Privy Council Appeal No. 26 of 1976

Melwood Units Pty. Limited – – – – – *Appellant*

v.

The Commissioner of Main Roads – – – – *Respondent*

FROM

THE FULL COURT OF
THE SUPREME COURT OF QUEENSLAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD MAY 1978

Present at the Hearing:

LORD WILBERFORCE
LORD HAILSHAM OF SAINT MARYLEBONE
LORD SIMON OF GLAISDALE
LORD RUSSELL OF KILLOWEN
LORD KEITH OF KINKEL

[*Delivered by* LORD RUSSELL OF KILLOWEN]

This appeal from the Full Court of the Supreme Court of Queensland arises in connection with a claim for compensation by the appellant for the compulsory resumption by the respondent on 11th September 1965 of an irregular central strip of the appellant's property in Brisbane, and for severance and injurious affection of other property of the appellant adjoining that strip to the south. The strip was to be the site of part of an expressway project from Brisbane to Combabah. The project for the expressway had reached a stage of detailed planning by the end of 1962, so that it was then a reasonable assumption that the central strip of the appellant's land would in due course form part of the site of the expressway and be resumed for that purpose.

In December 1964 the appellant exercised a series of earlier options and thus obtained a contractual right to acquire from five separate owners a total area of some 37 acres, at an average price of some $7,700 an acre. This area was bounded on the north by Logan Road and Kessels Road, on the west by Wadley Street and other land, on the south by Doone Street and on the east by other land. The area was irregular in shape and is shown in a plan at page 27 of the Record. The projected expressway site which was subsequently resumed in September 1965 embraced two areas of the appellant's land, one triangular and one a parallelogram, totalling slightly over 4 acres. An effect of the resumption was to sever from the northern part of the appellant's land (some 25 acres), that part of that land lying to the south of the

parallelogram (backing on Doone Street)—some 7 acres. The total area of the land acquired by the appellant is conveniently referred to as the 37 acres. That part lying to the north of the resumed land is referred to as the 25 acres and as the North land, and that part lying to the south of the resumed land as the South land.

The appellant having in June 1966 sold the North land filed in October 1966 in the Land Court a claim for compensation totalling some $280,000 for the value of the resumed land and loss due to severance of the South land. Being dissatisfied with the conclusion of the Land Court the appellant appealed to the Land Appeal Court, which appeal involves a rehearing. The Land Appeal Court delivered a judgment on 4th December 1972, arriving at a figure of compensation of $83,000 odd made up as to $42,000 odd from the value of the resumed land and $40,000 odd as loss to the South land due to severance. Neither side was satisfied with this outcome. Appeal from the Land Appeal Court to the Supreme Court is by way of case stated. The Land Appeal Court was asked to state a case, and did so after the lapse of some considerable time. The case stated appended as part of it the judgment which the Land Appeal Court had delivered so that there is considerable overlap between the former and the latter. The case stated concluded with a series of questions, some expressed to be posed at the request of the appellant and some at the request of the respondent. As to two questions the Full Court answered that the Land Appeal Court, in connection with its inspection of the land on its own, had infringed the principles of natural justice and on that ground set aside the determination of compensation and remitted the matter for determination of the appellant's claim according to law. Their Lordships are not concerned with that, nor with any questions other than questions (*a*), (*b*) and (*e*), stated in the case, and relettered (*a*), (*b*) and (*c*) in the order of the Supreme Court giving leave to appeal to Her Majesty in Council. The details of those questions are best understood after a fuller statement of the facts of this case. Suffice it for the present to say that the Full Court declined to answer them on the ground, to state it shortly, that an error in arriving at a valuation could only be a question of fact and could not involve a question of law. Neither appellant nor respondent supported that proposition and in their Lordships' opinion it is erroneous. If it should appear that the Land Appeal Court ignored a principle of assessment of compensation for compulsory acquisition (resumption) such as for example that commonly known as the *Point Gourde* principle, that in their Lordships' opinion would be an error in law. So also if the Land Appeal Court rejected as wholly irrelevant to assessment of compensation a transaction which *prima facie* afforded some evidence of value and rejected it for reasons which were not rational, that in their Lordships' opinion would be an error in law. And as will be seen it is on those lines that the appellant contends that the Land Appeal Court erred in this case.

