VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST VCAT REFERENCE NO. OC202/2017 & OC2089/2017

CATCHWORDS

Subdivision Act 1998 s 34D(1)(a) – occupation by a lot owner a 22 m² parcel of common property for 10 years – orders by consent for transfer of fee simple in that parcel of common property by Owners Corporation land to lot owner – determination of fair market value.

OC202/17

FIRST APPLICANT	Mr Ian Geoffrey Wallis
SECOND APPLICANT	Mr Teck Fook Liew
RESPONDENT	Acapulco Gold Pty Ltd (ACN: 005 201 927)

OC2089/2017

APPLICANT	Acapulco Gold Pty Ltd
FIRST RESPONDENT	Owners Corporation RP 18900
SECOND RESPONDENT	Ian Geoffrey Wallis
THIRD RESPONDENT	Teck Fook Liew
WHERE HELD	Melbourne
BEFORE	J Smithers, Senior Member
HEARING TYPE	Hearing
DATE OF HEARING	29 June 2018
DATE OF ORDER	9 August 2018
CITATION	Wallis v Acapulco Gold Pty Ltd (Owners Corporations) [2018] VCAT 1248

ORDER

1. Under s 34D(1)(a) of the *Subdivision Act 1988*, Owners Corporation RP 018900 must dispose of the fee simple in the 22 m² parcel of land shown hatched on sheet 2 of the plan by Neil Alfred Webster, Webster Survey Group, surveyor's file reference 12334, version 01, filed with the Tribunal and marked RE-1, by transferring it to Acapulco Gold Pty Ltd, in return for payment to the owners corporation of $104,500.00.

2. Acapulco Gold Pty Ltd must undertake all practical steps required to enable this transfer to occur, and it and all other parties are to provide whatever consents or documents are required to enable this transfer to take place, and for any new plan of subdivision incorporating that 22 m² parcel of land into lot 4 on plan of subdivision RP 018900, to be issued.
3. The existing lot entitlement and lot liability for the four lots comprising plan of subdivision RP 018900 is to remain unaltered.
4. Any application by Mr Wallis or Mr Liew for a costs hearing is to be filed and served by 16 August 2018.
5. Liberty to Apply.

J Smithers
Senior Member

APPEARANCES:

For Applicants	Mr D Free, solicitor
For Respondent	Mr M McKenzie, of counsel

REASONS

INTRODUCTION

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).

2 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. Unit 1 is owned by Mr Liew, and unit 2 is owned by Mr Wallis (the applicants). Mr Wallis purchased unit 2 in 1995. Mr Liew was apparently a tenant of unit 1 for many years, before he purchased it from his former landlord, Mr Ian Humble, on 1 September 2015. The respondent, Acapulco Gold Pty Ltd, a company controlled by Mr Rainer Ellinghaus, owns both units 3 and 4. These were purchased in 1989 and 1996 respectively. 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. Behind that is a pedestrian walkway connecting with Royal Park. While it appears Mr Humble and Mr Wallis acquiesced to the construction of the extension at the time, no formal arrangements were agreed at that point.

3 For the 10 years since, the issues about expenses incurred by Mr Ellinghaus on the behalf of the OC, and about the appropriation of common land by Mr Ellinghaus, have remained unresolved. Although suggested from time to time, there has never been a professional OC manager appointed. Mr Ellinghaus is a solicitor, and a principal of his firm. He was appointed secretary to the OC in 1995. He has apparently informally acted as the manager of the OC since then. He stated he has spent hundreds of hours over the years dealing with matters relating to the OC. However, the OC has been run informally, and records associated with the financial management and general administration have not been maintained in the usual way. In particular, it is clear Mr Ellinghaus (through his company) proceeded to occupy the land without the formal agreement of the OC being obtained, and without the price being agreed in any binding manner.

4 An application was commenced by Mr Wallis and Mr Liew in order to bring matters to a head. It is expressed as seeking the removal of the extension. References in this decision to the 'Applicants' or the 'Respondent' are to the parties in that case (OC 202/17) namely, Mr Wallis/ Mr Liew, and the company, respectively. In response, Mr Ellinghaus commenced another proceeding, naming the OC as first respondent (OC 2089/17) seeking orders regularising the acquisition of the property.

