Judgment 10 of 1978

IN THE PRIVY COUNCIL No. 26 of 1976

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT OF QUEENSLAND

BETWEEN:

MELWOOD UNITS PTY. LIMITED — Appellant

- and -

THE COMMISSIONER OF MAIN ROADS — Respondent

CASE FOR THE APPELLANT

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THE CIRCUMSTANCES OUT OF WHICH THE APPEAL ARISES

THE NATURE OF THE APPEAL

1. This appeal is brought by leave granted by the Full Court of the Supreme court of Queensland on the 30th day of July 1976. It is an appeal from the judgment of the Full Court of the Supreme Court of Queensland (Wanstall S.P.J., Matthews and Dunn JJ.) given on the 23rd day of June 1976 whereby the Full Court answered three questions but declined to answer four other questions stated for its opinion by the Land Appeal Court of Queensland. pp.103-6 pp.68-98 pp.99-102

2. The majority of the Full Court (Matthews and Dunn JJ., Wanstall S.P.J. expressly refraining from expressing any opinion) declined to answer questions A, B and E on a basis which is of fundamental concern and importance. The basis so adopted by the majority members of the Full Court is that: p.69 p.102 l.4-8

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p.81 l.29-38

"If the principles stated in Spencer's case and the Nelungeloo case are part of the common law, then a failure to apply them by the Land Appeal Court is an error of the law. But if they do no more than define the question for decision, ... a bona fide misunderstanding of the question by the Land Appeal Court ... must be a mere mistake of fact";

and that:

p.83, l.5-8

"I ... conclude that ... tne questions ... relate to or raise questions of fact, and do not involve any question of law".

If the reasoning of Dunn J. (adopted as it was by Matthews J.) were right then the decisions given by superior courts - including of course authoritative opinions of the Judicial Committee itself - which have always been treated by lawyers and valuers alike as laying down the legal principles to be applied in valuation are no more than expositions on questions of fact.

3. The undermentioned terms used in the judgments appealed from bear the following meanings:

expressway - motorway
resumed - compulsorily acquired.

4. In order to build a stretch of expressway the respondent on the 11th day of September 1965 resumed a substantial area of land running through and severing land owned by the appellant. The appellant is entitled to compensation in respect of the resumption of its land. The appellant and the respondent are at issue as to the proper measure of this compensation.

5. The appellant appealed to the Queensland Land Appeal Court from an assessment of the compensation payable to it for that resumption. The Queensland Land Appeal Court, allowing the appeal, awarded the appellant A$83,340. It is the appellant's case that the Land Appeal Court erred in principle in a number of respects in assessing compensation. Accordingly, at the

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request of the appellant the Land Appeal Court stated seven questions for the opinion of the Full Court of the Supreme Court of Queensland.

6. The Full Court held that the Land Appeal Court was bound by and failed to observe the rules of natural justice, being mistaken in law in taking into account what it observed on its unaccompanied inspections of other shopping centres without communicating to the parties that it was proposing to inspect them and what it had seen on its inspections.

7. The Full Court answered three of the seven questions in the case stated, two being answered in favour of the appellant, set aside the award of the Land Appeal Court and ordered the Land Appeal Court to make a fresh determination of the proper compensation. The Full Court refused to answer the remaining four questions, an answer to three of those questions which related to the legal principles applicable to valuations for the assessment of compensation being refused on the ground that they did not contain or give rise to any questions of law, and an answer to the fourth being refused on the ground that it was unnecessary to answer. In this appeal, the appellant will invite the Judicial Committee to hold that the Full Court should have answered the four questions and that it should have answered them in favour of the appellant.

p.102 l.1-7,12

THE BACKGROUND FACTS

The Proposed Expressway

8. In 1960 the Main Roads Department commenced planning the route proposed for an expressway from Brisbane to Combabah. In 1962 the centre line of the proposed expressway was finally fixed by the Main Roads Department to run across a number of parcels of land that the appellant subsequently bought ("the Melwood land") and no variation was made to it after that date. No part of the expressway had been constructed or commenced to be constructed on the Melwood land or in its vicinity. However, the Land Appeal Court found that from 1962 onward it would have been a reasonable assumption by any interested member of the public

p.3, l.2-3
p.2, l.15-20
p.3, l.5-8
p.27
p.3, l.8-10
p.3, l.11-15

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that if the proposed expressway proceeded as planned it would go through the Melwood land in conformity with the centre line fixed in 1962.

