Re an Arbitration between the Auckland Hospital Board and the Auckland Rugby League (Incorporated)

Supreme Court Auckland
'4, 17 August, 30 November 1965
erry J

Landlord and tenant – Lease – Right of renewal at rent to be fixed by arbitration – Whether town planning restrictions to be taken into account in valuing land – Whether possibility of removal of such restrictions also to be taken into account – Land designated as private open space – Thereby reserved for use for field sports – What type of hypothetical purchaser to be regarded as available – Methods of valuation of such land.

Valuation of land – Whether town planning restrictions to be taken into account in valuing land – Whether possibility of removal of such restrictions also to be taken into account – Land designated as private open space – Thereby reserved for use for field sports – What type of hypothetical purchase to be regarded as available – Methods of valuation of such land.

In making a valuation of land under the provisions of a lease for the purpose of assessing the rental payable under such lease town planning restrictions limiting the purposes for which the land in question may be used must be taken into account.

Hutt River Board v Lower Hutt City Council [1960] NZLR 1107 and *Valuer-General Plastics (NZ) Ltd* [1959] NZLR 857, approved. *Royal Sydney Golf Club v Federal Commissioner of Taxation* (1955) 91 CLR 610, applied.

The possibility of such restrictions being removed must also be kept in view and allowed for.

Corrie v MacDermott [1914] AC 1056, applied.

Land designated in a district town planning scheme as "private open space" which is thereby reserved for field sports commonly, in New Zealand, joined in by amateurs, is to be valued on the basis that a hypothetical purchaser would be a sports body.

Observations generally as to the correct method of valuing such a property which is situated in a metropolitan area and surrounded by industrial properties.

›tion by the Auckland Hospital Board to set aside the award of an umpire in an arbitration ɒetween itself and the Auckland Rugby League (Inc) upon the grounds: (a) That the umpire adopted principles erroneous in law; (b) That in view of the questions of law involved the arbitrators and/or the umpire ought to have stated a case for the opinion of the Court; (c) That the said award was erroneous in law and ought to be set aside or remitted to the arbitrators and/or the umpire for reconsideration.

Alternatively, it sought an order directing the arbitrators and/or the umpire to state a case for the opinion of the Court on the questions of law arising in the course of the arbitration on the grounds: (a) That in view of the questions of law involved, the arbitrators and/or the umpire ought to have so stated a case; (b) That counsel for the Auckland Hospital Board requested such a case to be stated.

P B A Sim and *Pidgeon*, for the Auckland Hospital Board.
Chilwell, for the Auckland Rugby League (Inc).

Cur adv vult

Perry J. The arbitration concerns the rent payable for six acres thirty-nine decimal six perches (6a 39.6p) of land situated in Auckland and known as Carlaw Park let by the owner, the Auckland Hospital Board (which I shall call "the board"), to the Auckland Rugby League Incorporated (which I shall call "the league").

Source: New Zealand Institute of Valuers (1993). Land valuation cases 1965-1992. Hutcheson Bowman & Stewart Ltd, Wellington.

The lease in respect of which the arbitration took place is dated 24 April 1942 and leased the land to three persons as trustees for and on behalf of the Auckland Rugby League. This league was incorporated on 16 February 1955 under the Incorporated Societies Act 1908 and the trustees transferred their interests in the lease to the incorporated society. This lease was for a term of twenty-one years from 1 January 1942, and the annual rental was £350 per annum. The lease contained various covenants by the lessee. *Inter alia,* there were covenants to fence the land within six months, to construct and maintain such drains as might be necessary to carry away all storm water from the land, and not without express written consent to erect more than one dwellinghouse or one shop with one dwellinghouse attached on the land. There is no obligation to use the land for any specific purpose, but there is the usual covenant not to carry on any noisy, noisome or offensive trade business or occupation or for advertising display purposes. The lease further provides that not sooner than eighteen months and not later than nine months before the end of the term, two separate valuations were to be made, to wit, a valuation of the then gross value of the fee simple of the land which was to include all buildings, fixtures and improvements, and also a valuation of all substantial improvements of a permanent character made or acquired by the ten or any preceding lessees and then in existence on the land. The valuations were to be made by a single valuer if the parties could agree on one, but otherwise by two arbitrators, one appointed by each party or an umpire appointed by them. When the valuation is made, a copy is to be served upon the league which could then elect whether it would accept a fresh lease for a further term of twenty-one years upon the same terms except as to rent, but together with the right of further renewal and all other rights conferred by the lessee and subject to a re-assessment of the rent at the end of every period of twenty-one years. The annual rental is to be at 5% per annum on the gross value of the land after deducting therefrom the value of the substantial improvements of a permanent character as fixed by the respective valuations. There were provisions in the event of the lessee electing not to take a new lease.

The parties did not agree upon a single valuer and Mr George Kenneth Yarnton, a registered valuer in Auckland was appointed to value for the board and Mr Frederick Edward Richard Noble of Auckland, a registered valuer, to value for the league. Each valuer set out his valuation in writing but, having failed to agree, they appointed Mr Robert Southwell Gardner of Auckland, a registered valuer, to be the umpire.

