Court of Appeal
Supreme Court

New South Wales

Case Name:	Hung v Aquamore Credit Equity Pty Ltd
Medium Neutral Citation:	[2022] NSWCA 272
Hearing Date(s):	10 October 2022
Date of Orders:	16 December 2022
Decision Date:	16 December 2022
Before:	Ward P at [1]; Macfarlan JA at [2]; Mitchelmore JA at [52]
Decision:	Appeal dismissed, with costs.
Catchwords:	MORTGAGES AND SECURITIES — mortgagee's power of sale — whether mortgagee failed to act in good faith or take all reasonable care to sell property for not less than market value — significance of expert valuation evidence as to market price of property — no error in primary judge's preference for respondents' expert valuation evidence
Legislation Cited:	Corporations Act 2001 (Cth), ss 9, 420A Environmental Planning and Assessment Act 1979 (NSW), ss 4.55, 4.56, 56 Real Property Act 1900 (NSW), ss 57, 58
Cases Cited:	ACES Sogutlu Holdings Pty Ltd (in liq) v Commonwealth Bank of Australia (2014) 89 NSWLR 209; [2014] NSWCA 402 Boz One Pty Ltd v McLellan [2015] VSCA 68; (2015) 105 ACSR 325 Investec Bank (Australia) Ltd v Glodale Pty Ltd (2009) 24 VR 617; [2009] VSCA 97 Stockl v Rigura Pty Ltd [2004] NSWCA 73

Category:	Principal judgment
Parties:	Edgar Hung (First Appellant) Trevor Chappell (Second Appellant) First on First Development Pty Ltd (Third Appellant) Aquamore Credit Equity Pty Ltd (First Respondent) Hsu Allen (Second Respondent) Zachary Chang (Third Respondent)
Representation:	Counsel: F Corsaro SC (Appellants) J Hogan-Doran SC/R Sud (Respondents) Solicitors: Tzovaras Legal Australia Pty Ltd (Appellants) Independent Legal (Respondent)
File Number(s):	2022/12119 2022/219950
Decision under appeal:	
Court or Tribunal:	Supreme Court
Jurisdiction:	Common Law
Citation:	[2021] NSWSC 1681
Date of Decision:	21 December 2021
Before:	Meagher JA
File Number(s):	2019/371915 2020/341930

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the judgment]

In 2016 Aquamore (the first respondent) entered into a Facility Agreement with First on First (the third appellant) pursuant to which Aquamore advanced $8,925,000 to it. As security, Aquamore obtained a mortgage from First on First over a property in the Blacktown CBD and guarantees from the directors (the first and second appellant). Following Aquamore's service of a purported notice of default (that was ultimately found to be invalid), Aquamore took possession of the property with a view to exercising its power of sale as mortgagee. The property was ultimately sold for $10 million, no step having been taken by the mortgagor or the guarantors to restrain the sale.

Aquamore commenced proceedings against the guarantors claiming an amount still outstanding. First on First commenced proceedings against Aquamore and two of its directors alleging that Aquamore had breached its general law and statutory duties in selling the secured property and that Aquamore's directors had breached duties they owed to the mortgagor.

In seeking to prove the market value of the property, Aquamore relied on the expert evidence of Mr Ellis and First on First relied on that of Mr Wood. Mr Ellis valued the property at $9,825,000 while Mr Wood valued it at $15,000,000.

In his judgment of 21 December 2021, Meagher JA held that Aquamore was not authorised to exercise its mortgagee's power of sale but held that First on First had not proven it suffered any damage as a result of the unauthorised exercise of the power of sale, nor that Aquamore did not take all reasonable care in selling the property.

The appellants appealed on four grounds. Ground 1 argued that the primary judge erred in not giving adequate reasons for preferring the opinion evidence of Mr Ellis over that of Mr Wood and not finding that the market value of the subject property was not realised when it was sold for $10 million. Grounds 2 and 4 relied on Ground 1 succeeding and Grounds 3 and 4A were not pressed.

