

LAND COURT OF QUEENSLAND

CITATION: *YFG Shopping Centres Pty Ltd as TTE & Trondage Enterprises Pty Ltd v Valuer-General; Shayher Alliance Pty Ltd as TTE v Valuer-General; Leda Commercial Properties Pty Ltd as TTE v Valuer-General; Lipoma Pty Ltd as TTE v Valuer-General* [2018] QLC 37

PARTIES: **In Application No. LVA182-17:**

YFG Shopping Centres Pty Ltd as TTE
(appellant)

ABN 56 853 411 699

and

Trondage Enterprises Pty Ltd

(appellant)

ABN 92 067 120 370

v

Valuer-General

(respondent)

and

Coles Group Property Developments Ltd

ACN 004 428 326

(respondent to notice of non-party disclosure)

In Application No. LVA183-17:

Shayher Alliance Pty Ltd as TTE

(appellant)

ABN 96 113 268 198

v

Valuer-General

(respondent)

and

Coles Group Property Developments Ltd

ACN 004 428 326

(respondent to notice of non-party disclosure)

In Application No. LVA211-17:

Leda Commercial Properties Pty Ltd as TTE

(appellant)

ABN 70 092 070 766

v

Valuer-General

(respondent)

and

Coles Group Property Developments Ltd

ACN 004 428 326
(respondent to notice of non-party disclosure)

In Application No. LVA212-17:

Lipoma Pty Ltd as TTE

(appellant)

ABN 65 002 203 581

v

Valuer-General

(respondent)

and

Coles Group Property Developments Ltd

ACN 004 428 326

(respondent to notice of non-party disclosure)

FILE NOS: LVA182-17
LVA183-17
LVA211-17
LVA212-17

DIVISION: General division

PROCEEDING: Application for non-party disclosure

DELIVERED ON: 19 October 2018

DELIVERED AT: Brisbane

HEARD ON: 21 September 2018

HEARD AT: Brisbane

PRESIDENT: FY Kingham

ORDERS:

- 1. The application is dismissed.**
- 2. The Valuer-General must pay Coles Group Property Developments Ltd's costs of the application.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – DISCOVERY AND INSPECTION OF DOCUMENTS – DOCUMENTS IN POSSESSION OF NON-PARTY – where the Valuer-General sought documents from a non-party regarding a sale the Valuer-General relied on as a comparable sale in valuation appeals – where the documents included information pre and post-sale regarding the estimated and actual costs and returns of the development of the property – whether the documents are directly relevant to an issue in the

appeals – whether a comparable sale must pass the Spencer test – whether the information was needed to analyse the sale – whether there were particular circumstances that required access to the information – where the application was refused:

Land Court Rules 2000, r 4

Land Valuation Act 2010, s 5, s 7, s 19, s 23, s 24, s 18, s 230, s 215

Uniform Civil Procedure Rules 1999, r 242, r 249

Brewarrana Pty Ltd v Commissioner of Highways (No 1) (1973) 32 LGRA 170, cited

Brewarrana Pty Ltd v Commissioner of Highways (No 2) (1973) 6 SASR 541, cited

Brisbane City Council v Bortoli [2012] QLAC 8, cited

Cassimatis v Axis Specialty Europe Limited [2013] QSC 237, cited

Chief Executive, Department of Natural Resources and Mines v Kent Street Pty Ltd [2009] QCA 399, cited

Crompton v Commissioner of Highways (1973) 32 LGRA 8, cited

Edgarhead Pty Ltd v Valuer-General [2015] QLC 18, cited

ISPT Pty Ltd v City of Melbourne (Land Valuation) [2007] VCAT 652, cited

Maurici v Chief Commissioner of State Revenue (2003) 212 CLR 111, cited

Riverbank Pty Ltd v Commonwealth (1974) 48 ALJR 483, cited

Valuer-General v Fenton Nominees Pty Ltd (1982) 150 CLR 160, cited

Western Australian Planning Commission v Arcus

Shopfitters Pty Ltd [2003] WASCA 295, cited

APPEARANCES: S Fynes-Clinton of Counsel (instructed by In-house Legal, Department of Natural Resources, Mines and Energy) for the respondent
S McCarthy of Counsel (instructed by Colin, Biggers and Paisley) for the appellants
N Andreatidis of Counsel (instructed by Allens) for the non-party

