IN THE LAND APPEAL COURT

TOWNSVILLE

Re: V96-791
Appeal from a decision of the Land Court - Determination of unimproved value - Valuation of Land Act 1944

BETWEEN:

George Vivian Roberts and Dalva Ellen Roberts

Appellants

and

Chief Executive, Department of Natural Resources

Respondent

REASONS FOR JUDGMENT

Judgment delivered this Twelfth day of August 1998

This is an appeal against the decision of the Land Court given on 12 December 1997, allowing an appeal against the unimproved value of the land at 26 Cleveland Terrace, Melton Hill, Townsville, Parish of Coonambelah, in the sum of $180,000.

The subject land is described as Lot 1 on Registered Plan 722451 and Lot 2 on Registered Plan 701633, containing an area of 1879 m². The improvements comprise an historical residential dwelling "Warringa", which has been included in the heritage register under the *Queensland Heritage Act* 1992 ("the Heritage Act").

The appellants argue that the learned President in coming to his decision, erred in law, or failed to take into account certain matters relating to impact upon the subject land by the Heritage Act, and also failed to apply an appropriate comparison of the subject with sales of comparable properties in the area.

Mr DGH Turnbull of counsel appeared on behalf of the appellants.

Mr J O'Rourke, legal officer, Department of Natural Resources, appeared on behalf of the respondent.

Background

The Chief Executive, Department of Natural Resources, determined the unimproved value of the subject land at 1 January 1996 to be $160,000 but subsequently amended the valuation to $200,000. The owners unsuccessfully objected to that valuation. An appeal was filed in the Land Court from the Chief Executive's decision on objection. In the Notice of Appeal, the appellants' opinion of unimproved value was stated as $115,000. Following a hearing in Townsville the learned President of the Land Court allowed the appeal and determined the unimproved value as $180,000. That decision was based on the finding that the unimproved value was not adversely affected by the restrictions imposed by the Heritage Act. It was from that decision that the appellants have appealed to this Court.

At the hearing before this Court the appellants conceded that they did not intend to pursue the second limb of their appeal in respect of the comparison of sales of other parcels in the area. The appeal deals solely with the impacts of the Heritage Act upon the unimproved value of the subject.

It is agreed by both parties that the dwelling on the subject land has been registered as an historic building under the Heritage Act, and is currently identified as a building to be preserved under the "Development Control Plan No. 2 - Melton Hill, Stanton and North East Castle Hill Slopes" of the Townsville City Council ("the Council"). The subject land is zoned "Residential 3" under the Town Plan of the Townsville City Council of 26 September 1994, and effective at the date of valuation.

Under s.33(1) of the Heritage Act the penalties for carrying out any development in relation to a registered place, without the approval of the Council, are defined, and constitute a major deterrent. In the event of any proposed development having a substantial effect on the cultural heritage significance of the registered place, s.34(3) of the Heritage Act establishes procedures for an application to be required to be publicly notified, and for the invitation of public representations.

In considering any application for development of a heritage place the Council must consider the effect of any such development, and may only grant approval for the work "if there is no prudent and feasible alternative to carrying out the development" (s.35(2)). Such decisions are then subject to review by Council (s.36(1)), and if the applicant is dissatisfied he may then appeal to the Planning and Environment Court (s.36(6)).

While the provisions of the Heritage Act apply to a registered place under that Act, protection to the physical environment of the area of the subject has been further extended to surrounding parcels under the local authority's Development Control Plan No. 2. That plan establishes a planning regime for the preservation of the heritage residences in certain selected areas in order to preserve the architecturally and historically significant traditional residential styles of North Queensland from late 19th century. The impact of the provisions of Development Control Plan No. 2 in s.52 (Precinct 2 - Melton Crest) is to require surrounding developments to be of a style which will blend visually with the historical character of the precinct and which will not intrude upon any historical buildings. In the case of the area including the subject land, any adjoining buildings are to be restricted to a maximum of 2 storeys in height.

The resulting impact of the above planning restrictions is that a registered historic building is not only subject to tight development controls upon its own structures, but also provides an envelope of limitations upon the surrounding parcels.

While the respondent agreed that the subject land is impacted by the heritage listing, he claims that the effect of s.17 of the *Valuation of Land Act* 1944 ("the Valuation Act"), requiring that the subject be valued as a single residence site with any higher use of the land ignored, establishes its highest and best use. Because of the residential nature of the heritage listing, and in the absence of any direct sales evidence to demonstrate some detriment in the valuation as a consequence of such listing, the respondent argues that the Heritage Act had no effect upon the unimproved value of the subject. The learned President agreed with that conclusion.