The Court (Macfarlan JA; Ward P and Mitchelmore JA agreeing) dismissed the appeal with costs, holding that the primary judge's reasons were not inadequate and there was no error in his Honour's preference for the expert evidence of Mr Ellis over that of Mr Wood: [1], [50]-[52].

JUDGMENT

1 **WARD P:** I agree with Macfarlan JA.

2 **MACFARLAN JA:** This is an appeal from Meagher JA's decision given in the Common Law Division in *Aquamore Credit Equity Pty Ltd v Hung; First on First Development Pty Ltd v Aquamore Credit Equity Pty Ltd* [2021] NSWSC 1681. The challenge is confined to his Honour's finding that Aquamore Credit Equity Pty Ltd ("Aquamore") did not breach its equitable and statutory obligations in the course of exercising its power of sale as mortgagee of a development property at Blacktown in Sydney. An application for leave to appeal was also made but it was based on a costs challenge that is no longer pressed. The application should therefore be dismissed.

3 For the reasons that appear below, I have concluded that the appeal, which is brought by the mortgagor, First on First Development Pty Ltd (First on First), and the guarantors, Mr Edgar Hung and Mr Trevor Chappell, should be dismissed with costs.

The factual circumstances

4 In December 2016 Aquamore entered into a Facility Agreement with First on First pursuant to which Aquamore advanced $8,925,000.00 to the mortgagor. Aquamore obtained a mortgage from First on First over a development property owned by First on First in the Blacktown CBD ("the subject property") and two guarantees from the directors of First on First (the guarantors) as security.

5 Following Aquamore's service on or about 20 July 2017 on the mortgagor of a purported notice of default under s 57(2)(b) of the *Real Property Act 1900* (NSW), which the primary judge subsequently held to be invalid, Aquamore took possession of the property on 31 January 2018 with a view to exercising its mortgagee's power of sale. On 5 March 2018 it entered into a contract to sell the property to 2-6 First Ave Pty Ltd for $10 million but that contract was not completed and on 9 July 2018 Aquamore entered into a second contract, with the same purchaser, again for a sale for $10 million. That contract was completed on 15 January 2019, no step having been taken by the mortgagor or the guarantors to restrain the sale.

The judgment at first instance

6 In Common Law Division proceedings commenced by Aquamore against the guarantors claiming a net amount outstanding of $19,477,587.76, the guarantors contended that a default interest provision in the Facility Agreement with the mortgagor was void as a penalty and alleged that Aquamore had breached its general law and statutory duties in selling the secured property. Subsequently, the mortgagor commenced Equity Division proceedings against Aquamore and two of its directors making allegations to the same effect and asserting that the directors of Aquamore breached duties that they owed to the mortgagor.

7 Meagher JA heard both sets of proceedings and determined in his judgment of 21 December 2021 that the mortgagor had not committed any monetary default at the time that the purported s 57(2)(b) notice was issued alleging that that had occurred. Although monetary default had subsequently occurred, no further notice had been issued.

8 His Honour held that, as a result, Aquamore was not authorised to exercise the mortgagee's power of sale for which s 58 of the *Real Property Act* provides, nor that which was contained in the mortgage. The sale by Aquamore was thus wrongful but, in a finding that is not challenged on appeal, his Honour held that the mortgagor did not prove that "it suffered any damage as a result of Aquamore's unauthorised exercise of its power of sale as distinct from its alleged breaches of duty in doing so".

9 His Honour then considered whether Aquamore breached its general law or statutory obligations in exercising the power of sale. He referred to the general law obligation of a mortgagee exercising a power of sale to act in good faith and to the duty of care imposed by s 420A of the *Corporations Act 2001* (Cth). The latter was applicable to Aquamore as it was a "controller" within the meaning of that term as defined in s 9 of the *Corporations Act*. Section 420A of the *Corporations Act* is in the following terms:

> "(1) In exercising a power of sale in respect of property of a corporation, a controller must take all reasonable care to sell the property for:
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> (a) if, when it is sold, it has a market value—not less than that market value; or

(b) otherwise—the best price that is reasonably obtainable, having regard to the circumstances existing when the property is sold."

