JAMAICA

Judgement Book 1075

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 19/82

BEFORE: THE HON. MR. JUSTICE ROWE - PRESIDENT
THE HON. MR. JUSTICE CARBERRY, J.A.
THE HON. MR. JUSTICE ROSS, J.A.

BETWEEN	KEITH C. BURKE	APPELLANT
A N D	COMMISSIONER OF VALUATIONS	RESPONDENT

Dr. Adolph Edwards and Mr. Randolph Williams
instructed by Messrs. K.C. Burke & Co. for Appellant

Mr. H. Hamilton and Miss Claudette Bowen
for Commissioner of Valuations

March 17, 18, 21, 22, 23, 1983 and
July 29, 1987

ROWE P.:

As Rowe J.A. I prepared this judgment some little while ago and express regret in the delay in its delivery.

Knutsford Park, once the scene of some epic horse races, was sub-divided into some four hundred lots in 1958 under the name of New Kingston. From a Central Avenue, Knutsford Boulevard, which runs north to south, the sub-division has an eastern spread and a western spread. Antigua, Barbados, St. Lucia and Tobago were honoured with Avenues, Grenada with a Crescent, Dominica with a Drive, but the large Island of Trinidad had its own Terrace. Between Grenada Crescent into which run Antigua Avenue on the west, and St. Lucia Avenue to the east (all three roads run north to south) there were six large blocks of land with a seventh block on the western side of Knutsford Boulevard, south of Trinidad Terrace. Common features of the six large blocks are that each lot in each block had a frontage of thirty feet except for

those at the corners; each block had lots fronting on one of the main roads; each block had a car park adjacent to a piazza and each block had lots which fronted on the car parks. It was estimated in evidence that some 200 lots fronted on the nine car parks.

In 1961, the appellant, an attorney-at-law purchased lot 141 for £2,700. On the sub-division map deposited on June 13, 1960, lot 141 appears on the eastern side of Knutsford Boulevard. Its frontage is on a car park which runs from St. Lucia Avenue. It is the 13th lot on the southern side of that car park and it is bounded on the west by a series of lots which have their frontage on Knutsford Boulevard. To the north of that car park are lots 121-133, lot 133 being the one bordering on St. Lucia Avenue. Immediately to the west of that car park is a piazza which adjoins an opening of 30 feet width which opening leads to Knutsford Boulevard. On one of the sub-division plans deposited in the Titles Office on 13th January, 1960 that opening is not shown as a roadway, and there are indications thereon that some obstruction should be constructed to preclude motorized access from Knutsford Boulevard.

New Kingston sub-division was zoned for commercial purposes and the appellant bought lot 141 for the construction of his legal offices or alternatively for speculation. A valuation of £500 was placed on the land in 1962 by the Valuation Commissioner and this was reduced in 1964 to £400. Ten years later the land was re-valued by the Valuation Commissioner at $36,700.00. The appellant objected and gave a valuation of $6,000.00. The Commissioner reduced the valuation to $27,000.00; the appellant thought this was still too high and he brought proceedings in the Revenue Court. He proferred evidence that his first impressions were that he had done good business in purchasing that lot which

was one of the cheapest in the sub-division but that he later became disenchanted with the lot and decided to sell it. During examination-in-chief he said, "after the area was built up I found I had made a mistake and I wanted to get rid of it." In the course of cross-examination the appellant said, "I thought I had made a bad mistake when I saw the layout of the roads in 1962" on the face of it there appears to be a discrepancy between the "area being built up" and "the layout of the roads" but as to this the learned Judge of the Revenue Court made no finding. The appellant said he put up the land for sale in 1962 and continued to do so until the hearing of the appeal. His efforts to sell included placing a "For Sale" sign on the lot, making personal contacts by letters with many organizations and enlisting the aid of Real Estate Agents. Up to 1970 his asking price was $6,000.00 and although he received enquiries he got no offers. To Mr. Hamilton's question as to whether the appellant had offered the land for sale to Citibank he answered "No, no one in their right mind would buy that lot." I again comment, that the learned judge of the Revenue Court made no specific reference as to the quality of this testimony.

On lots 134-140 Citibank has constructed a large building of eight to ten storeys high with frontage on Knutsford Boulevard. Lot 141 snuggles up against the rear of this building and is not visible from Knutsford Boulevard. Access to this lot said the appellant was officially from St. Lucia Avenue and the car park. He knew that one could enter his lot from Knutsford Boulevard as he had driven his car there but he did not know if it was legal so to do. The appellant was asked some questions as to the comparability of his lot with lots 216 and 217 and he admitted that he knew these lots and that they are comparable to lot 141.

Mr. A. Walters McCalla, a Real Estate Agent and Valuator with twenty-nine years of experience gave evidence for the appellant. In his opinion lot 141 was in a tenth-class location worth no more than $4,000.00 in 1974. The highest valuation that he placed upon that property was $4,800.00 although he did not agree that land prices in New Kingston had depreciated between 1961 and 1974. This Valuator considered lot 141 to be (a) "landlocked", (b) not to be conducive to an office building as it was not competitive, (c) not easily located as it carried no street number, (d) not easily saleable as there was a mound thereon, (e) land had only one special esoteric use common to few people only. He did admit that one could drive through a narrow passage from Knutsford Boulevard to lot 141 although at one point his evidence was that due to the existence of a mound one could only drive to within sixty feet of the lot from Knutsford Boulevard and would have to walk the rest of the way to get to the lot. Mr. McCalla said his efforts to sell some ten lots including lot 141 in 1973-1974 did not elicit a single offer although owners would have sold for cost price. Notwithstanding that he knew the purchase price of lot 141 to have been $5,400.00 in 1961, he could not place a higher value than $4,000.00 upon it in 1974 because 141 "was not a useful one."