p.3, l.5-7

The Pencil Caveats

9. In Queensland there is a practice whereby pencil caveats can be entered on title deeds to give warning of projects that may affect the land in question. The pencil caveats have no statutory authority. The Titles Office will not furnish any information to the public about a pencil caveat except to refer a person enquiring about it to the appropriate department which lodged it.

p.10, l.43

pp.10-11

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10. In 1962 the respondent entered pencil caveats on the title deeds relating to some parts of the lands bought by the appellant in 1964 but they were entered in relation to a road widening scheme then being considered by the respondent for another road altogether (Logan Road) and which was subsequently abandoned by him.

p.3, l.16-18

p.3, l.25-27

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11. Those pencil caveats were not entered in relation to the expressway proposal but after the resumed land was resumed from the appellant they were re-entered in relation to it.

p.3, l.28-9

p.10, l.37-42

The Purchase by the Appellant

12. Prior to December 1964 the appellant concluded option agreements with the several owners giving the appellant the option to buy the five parcels of land that made up the Melwood land for a total of A$290,620. At the time the vendors entered into the option agreements they were not aware of the fact that the appellant proposed to seek a permit for a major shopping centre on the lands.

p.4, l.4-6, 11-21

p.4, l.6-10

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13. In December 1964 the appellant entered into conditional contracts to buy the five parcels for the purpose of establishing a major shopping centre on those lands. When the contracts for the purchase of the lands by the appellant were signed in December 1964 the appellant knew about the proposed expressway on those lands. In December 1964

p.3, l.30

p.27

p.3, l.33-34

p.3, l.35-38

p.3, l.39-40

40

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when the contracts were signed the vendors knew of the proposed major shopping centre to be built by the appellant on the lands but they could not take advantage of that knowledge because the prices had been fixed by the option agreements. The contracts entered into by the appellant were conditional contracts but settlement was effected with one of the conditions unfulfilled. The appellant effected settlement with the vendors on 17th December 1965. At the date of settlement negotiations with a major department store had not been concluded in terms of the conditions of the contracts of sale, but this condition was waived.

p.4, l.1-3
p.4, l.3-6
pp.4-5
p.17, l.20-21
p.17, l.23-31
p.17, l.21-22
p.17, l.23-26

THE SHOPPING CENTRE PROJECT

14. In order to build the major shopping centre the appellant had to obtain a town planning permit from Brisbane City Council. On 5th January 1965 the appellant applied to Brisbane City Council for that permit by applications completed separately in respect of each piece of the land but accompanied by a plan which formed part of the application and which bore a solid black line which enclosed the whole of the land. By letter dated 15th April 1965 Brisbane City Council informed the appellant that it had "granted the necessary permission, in principle, to use (the) land ... for the purpose of (the) shopping centre" subject to specified conditions. By a letter dated 12th May 1965 Brisbane City Council referred the appellant to "the ... approval to develop as a drive-in shopping centre the land" and stated that it had decided to vary its previous approval as conveyed in its letter dated 15th April 1965 by substituting a condition for one of the conditions previously specified. The Land Appeal Court held that the letter of the 15th April only gave permission to develop the land to the north of the resumed land. The appellant challenged that finding by Question (f) in the case stated to the Full Court. The Full Court found against the appellant and the appellant does not now challenge that finding.

pp.45-48
p.5, l.32-36
pp.29-44
p.5, l.39-43
p.6, l.18-19
p.6, l.23-37
pp.6-9
p.9, l.31-33
p.9, l.35-27
p.10, l.19-21
p.10, l.22-30
p.26, l.16-21

15. The Land Appeal Court held that by September 1965 it would have been fairly widely known

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that Brisbane City Council had given the appellant permission in principle for the major shopping centre on the land and this would have caused a rise in excess of the normal rise in the market value of the land beyond the prices paid by the appellant and in excess of the normal rise in value of Brisbane surburban property during the period since December 1964.

p.12, l.21-25 16. On 6th December 1965 the appellant submitted to Brisbane City Council a plan showing the proposed major shopping centre on that part of its land north of the resumed land. By
p.12, l.25-26 letter dated 20th December 1965 Brisbane City Council replied: "reference is made to your
p.12, l.27-41 letter dated 6th December 1965 and previous correspondence dealing with the proposal of your clients to develop for drive-in shopping purposes and a service station land" which the Council described in terms including the whole
pp.12-13 of the land. It continued: "I take pleasure in advising that the Board has approved the use of the above-described land for development as a drive-in shopping centre and a service station, and the erection of the necessary buildings thereon in connection
pp.13-17 with the joint project, subject to .... conditions."

