

ARTICLES

VALUATION PRINCIPLES IN THE INCOME TAX ASSESSMENT ACT

By
Professor Bernard Marks
Adjunct Professor of Law
Bond University
Queensland

Introduction

One constant inherent in our Federal tax legislation is that property and non-cash-benefits must be 'valued'. This proposition is evident from the use, in many hundreds of instances, of the word 'value' throughout the *Income Tax Assessment Act*¹ and follows from the judicially established principle that an amount can only be income according to ordinary concepts if it is either money or something capable of being turned into money, *ergo*, it has some value.² Since any ordered valuation process inherently requires an estimation by reference to a standard, Parliament has seen fit, although apparently without any rational basis, to constrain or qualify in numerous provisions of the *Act* the word 'value' by reference to concept of the market place - hence the term 'market value'.³ However, even where Parliament has seen fit not to provide the market place standard for the valuation process, that is, where a provision simply refers to 'value', the courts have, nevertheless, virtually always assumed that standard, except where the terms of the provision have required some other standard to be applied, such as 'value to the taxpayer',⁴ or where the term 'value' is used in a specific context.⁵

1 Income Tax Assessment Act 1936 (Cth) (hereafter referred to as 'the Act'). The word 'value' appears about 1,900 times in the Act.

2 See *FC of T v Cooke & Sherden* 80 ATC 4140, especially at 4147-8 per Brennan, Deane and Toohey JJ, and *Dawson v Commr of IR (NZ)* 78 ATC 6012. The history and development of the rule can be seen in *Tennant v Smith* (1892) 3 TC 158, *Daly v IR Commrs* (1934) 18 TC 641, *Buckingham v FC of T* (1934) 3 ATD 37 and *Stagg v Commr of IR (NZ)* (1959) NZLR 1252, 12 ATD 72.

3 In the Act as consolidated as at 1 January 1996 there were in excess of 240 sub-sections which used the term 'market value'.

4 See, for example, s 26(e) prior to Act No 47 of 1984 and s 26AAAA and s 26AAAB prior to their repeal by Act No 41 of 1986. See, also, sections 524, 538 and 596 where the enquiry is of 'the value of the taxpayer's interest'.

5 There are hundreds of instances some diverse examples of which are: 'opening value' of trading stock (s 36) and 'depreciated value' for the depreciation provisions (s 56(1B)). For an unusual example,

It is surprising, therefore, that despite the critical role which the valuation process plays in the administration of the *Act*, and notwithstanding the scattered permeation of the terms 'value' and 'market value' throughout it, Parliament has not, in any practical way, set out any valuation criteria. The Australian *Income Tax Assessment Act* is not unique in this regard. Taxation and rating statutes in the United Kingdom, the British Commonwealth and the United States also have, more often than not, provided just the barest of valuation criteria. Instead, legislators have, by default, invariably relied on judicial common sense for establishing valuation rules.⁶ In the United States, administrators have taken this one step further and have actually codified judicially developed taxation valuation rules into regulations.⁷

The primary purpose of this article is to examine the concept of 'market value' and explain what factors make up the market place; it puts the concept of 'market value' in its proper context for the purposes of the application of the *Act*. Secondly, the article examines a particular aspect of the concept of market value; this concerns a proposition that in determining the market value of an asset there is to be excluded from the market all persons who can obtain and will pay for any special value from that asset because of its special adaptability or usefulness to those persons or

see the procedure for determining whether a foreign company was principally engaged in carrying on life insurance business (s 507(3)).

- 6 The former s 26(e) provided courts with a difficult challenge of balancing justifiable valuation principles with tax avoidance arrangements. Prior to Act No 47 of 1984, s 26(e) provided that the assessable income of a taxpayer included 'the value to the taxpayer of all allowances, gratuities, compensations, benefits, bonuses and premiums allowed, given or granted to him in respect of, or for or in relation directly or indirectly to, any employment of or services rendered by him, whether so allowed, given or granted in money, goods, land, meals, sustenance, the use of premises or quarters or otherwise...'. One of the most complex areas in which courts had to determine a value was where an employer granted an employee share rights and options which could only be exercised at a future date and with respect to which there were restrictions upon their exercise and transfer. In *Donaldson v FC of T* 74 ATC 4192 an employee participated in a scheme under which, after a qualifying period of employment, he would be entitled to take up shares in his employer. It was held that the option rights conferred an immediate benefit upon the taxpayer, even though exercisable in the future, and were thus caught by sec 26(e). With respect to the value of the rights Bowen CJ in Eq. said (at 4207): Where what is given is freely transferable, its value may be found by determining what a willing but not anxious purchaser might pay for it. Where what is given is subject to restrictions, its value may be found by determining what a willing but not anxious purchaser, who would, if he bought it, be subject to the same restrictions, might pay for it. Where, as here, what is given to the employee is subject to restrictions and conditions which he alone can fulfil, valuation is more difficult ... Section 26(e) speaks of 'value to the taxpayer'. This is a notion familiar in valuing to determine compensation for resumption purposes. In a case such as the present under sec 26(e) I consider it is appropriate in ascertaining value to the taxpayer to determine what a prudent person in his position would be willing to give for the rights rather than fail to obtain them (cf *Pastoral Finance Association Limited v The Minister*, [1914] AC 1083 at 1088). See also *FC of T v McArdle* 89 ATC 4051, *Commr of IR (NZ) v Parson* (1968) 15 ATD 66 and *Abbott v Philbin* [1960] 2 All ER 763. Prior to Donaldson's case the valuation of employee share rights and options was considered in numerous tribunal decisions; see (1963) 14 TBRD Case P26; (1968) 18 TBRD Case T49; Case D23, 72 ATC 140; Case D59, 72 ATC 364; Case F18, 74 ATC 91; and Case F57, 74 ATC 324. Section 26AAC governs the taxation of benefits in the form of shares or rights acquired under employee share acquisition schemes after 17 September 1974.
- 7 There are particularly detailed regulations dealing with valuation of property for estate and gift taxes (Internal Revenue Code Regs §§20.2031-1 through §§20.2031-10 and §§25.2512 through §§25.2512-9).

