HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

ON APPEAL FROM THE COURT OF APPEAL OF THE SUPREME COURT OF VICTORIA

BETWEEN: VALUER-GENERAL VICTORIA
Appellant

and

WSTI PROPERTIES 490 SKR PTY LTD
Respondent

APPELLANT'S REPLY

Part I: Certification

1 These submissions are in a form suitable for publication on the internet.

Part II: Reply

2 The respondent's submissions (**RS**) fail to grapple with the appellant's submissions on the question of construction on which the appeal turns. Instead, they focus on peripheral issues, advancing contentions that are unavailable and unsound.

The respondent's inability to rely upon the Tribunal's factual findings as it seeks to do

3 The respondent says that "[t]here are two issues that arise on appeal", the second being whether the appeal will "fail in any event" (RS[3]), and contends for an affirmative answer, on the basis that, even on the appellant's construction, Landene increased the value of the land at the time of the valuations and hence is an improvement.

4 The second issue does not arise on appeal and, even if it did, ought be answered in the negative.

5 The COA did not find that Landene increased the value of the land at the time of the valuations; rather, it concluded that Landene increased the value of the land upon its construction in 1897 and that the benefit of the works was unexhausted at the time of the valuations (AJ[146]-[147]).

6 In aid of its contention, the respondent seeks to rely on findings of the Tribunal to the effect that Landene increased the value of the land at the time of the valuations (RS[23], [52]). However, following the COA's judgment, those findings do not stand.

7 The Tribunal made the findings on which the respondent relies on the basis that the identification of improvements necessitates an anterior enquiry into the highest and best use of the land (PJ[110]). This led the Tribunal to conclude that (PJ[162]):

> … the correct approach in ascertaining whether the improvements add value is to compare the market value in its full current state, that is, including its limited development potential [i.e. the heritage overlay] and existing structures with the market value that the land would have with the *same development potential*, without the buildings on the land (emphasis in original).

8 It was the Tribunal's approach of identifying the land's highest and best use as a "'starting' point" (PJ[110]) that led it to assess whether Landene was an improvement by comparing the land with and without Landene but holding constant the assumption that the land was constrained by its present "development potential" and thus subject to the heritage overlay (PJ[162]).

9 However, the COA held that the Tribunal erred in proceeding on the basis that it was necessary to identify the highest and best use of the land *before* identifying what constituted an improvement (AJ[91(1)], [107], [158]). This obviates the findings of the Tribunal as to Landene adding value, on which the respondent seeks to rely, as those findings followed from and depended upon the Tribunal's erroneous approach and do not arise upon a proper approach.

10 Accordingly, on the supposed second issue, the respondent seeks to uphold the judgment below on grounds not decided by the COA, indeed on a basis rejected by the COA, and to do so impermissibly in the absence of any notice of contention.[1] That is sufficient to dispose of RS[3(b)], [23] and [51]-[64].

11 For completeness, on this aspect the COA was plainly correct to decide as it did, such that any notice of contention would have failed in any event. As the New South Wales Court of Appeal held in *Trust Company Australia v The Valuer-General* (2007) 154 LGERA 437 at [33], [36]:

> 33 It is particularly important, for present purposes, that there is a particular order of operations that s 6A requires to occur in ascertaining the "land value". In carrying out the thought-task that s 6A(1) calls for, first, the "improvements" other than land

[1] See *High Court Rules 2004*, r 42.08.5.

> improvement … are notionally removed. Only then does the notional sale occur. And it is by reference to that notional sale that the highest and best use is determined. Thus, it is necessary to determine the identity of the improvements that are to be removed *before* the highest and best use can be ascertained.
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> …
>
> 36 According to the appellant's submission, the identity of the improvements is ascertained by reference to what is the highest and best use. That requires the highest and best use to be known before the identity of the improvements is ascertained. But the temporal sequence of events that s 6A requires simply does not enable that to occur. This provides, in my view, a strong reason why the appellant's submission is incorrect.[2]

12 Once the analysis proceeds upon the correct footing, it is "obvious" and "self-evident" that the value of the land with Landene was less than the value of the land without Landene (AJ[110]).[3] The respondent appears to accept that factual conclusion, if the analysis is undertaken on this footing (RS[55]).

The respondent's invalid submission that the heritage overlay is not to be disregarded

13 The respondent seemingly also seeks to uphold the result below, even on the appellant's construction, by a submission (RS[60]-[61]) that the heritage overlay should not be "disregarded" when assuming that Landene is not present, notwithstanding the unchallenged finding (PJ[95.2]) that the overlay owed its existence to the presence of Landene and that in the absence of the building its restrictions were "not relevant".