THE SALE TO DAVID JONES LIMITED

p.17, l.35-39 17. Prior to October 1965 David Jones Limited had decided it would seek to become the owner of the major shopping centre instead of the tenant of the major department store in it. On 30th
p.17, l.40-41 June 1966 the appellant sold its land north of the resumed land to David Jones Limited. David
pp.17-18 Jones Limited paid the appellant $1,050,000 and also paid substantial payments to other companies within the group of companies of which the appellant is a member.

THE CONSTRUCTION OF THE MAJOR SHOPPING CENTRE

p.3, l.34 18. The major shopping centre, known as Garden
p.23, l.33-34 City, was duly built and came into operation in October 1970, the month following the Land Court's decision.

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THE HEARING BEFORE THE LAND APPEAL COURT

Unaccompanied Inspections and Extraneous Evidence

19. Upon the completion of the evidence a discussion occurred between that Court and counsel as to the possibility of the Court making a view of t the major shopping centre which the appellant had constructed on the Melwood land and which was by that time open for business. Thereafter no further discussion in relation to a view occurred. After the completion of the hearing the Land Appeal Court without notice to the parties beyond that (if any) in the said discussion and in their absence carried out inspections of the appellant's shopping centre on two days in July 1972. On the latter day the Land Appeal Court also carried out inspections of a department store and car parking area in another suburb and of a major shopping centre in a further suburb. The Land Appeal Court took into account in its reasons for judgment what it had seen on those inspections. The Land Appeal Court set out in its reasons for judgment in respect of a date after the completion of the hearing by it that "although (it) was not present it knows that part of the car park at the ... shopping centre on the (appellant's) land was out of bounds to shoppers" on a specified day.

p.18, l.28-30
pp.48-51
p.18, l.32-34
p.18, l.35-42
p.19, l.1-3
p.19, l.4-10

20. The appellant challenged the propriety of the conduct set out in paragraph 19 by Questions (c) and (d) in the case stated to the Full Court and the Full Court found in favour of the appellant. No further issue arises on this aspect of the case in the present appeal.

p.25 l.17-38

Evidence of the Effect of the Projected Expressway

21. Before the Land Appeal Court cogent and unchallenged evidence was adduced which indicated that, had it not been for the proposal to build the expressway across the Melwood land, the entirety of that land would have been required and used for the shopping centre. That evidence included the following:

(i) Uncontradicted and unchallenged evidence by town planning consultants that:

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p.20 l.26-33 (a) "A town planning authority adequately discharging its town planning functions on town planning principles in relation to the (appellant's) land would have approved the whole of the land as a ... shopping centre if the Main Roads Department had not previously announced its intention to construct an expressway through ... the land".

p.20, l.36-39 (b) "The most desirable land for additional parking space is the resumed land" and the appellant's land south of it "would also have been suitable for that purpose".

p.21, l.1-7 (c) "In the absence of information relating to the location of the expressway proposal it would have been an appropriate decision by the ... Board ... to have permitted the whole of the (appellant's) land to be developed as a (major) shopping centre".

p.21. l.8-13 (d) "Inevitably pressures build up for the expansion of (such) a shopping centre and that a reservoir of land should exist to cater for this expansion".

p.21, l.15-22 (e) If the Brisbane City Council figure (in the permit dated 20th December 1965) of four square feet of parking space per one square foot of retail sales area is applied then the 295,823 square feet of retail sales area at Garden City would require 11.2 acres of parking additional to that already provided.

p.21, l.24-31 (f) "The Garden City shopping centre is short of car parking and ... in the absence of the expressway proposal the resumed land and the (land to the south) would have been required for car parking to satisfy the requirements of Brisbane City Council for a ... shopping centre of this size".