because they can obtain synergistic advantages from it. Such persons are said to be prepared to pay a premium which is a 'special value' and are thus excluded from the market place because they are 'special purchasers' who are unrepresentative of others. Consequently, according to this proposition, that special value is excluded from the market value.

The crux of the special value proposition is that in determining the market value of an asset there is to be excluded from the market all persons who can obtain and will pay for any special value from that asset because of its special adaptability or usefulness to those persons or because they can obtain synergistic advantages from it. Such persons are said to be prepared to pay a premium which is a 'special value' and are thus excluded from the market place because they are 'special purchasers' who are unrepresentative of others. Consequently, according to the special value theory of market value, that special value is excluded from the market value.

It will quickly become evident that another principle must necessarily follow from the special value proposition. This further principle is that where parties, who are at arm's length and who are willing but not anxious to sell or buy, freely negotiate and agree to sell and buy an asset for a price, that price will not be the market value of the asset if the Commissioner or a court can properly take the view that the real purchaser paid a 'special value' because of its special adaptability or usefulness to that party or because the purchaser can obtain synergistic advantages from it. In such a case, according to the special value proposition, the arm's length negotiated price will be equivalent to the sum of 'market value' and 'special value' of the asset. It will be shown in this article that this syllogism also has no legal validity. In addition, it will be seen that even if the principle which must necessarily follow from the special value proposition were correct (because that proposition was in itself correct) there would be absurd practical consequences since, for each and every instance in the *Act* where the market value of an asset had to be determined, there would have to be an enquiry whether, even in an arm's length transaction, the purchaser was a 'special purchaser'.

The Concept Of Market Value

A variety of valuation formulary

Our omnibus federal tax legislation is replete with a variety of valuation formularies. Even where the *Act* simply refers to 'value' the principal valuation standard is 'market value'. 'Fair market value' is used but once⁸ as is a value in the 'open market'.⁹ Another formulary is a valuation on an 'arm's length' test; the term 'arm's length value' appears a number of times in the

8 Sec. 548(2).

9 *Fringe Benefits Tax Assessment Act* 1986 (Cth) s 13(4).

*Act*¹⁰ and a valuation of *prices* on that basis underpins the transfer pricing regime in both the *Act* and the numerous double tax treaties. Other Australian tax legislation has used other standards. For example, the former Federal estate duty law referred to 'value'¹¹ while some former State death duty laws used the standard of a sale price in the 'open market'.¹² State stamp duty laws principally refer only to 'value'.

The taxation codes of other countries use very much the same terms. In Canada, the principal standard in income tax law has always been 'fair market value' (although the term 'value' also appears by itself);¹³ 'fair market value' was also the standard in dominion and provincial estate and death duty laws.¹⁴ The United Kingdom has always used an 'open market' value test for capital transfer and inheritance taxes.¹⁵ In the United States, the *Internal Revenue Code* simply refers to 'value' for gift and estate duties and assumes the same for income tax assessment although, on occasion, 'fair market value' appears.¹⁶

It should not come as a surprise that, despite the differences in terminology and context, and notwithstanding occasional judicial expressions that the various terms may mean different things, and regardless of some academic theory that even the same valuation formulary could take on different meanings according to its context and purpose,¹⁷ courts and administrators have generally treated the meaning of the terms 'value', 'market value', 'fair market value' and 'open market value' as both equivalent and interchangeable whether they applied to income tax, capital transfer, death and estate duties or stamp duties.¹⁸ At the same time, the courts have recognised that a test of 'value to' a particular person in tax laws is a concept

10 See sections 21A, 26AJ, 47A, 51AK, 139FB, 139FC, 159GZA and 159GZG.

11 *Estate Duty Assessment Act* 1914 (Cth) s 10.

12 For example, *Probate Duty Act* 1962 (Vic) s 17(1).

13 *Income Tax Act* 1974 (Can); see, especially, sections 38 - 40.

14 See, for example, *Dominion Succession Duty Act* 1952 (Can) s 34.

15 *Inheritance Tax Act* 1984 (UK) and *Capital Gains Tax Act* 1984 (UK) s 160. The wording of s 160 can be traced to *Finance Act* 1894 (UK) s 7(5) which provided that the 'market value in relation to any assets means the price which those assets might reasonably be expected to fetch on a sale in the open market'. Section 160 (which is headed 'market value') reads: Except as otherwise provided by this Act, the value at any time of any property shall for the purposes of this Act be the price which the property might reasonably be expected to fetch if sold in the open market at that time; but that price shall not be assumed to be reduced on the ground that the whole property is to be placed on the market at one and the same time.

