Minister of Works v Green and McCahill (Contractors) Ltd

Land Valuation Court Auckland
23, 24 November 1965, 5 February 1964
Archer J

Compulsory purchase of land and compensation – Assessment of purchase price and compensation – Land taken for public work – Claimant having plan for subdivisional development – Such plan requiring removal of large quantities of soil and clay – Such soil and clay readily saleable – Whether claimant to be compensated for loss of profit on sales and clay – How availability and saleability of such soil and clay reflected in compensation – Valuation of subdivisional potentialities of land – Assessment of allowance for profit and risk.

Compulsory purchase of land and compensation – Practice – Appeal to Land Valuation Court from decision of Land Valuation Committee – Desirability of rehearing witnesses – Course to be followed in lengthy case – Land Valuation Court Act 1948, s 26.

Where the Land Valuation Court, sitting on appeal from the decision of a Land Valuation Committee, is required to decide disputed questions of fact, it prefers to hear the witnesses in person. If in a lengthy case it is desired to avoid the duplication of evidence, that can be avoided if the parties are prepared to have the case brought directly to the Court.

In a case where land taken for public works is capable of subdivision, and, in preparation for subdivision, large quantities of soil and clay have to be removed from it which have a market value, the land must still be valued in its state at the date of taking. What has to be valued is not such soil and clay as commodities available for sale, but the extent to which their existence as component parts of the land give added value to the land.

In *re Whareroa 2 E Block, Maori Trustee v Minister of Works* [1959] NZLR 7; *Lower Hutt City Corporation v Dyke* [1954] NZLR 166; *McCallum v Mount Maunganui Borough* [1960] NZLR 1101 and *Vile v Manawatu County* [1959] NZLR 337, referred to.

Where the potentiality of land subdivision has to be taken into account in arriving at its value, the appropriate allowance for profit and risk must be assessed in relation to the particular facts. A figure of 25% should not be regarded as a normal or usual allowance. Observations generally on the assessment of such allowance.

Carlton Heights Ltd v Minister of Works [1963] NZLR 973, referred Appeal from a decision of the Auckland Land Valuation Committee.

Speight, for the appellant.

Ennor, for the respondent.

Cur adv vult

Archer J. This claim for compensation arises out of the taking by the Minister of Works of 74 acres 1 rood 29 perches of vacant land being part of an area known as Hamlin's Hill which is situated in the Borough of Mt Wellington between Auckland and Otahuhu, and lies to the east and in close proximity to the Main South Road. The property has a short frontage to the Main South Road at its northern end but most of its western boundary is separated from the main South Road by a strip of industrial land. The property consists of fairly easy slopes to a height of about 135 feet above sea level and forming a ridge running roughly from north to south. The land to the west of the ridge overlooks the highly industrialised area around the upper reaches of the Manukau Harbour and is obviously more suitable for industrial than residential development. The land to the east of the ridge has a pleasant outlook over adjacent residential land from which it is physically separated by the

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

southern motorway. There is no immediate prospect of access to the area becoming available save from the Main South Road or from a short access road running into the Main South Road.

The respondent (claimant before the Committee) undertakes civil engineering and contracting work on a large scale, including the development of land for subdivision and the disposal of surplus materials. Mr Green, on the respondent's behalf, said in evidence that his company had bought the property in October 1959 with a view to excavating and selling soil and clay so as to remove its contour and then subdividing the land for industrial and residential use. Before purchasing this area the company had owned an adjoining section facing the Main South Road, which it had used as a depot and business headquarters. Mr Green said his company intended to move its headquarters to the Hamlin's Hill land and to operate from there during the development of that property. In pursuance of this intention the company had sold its adjoining property but has taken no steps to move Hamlin's Hill before that property was taken by the Crown. In consequence of the taking the company had bought another property and moved its headquarters to it in due course. The price paid for the subject land by the respondent was £29,500.

The Crown took the Hamlin's Hill land by proclamation on 12 September 1960, which is the relevant date for the assessment of compensation. During its ownership the respondent had affected no improvements to the land save a limited amount of filling and draining near the Main South Road frontage. The company had, however, removed and sold the property a considerable quantity of clay.