The umpire fixed 10 June 1964 for the hearing but on 9 June the solicitors for the Board wrote to the umpire strongly suggesting that before he came to any decision, or before hearing the evidence of the arbitrators as to the value, he should obtain from this Court a direction as to the correct method of assessing the value of the park. An accompanying statement drew attention to the designation of the area on the district plan as "private open space" and that the valuers had been unable to agree upon the correct method of valuation because of this.

An affidavit filed in these proceedings showed that a further request for a case to be stated was made at the hearing. The umpire did not state a case, but adopted the course of setting out the reasons for his decision so that, as he stated, if either party considered he was in error, it might challenge his findings. He thought that this course would save both parties considerable costs.

The award is dated 20 July 1964. The umpire, after setting out the background of the submission, records that the arbitrators were in agreement as to the value if the property should be valued (a) as an industrial property, and (b) as a residential property as follows: (i) industrial gross value £143,750, value of improvements nil; (ii) residential value, gross value £100,000, value of improvements £40,000.

If the property should be valued having regard to its designation under the Auckland City Council's district scheme and the code of ordinances and on the basis that the land is a "private open space", their respective values were as follows:

Lessor's arbitrator:

Gross value £70,000

Value of improvements £40,000

Lessees's arbitrator:

Gross value £55,600

Value of improvements £40,000

The umpire records that Mr Yarnton, the Board's valuer, relied upon the following decision: *Hutt River Board v Lower Hutt City Council* [1960] NZLR 1107, *Canterbury Club Inc v Christchurch City Council* (1961) 1 NZTCPA 150; *Raja Vyricherla Narayana Gajapatiraju v Revenue Division Officer, Vizagapatam* [1939] AC 302; [1939] 2 All ER 317, and an Australian judgment the effect of which could only be quoted. The umpire quotes certain parts of the *Hutt River Board* decision (a decision of the Land Valuation Court) and regards the last paragraph as pertinent having regard to the restrictions imposed on the use of the land by the designation. The last paragraph of that decision cited by him is as follows: "The evidence before us by no means satisfied us that in August 1958, there would have been a demand for the subject land for industry. Nor does it support the view that it would then have been a simple matter for an interested purchaser to have the land rezoned for industrial use. No evidence was given of any inquiry from a prospective purchaser for the subject land and the chances that a purchaser might have been able to secure an industrial zoning for the land were in our opinion too highly speculative to warrant the making of a valuation on that basis" (*ibid*, 1111).

The umpire records that Mr Yarnton refers to s 33A of the Town and Country Planning Act 1953 as enacted by s 13 of the Town and Country Planning Amendment Act 1961 but points out that the district scheme was prepared before this amendment was enacted and the amendment therefore has no application to it. He quotes also the *Canterbury Club* decision. He states that Mr Noble, the league's valuer, in his submission that the property should be valued as a private open space, also relied on two judgments referred to, ie, the *Hutt River Board* and *Canterbury Club* decisions, and places an interpretation on them which is, to all intents and purposes, in direct conflict with that of his co-arbitrator. He cites the decision *Valuer-General v General Plastics (NZ) Ltd* [1959] NZLR 857 where the Land Valuation Court had held that the land should be valued in accordance with its zoning, but says that this case is distinguishable because the land in that case was zoned and not designated. After considering all the evidence he adds that the principle upon which his award should be determined is that the property should properly be valued in accordance with this designation under the Auckland City Council operative district scheme but at the same time, taking into account its potentialities, if any. He then proceeds to assess the value in accordance with this finding. He reviews the submissions made by the arbitrators in this respect and cites the submissions made by Mr Noble which he sets out as follows:

> A sports body wishing to establish a ground would purchase residential land but the following considerations would apply:
>
> (1) The cheapest land would be bought and this would almost certainly be residential land.
> (2) It would be suburban land, as the cost of central city land would be prohibitive.
> (3) A natural amphitheatre formation would be sought and this would probably be a poor contour for residential development.
> (4) Location relative to transport and parking facilities would be important.
> (5) Residential land of this nature could reasonably be expected to be available with a very limited road frontage similar to Carlaw Park at £800 per acre as it is virtually back land.
> (6) For an ideal location, relative to transport and a central location, it would be reasonable to expect to pay treble this amount or say £2,500 per acre. 6 1/4 acres would therefore cost £15,600.
>
> Costs of drainage and formation of playing fields could well cost an additional £1,500 per acre before spectator accommodation was provided.

He concludes that Mr Noble's estimate of the value of Carlaw Park valued in accordance with the designation is soundly based and he accordingly adopts it. His award concludes:

> My conclusion based upon all the relevant factors (including those not mentioned as well as those mentioned) is and may award therefore is that:

1. The gross value of the fee simple of the land included in the lease, including all buildings, fixtures and improvements is fifty-five thousand, six hundred pounds (£55,600).
2. The value of all substantial improvements of a permanent character made or acquired by the lessees or any preceding lessees and in existence on the said land is forty thousand pounds (£40,000).