10 After referring to authority, his Honour concluded:

> "72 Thus the principal question to be addressed is whether the mortgagee has taken all reasonable care in advertising and selling the property. What must be done to comply with that general obligation will ultimately depend on the circumstances of the particular case (*Boz One Pty Ltd v McLellan* [2015] VSCA 68 at [371]; (2015) 105 ACSR 325). A breach of the requirement to take all reasonable care is not established merely because a mortgagee fails to realise the property for its market value (*Boz* at [168]). The focus remains upon whether the process utilised to effect the sale was undertaken with reasonable care (*Investec Bank [(Australia) Ltd v Glodale Pty Ltd* (2009) 24 VR 617; [2009] VSCA 97] at [46])."

11 As the issues on appeal are limited in the manner described below, it is unnecessary to repeat his Honour's description of the circumstances leading to the sale of the property. It is sufficient to refer to his Honour's following conclusions on this topic:

> "107 Before selling the property, Aquamore sought and obtained advice from CBRE [an experienced professional real estate agent] as to the manner in which the property might be sold and the price likely to be achieved assuming the marketing campaign CBRE proposed. That advice was sought in the context of CBRE (and Matrix [another experienced real estate agent]) having undertaken an earlier sales campaign. In the light of CBRE's somewhat pessimistic description of the state of the market, Aquamore is certainly not shown to have acted unreasonably in deciding to sell the property to Mr Roumeliotis' [a principal of LJ Hooker Blacktown] proposed buyer for $10 million.
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> 108 The exchanges between Mr Hsu and Mr Hung in mid-December 2017 concerning the latter's consent to a sale at that value do not suggest that sale was regarded by Mr Hung as outside the market range at that time. Nor do the results of CBRE's and Matrix's earlier marketing endeavours suggest otherwise. In the face of CBRE's advice as to the state of the market, Aquamore's decision to sell for $10m, rather than proceed with a marketing campaign which the agent did not think likely to produce a higher price, was justifiable and reasonable.
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> 109 The valuation evidence confirms the reasonableness of that decision, in the sense that Mr Ellis' [an expert valuer] opinion, which I accept, assessed a market value which was less than the amount for which the property was sold."

12 Mr Hung was a director of First on First and by his own description has been actively involved at a senior level in the acquisition, development and sale of properties by a property group since 1992. Mr Hsu was a director of Aquamore.

13 In a finding no longer the subject of appeal, his Honour then upheld the mortgagor and guarantors' argument that the provision in the Facility Agreement purporting to impose a higher rate of interest on default was a penalty, and therefore void.

14 In his further judgment of 17 February 2022 ([2022] NSWSC 117), his Honour determined the quantum of Aquamore's entitlements in light of his findings, and made formal orders.

CONSIDERATION OF THE APPEAL

15 The appellants comprise the mortgagor and the guarantors. Their first ground of appeal is in the following terms:

> "Having found that the first respondent was obliged to exercise its power of sale over the third appellant's property at 2-6 First Avenue, Blacktown (the Property) in good faith (Reasons, [69] and [70), his Honour determined that it had done so on the basis of the market value of the property being $9,825,000 based on the opinion evidence of Mr Mark Ellis. His Honour accepted that evidence over the contrary expert opinion evidence of Mr Kent Wood that the value of the Property was $15,000,000. The Primary Judge erred by not:
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> a. giving reasons, or alternatively adequate reasons, for preferring the opinion evidence of Mr Ellis over the evidence of Mr Wood; and
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> b. finding on the balance of the evidence before his Honour that the market value of the Property when the first respondent sold the Property was $15,000,000 and that, therefore, the sale did not realise the market value of the Property."