The major items claimed were set out in the claim for compensation as follows:

(1)	Value of land:	£75,040
(2)	Value of clay fill:	£126,324
(3)	As an alternative to (1) and (2) above land taken valued having regard to its subdivisional potential and expected profits from sales of clay filling	£201,364
	Less payment on account	30,000
		£171,364

To this sum were added minor claims for disturbance and settlement and for interest and costs. It will be noted that the alternative claim (3) was for a sum equal to the total of the claims (1) and (2) and that the sum described in (2) as "value of clay filling" is presumably included in the alternative claim under the description of "expected profits from sales of clay "filling". A substantial issue between the parties was as to the extent, if any, to which the availability of clay for disposal added value to the land and as to the extent to which profits anticipated from sales of clay could be recovered by way of compensation.

The claim came before the Auckland Land Valuation Committee in August 1964 at a hearing which extended over five days. The respondent contended that the land should be valued on the assumption that a purchaser on the relevant date would have set out to lower the maximum height of the land to 70 feet, that in the course of so doing he would have disposed of some 50,000 cubic yards of topsoil and some 1,800,000 yards of clay, and that he would then have subdivided and sold the land for industrial and residential purposes. It was claimed that all this could have been done in four years and that a purchaser would have paid for the land and clay filling the amounts respectively set out in the claim. Major issues between the parties were whether it would have been practicable to lower the level of the land to 70 feet and whether large quantities of topsoil and clay could have been profitably disposed of. The Crown conceded that it would be reasonable to assume that the land would be lowered to 85 feet and subdivided, but claimed that the surplus clay would be limited to 450,000 cubic yards. Whether this could have been disposed of at a profit was in the opinion of the Crown witnesses a matter of considerable doubt.

The Committee was impressed by the foresight and capacity of the respondent company and accepted as evidence of the value and saleability of clay filling its claim that it had been able to

dispose of over 220,000 yards of clay in less than 12 months at a profit of £23,000. While properly recognising that the award must be limited to the value of the land with its potentialities at the relevant date, the Committee held that the subject land had dual potentialities and treated each of these potentialities as able to be valued separately. It agreed with the Crown that the proper assumption was that the land would be lowered only 85 feet and held that topsoil and clay would be available for disposal to the extent of 34,000 cubic yards of topsoil and 450,000 cubic yards of clay. Having considered in detail the evidence as to the value of topsoil and clay and of the land itself, the Committee then awarded compensation as follows:

Sale of topsoil and filling	£43,950
Sale of subdivision	61,100
	£105,050
Less already paid	30,000
Sum awarded	£75,050

To this amount were to be added interest at 5% and costs.

From this decision both the respondent and the Crown appealed to this Court. Section 26 of the Land Valuation Court Act 1948 provides that every appeal to the Court shall be by way of rehearing and it is the usual practice of the Court to rehear the evidence in full. In the present case the Court was invited by counsel to dispense with hearing the witnesses and to deal with the appeals upon the notes of evidence (admittedly comprehensive) as taken before the Committee. Although in some doubt as to the wisdom of so doing in view of the large sum involved, the Court agreed to this course. Upon reflection we feel that we should have been able to assess with greater confidence the merits of the case if we had heard the witnesses and had been able to have their evidence amplified in certain respects. We think it desirable to indicate that where the Court is required to decide disputed issues of fact it prefers to hear the witnesses in person. If in a lengthy case it is desired to avoid the duplication of evidence that can be avoided if the parties are prepared to have the case brought directly to this Court.

The valuation of land which has a potentiality for future development, and previously where it enjoys what the Committee has described as "dual potentialities" is by no means easy, but the principles to be applied are as set out in the judgment of their Lordships of the Judicial Committee in *In re Whareroa 2E Block, Maori Trustee v Ministry of Works* [1959] NZLR 7, where Lord Keith said: "It is fundamental that the land must be valued in its state at the time of taking. Under the Act of 1944, that value is to be assessed at the amount which a willing seller might be expected to realise if the land were sold in the open market at the date of taking. This is not necessarily the price which it would fetch because the costs of realisation will have to be taken into account. Section 29 corresponds to s 2 of the Acquisition of Land (Assessment of Compensation) Act 1919, in the United Kingdom (9 & 10 Geo 5 c 57) 3 *Halsbury's Statutes of England,* 2nd ed, 975), which did away with the extravagant claims and extravagant words that were frequently made under the Lands Clauses Acts and similar legislation on the view that the owner was an unwilling seller. What in effect is being computed is the capital value of an asset; and, while in the case of land, it may not always be easy to calculate this as it would be in the case of ascertaining the market price of easily realisable stocks or shares or commodities in the field of commerce, the problem does not generally present any great difficulty on the hands of competent land valuers. There are, however, as has frequently been observed, cases where the land had 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 taking, as the case of *Vyricherla Narayana Gajapatiraju v Revenue Divisional Officer, Vizagapatam* [1939] AC 302; [1939] 2 All ER 317 shows, the task of valuing land with such a potentiality may not always be an easy one" (*ibid,* 10).