Witness Karl Francis, then Deputy Commissioner of Valuations, with sixteen years experience described how he valued lot 141 for $27,000.00 using the principles of location, availability of public transport services, location of residential areas servicing, site zoning, permitted development, state of development in the area and sales of comparable properties in the area. In support of his valuation he produced a scheduled culled from the Register Book of Titles as to sales of lots in the area which he considered to be comparable to lot 141. This exhibited

schedule contained the following information: Lot 142 sold in 1972 for $16,200.00, lot 152 sold in 1973 for $33,750.00, lot 153 sold in 1973 for $34,000.00, lot 129 sold in 1972 for $30,000.00. In Mr. Francis' opinion all lots with frontages on the car parks were comparable although some of them were nearer to St. Lucia Avenue than others. Visibility was not a relevant factor as the potential for the lot was office type development and offices did not require as great visibility as shops. Contrary to the views expressed by the appellant and his Valuator, Mr. Francis said that the real estate market was buoyant in 1972-1974 and that there was a significant upward movement of prices between 1972-1974. He did not find the existence of the mound on lot 141 significant. In principle the presence of vehicular access from Knutsford Boulevard to lot 141 was an important consideration in his valuation, and Mr. Francis said he saw evidence on the earth of vehicular access from Knutsford Boulevard to lot 141 at the time when he inspected the property and when he made his valuation.

There was no dis-similarity between the evidence for the appellant and the respondent as to the fact that lots 141-143 were about 18" below road level nor that the area of ground in front of these lots were in 1974 enclosed by a low 8" curb wall. Mr. Francis swore that in 1972 when lot 142 was sold the average price of car park lots was $6.00 per square foot and this price had increased to $10.00 per square foot in 1974. He agreed, however, that the valuation placed on car park lots was not similar to that placed on main road lots and especially those with Knutsford Boulevard frontages. Adjustments had been made by him to show the lesser valuation to be applied to car park lots. He stressed that one of the recognized principles of valuation was that there should be uniformity of valuation

between comparable properties in any given area as a consequence of which not only actual sales could be taken into consideration but also valuations placed on comparable lots, e.g. lots 216 and 217. Mr. Francis did not agree that lot 141 was landlocked and he said it had an advantage over lot 142 in that it had ventilation from three sides.

The learned Judge of the Revenue Court found the evidence of Mr. McCalla unsatisfactory in a number of material particulars. Firstly, Mr. McCalla's valuation of $4,000.00 would amount to a considerable depreciation of the selling price over a ten year period; secondly, Mr. McCalla who knew that selling price of comparable land was cogent evidence of value made no effort to investigate such sales and thirdly, he based himself upon the "landlocked" position of the lot, a phrase which the Judge found to be of "doubtful meaning." He dismissed the testimony of the appellant in one telling sentence. "The evidence of the appellant takes the matter little further."

Mr. Burke and his witness said there was no demand for office building in the New Kingston sub-division in 1974. The respondent's witness said he did not research that question but in the absence of an actual sale the permitted method of valuation is to assume a hypothetical purchaser, and the learned trial judge found that the absence of an actual purchaser was not a critical factor as the respondent was entitled to assume a hypothetical purchaser.

He was not at all impressed with the evidence of Mr. McCalla and concluded that it "would be unsafe to base any judgment thereon." He went on to accept the evidence of Mr. Francis that the real estate market between 1973 and early 1974 was extremely buoyant, that is to say that values were being maintained or were rising.

A decision of the Revenue Court is final on all questions of fact - see section 10 (1) of the Judicature (Revenue Court) Act consequently this appeal must of necessity be concerned only with questions of law. A Court of Appeal will always be slow to interfere with a trial judge's findings of fact. As Griffith C.J. said in one of the cases cited before us viz: Spencer v. The Commonwealth of Australia (1907) 5 C.L.R. 418 at 430:

> "It has often been pointed out that, when a cause of action has been heard by a Judge on oral evidence, a Court of Appeal is very reluctant to differ from him on a question of fact, especially when there is a conflict of evidence. And the same considerations apply whether the conflict is as to the actual facts, or as to a matter of opinion as to which it is material to weigh the relative values of the opinions of different witnesses."

This approach is hallowed by practice when an appeal is permissible on the facts, but when there is no appeal on the facts even that residuary power does not reside in the appellate tribunal. Even where there is no appeal against a finding of fact, this court will interfere if it is satisfied that the tribunal of fact has given no weight or no sufficient weight to those considerations which ought to have weighed with it or if it has been influenced by other considerations which ought not to have weighed with it or not weighed with it so much - Ward v. James (1965) 1 All E.R. 563.

The appellant filed and relied upon four Grounds of Appeal, and also upon the Grounds of Appeal argued before the Revenue Court: Grounds 1 - 4 are as follows:

> "1. The learned trial Judge erred in law in holding that lack of demand for Lot 141 was neither a relevant nor a vital factor in arriving at a valuation of $27,000 for the land.

"2. The learned trial Judge erred in law in holding that despite the fact that for over 14 years the land was advertised for sale (acceptable value being $6,000) and there were no offers to purchase, it was not unreasonable for the Respondent to value the said land for $27,000.

3. The learned trial Judge erred in law in holding that it was impossible to say that the value of $27,000 placed on the said land was excessive.

4. The learned trial Judge was wrong in law in accepting the Respondent's valuation of $27,000 for the said land in that:

(a) there was no evidence or no sufficient evidence of sales of comparable land;

(b) of approximately two hundred lots in the New Kingston subdivision which the Respondent stated to be comparable, evidence of sales was brought in relation to four lots only. The Respondent admitted that there were other sales but that those were not investigated;

(c) the four lots about which evidence of sales was brought were not comparable to lot 141;

(d) the Respondent valued lot 141 on the incorrect basis that there was motorised access from two main roads namely St. Lucia Avenue and Knutsford Boulevard;

(e) one of the factors which the Respondent stated to be important in the valuation of land was the potential use of the land. The Respondent further stated that the potential for lot 141 was an office type building of two or three storeys but the uncontradicted evidence was that there was no demand for this type of building;

"(f) the Respondent incorrectly notionally brought what was only potential into actual being and valued the potential as if it already existed.

(g) the learned trial Judge failed to take into account the fact that potential of land should be realizable in a short time.

(h) that the valuation imposed by the Commissioner of Valuations is grossly excessive, and also unreasonable."

Dr. Edwards complained that the Judge of the Revenue Board misdirected himself in holding that there was sufficient evidence of sales of comparable land. Witnesses on both sides had agreed that the best and most satisfactory method of valuation of land is the ascertainment of the price at which comparable land had been sold. It is a question of fact to be determined by the trial judge whether neighbouring property is comparable or not to the property in question. As was said by Douglas Brown on his treatise on Land Acquisition:

> "For the sale of neighbouring land to be relevant, the valuer needs to establish that the lands of the claimant are virtually identical with the land of the neighbour and that the latter were sold in the open market at a date close to the date of acquisition. The date of sale must be sufficiently close to the date of acquisition so that the market price could not have changed. The physical characteristics, amenities and the tenure need to be as closely alike as possible." Land Acquisition by Douglas Brown Cap. 42 p. 201.

