IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
JUDICIAL REVIEW AND APPEALS LIST

Not Restricted

S ECI 2018 01179

ACAPULCO GOLD PTY LTD (ACN 005 201 927) Appellant

v

IAN GEOFFREY WALLIS First Respondent

and

TECK FOOK LIEW Second Respondent

JUDGE:	Richards J
WHERE HELD:	Melbourne
DATE OF HEARING:	7 June 2019
DATE OF JUDGMENT:	21 June 2019
CASE MAY BE CITED AS:	Acapulco Gold Pty Ltd v Wallis
MEDIUM NEUTRAL CITATION:	[2019] VSC 414

APPEAL – Victorian Civil and Administrative Tribunal – Orders under *Subdivision Act 1988*, s 34D(1)(a) that owners corporation transfer part of common property to a lot owner in return for a payment assessed to be 'fair market value' – Whether Tribunal required to apply *Spencer v Commonwealth* (1907) 5 CLR 418 in assessing 'fair market value' of the land to be transferred – Whether Tribunal misapplied *Spencer* – Whether Tribunal had regard to irrelevant considerations – No real prospect of success on appeal – Leave to appeal refused – *Subdivision Act 1988* (Vic), ss 32, 34A, 34D, *Victorian Civil and Administrative Appeals Tribunal Act 1998* (Vic), s 130.

APPEARANCES:	Counsel	Solicitors
For the Appellant	Mr N Jones	Ellinghaus & Lindner
For the Respondents	Mr D Colman	LFS Legal

HER HONOUR:

1 The parties to this proceeding are neighbours at **12 St Georges Grove**, Parkville West, where there are four units. Unit 1 is owned by Teck Fook Liew, unit 2 is owned by Ian Wallis, and units 3 and 4 are owned by **Acapulco Gold** Pty Ltd, a company controlled by Rainer Ellinghaus. The parties are also members of an owners corporation, which owns the common property at 12 St Georges Grove. In this proceeding, Acapulco Gold seeks leave to appeal against orders made by the Victorian Civil and Administrative **Tribunal**, which determined a long running dispute between the parties about part of the common property.

2 The circumstances that gave rise to the dispute were described in the Tribunal's reasons for decision:[1]

> The property at 12 St George's Grove, Parkville West enjoys the prime position amongst a small cluster of streets largely surrounded by parkland. Number 12 is at the dead end of the street. Beyond is parkland. The property comprises four two-storey units, set one behind the other. Each enjoys a north-eastern aspect directly abutting Royal Park. The land is affected by Owners Corporation RP 018900 (the OC).
>
> Unit 1 fronts St Georges Grove, with units 2, 3 and 4 in a line behind it. There is a driveway along the south-western side serving all four units. … At the back of unit 4, furthest from the street, is an extension of unit 4, in the form of a granny flat which Mr Ellinghaus built in 2008 to accommodate his mother, who has since died. This small (22 m²) brick extension was built on common property beyond the end of the driveway, and largely across the back end of the site. …

3 While the then owners of units 1 and 2 acquiesced in the construction of the granny flat on common property, no formal arrangements were agreed at the time. Nor was agreement reached between unit owners during the decade that followed.

4 In February 2017, Mr Wallis and Mr Liew applied to the Tribunal under the *Owners Corporations Act 2006* (Vic), for orders that Acapulco Gold remove the granny flat and reinstate the common property at its expense. Acapulco Gold then made its own application, seeking orders under the *Subdivision Act 1988* (Vic) requiring the owners corporation to transfer to Acapulco Gold the common property on which the

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1 *Wallis v Acapulco Gold Pty Ltd* [2018] VCAT 1248 (Reasons), [1]–[2].

granny flat stands.

5 By the time of the final hearing before the Tribunal in June 2018, the parties were agreed that the disputed land should be transferred to Acapulco Gold, and incorporated into unit 4, on the basis that it paid 'fair market value'. The parties were agreed on all aspects of the transfer, except for the 'fair market value' of the disputed land. They asked the Tribunal, constituted by Senior Member Smithers, to determine that question.

6 On 9 August 2018, the Tribunal made orders under s 34D(1)(a) of the Subdivision Act, requiring the owners corporation to transfer the disputed land to Acapulco Gold, in return for payment to the owners corporation of $104,500. The Senior Member published reasons for his finding that the fair market value of the disputed land was $104,500. That finding accepted the opinion of the respondents' valuer, Donald Brindley, in preference to the opinion of Acapulco Gold's valuer, Des Dunn.