What has to be determined in the present case is the amount which the respondent's land might have been expected to realise if sold in the open market on 12 September 1960. The land was not then capable of sale in subdivision to two or more purchasers and the sale to be envisaged is a sale for

cash to a single purchaser. The respondent presented its case on the basis that the value of the land was the sum of two values – the value of removable clay and the value of the land for subdivision. Its witnesses sought to value the land by assessing these values separately and adding the assessments together. Mr Ennor, for the respondent, went so far as to suggest that the Court should envisage a sale of the clay to one purchaser for removal and a sale subject thereto of the land to another. There was nothing in the evidence to suggest that this would have been a practicable method of realisation however, and none of the valuers adopted this hypothesis as a basis of valuation.

In support of his contention that the clay should be separately valued, Mr Ennor cited *Lower Hutt City Corporation v Dyke* [1954] NZLR 166 where in assessing compensation for land taken the Court described part of the sum awarded as an allowance for topsoil. The Court referred to this aspect of the matter in its judgment as follows: "We are by no means satisfied that the respondent could have disposed of any great quantity of topsoil from his land, while, at the same time, disposing of the land itself for the amount which we are prepared to award. It is possible that some of those interested in the purchase of industrial sites might have regard to the availability of soil for sale and might on that account pay something more for the land than they would otherwise offer. This is much in the realism of speculation and we feel that in principle the proper assessment of the value of the land must be held to cover the land as it stands and to include the soil thereon. In view, however, of the demand for topsoil which may be a factor in making the land more attractive to certain purchasers, we propose to add a further £1,500 to the amount allowed for the land" (*ibid*, 170).

The reference to an allowance for topsoil in *Dyke's* case should not be interpreted as a recognition by the Court that when the value of a piece of land has been properly assessed an additional sum may be added because of the availability of topsoil for removal.

In *McCallum v Mount Maunganui Borough* [1960] NZLR 1101 the Court pointed out that in the case of land covered by bush it was not a realisable method of valuation for the land and timber to be separately valued and a total valuation ascertained by adding together the figures arrived at. In that case land valuers had been called to value the land and timber assessors to value the timber. The Court took the view that a skilled and experienced land valuer should have been able to assess the added value given to the land by the timber and to make a comprehensive valuation of the land as it stood in bush.

In *Vile v Manawatu County* [1959] NZLR 337, where agricultural land had been taken for the purpose of quarrying road metal, the Court held that the metal deposits underlying the land must be regarded as part of the land and that it was neither practicable nor desirable to value the land and metal deposits separately. It held further that the fact that metal from the land taken might be saleable at a profit was of concern to the Court only to the extent that it might help the Court to determine to what extent, if at all, the presence of the metal gave added value to the land.

In *Vile's* case the quarrying of metal would have destroyed the value of the subject land for agricultural purposes. The present case differs in that the removal of surplus clay as to be in preparation of the land for subdivision. The basic principles must nevertheless be applied: the land must be valued in its state at the date of taking, while the claimant's right to compensation is limited to the amount which the land might have been expected to realise if sold on that date in the open market. A qualified land valuer should have been able to value the land on that basis, giving due weight to all its potentialities. The Court is unable to agree with Mr Ennor that the valuation of the clay and soil in the evidence given by contractors as to their value should be preferred to that of land valuers. This contention envisages the clay and soil as saleable commodities after severance from the land. What has to be valued in this case is not the clay and soil as commodities available for sale, but the extent to which their existence as component parts of the land gave added value to the land.