16 See US *Internal Revenue Code* §§61(a), 1001(b), 2031, 2033-2042, 2512(a). There are also instances where a peculiar valuation standard is applied, for example, 'current use' value (see §2032A).

17 See, for example, JC Bonbright, *The Valuation of Property* (1937) at 693-746 and 976-1077.

18 In *Abrahams v FC of T* (1944) 70 CLR 23 Williams J said (at 29) that the estimation of 'value' in the *Federal Estate Duties Assessment Act* was done 'in the same manner' as the 'open market valuation' in the UK *Finance Act* 1894. In *Emerson v Custom Credit Corporation Limited* [1994] 1 Qd R 516 Davies JA and Williams J noted that the same test had been applied for determining 'value', 'market value' and 'market selling value' in various contexts (at 521). They also noted (also at 521) that 'The context in which the phrase 'market value' is used may indicate that the market in which the value is to be determined is one which has some special features.' In that case, the Queensland Court of Appeal declined to find that there was a difference in market value between mortgage sales and ordinary sales of real estate and that there was no identifiable mortgagee's market.

involving an assessment of different factors from 'market value'. In broad terms, the concepts of 'value', 'market value', 'fair market value' and 'open market value' require a reference to a notional sale in a hypothetical market place while a 'value to the taxpayer' notion requires reference to additional factors which can either increase or reduce the market value.¹⁹

Consequently, as will be seen below, the courts have intermixed valuation precedents from virtually all taxing statutes into a single body of valuation jurisprudence, regardless of whether the relevant term has been 'value' or whether it has been qualified by the terms 'market', 'fair market' or 'open market'. The courts have gone even further by adding into the same pot the case law dealing with 'value' in rating and compulsory acquisition of property legislation.²⁰

The notional market place hypothetical sale standard

The dominant notion of 'value', 'market value', 'fair market value' and 'open market value' in Australian, the United Kingdom, Canadian, and United States jurisprudence is the assumption of a hypothetical market in which the particular asset is placed. This market consists of hypothetical arm's length sellers and buyers who are reasonably informed of all relevant facts, who are willing but not anxious, and who are not under any compulsion to sell or buy. The hypothetical price at which the hypothetical sellers and buyers are prepared to agree will be the value of the asset.

It would appear that a valuation standard in which hypothetical parties compete in a market place was developed by English judges in the mid-nineteenth century in order to determine the value of the annual rent at which premises could be let and the value of property for the levying of rates²¹ and successions duty.²² The hypothetical parties were supposed to have reached the correct value 'as a result of bargaining in the light of competition or its absence in both demand and supply, as a result of "the higgling of the market"'.²³ The judges in rating cases (where the issue was the annual market rent of a property) early recognised that, although the standard by which the analysis was undertaken was a matter of law, the determination of market value required an economic enquiry. In an 1859 case it was held that the market rental value of a waterworks was to be determined by reference to the top slice of the demand curve; the economic enquiry was described as follows: 'Value is derived entirely from the relation of demand to supply, and if a water company comes into competition with a mere agriculturist for land for waterworks, an addition is made to the value of such

19 Valuation on a 'value to' the taxpayer basis is used in sections 26(e), 26(ea) and 160ZZR.

20 However, the courts have also recognised the different valuation standards, especially where the land value is an improved or unimproved basis; see the observations in *Gollan v Randwick Municipal Council* [1961] AC 82 at 100.

21 See *R v West Middlesex Waterworks Co* (1859) 28 LJ (MC) 135, 120 ER 1078; *Sheffield United Gas Light Co v Sheffield Overseers* (1863) 32 LJ (MC) 169, 122 ER 1291; *Mersey Docks and Harbour Board v Liverpool* (1873) LR 9 QB 84.

22 *Attorney General v Earl of Sefton* (1865) 11 HL Cas 257, 11 ER 1331.

23 *Robinson Bros (Brewers) Ltd v Houghton and Chesterle-Street Assessment Committee* [1937] 2 KB 445 at 470 per Scott LJ.

land by the additional competition. ... Upon the common principles regulating value, it is enhanced in proportion to the scarcity of the thing in demand; so that, if a few levels only were suitable for the required transit, or a few sources of water alone were accessible, the price would be higher'.²⁴

A number of consequences follow from this notional market standard in which a hypothetical sale is assumed. By its very nature, the criterion must necessarily be an objective one. The hypothetical nature of the market does not require that there actually be willing sellers or buyers; even if there are none, they are assumed to exist. Further, since the sale is hypothetical, it would only be proper to determine the value of the asset by reference to the elements of value in the asset itself. Thus, while the hypothetical sellers and buyers would be assumed to consider the realisable possibilities, potential and adaptabilities of the particular asset, none of them would be assumed to have any reasons for selling or buying because of personal factors which were not already known in the market place. That is, value is to be determined from the market perception of the elements of worth in the asset itself. The scope of the hypothetical market place is also assumed to be a wide and orderly one; all classes of sellers and buyers - wholesalers, retailers, investors, and speculators - are represented.

These consequences allow two conclusions to be drawn. *First*, while it is generally accepted that the actual price at which a specific asset is sold in the market place may prima facie be its market value, the market (sale) price may not be its notional market value because of particular circumstances surrounding the sale. That is, if the surrounding circumstances of an actual sale of an asset (or of comparable assets) do not conform to what might be a sale between willing but not anxious fully informed sellers and buyers, then it would be proper to ignore (or, perhaps, merely to consider) the actual sale price in estimating market value.