5 Ultimately, the parties have agreed that Mr Ellinghaus take the 22 m² parcel, and that the Tribunal make an order under section 34D(1)(a) of the *Subdivision Act 1988*, on the basis that he pays 'fair market value' to the OC. This payment would then be distributed amongst lot owners in accordance with lot entitlement. It is further agreed that Mr Ellinghaus carry out necessary steps to register a new plan of subdivision incorporating the extension into unit 4, at his cost.

6 It is agreed that lot entitlement will not alter following this acquisition. That is, lot entitlement will remain as 100 units for lots 1 – 3 inclusive and 120 units for lot 4. (Accordingly, a little over half of the payment made by Ellinghaus' company will be distributed back to it.)

7 The only thing the parties cannot agree on is what comprises fair market value. Each party relies on a valuation prepared by a Registered Valuer. The valuers are generally in agreement that the market value of land in Parkville West is in the region of $4,500 – $5,000 per square metre. The relevant difference between them is that Mr Ellinghaus' valuer, Mr Des Dunn, says that this should be discounted by 50%, because the 22 m² parcel is small, inaccessible and irregular in shape. The applicants' valuer, Mr Donald Brindley, says there should be no discount.

8 The consequence of this difference between the parties is that according to Mr Ellinghaus' valuer he should pay $49,500 for the 22 m² parcel, whereas the applicants' valuer says he should pay $110,000 for it. In practical terms, applying lot entitlements, on Mr Dunn's view, the result would be that each of Mr Wallis and Mr Liew would receive a benefit to the value of about $11,800, whereas on Mr Brindley's view, each of them would receive a benefit to the value of approximately $26,200.

9 That is the primary question for determination. I also need to determine what valuation of land in Parkville West generally should be adopted, noting that Mr Dunn assessed the value at $4,500 per m², and Mr Brindley assessed it at $5,000 per m². Both made reference to comparable sales. Mr Dunn, the only witness to give oral evidence, described these two figures as 'extremely close' in comparison to other valuation contests. It was implicit in the case put by both parties that I was to proceed on the basis of an assumption that the value of the land has not changed since the valuers' reports were prepared in September and November 2017 respectively. Both valuers provided supplementary information proximate to the final hearing date, none of which suggested any different position should be taken.

10 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).

SHOULD THE LAND VALUE BE DISCOUNTED BY 50%?

Mr Dunn's evidence

11 In his report dated 20 September 2017, Mr Dunn said he had applied a discount rate of 50% for the following reasons:

- The size of the common land which was built over, 19.76 m² [This is now agreed as 22 m², and nothing turns on the difference.]
- The site is rear land.
- The subject site cannot be sold adjoining/abutting owners as there is public parkland on the northern boundary, a right-of-way on the southern boundary.
- The abutting southern boundary has a sizable height/contour variation, where the boundaries abut.
- At the valuation date the East – West Tunnel debate was in full swing and the units at 12 Georges Grove would have been in reasonably close proximity to the tunnel opening.

12 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.

13 An alternative comparable scenario was put: where an adjoining owner wished to purchase land for their own specific purposes, such as to build a tennis court or to add development capacity to their existing land. In this instance, he acceded to the proposition that the purchaser would place a high value on the land because it would increase the value of the purchaser's existing land. However, in this instance, he said that the back lane analogy was applicable rather than the tennis court/development potential analogy.

14 In relation to the possible East/West Tunnel, Mr Dunn said that prior to the 2014 election this did affect the saleability of land in this area. But he said this particular parcel was not affected in any way which was different to any other land in the area. Consequently I do not see the possibility of impact by that tunnel as relevantly impacting this decision.

Mr Brindley's evidence

15 Mr Brindley prepared a report dated 24 November 2017. He elaborated on this in letters dated 18 May and 22 June 2018. In his letter of 18 March 2018, Mr Brindley summarised the matters he considered critical to the determination of valuation:

- The sales set out in the …tables [he provided].