7 Acapulco Gold seeks leave to appeal from these orders. It contends that the Tribunal erred in law by failing to apply, or misapplying, the well accepted industry definition of market value enunciated in ***Spencer*** *v Commonwealth*,[2] and by having regard to irrelevant matters. It further submits that the Tribunal denied it natural justice by modifying the *Spencer* test without informing the parties of the test it intended to apply.

8 For the reasons that follow, I have concluded that Acapulco Gold has no real prospect of success on any of the proposed questions of law in the amended notice of appeal, and so leave to appeal must be refused.[3] The Tribunal did exactly what the parties asked it to do, which was to determine the 'fair market value' for the disputed land. The Tribunal did not misapply or modify *Spencer*, but applied it appropriately in analysing the competing valuations. The amount by which unit 4 would increase in value with the addition of the disputed land was a relevant

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2 (1907) 5 CLR 418 (***Spencer***).

3 *Victorian Civil and Administrative Tribunal Act 1998* (Vic), s 148(2A).

consideration in assessing fair market value.

Did the Tribunal misapply or modify *Spencer*?

9 Acapulco Gold's primary contention is that the Tribunal did not assess the value of the disputed land in accordance with the principles in *Spencer*, but rather applied a modified version of those principles. This contention directs attention to the High Court's decision in *Spencer*, and the principles that have been drawn from it in subsequent authorities.

Spencer v Commonwealth

10 *Spencer* concerned a dispute about the value of land in Fremantle that had been taken by the Commonwealth for defence purposes under the *Property for Public Purposes Acquisition Act 1901* (Cth). The former owner of the land had a statutory entitlement to compensation for the value of the land taken. Griffiths CJ described the approach to be taken to valuing the land as follows:[4]

> 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. The necessary mental process is to put yourself as far as possible in the position of persons conversant with the subject at the relevant time, and from that point of view to ascertain what, according to the then current opinion of land values, a purchaser would have had to offer for the land to induce such a willing vendor to sell it, or, in other words, to inquire at what point a desirous purchaser and a not unwilling vendor would come together.

11 Barton J took a similar approach:[5]

> … a claimant is entitled to have for his land what it is worth to a man of ordinary prudence and foresight, not holding his land for merely speculative purposes, nor, on the other hand, anxious to sell for any compelling or private reason, but willing to sell as a business man would be to another such person, both of them alike uninfluenced by any consideration of sentiment or need.

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4 *Spencer*, 432 (Griffiths CJ).

5 *Spencer*, 436–437 (Barton J).

12 A third formulation was given by Isaacs J:[6]

> 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.

13 The hypothetical willing but not anxious buyer and seller are presumed to be familiar with the land and to know everything about it that might affect its value.[7] The question to be determined is 'what is the point at which the parties would meet; what is the sum the one would be willing to give and the other to take?'[8]

14 The approach to determining market value articulated in *Spencer* has been given statutory expression in many Australian jurisdictions. For example, s 40 of the *Land Acquisition and Compensation Act 1986* (Vic) defines 'market value', in relation to an interest in land on a particular date, to mean:

> … the amount of money that would have been paid for that interest if it had been sold on that date by a willing but not anxious seller to a willing but not anxious purchaser.[9]

15 Market value is not to be confused with two related, but distinct, concepts: compensation and 'value to the owner'. Compensation to be paid for land that has been compulsorily acquired is generally assessed by reference to the market value of the land, but may also include compensation for other matters in addition to the market value. These other matters may include any special value of the land to its former owner, losses due to disturbance and severance, and an additional amount of compensation by way of solatium.[10] The concept of 'value to the owner' was developed as a gloss or unifying concept that brought together all of these matters –

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6 *Spencer*, 441 (Isaacs J).
7 Ibid.
8 Ibid.
9 See also e.g. *Lands Acquisition Act 1989* (Cth), s 56 and *Land Acquisition (Just Terms Compensation) Act 1991* (NSW), s 56.
10 See e.g. *Land Acquisition and Compensation Act 1986* (Vic), ss 40, 41, 44.

market value, special value, disturbance and severance – for which an owner deprived of land by compulsory acquisition is entitled to be compensated.[11]

16 Acapulco Gold submitted that the Tribunal should have determined market value by reference to the 'value to the owner' of the disputed land. In my view, this submission confused the two concepts. In some statutory contexts, 'value to the owner' is used to describe the matters for which an owner of land is to be compensated for its compulsory acquisition.[12] These generally include the market value of the land as the starting point. But market value is not determined by reference to the subjective value of land to the owner at the time of acquisition. As formulated in *Spencer*, market value is to be determined objectively, as the point at which a hypothetical vendor and a hypothetical purchaser, each of them fully informed and willing but not anxious, would agree on a price for the land.

