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Carlton Heights Ltd. v Minister of Works - [1963] NZLR 973

Land Valuation Court, Auckland
1, 2, 21 August 1963
Archer J.

Public Works -- Compensation for land taken -- Land with subdivisional possibilities -- Method of valuation -- Evidence that some land sold at full realisable price without allowance for profit and risk -- Circumstances under which such allowance not to be made by Court.

When land taken for a public work has subdivisional possibilities its value for the purpose of fixing the compensation payable is in general to be arrived at by first calculating the gross sum capable of realisation from the sale of sections and then deducting therefrom the estimated costs of development and realisation including allowances for rates, other outgoings, interest on capital outlay and an allowance for profit and risk which in general is calculated at 25 per cent of the realisable value.

The fact that in the district in which the subject land is situated some building companies purchase land for subdivision and building purposes at its full realisable value does not require the Court to eliminate from its valuation of the subject land the usual allowance for profit and risk unless there is direct evidence that, on the date of taking, there was a purchaser available for the land who was prepared to pay in cash the full amount expected to be realised from the sale of sections.

General observations as to the method of valuing land with subdivisional possibilities and the nature of the evidence the Court expects from valuers called as witnesses.

CLAIM for compensation for the taking under the Public Works Act 1928 of an area of land at Mount Roskill, Auckland, for the purpose of a school site.

Beattie and Sim, for the claimant.

Speight, for the Crown.

Cur adv vult

ARCHER J.

The claim was originally for £ 28,000, and in the course of negotations between the parties a large measure of agreement was reached as to the value of the property as at 16 May 1961, the date of taking, if it could then have been subdivided by the owner for sale in residential lots. Using the recognised method of valuing land by reference to its subdivisional potential, it was agreed that a subdivider might have expected to realise £ 50,770 from the sale of sections and that

after deducting the costs of development and making all proper allowances including an allowance of £ 9,687 for profit and risk, there would be a balance of £ 19,550, representing the value of the land. This sum the Crown offered, without prejudice to certain legal defences, to pay to the claimant, and £ 19,000 has in fact been paid.

If the land is properly to be valued on the basis above described, the only issues now between the parties are whether the sum of £ 9,687 allowed for profit and risk was a proper deduction and whether the claimant should recover the cost of certain work done on the land before it was taken over. The claimant now asks for £ 9,687 for the land, in addition to the sum of £ 19,550 already offered, and £ 750 12s. 6d. for work done thereon. The Crown is prepared to pay £ 19,550 but says that if any greater sum is found to be the subdivisional value of the land as at 16 May 1961 it will raise by way of defence certain matters arising out of the provisions of the Town and Country Planning Act 1953, which it is otherwise prepared to waive.

The history of the subject land is somewhat involved but the essential facts may be summarised as follows: The claimant is a private company of three shareholders, to two of whom, Messrs. W. A. Subritzky and Robson, both being directors of the company, some reference will be necessary. In March 1956, before the Company was formed, its present shareholders became interested in purchasing and subdividing the subject land, and secured the approval of the Mount Roskill Borough Council to a proposed plan of subdivision. This proposal, however, fell through. In January 1959 the claimant company was incorporated and negotiations were again commenced for the purchase of the land. On 4 February 1959 Messrs. Subritzky and Robson inspected the land in the company of Mr J. McMichael, the Assistant Engineer of the Mount Roskill Borough Council. It was known to this officer that the Auckland Education Board had been interested in securing the land or a part of it for a school site, but it is not clear that he appreciated at the time that a large part of the area had been designated as a school site on an undisclosed scheme plan which had been prepared for the Borough Council in accordance with the Town and Country Planning Act and had been recommended by resolution of the Council for the approval of the Minister in October 1958. Mr McMichael told the Court that at the inspection on 4 February 1959 he inquired of Mr Robson as to the position with regard to the Education Board and that Mr Robson replied that the owner of the area, a Mrs Turnbull, had told him that the Education Board was no longer interested in it. Mr Subritzky told the Court that he did not hear this conversation, but that he would accept Mr McMichael's evidence thereon. Mr Robson was not called.

