SUPREME COURT OF QUEENSLAND

CITATION:	*Bennett v Fitzroy SC* [2003] QCA 444
PARTIES:	**JOHN CAMPBELL BENNETT** (appellant/appellant) v **FITZROY SHIRE COUNCIL** (respondent/respondent)
FILE NO/S:	Appeal No 1616 of 2003 P&E Appeal No 1315 of 1998
DIVISION:	Court of Appeal
PROCEEDING:	Planning and Environment Appeal
ORIGINATING COURT:	Planning and Environment Court at Brisbane
DELIVERED ON:	17 October 2003
DELIVERED AT:	Brisbane
HEARING DATE:	30 September 2003
JUDGES:	Davies JA and Jones and Holmes JJ Judgment of the Court
ORDER:	**1. Appeal dismissed** **2. Appellant to pay the respondent's costs of the appeal**
CATCHWORDS:	ENVIRONMENT AND PLANNING - PLANNING SCHEMES AND INSTRUMENTS - QUEENSLAND - DEVELOPMENT CONTROL PLANS - where appellant owner of property west of Rockhampton - where new Development Control Plan came into effect - where Development Control Plan discouraged use of subject land for rural home sites - where appellant sought compensation for injurious affection relating to lots affected by the scheme - where primary judge held that valuation of the subject land as rural home sites would have been less than value of sale of lots together for grazing purposes - whether primary judge adopted incorrect basis of valuation of the lots affected by the scheme *Local Government (Planning and Environment) Act* 1990 (Qld), s 3.5(8)(a) *Australasian Jam Company Pty Ltd v Federal Commissioner of Taxation* (1953) 88 CLR 23, distinguished *BSC Footwear Ltd v Ridgway (Inspector of Taxes)* [1971] Ch 427, distinguished

CMB No 1 Pty Ltd v Cairns City Council [1999] 1 QdR 1, cited
Spencer v Cth (1907) 5 CLR 418, applied

COUNSEL: D R Gore QC for the appellant
G J Gibson QC, with S M Ure, for the respondent

SOLICITORS: Connor O'Meara for the appellant
King & Company for the respondent

[1] **THE COURT:** This is an appeal and an application for leave to appeal from a decision of the Planning and Environment Court on 30 January 2003. That decision arose out of applications for compensation for injurious affection lodged by the appellant with the respondent following the coming into effect of a new town planning scheme for the Fitzroy Shire on 13 December 1996.

[2] On 20 December 1997 the appellant lodged with the respondent applications for compensation relating to 34 of 49 lots affected by Development Control Plan No 2-Alton Downs which was part of the planning scheme. On 26 March 1998 the appellant appealed to the Planning and Environment Court against deemed refusals of those applications. Five only of those appeals proceeded to trial and on 7 July 1999 the court awarded compensation in respect of four of those.

[3] Then on 1 December 1999 the appellant lodged with the respondent applications for compensation in respect of the remaining 15 lots and appeals were instituted out of time on 6 June 2000. However on 31 August 2001 the Planning and Environment Court extended the time for appeal to that date.

[4] All of the outstanding appeals, 44 involving 44 lots (all of those referred to above except the five which had been decided by the court on 7 July 1999), were the subject of the decision the subject of this appeal.

Whether leave is necessary to appeal to this Court

[5] The respondent conceded in this Court that leave to appeal pursuant to s 4.1.56 of the *Integrated Planning Act* 1997 was unnecessary. The concession was based, it seems, primarily on s 6.1.50 of the *Integrated Planning Act* which arguably unqualifiedly preserved any right to compensation, including any right to appeal to this Court in respect thereof, acquired under the *Local Government (Planning and Environment) Act* 1990 ("*Planning and Environment Act*") notwithstanding the repeal of that Act. We do not find it necessary to consider, whether or not that concession was properly made because the nature of the question sought to be argued in this appeal is such that we would grant leave to appeal if that were necessary. We shall therefore proceed to consider this appeal on that basis.

This appeal

[6] In the Planning and Environment Court the appellant contended and the court accepted that the development control plan, to which we have referred, discouraged the use of any part of the subject land for rural home sites and that consent for that purpose could not reasonably be expected. In this Court the respondent did not contend to the contrary. It was therefore common ground that, upon the coming into force of the development control plan, none of the lots the primary focus of the appeal ought to be valued on the basis that its highest and best use was as a rural home site.