17 *Spencer* is accepted as the 'classic test for establishing the value of land for compensation purposes'.[13] Its application in a given case is a question of fact,[14] informed by expert opinion.

18 Although there is a need for caution when taking principles developed in one context and applying them in another, the approach in *Spencer* has been adapted and applied to valuation questions beyond the compulsory acquisition context.[15] Recently, the High Court accepted that the *Spencer* approach could be adapted to determine the objective economic value of extinguished native title rights and interests, in assessing compensation under the *Native Title Act 1993* (Cth).[16] In

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11 *Leichhardt Council v Roads and Traffic Authority of New South Wales* (2006) 149 LGERA 439 (***Leichhardt Council***), [24]–[25]; *Barilla v Roads Corporation* (2017) 54 VR 198 (***Barilla***), [56]–[64].

12 E.g. *Spencer*, 435 (Barton J), *Turner v Minister of Public Instruction* (1956) 95 CLR 245 (***Turner***), 280 (Williams J). A concept developed in one statutory context is not necessarily applicable in a different, albeit analogous, context: *Leichardt Council*, [30]–[31]; *Barilla*, [68]; *Commissioner of State Revenue (WA) v Placer Dome Inc* (2018) 93 ALJR 65 (***Placer Dome***), [23].

13 *Barilla*, [52].

14 *Turner*, 267 (Dixon CJ); *Olefines Pty Ltd v Valuer-General (NSW)* (2018) 234 LGERA 444, [25]–[26] (Basten JA, Macfarlan and Leeming JJA agreeing).

15 *Placer Dome*, [22]–[27] (Kiefel CJ, Bell, Nettle, Gordon JJ).

16 *Northern Territory v Griffiths* (2019) 93 ALJR 327 (***Griffiths***), [66], [85] (Kiefel CJ, Gageler, Keane, Nettle and Gordon JJ), [245]–[246] (Gageler J), [280] (Edelman J).

reaching that conclusion, Edelman J emphasised that the *Spencer* approach is not a 'mandated legal rule' but is rather a 'common method of assessing the objective exchange value of rights'.[17]

19 *Spencer* established an approach to valuing land that has, over more than a century, been expressed in various ways. The three Justices in *Spencer* each gave a different formulation of the approach, with the common features of a voluntary bargain between an informed and willing but not anxious vendor and a purchaser with the same characteristics. I have difficulty with the notion of a rigid, immutable '*Spencer* test', given the variety of ways in the approach has been expressed, its flexibility and the range of different circumstances to which it has been adapted. Clearly, there is room for reasonable minds to differ about the application of *Spencer* in a given case.

What was the Tribunal asked to do?

20 Acapulco Gold's primary contention also raises the question whether the Tribunal was bound to apply *Spencer* in assessing fair market value. Acapulco Gold submitted that the Tribunal was bound to apply the *Spencer* test because that is the test that the parties had agreed upon. Alternatively, it submitted that *Spencer* is the accepted legal test for determining valuation disputes.

21 The competing applications were listed before the Tribunal on several occasions. At a hearing on 5 October 2017, the parties sought the Tribunal's assistance to determine the actual area of land in dispute, and the value per square metre of that land. The Tribunal made orders for a survey to be undertaken of the disputed land, and for Mr Wallis and Mr Liew to file and serve a report of their valuer, Mr Brindley.

22 At the next hearing on 7 March 2018, with the benefit of the survey, the parties accepted that the disputed land was an area of 22 square metres. Counsel for Acapulco Gold characterised in various ways the dispute that the parties wished the Tribunal to determine. He said that his client was prepared to pay 'a reasonable figure', 'the proper figure', 'reasonable market price', 'a fair market price' and 'full

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17 *Griffiths*, [275], [280] (Edelman J).

market' for the land.[18] The main issue dividing the parties was whether a discount of 50% should be applied when valuing the disputed land, because it was small, inaccessible and irregular in shape. Mr Dunn was of the opinion that such a discount was warranted, while Mr Brindley was not.