16 For the reasons that follow, in light of my rejection below of Ground 1, none of the remaining grounds needs to be addressed. Ground 2 complains that the primary judge did not find that Aquamore breached its good faith and statutory obligations but the submissions supplied in support of it rely on the valuation point which is the subject of the Ground 1. Moreover, the appellant's senior counsel accepted in oral argument that the appellants could not succeed on Ground 2 unless they succeeded on Ground 1. This position is the same in relation to Ground 4 (complaining of the absence of a finding of breach of section 420A of the *Corporations Act*), a concession to that effect having been made in the appellant's written submissions. The only remaining grounds (Grounds 3 and 4A) were not pressed.

17 For the appellants to have succeeded on appeal, they thus at least needed to demonstrate, as contended in Ground 1, that the primary judge erred in

preferring the evidence of the respondents' valuer, Mr Mark Ellis, to that of the appellants' valuer, Mr Kent Wood. For the reasons that appear below, I do not consider that they did this.

18 I need to emphasise however that success in establishing that error would not of itself have led to the appeal being allowed. As the primary judge pointed out, "[a] breach of the requirements to take all reasonable care [or to act in good faith] is not established merely because a mortgagee fails to realise the property for its market value" (see [10] above). His Honour then referred to the statement of Palmer J (Mason P and Ipp JA agreeing) in *Stockl v Rigura Pty Ltd* [2004] NSWCA 73 at [37] that "[t]he test of good faith focuses primarily upon whether the mortgagee has seriously failed to take reasonable steps in all of the circumstances to obtain a proper price, and not upon what valuers may say the property should have sold for". An additional difficulty for the appellants in the present case is that, although the valuers expressed views as to the value of the property at the date of the mortgagee's first contract to sell (that is, 5 March 2018), both relied to a significant extent on sales, said to be comparable, that occurred after that date. In particular, they relied on a sale of 26 Second Avenue Blacktown ("the 2nd Avenue Property") which took place in August 2019. As well, Mr Wood relied on a sale in late 2018 of an interest in 5-19 George Street Blacktown ("the George Street property"). Mr Ellis also relied on a sale of that property, but one that predated the valuation date of 5 March 2018 used by both valuers of the subject property.

19 Not only were post valuation date sales of doubtful or at least limited utility in establishing a breach by the mortgagee of a duty of good faith or the statutory duty to take reasonable care, but the appellants' case in this regard also suffered from the problem that there was an absence of instructions to either valuer to consider Aquamore's conduct in attempting to sell the property and the various communications it had with possible purchasers in the 12 months prior to the January 2019 sale (see *Stockl v Rigura Pty Ltd* [2004] NSWCA 73 at [31]–[34]; A*CES Sogutlu Holdings Pty Ltd (in liq) v Commonwealth Bank of Australia* (2014) 89 NSWLR 209 at 222; [2014] NSWCA 402 at [65]). Nor were those matters the subject of evidence from any other experts.

20 In criticising the primary judge's preference for the valuation evidence of Mr Ellis (who arrived at a value for the subject property of $9,825,000 as at 5 March 2018) over that of Mr Wood (who arrived at a value of $15,000,000 as at the same date) the appellants identified five issues arising out of the valuations in relation to which they argued that Mr Wood's approach should have been preferred, resulting in the acceptance of Mr Wood's valuation figure. I address those five issues as follows.

(1) The 2nd Avenue Property: site area

21 Both valuers sought to derive assistance in valuing the subject property from sales of nearby properties that they identified as comparable, including the 2nd Avenue Property. The valuers calculated the price per square metre of developable space at which those properties were sold by multiplying the site area of the properties by the applicable Floor Space Ratio ("FSR") to obtain the gross floor area ("GFA") and dividing the sale price by the GFA to obtain the GFA dollar rate. Under the existing local environment plan ("Blacktown LEP 2015") the FSR was 6.5 (that is, developments could have a floor area up to 6.5 times the site area).