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(g) "Of equal importance in the absence of resumption for the expressway proposal the resumed land and the (appellant's land to the south of it) would have enabled improved access to the ... shopping centre" from two other streets. — p.21 l.33-38

(h) "Had it not been for the ... resumption he would have expected the car parks at Garden City to have been more extensive and to have included the resumed land and the major part if not all of (the appellant's land to the south of it)". — p.21, l.40-45

(i) "Had he been advising Brisbane City Council at the time it was considering the application for the permit for the ... shopping centre he would have urged it to ensure that the whole of the (appellant's) land was devoted to the ... shopping centre and additional commercial development of associated car parking". — p.22, l.1-10

(j) At the date of the gazettal of the resumption of the land in September 1965 if there had been no resumption he would have expected a developer of such a shopping centre to take in for his shopping centre site the whole of the appellant's land. — p.22 l.13-30

(ii) Uncontradicted and unchallenged evidence by an architect that:

(a) the Garden City shopping centre does not meet the 4:1 ratio required by Brisbane City Council permit of 20th December 1965; — p.22 l.31-34

(b) the ratio was only 2.28:1; — p.22 l.35-37

(c) the purchase of a further 2 acres 1 rood 38.1 perches provided 242 parking spaces additional to the 1971 parking spaces that gave the ratio of 2.28:1. — p.22 l.38-40

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(iii) Uncontradicted and unchallenged evidence by Directors of David Jones Limited (a major department store company with department stores in several States of Australia) that:

p.23 l.6-13 (a) "The whole of the (appellant's) land should and would have been used for the ... shopping centre if no part of it had been resumed for the expressway proposal and no part severed by the expressway proposal and that he had no doubt the Board of David Jones Limited would have agreed";

p.23, l.15-19 (b) "Had additional land been available David Jones Limited would have purchased it and ... he would have recommended the purchase of the whole of the appellant's land but for the resumption";

p.23 l.20-23 (c) "At the time David Jones Limited arranged to buy the (land north of the resumed land) it desired more land because it knew the business would expand";

p.23 l.26-28 (d) "He would have recommended that David Jones Limited purchase the whole of the (appellant's) land if it had been available";

p.23 l.29-32 (e) "Purchases were made by David Jones Limited of additional land in April 1969 and June 1970".

THE JUDGMENT OF THE LAND APPEAL COURT

pp.24-25 22. By Question (b)(i) of the case stated the appellant challenged the decision of the Land Appeal Court on the ground that it had been wrong in law to assess the value of the resumed land and the effect of severance by reference to four facts. The appellant will seek to demonstrate first that the Land Appeal Court did indeed have regard to those facts and secondly that it erred in principle in so doing.

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23. "(A) at the time when the contracts for the purchase of the Melwood land were signed in December 1964 Melwood knew about the proposed location of the expressway proposal" p.24

"(B) at all relevant times from 1962 at the latest Melwood was aware that the only land available to it for a drive-in regional shopping centre was the northern land and that at no time did Melwood have any reasonable expectation of receiving a permit to use the southern area for purposes of a drive-in regional shopping centre"

The Land Appeal Court plainly attached great significance to the fact that, when it bought the Melwood land, the appellant was aware of the limitations which that Court regarded as imposed by the expressway proposal, as appears from the following passages of the judgment:

> "There can be no doubt that when the appellant executed the conditional contracts of December 1964 it knew or should have known that there was every likelihood that portion of the land purchased would be resumed for highway purposes". p.57, l.4-10

Over two pages of the judgment were thus devoted to substantiating the above fact. pp.57-59
The Court then went on to state:

> "We propose to determine the appellant's loss by premising our belief that at all relevant times from 1962 at the latest, the appellant was aware that the only land available to it for a regional drive-in shopping centre was the area north of the proposed expressway, and that at no time did it have any reasonable expectation of receiving a permit to use the land south of the proposed expressway for purposes of a regional drive-in shopping centre". p.62 l.35-45

24. "(C) the centre line of the expressway proposal through the resumed land and p.24

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its vicinity was finally fixed in 1962"

p.25 "(D) the pencil caveats referred to in paragraph 5 above were entered on the title deeds relating to parts of the Melwood land"

The Land Appeal Court also attached weight to the fact that any member of the public interested in the Melwood land would have known that an expressway was likely to be built over the land. Thus it found:

> "The centre line was finally fixed in 1962 and Mr. Inglis said no variation was made to it since that date. From 1962 onwards, it would have been a reasonable assumption by any interested member of the public that the expressway, if it proceeded as planned, would go through the subject land in conformity with the centre line. Further, pencil caveats on relevant title deeds entered thereon in 1962 as noted in November 1964 by Mr. Thompson, an articled clerk in the employ of the appellant's solicitors, served as a warning to anyone interested in the land that action to acquire the land or deal with it in any other manner should be taken with caution and only after proper inquiry".