On 6 February 1959 the claimant purchased the land from Mrs Turnbull and approximately a week later submitted a subdivisional plan for the approval of the Borough Council. Mr Subritzky claims to have understood that the plan would be approved, and the Company forthwith undertook the development work for which it claims £ 750 12s. 6d. On 13 February 1959 the Town Planning Committee of the Borough Council requested the company to amend its plan in certain respects and an amended plan was submitted in due course. On or about 24 February 1959 the Education Board came more directly into the picture and it then became clear to all parties that a substantial part of the property had been designated as a school site on the undisclosed plan which had been approved by the Borough Council

in 1958. Mr Subritzky made urgent representations to the Education Board to release its claim on the land and to the Borough Council to approve the plan of subdivision, and it would appear from the records that the Borough Council was sympathetic to the company's proposal to develop the property for residential purposes. On 13 March 1959, however, the Education Board served upon the Mount Roskill Borough Council a requisition under s. 38 (5) of the Town and Country Planning Act 1953 the operative portion of which read:

> NOW THEREFORE the Board doth hereby require you and doth hereby confirm its earlier requirement to you to prohibit the proposed work of Carlton Heights Ltd. on the said land and to prohibit the subdivision of the said land.

Notice of the requisition was in due course given by the council to the claimant company.

Following receipt of this requisition the Borough Council appears to have taken no further action on the claimant's application for approval of its plan for subdivision, and there is no record of the application being specifically refused. Mr Subritzky sought with great persistence during the next two years to persuade the Education Board and the Minister of Education to release the land so that the claimant could proceed with its plans. His representations were not successful and the land was ultimately taken by the Crown on 16 May 1961.

The claimant does not question the validity of the requisition given under the Town and Country Planning Act on 13 March 1959, and does not dispute that from and before October 1958 a large portion of the subject land had been designated as a school site on the undisclosed scheme plan of the Mount Roskill Borough Council. It contends, however, that the designation upon the plan was not known to it and was not binding upon it when it purchased the land on 6 February

1959. It contends, moreover, that for the purposes of this claim the Court should disregard the requisition of 13 March 1959, and should value the property as if at the date of taking it was freely available for subdivision by the owner.

The Crown, as already stated, has offered to pay the value of the land as if subdivisible at the date of taking, provided that in the calculation of its value a proper allowance, which it assesses at 25 per cent, is made for profit and risk. The claimant contends that there are special circumstances in this case which make it unnecessary to make any allowance at all on this account. Before considering the nature of these special circumstances we propose to set out the principles of law which appear to be relevant to the matter.

The Court is directed by s. 29 of the Finance Act (No. 3) 1944 to fix the value of land for purposes of compensation at the amount which the land if sold in the open market by a willing seller on the specified date might be expected to realise. The conception of a sale in the open market by a willing seller imports, by implication, the participation therein of a willing purchaser, as was recognised by Lord Romer in Raja Vyricherla Narayana Gajapatiraju v Revenue Divisional Officer Vizagapatam [1939] A.C. 302; [1939] 2 All ER 317, when he said: "The compensation must be determined, therefore, by reference to the price which a willing vendor might reasonably expect to obtain from a willing purchaser. The disinclination of the vendor to part with his land and the urgent necessity of the purchaser to buy must alike be disregarded. Neither must be considered as acting under compulsion. This is implied in the common saying that the value of the land is not to be estimated at its value to the purchaser" (ibid., 312; 321).

As to the valuation of land which is suitable for subdivision for building purposes, Lord Romer said in the same case: "It is plain that in ascertaining its value the possibility of its being used for building purposes would have to be taken into account. It is equally plain, however, that the land must not be valued as though it had already been built upon, a proposition that . . . is sometimes expressed by saying that it is the possibilities of the land and not its realised possibilities that must be taken into consideration" (ibid., 313; 322).

Witnesses giving evidence before this Court appear sometimes to be under the impression that there is room for substantial differences of opinion between a "willing seller" and a "willing purchaser" as to the value of a piece of land. It should not be overlooked that the statutory conception of a sale by a willing seller to a willing purchaser presupposes agreement between them upon a cash price which is acceptable and fair to both, and which represents the market value of the land. Both seller and purchaser are deemed to be reasonable men who are prepared to give proper but not excessive weight to all relevant considerations. The actual owner of the subject land may in certain circumstances be envisaged as a hypothetical purchaser of the same. In Pastoral Finance Association Ltd. v The Minister [1914] A.C. 1083, it was held (where land had been resumed by the Government of New South Wales) that the compensation payable to the owner of the land was the amount which a prudent man in the position of the owner would have been willing to give rather than fail to obtain it. The view was expressed in the same case that no man would pay for land in addition to its market value the additional profits he would hope to make by the use of it.