22 For the 2nd Avenue Property sale in August 2019, Mr Ellis derived a GFA dollar rate of $567/ m2 and Mr Wood derived a GFA dollar rate of $697/ m2.

23 The primary judge said that the difference arose because Mr Ellis used the "site area figure [of the 2nd Avenue property] derived from the relevant development approval" whereas Mr Wood did not. As the respondents submitted, his Honour's reference to the "site area figure" was a slip and should be understood as a reference to Mr Ellis using the GFA of 7932 m2 approved in the then subsisting development approval. Mr Wood took a lower GFA of 6455 m2 (which was based on the maximum area permitted by the existing LEP, the Blacktown LEP 2015). The former (post development approval) was higher than the latter because at the relevant time the Blacktown council was granting approvals allowing a greater GFA in anticipation of changes to the LEP foreshadowed by the Gateway Determination referred to in [39] below.

24 The effect of the primary judge's decision was that Mr Ellis did not err in using the GFA figure that had been approved by the Council. An inference can readily be drawn that negotiations for the sale of the 2nd Avenue Property would have taken place on the assumption that, as Council had given its approval, a purchaser would be able to build a development on the property with that GFA, and that that assumption was reflected in the price. Mr Wood's assumption that a lesser GFA was applicable had the effect of increasing the putative GFA dollar rate in respect of the sale. If nothing else, it can at least be said that Mr Ellis' choice of the GFA to use involved an evaluative decision that was reasonably open to him, thereby negating any suggestion of error on his part.

25 Contrary to the appellants' complaint, the primary judge's reasons were not deficient. They identified the essential point relevant to this issue, namely that Mr Ellis but not Mr Wood had used the GFA from the development approval, and his Honour found that that was appropriate. In any event, criticism of his Honour's reasons should be rejected because the point was not put to Mr Ellis in cross-examination and was not raised in the appellant's oral argument before his Honour.

(2) The George Street Property December 2018 sale: whether arms-length

26 Mr Wood and Mr Ellis also arrived at different applicable GFA dollar rates for the George Street property which was also used by both valuers in assessing the value of the subject property. The primary judge addressed this topic as follows:

> "97 The valuers also disagreed as to the applicable GFA dollar rates for the George Street property. There are two reasons which explain that difference.
>
> 98 First, there were two transactions concerning that property, one on 3 August 2017 and the other on 21 December 2018. Mr Ellis used the former, and rejected the latter as not involving an arm's length transaction. I agree with Mr Ellis' reasons for taking that position in light of the apparent association between the transferor and transferee companies."

The other (that is, second) reason is dealt with below in [33] – [34].

27 In his statement of evidence of 28 April 2021, Mr Ellis said in relation to the sale of 21 December 2018:

> "40 First, I have been briefed with documents produced by the Office of the Registrar General which identif[y] that the transferor of the subject property was a company called Good Luck Plaza (Blacktown) Pty Ltd, and the transferee was Good Luck Blacktown Centre Pty Ltd and the date of the transfer as 31 December 2018. I note that the transfer was in relation to 1/10th of the tenancy in the property, which was held as tenants in common (see Appendix 23 and 24 to this report).
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> 41 Secondly, I have been briefed with ASIC documents which identify common shareholders and common directors in both companies (see Appendix 25 to 29 to this report)."

28 Mr Ellis' statement that the ASIC documents "identify common shareholders and common directors in both companies" was not precisely correct but it was sufficiently accurate to sustain his decision not to rely on the transaction. For the following reasons, there was clearly a close connection between the transferor and the transferee. The transferor (Good Luck Plaza (Blacktown) Pty Ltd) was about 49.5% owned by Heli Family Pty Ltd. All of the shares in Good Luck Blacktown Centre Pty Ltd (the transferee) were held by Good Luck Property Investments Pty Ltd. All of the shares in Good Luck Property Investments Pty Ltd were held by Good Luck Holdings Pty Ltd. All of the shares of Good Luck Holdings Pty Ltd were in turn held by Heli Family Pty Ltd. Zening He and Mi Yi Li were directors of each of the companies and owners of the shares in Heli Family Pty Ltd.

