IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT

Not Restricted

S CI 2016 01200

BETWEEN

ADNOW PTY LTD (ACN 006 684 395) (AS TRUSTEE FOR THE ADNOW PENSION FUND) — Plaintiff

and

GREENWELLS WOLLERT PTY LTD (ACN 128 803 092) — Defendant

JUDGE:	JUDD J
WHERE HELD:	Melbourne
DATE OF HEARING:	11 April 2016
DATE OF JUDGMENT:	14 April 2016
CASE MAY BE CITED AS:	Adnow Pty Ltd (as trustee for the Adnow Pension Fund) v Greenwells Wollert Pty Ltd
MEDIUM NEUTRAL CITATION:	[2016] VSC 153

CONTRACT — Expert determination — Valuation of land — Assumptions — Planning Scheme — Ministerial approval — Application of Valuation and Property Standards — Whether determination was a 'valuation' — Determination made pursuant to contract.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr J Delany, one of Her Majesty's Counsel with Mr C Parkinson	G & M Lawyers
For the Defendant	Mr C Wren, one of Her Majesty's Counsel	Maddocks Lawyers

HIS HONOUR:

1 This proceeding required an urgent hearing and disposition. The background is not controversial and is unnecessary to rehearse. The plaintiff, Adnow Pty Ltd, as trustee for the Adnow Pension Fund, is the registered proprietor of land at 220 Craigieburn Road, Wollert, Victoria. The property is approximately 42.63 hectares and is prime land for residential development.

2 On 14 October 2008 the plaintiff granted to the defendant, Greenwells Wollert Pty Ltd (then known as AV Jennings Properties SPV No 11 Pty Ltd) an option to call for the transfer of land at a price to be determined under cl 5 of the Option Deed. The purchase price under the proposed contract of sale, the form of which was annexed to the Option Deed, was to be determined under a cascading regime of negotiation, but in the event agreement could not be reached, by an Independent Valuer. Such a person was defined to mean a certified practising valuer approved by both parties and, failing agreement, nominated by the president for the time being of the Australian Property Institute (Victorian Division).

3 The parties were unable to agree on a price, nor were valuers appointed by them under cl 5.4. Clause 5 relevantly provided:

> 5.5 In the event the Appointed Valuers cannot agree on the valuation of the Property within 1 month of the date of the Pre Exercise Notice, the Grantor and Grantee will arrange for a valuation of the Property as at the date of the Pre Exercise Notice to be carried out by an Independent Valuer who must be appointed no later than 45 days after the date of the Pre Exercise Notice.
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> 5.6 Each party will be entitled to provide a submission to the Independent Valuer within 7 days of his appointment.
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> 5.7 The Independent Valuer's valuation must:
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> (a) be in writing;
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> (b) have regard to the Valuation Guidelines;
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> (c) assumes that the Precinct Structure Plan affecting the Property has been approved by the Minister for Planning;
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> (d) specify the matters to which the Independent Valuer had regard in making the determination; and

(e) be provided within 1 month of his appointment.

5.8 The Parties agree that the Price under the Contract will be the greater of:

(a) the amount specified in the valuation; and

(b) the amount calculated by multiplying the Developable Area by $200,000 per acre.

4 Mark Murray, a fellow of the Australian Property Institute, was appointed and delivered his report on 7 January 2016. He valued the property at $18,700,000. The defendant exercised its option right on 19 January 2016. A dispute arose concerning the valuation. The parties were unable to resolve the dispute. Settlement of the contract of sale, if the option has been validly exercised, is due to take place on 18 April 2016.

5 To expedite a resolution of the dispute, the plaintiff commenced this proceeding by Originating Motion, filed 4 April 2016. The trial took place on 11 April 2016.

6 The Originating Motion was endorsed with a statement of claim, in which the plaintiff sought a declaration that the independent valuer failed to comply with cl 5 of the Option Deed, and that the valuation be set aside. The parties appeared to accept that if such a declaration was made, the parties would start afresh under cl 5, with the appointment of an Independent Valuer in default of agreement.