Five experienced valuers were called in this case. Each of them had first valued the land as a subdivisional proposition upon the assumption that large quantities of clay had been removed and the area suitably levelled and "landscaped". For this purpose all the valuers used a plan of

subdivision as a basis for valuation by the engineers for the Crown. The valuers proceeded to apply in relation to this plan the formula customarily adopted by New Zealand valuers when valuing land suitable for subdivision. For the purpose of the formula the valuers used estimates of development costs on which there had been a large measure of agreement between the engineers for the parties. The valuers differed materially only in relation to the gross proceeds to be expected from the dale of sections and the appropriate allowance for profit and risk. Their differences on these subjects were no doubt responsible for the vary considerable differences in their final assessments. These, for the value of the land alone, were as follows:

For the respondent:	
Mr C T Barraclough	£73,700
Mr W G Boswell	70,760
For the Crown:	
Mr D H Baker	54,000
Mr G K Yarnton	39,600
Mr F S Cooper	36,850

It is surprising that such variations should be found in the values assessed by experienced valuers, and they suggest to us a too slavish acceptance of results achieved by the use of the formula, together with a failure by some of the valuers to have sufficient regard to sound judgment as a basis for assessing market value. We think it is significant that, though it was "market value" they were concerned to assess, not one of the valuers said in his report that the land could have been sold, or that he believed it could have been sold, at the relevant date for the amount of his valuation. A result obtained by the use of the formula should not necessarily be accepted as final, but should be regarded rather as a guide to market value.

Evidence of sales of comparable land near to the relevant date provides a valuable check on an assessment made by the use of the formula, while a recent sale of the subject land should receive due consideration. The subject had been bought by the respondent for £29,500 a little over twelve months before the relevant date and we are concerned that neither Mr Barraclough nor Mr Boswell thought it necessary even to mention this sale in their valuation reports while the Crown's valuers mentioned it only as a matter of record. It would appear that having been invited to value the land on the basis of an agreed plan of subdivision, the valuers considered themselves relieved of the responsibility of considering other methods of valuation. It is not desirable in our view for valuers to limit their consideration to a particular method of valuation.

Mr Ennor went to considerable pains to satisfy the Committee that the characteristics of the subject land and the respondent's proposals for its development were so unusual as to render useless comparisons with other properties and other developmental projects. For this reason it was suggested that neither the price paid for the subject land in 1959 nor the prices paid for other blocks of land in the vicinity could have any relevance to the value of the subject land for purposes of compensation. The acceptance of this proposition in part is suggested by the Committee's description of the respondent's proposals as a "new" "concept" and by the statement in the decision that:

> "The cost of the purchase by the company is immaterial if it satisfies this Court that it had foreseen potentialities in the land that it proves it was able to develop."

We are not impressed by the suggestion that the subject land had very unusual characteristics. It was an ordinary piece of rolling country which by virtue of its situation had become, or was rapidly becoming suitable for subdivision. Most of the land had a good covering of topsoil over clay and sandstone. The subdivision of similar land in the Auckland area had been undertaken before, a comparable case being the recent subdivision by the Fletcher organisation of an area close to the subject land and separated from it only by the southern motorway. The only unusual feature of the respondent's scheme of development was the extent of the excavations proposed and the quantity of clay in consequence to be disposed of. The novel feature of this "new concept" was the anticipation of making a substantial profit from the sale of surplus clay.

We see no reason, therefore, why the valuers should not have undertaken the complete valuation of the subject land, including any potential value which might arise from the possibility of quarrying clay. The reports of all the valuers, however, dealt in the main with the valuation of the land on a subdivisional basis. Others made somewhat hesitant or tentative estimates of their value. None of the valuers gave convincing evidence as to the value of surplus clay or soil, and the respondent relied, upon this issue, on other evidence which will be later referred to. As the evidence was presented the Committee had little alternative but to value the land, the soil and the clay separately, and undesirable though this method may be, we shall consider these appeals on a similar basis, dealing first with the subdivisional value of the land, and later with the additional amount, if any, to be allowed for soil and clay.

In relation to the land the Committee considered the figures placed by the respective valuers on each of the items in the formula, and from them prepared its own computation of the value of the land, which it fixed at £61,100. For the purpose of the Crown's appeal Mr Speight accepted the Committee's figures save in respect of one item, the allowance for profit and risk, which had been fixed at 25%. The Crown claimed this to be too low.