The onus is upon the party submitting such evidence to prove that the sales were in fact comparable and where there is a divergence of opinion as to which sales are comparable sales, the burden may shift to the other party. Land Acquisition by Brown (supra) p. 202:

Exhibit 3 which was put in evidence by the respondent made reference to thirteen properties, four of which represented sales. Of these sales, a point of comparability was that they were all car park lots within the same car park. Lot 153 which was sold for $34,000.00 in 1973, at approximately $10.94 square foot is situated at the corner of St. Lucia Avenue and the car park. Lot 152 which is immediately west of lot 153 and which was sold in 1973 for $33,750.00, at a rate of $10.93 per square foot was described by Mr. Francis as "more attractive" than lot 141 due to its proximity to St. Lucia Avenue. Lot 129 which is to the northern section of the car park, is fifth removed from St. Lucia Avenue and it was sold in May 1973 for $30,000.00. That lot, too, was considered by Mr. Francis as more attractive than lot 141. The fourth lot for which the respondent provided evidence of sale was lot 142 situated immediately to the east of lot 141. It was of similar size, suffered from a similar 18" depression and it was sold in 1972 for $16,200.00.

Mr. Francis testified that he did not carry out a research of sales throughout the sub-division and that he concentrated on the car park of which lot 141 formed a part and over a period mediate to March 1974.

Severe criticism was launched at the inclusion in Exhibit 3 of the valuations placed by the Commissioner on lots 216 and 217. The evidence, it is to be recalled, is that these two lots were immediately west of Knutsford Boulevard in the same line with lots 141 and 142 on similar car parks but that there was no motorized access to lots 216 and 217. There was no dispute that lots 216 and 217 were similarly located to lots 141 and 142 but Dr. Edwards argued that it was impermissible

for the respondent to himself create a valuation and then to use that creation for his own benefit as a precedent. This argument drew the response that the Commissioner has a statutory obligation to attain and preserve uniformity in values between valuations of comparable parcels of land in any given district and to achieve this end the Commissioner is empowered to alter valuations during the subsistence of a five-year valuation cycle in accordance with section 11 (3) (g) of the Land Valuation Act. The valuation placed by the Commissioner on lots 216 and 217 respectively, are at the rate of $10.00 and $9.84 per square foot respectively. In my opinion, if indeed the Commissioner of Valuations has acted uniformly throughout his valuation of property which is truly comparable, then evidence of other valuations is admissible, not for the purpose of binding the Court as to the correctness of the valuation, but as an indicator that the challenger's property has been impartially (even if wrongly) and indifferently valued.

In support of Ground of Appeal 4 (d) Dr. Edwards argued that the Commissioner acted on an incorrect basis when he based his valuation inter alia, on motorized access to lot 141 from St. Lucia Avenue via the car park and also from Knutsford Boulevard, in that there was no provision in the sub-division for motorized access from Knutsford Boulevard. He pointed to the physical situation in relation to the car park lots which border on Tobago Avenue and on Grenada Crescent and these, he argued, were in a similar legal situation to the lots off the car park at which lot 141 was located. A raised piazza from Knutsford Boulevard prevented motorized access to the car park lots west of Knutsford Boulevard and Dr. Edwards submitted that this Court should draw the inference that at any time a similar obstruction could be constructed to affect lot 141. What Dr. Edwards could not say, and what the appellant and his

witness could not deny, is that there was on the ground at the time of the valuation clearly defined motorized access from Knutsford Boulevard to lot 141. Apart from the markings on the sub-division plan from which an inference could be drawn that motorized access to lot 141 from Knutsford Boulevard had not been originally intended, the appellant could provide no documentary or other evidence to contradict evidence of the physical condition of the land. As Dr. Edwards had to preface his submissions by an admission that people drive to lot 141 from Knutsford Boulevard, he was met by the response of the respondent that such a situation was in the contemplation of the legislature when it defined "unimproved value" to mean:

> "(a) in relation to unimproved land the capital sum which the fee simple of the land together with any licence or privilege (if any) for the time being affecting the land, might be expected to realize if offered for sale on such reasonable terms and conditions as a bona fide seller would require." [Emphasis mine].

At the very least, said the respondent, lot 141 enjoys for the time being a licence or privilege over the roadway which leads from Knutsford Boulevard to that lot. Here was an opportunity for the appellant to present evidence from Kingston and St. Andrew Corporation as to what, if any, were their intentions in regard to this roadway, but no such evidence was forthcoming. In those circumstances, I am clearly of the opinion that the respondent was obliged to take into consideration the existing physical condition of lot 141 in relation to motorized access and consequently no irrelevant consideration, as contended for by the appellant, affected the respondent's decision.

Grounds 4 (e) (f) (g) were argued together as Dr. Edwards submitted that the respondent misapplied the principles dealing with the potential use of the land by valuing the lot at its realized possibilities rather than by its possibilities. Mr. Francis for the respondent valued the lot on the basis that it was suitable for the construction of a two or three storey office building and this he did although he had done no research as to the demand for office space in the New Kingston area in 1974. Messrs. Burke and McCalla said they could get no offers for the purchase of lot 141 although willing to sell for $6,000.00 in 1974.

This Court held in Valuations Commissioner v. Hall (1963) 8 J.L.R. 234 that the decisions in the line of cases exemplified by Vyricherla Narayana Gajapatiraju (Raja) v. Revenue Divisional Officer, Vizagapatam (1939) 2 All E.R. 317, dealing with compensation for compulsory acquition of land are applicable for the interpretation of the Land Valuation Act. Lewis J.A. said at page 239:

> "In my view this reasoning is as applicable to the consideration of the real value of the land under the Land Valuation Law as it is under statutes dealing with compensation for land compulsorily acquired. Since the concept in both cases is the same, namely the sum which the willing owner selling in open market on reasonable terms and conditions would expect to realize, there seems to be no good reason why the same principles should not apply. Granted that the main purpose of the Land Valuation Law is valuation for rating purposes, the emphasis in the definition of unimproved value nevertheless is upon the value to the owner and there is no reason why that value should differ according to the purpose for which it is assessed."