Secondly, since the market is hypothetical, no sellers or buyers are to be excluded from it unless their reason for being there primarily depends on factors which are not inherent in or intrinsic to the asset itself. That is, no element of demand should be excluded. For example, the price a daughter would pay to the executor of her mother's estate for a personal item, such as her wedding ring, might be determined by her on account of sentimental reasons and thus she would be excluded from the hypothetical market place. On the other hand, if it were reasonable to assume that these sentimental reasons would be known in an orderly market and it would also be reasonable to assume that there are other sentimentally driven buyers (such as all the children of the deceased), the existence of speculators and the forces of competition must not be discounted. Obviously, the wedding ring of a deceased celebrity could, in the hypothetical market, have a value well above its intrinsic worth because it must be assumed that, in addition to the

²⁴ *R v West Middlesex Waterworks Co* (1859) 28 LJ(MC) 135 at 138, 120 ER 1078 at 1082 per Wightman J.

sentimentally driven purchasers, there will be collectors, museums and speculators in the market place.

Development of the notional market place hypothetical sale standard

Despite a line of English rating valuation cases commencing as early as 1859,²⁵ the accepted starting point in Australian law for the principle that market value is determined by reference to a hypothetical sale in a notional market place is the 1907 High Court decision in a compulsory acquisition of land case. In *Spencer v Commonwealth*²⁶ Griffith CJ said that the 'test of value of land is to be determined not by inquiring what price a man desiring to sell could actually have obtained for it on a given day, *i.e.*, whether there was in fact on that day a willing buyer but by inquiring "what would a man desiring to buy the land have had to pay for it on that day to a vendor willing to sell it for a fair price but not anxious to sell?" It is no doubt very difficult to answer such a question and any answer must be to some extent conjectural'.²⁷ The 'willing but not anxious' proviso was also stated as was the equal knowledge of the supposed seller and buyer. With respect to the assumed required knowledge Isaacs J added: 'We must further suppose both to be perfectly acquainted with the land, and, cognisant of all circumstances which might affect its value, either advantageously or prejudicially including its situation, character, quality, proximity to conveniences or inconveniences, its surrounding features, the then present demand for land, and the likelihood, as that appearing to persons best capable of forming an opinion, of a rise or fall for whatever reason soever in the amount which one would otherwise be willing to fix as a value for the property'.²⁸

The *Spencer* test has not only dominated the compulsory acquisition jurisprudence where no separate issue of a 'value to' the owner was involved²⁹ but it also has influenced compulsory acquisition legislation.³⁰ The same notional market place hypothetical sale standard principle was soon after applied by the Privy Council in compulsory acquisition cases³¹ which have had wide influence throughout the Commonwealth.³²

25 *R v West Middlesex Waterworks Co* (1859) 28 LJ (MC) 135; *R v Sheffield United Gaslight Co* (1863) 32 LJ (MC) 169.

26 (1907) 5 CLR 418.

27 *Ibid* at 432.

28 *Ibid* at 441.

29 See, for example, *Commonwealth v Arklay* (1952) 87 CLR; *Brewarrana Pty Ltd v Commr of Highways (No. 2)* (1973) 6 SASR 541; *Melwood Units Pty Ltd v Commr of Main Roads* (1976) 3 QCLR 209; *James v Swan Hill Sewerage Authority* [1978] VR 519.

30 See, for example, *Lands Acquisition Act 1989* (Cth) s 56 and *Land Acquisition and Compensation Act 1986* (Vic) s 40.

31 *Cedars Rapids Manufacturing and Power Co v Lacoste* [1914] AC 569 and *Raja Vyricherla Narayana Gajapatiraju v Revenue Divisional Officer, Vizagapatam* [1939] AC 302.

32 See, for example, the debate in Canadian law as to whether 'value to owner' could be greater than market value: *Lake Erie & Northern Rwy Co v Brantford Golf & Country Club* (1917) 32 DLR 219; *R v Lawson & Sons Ltd* [1948] 3 DLR 334; *Diggon-Hibben Ltd v R* [1949] 4 DLR 785; *R v Woods Manufacturing Co Ltd*. [1949] Ex CR. 9, reversed at [1951] 2 DLR 465.

The *Spencer* test was early applied in State probate and succession duty,³³ and Federal estate duty³⁴ and land tax³⁵ cases and has long been assumed to apply to the valuation of property for State stamp duties.³⁶ The cases dealing with valuation issues in the current and former State probate, succession and stamp duty laws and the former Federal estate duty law have, at times, noted that the only legislative test was one of 'value' (as opposed, to, say, 'market value' or 'open market value') and that the governing standard (disparately described as 'real value' and 'true value') was different from 'market value'.³⁷ However, a close analysis of these cases shows that the hypothetical sale in a notional market place test was sought to be applied and the proper explanation for the statement that there is a difference between 'real value' and 'market value' probably lies in an additional standard applying in compulsory acquisition cases.