The assessment of a proper allowance for profit and risk was discussed at length in the decision of this Court in *Carlton Heights Ltd v Minister of Works* [1963] NZLR 973, a case in which some of the valuers concerned in the present case were engaged, and in which 25% was allowed. We wish to add little to what was there said save to point out that it would be wrong to regard 25% as the "usual" or "normal" allowance for profit and risk, though it would appear that this figure has been frequently adopted by valuers when assessing subdivisional values. The appropriate allowance in any case must be assessed in relation to its own particular facts.

In the *Carlton Heights* case it was virtually agreed that a 25% allowance would have been appropriate save for special allowances, peculiar to that case, which were claimed to justify a smaller allowance, or no allowance at all. The case concerned an area of land immediately available for subdivision in a district where sections were greatly in demand, and where it was reasonable to suppose that all the sections in the subdivision could have been sold within two years.

The Committee held in the present case that the subject would take four years to complete, and while this was reflected in an increased allowance for interest, it still tended to increase the risks of the venture. The extensive quarrying envisaged before subdivision could be commenced and the lengthy period of realisation suggest that the elements of uncertainty and risk would be more substantial than in the case of less extensive subdivisions where 25% has frequently been allowed. The Committee nevertheless considered that an allowance limited to 25% was justified on two grounds, first because certain industrial sections facing the Main South Road could have been speedily disposed of, and secondly because the financing of the project could be facilitated by the sale of surplus clay. In our view the availability for early sale of the Main South Road sections had little bearing upon the risks of the project as a whole, of which they constituted but a very small part. The value of the soil and clay having been separately assessed and compensation awarded, we are unable to see that this had any bearing upon the amount to be allowed for profit and risk on the valuation of the land.

Apart, however, from the magnitude of the project and the period of realisation, there were other factors in relation to the project which made unavoidable a large measure of uncertainty and risk. The cost of removing such large quantities of surplus material could not be accurately assessed, and could be affected by wet weather, and by the character, then largely unknown, of the material to be removed. Before the project could proceed the land would have to be rezoned, plans prepared, necessary consents obtained, access roads provided, and other incidental matters settled. The sale of the residential sections, as planned, might have been prejudiced by their relatively poor access, and the lack of schools, shopping facilities and places of amusement in the vicinity.

In determining the proper allowance to be made we are not concerned with what may in theory appear reasonable or adequate, but with what is in practice deemed necessary by subdividers of

land to cover risks and provide adequate profits when they subdivide land. We believe that subdividers take care to cover all risks and expect to receive substantial profits from their undertakings, and that this is reflected in the prices they are prepared to pay for subdivisional land, and in the market value of such land.

The evidence of the valuers in this case as to the appropriate allowance for profit and risk was complicated by the fact that they had in the first place envisaged a subdivision at not more than the 70 foot contour with a corresponding period of realisation. The risk factor was reduced by the Committee's finding, with which we agree, that the subdivision should be envisaged with an 85 foot maximum contour and with a realisation period of four years. We are nevertheless of opinion that a 25% allowance was too low, and that the allowance should have been 30%.

It is convenient at this stage to mention that two minor claims raised in the cross-appeal of the respondent were conceded by the Crown. These involved adjustments in favour of the respondent of £2000 and £1600 respectively in the Committee's formula figures. Taking these figures as a basis and having made the alterations necessary to increase the allowance for profit and risk to 30% and to make the adjustments above mentioned, the result is to reduce the Committee's figure for the value of the land to £57,400.

We come now to consider the claims relating to soil and clay. It will be noted that the claim itself made no mention of soil, being for a sum of £126,324 described as "value of clay filling" which was alternatively referred to as "expected profit from sales of clay". No objection was made by the Crown to the presentation of the case as if separate claims had been made for topsoil and for clay.

It is clear that an award could properly be made in respect of these materials only if, and only to the extent that, their presence in the subject land had been shown to have increased its market value. If therefore, as we are prepared to hold, the value of the land without reference to any potentiality arising from the availability of spoil for disposal was £57,400, it was incumbent upon the respondent, before it could succeed in any further claim, to establish that the market value of the land was in excess of that sum. We confess that we find little in the evidence to justify that view. There was in fact very little evidence, even from the professional valuers, directly relating to market value.