7 The plaintiff relied on three substantive grounds:

(1) Contrary to cl 5.7(c), the valuer failed in his assessment to assume that the Wollert Precinct Structure Plan had been approved by the Minister. I understood the plaintiff to mean that the valuer did not have regard to, or disregarded, the content of the Plan.

(2) Grounds (2) and (3) overlap, and challenge the nature of the report as a 'valuation'. In paragraph 16 of its statement of claim, the plaintiff alleged that contrary to clauses 5.5 and 5.7, the Independent Valuer failed to carry out a 'valuation' in making his determination. The plaintiff alleged that the valuer

failed to specify the matters to which he had regard; and the report failed to satisfy the minimum requirements for a valuation, because the valuer failed to identify comparable transactions on which he relied, and provided no analysis or workings to show the basis for his calculations when reaching a rate of $525,000 per hectare of Gross Developable Area for the property.

(3) Ground (3) raised a sub-set of issues under ground (2). These were:

(a) The valuer failed to have regard to the Valuation Guidelines referred to in cl 5.7(b). It was common ground that these Guidelines were the Australia and New Zealand Valuation and Property Standards published by the Australian Property Institute. The particular standards identified by the plaintiff involved valuation procedures found in Part 8.1, and guidelines in relation to feasibility studies, found in Part 11.5.

(b) The valuer failed to specify the matters to which he had regard in making his determination as required under cl 5.7(d).

8 The principles to be applied were not controversial. The primary question was what the parties should be presumed to have intended by their contract, determined objectively from its terms, bearing in mind the context in which it was created.[1]

9 In *Legal & General Life of Australia Ltd v A Hudson Pty Ltd*,[2] McHugh JA, having reviewed the authorities, said:

> In my opinion the question whether a valuation is *binding* upon the parties depends in the first instance upon the terms of the contract, express or implied. This was pointed out by Sir David Cairns in the Court of Appeal in *Baber v Kenwood Manufacturing Co Ltd* (at 181). A valuation obtained by fraud or collusion can usually be disregarded even in an action at law. For in a case of fraud or collusion the correct conclusion to be drawn will almost certainly be that there has been no valuation in accordance with the terms of the contract. As Sir David Cairns pointed out, it is easy to imply a term that a valuation must be made honestly and impartially. It will be difficult, and usually impossible, however, to imply a term that a valuation can be set aside

1 *AGL Victoria Pty Ltd v SPI Networks (Gas) Pty Ltd & Anor* [2006] VSCA 173 at [51]–[54] inclusive.
2 (1985) 1 NSWLR 314.

> on the grounds of the valuer's mistake or because the valuation is unreasonable. The terms of the contract usually provide, as the lease in the present case does, that the decision of the valuer is 'final and binding on the parties'. By referring the decision to a valuer, the parties agree to accept his honest and impartial decision as to the appropriate amount of the valuation. They rely on his skill and judgment and agree to be bound by his decision. It is now settled that an action for damages for negligence will lie against a valuer to whom the parties have referred the question of valuation if one of them suffers loss as the result of his negligent valuation: *Sutcliffe v Thackrah* [1974] AC 727; *Arenson v Arenson* [1977] AC 405. But as between the parties to the main agreement the valuation can stand even though it was made negligently. *While mistake or error on the part of the valuer is not by itself sufficient to invalidate the decision or the certificate of valuation, nevertheless, the mistake may be of a kind which shows that the valuation is not in accordance with the contract. A mistake concerning the identity of the premises to be valued could seldom, if ever, comply with the terms of the agreement between the parties. But a valuation which is the result of the mistaken application of the principles of valuation may still be made in accordance with the terms of the agreement. In each case the critical question must always be: Was the valuation made in accordance with the terms of a contract? If it is, it is nothing to the point that the valuation may have proceeded on the basis of error or that it constitutes a gross over or under value. Nor is it relevant that the valuer has taken into consideration matters which he should not have taken into account or has failed to take into account matters which he should have taken into account. The question is not whether there is an error in the discretionary judgment of the valuer. It is whether the valuation complies with the terms of the contract*.[3]