In the valuation of a block of land by reference to its subdivisional potential a well recognised method of calculation has been devised by valuers, and reduced to a formula which appears to be generally acceptable to valuers and to the Courts. The method envisages a hypothetical subdivision of the subject land, and the formula requires first the calculation of the gross sum capable of realisation from the sale of the sections therein. From this sum are deducted the estimated costs of development and realisation, including allowances for rates and for other outgoings, and for interest on capital outlay. The formula provides also for an allowance for profit and risk, the need for which is, in the present case, in dispute. The balance after deduction of costs and outgoings and all proper allowances, is deemed to be the value of the land as an undivided block.

The making of a proper allowance for profit and risk has been considered in the past to be an essential step in the calculation of the value of land by reference to a hypothetical subdivision. The allowance has been made in the belief that no one would be prepared to undertake the subdivision of land without making due allowance for the risks associated therewith, and without the prospect of a reasonable return for his efforts. In In re Whareroa 2E Block [1957] NZLR 284 Gresson J. said in reference to this matter: "The Court in assessing the potentialities may take into account the suitability of the land for subdivision, the prospective yield from a subdivision, the costs of effecting such a subdivision, and the likelihood that a purchaser acquiring the land with that object would allow some margin for unforeseen costs, contingencies and profit for himself" (ibid., 290).

On behalf of the claimant it is suggested that the use of the word "likelihood" indicates a recognition by the Court that there might be

purchasers who would not make allowance for profit and risk, but we doubt whether the learned Judge intended to subscribe to that view. F. B. Adams J. in the same case made reference to the fact that valuers had made deductions of from 25 per cent to 33 1/3 per cent by way of allowance for profit and risk, and said: "We are in no way concerned with figures but the propriety of making due allowance for such matters is not open to question" (ibid., 299).

Later in his judgment the same learned Judge said: "As for the possibility of his making a profit from his bargain, all purchasers, real or hypothetical, presumably contemplate so doing and the argument is beside the point. The realisable value, which is the measure of compensation, is merely the price that people may be expected to pay for the opportunity of making whatever profit can be got from the land" (ibid., 300).

The specific question whether deductions for risk and for profit should be made when valuing for purposes of compensation was fully considered in Turner v Minister of Public Instruction (1956) 95 C.L.R. 245, where it was held by the High Court of Australia that in valuing on the hypothesis of a sale in globo to a purchaser buying land with a view to subdividing and selling in subdivision it was necessary to make both deductions (i.e. for risk and for profit) in order that full allowance should be made for the fact that the potentiality of the land for sale in subdivision was not immediately realisable at the date for valuation. In discussing the reasons for these deductions, it was pointed out that the allowance for risk was equivalent to a discount by the vendor in consideration of his being relieved of risks which he could not avoid if he undertook the subdivision of the land himself, and to a discount for cash in lieu of an estimated and uncertain future return. As to the deduction for profit (so called), it was pointed out that this was not a true profit but the return which it would be customary and reasonable for a subdivider of land to expect, in addition to interest, as a reward for his enterprise and capital outlay. A smaller cash price may be the equivalent in value of a larger return which is securable only at the cost of risk and effort, while a vendor is entitled to no more for his land than the sum which a willing and prudent purchaser would give to obtain it.

It is important to remember that the sale which is envisaged in the course of valuing land is a hypothetical sale. When we attempt to decide what a willing seller may expect to receive and what a willing purchaser should be prepared to pay for a piece of land, we are dealing with hypothetical people envisaged in a hypothetical transaction. The owner's views as to the value of his land and his plans for its use concern us only to the extent that they may help us to decide what a hypothetical owner might reasonably expect to receive for the land if willing to sell it but not under pressure to sell. Similarly we are concerned with what a particular person might be prepared to pay for the land only to the extent that it may help us to decide what a hypothetical purchaser might prudently pay if willing to buy the land but not obliged to buy. When land with a potential value for subdivision has to be valued it is proper to assume, in our opinion, that a hypothetical seller would recognise that the subdivision of land is always subject to risks against which a purchaser is entitled to protect himself and the extent of which must be considered in fixing the price. Similarly it is proper to assume that a purchaser who subdivides land will expect to secure an appropriate return or profit as a reward for his enterprise.