In *Collins v Feltham Urban District Council* [1937] 4 All ER 189, where a builder whose land had been taken claimed for loss of the profits he had expected to make from the building of houses, the Court held that compensation could be paid only in respect of "the ordinary market value of the land, being the amount which the land if sold in the open market by a willing seller might have been expected to realise". It is well recognised as such be the subject of a claim for compensation.

While the Committee properly recognised that in order to succeed the evidence must establish a potentiality reflected in the value of the land and not merely a loss of profits anticipated from its use, the wording of the Committee's decision leaves us in doubt as to whether it adequately distinguished between the profit which might have been earned from the disposal of surplus materials and the amount which a purchaser would have paid for the opportunity, with its attendant risks, of making such a profit.

For topsoil the Committee awarded £10,200. After holding that there would be a surplus of 34,000 yards of topsoil for disposal its decision proceeded:

> "Mr Green estimated a profit of 7s 6d (with 1s 6d to handle) and Mr Grierson 5s. The Committee adopts 6s which for 34,000 cubic yards amounts to £10,200."

For clay the Committee awarded £33,750. In relation to this award the decision reads:

> "Mr Green produced actual figures to show an established profit of 2s 6d per cubic yard but with the volume here and the necessity to dispose of the filling on schedule the Committee adopts the figure of 1s 6d per cubic yard profit, ie 450,000 at 1s 6d is £33,750."

The repeated use of the word "profit" suggests that the sums awarded were assessments of anticipated profits rather than assessments of potential value.

It is true that the respondent, according to its managing director Mr Green, expected to make profits much greater than the amounts awarded and the Committee may have taken a conservative view of the profits which might have been earned if the project had been proceeded with, and made

its assessments accordingly. With this the Court could have no complaint, nor with the view, if that were the Committee's view, that the sums awarded for topsoil and clay represented a reasonable assessment of the profits of which the respondent had been deprived by the taking of the land. We are unable, however, to construe the decision of the Committee as a finding that £43,950 would have been paid by a purchaser for the right to dispose of soil and clay from the subject land, or that the gross sum of £105,050 which was the basis of the final award was the market value of the subject land at the date of taking. We therefore hold that the award of £43,950 for topsoil and clay cannot stand.

In justice to the respondent, however, we must now consider whether on the evidence any other sum should be allowed as a potential value attributable to the saleability of spoil and clay. On the subject of surplus spoil there was a vast amount of evidence of a highly conflicting character. Mr Green took a very optimistic view of the scheme of development he described and appeared confident that almost unlimited quantities of topsoil and clay could be disposed of at a constant rate and are a handsome profit. The Committee was impressed with Mr Green's competence and reliability and said in relation to his company's ability to develop the subject land:

> "That this land had a potentiality in the hands of this company realisable in the near future is clearly proven by the fact that in the few months the company held the land it had made a profit from clay disposal of some £23,050."

The profit in question was said by Mr Green to have been realised from the sale of some 220,000 cubic yards of clay filling as evidence of which a file of dockets was produced. This was, of course, a most important piece of evidence, but on the notes of evidence and the exhibits before us we are left in some doubt as to whether the Committee's finding was entirely justified. The profit of £23,050 claimed to have been made from these transactions was not supported by statements of costs and expenses and appears to have been an estimate only, while the file produced shows that of the 220,000 cubic yards of spoil in question 56,010 cubic yards were charged to McCarten Bros (Auckland) Ltd several months before the subject land was purchased by the claimant , and was presumably obtained from another source. We do not doubt that the claimant sold 220,000 cubic yards of filling between February 1959 and (say) June 1960 but we are not satisfied that all of it came from Hamlin's Hill, or that the net profit on these transactions was so great as claimed by Mr Green. Nor are we satisfied that there was a continuing demand for filling in compatable quantities. Mr Green gave detailed evidence as to places where he believed that filling could be disposed of but the evidence of witnesses called by the Crown made it quite clear that a good deal of Mr Green's evidence in that regard was based on hopeful anticipation rather than fact.