To return to the narrative. The 37 acres, at the time when by contract in December 1964 the appellant acquired them, could not be used under the relevant planning law otherwise than for residential purposes unless a permit was obtained under that law for another use. The appellant sought planning permission in January 1965 for development of the area as a drive-in shopping centre with ancillary parking space, the latter an obvious essential to such a project. The application was in terms applicable to the whole 37 acres but having regard to the impact of the expressway project, the course of which was indeed shown on the plans accompanying the application, it is now accepted that the application was rightly treated as an application for the 25 acres North land and any consequential permit was also so limited.

On 23rd February 1965 the appellant was informed by letter from Brisbane City Council that the Greater Brisbane Town Planning Committee had decided to recommend the drive-in shopping centre in principle to the Registration Board. That Board was the decision-making body on applications for planning permissions such as this. On 15th April 1965 by letter the appellant was informed by Brisbane City Council that its Registration Board " has granted the necessary permission, in principle, to use land [describing it in detail] and to erect buildings on such land for the purpose of a Drive-in Shopping Centre ". The letter concluded by pointing out that the approval gave permission to use and erect buildings on " only that part of the land north of the proposed arterial road, as determined by the Main Roads Department ". The permission was expressed to be subject to a long list of conditions, of the kind which might be expected in a permission in principle or outline permission. The first condition was that a plan of the proposed layout satisfactory to the Board be submitted showing *inter alia* facilities within the site for loading and unloading and for parking of not less than 2,500 vehicles.

Their Lordships can have no doubt that from the viewpoint of value of the 25 acres of the North land this permission in principle was the vital event, and that when, as happened in December 1965, the Registration Board reiterated its approval on the basis of a layout plan submitted in accordance with the first condition of the April permission this would not have significantly added to the value of those 25 acres of North land in the hands of the appellant. On this occasion their Lordships observe that substantially the same long list of conditions was attached as was attached to the April 1965 permission.

The Land Appeal Court referred to certain evidence set out in the case as " uncontradicted and unchallenged ". Their Lordships add to the many occasions on which appellate Courts have deplored the practice in stated cases of rehearsing evidence rather than directly finding facts. But in the relevant respects their Lordships conclude that the rehearsal of the uncontradicted and unchallenged evidence, as such, is tantamount to a finding of fact of the contents of that evidence. The following are what their Lordships, on that basis, accept as findings of fact.

First: that but for the expressway project and its impact on the 37 acres an application to develop the whole area for a drive-in shopping centre with ancillary parking area would have been granted by the Registration Board, including the resumed land and South land. Second: that had that been done there would have been a market available to the appellant for the whole 37 acres for that purpose. Moreover, it is clear that David Jones Ltd. would have been one of the, perhaps limited, number of hypothetical purchasers in the market at resumption date for the 37 acre area for that purpose. David Jones in June 1966 bought the North land of 25 acres for an average price of approximately $40,000 an acre.

This purchase appears to their Lordships to be a highly relevant piece of evidence for the evaluation of compensation in this case when it is considered in the context of the assumed findings of fact already mentioned. Their Lordships by no means say that it follows that David Jones as a notional purchaser, willing to buy the whole 37 acres, as shopping centre plus ancillary parking, would have paid for the extra 12 acres (resumed land and South land) at the same rate per acre: the extra 12 acres would have been parking area more remote from the assumed actual buying area, though avoiding in part a need for nearer expensive vertical car park building.

Their Lordships consider now various aspects of the Land Appeal Court decision in order to see whether they show error in law. The Land Appeal Court purport (*e.g.* page 63 of the Record) to premise their assessment on the fact that the appellant when it bought was aware that because of the respondent's road project there was no prospect of a drive-in shopping centre other than for the North land 25 acres. Insofar as this indicates a view that, as a consequence, the value of the resumed land and the loss by severance of the South land is to be based on the hypothesis that they never had a potential as part of a 37 acre drive-in shopping centre, it discloses in their Lordships' opinion an error in law. Under the *Point Gourde* principle the landowner cannot claim compensation to the extent to which the value of his land is enhanced by the very scheme of which the resumption forms an integral part: that principle in their Lordships' opinion operates also in reverse. A resuming authority cannot by its project of resumption destroy the potential of the whole 37 acres for development as a drive-in shopping centre, and then resume and sever on the basis that that destroyed potential had never existed. Moreover, in their Lordships' opinion the principle remains applicable in a case such as the present, notwithstanding that planning permission had not been given for the whole 37 acres and would not have been given, when the lack of such permission was manifestly due to the expressway project, and it is established that, without the expressway project, such planning permission would have been given for the whole 37 acres. To hold otherwise in this case would enable the acquiring authority to inflict by its project the same injustice at one remove.