10 In *Challenger Property Asset Management Pty Ltd v Stonnington City Council & Anor*,[4] Croft J observed, concerning the variety of circumstances in which valuations may be made,

> ***Role of the valuer***
>
> 24 It is clear from the authorities that, depending on the particular circumstances, different methods of valuation may be appropriate. The Courts have not adopted a prescriptive position with respect to valuation methodology and care should be taken to ensure that no single process of reasoning is elevated into a statement of principle. The valuer's task is then, within the context of the facts and circumstances relating to the relevant property, to apply the most appropriate method of valuation according to his or her expertise and experience. Valuation practice is principally an art, rather than a science and is an art that continues to evolve.

11 To similar effect, in *Karenlee Nominees Pty Ltd v Gollin & Co Ltd*,[5] the Full Court observed,

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3 Emphasis added.
4 [2011] VSC 184.
5 (1983) 1 VR 657, 669.

> The valuation of land and buildings involves a matter of judgment. Opinions notoriously vary on this subject matter – it would be surprising to find two valuers who agree on the valuation to be given to land and buildings of the nature of the subject premises. There is no scientific exactitude in the valuations of land and buildings. They are as hypothetical as the hypothetical purchaser whom they assume.

12 The express terms of the contract between the parties required the valuer to perform his work in a particular way. The objective intention of the parties is informed by the text, context and the purpose of the provision. The purpose was to fix a price for valuable land, with a known development potential, where the parties had failed to reach agreement, and after appointed valuers had also failed to agree. The appointment of an Independent Valuer was to break an impasse. The parties agreed in advance that the decision of the Independent Valuer would be final and binding. While those words are not contained in the Option Deed, by their agreement to appoint the valuer, the parties agreed that his determination would be final and binding. The valuer was required to make an assumption as to ministerial approval, but was not expressly directed to have regard to any particular part of the Plan, or data contained therein.

Precinct Structure Plan

13 The obligations in cls 5.7(b) and (d) of the Option Deed may be regarded as unnecessary, because of the duties and obligations imposed on a valuer bound by the Valuation Guidelines, as was this valuer. Nevertheless, the parties chose to introduce those specific provisions, in addition to the important assumption in cl 5.7(c).

14 A question arose as to whether the obligation to assume ministerial approval of the Plan imposed an implied obligation on the valuer to have regard to all, or some part, of its content. Mere approval of the Plan would provide a valuable degree of certainty to any development proposals. But the plaintiff went further, and relied on a construction of cl 5.7(c) that would require the valuer to consider, and perhaps adopt estimated yields from the Plan, or at the very least to explain why he had not adopted those estimates. According to the plaintiff, had he done so, the resulting

valuation would have been substantially higher.

15 The Plan does not purport to be wholly prescriptive. It is described as a long term plan for urban development, setting out objectives, requirements and guidelines for land use, development and subdivision. The document draws a distinction between 'Requirements', which must be adhered to in developing the land, and 'Guidelines' which express how to discretion will be exercised by the Responsible Authority.

16 Not surprisingly, the plaintiff's contention, that the valuer failed to assume approval of the Plan, was at the forefront of its case. The plaintiff identified what it contended was a material oversight in the valuer's report, by his failure to adopt, or to at least consider such yields. The plaintiff complained that the valuer had relied upon his own judgement, based upon an adjustment made to an Indicative Masterplan for the property, prepared by Taylors Development Strategists. Taylors had calculated a Net Developable Area of 36.02 hectares, from a total area of 42.69 hectares; and a residential lot yield of 543 lots. Lots were calculated at an average size of 422 square metres, with a lot range from 182 square metres to 908 square metres. The adjustment made by the valuer was to adopt a slightly smaller lot size of 14.7 lots per hectare over a Gross Developable Area of 36.69 hectares.