The general tenor of the evidence given by witnesses for the Crown was that there was a very limited market for surplus spoil that those with filling to dispose of frequently had to give it away and sometimes to pay to have it removed. The professional valuers and engineers called on both sides gave only limited support to Mr Green's optimistic predictions as to the saleability of surplus spoil from Hamlin's Hill.

We would have been disposed to hold that the claim for an additional potential value by reason of the soil and clay content of the land had not been established, but for certain evidence of Mr D H Baker, called by the Crown, and the fact that Mr Speight for the Crown appeared prepared to concede that a limited sum might properly be allowed. Mr Baker, an experienced officer of the Valuation Department, discussed the disposal of surplus soil in his written report, and summarised his views as follows:

> "Conclusions: An average purchaser buying this land to subdivide would pay nothing extra for the clay filling. Any profit he was able to make would be incidental. If there was a public work in progress in the vicinity where filling was required, the clay would have a marketable value based on the quantities which could be readily won and disposed of. In the present case if the valuation on the 85 feet contour line is acceptable, there could be an added sum to the value of the land to cover the present value of the 500,000 yards which would possibly be disposed of over a period of two years, yielding a net royalty of 9d a yard. This calculation would give a figure of £16,500.

However, from this would have to be deducted the filling and earthworks not included in the engineers' estimate of expenses."

This somewhat hesitant opinion was confirmed by Mr Baker in more positive terms in oral evidence when he said:

"My valuation is my figure of £54,000, plus £16,500, less this unknown sum in Mr Grierson's estimate for filling Great South Road lots plus whatever earthworks he has allowed."

In these circumstances the respondent is entitled in our opinion to something more than the assessed subdivisional value of the subject land, having assessed the subdivisional value at £57,400 we propose to add for what might perhaps be described as "spoil disposal potential" a further £13,100, bringing the value of the land to £70,500, an amount equal to the full amount of Mr Baker's valuation.

The refusal of compensation for loss of profit to a claimant who has been deprived by the taking of his land of the opportunity of developing it to his advantage may seem inconsistent with the statutory provision that he is entitled to "full compensation", but the reason for its refusal is that the loss for which a claimant is entitled to be compensated is limited by law to the capital value of the land. "The land in the hands of the owner is just capital for whatever purpose he chooses to put it. If he chooses to employ his capital in a subdivisional scheme the profit he will make cannot in anticipation be taken to increase the value of the land before that profit has been realised": *Turner v Minister of Public Instruction* (1956) 95 CLR 245 cited in *In re Whareroa Block (supra).* Having purchased the land for £29,500 in 1959 we find it difficult to believe that the capital investment of the respondent in the subject land in 1960 could on any reasonable basis be assessed at more than £70,500.

We have still to deal with certain matters raised by Mr Ennor on his cross-appeal. Two of these have been dealt with as already stated. The others are now dealt with as follows:

Re Contour: Mr Ennor contended that the subdivisional value of the land should have been assessed by reference to a subdivision plan based on a 70-foot contour instead of an 85-foot contour as held by the a Committee. This contention is not in our opinion supported by the weight of evidence, nor are we satisfied that if adopted it would warrant an assessment of subdivisional value in excess of £57,400.

Re Radio Telephone: The respondent seeks payment, on the ground of disturbance, of £800 said to have been lost by reason of the removal of a radio telephone installation from its previous premises in Main South Road to its present premises elsewhere. The radio telephone had never been installed on the Hamlin Hill property and any loss consequent upon its removal cannot, in our view, be recovered from the Crown.

Re Rate of Interest: The respondent seeks an increase in the rate of interest allowed by the Committee from 5 per cent to 6 per cent, but we are not satisfied that the interest rate which has been customary in connection with awards of compensation for some years should be raised.

To give effect to the foregoing findings the decision of the Committee is set aside and in substitution the respondent is awarded:

a. For the loss of its land — £70,500
   less paid on account — 30,000
   Balance — £40,500

b. Interest from date of taking to date of payment at 5% per annum calculated on the balance owing from time to time.

The question of costs is reserved, but it is suggested for the consideration of counsel that the Crown should pay to the respondent the costs awarded by the Committee and that each party should pay its own costs on this appeal.

Appeal allowed

Solicitor for the appellant: *Crown Solicitor* (Auckland).

Solicitors for the respondent: *Terry and Frankovich* (Auckland).