- The appeal of Unit 4 market prior to the extension work.
- The appeal of Unit 4 market after the extension work and increased land footprint.
- The element of any special value of the land portion to the owner of Unit 4.
- The options available to the owner of Unit 4 if the land was not available, such as disposal costs on the sale of Unit 4 and the acquisition costs on the procurement of another property in comparable locations.
- The process of disposal of partial land interests such as disused rights-of-way (owned by Local Government), surplus carparks in residential and commercial facilities and common property which may be maintained but not owned by a lot owner.
- The rights of Owners' Corporations to deal with the disposal, property by sale, lease or licence and the obligation to obtain market value sale common property based on the definition of Market Value in accordance with the principles of the Spencer Case.[1]

16 Mr Brindley went on to say:

> The question is: why should any unit owner be granted the opportunity to purchase a portion of the common land (irrespective of position) at a discounted price? When a future sale of either the site as a whole (4 townhouses) or the unit individually will then wrongfully enrich that unit owner due to the increased land component. In this instance, the Respondent.
>
> Unit 4 is more valuable with the additional accommodation granted by the taking of the additional land than it was in its original configuration and occupying a smaller land area.
>
> The proposition of a discount in land value would not be equitable to the other lot owners or the Applicants and for this and other reasons explained in this letter I cannot accept proposition of a discount in value of the land.
>
> Also the proposition of discounting the land value by an arbitrary amount (e.g. 50%) is not in accord with principle of the Spencer Case or the principle of equity.
>
> The proposition of the land being rear land and not appealing to another buyer is not sustained on the basis of my arguments and reasoning above.
>
> If it was the intent of the Respondent/Unit 4 to acquire the land at less than market value then the unilateral physical occupation of same has prejudiced the Applicants/Owners' Corporation from following due process and obtaining full unencumbered market value rather than parties being in the usual position to freely negotiate a sale when the

[1] *Spencer v Commonwealth* [1907] HCA 82; (1907) 5 CLR 418.

> Owners Corporation had control and prior to the unauthorised construction thereon.
>
> From discussions with the Applicants I note the following points which I believe have relevance and are worthy of consideration:
>
> - Local Government Authority grants building approval without reference or approval of the Owners' Corporation.
> - No consent to occupy the land was sought from the Owners' Corporation.
> - Construction of extension without consent of the Owners' Corporation.
> - The resultant costs of the Owners' Corporation/Applicants in bring[ing] this matter to VCAT.

17 In his letter of 22 June 2018, Mr Brindley in effect mounted an additional argument in support of a valuation of $5,000 per m². This was a contention the parcel could be attractive to a person wishing to develop a separate residence that site. He postulated the construction of a three-level two-bedroom townhouse on the parcel of land in question, supported by some basic architectural drawings, notwithstanding it is irregular in shape, and only 22 m² in area. Mr Brindley prepared hypothetical development costings and yield figures including a gross realisation figure for the 66 m² building area at $10,000 per m² (suggesting an estimated selling price of $660,000). Accordingly, he said there would be demand in the market for such a parcel if sold separately to a third party.

18 Mr Dunn commented that he felt the postulated expenses were understated and the estimated selling price of $660,000 was overstated. In any event, from a planning perspective, it seems quite unrealistic to postulate such a development, and so I place no weight on it in terms of supporting the Applicants' position.

Analysis

19 Both valuers referred to the well accepted industry definition of market value. Mr Dunn expressed it as follows:

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

20 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'.

21 In his evidence, Mr Dunn agreed with the proposition that once the vendors had decided to sell, they were 'walking into a totally constrained market.' He said there were in reality very few willing buyers. The land is irregular in shape and there is a pronounced fall in level between this land and the neighbouring property to the south-west of the OC site. No adjoining owner could use this land other than units 1, 2, 3 or 4, and of those, it was far more valuable to unit 4 than the others. During his evidence, Mr Dunn said that if the property was to go to the open market, Mr Ellinghaus (or, in fact, Acapulco Gold Pty Ltd) 'would say well, I don't want to buy it or I don't need to buy, then there is no market for it.' That is, to take the stance that there would be no other buyer who would be prepared to pay anything approaching $4,500 – $5,000 per m², and so hold out for a lower price.

22 That does not correctly reflect the circumstances here, however. The reality is that Mr Ellinghaus took possession of this parcel in 2007 – 2008, and the question of how this should be dealt with in a legal sense has dragged on for 10 years since.

23 To his affidavit of 3 October 2017, Mr Ellinghaus exhibited correspondence from him which suggested that he be entitled to take this land (or at least some part of its value) as recompense for all the work he had done and expenses incurred in administering the OC over the years. It is not clear this was ever agreed to. Certainly no formal document to that effect was produced. In this proceeding, the issues of the reimbursement which Mr Ellinghaus was entitled to for his work in administering the OC over the years, and the expenses he had been paying on the OC's behalf, were initially part of the dispute between the parties. However, following a very time-consuming accounting process, that has been resolved.