- [2] A number of owners of land developed with shopping centres have appealed to the Court against the site value assessed for each property by the Valuer-General. In resisting the appeals, the Valuer-General relies on a number of comparable sales, including the purchase by Coles Group Property Developments Ltd in June 2013 of four properties in Rochedale.

- [3] The Valuer-General has applied for orders requiring the Coles Group, which is not a party to the appeals, to disclose certain documents about the sale and the Coles Group's assessment of the feasibility of developing a shopping centre on the land.
- [4] The Coles Group provided the contract of sale and has agreed to provide further documents about its estimate, as at the date of sale, of the costs of works necessary to prepare the site for its intended use. Otherwise, it resists the application.
- [5] The Coles Group argued the categories of documents are described too broadly and the application is a fishing exercise. The proposed orders will catch highly confidential and privileged documents. They include documents recording the subjective beliefs, opinions or knowledge of the Coles Group, both pre and post-sale. The Valuer-General has not established those documents are relevant. Because the Valuer-General has cast his net wide, responding to the orders will cause significant inconvenience and expense to the Coles Group.
- [6] Because the Valuer-General said he would not contest any claim the Coles Group made about privileged documents, that issue falls away. The following questions address the remaining issues:
1. Are documents relevant?
 2. Should the Court make the orders sought?

Are the documents relevant?

- [7] A party may seek an order requiring a person who is not a party to a proceeding to disclose documents that are *directly relevant to an allegation in issue in the pleadings*.¹ For these appeals, I take the pleadings to mean the appellant's Notices of Appeal and the parties' Statements of Facts, Matters and Contentions.²
- [8] The first ground of each appeal is that the site value as assessed for the property is *excessive having regard to comparable property sales*. In response, the Valuer-General relies on the Rochedale sale as a comparable sale that supports the assessed site value.³

¹ *Uniform Civil Procedure Rules 1999* r 242(1)(a).

² *Land Court Rules 2000* r 4.

³ Respondents Statement of Facts, Matters and Contentions in Response, filed 29 September 2017, [2].

- [9] Given the appeal properties are developed with shopping centres, it is natural the Valuer-General would assess their site value by reference to sales of similar properties to persons intending to develop them for the same use. The Valuer-General has identified the Rochedale sale as potentially comparable, presumably taking into account the features of the property and the apparent development intention of the purchaser.
- [10] The appellants did not nominate the Rochedale sale and it is reasonable to infer they do not accept it is comparable, at least at this stage of the appeals. That does not mean the documents the Valuer-General wants disclosed are directly relevant to an issue in dispute.
- [11] By the end of oral argument, the Valuer-General whittled down his request to certain information about the estimated and actual costs of site-improvements and valuation, feasibility and due diligence reports pre and post-sale.
- [12] The Valuer-General relied on two affidavits from his valuer to explain the relevance of the documents. He noted the Coles Group did not lead contrary evidence from a valuer. That may be, but relevance is a legal, not a valuation, issue.
- [13] The Valuer-General argued the documents were necessary so the valuer could be satisfied the sale meets the *Spencer test*;⁴ and to analyse the sale properly in valuing the subject properties.⁵

Does the Spencer test apply to a comparable sale?

- [14] The Valuer-General must decide the site value of the appeal properties.⁶ Site value is its expected realisation under a *bona fide sale* assuming no *non-site improvements* have been made.⁷ Site improvements are any work done to the land necessary to improve or prepare it for development.⁸ Any other work done, or material used, on land are non-site improvements.⁹

⁴ T 1-9, line 45 to 1-10, line 12.