Mr Sim, for the Board, said that although the written motion sought the stating of a case, counsel had agreed that the matter should be argued as though the present proceedings were a case stated. He submitted: 1. That the umpire was wrong in law and if this were so, there would be grounds for referring it back to him; 2. That the umpire was wrong in refusing to state a case when requested to do so: see *Russell on Arbitration*, 17th ed 808.

If the umpire had proceeded on a wrong basis, that would be an error of law enabling the Court to set aside the award. An illustration of this is *Melbourne Tramway & Omnibus Co Ltd v Tramway Board* [1919] AC 667. The lower Court hearing is reported in [1917] VLR 472.

The legal issue arises, he said, because of the City of Auckland district scheme which became operative on 12 June 1961 and in which the land was designated on a map as "private open space – playing fields". Designation is different from zoning. Designation is provided for in the second schedule to the Town and Country Planning Act 1953 which was amended in 1961. "Private open space" is not actually stated as such in the Act, but was meant to be private land designated as an open space in contra-distinction to publicly owned land. He accepted the relevant ordinances as being Ords 4 and 6 and the appendix at p 57 of the scheme. The effect of this is that, if a piece of land is designated for a particular purpose, it is not to be used except in accordance with that designation. The problem then is, what is the legal method of valuation? His two major submissions were: 1. If the proper method of valuation is to take into account the existing designation, then the umpire applied wrong principles of law in his valuation; 2. Alternatively, in the circumstances of this case, the designation should be entirely ignored and if that were so, then the valuation should proceed on the basis that the land was industrial land because both valuers had agreed that that would be its appropriate zoning.

Dealing with this first submission, namely, that the umpire had applied wrong principles of law, he considered that the umpire had not taken into account the actual location of the land or the possibility that the restrictions might be removed. Before advancing his argument as to the proper method, he submitted that the award showed various errors:

1. That a valuation in a contract means a market value: see *Lord Advocate v Home* (1891) 18 R (Ct of Sess) 397.

2. That the market value or exchangeable value is still the test even if there is not a market for a particular property and however difficult it may be to discover what the market value is: see *Spencer v The Commonwealth* (1907) 5 CLR 418, 431; *Holt v Inland Revenue Commissioners* [1953] 2 All ER 1499, 1501.

3. The umpire does not seem to have approached the matter in this way, but seems to have adopted the valuer Noble's submissions "what would a sports body do?"

4. What the umpire has in fact done is that, having held that it cannot be valued as industrial or residential land because of the designation, he has then valued that piece of land as if it were residential land somewhere else, that is to say, in the suburbs, and that cannot be the correct approach: see *Corrie v MacDermott* [1914] AC 1056, 1064, 1065. To arrive at the valuation of something by valuing something else is wrong and that is what was done here.

5. The fact that it is difficult to arrive at a market value cannot justify the adoption of a wrong method.

6. The method adopted is also wrong in that it is assumed that the only possible interested party might be a sports body. He has overlooked the possibility of an entrepreneur and by limiting the field to a sports body, he had precluded himself from considering its potentiality.

Dealing with the affirmative approach as to what should be done, he submitted:

1. That the correct approach was to take it at the market value including all potentialities: see *In re Whareroa 2E Block* [1959] NZLR 7, 11 and 12, and *Commissioner of Land Tax v Nathan* (1913) 16 CLR 654.

2. In arriving at this, an allowance must be made for the additional potentiality, namely, the possibility of this restrictive designation being removed: see *Corrie v MacDermott (supra)* 1056. A valuer must make some estimate of the chance of removal of the restrictions: see *Royal Sydney Golf Club v Federal Commissioner of Taxation* (1955) 91 CLR 610 when the principle was laid down and (1957) 97 CLR 379 where the amount was assessed by Kitto J.

3. The umpire and arbitrators have not taken this potentiality into account although the award makes a passing reference to potentiality when citing the *Hutt River Board* decision, but the reference to that decision by the umpire cannot be taken as indicating that the umpire has given proper consideration to this principle. This is shown by –

(a) The award is too obscure to be regarded as a finding of fact in this regard or as disclosing that he gave a proper direction on the law; and,

(b) Because the umpire has expressly adopted the method of the valuer Noble, those figures took no account of its potentiality and, accordingly, the umpire cannot be regarded as having done so;

(c) The method actually adopted which consists of valuing hypothetical land (not Carlaw Park) necessarily precluded a proper account being taken of Carlaw Park's potentialities;

(d) The reference in the award suggests that the umpire may have regarded the decision of the Land Valuation Court in the *Hutt River Board* decision as enunciating the likelihood of obtaining the removal of a town planning restriction is too speculative to be taken into account. If that is what the umpire meant, he has applied an entirely wrong principle because there is clearly no such principle of law. The *Royal Sydney Golf Club* decision showed that an allowance must be made for this, even although a small one;