29 Moreover, as Mr Ellis noted, the transfer was only as to one tenth of the property and, after the transfer, all the owners held as tenants in common.

30 In these circumstances, it was well open to Mr Ellis to conclude that the transfer was probably a related party transaction and on that basis to exclude it from consideration.

31 Mr Ellis' concerns about using the transaction for his valuation task were heightened by the fact that the sale/transfer price rose from $22 million for the first sale to $25.75 million for the second sale, notwithstanding that the market for properties like the 2nd Avenue Property was stagnant in the intervening period. Mr Ellis said that he would not have expected any increase in the market price in that period, let alone an increase of $3.75 million. Mr Wood agreed that the market was stagnant in this period.

32 The appellants sought to establish that the Chief Commissioner of State Revenue would not, for revenue purposes, have treated the 2nd Avenue Property sale as a transaction between related or associated persons. Whether the Chief Commissioner would have done this is in my view irrelevant to the valuation task undertaken by Mr Ellis and Mr Wood. It was for Mr Ellis to form an evaluative view as to the relevance, if any, of the second sale to the valuation task that he was asked to undertake. His concerns that it was not an arms-length transaction were well founded and there was no error in his reasoning or the primary judge's conclusion.

(3) The George Street Property: site area

33 The primary judge concluded as follows in relation to the second difference between the valuers concerning the George Street Property:

> "Secondly, the valuers adopted different site areas, 4,652m2 in the case of Mr Wood and 4,630m2 in the case of Mr Ellis. Again, for the reasons given by Mr Ellis, his site area is to be preferred. It accords with that area as shown in the relevant deposited plan. It follows that the rate of dollars per m2 of GFA for the George Street property was $731, and not $851 as derived by Mr Wood."

34 The difference in site areas was small (22 metres) and therefore had only limited impact on the valuers' calculations. Moreover, in their written submissions, the appellants conceded that the figure of 4630 m2 GFA used by Mr Ellis was the correct figure, as did Mr Wood in cross-examination. As a result, no error by Mr Ellis, or the primary judge, was demonstrated.

(4) The subject property: site area

35 The primary judge addressed as follows the difference between the areas of the subject site used by the valuers:

> "100 Having regard to the derived GFA dollar rates per m2 of the two [comparable] properties, namely $567/m2 and $731/m2, Mr Ellis assessed the GFA [dollar] rate for the subject property at $700/m2. Using his GFA dollar rates per m2 of $697/m2 for Second Avenue and $851/m2 for George Street, Mr Wood assessed the GFA dollar rate for the subject property as being $800/m2.
>
> 101 The valuers also used a different site area for the subject property in determining the gross floor area to which their respective assessments of the GFA dollar rate were to be applied. It was not controversial that the gross floor area was derived by multiplying the site area by the FSR of 6.5:1. In doing so Mr Ellis used a 'developable' site area of 2,111m2 producing a value of $9,605,000. Mr Wood undertook the same exercise, but used a site area of 2,214m2 because that was the original site area *before* dedication of an area

> of 103m2 for road widening. He did so adopting an assumption that the relevant consent authority would allow the permissible GFA to be calculated by reference to the original site area.
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> 102 Mr Ellis took issue with the correctness of that assumption. It was not the site area used by Mr Wood in his October 2016 valuation which took account of the July 2016 DA. Nor was it the site area described in the marketing material issued by CBRE and Matrix which referred to the property as being a 'site of 2,111sqm' with a DA. Ultimately Mr Wood's evidence was that the assumption he adopted accorded with a practice of which he became aware at some time after October 2016. It is not necessary to make any further findings as to Mr Wood's understanding because the evidence does not establish that the practice was widely known or adopted as between potential buyers and sellers in the relevant market. The evidence as to how CBRE and Matrix described the property makes it most likely that participants in the relevant market treated the developable site area as 2,111m2. For that reason Mr Ellis' calculation of the GFA is to be preferred."