In Hall's case (supra), a Valuation Board had decided that in valuations under the Land Valuation Law it was improper to take into account the future development of the land. Earlier Lewis J.A. had referred to the definition of "unimproved value" in the Land Valuation Law and continued:

> "There is no dispute that these provisions require the Commissioner in valuing the land to visualise a hypothetical sale of the land as one parcel by a willing seller to a willing buyer. The implications of the willing seller and the willing buyer concept are now well established and have with modifications, been codified in the Land Acquisition Statutes of many commonwealth countries. They have been authoritatively stated in a number of cases to which this Court was referred. I need only mention Spencer v. Commonwealth of Australia; Cedar Rapids Manufacturing & Power Co. v. Lacoste; Fraser v. Fraserville City; Vyricherla Narayana Gajapatiraju; Raja vs. Revenue Divisional Officer.
>
> These cases establish that the 'value' of the land is its market value, that is what a man desiring to buy the land would have had to pay for it on the prescribed day to a vendor willing to sell it for a fair price but not desirous of selling it. In arriving at this value, all the advantages which the land possesses, present or future, in the hands of the owner may be taken into consideration; but its potentialities must be considered as possibilities and not as realised in the hands of the purchasers."

Finally the applicable rule of law, however clear, is not the end of the matter as in the instant case the question is whether the applicable legal rule was correctly applied to the facts of the case. The absence of an offer to purchase is not an insurmontable hurdle in arriving at the unimproved value of the land. The definition of unimproved value proceeds on the assumption that there must be a purchaser and in the absence of an actual purchaser, a mythical or hypothetical purchaser must be assumed and hence it must be assumed that there is a demand -

Collins on Valuation of Property Compensation and Land Tax, p. 27.

The function of the hypothetical purchaser was authoritatively expounded by Isaacs J., in Spencer v. Commonwealth of Australia (supra), when he said that the ultimate question was the value of the land at the valuation date and continued:

> "The all important fact is the opinion regarding the fair price of the land which a hypothetical prudent purchaser would entertain, if he desired to purchase it for the most advantageous purpose for which it was adapted ..... To arrive at the value of the land at that date, we have, as I conceive to suppose it sold then, not by means of a forced sale, but by voluntary bargaining between the plaintiff and a purchaser, willing to trade, but neither of them so anxious to do so that he would overlook any ordinary business consideration. We must further suppose both to be perfectly acquainted with the land, and cognizant of all circumstances which might affect its value, either advantageously or prejudically including its situation, character, quality, proximity to conveniences or inconveniences, its surrounding features, the then present demand for land, and the likelihood, as then appearing to persons best capable of forming an opinion of a rise or fall for what reason soever in the amount which one would otherwise be willing to fix as the value of the property."

In Spencer's case there was evidence that the land in question at the date of valuation situate at North Freemantle about ten miles from Perth, Australia, consisted of sand hummocks overlooking the Indian Ocean. It had no grass, and was useless in that condition for any purpose of production. The plaintiff's witnesses thought that the land in question, by reason of its situation, its height, and its exceptionally large area amongst a number of small sub-divisions, had a prospective value as a site for a factory or some other enterprise requiring a considerable space. The defendant's witnesses on the other hand thought that the land was not fit for anything except sub-division into small allotments for workmen's dwellings. On these conflicting facts the learned trial judge arrived at the special finding that

on the material date, whatever the property might have fetched as a future factory site, the highest value of the land was for workmen's cottages. With this finding of fact the Appellate Court found itself unable to disagree, although in the view of Isaacs J.:

> "The suitability of the land for a factory site is incontestable. But its inherent suitability, and its money value, for a factory are two very different matters. No demand for factory sites there existed on 1st January, 1905 and therefore no special value could be placed on it for that purpose, unless the hypothetical prudent purchaser would then taken into his calculation the future prospects of the land being wanted for such a site. As to this not a single concrete fact leading to such a probability, or likely to influence a would be purchaser, is adduced."

The speculative prospective futuristic hope in Spencer's case is to be contrasted with the position in the instant case where the land had been sub-divided some thirteen years before valuation date, office buildings had already been constructed at various sections within the development and there were previous sales of land which border on the car park on which lot 141 is situated. The caution of Isaacs J., in Spencer's case (supra) may well be heeded when he said of the judge's finding of facts:

> "Unless some error of principle is established, or the evidence on one side so preponderates over that on the other by reason of its character, force, or quality, as to distinctly outweigh the disadvantages of not seeing and hearing the witnesses, it is impossible to disturb a finding of the nature now under consideration."

Lucas v. Chesterfield Gas and Water Board (1909) 1 K.B. 16, proceeded on the basis that the land in question had a special adaptability for the construction of a reservoir and that this special quality ought to be taken into consideration in the assessment of compensation. The Court re-iterated the principle that the test is of the possibilities and not the realized

possibilities. In that case there was no power in the owner of the land to have developed it into a reservoir and the land could be sold for that purpose to only a very limited number of purchasers who had parliamentary power to construct a reservoir, yet having regard to the state of readiness of the land for the purpose of a reservoir, Vaughan Williams L.J. concluded:

> "It may be that the adaptability of the land for the purpose of enlarging the reservoir was so unique that he will give a value little less than that which he would give if dealing with the realized possibility."

The facts in the case of Maori Trustee v. Ministry of Works (1958) 3 All E.R. 336 P.C. were entirely different from those in the instant case. There a plan subject to the approval of the appropriate Minister had been prepared for the sub-division of two hundred and forty-two acres of Maori land. Before the approval of the Minister was obtained a notice of intention to compulsorily acquire ninety-one acres of the land was served. At the time of the notice there was no more than a paper plan for the sub-division and the land had not then been sub-divided in fact. This is how Lord Keith of Avonholm described the land in question:

> "It is clear that, as a scheme of land development, the plan, if it had ever got to the stage of consideration by the Minister, might have been materially modified in the matter of roads, drainage, access, the establishment of reserves, co-ordination with adjacent areas and other respects, if it were not entirely scrapped and had to be written anew ..... there were in fact no subdivided lots as shown on the plan, no roads, fences, accesses, drainage or other facilities."

Some of the factors which a Court must take into consideration in valuing land, ripe for sub-division are the prospective yield from the sub-division, the costs of effecting such a sub-division, and the likelihood that a purchaser acquiring the land with that object would allow some margin for unforeseen costs, contingencies and profit for himself. All

these factors are quite irrelevant to the instant case where the sub-division was zoned for commercial purposes, the permitted development on each lot of land was set at three times the ground space and a hypothetical purchaser could commence construction as soon as he had secured approved building plans. I can therefore find no merit in the complaint that the land was valued on the basis of realized possibilities rather than upon its possibilities.