However the appellant argues that, because of the heritage listing, the owner of the subject land does not have the same freedom for the use of the land that is inherent in a property free of any such heritage requirement.

Such a statutory restriction is likely to vary from site to site, and may have either a positive or negative resulting impact upon the value of a heritage listed property. However what must be recognised is that such a statutory restriction does exist, and prima facie must impact on the resultant value of the property. The consequence of the heritage listing is therefore a separate consideration to the effect of s.17 of the Valuation Act which applies to all single residence sites.

In the course of his submissions, counsel for the respondent conceded that a heritage listing attaches to the land. This concession is in line with the principle enunciated in *The Valuer-General ats Queensland Club* (13 QLCR 207 at p.221) and

Ballow Chambers v. The Valuer-General (14 QLCR 422 at pp.433-4). Thus, the effects of the heritage listing have to be considered in any determination of the unimproved value of the land.

In determining that the unimproved value was not affected by the restrictions imposed by the Heritage Act, the learned President relied on two bases:

> firstly, the applicant did not produce any **sales** evidence to prove that the statutory restrictions would affect the price that a prudent purchaser would pay (Appeal Record at p.10); and
>
> secondly, Mr Noakes' evidence that there was a ready demand for old Queensland homes which resulted in his opining that the subject's unimproved value was not affected by the restrictions (Record at p.10 (Reasons), at p.55/30 (evidence)). (Mr Noakes was the valuer responsible for the Chief Executive's valuation).

In our view, the learned President erred in so holding.

Certainly there is no sales evidence but that is to be expected given that the listed residential properties in Townsville are only four in number and none have been recently sold (Record at p.55/20). The traditional approach of applying comparative sales is therefore not available.

The absence of sales evidence does not preclude the Court from making an assessment of an adverse impact. Any Court faced with an obligation to make an assessment, whether it be of damages or as here, of value, must rely on such evidence as is available. As Devlin J said in *Biggin v. Purmanite* ((1951) 1 KB 422 at p.438), "Where precise evidence is obtainable, the court naturally expects to have it, but where it is not, the court must do the best it can." The phrase "difficulty of proof does not dispense with necessity of proof" used by Atkinson J in *Aerial Advertising Co. v. Batchelor's Peas* ((1928) 2 All ER 788 at p.796) is particularly applicable to the situation in which the learned President found himself.

Prima facie, the imposition of a heritage listing imposes restrictions in limitations on the owner's use of the land. It follows that two blocks side by side, in all respects identical save that one is heritage listed, would most likely have different values. Bearing in mind the task at hand is to determine the unimproved value of the land looking at it as though the dwelling "Warringa" never existed, seeing the land in its virgin state but as presently zoned and with all the statutory restrictions imposed by the Heritage Act.

The starting point is to look at the statutory restrictions. At least with regard to the improved property some of these could possibly have been assessed in financial

terms e.g., increased cost of maintenance capitalised over the expected life of the building. Others would not be susceptible to any arithmetic approach e.g., the loss of control over removal of the building, extensions to and renovations of the building, the planting of trees etc. There is also loss of time and inconvenience in having to deal with and take directions from the staff of the Heritage Council. Some evidence was given by Mr Roberts as to the increased cost of maintenance and repairs to the building because of a need to comply with higher standards but this was by no means intended as the identification of financial detriment.

It is important to note that these restrictions are imposed not for the benefit of the property owner but for the whole of the community (*Queensland Heritage Act* 1992 s.3(2)b - "... seek to achieve the greatest sustainable benefit to the community ...").

Against the financial detriment attendant upon these restrictions there must be weighed any evidence of enhancement to the owner. In this regard, both in the hearing before the learned President and again before us, suggestions were made that the fact of a property being heritage listed might cause it to be more sought after and to have a higher value. This was dealt with by Mr Noakes not in his report but in his oral evidence in the following terms (p.51 of the record):

> "I think in this particular area, considering the unique nature of Melton Hill and I also examined sales in Stanton Hill, looking for some indication as to the way the market perceived the heritage issue and what I found was that first of all for historic or for what may be termed loosely as a Queenslander, that style of house which is fairly unique to Queensland and North Queensland that there was a strong demand for properties of this nature and I found that people that purchase them, their intention was not to have disputed the likes of the Heritage Act, but basically to go along with it. I couldn't find any conflict between that sort of situation of the difference in value, the prices paid, I couldn't discern anything that I could attribute to either the property or to the land, I think the fact that Melton Hill and Stanton Hill are fairly unique inner city areas, the circumstances are such that these properties and listing could in fact add to the value of them when you consider the locality and the limited nature of that land being available."