The valuation of land suitable for subdivision, being a matter requiring a wide practical knowledge of the subdivision of land and the application of that knowledge to situations of a hypothetical character, is peculiarly within the province of experienced professional valuers. When a valuer is called to give evidence, the Court prefers him to present a complete valuation of the land and to vouch for each step therein and for the final conclusion arrived at. The Court is not happy when presented with a mass of factual evidence by laymen, and virtually invited to co-ordinate the evidence and make its own assessment of value. Whether and to what extent, when using the customary formula, an allowance should be made for profit and risk, is a matter to be determined in our opinion by reference to the character of the land and the nature and extent of the risk to be anticipated in its subdivision, and is a matter on which the Court prefers to be guided by valuers. The risk associated with the subdivision of land may still be substantial notwithstanding that a particular person may say that he would be prepared to disregard the risk and to make no allowance for risk if subdividing the same. We are not so much concerned with the attitude of any particular person towards the question of allowing for risk and profit as with the extent to which such an allowance should be made by a prudent purchaser if proposing to subdivide the subject land.

The extent to which those who undertake the subdivision of land do in fact allow for risks and budget for profits is, of course, entitled to some weight as evidence of what is reasonable in this regard. Such evidence on these matters as has come before the Court from time to time does not suggest that any particular percentage of capital outlay is generally acceptable to subdividers as producing an adequate cover for risk and a sufficient return for enterprise. It does suggest, however, that separate allowances are not usually made for risk and profit and that what subdividers usually aim for is a profit large enough to cover all possible risks. Where a specific sum is allowed for profit and risk the hope of the subdivider is that the risks will prove negligible and the profit correspondingly enhanced. While 25 per cent of capital outlay

is frequently allowed for profit and risk when calculating the value of subdivisible land by the use of the formula, a larger allowance may in appropriate circumstances be desirable, and we believe that profits greatly in excess of 25 per cent are frequently sought and recovered by those engaged in the subdivision of land. In the present case the claimant purchased the subject land in February 1959 for £ 8,500. According to Mr Subritzky it expected at that time to make a profit of £ 19,000 within two years by the subdivision of the same.

The contention that no allowance for profit and risk should be made in this case is novel and is based upon an unusual situation which is claimed to exist in parts of the Auckland area. According to the claimant, a number of Auckland builders have found it necessary since the early part of 1961 to pay such high prices for land on which to erect houses for sale that they are obliged to carry all risks and to forgo all profit in connection with the subdivision of the land. It is conceded that until recently it was the practice of builders when buying land for subdivision to make allowance for the risks of subdivision and to budget for a profit on the sale of sections as well as upon the houses to be erected thereon, but it is claimed that some large builders now dispose of sections on a non-profit basis and even at a loss, and make their profits entirely on their building operations.

Mr Subritzky on behalf of the claimant is prepared to concede, we understand, that prior to the early part of 1961 when this situation arose, the subject land would have been properly valued on the basis propounded by the Crown at £ 19,550. This figure, as already stated, was reached after making an allowance of £ 9,687 for profit and risk, being 25 per cent of total estimated outlay. Mr Subritzky claims, however, that at the date of taking there were building companies which would have bought the land at the value shown by the formula if no amount had been deducted for profit and risk. They would, in his opinion, have been prepared to pay the £ 9,687 so deducted, as well as the normal value of £ 19,550, or a total of £ 29,237 for the subject land.

The policy attributed to these building concerns is said to have been caused by a change made by the Government in April or May 1961 in the basis on which State assistance was made available to builders for the financing of homes through what were known as the "group housing" and "lease-purchase" schemes. The substance of the change made in April-May was that from that date forward State assisted finance was to be available only in respect of 60 per cent of the houses built in any subdivision, instead of in respect of 100 per cent as theretofore. Those undertaking the building of houses have therefore found it necessary to sell 40 per cent of their houses without the benefit of easy finance, and we are told that this led to great competition between the larger builders for land in favoured areas where sections could be readily disposed of. This state of affairs is not claimed to have affected the value of sections to the public, for there was no dispute as to the gross return to be expected from the sale of sections in the Carlton Heights block to the public. What is claimed is that on 16 May 1961 a building company would have paid £ 29,237 for the subject land, though shortly before that date it would have expected to pay no more than £ 19,550.