The reference to the pencil caveats was doubly irrelevant in that they did not even refer to the expressway proposal, but to an alternative possibility of resumption (namely, the widening of another road altogether and unconnected with the expressway proposal) which never came to pass.

p.3, l.16-29

25. By basing its assessment on the premise quoted in paragraph 23 above and having regard to the facts above set out the Land Appeal Court necessarily disregarded as irrelevant important evidence of the probable user of the Melwood land had the expressway never been proposed. Thus:

p.63, l.35-45

p.56, l.16-20

(i) It disregarded the uncontradicted and

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unchallenged evidence that, but for the proposed resumption a permit would have been granted to develop all the Melwood land. Instead it valued the land on the basis that the permit was restricted to the northern section. pp.19-23

(ii) It disregarded the uncontradicted and unchallenged evidence that the northern section was of inadequate size for the shopping centre.

(iii) It disregarded the uncontradicted and unchallenged evidence that, but for the limitations imposed by the resumption, the whole of the Melwood land would have been required and used for the shopping centre. p.23, l.6-32

26. ERRORS OF LAW

In having regard to the facts above set out the Land Appeal Court failed to observe the following principles of law relating to the assessment of compensation for the compulsory acquisition of land

27. THE VALUE OF THE LAND PRIOR TO RESUMPTION MUST BE ASSESSED WITHOUT REGARD TO THE EFFECT ON THAT VALUE OF THE PROPOSED RESUMPTION.

This principle is fundamental. The Land Appeal Court paid lip service to it (but no more). If the principle should be challenged the Appellant will rely upon the following authorities: pp.66-67

Re an Arbitration between Lucas and the Chesterfield Gas & Water Board (1909) 1 K.B.16, at pp.29-30: Cedar Rapids Manufacturing & Power Company v. Lacoste [1914] A.C.569, at p.576; Fraser v. City of Fraserville (1917) A.C.187 at p.194; Raja Vyricherla Narayana Gajapatiraju v. The Revenue Divisional Officer, Visagapatam [1939] A.C.302, at pp.319-20; Nelungaloo Pty. Limited v. The Commonwealth (1948) 75 C.L.R. 495, at p.538; Thistlethwayte v. The Minister (1953) 19 L.G.R. (N.S.W.) 87; Chapman v. The Minister (1966) L.G.R.A. 1, at pp.11-13; Edinburgh Pty. Limited v. The Minister (1962) 8 L.G.R.A.45, at pp.50,52.

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28. This again is trite law clearly stated in Spencer v. The Commonwealth (1908) C.L.R.418. The appellant does not cavil at the test propounded by the Land Appeal Court at the beginning of their judgment. Unfortunately the Land Appeal Court then proceeded to ignore the test. Repeatedly the Land Appeal Court emphasised the fact that the appellant had been aware of the restrictions consequent upon the proposed resumption and yet had been anxious to acquire the land. This approach obscured the fact that the land would have been very much more attractive, both to the appellant and to the hypothetical purchaser had its user not been fettered by the proposed resumption.

QUESTIONS (b)(ii) AND (iii) OF THE CASE STATED

pp.24-25

29. By Questions (b)(ii) and (iii) of the case stated the appellant challenged the decision of the Land Appeal Court on the ground that it was wrong in law in assessing the value of the resumed land and the effect of severance:

"(ii) by reference to the market value of the Melwood land unaffected by proposals for its use as a drive-in regional shopping centre;

(iii) by excluding from consideration the sale of the northern land by Melwood to David Jones Limited and the payments by David Jones Limited to other companies within the Hooker Group of Companies of which Melwood was a member"

30. In attempting to value land, actual sales of the land in question close to the time at which the land falls to be valued are of the greatest potential relevance. The Land Appeal Court had to value the land as on the 11th September 1965, the date of resumption. It had evidence of two sales of the land close to this date:

(i) the sales in December 1964 of all the Melwood land by the original owners to the appellant ("the original sales") for a total of A$290,620;

p.4 l.4-6, 11-21

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(ii) the sale on the 30th June 1966 of the northern section to David Jones Limited ("the David Jones sale") for consideration consisting of (a) $1,050,000 paid to the appellant, and (b) substantial payments to other members of the appellant's group of companies. pp.17-18

The Land Appeal Court relied upon the original sales but excluded from consideration the David Jones sale on the ground that the former but not the latter satisfied the test in Spencer v. The Commonwealth. The appellant submits that in so doing the Land Appeal Court disregarded a basic principle that it had itself propounded at the beginning of its judgment. p.64 p.65

THE LAND MUST BE VALUED HAVING REGARD TO ITS "HIGHEST AND BEST USE"

31. It is clear that the most significant element in the value of the Melwood land was its development potential. Any valuation as at the date of resumption was bound to reflect that element. The original sales did not reflect that element because the sellers were unaware of the development potential when they granted the options fixing the prices. Yet despite this fact the Land Appeal Court held: p.64, l.4-15

> "At that time (December 1964), we are of opinion the relationship between vendor and buyer satisfied the tests applied by Spencer v. The Commonwealth. We think it reasonable to deduce from this that the prices paid for the land in December 1964 can be accepted as the fair market value for the land at that date, unaffected by proposals for the use of the land as a regional drive-in shopping centre" p.64, l.1-4 p.64, l.15-21

The appellant submits that the above passage contains a contradiction in terms.

32. The Land Appeal Court held that the "surrounding circumstances" of the David Jones sale prevented that sale from complying with the requirements of Spencer v. The Commonwealth. p.64, l.49 p.65, l.10

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Those circumstances were that:

p.62, l.41-45

> "at the relevant date, 11th September 1965 ... permission had only been granted in the principle subject to a large number of conditions which had not been carried out".

In the appellant's submission the grounds for disregarding the David Jones sale do not withstand analysis. The conditions attaching to

pp.6-9

development permission as at 11th September 1965 were essentially identical to the conditions attaching when David Jones bought

pp.12-17

the northern section, save that a number of additional conditions had by then been added. Far from failing to satisfy the requirements of Spencer v. The Commonwealth, the David Jones sale satisfied them ideally as it reflected the "highest and best use of the land", namely development as a shopping centre.

33. The Land Appeal Court compounded its error in disregarding the David Jones sale, by holding that that part of the consideration paid, not to the appellant, but to other members of the

pp.55-56

Group was of no relevance. Clearly the total consideration paid by David Jones, no matter to whom, was relevant in so far as it indicated the value of the land.

34. In place of the David Jones sale, which constituted compelling evidence of the extent to which the development potential affected the value of the land, the Land Appeal Court had regard to an increase in value "as public

p.64, l.30-39
p.65, l.20-22

awareness of the probability of a drive-in shopping centre increased". The fair value of land being sold with development potential will necessarily depend upon the evaluation of that potential by persons with professional expertise. The Land Appeal Court wrongly substituted the vague factor of "public awareness" for the actual professional evaluation of the development potential as evidenced by the David Jones sale.

THE LAND APPEAL COURT TOOK INTO ACCOUNT INSTEAD OF EXCLUDING THE DEPRECIATING EFFECT OF PUBLIC KNOWLEDGE OF LIKELY RESUMPTION

35. The Land Appeal Court took into account in

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assessing compensation public knowledge of the likelihood of compulsory acquisition of land. That public knowledge arose from the exhibiting of the proposed route in 1961 and from knowledge of the centreline having been fixed. It worked on the basis of sales at a time when that knowledge was, on its own view, public.

p.3, l.11-15
p.56, l.38-42
p.56, l.30-31
p.3, l.5-8
p.56, l.36
p. 5, l.15-17
p.64, l.15-19

36. In so doing, the Land Appeal Court acted contrary to a basic principle for the assessment of compensation for the compulsory acquisition of land;

Verebes Investments Pty. Ltd. v. Commissioner for Main Roads (1972) 25 L.G.R.A. 391, at p.402;
Woollams v. The Minister (1957) 2 L.G.R.A. 338, at pp.344-5;
Trocette Property Co. Ltd. v. Greater London Council (1974) 28 P. & C.R. 408, at pp.422-3.