When challenged in cross-examination why he had not produced the details of his analysis of sales which led him to that opinion he commented (at p.54 of the record):

> "I did not carry out an extensive analysis, I carried out a market survey, I examined the sales and I was unable to ascertain from those sales any movement to suggest that the heritage listing is a detriment on the value.
>
> Well, can you provide the court, can you provide now to us that information that led you to that conclusion?-- No I can't.

> You say it's supported by sales evidence, I mean can you help the court?-- No I am not saying it is supported by sales evidence, I'm saying I examined sales, I couldn't find any evidence to suggest that heritage listing is a detriment to value."

Mr Noakes' opinion unsupported by any examinable facts is of little weight. Properly understood it goes little further than saying in the sales that he examined he could find no evidence to suggest heritage listing was a detriment. This is not surprising since it was a fact that there were no sales of heritage listed property. Relevantly it does not go to providing any evidence of enhancement in this case.

The learned President was correct in identifying that the onus of proving any adverse effect of heritage listing is upon the appellants. We disagree however with his finding that the appellants have not produced any proof of their assertion. They certainly produced no sales evidence to support their assertion but there is ample other evidence of financial detriment as is referred to above. There is no direct evidence of any enhancement in value and that is a matter which the respondent clearly bears an evidential burden to show that it exists. More is required than merely raising the possibility of some enhancement. It was not put either to Mr Roberts or to Mr Eales (the appellants' valuer) in cross-examination that there was any enhancement in value of the subject land by reason of its being heritage listed, apart from some vague suggestion that in various instances the Townsville City Council has made a contribution to painting some such places.

Quite apart from the lack of evidence, it was argued on behalf of the appellants that even if there was evidence of enhancement, by reason of the listing, that enhancement would relate to the structure only, resulting in an increase in the value of the improvements and not in the unimproved value of the land. Similarly it might be argued that in the analysis of an improved sale of a heritage listed property any alleged detriment might be restricted to the added value of the structures (improvements) (see s.5(1) Valuation Act.

In the circumstances of this case it seems to us there is simply no evidence of enhancement that arises for consideration and consequently there was no offset to the financial detriment to the land as a result of the imposition of the heritage listing. Consequently some allowance must now be made by reducing the amount of $180,000 which the learned President assessed as being the unimproved value of the land not affected by heritage listing.

Appropriate Allowance for Detriment

Mr Eales' unimproved valuation of the subject land, as presented to the Land Court was $145,000. That valuation had been made on the basis that the heritage listing deleteriously affected the land. It was his opinion that the detriment would be in the order of 20%-25% of the unimproved value of the land free of the listing. The appellants were at that time contesting a valuation of $200,000 which valuation was based on the opinion of Mr Noakes, that the heritage listing had no effect.

The evidence was that the increased valuation to $200,000 had resulted from an amendment to an existing departmental policy with regard to the valuation of heritage listed properties.

Mr Eales, who had conducted the appellants' case in the Land Court, had called for the departmental policy notification to be tendered. The Land Court appeal in this matter had been heard concurrently with an appeal against a valuation of adjoining land and the tendered notification was accepted as an exhibit on the file of that other appeal. It has now been sighted by the Court. The notification is titled "Valuation of Land Subject to Listing on a Heritage Register" dated 29 January 1996 to take effect from 30 January 1996. The direction contained within that notification is as follows:

> "A valuation of a **heritage listed** property made under the *Valuation of Land Act* 1944 for rating and taxing purposes must reflect the effects of the listing."
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> Note 2 in the notification suggested as follows:
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> "The valuation of residential land, where valued under section 17 of the *Valuation of Land Act* 1944, may be unaffected by Heritage listing, while the balance may be determined by deducting the added value of improvements from the price of the listed properties to arrive at a basis."