36 The appellants' counsel criticised this reasoning only on the basis that the primary judge failed to consider the Blacktown City Council Supplementary Report to Sydney West Joint Regional Planning Panel considered by the Panel on 21 July 2016. The appellants contended that the Report supported Mr Wood's use of a site area of 2214 m2, being the site area of the property before dedication of an area of 103 m2 for road widening.

37 The correctness or otherwise of this contention is however not important as the primary judge found against the appellants for the following different reasons that they do not challenge. His Honour referred to the fact that the marketing material for the property used the figure of 2,211 m2 for the site area and concluded that that figure was therefore likely to have been used by potential purchasers in their consideration, and negotiations for purchase, of the property. The Report referred to by the appellant was in these circumstances not relevant to determining what amount the participants in the market would have paid for the property at the relevant time.

38 This was a rational process of reasoning, not challenged by the appellants and involving no apparent error. Again therefore the appellants failed to establish that the primary judge, or Mr Ellis, fell into error.

(5) Potential changes to planning controls

39 On 23 December 2016 the Blacktown City Council wrote to the Department of Planning and Environment requesting a Gateway Determination under the then section 56 of the *Environmental Planning and Assessment Act 1979* (NSW) for

a proposal to amend planning controls inter alia in the Blacktown CBD including by the removal of FSR controls in the Blacktown CBD.

40 On 12 April 2017 the Department responded by advising the Council that it had been determined that the Council's planning proposal "should proceed subject to the conditions in the attached Gateway [D]etermination". The attached Gateway Determination advised that community consultation in relation to the proposal was required, as was consultation with a number of public authorities. It stipulated a "timeframe for completing the LEP" of 12 months. This Determination became a matter of public record at or about the time that it was made. Its effect was that there was from 2017 a prospect of the relevant LEP being amended to remove FSR controls applicable to the development of the subject property.

41 Mr Wood calculated the GFA of the subject property as 14,391 m2 (as noted above based on a site area of 2214 m2). He said that a prudent developer of the subject property would have lodged an amended Development Application seeking to take advantage of the possible change to the FSR resulting from the Gateway Development approval. He said that an additional 5803 m2 of GFA would have been sought, representing an additional approximately 70 units across 7 additional floors, giving a total GFA of 14,391 + 5803 = 20,734 m2. He had calculated the value of the subject property at the relevant date without this addition as $11,512,800.00. To take account of the additional GFA he did not apply the dollar rate per square metre derived from the comparable sales ($800) but instead discounted that rate by 25% to $600 "to allow for D.A. costs, time element, contingencies and risk, i.e. in gaining development consent under … Section 4.55 and 4.56 of the Environmental Planning and Assessment Act". This produced an additional value to the subject property of $3,481,800 (5803 m2 x $600). When Mr Wood added this figure to the above mentioned figure of $11,512,800, a valuation of the subject property of $14,994,600 was produced. This was rounded to $15 million.

42 Mr Ellis made a detailed response, including opining that a discount of the dollar per m2 rate of any additional floor area of 75% was appropriate having regard to a number of matters to which a reasonable property developer would

have had regard when considering the purchase of the subject property. These included the "climate of declining confidence" in the development property market, and the risk that the foreshadowed amendment to the LEP would not occur or would in any event take some years to occur. Mr Ellis' conclusions included the following:

> "My calculations are as follows in relation to the possible amendments to the LEP:
>
> a. I say that possible amendments to the LEP that were known at the date of valuation were not able to be quantified at the time, in part because DA approval would have been based on 'Design Excellence' criteria. However, a prudent developer could have applied an allowance of an additional 10% on top of the current FSR of 6.5:1, which equates to 7.1:1.
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> b. This would increase the GFA to 14,988 sqm (2,111 x 7.1) which is an increase of 1,266 sqm (14,988sqm – 13,722sqm). Using the discounted rate of $175 per sqm of GFA for the additional area of 1,266 sqm equates to a value of **$221,550** ($700 x 25% x 1266 sqm).
>
> c. The total market value is therefore made up of the $9,605,050 value as calculated in paragraph 53 of my report plus the additional value as calculated above at $221,550. This equates to a total market value of $9,826,550. I have rounded this to **$9,825,000**."