(e) The Land Valuation Court was wrong in basing its decision in that case on there being no evidence of any purchaser and is at variance with the *Royal Sydney Golf Club* decisions which stated that a hypothetical purchaser was to be taken into account. If the arbitrators and their umpire had not taken this into account the possibility is by no means remote and there is nothing in the papers to show that any real consideration was given to this possibility;

(f) In assessing the potentiality of the land the umpire should not assume that a sports body was the only possible occupier of the land and should consider its potentiality as industrial land;

(g) It is clear from the award that the value of the property has been assessed by reference to suburban land. It must be valued as city property: see *Tetzner v Colonial Sugar Refining Co Ltd* [1958] AC 50. The valuer must not shut his eyes to the fact that Carlaw Park has many advantages that other places have not.

On this aspect he concluded that if the submissions were correct then the award should be remitted back to the umpire with directions as to the correct principles to be applied. This was done in *In re an Arbitration, Fletcher Humphreys & Co Ltd v Middleton* [1944] NZLR 502; [1944] GLR 262. The directions should be as follows: 1. The land should be valued on a basis of market value as it stands; 2. In assessing this value the umpire must make proper allowance for its central site and all other specific advantages and all the other specific advantages it possesses; 3. He should also base and allow for the possibility of the present designation being removed and the land being rezoned; 4. In this respect he should assess what a person interested in developing for industry would be prepared to pay for it taking into account the possibility of rezoning.

Mr Sim, then, as the second major submission, submitted that the whole approach was wrong and that the designation should be ignored entirely and the land valued as unrestricted fee simple land. He said that he made this submission with some hesitation and did so on the basis that this was a valuation based on contract whereas the reported decisions were all based on various statutory provisions such as rating, land tax, compulsory taking of land, etc. Just as a value to be assessed

under a particular statute may require a different interpretation, so here the value is a matter of construing the lease and, in line with previous authorities, the value must be the current market value. It must have been in the contemplation of both parties when the lease was entered into that the value would be based on the full value of the land and that the rental would be a true rental and not merely a nominal rental. The present position has arisen because of the use made of the leased land by the league as it was not bound to devote it to playing fields, although that may have been in the contemplation of the parties (see the judgment of Powers J in *MacDermott v Corrie* (1913) 17 CLR 223, 252). The intention of the parties was that a true rental should be paid.

Mr Chilwell, for the league submitted that the designation placed on the land, viz, private open space, was a designation in accordance with the facts and in accordance with its use from 1920 and that it was inappropriate to submit that the designation was not in the contemplation of the parties. From a legal point of view the designation was as much a matter for the board as for the league, as the board had had the right to object to the designation: see ss 23, 25 and 26 of the Town and Country Planning Act 1953. No object was made by either the board or the league to the designation. The arbitrators here were in the nature of experts, and valuers are commonly chosen in this field because of their superior knowledge: see 2 *Halsbury's Laws of England*, 2nd ed p 32 para 71. This could be relevant when considering Mr Sim's point that a valuer has disregarded the possibility of rezoning. He may have taken it into account and disregarded it or discounted it to nothing. He submitted: 1. That the primary function was to interpret the words in the lease and there did not seem to be any disagreement between the two parties on this; 2. The market value of the land is, for practical purposes, equivalent to the capital value of land under the Valuation of Land Act 1951. An authority for its use for the valuation of leases is *Cox v Public Trustee* [1918] NZLR 95; [1918] GLR 55; 3. The valuers after referring to that means, have had regard to the provisions of the operative scheme: see *Royal Syndey Golf Club* case (1955) 91 CLR 610 which decision emphasises that restrictions such as designations or zoning must be taken into account in contrast to other restrictions which must be disregarded: see also *Gollan v Randwick Municipal Council* [1961] AC 82 and *Rosehill Race Course* [1965] *The Valuer* 406.

The decisions also require that a possibility of change in a scheme is to be taken into account: see *Sonnerdale v Valuer-General* (1953) 19 LGR 211 and the second decision in the *Royal Sydney Golf Club* case, (1957) 97 CLR 379 and *Rosehill Race Course* (*supra*).

The valuers are not entitled to place a valuation upon the land upon the basis of its possible underlying zoning depreciated by an allowance for restricted designation: see *Royal Sydney Golf Club* case, 2nd Report (*supra*) 391 per Kitto J and the *Rosehill Racecourse* decision. The importance of the *Rosehill Racecourse* decision is that the valuers were agreed that, as here, the appropriate industrial zoning would have been the logical zoning if the restrictions were removed. Next, the valuers must have regard to the effect of the town planning scheme and they did correctly address themselves to the purpose for which the land must be used.

What has to be taken into account is the designated use, viz, private open space with the possibility of rezoning.