23 Orders were made for a further report from Mr Brindley, addressing the reasons why he did not apply a discount to the market value of the disputed land. The proceeding was listed for further hearing 'on the issue as to whether a 50% discount is appropriate'. This was to be determined on the basis of the valuers' evidence and 'cross-examination of the valuer to work out who has got the best logic'.[19]

24 The hearing on 29 June 2018 proceeded on the shared understanding that the main issue for the Tribunal was whether a 50% discount should be applied.

25 At the beginning of the hearing, the Senior Member took care to establish the statutory basis on which the Tribunal could make the orders and undertake the assessment sought by the parties. Appropriately, he did not proceed until he was satisfied that he had jurisdiction, which he explained in his reasons as follows:

> The Tribunal's jurisdiction to determine these questions arises under s 34A of the *Subdivision Act 1988* (the relevant general power to resolve disputes under that Act) s 34D(1)(a) of the *Subdivision Act 1988* (the power to order the OC, relevantly, to dispose of, property) and under s 130 of the *Victorian Civil and Administrative Tribunal Act 1998* (power to make orders subject to conditions).

26 Again, there was some imprecision about the question the parties were asking the Tribunal to determine. It was described variously as 'fair market price', 'fair value', 'full market', 'this price matter' and 'value'.[20] In the course of final submissions, the Senior Member sought to clarify the question for determination:

> SENIOR MEMBER: Well, I suppose I'm concerned as to whether or not this is determined as according to what the parties have actually agreed, fair market value versus some other formulation. Well, both of you agree it's fair market value?

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18 Tribunal transcript, 7 March 2018, 7:25–26, 8:14, 26:4, 30:20,35:13.
19 Tribunal transcript, 7 March 2018, 35:14–23.
20 Tribunal transcript, 29 June 2018, 9:26, 10:6–7, 11:1, 12:2-3, 14:2, 45:19–22.

MR FREE:[21] We do.

MR MACKENZIE:[22] We do.

…

SENIOR MEMBER: All right, so it will come down to the Tribunal's view as to what factors you do and don't include in the concept of fair market value?

MR FREE: Yes, sir.

SENIOR MEMBER: Yes, all right.

27 There was no suggestion by either party, during that exchange or in other submissions, that they had agreed that the Tribunal should apply the *Spencer* test, or that the Tribunal was bound to do so. Neither representative mentioned *Spencer* during the hearing on 29 June 2018. Their submissions focused on whether it was fair and logical to apply a 50% discount in valuing the disputed land, by reference to the opinions of Mr Dunn and Mr Brindley.

28 Based on the transcripts of the hearings before the Tribunal, I find that the parties did not agree that the Tribunal should apply the *Spencer* test in assessing the value of the disputed land.

29 The Tribunal's orders were made in the exercise of its jurisdiction under Pt 5, Div 5 of the Subdivision Act. Section 34A gives the Tribunal a general power to deal with disputes relating to owners corporations, in the following terms:

> (1) This section applies if a dispute or any other matter arises under this Act or the regulations and affects—
>
> (a) an owners corporation; or
>
> (b) an owner of land affected by an owners corporation; or
>
> (c) a purchaser in possession under a terms contract of a lot affected by an owners corporation.
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> (2) The owners corporation, owner of a lot or purchaser may apply to the Victorian Civil and Administrative Tribunal for an order determining the dispute or matter.

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21 Solicitor for Mr Wallis and Mr Liew.

22 Counsel for Acapulco Gold.

(3) The Victorian Civil and Administrative Tribunal may make any order it thinks fit on an application under this section.

30 More specifically, s 34D provides:

(1) A member of the owners corporation, an owners corporation, an administrator of an owners corporation or a person with an interest in the land affected by the owners corporation may apply to the Victorian Civil and Administrative Tribunal for –

(a) an order requiring the owners corporation to do any of the things set out in section 32 or 33;

…

(2) The Victorian Civil and Administrative Tribunal may make an order on an application under subsection (1)(a) even though there is no unanimous resolution of the owners corporation authorising the action.