Further, as to the premise of the Land Appeal Court abovementioned, if it is meant thereby that because the appellant bought the land with knowledge he should not, on some principle, be allowed compensation except on the basis of what he knew, this would be doubly wrong: a person buying land buys with it the right to compensation for resumption and severance.

In their Lordships' opinion the only light cast upon the matter by the appellant's knowledge of the expressway project is that he considered that the North land alone could be a viable area for a drive-in shopping centre: and this in itself might be a factor in determining the value per acre of the resumed land and South land for that purpose in comparison with the value per acre of the North land.

Although there are strong indications of departure from principle on the above lines by the Land Appeal Court, when they come to the estimate of value of the resumed land and loss by severance of the South land it may be arguable that ultimately, and in apparent contradiction of their " premise ", they adjusted to the principles stated above. Their approach to valuation (which was for a different reason, later stated, in their Lordships' view erroneous in principle and therefore in law) was to take the whole 37 acres at the price of $7,700 per acre payable by the appellant in December 1964 as residential area value, add something for an assumed inflationary increase in value as such at 10% per annum for nine months to resumption date, and then add a further sum of about $1,000 per acre for the market potential generated by the April 1965 permit—a total of $9,250 per acre. This figure was applied to the resumed area and as the basis for assessment of loss due to severance, and did not distinguish (apparently) between the potential of the three different zones of the 37 acres. If this were so, and the passage is in some respects obscure, it would mean that the Land Appeal Court were not discounting as a result of the expressway project the value as part of a drive-in shopping centre of the resumed and South land, and were not infringing the reverse *Point Gourde* principle.

On the other hand, the Land Appeal Court (pages 66 and 67 of the Record) in discussing *Woollams v. The Minister* (1957) 2 L.G.R.A. 338 pointed out that that decision was based upon a section of the relevant New South Wales statute which, so to speak, embraced both the *Point Gourde* principle and its reverse operation, and distinguished the relevant operative section of the Main Roads Acts 1920 to 1952 as only forbidding consideration of *increase* in value attributable to the relevant project. This suggests that the Land Appeal Court thought that effect could be given to a decrease in value so attributable, which as their Lordships have indicated would be wrong in principle and in law. In their Lordships' opinion it is a part of the common law deriving as a matter of principle from the nature of compensation for resumption or compulsory acquisition, that neither relevantly attributable appreciation nor depreciation in value is to be regarded in the assessment of land compensation. The relevant New South Wales section merely reflects the law, as did in England section 9 of the Land Compensation Act 1961, and the absence of the reverse of the medal in the relevant section of the Queensland Main Roads Acts is not to be taken as altering the law.

Immediately after that passage in the judgment of the Land Appeal Court, they say this:

> "Apart from that, however, there is no evidence before us that, prior to the resumption, foreknowledge of the proposed expressway had a depressing effect upon land values in the neighbourhood of the resumed land".

Their Lordships venture to think that this overlooks the true question, which is whether such foreknowledge had a depressing effect upon the development potential of the resumed and South land.

Having been left in some uncertainty on the question of departure in principle on the lines above mentioned, their Lordships turn to the second alleged error in principle and law.