ANSWERS TO THE QUESTIONS (a), (b) AND (e)

37. The appellant submits, on the basis of the considerations set out above, that Questions (a), (b) and (e) should have been and should be answered as follows:

(a) Yes.

(b) (i) Yes. None of the facts should have been taken into consideration.

(ii) Yes.

(iii) Yes.

(e) (i) Yes.

(ii) Yes.

As to question (e), if the evidence left any room for doubt, and the appellant submits that it did not, that doubt should have been resolved in favour of the appellant. The Land Appeal Court ignored the well established principle of law that in assessing compensation "doubts are to be resolved in favour of a more liberal estimate";

Gregory v. Commissioner of Taxation of the Commonwealth of Australia (1971) C.L.R. 547, at p.565;

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Castle Hill Brick Tile & Pottery Works Pty. Limited v. Baulkham Hills Shire Council (1961) 7 L.G.R.A. 139, at p.154; Duncan v. The Minister for Education (1968) 17 L.G.R.A. 322, at p.329.

DO THE ANSWERS TO THE QUESTIONS INVOLVE OR DETERMINE QUESTIONS OF LAW?

38. At this stage it is necessary to conksider whether the Full Court was justified in declining to answer Questions (a), (b) and (e).

p.102, l.4-8 The Full Court declined to answer questions (a), (b) and (e) ruling in respect of each of them that "the case stated does not contain or give rise to any questions of law which an answer to this question would involve or determine".

p.69 Wanstall S.P.J. expressly refrained from expressing any opinion on these three questions. Matthews J. agreed with the

p.70 answers and orders proposed and the reasons published by Dunn J.

39. In Australia for nearly 70 years the test of value has been regarded as having been established authoritatively by a decision of the High Court of Australia, in which Griffith C.J. said:

> "In my judgment the test of value of land is to be determined, not by inquiring what price a man desiring to sell could actually have obtained for it on a given day, i.e., whether there was in fact on that day a willing buyer, but by inquiring 'What would a man desiring to buy the land have had to pay for it on that day to a vendor willing to sell it for a fair price but not desirous to sell?'"

Spencer v. The Commonwealth (1908) 5 C.L.R. 418, at p.432.

40. Dunn J. gave reasons for judgment which may be summarised as follows:

p.77, l.11-15 (a) "It was argued for Melwood that the Land Appeal Court erred in law in that, in

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determining compensation, it did not make use of the mental process commended by Griffith C.H. in Spencer v. The Commonwealth".

(b) "Additionally, it was argued that the Land Appeal Court erred in law in that it departed from the principle, enunciated in many cases, that 'value is to be assessed as if the acquiring authority had no powers of compulsory acquisition', per Latham C.J. in Nelungaloo Pty. Ltd. v. The Commonwealth (1948) 75 C.L.R. 495, at p.538". p.78, l.2-8

(c) "It is only identifiable questions of law which (the Full Court) may determine". p.78, l.26-28

(d) "Melwood's objection was not to the components of compensation selected by the Land Appeal Court but to the methods which it was said to have used in forming its opinion as to the value and damage". p.79, l.20-24

(e) "The Resumption Acts do not contain any statutory command as to the method which is to be followed in determining the value of land taken, or in measuring the quantum of damage to adjoining land". p.79, l.29-33

(f) "Assuming (but not deciding) that the Land Appeal Court was guilty of some error or errors in its method of assessing compensation it was guilty of an error of law only if (i) the common law prescribes methods of determining value, and of determining the quantum of damage when land is severed by resumption or injuriously affected by the exercise of statutory powers; or (ii) the words 'value' and 'damage' in Section 19 (of the Act) ought to be understood to mean 'value determined applying the principles enunciated in Spencer's case and the Nelungaloo case' and 'damage assessed applying those principles'." pp.79-80

(g) "I have found no case which suggests that 'principles of valuation' form part of the law and custom of England, in other words the common law." p.80, l.4-7

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p.81, l.29-38 (h) "If the principles stated in Spencer's case and the Nelungaloo case are part of the common law, then a failure to apply them by the Land Appeal Court is an error of the law. But if they do no more than define the question for decision, ... a bona fide misunderstanding of the question by the Land Appeal Court ... must be a mere mistake of fact".