Dr. Edwards argued Grounds 1, 2 and 3 together and submitted that the Judge of the Revenue Court failed to assess the evidence properly and erred in law in holding that the assessment of $27,000.00 was not excessive. In my opinion the purchase price paid for lot 142 in 1972 was very cogent evidence upon which the learned trial judge could rely for his decision to reject the appellant's valuation of $6,000.00 and that of Mr. McCalla of $4,000.00 in respect of lot 141.

The criticism that the respondent's sample was insignificant as it amounted to a minimal 1% of the total number of car park lots is in my view unsupportable, as the lot or lots selected for comparison fell within the lots adjacent to the same car park in which lot 141 was located and provided evidence most closely related to lot 141. Evidence of the sale of lot 142 was of such exceptionally high cogency that no tribunal of fact which had properly directed itself in law could fall to accord to it significant weight.

The existence of motorized access from Knutsford Boulevard to lot 141 is an unassailable fact which cannot be destroyed or displaced by mere argument and debate. It is my opinion that the learned judge of the Revenue Court was obliged to give weight to this factor and he has not been shown to have erred in law in accepting and acting upon the evidence of Mr. Francis.

At the time of the purchase of lot 141 by the appellant it was his intention to build his professional offices there. No evidence was led by him to indicate that that land had become wholly unsuitable for office purposes and therefore worthless. One is left to wonder how the appellant and his auctioneer described this lot when they advertised it for sale. Where the evidence of Messrs. Burke and McCalla on the one hand, conflicted with the evidence of Mr. Francis on the other hand, the learned judge of the Revenue Court was in the best position to assess their credibility and to assign weight to their evidence. I am not at all persuaded that he was in error in any of his findings of fact nor that he took any irrelevant matter into consideration, nor that he failed to give due weight to any matter which he ought to have considered. In the circumstances, therefore, I am of the opinion that this appeal should be dismissed, the Order of the Court below ought to be affirmed and the appellant should be ordered to pay the costs of the appeal to be agreed or taxed.

CARBERRY J.A.

I have had the opportunity of reading in draft the judgment of Rowe J.A. (as he then was), and have in fact had it under advisement for longer than I should. Frankly it seemed to me that in accepting the arguments made by counsel on behalf of the Commissioner of Valuations rather less than justice had been done to the taxpayer, Mr. K.C. Burke. However in the period of recovering from a recent operation I have had the opportunity of going through once more not only the arguments and cases addressed to us, but also reviewing a great many other cases culled from the Australian Reports (The Commonwealth Law Reports), and I am sorry to say that none of them dealt directly with the problems that faced us in this case, (nor did the cases from other jurisdiction cited to us). I have been reluctantly compelled to come to the conclusion that ultimately what we faced was a combination of a question of fact and the way the statute involved, The Land Acquisition Act, had been drafted. I am therefore of the view that the Judgment of Rowe J.A., is correct. I must however set out the difficulties in this case of fact and the law as I saw them.

The appellant Mr. K.C. Burke, (hereafter referred to as the tax payer), a solicitor and Attorney-at-law, and sometime President of the Jamaica Bar Association, bought in 1960 a Lot, No 141, in a sub-division called New Kingston; the sub-division consisted of the major part of what had formerly been the Knutsford Park Race Course. The sub-division had been first approved in principle by the Kingston and St. Andrew Corporation in late 1958, but the final sub-division plan was deposited on 13th January, 1960 and Mr. Burke got his title, registered at Volume 957 Folio 34, on the 10th January, 1961. The lot was of the average size, 30 by 90 feet, and he bought it for £2,700 (subject to a mortgage of £1,900). (In the decimal currency which

replaced the ℓ those figures would be $5,400 and $3,800 respectively). He has been in possession since 1961, and has made no improvements and in fact done nothing with the lot since he bought it. He bought it with the intention of building his office there, or to sell it and acquire other land for that purpose. A fair inference would be that he bought it as a speculative investment, hoping that as one of the original purchasers he might resell later at a profit. Unfortunately, though he has made efforts to resell, advertising the lot for sale, putting up a for sale sign, engaging auctioneers etcetera he has had no offers. He has indicated that he would have been willing to accept as little as $6,000 up to 1970. In his Declaration of Value dated 30th October, 1974, this tax payer declared the value of the land to be $6,000.00 and complained that no one had offered as much as $10,000.00

The Declaration of Value form appears to be one of the forms used by the taxpayer who wishes to challenge the valuation made by the Commissioner of his premises. He signs or submits (1) a Notice of Objection, and (2) at the same time is required to submit his own Declaration of value, and presumably will until the matter is settled pay taxes at least on that value.

In the Notice of Objection form, it appears that this lot had been valued by the Commissioner at $36,700 (unimproved value). The form records the tax payer's reasons for objecting to the valuation as follows:

> "No building thereon and land is empty lot. No income earned therefrom. Land is 'landlocked' with buildings on all adjoining lots and is very small. Frontage is only 30 feet and depth 90 feet. Area 2700 square feet. Have been trying to sell land for several years, and no one up to now with offer as much as $10,000 or more. Value assessed grossly excessive."

Though the Notice of Objection to the valuation was dated 30th October, 1974, The Notice of Decision of Commissioner is dated 11th November, 1980.

The Commissioner's decision on the objection was to reduce the unimproved value from the figure of $36,700 to $29,700, and to amend the valuation roll to that effect as from 1st April, 1974.

The form records that the Collector of Taxes has been advised of the new valuation and that that taxes should now be paid on that valuation. It is I think worthy of comment that at no time was any reason ever advanced or evidence given by the Commissioner to support the original valuation of $36,700 or to suggest how that figure had been arrived at in the first place. The Commissioner's evidence was directed at justifying the $29,700 to which he had reduced the valuation, or rather the still lower figure of $27,000.00 to which he ultimately came.

The taxpayer appealed to the Revenue Court against the valuation of $29,700 by a Notice of Appeal, 14th January, 1981. The grounds of appeal will be discussed later on.

