at 451). I do not think treating the appellants as potential purchasers assists in the valuation process. The building is unique but there is no evidence to establish that the appellants, on behalf of the membership, would be a potential purchaser so different in relevant respects from other potential purchasers as to be willing to pay a significantly greater purchase price. However, the principal reason why this concept should not be employed is that the building, and the site, are not "so extraordinary in character" or in any other respect as to justify the owner being treated as a purchaser as may be the case with a unique factory which is of little use to someone other than the owner. The club would be of use to other potential purchasers for uses compatible with the zoning and the heritage listing.

I now turn to the challenge to the valuation of the capital value. For the reasons already expressed, the comparison method adopted by Mr Butcher was inappropriate. I accept that the approach of Mr Fereday was correct. However, TFA cannot be excluded from the capital value, which necessarily includes the value of all of the improvements on land. In my view, the only issue is the method of assessment of the value of TFA.

There had not been any sales of TFA by 25 May 1990, the date of the

valuation, although there had been a transfer of TFA from one property to another, both having the same owner. In August 1990, a sale was recorded at $300 per square metre. When Mr Butcher came to ascribe some part of his valuations to the component of TFA, it appears that he had regard to that sale as a realistic indication of the value of TFA. I do not think that approach is correct. Without necessarily being precise, the total amount of TFA in the core district at the relevant time was at least 145,000 m². A valuer in May 1990 would be obliged to consider whether the "stock" of TFA would be likely to increase upon more buildings being heritage listed, as in fact has occurred. With such a large "stock", a valuer would necessarily be sceptical about one sale being a true indication of value.

Mr Fereday had regard to the lack of sales and the considerable amount of TFA potentially available for sale. Also increased basic flat ratios since 1986 in the City of Adelaide have lessened the demand for TFA. Furthermore, some cost is involved in the transfer of TFA, including the cost of survey. Having regard to these and other factors, in the nature of assessing relevant contingencies, Mr Fereday assessed the net value of the TFA of the club at $178,488. He made that calculation on the basis that the club had 4,798 m² of TFA. He was so informed by the Adelaide City Council. Mr Butcher and Mr Fenwick accepted that the club had 5,160 m² subject to survey. I accept that area to be correct. If incorporated into Mr Fereday's calculations, he would have valued the TFA at about $153,000.

Mr Fenwick valued the TFA on the assumption that it would not be sold for 20 years. He accepted a present day value of $400 per square metre and applied a discounting factor of 0.261 to arrive at a present day value of $53,837.

I prefer the reasoning and the approach of Mr Fereday. He has attempted to balance all relevant contingencies. Even though different minds may give different emphasis to some of the contingencies, I do not think that his approach is fundamentally flawed. As precision is not possible, it is reasonable to round off his value of the TFA to $200,000. That amount must be added to his capital value of $965,000 to provide a capital value of $1,165,000. I accept his valuation, with that exception, and the subject valuation of the capital value must be decreased to $1,165,000.

It was contended that the subject property had an increased value because of the interest which the adjoining owner, Westpac Bank, would have in purchasing it to acquire the TFA and other benefits which would flow to it in the nature of additional capacity to develop its own site. I do not propose to repeat the evidence on the respective submissions as to this aspect of the matter. At the time of the subject valuation, the building owned by Westpac on the adjoining site had not been entered on either heritage list. However, a valuer would be obliged to assess the possibility that such may occur. He would be obliged to make that assessment after informing himself of all relevant matters which could then be ascertained. The evidence suggests that if he had inquired of Westpac, he would have been informed that it was not interested in acquiring the club. Subsequently Westpac's building was entered on the heritage list. I think any valuer applying his mind to this question at the relevant date would also have come to the conclusion that it was more than a mere possibility that the Westpac building would be placed on the heritage list with the consequence that it could not be demolished and

the site redeveloped in a way which would make the acquisition of the club's TFA an attractive proposition. Having regard to all of the evidence, I am satisfied that Westpac was not a potential purchaser of the club or even of the TFA and that there was no additional value for that reason.

I am satisfied that the subject valuation was made erroneously and the appeal is allowed. I decrease the valuation of the capital value to $1,165,000 and the valuation of the site value to $924,000.

Solicitors for the appellants: *Finlaysons*.

Solicitor for the respondent: Crown Solicitor (SA).

TIM BRYANT