⁵ Submissions of the Valuer-General, filed 12 September 2018, [3]; affidavit of Allister Paul Elliott, filed 1 June 2018, [9].

⁶ *Land Valuation Act 2010* s 5 and s 7.

⁷ LVA s 19.

⁸ LVA s 23.

⁹ LVA s 24.

- [15] A *bona fide sale* is one on reasonable terms and conditions assuming: a willing, but not anxious buyer and seller; a reasonable period within which to negotiate the sale; and, that the property was reasonably exposed to the market.¹⁰ This is a statutory formulation of the common law test propounded by the High Court in *Spencer v the Commonwealth*.¹¹ Arriving at the site value assumes a hypothetical sale of the land, without non-site improvements, at the date of valuation.
- [16] The traditional method to assess market value is to use relatively contemporaneous sales of comparable properties, at arms-length and unaffected by special circumstances, as a *yardstick for the valuation*.¹² The purpose in looking at potentially relevant sales is to establish the pattern of prices and alterations in the levels of prices over specified periods.¹³ The best basis for assessment of site value is sales of comparable properties that are vacant or lightly improved, and which have similar site improvements to the land being valued.¹⁴ That process can be more complex if the valuer must consider the sales of improved land.¹⁵
- [17] The Valuer-General says he needs both pre and post-sale information about the valuation, feasibility and due diligence on the sale. The pre-sale information will assist him to understand the state of mind of the purchaser in settling on the purchase price. The post-sale information will allow him to assess whether the purchaser was fully and accurately informed, or purchased the land with unrealistic expectations.
- [18] If I understand that argument correctly, the Valuer-General says the Rochedale sale is only comparable if it also meets the *Spencer test*. I do not accept that is correct.
- [19] The *Spencer test* is used to value the subject land. It assumes a *hypothetical sale* of that land at the date of valuation and considers what a prudent purchaser, fully informed about relevant matters, would have paid for it.
- [20] Comparable sales are *actual sales* of other land used to assist in the hypothetical valuation of the subject land. They are a source of evidence. They assist the valuer to

¹⁰ LVA s 18.

¹¹ (1907) 5 CLR 418.

¹² *Riverbank Pty Ltd v Commonwealth* (1974) 48 ALJR 483, 484; *Maurici v Chief Commissioner of State Revenue* (2003) 212 CLR 111 [16].

¹³ *Brewarrana Pty Ltd v Commissioner of Highways (No 1)* (1973) 32 LGRA 170, 180.

¹⁴ *Edgarhead Pty Ltd v Valuer-General* [2015] QLC 18 [37].

¹⁵ *ISPT Pty Ltd v City of Melbourne (Land Valuation)* [2007] VCAT 652 [54].

apply the *Spencer test*. They are not subject to the test in the sense argued by the Valuer-General.

Does the Valuer-General need the information to make adjustments in analysing the sale?

- [21] Considering a sale's comparability is not a binary exercise. It is an oversimplification to say a sale is either comparable or not.¹⁶ Whether a sale is truly comparable is a question of fact, not law, and necessarily involves questions of judgment.¹⁷ To analyse comparable sales in isolation assumes the sale price reflects the market value and that there will be a most comparable sale. That cannot be assumed.¹⁸
- [22] The comparable sales method assumes a sufficient sample size of comparable sales to justify a valuation. They should be analysed collectively and individually. Although the valuer will attach different weights to individual sales, and may be able to identify one with the greatest weight, that occurs within the context of a number of sales in a sample that is representative and sufficient in volume.¹⁹ Whether the sample has sufficient volume will depend on the facts of the case.²⁰
- [23] The purpose of analysing a comparable sale is not to second-guess the prudence of the actual purchase, but to identify differences between that sale and the subject property, or the circumstances that applied to the subject property at the date of the hypothetical sale. The valuer may need to make adjustments to account for those differences in drawing upon that sale.
- [24] However, that does not require a point-by-point comparison of each characteristic of the comparable sales and the property to be valued. What is required is a weighing up of the effect of similarities and differences, which is rarely a precise exercise.²¹ Some adjustment is always necessary.²²

¹⁶ *Crompton v Commissioner of Highways* (1973) 32 LGRA 8, 22–3.