Something must now be said of the legal context in which the question of unimproved value was being discussed. Under The Property Tax Act persons in possession of property are required to pay to the appropriate Collector of Taxes property tax on their land, annually, the tax being due and payable on the 1st day of April in each year. The Schedule to that Act sets out the rate of property tax, and it is payable on the unimproved value of the property. Section 12 (2) of the Act provides:

> "(2) In this Act any reference to the unimproved value of property in whatever terms shall be deemed to be a reference to the unimproved value of land within the meaning of the Land Valuation Act."

The powers of the Collectors of Taxes and the mechanics of tax collection are to be found in the Tax Collection Act.

Before looking at the Land Valuation Act itself, it should be noted that there is another dimension to that Act, which is to be found in The Land Acquisition Act. This act gives power to the government to acquire for public purposes particular lands deemed to be necessary for such purposes, and provides for the payment of compensation for such lands. Section 14 deals with the determination of the amount of compensation to be awarded, and one of the principal items of compensation is of course the market value of the land taken. Subsection 2 (c) of section 14 observes:

> "(c) in determining the market value, regard shall be had to any subsisting valuation of the unimproved value of the land pursuant to the Land Valuation Act and all assessments and returns acquiesced in or made in that behalf."

The result then is that the Land Valuation Act serves a double purpose: it fixes the valuation of property for rating or tax purposes, (in respect to which the taxpayer will be anxious to secure a low valuation figure), but at the same time fixes the valuation or compensation which the Government will give to the owner whose land it compulsorily acquires, (in respect to which the owner would naturally wish to have the highest possible value awarded). These two approaches are inconsistent the one with the other, but two further comments should be made: for Taxation purposes what is being taxed is the unimproved value of the land, while for compensation purposes what is being compensated for is the improved or market value as it stands of the land taken; and secondly there are provisions for the payment of additional compensation for damage caused to the remaining land, reasonable expenses for removal from the land acquired etcetera, but to be set against this is any increase in value to the remaining land arising from the use to which the acquired land is put. The

introduction of this new approach has caused some dislocation to land owners accustomed to having a special valuation put on their land for tax or rating purposes, which was very much lower than the amount they would have either sold their land for, or expected in compensation if it were compulsorily acquired. The devising of a common formula for valuing land for both taxation and compulsory acquisition purposes seems to have originated in New South Wales, Australia, though the formula for compensation has become widely used throughout the Commonwealth.

The Land Valuation Act defines "Unimproved value" thus:

> "unimproved value" means:
>
> (a) in relation to unimproved land the capital sum which the fee simple of the land together with any licence or other right or privilege (if any) for the time being affecting the land, might be expected to realize if offered for sale on such reasonable terms and conditions as a bona fide seller would require;
>
> (b) in relation to improved land the capital sum which the fee simple of the land might be expected to realize if offered for sale on such reasonable terms and conditions as a bona fide seller would require, assuming that at the time as at which the value is required to be ascertained for the purposes of this Act the improvements as defined in this Act do not exist:
>
> Provided that .... (proviso omitted)
>
> (The provisos conclude by saying that the unimproved value shall in no case be less than the sum that will be obtained by deducting the value of the improvements from the improved value.)

It appears to me that sections (a) and (b) of the definition of "unimproved value" are meant to arrive at the same end result, seeing that in the case of "improved land" the value is to be arrived at as if the improvements did not exist, and further the value of the improvements is to be deducted from the improved value in order to arrive at the unimproved value. "Value

of improvements is also defined, and is sharply distinguished from the cost of the improvements.

The result then is that on either approach, whether it be valued as unimproved land, or as improved land, the valuation of the lot, or its "unimproved value" ought to be the same. The total area has of course been improved, by the subdivision, the cutting of roads, installation of water and electricity mains etcetera, though the individual lots themselves have not been worked on.

One other general comment: when the formula indicated above is used in land resumption or compulsory acquisiiton cases to arrive at the value or compensation to be paid the dispossessed former owner, the cases indicated that what is to be valued is the land as it was worth to the owner, it is his interest that is being acquired.

It should also be noted that while the best evidence of the value of land, its market value, would be evidence of offers made for it, or evidence of what it had recently been purchased for or sold for, evidence of sales of similar land in the same area at the relevant times is probably the next best evidence that can be got, and in practice is the evidence most frequently offered.

In particular it should be noted that the exercise of valuation is somewhat arbitrary: it is not to the point that in actual fact at the date of valuation no one would have been willing to make any offer at all for the subject land. Griffiths C.J., put the matter thus in Spencer v. The Commonwealth (1907) 5 C.L.R. 418 at 432:

> "It may be that the land is fit for many purposes, and will in all probability be soon required for some of them, but there may be no one actually willing at the moment to buy it at any price, still it does not follow that the land has no value. In my judgment the test of value of land is to be determined, not by inquiring what price a man desiring to sell could actually have obtained for it on a given day, i.e., whether there was in fact on that day a willing buyer, but by inquiring 'What would a man desiring to buy the land have had to pay for it on that day to a vendor willing to sell it for a fair price but not desirous to sell? It is, no doubt very difficult to answer such a question, and any answer must be to some extent conjectural."

Isaacs J., in the same case put the matter thus, at page 441:

> "The plaintiff is to be compensated; therefore he is to receive the money equivalent to the loss he has sustained by deprivation of his land, and that loss, apart from special damage not here claimed, cannot exceed what such a prudent purchaser would be prepared to give him.
>
> To arrive at the value of the land at that date, we have, as I conceive, to suppose it sold then, not by means of a forced sale, but by voluntary bargaining between the plaintiff and a purchaser, willing to trade, but neither of them so anxious to do so that he would overlook any ordinary business consideration. We must further suppose both to be perfectly acquainted with the land, and cognizant of all circumstances which might affect its value, either advantageously or prejudicially, including its situation, character, quality, proximity to conveniences or inconveniences, it surrounding features, the then present demand for land, and the likelihood, as then appearing to persons best capable of forming an opinion, of a rise or fall for what reason soever in the amount which one would otherwise be willing to fix as the value of the property."

It is I think clear that in this situation one may find conflicting opinions of equally honest competent and confident experts.