It will be seen below that one of the relevant tests in compulsory acquisition cases has been the 'value to' the owner and this in effect includes all potentialities to the owner of the asset which has been compulsorily acquired as well as compensation for disturbance. In the probate and estate duties cases it appears that the terms 'real value' and 'true value' were used by the judges to ensure that the value liable for duties *excluded* any value in the asset which the deceased could have turned to his own account but for his death; this followed from the principle that the estate was to be valued at the date of death and on the hypothesis that the deceased was at that time dead and thus could no longer take any special advantage from the asset.³⁸ In a case dealing with the value of a motor vehicle for stamp duties, the notion that there is any difference between 'real

33 See, for example, *Macarthur Onslow v Commr of Stamps (NSW)* (1913) 13 SR (NSW) 354; *Blackwood's Executors v Commr of Stamps (NSW)* (1917) 17 SR(NSW) 447; *Myer v Commr of Taxes (Vic)* [1937] VR 106; *Commr of Succession Duties (SA) v Executor Trustee and Agency Co of SA Ltd (Clifford's case)* (1947) 74 CLR 358.

34 *Perpetual Trustee Co Ltd v FC of T (Murdoch's case)* (1942) 65 CLR 572; *McCathie v FC of T* (1944) 69 CLR 1; *Abrahams v FC of T* (1945) 70 CLR 2; *Elder's Trustee and Executor Co Ltd v FC of T (Braund's case)* (1951) 96 CLR 563.

35 *FC of T v Duncan* (1915) 19 CLR 551.

36 *Wayne v Commr of Stamp Duties (NSW)* (1969) 91 WN (NSW) 51. See also *Nischu Pty Ltd v Commr of State Taxation (WA)* 90 ATC 4391 at 4395 per Commr Zestis.

37 *Myer v Commr of Taxes (Vic)* [1937] VR 106 at 120 per Martin J ('real value'); *Perpetual Trustee Co (Ltd) v FC of T (Murdoch's case)* (1942) 65 CLR 572 at 578 per Williams J ('true value'); *McCathie v FC of T* (1944) 69 CLR 1 at 6 per Williams J ('real value'); *Abrahams v FC of T* (1945) 70 CLR 23 at 29 per Williams J ('real value').

In a New Zealand succession duty case the term 'value' was said to refer to 'true value'; see *Commr of Stamp Duties v Haynes* [1924] NZLR 337 at 339 per Sim J referring to the unreported decision in *Re Alfred Louisson*.

38 See the observations in *Robertson v FC of T* (1952) 86 CLR 463 at 486 per Kitto J (re Federal estate duties) and in *Re Alex Russell* [1968] VR 285 at 300-1 per McInerney J (re Victorian probate duties). If this principle had not been adopted and the potentialities to the deceased of the asset at his death were included as part of its value, the value would have been increased and the relevant duty would have been greater.

value' and 'market value' was rejected.³⁹ In rating cases, 'true rent' and 'market rent' have been said to be the same.⁴⁰

On the other hand, the observation that there is a difference between 'market value' and 'real value' may be justified where there is a danger that an actual market price of an asset might be used as the reference point when in fact there may be valid reasons for taking other factors into consideration. For example, the quoted share price of a publicly listed corporation will be a prima facie indicator of its value. However, in extraordinary very short-term circumstances, the quoted price on a particular day may not be a proper indicator of value under the notional sale in a hypothetical market place test. This explanation appears to have been the basis of the view of the Supreme Court of Canada that 'value' in provincial death duty legislation was a reference to a market value which was 'fair' (in the sense of representative or typical). In *Untermeyer v Attorney-General (BC)*⁴¹ Mignault J observed:⁴²

The dominant word here is evidently 'value', in determining which price that can be secured on the market - if there be a market for the property (and there is a market for shares listed on the stock exchange) - is the best guide. It may, perhaps, be open to the question whether the expression 'fair' adds anything to the meaning of the words 'market value', except possibly to this extent that the market price must have some consistency and not be the effect of a transient boom or a sudden panic on the market.

A New Zealand decision also supports the view that the quoted price of a share in a publicly corporation would not be its 'real value' if the market on the valuation day had been affected by a panic.⁴³

The 'open market' standard is a product of United Kingdom legislation; it essentially requires an estimation of the price which an asset might reasonably fetch if sold in the open market without a reduction on the basis that the whole property is placed on the market at one and the same time.⁴⁴ The explanation of an open market sale has been expressed in notional sale hypothetical market terms. In *Lynall v IR Commrs*⁴⁵ Lord Reid commented:⁴⁶

39 *Brisbane Water County Council v Commr of Stamp Duties (NSW)* 80 ATC 4051 at 4053-4 per Waddell J.

40 See, for example, *Robinson Bros (Brewers) Ltd v County of Durham Assessment Committee* [1937] 2 KB 445 at 470 per Scott LJ.

41 [1929] 1 DLR 315.

42 [1929] 1 DLR at 319-320. In *Henderson Estate and Bank of New York v MNR* 73 DTC 5471 Cattanaach J suggested that the last sentence of the quote in the text above referred to 'a sudden or unusual circumstance not normally contemplated and which will pass away quickly' (at 5482). See also *Attorney-General of Alberta v Royal Trust Company* [1945] SCR 267 at 288 per Estey J.

43 Unreported decision in *Re Alfred Louisson* referred to in *Commr of Stamp Duties v Haynes* [1924] NZLR 337 at 339 per Sim J.

44 *Inheritance Tax Act* 1984 (UK) s 160 and *Capital Gains Tax Act* 1984 (UK) s 160 (this provision can be traced to *Finance Act* 1894 (UK) s 7(5) as amended by *Finance (1909-10) Act* 1910 (UK) s 60(2)).

45 [1972] AC 680.

46 *Ibid* at 695.