…

(6) Subject to this section, the Victorian Civil and Administrative Tribunal may make any order it thinks fit on an application under this section.

31 Section 32 of the Subdivision Act provides for the alteration of a subdivision by an owners corporation, relevantly:

If there is a unanimous resolution of the members, an owners corporation may proceed under this Division to do one or more of the following—

(a) dispose of the fee simple in—

(i) all or part of any common property vested in it; or

…

32 The Tribunal also relied on s 130 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (**VCAT Act**). Section 130(1) provides:

A power of the Tribunal to make an order or other decision includes a power to make the order or decision subject to any conditions or further orders that the Tribunal thinks fit.

33 The orders of the Tribunal were made in the exercise of broad powers to make any order that it 'thinks fit', and to make that order subject to any condition that it 'thinks fit'. The breadth of these powers did not mean that the Tribunal was completely at

large. It was required 'when deciding the merits of a case, to apply the law' and was not free to resort to 'idiosyncratic notions of fairness and justice'.[23]

34 Neither party really addressed the question of whether the Tribunal, in exercising its powers under ss 34A and 34D of the Subdivision Act and s 130 of the VCAT Act, was obliged to apply *Spencer* as a matter of law. Acapulco Gold simply asserted that it was the accepted test for determining the market value of land. On the other hand, the respondents referred me to recent authority to the effect that the approach in *Spencer* is a method for assessing value and not a 'mandated legal rule'.[24]

35 Given the diverse ways in which the approach in *Spencer* has been expressed over the years – including by the two valuers in this case – I am inclined to the view that the Tribunal was not obliged to apply the '*Spencer* test' as a legal rule in determining the fair market value of the land. However, it is not necessary to decide that question. As I discuss below, I have concluded that the Tribunal applied *Spencer* in an orthodox way, without modification.[25]

36 There was no suggestion that s 5A of the *Valuation of Land Act 1960* (Vic) applied to the valuation that the Tribunal was asked to undertake. Section 5A(1) of the Valuation of Land Act provides:

> Unless otherwise expressly provided where pursuant to the provisions of any Act a court board tribunal valuer or other person is required to determine the value of any land, every matter or thing which such court board tribunal valuer or person considers relevant to such determination shall be taken into account.

Even if ss 34A and 34D of the Subdivision Act or s 130 of the VCAT Act are provisions that 'required' the Tribunal to determine the value of the disputed land,

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23 *Christ Church Grammar School v Bosnich* (2010) 34 VAR 23 (***Bosnich***), [40]. This decision concerned the Tribunal's power under s 109 of the *Fair Trading Act 1999* (Vic) to make any order it considers fair. The reasoning in *Bosnich* has been applied in relation to other similarly broad powers of the Tribunal, including s 165 of the *Owners Corporations Act 2006* (Vic): see *Energy Technology Australia Pty Ltd v Owners Corporation PS 439401J* [2017] VSC 145, [73]–[79] and *Elwick 9 Pty Ltd v Freeman* [2018] VSC 234, [56].

24 *Griffiths*, [275], [280] (Edelman J).

25 See [51]–[57] below.

s 5A of the Valuation of Land Act is not a statutory version of the *Spencer* approach. If it applied, it would have permitted the Tribunal to take into account anything it considered relevant, in addition to the mandatory considerations specified in s 5A(2) and (3).

The Tribunal's reasoning

37 After setting out the factual and procedural background, the Tribunal identified the questions it had to determine. The primary question was whether the market value of the disputed land should be discounted by 50% because it is small, inaccessible and irregular in shape. A secondary question was the market value of land in Parkville West generally, which Mr Dunn assessed at $4,500 per square metre, and Mr Brindley assessed at $5,000 per square metre.

38 Under the heading 'Should the land value be discounted by 50%?', the Tribunal set out the competing opinions of Mr Dunn and Mr Brindley on that question. Mr Dunn's reasons for applying the 50% discount were summarised as follows:[26]

> In giving his oral evidence, Mr Dunn referred to the irregular shape of the 22 m2 parcel, and its location at the back of unit 4. He said it really was of little value to anyone other than the owner of unit 4. He said it is very difficult to analyse the value of such parcel by way of comparable sales. Mr Dunn said the most comparable situation would be where old laneways (former night cart lanes) are sold to adjoining owners. Typically, he said such land is sold to adjoining owners at a 50% discount.