To establish such a novel proposition it was first necessary for the claimant to satisfy the Court that the land could in fact have been sold on 16 May 1961 (if then freely subdivisible by the purchaser) for £ 29,237. Mr Subritzky expressed the opinion that the land could have been sold to a building company at the relevant date without allowance for profit and risk and evidence as to the practice of building companies was given by other witnesses, all of whom were associated to a greater or lesser degree with certain associated companies to which we shall refer as the "Paramount" organisation. Mr Subritzky, who is himself a director of one or more of the companies comprised in this organisation, said the organisation had at the relevant date been interested in taking over the land from the claimant on this basis. Mr S. M. Smith, one of the founders of the Paramount organisation, confirmed that his organisation had been buying land in Auckland on a basis which required it to carry all the risks of subdivision and to resell sections without profit. He said that his organisation would have been prepared to take over the Carlton Heights block on that basis, subject to the recommendation of its consulting engineer, a Mr Edward Senior. Mr Senior confirmed that the Paramount organisation and other large builders had been dealing in land on a nonprofit basis, but we gather that neither he nor Mr Smith had made any detailed investigation of the Carlton Heights block. It will be noted that none of the witnesses said specifically that the Paramount organisation would have paid £ 29,237 in cash for the block at the relevant date.

We gather that its purchases of land were usually negotiated on terms, and seldom for cash. Mr Smith agreed that in the normal course of its operations over the past twenty years the Paramount organisation had sought to make profits from the subdivision of land, and that until early in 1961 he would have considered an allowance of 25 per cent for profit and risk to be prudent and reasonable. He conceded that the policy of buying land on a non-profit basis had been forced on the organisation by circumstances beyond its control and had reduced its profits. He agreed his organisation's reason for buying land on a non-profit basis was to enable it to keep the building side of its business fully engaged and to make

profits on the erection of houses from which his organisation was still making satisfactory profits overall. Mr R. A. Green, a land agent, gave evidence as to a number of subdivisions with which he had been connected where land had been purchased by building companies on a non-profit basis, some of these being areas sold to the Paramount organisation. He indicated that in some cases the building company had suffered losses on its dealings in respect of the land.

The only valuer called on behalf of the claimant was Mr F. S. Cooper a valuer of recognised standing and experience. For the reasons already given, the Court feels that greater weight should be attributable to the opinions of a valuer of Mr Cooper's standing than to those of laymen closely associated in business with the claimant company or its directors. Mr Cooper was not in our opinion a confident witness. He did not present a report and valuation, as is usual when a valuer is called to establish the value of land at a given date. It is true that he expressed the view, though not we feel with entire confidence, that the property could have been sold to a building company at the relevant date for the amount claimed, and in his evidence in chief he gave hesitant approval to the proposition that in the circumstances the land could properly be valued without making allowance for profit and risk. Mr Cooper said that an allowance of 25 per cent for profit and risk would have been customary before the early months of 1961 and that he had been greatly worried as a valuer by the situation which had more recently arisen by reason of the purchasing policy of certain building companies. He said that building companies were pushing up the price of land too high with the result that the subdividing of land by private individuals and speculators had fallen right away and subdivision was being left largely to building companies.

Mr Cooper told the Court that he was the chairman of directors of a public company formed in 1960 for the purpose of subdividing and developing real estate. He said his company was not concerned with building and agreed that it would not be in business if it did not make allowance for profit and risk in the subdivision of land. He said that building companies which were not now making that allowance were making their profits out of the building side of the businesses. He agreed that the subdivision of land and erection of buildings by a building company was in effect one undertaking and that having both activities in its business a building company could afford to subdivide land on a non-profit basis and without making the provision for risk that an ordinary subdivider would have to make. Referring to the operations of his own company, Mr Cooper said that in assessing the price it could afford to pay for land, his company would naturally provide for both profit and risk and that if it was not able to buy at a price which would enable it to make that provision it would not be

able to buy. Mr Cooper said that if his company were buying the subject land it would pay £ 19,550, but he thought that a building company would have paid £ 28,000.