... sale in the open market may take many forms. But it appears to me that the idea behind this provision is the classical theory that the best way to determine the value in exchange of any property is to let the price be determined by economic forces - by throwing the sale open to competition when the highest price will be the highest that anyone offers. That implies that there has been adequate publicity or advertisement before sale, and the nature of the property must determine what is adequate publicity. Goods may be exposed for sale in a market place or place to which buyers resort. Property may be put up to auction. Competitive tenders may be invited.

While the above quote refers only to the type of sale process, the notion of open market value also assumes a hypothetical market place with willing and informed but not anxious sellers and buyers.⁴⁷ In *Brisbane Water County Council v Commr of Stamp Duties (NSW)*⁴⁸ Waddell J expressed the view that the notions of market value and open market value were the same.⁴⁹

In my opinion the ordinary meaning of the term 'market value' is the best price which may reasonably be obtained from the property to be valued if sold in the general market. The cases ... indicate that where the 'value' of an item of property is to be ascertained, this means its value in the general market with three qualifications. Firstly, if there is no general market, as in the case of shares in a private company, such a market is to be assumed. Secondly, all possible purchasers are to be taken into account, even a purchaser prepared for his own reasons to pay a fancy price. Thirdly, the value to be ascertained is the value to the seller. ... A requirement that something is to be valued on the 'open market' also imports these qualifications.

Two other comments should be made about the development of the notional price in a hypothetical market place standard for determining value and market value in the *Act*. *First*, there is an assumption that all non-cash consideration must be valued at market value. This follows both from s 21 (which provides that where, upon any transaction, any consideration is paid or given otherwise than in cash, the 'money value' of that consideration shall be deemed to have been paid or given) and from the general principles inherent in the concept of income.⁵⁰

47 See *Ellesmere v IR Commrs* [1918] 2 KB 735 (1918) 119 LT 568; *Duke of Buccleuch v IR Commrs* [1967] 1 AC 506; *Lynall v IR Commrs* [1972] AC 680.

48 80 ATC 4051.

49 *Ibid* at 4054. See, also, to the same effect, *Abrahams v FC of T* (1944) 70 CLR 23 at 29 per Williams J.

50 See *Cross v London and Provincial Trust Ltd* (1938) 21 TC 705; *Weight v Salmon* (1935) 19 TC 174; *IR Commrs v Baillie* (1936) 20 TC 187; *Gold Coast Selection Trusts Ltd v Humphrey* (1948) 30 TC 209; *Murphy v Australian Machinery & Investment Co Ltd* (1948) 30 TC 244.

Secondly, in the transfer pricing context, the market value, open market value and independent arm's length price tests have been treated as not materially different in their operation.⁵¹

Features Of The Hypothetical Market Place

The *Spencer* test can at best point an independent adjudicator towards a representative or typical value of a particular asset since, in the hypothetical market place, there is no presumption that there actually exist any willing sellers or buyers. A wise adjudicator will inevitably suggest a range of values⁵² (unless the price obtained in an actual arm's length sale is used as a prima facie indicator).⁵³ Depending on the purpose of the valuation, a value at the higher or lower end of the range might be adopted.⁵⁴ And courts have not been deterred from dealing with difficult issues of valuation where opinions may differ.⁵⁵ It has been suggested that the hypothetical parties are 'intellectual automatons' whose 'automatic thoughts remain those of business life, not law'⁵⁶ and that the valuation process is 'a retrospective exercise in probabilities, wholly derived from the real world'.⁵⁷

The judicial pot in which the large volume of valuation jurisprudence has been stirred suggests there are numerous aspects to the application of the market value standard. The more important of these aspects are discussed below.

Market value is determined from the perspective of the seller

Since the market value is the price at which the hypothetical sellers and buyers would agree to make a deal, it should not matter whether the value is expressed from the perspective of either party. However, common

51 See *Taxation Ruling* TR 94/14 at paras 165 and 166.

52 While valuers have the comfort of estimating a range of values, inevitably, a court or tribunal will have to fix an actual dollar value. In *Re Hayes's Will Trusts, Pattinson v Hayes* [1971] 1 WLR 758 Ungood-Thomas J observed (at 768) that 'It has been established time and time again ... that there is a range of prices, in some circumstances wide, which competent valuers would recognise as the price which 'property would fetch if sold in the open market'.

53 See text below at 28.

54 It has been suggested that in compulsory acquisition cases a market value might be set at the higher end of the range while in tax cases a value might be set which would minimise any tax liability. See the observations in *Commr of Succession Duties (SA) v Executor Trustee and Agency Co of SA Ltd (Clifford's case)* (1947) 74 CLR 358 at 373-4 per Dixon J.

55 In *Donaldson v FC of T* 74 ATC 4192 Bowen CJ in Eq. remarked (at 4209): The Courts are accustomed to dealing with difficult questions of valuation where opinions may differ, but where a figure has to be arrived at. Again, in the ordinary affairs of life, the multiplicity of contingencies which renders precise valuation impossible does not deter people from laying out their money, whether it is for a premium for insurance, a bet on a racehorse, the purchase of wool futures or the acquisition of convertible notes. I am not convinced that it is impossible to place a value on the option rights in the present case.

56 *Turner v Minister of Public Instruction* (1956) 95 CLR 245 at 267 per Dixon J referring to an observation in *Melbourne Tramway & Omnibus Co v Tramway Board* [1917] VLR 472 at 481 per Cussen J.