¹⁷ *Chief Executive, Department of Natural Resources and Mines v Kent Street Pty Ltd* [2009] QCA 399 [154].

¹⁸ *Western Australian Planning Commission v Arcus Shopfitters Pty Ltd* [2003] WASCA 295 [51].

¹⁹ *Western Australian Planning Commission v Arcus Shopfitters Pty Ltd* [2003] WASCA 295 [52].

²⁰ *Chief Executive, Department of Natural Resources and Mines v Kent Street Pty Ltd* [2009] QCA 399 [156].

²¹ *Brisbane City Council v Bortoli* [2012] QLAC 8 [54].

²² *Brewarrana Pty Ltd v Commissioner of Highways (No 2)* (1973) 6 SASR 541, 550–1.

- [25] The Coles Group has agreed to provide documents about its pre-sale estimates of the cost of site improvements. That makes sense. The valuation of the subject properties assumes the land as site-improved. The information the Coles Group has agreed to provide will allow the valuer to analyse the Rochedale sale to exclude the estimated cost of site-improvements, which may have influenced the purchase price.
- [26] However, it is not necessary for the valuer to know the actual cost of the site improvements later made. That post-sale evidence might show the purchaser under or over estimated the cost, but what is important is what value the purchaser assigned to the land at the date of purchase. Excluding its estimate of site improvement costs assists that process. Whether the estimate was wrong is not material.
- [27] The other documents are valuation, feasibility and due diligence reports both pre and post-sale. Usually, the particular circumstances and considerations that led to the vendors and purchasers of the comparable sales at the several prices agreed upon are regarded as immaterial. However, there may be circumstances or considerations of a particular sale that plainly take it out of the ordinary run of transactions that together constitute the relevant market. If so, a valuer will exclude the sale because it was affected by special considerations.²³
- [28] No party to any of the appeals has pleaded it was not a bona fide sale. Nor have they raised any particular circumstances and considerations that might suggest the Rochedale sale is outside the ordinary run of transactions in the market.
- [29] The Valuer-General has not demonstrated the information is directly relevant to an issue in the appeals.
- [30] Before leaving the question of relevance, there is another submission I wish to address. The Valuer-General asserted there is no other reasonably simple and inexpensive way of proving the matter sought to be proved.²⁴
- [31] That is not entirely true. At least one of the documents sought, the infrastructure agreement, is publicly available for a fee. There may be others. It is not appropriate to use the non-party disclosure process to obtain publicly available documents.

²³ *Valuer-General v Fenton Nominees Pty Ltd* (1982) 150 CLR 160, 166–7.

²⁴ UCPR r 242(2).

- [32] As for documents that are not publicly available, counsel referred to a statutory power to obtain information that, he argued, the Valuer-General could not use to obtain the documents sought. I accept the Valuer-General cannot exercise that power after he has made the objections decisions. However, he may well have been able to do so beforehand.
- [33] An officer authorised by the Valuer-General may require a person to provide information under s 230 of the *Land Valuation Act 2010* if they reasonably believe the information is needed to perform their functions.²⁵
- [34] One such function is to help the Valuer-General decide land values, including, for example, by gathering information about land for that purpose.²⁶
- [35] The Valuer-General submitted *this power is self-evidently one to be used for purposes of carrying out a statutory valuation of or in some other way directly relevant to land owned or controlled by the person to whom the notice is given.*²⁷
- [36] I read that submission to mean the Valuer-General can only issue the information requirement to the owner or the person in control of land being valued. That restriction is not apparent from the ordinary meaning of the words of the section. In assisting the Valuer-General to value land owned by one person, it may be reasonably necessary for an authorised person to obtain information from other persons about sales of other land that may be comparable to the land being valued.
- [37] Further, the Valuer-General has a specific power to require an owner of the land being valued to provide information that will likely be relevant to deciding their objection to the valuation of that land.²⁸
- [38] Although it is not necessary for me to decide, I am not persuaded the section should be interpreted as narrowly as the Valuer-General contended.