[7] The learned primary judge held, however, that, had the development control plan not come into force, those lots, 34 in all comprising what was described by a number of witnesses as the "western aggregation", could have been sold as individual rural home sites. However he held that, on the basis of valuation of the western aggregation which he accepted, which was, in effect, of a sale en globo thereof for that purpose, their value as rural home sites would have been less than the value of the sale of them together for grazing purposes. It is the latter of these conclusions that the appellant contests in this appeal. He submits that his Honour adopted a wrong basis of valuation of the western aggregation and that, on the correct basis, the value of the western aggregation for rural home sites was greater than its value for grazing purposes.

The question which the appellant contends is in issue

[8] A major question in issue before the learned primary judge and the question sought to be agitated in this Court thus concerns the basis of valuation of the western aggregation adopted by the learned primary judge on the assumption that the development control plan had not come into effect. That question is whether the value as rural home sites of the lots comprising the western aggregation is their value immediately after 13 December 1996 on the basis that they had been sold en globo at that time for that purpose; or whether that value is reached by assuming an orderly sale of those lots separately over a period of 18 months thereafter, and discounting to the value, immediately after 13 December 1996, of the nett sum assumed to have been obtained from the sale of each such lot.

[9] The question so framed assumes that, in arriving at the value of those lots on the second basis referred to above, the discounting referred to is such discounting as is necessary only to bring to their present value, immediately after 13 December 1996, sums obtained in the future. It does not include any discounting for the risk involved in marketing and selling land over an extended future period.

The general principle in valuing land

[10] The general test of value of land, or "market value", the relevant term here,[1] for whatever purpose, has long been settled. It assumes for that purpose a voluntary bargain between a vendor and a purchaser both willing to trade but neither of them so anxious to do so that he or she would overlook any ordinary business consideration.[2]

[11] The appellant contends that "market value" in s 3.5(8)(a) of the *Planning and Environment Act*, bears some meaning different from this. That section relevantly provided:

> "the amount of compensation is … to be an amount equal to the difference between the market value of the interest immediately after the time of the coming into operation of the provision of the planning scheme by virtue of the operation whereof the claim for compensation arose and what would have been the market value of that interest if the provision had not come into operation … "

The two market values to which this section refers are values which are to be assessed, on different hypotheses, at the same time, "immediately after"

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1 *Local Government (Planning and Environment) Act* 1990, s 3.5(8)(a).

2 *Spencer v The Commonwealth* (1907) 5 CLR 418 at 441 per Isaacs J; see also at 432 per Griffith CJ.

13 December 1996.[3] But it is convenient to refer to a valuation on the second hypothesis as a "before" valuation and the one on the first hypothesis as an "after" valuation.

[12] Unsurprisingly "market value" is the basis used to determine the "before" and "after" valuations of the land. It was accepted by the appellant that the correct basis for ascertaining the "after" market value of the land was by asking what a willing but not anxious buyer would have been prepared to pay and a willing but not anxious seller prepared to accept at that time for the total of the western aggregation as grazing land; and that the correct basis for ascertaining the "before" market value of that land, on the assumption that it would be used for grazing land, was the same. Prima facie, then, it is difficult to see why the "before" value of the land on the assumption that it would be used for rural home sites should not have been similarly ascertained by asking what a willing but not anxious buyer would have been prepared to pay and a willing but not anxious seller prepared to accept at that time for the western aggregation as rural residential land.

The appellant's principal contention

[13] The appellant's main contention was that to value the lots comprising the western aggregation as rural home sites on the assumption that they were all sold immediately after 13 December 1996 would be to give a false value because it would be analogous to a valuation made on a forced sale such as a sale by a mortgagee. He contended that the proper analogy, in such a case, was with the sale of trading stock and sought to rely on revenue cases which discussed valuation of trading stock for the purpose of ascertaining the taxable income of a business.[4] Implicit in that contention is the submission that no deduction should be made, in arriving at that valuation, for the risk involved in selling a large number of lots over an extended future period.

The application of the principle in *Spencer* to this case

[14] It is convenient at the outset to identify the context in which and the purpose for which trading stock has been valued in income tax cases. The context in such cases is generally that of a continuing business of trading in stock the likelihood of sale of which and the likely selling price of which are highly predictable and which is expected to be sold within a short period. And the purpose of ascertaining market value, or as it is described in the *Income Tax Assessment Act*[5] "market selling value", is to ascertain the income earned by the trader in a specified year in that continuing business. That requires taking into account trading stock on hand at the beginning and at the end of that year.