24 The position of Mr Wallis and Mr Liew in this hearing was that Mr Ellinghaus had simply taken over the land without permission, or at least without formal permission from the OC, and now seeks to regularise that acquisition. The narrative of events set out in Mr Ellinghaus' affidavit, and the correspondence exhibited to it, suggests that Mr Ellinghaus proceeded to obtain a planning permit for the extension to his unit 4 around late 2007 (apparently without objection from Mr Wallis or Mr Humble), that a building permit was obtained on 13 June 2008, followed by construction of the extension (at a cost of approximately $150,000), with Mr Ellinghaus's mother moving in on 19 December 2008.

25 There was reference to a valuation of $38,000 obtained by Mr Ellinghaus from a valuer, Mr Barry McClelland, dated 28 September 2007. This related to a differently configured parcel, 38 m² in size. Like Mr Dunn's valuation it applied a 50% discount, and for similar reasons. While initially Mr Wallis and Mr Humble were inclined to agree to the $38,000, as time passed, and the arrangements were not finalised during 2008 – 2010, they indicated they did not accept it. On the other hand, in correspondence, Mr Ellinghaus suggested at one point that this amount was too high. Both Mr Wallis and Mr Humble floated a proposal for other parts of the common

land comprising gardens adjacent to each of the units, to be incorporated into the title each of those units. But this has not eventuated.

26 The questions of the accounting for the OC's expenses, and the arrangements concerning the occupation of the 22 m² parcel remained unresolved until around 2016, when it appears correspondence about these matters resumed. By that time Mr Liew had purchased unit 1, in September 2015, from Mr Humble.

27 This proceeding was commenced in February 2017 by Mr Wallis and Mr Liew. This appears to have been in an attempt to achieve a final resolution of an issue which had dragged on since 2007.

28 So 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. Mr Wallis and Mr Liew commenced this action in order to try to bring a long-running issue to a head, rather than because they are particularly keen for the OC to sell the land. After all, Mr Ellinghaus has occupied this land for 10 years. Their primary application was for the extension to unit 4 to be removed, and the land to be reinstated by Mr Ellinghaus' company to the possession of the OC. They pleaded in the alternative, that if consent had been given to construction of the extension (which was specifically denied) it was on the basis that the respondent would pay fair market value for the parcel, obtain a valuation, obtain written consent for the construction, and do all things necessary to facilitate transfer to the respondent, including preparing an amended plan of subdivision and taking all steps necessary for it to be registered by the Registrar of Titles.

29 Accordingly, in my view it is not correct to seek to apply the principle in the *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.

30 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.

31 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.

VALUE OF THE LAND IN THIS LOCALITY

32 I now turn to the question of $4,500 versus $5,000 per m². There was no argument about this particular question during the hearing. As noted, Mr Dunn commented that the two valuers were very close in comparison to other valuation contests. The parties were content to leave it to the Tribunal to determine what the is appropriate figure.

33 Parkville West is a small suburb. There are not a lot of dwellings, and consequently only a small number of comparable sales to consider. This land's proximity to Royal Park makes it more attractive and even more unusual – probably unique. So there are no direct comparisons by way of comparable sales. Mr Dunn referred to 11 Henry Street Fitzroy. This is a vacant site of 80 m² sold in November 2016 with plans and permit for a residence, for a price equating to $8,462 per m². Mr Brindley's report included reference to the property directly opposite the OC site, 11 St George's Grove. This was a single dwelling on land which also abuts Royal Park along its sidage. Mr Brindley's report stated this land was sold in July 2014 for an amount equivalent to $2,383 per m². He said it was sold for land value without a permit for redevelopment. Mr Brindley notes that land value has increased since then, and comments that this sale is of limited use because it is out of date.

34 Thus neither valuers' comparable sales are particularly instructive in this case. I cannot find that either opinion on this question is more persuasive than the other. Accordingly, in my view, the appropriate finding is one which gives the reports equal weight. I find that the fair market value of the land in the area where the subject land is located is $4,750 per m².

CONCLUSION

35 Accordingly, I will order under s 34D(1)(a) of the *Subdivision Act 1988* that the 22 m² parcel the subject of this proceeding be transferred by the OC to Acapulco Gold Pty Ltd, for the price of $104,500.

36 As requested by the parties, I will make orders allowing for any application for costs.

J Smithers
Senior Member