17 There was little difference between the position of the parties on the Gross Developable Area. The plaintiff's expert had calculated the area at 36.85 hectares. One of the plaintiff's experts, Mr J F McEntee, estimated a yield of approximately 663.3 allotments, based upon a yield of 18 lots per developable hectare. Therein lay a substantial difference between the parties.

18 The plaintiff contended that a proper application of the content of the Plan involved an analysis of the estimated dwelling yield for the area for medium to high density portions, and for conventional density portions. The Plan estimated yield for medium to high density, of 27.5 dwellings, and for conventional density, 15 dwellings or allotments per hectare. These estimates were calculated on the Net Developable Area, which may well correspond with Gross Developable Area,

although the degree of correspondence was unclear. Both seem to exclude areas set aside for easements, roads and public services.

19 The estimates of yield found in the Plan were presented as just that — estimates. They were described in Table 3 as the 'minimum'. Table 3 was,

> intended to provide statutory planners with guidance on the required densities and lot yields across the precinct to underpin the viability of town centres and support the broader town centre objectives.

20 There was a requirement in the Plan that a subdivision 'within a 400-metre walkable catchment of town centres' or 'designated public transport routes' must create a range of lot sizes suitable for medium or high density housing types listed in Table 4 and in accordance with the guidance provided in Table 5. The plaintiff seized on this requirement as a factor the valuer was required to take into account.

21 I am satisfied that the valuer assumed that the Plan affecting the property had been approved by the Minister. His report made that clear. But it did not reveal any consideration of the application of the particular housing densities and estimated yields in Table 3, or any resulting calculation based upon those yields to arrive at his valuation. He did, however, consider the yield by reference to the Taylors Indicative Masterplan, which incorporated high density housing in at least two locations, in the vicinity of the town centre and a public transport route.

22 Subject to the 'Requirements' in a plan and the application of 'Guidelines', decisions concerning housing density, and thus yield will be, at least in the first instance, supervised by statutory planners. The Plan itself noted,

> that subdivision applications must be tailored to the context of each individual site.

Thus, the Plan contemplated a degree of flexibility.

23 Another contextual feature of the contract was the fact that, while approval of the Plan was to be assumed, it had not in fact been approved by the Minister. Approval may be regarded as a mere formality. But following exhibition of the Plan, various steps are required, such as a panel hearing, recommendation to the Minister, reports

to the public, consideration of the panel's report by the planning authority and ultimately approval by the Minister.[6] Ministerial approval, to be assumed by the valuer, would bring the Plan into operation providing,

> Government agencies, the Council, developers, investors and local communities with certainty about future development.

24 The particularity of the required assumption, that an incomplete process be assumed to have been completed, militated against the implication of any requirement that the valuer assume, consider or apply any particular item of content. There was significance and purpose in the assumption, without the need to interpret, and attempt to apply, particular, unspecified parts of its content.

25 I am not persuaded that the parties' intention, objectively ascertained, was to require the valuer to undertake his own hypothetical application of the Plan to the site by reference to the particular yield estimates. Their intention was only that he should make the required assumption of approval. That is not to suggest, in the absence of other material made available to him, the valuer may have found it useful, or even necessary, to develop, for example, an indicative or hypothetical masterplan. But, in the present case, he was not required to do so. I do not regard the valuer's failure to have undertaken his own calculations by reference to estimated yields found in the Plan to have resulted in his report failing to comply with the contract between the parties.

26 There is another reason for reaching this conclusion. The defendant complained that the occasion to raise any question concerning the interpretation and application of any part of the Plan, including a calculation of yield, was in submissions to the valuer, if the plaintiff was so minded. I agree.

27 It was not suggested by the plaintiff, in its submissions to the valuer, through the opinions of Messrs McEntee and Brady, dated 12 October 2015, that he should direct his attention to the relevant content of the Plan. On the contrary, it may be said that his attention was diverted from those aspects of the Plan by the nature of the

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6 *Planning and Environment Act 1987* (Vic) Pt 3.

opinion. Messrs McEntee and Brady approached their assessment 'on a direct comparison basis', having assigned a value per hectare of developable area of $800,000 or a rate per lot of $45,000, thus arriving at a value of $30 million excluding GST.