14 Again, the respondent not having filed and served a notice of contention, this submission is not open.

15 Nor would any such notice of contention have availed the respondent. That is because RS[60]-[61], and the authorities there cited,[4] are directed to the process of valuation, rather than the logically distinct and anterior step of identifying improvements. As this Court has explained, there is a three step process, being (1) the identification of any improvements; (2) the notional removal of those improvements from the land; and (3) having thus identified what is to be valued, the assessment of its value.[5] This appeal

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[2] See also *Surfers Paradise Resort Hotel Pty Ltd v Department of Natural Resources* (2007) 163 LGERA 14.
[3] That follows irrespective of the respondent's attempt to confine the findings made at first instance regarding the respondent's expert evidence (RS[16]), and its misreading of the COA's reasons (RS[20]).
[4] *Australian Postal Commission v Melbourne City Council* (2005) 14 VR 678 at [17], [20]; *McEwin v Valuer-General* (1993) 60 SASR 241 at 247.
[5] See *Maurici v Chief Commissioner of State Revenue* (2003) 212 CLR 111 at [16], which concerned the relevantly cognate definition of "land value" in the *Valuation of Land Act 1916* (NSW), and *Trust Company of Australia Ltd v Valuer-General* (2007) 154 LGERA 437 at [33], cited with approval in *Surfers Paradise Resort Hotel Pty Ltd v Department of Natural Resources* (2007) 163 LGERA 14; AJ[152].

concerns the first step, and the authorities relied on by the respondent directed to the third step are therefore irrelevant.[6]

16 Moreover, the authorities cited by the respondent are selective and do not reflect the preponderance of authority even on the third step.[7]

The proper construction of the definition of "improvements"

17 In respect of the issue that *does* arise on the appeal, the respondent contends that "[t]he VGV's argument appears to rest on two premises" (RS[30]; see also [49], [64]).

18 That is not correct. On the proper construction of the statutory definition, the appellant relies primarily on the statutory text (AS[24]-[28]) and also on matters of context, history and authority concerning analogous provisions (AS[29]-[58]). The "two premises" on which the respondent focuses comprise a fraction of the considerations upon which the appellant relies.

19 The respondent's submissions otherwise say little by way of response to the VGV's contentions regarding the proper construction. Only four points arise for reply.

20 ***First***, as to the submission that the appellant's construction would leave the concept of exhaustion in the definition of improvements with no work to do (RS[36]), the composite phrase "increases the value of the land and the benefit is unexhausted" is readily explicable in light of its drafting history (AS[38]-[47]), and may be said to reflect "a different and more verbose style of drafting from what is seen in more recent legislation".[8] As this Court has explained, Parliament is sometimes guilty of surplusage,[9] and provisions may be enacted merely by way of precaution.[10] Indeed, as to the provision in question, so much was plainly the case. Thus, in response to a

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[6] It is of note that the appellant raised these matters before the COA (AJ[91] (ground 3), [93]-[97]), and the COA accepted that the Tribunal had conflated the three step process (AJ[108]). That conflation continues to infect the respondent's submissions (eg RS[62]), including its reliance on parts of the Tribunal's reasons (PJ[136]-[138]) directed to valuation as distinct from the identification of improvements: RS[58].

[7] *Randwick Municipal Council v Valuer-General* [1960] NSWR 778 at 784 (a valuation of land on an assumption that improvements had not been made will entail the consequence that all restrictions whose existence depend upon the presence of the improvement "must be regarded as having departed with the improvements to which they were attributable"); *Toohey's Ltd v The Valuer-General* [1925] AC 439 at 443, 445; *Sonnerdale v The Valuer General* (1953) 19 LGR (NSW) at 212; *Wunderlich Ltd v The Valuer General* (1959) 5 LGRA 50 at 61**,** 63 (and see *Valuation of Land and Local Government (Amendment) Act 1959* (NSW)); *Valuer-General v Queensland Club* (1991) 13 QLCR 207 at 220.

[8] See eg, in a different context, *Taheri v Vitek* (2014) 87 NSWLR 403 at [121].

[9] *Western Australian Planning Commission v Southregal Pty Ltd* (2017) 259 CLR 106 at [55].

[10] *Council of the City of Brisbane v AG (Qld)* (1908) 5 CLR 695 at 720, cited with approval in *Solution 6 Holdings Ltd v Industrial Relations Commission of New South Wales* (2004) 60 NSWLR 588 at [75]; *Beaufort Developments (NI) Ltd v Gilbert-Ash (NI) Ltd* [1999] 1 AC 266 at 273–274.

criticism raised during the parliamentary debates that the words "and the benefit thereof is unexhausted" were "surplusage",[11] it was ultimately agreed that those words should be retained in order to render the definition "stronger and more explicit" and "merely [to] emphasize what we desire to enforce".[12]

21 ***Secondly***, as to RS[34], the respondent's suggestion that "the use of the present tense in the definition … is grammatically neutral" is untenable. There is no basis in the statutory text or otherwise to consider that the legislature's use of the present tense gives rise to an indication that the increase in value "is to be assessed at the time the works or materials were applied".

22 ***Thirdly,*** as to RS[45]-[49], the respondent's contentions are difficult to follow, although the first "alternative" construction in RS[45(a)] appears inappositely to pertain to the valuation step. To the extent that the contentions are developed orally, do not require a notice of contention, and are relevant, the appellant will address them orally.

23 ***Finally***, the respondent relies on authority that in fact supports the appellant (RS[38]-[41]) and appears to seek to construe the VLA by reference to differently drafted provisions in Tasmanian and Queensland statutes (RS[42]-[43]).

Dated: 10 February 2025

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[11] Victoria, *Parliamentary Debates*, Legislative Assembly, 10 November 1909 at 2154. See generally at 2148 to 2154.
[12] Victoria, *Parliamentary Debates*, Legislative Assembly, 25 November 1909 at 2551. The debates in question concerned the *Land Tax Bill 1909*, as to which see AS[46] and footnote 15 thereof.