39 Mr Brindley, on the other hand, was of the opinion that discounting the land value by 50% was 'not in accord with the principle of the Spencer Case or the principle of equity'. He emphasised that the value of unit 4 would increase with the addition of the disputed land, enriching the owner of unit 4, so that discounting the market value of the land would not be equitable to the other lot owners.

40 The Senior Member commenced his analysis by setting out the 'well accepted industry definition of market value', as expressed by Mr Dunn:[27]

> Market value is the estimated amount for which an asset should exchange on

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26 Reasons, [12].
27 Reasons, [19].

> the date of valuation between a willing buyer and seller in an arm's length transaction, after proper marketing, wherein the parties had each acted knowledgeably, prudently and without compulsion.

41 He continued:[28]

> However, this is an unusual situation. The reality is that the 'market' for this land has very different characteristics to the market for land in the local area or in Melbourne generally. This means that traditional approaches to the ascertainment of value need to be applied in a modified way. Also, here, the parties have agreed the thing to be determined is 'fair market value'.

42 He then analysed Mr Dunn's reasons for applying a 50% discount to the market value of the land. Mr Dunn said that the market for the disputed land was 'totally constrained' and that there were in reality very few willing buyers. No adjoining owner other than units 1, 2, 3 or 4 could use the land, and it was far more valuable to unit 4 than to the other units. Mr Dunn hypothesised that the owner of unit 4 could simply refuse to buy the land, and could hold out for a lower price because there would be no other buyer willing to pay full market value.[29]

43 The Senior Member observed that this hypothesis 'does not correctly reflect the circumstances here'.[30] Far from being a reluctant purchaser, Mr Ellinghaus had taken possession of the land in 2007-8 and had built an extension on it at a cost of $150,000. The question of how this should be dealt with legally had dragged on for over 10 years, the other lot owners had not agreed to sell the land at a discount, and had applied to have the extension removed.[31] In those circumstances:[32]

> I do not think it is accurate to infer that the present situation is one where the vendor is particularly willing, or where the buyer is not particularly willing. Rather, it is the other way around.

44 The Senior Member concluded his analysis on the 50% discount question as follows:[33]

> Accordingly, in my view it is not correct to seek to apply the principle in the

28 Reasons, [20].
29 Reasons, [21].
30 Reasons, [22].
31 Reasons, [22]–[28].
32 Reasons, [28].
33 Reasons, [29]–[31].

> *Spencer* Case in the manner Mr Dunn has, since that principle applies when considering sales evidence in relation to an ordinary arm's length transaction, and in the case of the subject property, a hypothetical willing buyer and willing seller.
>
> In my view, in determining 'fair market value' in the particular circumstances of this case, the most significant factor is the financial benefit that the acquisition will bring to Mr Ellinghaus' company. Once the 22 m² is added to the title to unit 4, the value of unit 4 will increase by $99,000 – $110,000 (applying a per square metre valuation of $4,500 – $5,000). Mr Dunn accepted that proposition.
>
> It was suggested by the Applicants that in circumstances where Mr Ellinghaus simply appropriated the land without formal permission of the OC, or the terms having been agreed, the notions of there being a willing seller and this being an arm's length transaction, were distorted. And that there was a conflict between Mr Ellinghaus' private interest as the owner of two of the units on the one hand, and as a member of the OC, whose interests are to maintain the value of common property, on the other. I agree. In my view, the value of the land is to be assessed not on the basis of a single parcel of 22 m², but as 22 m² of the entire site. As such, a 50% discount for the reasons Mr Dunn has outlined, should not apply.

45 The Tribunal determined that the market value of land in Parkville West was $4,750 per square metre. The Senior Member could not find either valuer's opinion more persuasive than the other, and so gave them equal weight.[34] On that basis, the fair market value of the disputed land was assessed to be $104,500. The Tribunal made an order under s 34D(1)(a) of the Subdivision Act requiring the owners corporation to transfer the disputed land to Acapulco Gold, in return for payment to the owners corporation of $104,500.

Parties' submissions

46 Acapulco Gold submitted that there were a number of indications in the Tribunal's reasons that it had applied a test other than the *Spencer* test to determine the value of the disputed land. It emphasised the following:

(a) the Tribunal's statement at [20] that, given the characteristics of the market for the disputed land, 'traditional approaches to the ascertainment of value need to be applied in a modified way' and that the parties had agreed that 'fair market value' was the thing to be determined;

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34 Reasons, [32]–[34].