28 When presented with opinions and valuations from the parties' experts, which included estimated yields, the valuer identified the differences in yield as significant. But there is no evidence he was instructed, or even invited, to make an assessment of yield by reference to the content of the Plan. Rather, he considered the competing opinions, based on the direct comparison approach which he adopted as his primary method of assessing market value as at the specified date.

29 There was highly relevant local data available. The submissions referred to relevant sales data. While yield would have been a significant factor to a vendor achieving the price revealed by comparative sale data, the valuer adopted the direct comparison approach to arrive at a value per hectare of Gross Developable Area and extrapolated to a value for the whole property. That was consistent with the approach adopted by the plaintiff's experts, although they arrived at a different rate per hectare.

Valuation Guidelines

30 In addition to the requirement that the valuer have regard to the Valuation Guidelines, the plaintiff relied on s 5A of the *Valuation of Land Act 1960* (Vic) under which certain matters are to be taken into account by a valuer of land, but only where relevant. That qualification, found in sub-s (3), is consistent with the application of the Valuation Guidelines to which the valuer was required to have regard.

31 The Act and Guidelines acknowledge that each parcel of land is unique, and the purposes for which a valuation may be required are various. Section 5A and the relevant Guidelines are designed to provide flexibility in approach, to accommodate differences in land topography, location, use and available data as well as the

purpose of the valuation.

32 The plaintiff identified various Guidelines that had not been applied, or adequately applied, by the valuer. There was no dispute as to the identity of the Valuation Guidelines or that the valuer was obliged to have regard to them. The plaintiff contended that the valuer did not specify that he had regard to the Valuation Guidelines, as required under cls 5.7(b) and (d); and that a proper analysis of the report demonstrated that he did not.

33 As the defendant pointed out, the valuer was a fellow of the Australian Property Institute, and as such was bound by the Guidelines. It is true that he did not expressly say he had done so, although their application was acknowledged in his letter of engagement. I do not regard the absence of an express acknowledgement in the report that the valuer had applied the Guidelines as a defect or omission vitiating the report as non-compliant with the terms of the contract. The valuer was, by reason of his appointment, qualification and status, bound to apply the Guidelines.

34 The Guidelines contain, of course, some immutable obligations, such as the duty to act honestly and in good faith, without personal bias. A valuer must avoid a conflict of interest and act impartially. There is no allegation in this case of any kind of bias, conflict, partiality, dishonesty or other misconduct. The Guidelines contain a raft of more general obligations relating to the valuation process, such as a duty to inspect a property to be valued, to gather sufficient relevant data, to form an opinion of value, to ascertain and verify such relevant facts and information, and to prepare a valuation report in a particular manner.

35 The contract did not specify any particular rule or requirement in the Guidelines, except to the extent that cl 5.7(d) repeated a general requirement. The particular requirements upon which the plaintiff relied are to be found in Parts 8 and 11 of the Guidelines. It is to be noted, however, that under Part 8.1, there is an obligation to include such content in a report 'as is relevant to the type of property and the style of report'. The Guidelines acknowledge that 'the extent of detail under any heading

will vary depending on the style of report and the nature of the property'.

36 Item 4.5 of Part 8.1 of the Guidelines requires a methodology employed by a valuer to be appropriately outlined for each approach, along with important calculations and rationale. The reconciliation of approaches adopted should be included. A value range may be expressed before being reconciled to a single point figure.

37 In relation to the basis for valuation, item 4.19 provides that a valuation report usually includes an adequately detailed basis of valuation for the type of property, type of report and condition of the market, providing a reasoned approach to the valuation. When sales evidence is employed, but not directly comparable, an explanation should be provided. Item 7 acknowledges that different approaches may be adopted for a valuation. These are: (1) sales comparison approach; (2) income capitalisation approach; (3) cost approach or depreciation replacement cost. The Guidelines provide that valuation calculations should be summarised in the report.