We think it is not unfair to Mr Cooper to say that his evidence was directed rather to confirming the proposition that building companies are prepared to buy land without allowing for profit and risk, than to establishing the value of the Carlton Heights block on 16 May 1961 The principal function of a valuer is to assess in unequivocal terms the sum for which the subject land could have been sold for cash in the open market at the relevant date. Where practicable this assessment is best made by reference to comparable sales of similar land, but Mr Cooper rejected this method of approach on the ground that no sales of a sufficiently comparable character could be quoted. The fact that certain people say two years after the relevant date that they would have been prepared to buy the land on a non-profit basis has little probative value compared with that afforded by actual sales. The unreliability of such evidence may be judged from the fact that there can be no certainty at this stage as to how any interested building organisation would, on 16 May 1961, have interpreted its supposed policy of buying land without allowance for profit and risk, or as to what cash price it would then have been prepared to pay for the subject land. Mr Smith told us that his organisation usually found it possible to conduct its development and building operations without a large outlay of capital, and we very much doubt whether it would have been prepared at the relevant date to pay so large a sum as £ 29,237 in cash for bare land on the subdivision of which it could expect to make no profit. Mr Subritzky's confidence that the subject land could have been sold at the relevant date without allowance for profit and risk, was not supported in evidence by any builder prepared to say unequivocally that he would have paid £ 29,237 for the land at that date. Mr Cooper, though prepared to give general support to the proposition that the land could have been sold to a builder for £ 28,000 at the relevant date, was careful to express doubt as to whether he would have valued it so highly at that time. In re-examination, indeed, he said he did not think he would then have gone so far as to suggest that the land could have been sold without any profit allowance. Pressed as to the percentage for profit he would have allowed if valuing the land at that time, Mr Cooper said: "I do not think I would have put on any more than 15 per cent; it might have been something less".

That building companies have been paying very high prices for land since early in 1961 was confirmed by witnesses called by the Crown. They were not, however, prepared to go all the way with the claimant's witnesses. Mr A. G. Gray, a legal practitioner with wide experience in the subdivision of land, expressed doubt whether a building company could

make money if subdividing land on a non-profit basis, unless it was exceptionally efficient. He considered that 25 per cent would be a reasonable allowance for profit and risk in the case of a man undertaking a single subdivision but would be unnecessarily high in the case of an operator subdividing land in a big way. Mr C. T. G. Barraclough, a registered valuer who had participated with Mr Cooper in drawing up the figures before the Court, said he was aware that building companies had purchased subdivided sections and resold them at the price paid, but that he had not before the current hearing heard that building companies were undertaking the subdivision and development

of land without profit. He considered that the rear portion of the Carlton Heights block would not be attractive to a subdivider and that its contour would have involved a subdivider in risk. He agreed that builders developing land for group housing could be reasonably sure of disposing of the houses thereon and would be justified in allowing only 15 per cent for profit and risk. He was nevertheless of opinion that 25 per cent should be allowed in this case because of the degree of risk involved and because the Carlton Heights subdivision did not qualify for either group housing or lease-purchase assistance. Mr S. W. Taylor, a District Valuer of the Valuation Department, agreed in substance with Mr Barraclough's views and considered that 25 per cent would be the least which a normal subdivider would expect to allow for profit and risk if purchasing the subject land for the purpose of subdivision.

We are concerned in our present inquiry with the position as at 16 May 1961 and Mr Cooper's admission that he would at that date have allowed 15 per cent or thereabouts for profit and risk disposes in our view of the claimant's contention that no allowance at all should be made on this account in the calculation with which we are now concerned. No alternative method of valuation, save by the use of the formula, was put before the Court by any of the witnesses.