²⁵ LVA s 230(1).

²⁶ LVA s 215(a).

²⁷ Submissions of the Valuer-General, filed 12 September 2018, [66].

²⁸ LVA ch 3 pt 4 div 2.

Should the Court make the orders sought?

[39] The Coles Group raised two matters I should take into account in deciding whether to require disclosure: the expense and inconvenience of complying with the orders²⁹ and the confidentiality of some of the documents, given the commercially sensitive nature of the information.

Expense and inconvenience

[40] The Coles Group said it would have to review thousands of hard copy and electronic documents in numerous locations to comply with the order. This process could take several months and produce in the order of 1,000 documents. Its external lawyers would then need to review the documents, a further expense.

[41] Courts are astute to the oppression and expense of voluminous disclosure.³⁰ The Notices of Non-Party Disclosure were expansive, describing broad categories of documents relating to the type of information they would contain.

[42] The Valuer-General considerably narrowed the scope by identifying particular types of documents in the proposed orders. In oral submissions, the request was further refined to particular reports. The Valuer-General questioned whether producing those documents involved excessive expense or inconvenience.

[43] The only evidence on the point comes from Mr Burstyner, who responded to the scope of the application. His evidence was uncontested. He was not required for cross-examination.

[44] Nevertheless, the Valuer-General must meet the reasonable costs incurred by the Coles Group in complying with the orders.³¹ Were this the only issue, I would not refuse the application.

Commercial sensitivity

[45] The commercially sensitive nature of the documents sought has particular significance for this application. The Coles Group's site selection strategy is an

²⁹ UCPR r 245(4).

³⁰ *Cassimatis v Axis Specialty Europe Limited* [2013] QSC 237 [30].

³¹ UCPR r 249.

integral part of its growth strategy. The documents sought include information about its methodology for selecting sites.³²

[46] Coles is a tenant in each of the properties the subject of the appeals. The Coles Group has an understandable concern about disclosure of documents that might affect its negotiating position and its relationship with the appellants.

[47] The confidentiality of the documents is not a reason to refuse to make the orders, provided there are adequate means to preserve their confidentiality.³³ The Valuer-General and the Coles Group agreed on a confidentiality regime that limits access for those documents voluntarily disclosed to the Valuer-General and his legal advisers.³⁴ They require the documents to be considered in closed court and they would not be produced to the appellants.

[48] For the hearing, the Valuer-General proposed orders that would preserve the confidentiality of the documents within the hearing. I am satisfied that appropriate orders could be framed to protect the interests of the Coles Group. If this were the only issue, I would not refuse the application.

Conclusion

[49] The Valuer-General has not established the documents sought are directly relevant to an issue in the proceedings. Therefore, the application for further disclosure must fail. After the Valuer-General filed its application, the Coles Group agreed to provide some documents. However, there were significant differences between the scope of the request made in the Notice of Non-Party disclosure and the orders proposed in the application. The scope of the orders was further confined at the hearing. The Valuer-General has largely failed in its application. The Coles Group is not a party to the appeals and raised valid grounds of objection. I consider the Valuer-General should pay its costs of the application.

³² Affidavit of Andrew Zellar, filed 8 June 2018, [18].

³³ *Cassimatis v Axis Specialty Europe Ltd* [2013] QSC 237 [21].

³⁴ Orders made on 7 August 2018.

Orders

1. The application is dismissed.
2. The Valuer-General must pay Coles Group Property Developments Ltd's costs of the application.

**FY KINGHAM
PRESIDENT OF THE LAND COURT**