The umpire had applied the proper principles in his award and the Court should be careful not to convert the appeal into an appeal on the facts, as that is a matter for arbitrators and umpire and the jurisdiction lies only on questions of law: see *Melbourne Tramway and Omnibus Co Ltd v Tramway Board* (*supra*). He agreed that value means market value, that if you cannot find a market the arbitrators have to do the best they can and, in some cases, must assume a hypothetical purchaser. He contended that the valuer, Noble, although he had considered values in the suburbs, had eventually settled his figure having regard to the land's ideal location and that he had in fact valued the park in its location.

With regard to the selection of a sports body as a hypothetical purchaser, he submitted that was a proper approach having regard to the designation of the land and that a valuer would be involved in feats of imagination were he to consider any other purchaser than the sports body: see the decision

of the Judicial Committee in *Raja Vyricherla Narayana Gajapatiraju v Revenue Divisional Officer, Vizagapatam* (*supra*). He agreed that a valuer must take into account all the potentialities of the land including the possibility of the removal of the restrictions, but he submitted that the umpire had taken that factor into account. He referred to p 7 of the award where the umpire particularly said "at the same time taking into account its potentialities if any" and his conclusion "based upon all the relevant factors including those not mentioned as well as those mentioned".

Mr Sim has said that the valuation of the valuer, Noble, which had been accepted by the umpire, had not taken the special advantages of Carlaw Park into account, but he pointed out that Noble had referred to the quite ideal location. If directions as suggested by Mr Sim were to be given, the first direction should have added to it "subject to its designation", the second suggestion should include the words "and disadvantages". As regards the fourth suggestion, if I should decide that consideration should be given to a body other than a sports body, then the suggestion should be preceded by the words "if they should consider that there was a possibility of there being a buyer other than a sports body then they should assess etc . . .".

As regards Mr Sim's second major suggestion, namely, that the designation should be disregarded, he submitted that there was not basis whatever for this suggestion and that it was an approach not at all justified by the reported decisions.

I have read the authorities cited carefully and considered the award in the light of them. I consider there is no basis at all for Mr Sim's second major submission, namely, that the valuation should be made in disregard of the plan. There are no special features in my view when the valuation is made for the purposes of fixing the rental under a lease. It is simply a matter of ascertaining the true value of the land according to the formula set out in the lease and then applying the appropriate percentage return. The clause in the lease is very similar to that in the leases under consideration in *Cox v Public Trustee* (*supra*). If there is to be a different value for rent assessment from the market value, then it means that the lessee is paying and the owner is receiving a rental based on a higher value than that at which the land could be sold. This cannot be so. The purpose of the rent assessment is to give a fair return on the unimproved value of the land affected by the extrinsic circumstance outlined by the Full Court in that decision.

The necessity to take town planning restrictions into account in valuations of land in New Zealand has been so determined by the Land Valuation Court in *Hutt River Board v Lower Hutt City Council* (*supra*) and *Valuer-General v General Plastics (NZ) Ltd* (*supra*). In the former decision the scheme was not yet operative, but there seemed to be general agreement as to what the zoning would eventually be, and the Court held that the valuers should have valued the land in its existing state at the relevant date and zoned as it would be while making a proper allowance for any potentialities it might possess. In the latter decision there was actually a scheme in operation, but the existing use was a permitted non-conforming use. The report of that decision shows that it was agreed that regard must be had to the restrictions on use imposed by an operative scheme and the Court determined the value on the zoning of the land irrespective of the use of the buildings. The Court said that this was in accordance with decisions in New South Wales cases.

The matter has been prominently before Courts in Australia for some years. In 1954 the Royal Sydney Golf Club, which owned a golf course, appealed against an assessment for land tax. The matter came before Kitto J who stated a case for the opinion of the Full Court. The question asked was –

> In arriving at the unimproved value under the Land Tax Assessment Act of the land the subject of the appeal should the land be valued without regard to the provisions and effects of the Council of Cumberland Planning Scheme Ordinance?

The case stated shows that the scheme came into operation in 1951 as a schedule to a local government amending Act. The land was shown on the scheme map as "Park and Recreation Area". The decision was given as a single decision of the Court. The Court comprised Dixon C J, McTiernan J, Webb J, Fullagar J, and Kitto J. The Court said: "There remains the question how the distinction

which is drawn above applies in this case to the County of Cumberland scheme. Do thew restrictions which it imposes upon, threatens to or suspends over land within the areas in the scheme, particularly that coloured dark green, amount to nothing but an encumbrance or condition or restrictive obligation affecting the titles to specific parcels of land? Is it not rather a law operating over an area of country within the State which, though not large, is chosen independently of all questions of title or ownership and controlling the use to which owners in fee simple or for any less estate or interest occupiers, licensees and indeed even trespassers may put the land? Its nature and purpose seem to bring the restrictions flowing from the scheme under the second description. However the title may be derived and whatever may be the form of ownership, occupation or enjoyment, the use of all land within the scheme is affected actually or contingently, presently or in the future, but in varying degrees and subject to varying conditions. In the case of land within the area coloured dark green the restriction, if not more proximate, is at all events more stringent. But it is nevertheless a restriction which arises from the law affecting an area in which the land lies, and not something altering the hypothesis upon which the Federal statute requires the land to be assessed. It must be taken into account in ascertaining the unimproved value of the land. The first question in the case stated should therefore be answered that in arriving at the unimproved value under the Land Tax Assessment Act of the land the subject of the appeal the land should not be valued without regard to the provisions and effect of the Country of Cumberland planning scheme" (*ibid*, 624).