(b) the discussion of the particular circumstances of this case, in analysing Mr Dunn's opinion that a 50% discount should be applied;[35]

(c) the Tribunal's conclusion that it was not correct to apply the *Spencer* principle as Mr Dunn had 'since that principle applies when considering sales evidence in relation to ordinary arm's length transaction and, in the case of the subject property, a hypothetical willing buyer and willing seller';[36]

(d) the statement that the most significant factor in determining fair market value is the financial benefit to Acapulco Gold;[37] and

(e) the Tribunal's acceptance that the notions of a willing seller and an arm's length transaction were distorted in this case.[38]

47 These statements indicated, it was submitted, that the Tribunal failed to apply the *Spencer* test, and instead applied a different test, assessing value on the basis that the vendor was not a willing vendor and that the sale was not at arm's length. Acapulco Gold complained that the Tribunal did not inform the parties that it would not apply the *Spencer* test, or would apply it in a modified manner, and contended that this was a denial of natural justice and a separate error of law.

48 Acapulco Gold also took issue with the Tribunal's determination, at [31], that the value of the land should be assessed 'not on the basis of a single parcel of 22 m^2, but as 22 m^2 of the entire site'. It said that this meant that the Tribunal valued the wrong parcel of land, by valuing the disputed land as if it was already incorporated into unit 4.

49 Mr Wallis and Mr Liew submitted that the Tribunal applied the *Spencer* test. They argued that *Spencer* is not authority for the proposition that a discount of 50% must be applied when valuing a small, inaccessible, irregular shaped parcel of land. To

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35 Reasons, [22] and [28], reproduced at [42]–[43] above.
36 Reasons, [29].
37 Reasons, [30].
38 Reasons, [31].

the contrary, it would have been a modification of the *Spencer* test to apply a 50% discount to the market value of land in Parkville West, because the discount assumed an anxious vendor and an unwilling purchaser.

50 Further, they contended that the *Spencer* test is adaptable and may be modified to accommodate the unique character of the land being valued.[39] On that basis, the Tribunal was permitted to modify the *Spencer* test to accommodate the unique circumstances of the disputed land. To the extent that it did that, no error was involved. They refuted the submission that the Tribunal had valued the wrong parcel of land, arguing that it had valued the disputed land in the context of its position within the site. They submitted that the Tribunal had decided the case on the basis that it was argued, and had not been procedurally unfair to either party.

***The Tribunal did not misapply or modify* Spencer**

51 Reading the Tribunal's reasons as a whole and without searching for error,[40] it appears to me that the Tribunal did exactly what the parties asked it to do, which was to determine the 'fair market value' of the disputed land. That determination turned almost entirely on whether the general market value of land in Parkville West should be discounted by 50% because the disputed land was small, an awkward shape and at the rear of the common property. The Tribunal concluded that it should not, by applying the *Spencer* approach and by reference to fairness between the parties. As the Tribunal found at [29] of its reasons, to apply the discount would not have been consistent with the principle in *Spencer*.

52 Although the Tribunal said that traditional approaches to the ascertainment of value had to be applied in a modified way in this case,[41] in the end it did not depart from the traditional, or orthodox, *Spencer* approach. It accepted Mr Dunn's description of the relevant market as 'totally constrained', in view of the small number of potential buyers who could use the land. As I read Mr Dunn's report and oral evidence, his

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39 Relying on *Spencer*, 431–432 (Griffiths CJ).

40 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, 272 (Brennan CJ, Toohey, McHugh and Gummow JJ).

41 Reasons, [20].

argument was that a discount should be applied in this market, because a willing seller could find only one possible buyer – the owner of unit 4 – who could hold out for a lower price. This seems to me to be a modification of the *Spencer* approach, because it does not assume the existence of a willing purchaser.

53 The Tribunal tested Mr Dunn's hypothesis against the very different reality of this case. The hypothesis did not hold. In fact, Mr Wallis and Mr Liew were not keen to sell the land, while Mr Ellinghaus was more than usually anxious to acquire it for his company. In those circumstances, the Tribunal did not accept that a discount should be applied.