p.81, l.39-42 (i) "The statements of principle upon which which Melwood relied are authoritative and important definitions of the question for decision, but they do not form part of the common law".

pp.81-82 (j) "Therefore, unless a departure from the principles stated in Spencer's case and the Nelungaloo case in some way involved disobedience to Section 19 of the Resumption Acts, if it was the case that the Land Appeal Court took an erroneous step in the process of reasoning, it was an erroneous step in a process of reasoning about matters of fact. Such an erroneous step, if there was one, cannot be described as a mistake of law".

p.82, l.9-13 (k) "If it were correct to attribute to the words 'value' and 'damage' in Section 19 some special legal or technical meaning, then the arguments developed on behalf of Melwood might merit closer examination".

p.82, l.13-16 (l) "Neither word is defined by the statute and ... the statute gives no instructions as to how value is to be assessed or damage quantified".

p.82, l.17-22 (m) "The words 'value' and 'damage' are ordinary English words. They do not have, and the context does not require that they be given, some special technical meaning (related, for instance, to court decisions on valuations), so that Section 19 may be understood".

p.83, l.5-8 (n) "I therefore conclude that ... the questions ... relate to or raise questions of fact, and do not involve any question of law".

RECORD

41. If the reasoning of Dunn J. were right then the decisions given by superior courts - including of course authoritative opinions of the Judicial Committee itself - which have always been treated by lawyers and valuers alike as laying down the legal principles to be applied in valuation are no more than expositions on questions of fact. A number of these decisions were cited to the Full Court, including decisions of the Judicial Committee, but these would appear to have been included in the matters that Dunn J. found "it has not been necessary to consider". p.83, l.30-31

42. That the reported decisions of the superior courts in valuation cases do establish principles of law is, it is submitted, axiomatic. In any event, however, there are of course numerous cases in which the words used make it plain that what was being decided was a question of law. By way of illustration the appellant will refer, in addition to Spencer v. The Commonwealth (1908) 5 C.L.R. 418, to the following cases:

Raja Vyricherla Narayana Gaja-Patiraju v. The Revenue Divisional Officer, Vizagapatam (1939) A.C. 302, especially at pp.311-314;

Doherty & Doherty v. Commissioner of Highways (1974) 7 S.A.S.R. 57, at p.85;

The Minister for Public Instruction v. Turner (1955) 55 S.R.(N.S.W.) 310 at pp.317-8 and (1956) 95 C.L.R. 245 at pp.260, 268, 280, 285-6, 292-3.

Maori Trastor v. Ministry of Works (1959) A.C. 1 at pp. 4 & 18.

In the light of these authorities it is submitted that the Full Court was wrong to decline to answer questions (a), (b) and (e) and that the reason for declining to do so given by Dunn J. cannot be supported. The appellant respectfully invites the Judicial Committee to supply the answers which the Full Court declined to give.

43. The appellant humbly submits that this Appeal should be allowed and that Questions (a), (b) and (e) should be answered in the manner set out in paragraph 35 above for the following among other

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REASONS

(1) BECAUSE the answer to each question involves or determines questions of law.

(2) BECAUSE the question of whether or not judicial decisions upon the principles to be applied in the assessment of compensation establish principles of law is a question of fundamental importance not only to the appellant but generally.

(3) BECAUSE the Land Appeal Court has plainly and repeatedly erred in law in assessing compensation and, in particular, has failed to disregard the effect on the value of land prior to resumption of the proposed resumption itself, has approached the task of valuation subjectively instead of objectively, has failed to value the land having regard to its highest and best use.

(4) BECAUSE the Land Appeal Court wrongly disregarded the uncontradicted and unchallenged evidence called by both parties.

KENNETH H. GIFFORD

(Sgd.) Nicholas Phillips

NICHOLAS PHILLIPS.

IN THE PRIVY COUNCIL

No. 26 of 1976

O N A P P E A L
FROM THE FULL COURT OF THE SUPREME COURT OF QUEENSLAND

B E T W E E N :

MELWOOD UNITS PTY. LIMITED — Appellant

- and -

THE COMMISSIONER OF MAIN ROADS — Respondent

CASE FOR THE APPELLANT

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