In *Gollan v Randwick Municipal Council* [1961] AC 82; [1960] 3 All ER 449 the Judicial Committee considered the question of *other* restrictions on the title to land, and held that they were not part of the general statutory law of the State to be taken account of (as were the county planning restrictions in the *Royal Sydney Golf Club* case). This, at least by implication, shows an approval of the Full Court's decision in respect of planning restrictions – nor did the parties argue otherwise, the question being only whether the other restrictions were to be taken into account. This was a case of a valuation for rating purposes. The question rose also before Sugerman J in *Council of the City of Sydney v Valuer General (supra)* when he followed the decision of the Full Court in the *Royal Sydney Golf Club* appeal and he held that the case of Trumper Park which was coloured dark green on the plan of the Cumberland County was indistinguishable so far as the restrictions were concerned "as to them the only questions are what they are and to what extent they affect value".

Section 33 of The Town and Country Planning Act 1953 makes it the duty of the council and of every public body to enforce the observance of the requirements and provisions of the scheme and

> "neither the Council nor any other public body or local authority nor any person shall thereafter depart or permit or suffer any departure from the requirements and provisions of the scheme."

Section 36 provides penalties against those using land in a manner not in conformity with the scheme and s 37 provides additional powers for enforcement of district schemes. The scheme accompanying the plan has various ordinances to the same effect.

There is therefore the highest authority (which I adopt with respect) for the view that in the valuation of land for rating and land tax purposes town planning restrictions must be taken into account and I cannot see that in a valuation of land for the assessment of rent the valuers can disregard these restrictions where also the statute so clearly limits the use of the land. Both arbitrators and the umpire did take them into account in their respective valuations and award. The schedule to the Act as it stood when the scheme was being prepared required provision to be made for "the designation of open spaces for purposes of value to the community or land not intended to be owned by the Council". After the 1961 amendment this read "the designation of land or buildings used for purposes of value to the community but not intended to be owned by the Crown, the Council or any local authority". The amendment is designed to restrict the designation to lands privately owned.

I now turn to the other questions raised by Mr Sim.

He says that the arbitrators and the umpire have proceeded on the basis that the hypothetical purchaser would be a sports body and that they should also have considered the possibility of its

being purchased by an enterprise for development. I think it is correct that that has been the approach of all three. They found themselves faced not only with such a designation but also the further qualification of "field sports" which under the scheme plan are "archery, athletics, baseball, cricket, football, hockey and softball". In New Zealand these are all games for amateurs, not professionals, and I do not think that it was being anything else but realistic to regard the hypothetical purchaser as a sports body if its use is to continue as designated. If this is so then the question becomes simply "what would a hypothetical purchaser as a sports body if its use is to continue as designated. If this is so then the question becomes simply "what would a hypothetical purchaser pay for the land having regard to its use?" The next question must also be asked, namely, as to its potentiality and the possibility of the removal of restrictions. But in the meantime I consider the question divorced from potentiality. The approach adopted, as I see it, has been this. A sports body could as an alternative buy a similar block of land elsewhere. On the present state of development of metropolitan Auckland the alternative might well be or rather have to be land in the suburbs. That would normally be residential land, as industrial or commercial land almost usually bears an enhanced value and normally also, it would be a block of land not yet subdivided and perhaps presenting difficulties for subdivision. Such land would cost so much per acre. What would the same body be prepared to pay for land in an ideal situation but designated for the same purposes? That seems to me to be the approach of the umpire and the arbitrator whose valuation he adopted, and it seems to me to be a proper first approach to the valuation.

But the potentiality of the land must also be taken into account and here they are in agreement that, if it were not a designated area, it would be of greatly enhanced value as industrial land. But such potentiality can only arise if the designation is removed. It seems to me, then, that the next question must be "what additional sum would a hypothetical purchaser, whether a sports body or any other person, be prepared to pay for the chance of having the restriction removed and being able to explore its potential as industrial land?"

As was said by Lord Dunedin when delivering the judgment of the Judicial Committee in *Corrie v MacDermott* [1914] AC 1056, 1063: "It seems quite plain that although as above said by their Lordships restrictions must be kept in view, the chance of such restrictions being discharged must also be kept in view" and referring to *Stebbing's* case (1870) LR 6 QB 37 where certain land which was taken was held in trust as a church yard: "The Rector was entitled to have valued his chance of ever getting the land in his hands in such condition as could bring pecuniary value. But the valuation under the circumstances might well be nil."