57 *Estate of Lady Fox v IR Commrs* [1994] STC 360 at 372 per Hoffmann LJ.

expressions of the formulary usually pronounce that the value to be ascertained is the value from the point of view of the seller, that is, as though it were the best price which the seller could hope to obtain.⁵⁸

It is suggested that in practice nothing will turn on this emphasis since the price to the seller will also be the identical price which the hypothetical buyer would be prepared to pay.

Market value is not necessarily a 'fair value' but the market place must be a 'fair' one

The dominant task in a market valuation is to ensure that the market place is a fair one even if it later turns out that the value was not 'fair'. A fair market place assumes willing but not anxious parties who are at arm's length and who are properly informed. A well publicised and well attended art auction at which an unsigned Arthur Boyd painting is assumed by everyone present (including knowledgeable persons) to be the work of an unknown artist may result in the highest bidder paying a bargain price. Even if it is agreed that this price cannot ever be representative of the value of any Arthur Boyd work, it would nevertheless not be proper to treat the price paid on the auction day as not being representative of market value of that painting at the time of the auction.

On the other hand, the quoted price of a share in a publicly listed company may not be the market value of a share which was not traded on that day where there has been a significant short-term price fall due to a sudden panic.

An orderly, skilful and well publicised sale is assumed

The hypothetical market place assumes that the particular asset will be sold in the best possible way, that is, to obtain the best price for the seller. Thus two or more items may be sold either together or separately to ensure the best price.⁵⁹ However, the hypothetical market place does not extend to any assumption that assets which are not being valued can be included in the sale when the combined assets would be easier to sell or would bring a higher price.

The rule against enhancement of assets is particularly relevant where the owner or a related party has additional connected assets. One block of land owned by a taxpayer and which is the subject of a valuation will not be aggregated with another (which is not being valued) for the purpose of the hypothetical sale where both together would command a higher value merely

58 See, for example, *Abrahams v FC of T* (1944) 70 CLR 23 at 29 per Williams J; *Brisbane Water County Council v Commr of Stamp Duties (NSW)* 80 ATC 4051 at 4054 per Waddell J; *Ellesmere v IR Commrs* [1918] 2 KB 735 at 740 per Sankey J. See generally *Duke of Buccleuch v IR Commrs* [1967] 1 AC 506 and *Re Hayes' Will Trusts* [1971] 1 WLR 758.

59 *Ellesmere v IR Commrs* [1918] 2 KB 735; *Attorney-General of Ceylon v Mackie* [1952] 2 All ER 775; *Duke of Buccleuch v IR Commrs* [1967] 1 AC 506; *Estate of Lady Fox v IR Commrs* [1994] STC 360; *Estate of Walton v IR Commrs* [1996] STC 68.

because the owner has control over both. Similarly, where a father and his children each own minority interests in a company but together would have control of the company, the value of the father's shares for the purpose of estate duty will not be increased to reflect any additional value for control.⁶⁰

The hypothetical market place also assumes that the seller will take all reasonable steps to attract as much competition as possible and will consider the most appropriate method of sale, such as auction or private sale.⁶¹ Since no potential buyer can be excluded, no private deal on a confidential basis can be considered as part of the hypothetical market place.⁶² The fact that it may take many months to properly prepare the sale of a particular asset is irrelevant since the hypothetical sale is assumed to have occurred on a particular day; all preliminary arrangements are deemed to have been effected so that the orderly, skilful and well publicised sale can be treated as having been made on that day.⁶³

All property can be assumed to be sold in the hypothetical market place even if in fact there could be no sale

Early income tax cases grappled with the issue of the effect of restrictions on non-cash benefits. It was agreed that where a taxpayer received an asset for which there was no actual market because of restrictions on its transferability or exchange, that asset had no real value and thus was not income within ordinary concepts.⁶⁴ The hypothetical market place is not so constrained since there is an assumption that there can be sellers and buyers of assets for which an actual market may either not exist⁶⁵ or be very bare and for which a valuation will be a difficult exercise. Indeed, Parliament has assumed that there can be a market value of assets which cannot be valued.⁶⁶

The market place only includes willing but not anxious sellers and buyers

The 'willing but not anxious' principle is basic to the *Spencer* rule because the hypothetical market place assumes objectivity. Any other principle would be impossible to apply since, presumably, the less willing or the more anxious the participants the lower or higher would be the price. Thus actual sale prices in mortgagee auctions or sales by a receiver or trustee in

60 Cf *Re Mann Estate* [1972] 5 WWR 23, [1973] 4 WWR 223, [1974] 2 WWR 574.

61 See *Duke of Buccleuch v IR Commrs* [1967] 1 AC 506 at 524 per Lord Reid.

62 In *Lynall v IR Commrs* [1972] AC 680 Lord Morris expressed this restriction (at 699): In an open market 'all potential purchasers have an equal opportunity to make an offer as a result of it being openly known what it is that is being offered for sale. Mere private deals on a confidential basis are not the equivalent of open-market transactions'.

63 *Duke of Buccleuch v IR Commrs* [1967] 1 AC 506.

64 See *Tennant v Smith* (1892) 3 TC 158; *Daly v IR Commrs* (1934) 18 TC 641; *Buckingham v FC of T* (1934) 3 ATD 37.

65 For example, property owned by an enemy alien and seized by a government authority can have a market value even if the sale of such property was illegal. See *Re Aschrott, Clifton v Strauss* [1927] 1 Ch 313.