Spencer's case was a case of valuation for compulsory acquisition of land. However the principles set out in the passages quoted have been adopted in cases of valuation for the purposes of taxation. See for example Federal Commissioner of Land Tax v. Duncan (1915) 19 C.L.R. 551 at 553, where Griffiths C.J. says:

> "The definition of "unimproved value" in section 3 of the Act is this:
>
> 'the capital sum which the fee simple might be expected to realize if offered for sale on such reasonable terms and conditions as a bona fide seller would require'.
>
> The underlying idea is that the land is to be treated as converted into money as on the day as of which the assessment is made, so that a realized capital sum takes the place of the land. That of course assumes a hypothetical purchaser. It does not mean that you are to inquire whether there was at that time a purchaser in existence who would have been willing to buy the particular parcel of land. That was pointed out in Spencer v. The Commonwealth."

The definition of "unimproved value" appearing above is virtually the same as that in the Jamaica Land Valuation Act, and Spencer's case was followed in our own case, Valuation Commissioner v. Hall (1963) 8 J.L.R. 234; 5 W.I.R. 401.

The fact that Mr. Burke is unable to find a purchaser for his lot at a price that he would accept, even as little as $6,000 - $10,000 is not necessarily conclusive, seeing that what we are to find is a hypothetical purchaser. Nevertheless the failure to find any purchaser over such a long period must I think be a factor to be taken into account, but how?

The Land Valuation Act operates on the premise that the valuations made by the Commissioner will be reviewed periodically as near as may be five years after the date fixed for the first valuation, and then as near as may be on every fifth anniversary of such date thereafter: see section 11.

Though Mr. Burke had bought his lot in 1960 for ⁄2,700, it appears that for taxation purposes it was valued at ⁄500 by the Collector of Taxes, and was reduced from ⁄500 to ⁄400 in 1964. Though the Land Valuation Act had been passed in 1957 it seems that in the period 1960-64 the previous system by which valuations for tax purposes were made by the Collector of Taxes still obtained. Be that as it may, if the Commissioner of Valuations was now taking over and purporting to re-value the land, under one of the periodic 5 year re-valuations, it would seem arguable that the onus of showing that the value of the land had increased since it was first valued should rest on the Commissioner. After all the land is already on the Tax and Valuation Rolls, and if it is alleged that its value has increased, should not the burden of showing the change rest on the Commissioner who asserts it?

Something should be said generally about this sub-division and Mr. Burke's Lot. The land in question was what might be called "prestige land", and since development commenced on it, some very large and expensive buildings have been erected on it. The subdivision plan did not cut the land up into a grid or system of small blocks. Instead there was a large central road running through the heart of the subdivision, Knutsford Boulevard. If that road is regarded as running north to south, then on each side of the subdivision there was another north to south road, not as wide, but running parallel, one on the east being St. Lucia Avenue, and the other on the west being Grenada Crescent (running into Antigua Avenue). Apart from the perimeter roads to the north and south (Trinidad Terrace and Tobago Avenue) There were two main avenues running east to west across the full breadth of the subdivision. In between these two main avenues were smaller areas, indicated as "car parks" on the plan, which ran from St. Lucia Avenue on the East and from Grenada Crescent

on the west, but did not emerge on to Knutsford Boulevard, that is they stopped short, and represent so to speak inlets from the two outside roads which have no connection or egress on to the main central highway Knutsford Boulevard. Persons having lots on these car parks have no direct access to the central highway Knutsford Boulevard, and their only means of egress is through the car park and onto one or other of the two subsidiary north to south roads, St. Lucia Avenue or Grenada Crescent. In addition, for some reason explicable only to the developers, each car park is terminated by an area designated "piazza." This apparently is an area to be raised above ground level, and onto which no vehicular traffic at all will go! Each "piazza" however has two lots on each side of it, and as the plan stands it appears that those lots have no road access at all. The lot that Mr. Burke chose to buy was such a lot; it had no road access according to the subdivision plan, and could acquire such access only if it was held by some one who had an adjoining lot which directly fronted on the car park. Alternatively, it could get road access if vehicles were allowed to cut across what seemed to have been designed as pedestrain footways to the piazza. The evidence indicated that in fact this had been happening, though it was contrary to the subdivision plan and at some time or the other the developers or for that matter the appropriate civic authority might intervene to restore the barriers and footways originally planned for.

Bearing these considerations in mind Mr. Burke's choice of this lot (and there are others like it) was unfortunate. He complains that it was "landlocked". It might also be observed that in a prestige area where buildings were being erected on holdings of six lots or more, buying a single lot was like entering into a poker game with a very inadequate stake

considering what the other players had! His lot now is so to speak in the back yard of one of the very big buildings which front on Knutsford Boulevard, namely Citi-Bank. He has not offered his lot to them for sale. Further, unless they plan some small extension or annex it is not easy to see what could ever induce them to buy it.

Before turning to the evidence in detail one or two further general comments are in order. In actual fact the development of the New Kingston sub-division has been very unequal. Several large and imposing buildings have been erected, surrounded now by deserts of undeveloped lots with a good deal of untidy rubbish thereon. There are some areas however which do house what may be called middle sized buildings of two stories or three. Such building as has taken place will have undoubtedly increased the value of the lots that have so far not been built on. It may be that some are single lots, and that some are single lots fronting on the car park areas, or even landlocked like that of Mr. Burke. Be that as it may if land values increase generally because of such development as has taken place, then this will affect the remaining lots whatever their actual condition may be. This may sometimes operate harshly on the tax payer, as in Tetzner v. Colonial Sugar Refining Co., Ltd.,(1958) A.C. 50 (P.C.). Here the taxpayer, the Sugar Co., had by its industry brought new abundant life to the surrounding village, provided steady work for its inhabitants, and seen them improve their holdings and houses. Land values went up, largely due to the growth stimulated by the company. The result was that the taxable values of the company's land also increased in value. It was held that though the increased prosperity of the neighbourhood was due to all that goes with the carrying on of a successful manufacturing enterprise by the company it could not be regarded as a deductable

improvement; the company's land had to be valued as land void of buildings but situated in the community with the amenities and facilities which have grown up around it.

In the result then unbuilt on lots may well find that their value has increased due to the development elsewhere in the subdivision, though they continue in the same condition as when first acquired, bringing in no income, and they may have few attractions for a purchaser.

The taxpayer here, set up as his main line of attack on the valuation of $27,000 proposed by the Commissioner the fact that he had been unable to find a purchaser for his lot despite his efforts to sell it, and the fact that he was up to 1970 asking as little as $6,000 ($600 above what he originally paid for it.)