What we have now, therefore, to consider is whether the proper allowance for profit and risk should be 15 per cent or whether, as claimed by the Crown, 25 per cent should be allowed. It was not seriously contended that a 25 per cent allowance would not have been proper if the land had been taken before the early months of 1961 when the change in Government policy and the consequent change in the purchasing practice of building companies is said to have taken place. It was not specifically proved that this change of practice had come fully into operation by 16 May 1961, when the land was resumed by the Crown. Nor, if such a change in their purchasing policy had been made by certain building companies by that date, was there any evidence as to the number of companies to have adopted the new policy and as to the extent of their operations. There was little but hearsay evidence as to this supposed practice, save with respect to the Paramount organisation, and the evidence as to the policy of that organisation was not entirely consistent. Mr S. M. Smith in a written statement submitted to the Court said that during the period under discussion his company had purchased blocks of land in Christchurch as well as in Auckland for development on a non-profit basis and that if necessary he could give instances apart from Christchurch and Auckland where the same policy had been implemented -- viz., in Hamilton, Tauranga and Whangarei. In answer to questions from a member of the Court, however, Mr Smith said:

> At present it would be only in Auckland that we would expect our company to operate on a non-profit basis. The difference between Auckland and other places is explained by the demand by building companies to purchase land. It is the competition with these other companies similar to our own which has forced us to pay higher prices.

The evidence as a whole leaves us far from satisfied that the Carlton Heights block could have been sold on 16 May 1961 for as much as £ 28,000 in cash though it supports the view that it could have been sold to a building company for something more than the figure of £ 19,550 arrived at as its value by the application of the usual formula after the allowance of 25 per cent for profit and risk. Assuming,

however, that such a sale could have been made, it would not in our view have been a sale to a willing purchaser in the sense in which that term is to be construed in law. A willing purchaser, as envisaged in the legal sense, is one willing to buy but not obliged to buy and not under pressure to buy. Mr Smith, with his experience as a director of the Paramount organisation, made it quite clear that his organisation would buy land on a non-profit basis only if forced to do so in order to keep its building organisation fully operative and in order to make satisfactory profits overall. His organisation's purpose in buying land on this basis was nevertheless to make profits. If land is bought for subdivision at so high a price that the subdivider has no margin for risk and no prospect of any reward for his enterprise, the price must in our opinion be deemed to be excessive and to be unacceptable as evidence of market value. In the words used by Lord Romer in Vyricherla's case (supra), "The value of the land is not to be estimated at its value to the purchaser".

We are in agreement, moreover, with the opinion of the valuers for the Crown that the risks involved in the subdivision of the Carlton Heights block would in fact have been far from negligible, and would, indeed, have been comparable with the subdivisional risks for which, in association with profit or reward, it is customary to make an allowance of not less than 25 per cent. The fact that neither group housing nor lease-purchase finance would be available makes it exceedingly doubtful whether all the sections in the subdivision, when built on, could have been speedily disposed of. We hold that accordingly a 25 per cent allowance for profit and risk was properly deducted in the calculation of the value of the claimant's land for the purposes of this claim, and that the market value of the land at the date of taking by the Crown was £ 19,550.

The offer of the Crown to pay that sum makes it unnecessary for us to consider whether some other basis of calculation, less favourable to the claimant, might not have been more appropriate if the Crown had chosen to rely upon the restrictions upon the use of the subject land which it claims to have been in force, at the relevant date, under the Town and Country Planning Act 1953. As to this aspect of the matter, we have to say only that it was in our opinion well known to the directors of Carlton Heights Ltd., before that company purchased the subject land, that the Education Board was interested in acquiring the land or a large part of it for a school site, and that this at all relevant times constituted a serious obstacle to the company's plans for subdivision. At the time when the claimant spent the £ 750 12s. 6d. claimed for development work its proposed plan of subdivision had not been approved by the Mount Roskill Borough Council, a large part of the subject land was designated as a "school site" on the Council's undisclosed plan, and the claimant should have been fully aware of the insecurity of its tenure. We think it is clear that the directors of the claimant company were prepared to buy this property knowing that it was being sought after by the Education Board, and in the expectation that they could either persuade the Board not to proceed with its plans, or secure adequate compensation from the Crown. Their expectation of adequate compensation will in our view have been amply realised when the amount offered by the Crown has been fully paid. The development work so rashly undertaken was valueless, we were told in evidence, for the purposes of a school site and, indeed, caused the Education Board unnecessary expense.

The Court accordingly awards to the claimant the sum of £ 19,550 together with interest thereon at 5 per cent per annum from date of taking to date of payment, credit being given for moneys paid on account. The Crown may apply for costs if so desired.Judgment accordingly.

Solicitors for the claimant: Subritzky, Ryan and Tetley-Jones (Auckland).

Solicitors for the respondent: Crown Solicitor (Auckland).