This decision as to the question of which restrictions should bear against the land is probably now to be confined to cases of property resumed or expropriated (see *Gollan v Randwick Municipal Council* (*supra*) 96) but I think the principle that a relevant issue in a valuation of restricted land is the removal of restrictions, still applies.

The *Royal Sydney Golf Club* case again cam before Kitto J (1957) 97 CLR 379 after the answers to the case stated by him had been given by the Full Court. By this time (March 1957) removal of the restriction was not a mere possibility because the local body found that by imposing the restriction it had become liable to acquire the land if so requested by the owner, and to avoid the expenditure of so much money as so many parcels were affected, the council obtained the suspension of the scheme. The land was consequently available for interim development, but for this the further permission of the council would be required and there was evidence that this would be contrary to the policy of the council. However, the question still was as to the value of the land at the date of the assessment. Kitto J said: "As at 30 June 1951 then, the effect of the County of Cumberland Planning Scheme Ordinance in relation to the appellant's non-exempt land was that no building could be erected on it and no work of a permanent character could be carried out on it, unless the scheme should be suspended so far as that land was concerned under s 342 and permission for the erection of buildings or the carrying out of work upon it should be given by or under the provisions of an ordnance. It seems clear that if the scheme had not applied to the land the most economic

method of dealing with it would have been the method of subdivision and sale of residential blocks. The restrictions, so long as they remained undiminished, made the adoption of that course impossible. They must therefore have had a depressing effect upon the value of the land. But that effect could not have been as great as it would have been if the restrictions had been completely incapable of removal or relaxation. In determining the value of the land I must allow for such possibilities as there were that the restrictions might be removed or relaxed: *City and South London Railway Co v St Mary Woolnoth and St Mary Woolchurch Haw* [1903] 2 KB 728; *Corrie v MacDermott* [1914] AC 1056. And in doing so, I must take into account not only all that was then generally understood or ascertainable but the situation as it actually was in respect both of fact and of law; for the supposition must be made, in order properly to apply the test of value laid down in *Spencer v The Commonwealth* (1907) 5 CLR 418 that a price is arrived at in bargaining between a hypothetical prudent purchaser and vendor each of whom is equipped with knowledge of the existing circumstances: *Deputy Federal Commissioner of Taxation v Gold Estates of Australia (1903) Ltd* (1934) 51 CLR 509, 515. Theoretically, the position at the material date was that the County of Cumberland Planning Scheme Ordinance might at some time be simply repealed by Parliament or rescinded by the Governor under s 342M and might not be replaced by any provisions of a similarly restrictive kind: but having regard to the nature, purpose and history of the scheme I think that there was little more than a theoretical possibility of such an eventuality. It is not so easy to decide what was the likelihood that an owner of the appellant's non-exempt land might be able to procure, either as to the whole or as to any part of that land, a suspension of the scheme and a permission for residential use, so that sales of subdivided residential blocks might become feasible" (*ibid* 384).

He reaches a figure "before making any allowance for the chance that sales of building lots in subdivision might become possible at some future date". He continues: "How much should be allowed under that head is necessarily a matter of guesswork, for the hypothetical vendor and purchaser would have to engage in sheer speculation. They might perhaps consider what net profit might be realised in the event of subdivision becoming possible, working along the lines discussed in *Turner v Minister for Public Instruction* (1956) 95 CLR 245 and include in the price they agreed upon a percentage of that sum, chosen so as to reflect what chance they thought there was that the price might be realised and what delay in realising it they thought should be provided for. But there would be so many incalculable factors in this method of approach that I think they would more probably agree on the addition to the amount otherwise arrived at of a percentage of that amount. From what I have said it will be apparent that I regard the chance to be allowed for as one which negotiating parties would acknowledge but would not treat as more than a very speculative item in their deliberations. I think an increase of 5% is as near the mark as one can get" (*ibid*, 395).

The question arose also in *In the matter of Objections by the Council of the City of Parramatta to the Valuation of Rosehill Racecourse*, 18 *The Valuer* (No 5 issue of January 1965). The land was also within the County of Cumberland planning scheme being designated or zoned "open space – parks and recreation areas etc, . . ." It was agreed by all witnesses that the land upon which the racecourse is established would be eminently suited and in great demand for industrial purposes if the provisions of relevant planning schemes permitted it to be used for those purposes. This land was also subject to the same planning history as the Golf Club. Else-Mitchell J sets out that history most conveniently. Suffice it to say that after the suspension of the scheme, the restrictions were reimposed with some slight variations on the Turf Club's giving a release of claims for injurious affection by reason of the designation or planning. Else-Mitchell J adopted with approval the passage of Kitto J's judgment which I have set out and also commented, referring to the authorities: "They also, I think cast upon the person or authority seeking to establish a value based upon some different use from that which is authorised by the restrictions, the burden of showing the practicability or reasonableness of the land being devoted to some such use, and needless to say this extends to showing the probability of some relaxation or variation of the scheme and the means by which that is likely to be achieved" (*ibid*, 412).