54 On the critical issue of whether a discount should be applied, the Tribunal preferred Mr Brindley's opinion to that of Mr Dunn. Mr Brindley formed his opinion using *Spencer* as the 'guiding authority'.[42] In his report he set out the definition of market value adopted by the Australian Property Institute and the International Valuation Standards Committee:[43]

> The estimated price that would be agreed between a willing Seller and a willing Buyer at the relevant date, in an arm's length transaction, subject to all usual business considerations with each party acting knowingly, knowledgeably and prudently.

He rejected any discount of the land value as 'not in accord with the principle in the Spencer Case'.[44] It is implicit in the Tribunal's reasoning that it considered Mr Brindley's opinion to be the better application of the *Spencer* approach.

55 As to the submission that the Tribunal valued the wrong parcel of land, I think that this submission was based on a misunderstanding of the Tribunal's reasoning. Mr Dunn's opinion valued the disputed land in isolation. The Tribunal preferred the approach of Mr Brindley, which was to value it as part of the entire common property. Either approach was open. The Tribunal did not value the land on the basis that it had already been incorporated into unit 4. As I discuss below, the future

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42 Report of Donald Brindley, Brindley Consulting dated 24 November 2017, 12.
43 Ibid, 4.
44 Second report of Donald Brindley, Brindley Consulting dated 18 March 2018, 2.

increase in the value of unit 4 was a relevant consideration for the Tribunal.

56 Acapulco Gold has not established a real prospect of succeeding on any question of law arising from the Tribunal's application of *Spencer*. If the Tribunal was bound to apply *Spencer* as a legal rule, it did so. Its determination that a 50% discount should not be applied was a finding of fact, based on the expert opinion of Mr Brindley. That finding was open to the Tribunal, applying the *Spencer* approach to the evidence before it.

57 It follows from what I have already said that there is no substance to Acapulco Gold's natural justice ground. The Tribunal applied *Spencer* in an orthodox way. It did not apply a modified version of *Spencer* without notice to the parties, and did not otherwise depart from the shared understanding of the issue it was to determine.

Did the Tribunal have regard to an irrelevant consideration?

58 Acapulco Gold further contended that the Tribunal erred in finding that the most significant factor in determining fair market value was 'the financial benefit that the acquisition will bring to Mr Ellinghaus' company'.[45] It submitted that this was an irrelevant consideration, because it was not related to the characteristics of the disputed land.

59 In support of this ground, Acapulco Gold argued that *Spencer* required the Tribunal to determine the value to the owner, not the value to the buyer, and so it was impermissible for the Tribunal to consider the increase in the value of unit 4 with the addition of the disputed land.

60 This submission was misconceived. As discussed, the *Spencer* approach does not focus solely on 'value to the owner'.[46] It determines market value by reference to the point at which an informed, willing but not anxious buyer and seller would agree on a price for the land. The financial benefit that will accrue to the buyer on acquiring the land is obviously relevant to an assessment of the point at which 'a desirous

45 Reasons, [30].
46 See [16] above.

purchaser and a not unwilling vendor would come together'.[47]

61 It was not the case that the financial benefit to Acapulco Gold was unrelated to the characteristics of the land. To the contrary, the opinion of both valuers that the value of unit 4 would increase by between $99,000 and $110,000 with the incorporation of the disputed land was based on comparable sales data for the area.

62 The Tribunal could, consistent with *Spencer*, check the valuation 'by reference to as many sources of information and inference as may be found'.[48] The projected increase in value of unit 4 was not affected by the fact that the disputed land was small, inaccessible and irregular in shape. This confirmed the Tribunal's conclusion that a 50% discount was not warranted.

63 Finally, in circumstances where the parties had asked the Tribunal to determine the fair market value of the land, considerations of fairness between them were relevant. It was the opinion of Mr Brindley that applying a discount was 'not in accord with the principle of the Spencer Case or the principle of equity' and would 'wrongfully enrich' Acapulco Gold. Both the reduction in the value of the common property and the increase in the value of unit 4 following the transfer were matters that the Tribunal could take into account in assessing fair market value.

64 There is no real prospect of success in relation to this question of law.

Disposition

65 I have concluded that there is no real prospect of success on any of the questions of law identified by Acapulco Gold in its amended notice of appeal. I therefore refuse leave to appeal.

66 I will hear the parties on the question of costs.

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47 *Spencer*, 432 (Griffiths CJ).
48 *Turner*, 268 (Dixon CJ).