It has already been noted that the Land Appeal Court worked forward to a figure of $9,250 per acre as a value basis at resumption date of September 1965. But David Jones Ltd. in June 1966 bought the North land of 25 acres for the purpose of a drive-in shopping centre at a price of about $40,000 per acre. While it may well be that this average price should not be attributed without qualification to every part of the 25 acres, however important the more southerly part as a parking facility (which facility David Jones later found desirable to increase), this was the only tangible evidence of the value of land in this area for that purpose, and in respect of which there would have been availability of planning permission and demand from David Jones for the whole 37 acres. This was wholly rejected by the Land Appeal Court as irrelevant to the assessment of value to the appellant of the resumed land and the assessment of loss due to severance of the South land. What was the reason for this rejection, which led to an alternative build up which attributed no more than about $1,000 per acre to the commercial potential, a figure in support of which no evidence is referred to by the Land Appeal Court? At page 64 of the Record the Land Appeal Court considered that by September 1965 (the date of resumption) the fact that in April 1965 there had been permission in principle to the relevant use would have become fairly widely known by September 1965. Their Lordships fail to see the relevance of this: the only relevant knowledge would be that of a narrow market of potential purchasers for the given purpose, who would be assumed to know of the April permission. Having attributed to this general knowledge some particular rise in the value of "the land" beyond the

December 1964 values the Land Appeal Court thought the price paid in June 1966 by David Jones Ltd.—which as their Lordships have remarked was not less than an average $40,000 per acre for the North land 25 acres—not to be a reliable guide to the value of the resumed land at the date of resumption in September 1965. Now it is plain that in assessing values for the purpose of compensation for resumption on compulsory acquisition a tribunal is not required to close its mind to transactions subsequent to the date of resumption: they may well be relevant or of assistance to a greater or lesser degree, and in the instant case the figure paid by David Jones was the only figure available at the date of assessment of the value of adjacent land to a person wishing to develop the land for its " highest and best use ". Why then did the Land Appeal Court reject any consideration of this transaction in their evaluation? The reasons are stated at pages 64 and 65 of the Record. The first is that at the date of resumption planning permission had only been granted (in April) in principle, and then subject to a long list of conditions. But the December 1965 permission was subject to substantially the same conditions, and David Jones agreed to buy at an average price of $40,000 per acre nevertheless: and the Land Appeal Court considered that after the April permission in principle re-zoning was virtually ensured. Moreover, the Land Appeal Court did not seek to attribute to the December 1965 planning permission the startling increase to an average price of $40,000 per acre.

The other reason for rejection of the David Jones figure as not relevant was that the witness for the appellant had advanced a figure based not only on the David Jones purchase price from the appellant but also on the price per acre of adjacent land, which David Jones paid in 1969 and 1970 as a desirable adjunct to its expected expansion of the drive-in shopping centre, which opened in 1970. The Land Appeal Court referred to the " circumstances surrounding " all three purchases by David Jones in 1966, 1969 and 1970 as preventing them complying, for relevance to valuation, with the requirements of *Spencer v. The Commonwealth* (1907) 5 C.L.R. 418. Counsel for the respondent suggested that in relation to the 1969 and 1970 purchases the " circumstances surrounding " were the pressure to buy exerted by the fact of being committed to the major 1966 purchase. That may be so, and the price per acre paid in 1969 and 1970 may not consequently be a reliable guideline in this case: though the acquisition may in part incidentally stress the value to such a project of parking space. But no suggestion was advanced to suggest that the 1966 average price per acre was not some guideline except that David Jones had been for some time in negotiation in relation to the 25 acre site. If this, as their Lordships must suppose in default of any other suggestion, was the reason for total rejection from consideration of the average price for the relevant purpose of some $40,000 an acre (quite apart from additional benefits on the sale to associated companies of the appellant) it was a rejection of evidence, and indeed the only relevant evidence, of value which no properly instructed valuation tribunal should have made, and was therefore an error in principle and of law. Their Lordships do not of course say that the average price paid in June 1966 per acre for the 25 acres is necessarily to be applied for compensation purposes to the rest of the 37 acres. Maybe some value is to be attributed to the more definitive planning permit of December 1965. Maybe the South land, or the more southerly parts of it, as being more remote as a parking area from the actual shopping centre in the North land, would have been of less value per acre to a hypothetical purchaser such as David Jones, although no doubt the alternative cost of building vertical car parks (mentioned by the Land Appeal Court) would have been a material consideration. But taking for example the resumed land there does not

seem any justification for ignoring a value of the immediately adjacent North land at an arms length sale in June 1966 of well over $31,000 per acre above inflated residential use value and deciding upon a comparable figure only nine months earlier of about $1,000 per acre. The slight extra distance from the actual proposed shopping buildings coupled with the December permit can scarcely be justification for a difference of $30,000 per acre. In making these value contrasts their Lordships are not to be thought to overlook the fact that $40,000 is an average figure and that it may be that the value per acre of the land for the stated purpose diminishes with its increasing remoteness in a southerly direction from the proposed site of the shopping area in the northern part of the North land.