As we would interpret Note 2, it suggests that the effect of heritage listing may be established for individual properties, through analysis of sales of those properties. We would agree that any available sales evidence of heritage listed property must be analysed if the effect of heritage listing on market value is to be proved and applied. Caution needs to be used however, in our opinion, in the assessment of "added value" of improvements, in that it is the value which the improvements add to land which is heritage listed which needs to be established, and not the value which the improvements would have added to the land if it had not been heritage listed. In other

words, it would defeat the purpose of the analysis if the added value of the improvements was established, in the analysis of a sale of a heritage listed residential property, simply by deduction, from the improved sale price, of a land value established from market evidence of unfettered vacant land.

Interestingly, Note 3 in the departmental notification suggests as follows:

> "The unimproved value for statutory purposes derived from the sale of a heritage listed property can never be greater than the value of a similar parcel of land which has no heritage listing. (Basis - the added value forms part of the building - not the land)."

While it may be that it would occur only in exceptional cases such as where the historical importance of land relates more to the "place" than to the improvements, we are unable to accept that, just as a heritage listing may have a deleterious effect on land, such a listing would be incapable of also having an effect enhancing the value of certain lands over and above their market value free of heritage listing.

In the *Queensland Club* matter (supra) this Court had this to say at p.221:

> " In this case the valuer must put from the mind that as at 31st March, 1989, the fact that the Queensland Club existed, or ever existed, but for no other reason than to see the land in its virgin state but as zoned and in the existing environment. Once this scene has been set, the making of the valuation would indeed be conducted in a vacuum if any statutory restrictions (or advantages) attaching to the use of that land (no matter the historical happenings which created those restrictions or advantages, whether related to the local environment or confined within the boundaries of the particular site) and which had an effect on "the capital sum which the fee simple of the land might be expected to realise if offered for sale", were to be ignored. If the valuation was conducted in such a vacuum the result would be plainly wrong."

In this case there was no suggestion by Mr Noakes that the land had been enhanced in value by the heritage listing, but instead that it had not been adversely affected. In other words, he would have expected the subject property to have sold for no more, or no less, than a hypothetically directly comparable residential property which had not been heritage listed. As we understood his evidence in the Land Court, that opinion had something to do with the historical environment which existed on Melton Hill (the location of the subject property), in close proximity to the city centre. We can see some logic in the opinion that the market value of "Warringa" relates to the historical environment in which it exists.

We are not able to accept, however, that there is logic in the opinion that two hypothetically directly comparable residential properties, located in the same

environment, one with a heritage listing, and the restrictions on freedom of use and private enjoyment which that entails, would be seen as equally desirable in the marketplace as the other, which could be used and privately enjoyed free of bureaucratic interference and direction.

The difficulty is of course the assessment of what the difference in value might be, in the absence of convincing market evidence. A further difficulty is recognised in apportioning loss in value to a heritage listed improved property, between land and improvements.

The professional valuation evidence before us ranges from Mr Noakes' opinion of nil effect, based on a "market survey" unsupported by market evidence, to Mr Eales' opinion of adverse effect of 20%-25%. Mr Eales provided no evidential basis for his professional opinion but we suspect he saw it as fair to have reinstated the apparent 25% allowance previously applied to the valuation of the property, before the amended departmental policy came into effect.

As we see the circumstances of the subject property, the nature of the dwelling appears to be in keeping with acceptable development of the site, if its potential was limited to exclusive use for purposes of a single dwelling house (s.17 of the Valuation Act). While the disadvantages of the location were well exposed in the Land Court, that location has provided a heritage orientated environment which has been seen by the planning authority to be worthy of protection. The level of value of the site unencumbered by the listing appears to be influenced by that environment as well as the residential amenity provided by the elevation, outlook and proximity to the city.

In contrast with a situation where, for example, a heritage listing was intended to preserve a "worker's cottage" on a large otherwise valuable residential site, we see the effect on the land value in the subject case to fall within the lower spectrum of probable effect but an effect more identifiable than nominal.

Borrowing the words of Devlin J in *Biggin v. Purmanite* (supra) this is a case where "the court must do the best it can" and we have decided that, based on an unencumbered valuation of $180,000, an encumbered value of $160,000, rounded from a discount of 10%, reflects our appreciation of the probable effect of loss of freedom of choice in the use and quiet enjoyment of the land content of "Warringa".

Order

The appeal is allowed.

The determination of the Land Court is set aside and the unimproved value of the land as herein described is determined in the amount of One Hundred and Sixty Thousand Dollars ($160,000), as at 1 January 1996.

JONES J
JUSTICE OF THE SUPREME COURT

RE WENCK
MEMBER OF THE LAND COURT

NG DIVETT
MEMBER OF THE LAND COURT