In support he called an auctioneer and real estate agent of some 29 years experience, who valued the lot in 1974 at $4,000. and commented adversely on the situation of the Lot ("location is everything.)" This valuation was less than the taxpayer had originally paid for the lot, and less than he was willing to accept from any purchaser. Unfortunately the witness had no evidence as to sales of any comparable lots in the subdivision and no ready answer to the suggestions as to comparative sales put forward by the Commissioner, save to point out that they were at better locations and were not landlocked as was lot 141.

For the Commissioner, evidence was given by his deputy, who said that he had assessed this lot at $27,000, taking into account the various features of the subdivision. He offered evidence culled from the Registered Book of Titles (which records transfers and consideration) to the effect that Lot 142 which adjoins the subject lot 141 had been sold in 1972

for $16,200, while lots 152 and 153 which are on the same car park as lot 141 but 153 fronts on St. Lucia Avenue were sold for $33,750 and $34,000 in 1973. Further Lot 129, which fronts on the same car park, but on the other side and fairly close to St. Lucia Avenue sold in 1972 for $30,000.

In response to the question why value lot 141 for $27,000 when lot 142 next to it sold for $16,200 in 1972 the deputy commissioner stated that the real estate market was quite buoyant in 1972 and that there had been a significant upward movement of prices between 1972 and 1974. In cross-examination he admitted that lots on the car parks were valued at less than lots that fronted on the roads in the subdivision, and that these latter lots had been more developed in the 21 years that the subdivision had been in existence.

In response to a question from the trial judge as to valuing Lot 141 for $27,000 when lot 142 had sold for $16,200 in 1972, the witness repeated his suggestion that sale prices had gone up in 1973 over 1972, from $6.00 per square foot to $11.00 per square foot. No actual evidence was ever called in support of this assertion.

In his judgment the learned trial judge seems to have accepted the submission made by counsel for the Commissioner that there was an onus on the taxpayer to prove the Commissioner's valuation wrong. (This seems to me to be debatable: there was a previous valuation figure on the roll, and it is the Commissioner who is re-valuing the premises, should he not have the burden of justifying his new increased figure? Why should the taxpayer have to prove the figure wrong? He already has on the existing roll the previous valuation, there is no reason to assume without evidence that the figure has changed?)

Be that as it may, the learned trial judge rejected the evidence of the taxpayer's witness (as to a $4,000 value) as unsatisfactory: it lacked any evidence of comparative sales of comparable lots. He did not reject the taxpayer's evidence that he had been trying to sell the lot for some years without finding a purchaser, but observed that as indicated in Spencer's case (supra) what is needed is a hypothetical purchaser not a real one. He was I think troubled as to the significance that could be attached to the taxpayer's evidence as to failure to find a purchaser, but he did not reject it as untrue. On the other hand he accepted the evidence as to the sale of lot 142 in 1972 at $16,200 and did not agree that the 70% increase in two years to $27,000 was not supported by other evidence in the case. He accepted the assertion that had been made by the deputy commissioner that prices had escalated between 1972 and 1974.

Speaking for myself there are two things about this case that worry me considerably. There were some 380 lots in this subdivision, and one would have thought that (a) some classifications were possible, e.g. ranking differently in value lots that had frontage on a road from those that fronted only on car parks, (b) but that a certain level of uniformity as to valuation should have been possible to establish. There was no evidence as to the original prices at which the lots were sold, but if in fact differentiations were made dependent on the location of the lots, it would have been possible to discover these and to use them as points of reference.

The second matter that worries me is that if the taxpayer comes to court and says "I have been trying to sell the lot for $6,000 or thereabouts, and I can't get a buyer, despite putting the place into the hands of real estate agents, and putting up for sale sign," it seems unfair to tell him well

the man next door to you sold his lot for $16,200 and I say your lot is worth $27,000 or 70% more two years later. The Statute contains no clause which would enable the tax payer to say to the Commissioner "You say its worth $27,000, then kindly take the land over from me at that figure, its your own valuation!" While it is true that the valuation exercise is a conjectural one, and that the purchaser is "hypothetical," if in fact the taxpayer has had the land advertised for sale at a far lower figure and has had no offers, then the problem remains how does this affect the valuation? Unfortunately the cases are quite silent on this particular problem. Possibly because it is to some extent a question of fact. If one accepts the evidence of the Commissioner as to the value of a comparable lot, then whether you have been able to sell your lot or not that is the valuation. To use the American proverb, "If you can't stand the heat come out of the kitchen", but says the taxpayer, "that's exactly what I have been trying to do, but I can't find a purchaser, nor will Government take it over for what they allege its worth."

Finally, it is my opinion that where the Commissioner is revaluing a taxpayer's land, and alleges it has increased in value, the onus should be on him to show the increase over the previous existing valuation. In this case that would have made no difference as the learned trial judge found that the Commissioner had discharged any burden, he accepted the Commissioner's evidence.

In Spencer's case (supra) at p. 430-431 Griffiths C.J. discusses the role of a Court of Appeal dealing with findings of fact by the trial judge. He said:

> "It has often been pointed out that, when a cause has been heard by a Judge on oral evidence, a Court of Appeal is very reluctant to differ from him on a question of fact, especially when there is a conflict of evidence. And the same considerations apply whether the conflict is as to the actual facts, or as to a matter of opinion as to which it is material to weigh the relative values of the opinions of different witnesses. So far, therefore, as Higgins J., founded his judgment on the weight to be given to the opinion of the different witnesses as to relevant facts, I am not prepared to differ from him..."

There are of course dicta that go the other way, and which indicate that if the Appellate Court is of the view that the judge has taken into account matters that should not have been allowed to influence him, or has failed to take into account matters that should have influenced him, or even if it is clear that he has made a mistake, the Appellate Court will intervene and correct the judgment.

Here the trial judge accepted the evidence given by the Deputy Commissioner and his assertion that there had been a 70% increase in land values between 1972 and 1974, as against the evidence of the taxpayer's witness that there had been a slump in the market (for land) between 1973-75, and that there had been a marked lack of demand 1973-74, and that the market had been better in 1972 than in 1973.

I have, with some reluctance, come to the view that the appeal must be dismissed, and the judgment below upheld. The respondent will have his costs of the appeal, to be taxed or agreed.

ROSS J.A.

I have had the opportunity of reading the judgments in draft of Rowe J.A., (as he then was) and Carberry J.A., and I agree that the appeal should be dismissed, with costs to the respondent.