43 The primary judge's conclusions on this issue were as follows:

> "103 Mr Wood and Mr Ellis arrived at different conclusions as to the value of the potential changes to the relevant planning controls arising from the Gateway Determination. Mr Ellis allowed a small additional value of $221,550 for the opportunity of taking advantage of those changes; whereas Mr Wood attributed a value of $3,481,800 to that opportunity.
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> 104 Again I prefer the evidence of Mr Ellis concerning the allowance that should be made for this opportunity. It is far more conservative than that made by Mr Wood, and the latter produces an overall value of the property which is not at all reflected in the offers and indications which were being made in the market place during 2017 and in early 2018."

44 In their written submissions, the appellants made two criticisms of this reasoning.

45 First, the appellants contended that the primary judge failed to consider Mr Wood's evidence that amendment of the LEP "would allow" an additional 7 floors in the development on the site. His Honour's reasoning did however encompass that matter because his Honour referred to the $221,550.00 added by Mr Ellis to his valuation to take account of the prospect of benefit to the development of the site arising from amendment of the LEP. In his reasoning, Mr Ellis explicitly referred to the possibility of an additional 7 floors being

allowed in a development on the subject property but discounted that prospect heavily for the reasons to which I have referred. Mr Wood did not proceed on the certain basis that 7 further levels would be allowed but rather saw some risk in that occurring and allowed for a discount, albeit far less than Mr Ellis' discount.

46 Secondly, the appellants submitted that there was no evidence that the "offers and indications" to which the primary judge referred "had factored in an allowance for the opportunity arising from the Gateway Determination". It is notable that the appellants did not challenge his Honour's view that the value derived by Mr Wood was "not at all reflected" in those offers and indications. Instead, the point they made is a different one, namely, that the people in the property market who had made such offers and given such indications had been ignorant of the Gateway Determination. This is a difficult proposition for the appellants to sustain in the absence of any evidence to that effect. In my view the contrary inference, as implicit in the primary judge's reasoning, was the obvious one, as the Gateway Determination was a matter of public record and clearly of considerable importance to persons considering the acquisition of development properties for prices of many millions of dollars.

47 In this regard, Mr Ellis gave evidence that anticipated changes to LEP's were a matter of public knowledge which developers could access and take into account when purchasing a property and the primary judge found that "[t]he request for [the] Gateway Determination and the delegate's response became known to Mr Hung at the times each was made. It may be inferred that he took them into account in his subsequent actions in relation to the property". There was no reason to think that Mr Hung's knowledge and actions were not typical of prospective developers.

48 In these circumstances, the appellants did not establish that Mr Ellis made any error in addressing this issue. He gave detailed, rational reasons for allowing a substantial discount and there is no reason to conclude that the discount at which he arrived was outside that reasonably open to him in exercising what was essentially an evaluative decision. Moreover, the matter to which his Honour referred, of inconsistencies with offers and indications actually made,

was a sound basis for his Honour to prefer the views of Mr Ellis to those of Mr Wood on this issue. Accordingly, no error on the part of the primary judge, or of Mr Ellis, has been established.

49 As in relation to the other issues addressed above, no deficiency in his Honour's reasoning has been demonstrated.

ORDERS

50 The appellants' submissions in relation to each of the five issues raised by them under Ground 1 have been rejected. Ground 1 should therefore be rejected. As I indicated in [16] above, in those circumstances, the other grounds do not arise.

51 As the appeal lacks merit, I would dismiss it with costs.

52 **MITCHELMORE JA:** I agree with Macfarlan JA.

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