[15] In considering the ascertainment of market selling value in that context and for that purpose, Fullagar J in *Australasian Jam Co Pty Ltd v Federal Commissioner of Taxation*[6] said:

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3 That is not to say that evidence of events subsequent to that time may not be relevant to the ascertainment of value at that time: *CMB No 1 Pty Ltd v Cairns City Council* [1999] 1 QdR 1.

4 *Australasian Jam Company Pty Ltd v Federal Commissioner of Taxation* (1953) 88 CLR 23 at 31 - 32; *BSC Footwear Ltd v Ridgway (Inspector of Taxes)* [1971] Ch 427 at 434, 441; [1972] AC 544.

5 *Income Tax Assessment Act* 1936 (Cth), s 31; *Income Tax Assessment Act* 1997 (Cth), s 70-45.

6 Supra fn 4.

> "But it was said that the company sold during each year as much of its jams and canned fruits as it could sell, and that the stock which was left on hand at the end of the year represented a 'surplus', the 'market selling value' of which could only be ascertained by supposing the whole to be offered for sale *en bloc* on the last day of the accounting period. If one supposes such a sale - by auction or otherwise - I am quite prepared to accept the evidence that much lower values than those taken by the Commissioner would have been realized. But it is not to be supposed that the expression 'market selling value' contemplates a sale on the most disadvantageous terms conceivable. It contemplates, in my opinion, a sale or sales in the ordinary course of the company's business - such sales as are in fact effected. Such expressions in such provisions must be interpreted in a commonsense way with due regard to business realities, and it may well be - it is not necessary to decide the point - that, in arriving at market selling value, it is legitimate to make allowance for the fact that normal selling will take place over a period. But the supposition of a forced sale on one particular day seems to me to have no relation to business reality."

[16] There is no reason to doubt that, in that context and for that purpose, his Honour's remarks were correct. To have valued the whole of the taxpayer's trading stock on hand at the end of an accounting period of a continuing business on the assumption that it was all put up for sale on that day would have defied common sense; it would have borne no resemblance to reality. To similar effect, in the same context and for the same purpose, are statements made by Russell LJ and Megaw LJ in *BSC Footwear Ltd v Ridgway*.[7] It was these statements upon which the appellant principally relied. But that context and purpose are, as we shall endeavour to show, a far cry from the present case.

[17] Unlike the trader in the trading stock cases, the appellant was not in a continuing business of selling home sites which sold at predictable prices over a short time span. On the contrary, he was not in the business of selling land at all and a valuation had to be made of this land, as at 13 December 1996, whether he intended to sell it or not. Moreover, unlike in the ordinary case of trading stock, neither the prospective selling prices of the individual lots nor the time required for their optimum sale can be easily predicted; there was a significant risk attaching to both.

[18] The correct application of *Spencer* to a "before" valuation of the lots comprising the western aggregation, on the assumption that they will be ultimately sold for rural home sites, may be seen by assuming that, immediately after 13 December 1996, the appellant, or a hypothetical seller, had a choice; either he could have sold those lots en globo to a person who would accept the risk of selling them individually; or he could have assumed that risk himself and embarked on the marketing and sale of those lots. In the former case the hypothetical buyer would have been prepared to pay no more than the present value of his estimate of the ultimate nett selling price of the lots less a sum which represented the risk that his estimated sale prices might not be obtained or not obtained within his estimated time for sale. And if that risk was not actualized that sum would represent the buyer's profit.

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[7] Supra fn 4.

[19] In the latter case, because he, or the hypothetical seller, had assumed that risk, the lots were, in his hands, worth less, by the estimated value of that risk, than the present value of the total of the nett estimated selling prices of the lots. In other words, a valuation, in the appellant's hands immediately after 13 December 1996, of the land comprising the western aggregation would yield the same result whether based on the assumption of its sale en globo at that time for rural home sites or on the assumption that the appellant would himself embark on the marketing and sale of the individual lots therein as rural home sites.

Conclusion

[20] It follows that the analogy of valuing trading stock is inapt and that the contention that the basis upon which his Honour valued the western aggregation for rural residential purposes was analogous to a valuation upon a forced sale, must fail. It was not contended that there was any other error in his Honour's assessment. The appeal must therefore fail.

Orders

1. Appeal dismissed.
2. Appellant to pay the respondent's costs of the appeal.