Their Lordships have indicated the respects in which in their opinion the Land Appeal Court erred in principle and therefore in law: and it might well be that this opinion would suffice as a direction to the Land Appeal Court when they come to reconsider the question of value to the appellant of the resumed land and loss to the appellant as a consequence of severance of the South land, on the remission ordered by the Full Court of the Supreme Court of Queensland. And any answers given by their Lordships to the questions posed will be interpreted in the light of the opinions here expressed.

Nevertheless it is as well to set out the questions referred to in the order giving leave to appeal, being some of those extracted from the case stated. These were as follows:—

(*a*) Was the Land Appeal Court in error or mistaken in law in the method which it adopted for assessing the value of the resumed land?

(*b*) Was the Land Appeal Court in error or mistaken in law in assessing the value of the resumed land and the effect of severance—

(i) by reference to the facts that—

(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?

(B) at all relevant times from 1962 at the latest Melwood was aware that the only land available to it for the 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?

(C) the centre line of the expressway proposal through the resumed land and in its vicinity was finally fixed in 1962?

. . . .

(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?

(*c*) Having regard to the evidence set out in paragraphs 17, 18, 20, 32 and 46 of the case stated should the Land Appeal Court have assessed compensation on the basis that but for the resumption—

(i) a town planning consent would or would probably have been granted by Brisbane City Council by its Registration Board for the whole of the Melwood land to be developed as a drive-in regional shopping centre?

(ii) the resumed land and the severance area would have been used for the purpose of a drive-in regional shopping centre?

Taken by themselves the answers to these questions, on the basis of their Lordships' opinion, would be—

(*a*) Yes, to some extent.

(*b*) (i) (A) Yes, if it did.

(B) Yes, if it did.

(C) Yes, if it did.

(ii) Yes, if it did.

(iii) Yes, as to the direct payment at the average rate of about $40,000 per acre.

(*c*) (i) Yes.

(ii) Yes.

These answers by themselves may not serve any very useful purpose. The appellant at the hearing of this appeal reformulated the proper answers to the questions as follows:—

(*a*) (i) Yes.

(ii) In assessing the value of the Melwood land (including the resumed land and the southern severance) the Land Appeal Court should:

(A) Leave out of account any diminution in value attributable to the proposal for the expressway.

(B) Ascertain the highest and best use of the land on the basis that, there being for this purpose no expressway proposal, planning permission would have been obtainable for the use of the resumed land and of the southern severance as part of the drive-in regional shopping centre.

(iii) Neither the reasons given nor the material contained in the Land Appeal Court's reasons for judgment and in the case stated precludes the purchase by David Jones Ltd. in 1966 from complying with the test in *Spencer v. The Commonwealth.*

(iv) In assessing compensation for severance and injurious affection the Land Appeal Court should have regard to the existence of the expressway.

(*b*), (*c*) Need not be answered having regard to the answer to (*a*).

Their Lordships do not regard these answers, when read in the light of their opinions, as really being different save by way of formulation, and are prepared to adopt them.

Their Lordships are of opinion that the Full Court of the Supreme Court, in declining to answer certain of the questions posed, were for the reasons already stated in this opinion in error, and should in their order have remitted the case to the Land Appeal Court not only on the matters referred to in their order but also upon the matters referred to

in, and upon the basis of, this opinion. The order of the Full Court of the Supreme Court must be varied accordingly and the appeal allowed, so that the Land Appeal Court shall on the reconsideration of the question of compensation have regard both to the order of the Full Court and to this opinion. In all the circumstances their Lordships are not minded to interfere with the order for costs in the Full Court but are of opinion that the respondent should pay to the appellant its costs of this appeal. Their Lordships will humbly advise Her Majesty accordingly.

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In the Privy Council

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v.

THE COMMISSIONER OF MAIN ROADS

DELIVERED BY
LORD RUSSELL OF KILLOWEN

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