38 The plaintiff also relied on Part 11.5, which concerned feasibility studies. This Part was called in aid because, after expressing his opinion based on a comparison of sales, the valuer undertook a feasibility assessment as a secondary check to accuracy, without fully disclosing underlying data.

39 As the Guidelines acknowledge, the content of a report will depend upon the style of the report and the nature of the property. The Guidelines afford a valuer a high degree of latitude in his or her approach to the task, depending on the purpose for which a valuation report is prepared and differences inherent in land that make each parcel unique. They do not contain inflexible rules, and the parties should not be taken to have agreed otherwise.

40 The valuer adopted a direct comparison approach, which is authorised under the Guidelines and favoured by the plaintiff's experts in their submission to him. There were two particular complaints made by the plaintiff of non-compliance. The first concerned the absence of any explanation as to how the valuer arrived at a value of

$525,000 per hectare. The second, was the absence of important data concerning the hypothetical development model.

41 The reasoning of the valuer in arriving at $525,000 per hectare is evident in the market analysis undertaken by the valuer in section 8 of his report. He reviewed the attributes of the comparable sales to arrive at a value per hectare. It was based on that evidence he reached his conclusion. The report does not contain a detailed explanation of how the valuer selected $525,000 per hectare as the value. But having regard to his analysis in section 8 of his report, there is a rational basis disclosed for selecting a sum of that magnitude. After all, the valuer has been asked for an opinion as to the value of the property, and to reach his conclusion, expressed an opinion as to the value per hectare. Such valuations are, as Croft J pointed out in *Challenger Property*, more an art, rather than a science. It is almost inevitable that different valuers of identical property will arrive at a different conclusion. Absent a bona fide sale, there is no single correct value. Notwithstanding the absence of a more elaborate reduction of the sales data to arrive at the value of $525,000 per hectare, I am not persuaded the valuer failed to apply, or have regard to, in his duty under the Valuation Guidelines when arriving at that figure.

42 The hypothetical development model was not deployed by the valuer to express his opinion as to the value of the land. Had he adopted that approach, it would have been necessary to explain his departure from the direct comparison methodology, urged upon him by the plaintiff's experts, and objectively the most compelling basis for an assessment. It would also have been necessary to identify the various assumptions made in the development of his model, including interest or discount rates. But that was not the approach he adopted. He was not criticised for adopting a direct comparison methodology. He need not have mentioned his hypothetical development model at all. In doing so, he used a summary form and did not elaborate. I am not persuaded that the omission of more detail in that regard was a failure to apply or have regard to the Guidelines.

43 The process of assessment undertaken by the valuer involved a disclosed

methodology, disclosed data and the exercise of judgement to arrive at a value per hectare. The valuer applied a 'hypothetical development model' as a means of checking the accuracy of his primary assessment. He concluded that the 'cash flow assessments' made by him supported his valuation arrived at by direct comparison.

Failure to specify matters

44 The final complaint by the plaintiff was that the valuer had failed to specify the matters to which he had regard, contrary to his obligation under cl 5.7(d). The plaintiff submitted that its complaint was not merely technical, but based on the express requirement in cl 5, and because the valuer had, at various times, expressly stated his reliance upon some fact or matter. In my opinion, there is no reasonable requirement that the valuer state the obvious. His report is replete with evidence that he relied on particular matters upon which he relied in forming his opinion. The defendant listed such matters in its written submission, most of which had a direct bearing on the assessment process.

Conclusion

45 As Nettle JA pointed out in *AGL Victoria*, the question in each case is what the parties should be presumed to have intended, and what is to be determined objectively from the terms of the contract, bearing in mind the context in which it was created. In the present case, the parties called for the expression of an opinion as to the value of the land under the terms of their contract. I am not persuaded that the valuer failed to express such an opinion. He was required to make an assumption of ministerial approval, and did so. He was required to apply the Valuation Guidelines and, having regard to the nature of the land and the report to be prepared, relevantly complied with those Guidelines. He was required to specify the matters to which he had regard, and did so. His report was in writing. No issue arose concerning the time within which the report was provided.

46 The plaintiff's application is dismissed with costs.