Later he adopts Kitto J's approach: "I think the proper course is to inquire first what was the value of the land on the footing that there was no possibility of its ever being turned to other than recreational purposes and then how much extra should be allowed for such chance as there was of securing permission for (some other) use at some future time" (*ibid*, 414).

And he reviews the valuations for the first of these and proceeds: "For these reasons I adopt the recreational value, assigned to the land by Mr Dawson, of £1,000 per acre at each of the valuation dates and it remains only to consider what amount if any should be added to those values to allow for the chance that at one or other of those dates the land might be developed for more profitable industrial uses."

Various estimates of this chance were given by the expert witnesses and he states that he has already expressed his view as to the prospect of any such development being allowed but adds the general observation: "That any scheme for the release of the land for other than recreational uses would have had to undergo the scrutiny of the Cumberland County Council, the Department of Local Government, the Parramatta City Council and probably other authorities and might not have been implemented until some formal inquiry had been undertaken into the desirability of such a release and into objections which might have been made to it in the public interest" and he sets out the sections making provision for those things and comments on the difficulties which might b e experienced. Eventually he fixed a round figure to be added to the original figure. It is convenient at this stage to draw attention to the procedure laid down in s 35 of our Act where it provides the procedure for the departure from a scheme and to the regulations made thereunder.

I adopt with respect the approach made by Kitto J and adopted by Else-Mitchell J as the correct approach in New Zealand to the valuation of land affected by planning zoning or designations.

There is no doubt here that all concerned have adopted the correct method of first valuing the land on the footing that there was no possibility of its ever being turned to other than recreational purposes, but have they considered how much extra should be allowed for such chance as there was of securing permission for some other use at some future time?

It may be that when a valuer uses the term "potential" to land subject to a scheme that he embraces this aspect in the term. But I think not necessarily so.

"Potentiality" has always been a relevant factor in the valuation of land. The land being valued has always been entitled to any extra value because of potentiality. Lord Keith when delivering the judgment of the Judicial Committee in *In re Whareroa 2E Block* (*supra*) said: "There are, however, as has frequently been observed, cases where land has a potentiality which may be realisable in the foreseeable future and if so, will give the land an added value over and above its value for the uses made of it at the time of the taking" (*ibid*, 10).

Those last words are wide enough to cover not only other uses, by which I mean alternative uses such as, for example, farm land capable of development for urban industrial or residential use within the foreseeable future, but also more intensive use within itself, eg, farm land capable of more intensive production by improved farming methods. The Full Court in *Cox v Public Trustee* (*supra*) listed a number of matters, particularly improved drainage, better transport facilities and increased settlement which it called intrinsic matters affecting values and I think if these are likely to occur within the foreseeable future they give the land a potential value in addition to its value without that. Here the umpire says in his award that he has reached his decision "taking into account its potentialities (if any)". The use of the term by itself would be sufficient to embrace the possibility of the removal of planning restrictions, but planning in New Zealand is of comparatively recent times. Although we have had town planning legislation since 1926, it is only during the last few years that we have had operative schemes, an Appeal Board, special departments of local body administration, etc.

Moreover the Australian decisions, where this matter has been so prominent and Judges have had to place a figure on that possibility, may not be generally known in New Zealand although, of course, they are more likely to be known to arbitrators and an umpire as expert as these here.

Because by itself the term "potentiality" embraces many aspects or "possibilities", a term that Archer J used in the *Hutt Power Board* decision, I cannot be sure that the umpire did consider this possibility – this aspect of potentiality – when considering the land's potentialities even although he concludes that he has reached his conclusion "upon all relevant factors (including those not mentioned as well as those mentioned)". I think, therefore, that I should remit the matter back to him with the following proposed direction (upon which I shall seek the assistance of counsel before finally settling it):

> "The law requires you to take into account in your valuation the chance if any of permission being obtained for some other use at some future time and to value such chance and to add such figure (if any) to the valuation otherwise reached on the assumption that there is no possibility of its being used for any other purpose than as designated. It may be that you have already done so, but the Court considers you should again consider the valuation after hearing representations from the parties. This direction is not to be construed as indicating that any amount at all should be added to the amount of the award, that being a matter entirely for the umpire, and this decision is given *ex abundante cautela.*"

I should add that the position which has arisen does not reflect adversely on either partly. It is understandable that the board as a public body should seek to obtain the maximum proper rent for land which probably but for this lease might be in use as industrial land. On the other hand the designation or zoning of the land is not in the hands of the league which is also bound by the designation and cannot, even if so wished, use the land for any other than the designated purpose.

This is not a case for an award of costs for or against either party.

Judgment accordingly.

Solicitors for the Auckland Hospital Board: *Hesketh and Richmond* (Auckland).
Solicitors for the Auckland Rugby League (Inc): *Haddow, Chilwell, Pain and Palmer* (Auckland).