66 Sections 160ZD(2)(b) and 160ZH(9)(b).

bankruptcy would ordinarily not be useful as comparable market value transactions.⁶⁷ On the other hand, the sale prices reached at a well publicised and orderly auction of a person who has been forced to sell his assets - a classic 'unwilling' seller - may well be market value where a reasonable reserve is set simply because, if the seller had actually been willing to sell, the auction price would have been the same.

Nor will a purchaser who is prepared to pay a premium price for an asset because of its special adaptability or usefulness to his own business or because of the synergistic advantages which can be obtained from it be treated as an anxious buyer on that account alone. What may appear to a seller as a 'fancy price' may be a bargain price to a particular buyer. Part III of this article deals with the situation of the 'special purchaser'; it will be seen that in none of the special purchaser cases referred to there was the purchaser treated as anxious or acting under compulsion. Rather, judges have found to the contrary. For example, in *IR Commrs v Clay, IR Commrs v Buchanan*⁶⁸ the owner of a nursing home purchased the two adjacent houses for £1000 each so that it could expand its site; at that time the adjoining sites had a market value of £750 as private residences. The trial judge held that although the owner of the nursing home paid a premium price it was not a forced buyer; Scrutton J said that 'the £1000 actually paid was a profitable business transaction to the nursing home and not a fancy price'.⁶⁹

All sellers and buyers in the hypothetical market are at arm's length

The expropriating authorities in compulsory acquisitions will, with but the rarest of exceptions, be at arm's length with the owner of the property being acquired. Thus it should not be unexpected that the *Spencer* test (and the numerous judgments which have applied it) does not refer to the seller and buyer being at arm's length.

However, common sense demands that, for the purpose of the *Act*, any determination of market value will be made on the assumption that the parties were dealing at arm's length. Indeed, this appears to be assumed because the *Act* requires that the market value of an asset be determined where the parties have *not* been dealing at arm's length.⁷⁰

In practice, the arm's length issue will only arise where the enquiry is whether or not the price in an actual sale was at its market value and in such

67 See *Spencer v Commonwealth* (1907) 5 CLR 418 at 442 per Isaacs J and in *Australian Jam Company Pty Ltd v FC of T* (1953) 88 CLR 23 at 32 per Fullagar J: In special situations the price obtained at a mortgagee auction without a reserve may be the market value. For example, if the terms of a mortgage require that in any foreclosure sale the mortgagee must take proper steps to obtain the market value, the price obtained at auction may be the market value in a foreclosure sale. See *Emerson v Custom Credit Corporation Ltd* [1994] 1 Qd R 516.

68 [1914] 3 KB 466; appeal from [1914] 1 KB 339.

69 *Ibid* at 348.

70 Sections 160ZD(2) and 160ZH(9).

cases the arm's length and market value notions are functionally the same. Where there is a connection between the parties, they will have dealt with each other at arm's length if the price paid was market value.⁷¹

A sale agreement which includes a 'tax adjusted revaluation' clause will, at least on US experience, be treated as not having been at arm's length.⁷² Such clauses have the effect that if the market value of the sold asset is later determined by the Commissioner or a court or tribunal to be greater or less than the price actually paid, the purchase price will be adjusted to reflect the market price so determined.

There are no transaction costs in the hypothetical market place

The assumed sellers and buyers are concerned only with reaching a value for the asset which is being valued. There is no addition or reduction for legal and accounting advice, brokerage or sales commission, advertising or auction expenses which actual sellers and buyers might have incurred.⁷³ However, costs which would be incurred by a hypothetical buyer in using the asset to its realisable potential will be deducted. For example, the market value of land with an unexploited mineral deposit will include the mining potential of the land but would recognise the cost of accessing privately held mining information which was not the subject of the hypothetical sale.⁷⁴

The hypothetical market place is a wide and general one which includes all specialised markets

Since the notional market value is the best price which a willing but not anxious seller of the asset could obtain in an orderly, skilful and well publicised sale, it would not ordinarily be proper for an adjudicator or a judge to limit the enquiry to either a wholesale or a specialised market. Thus a used car is to be valued in a retail market; the wholesale used car market and other specialised markets in which the best price obtainable might be different is not the proper market place to consider and, indeed, even comparable prices in such a market would not necessarily provide an

71 It does not necessarily follow that where two or more of the parties to an agreement are associated or are 'connected' they were not dealing at arm's length with each other. See *Barnsdall v FC of T* 88 ATC 4565; *Trustee for the Estate of the late AW Furse No 5 Will Trust v FC of T* 91 ATC 4007. Parties will not be at arm's length 'where the 'mind' by which the bargaining is directed on behalf of one party to a contract is the same 'mind' that directs the bargaining on behalf of the other party, it cannot be said that the parties are dealing at arm's length. In other words, where the evidence reveals that the same person was 'dictating' the 'terms of the bargain' on behalf of both parties, it cannot be said that the parties were dealing at arm's length.' *MNR v Merritt* 69 DTC 5159 at 5165-5166 per Cattanach J. This statement was referred to with approval by Davies J in *Barnsdall v FC of T* 88 ATC at 4568).

72 *Harwood v Commr* (1984) 82 TC 239; *Ward v Commr* (1986) 87 TC 78. Such clauses have been held not to be void against public policy where they do not have the effect of avoiding tax, see *King v US* (1976) 545 F2d 700.

73 See the observations in *Elder's Trustee and Executor Co Limited v DFC of T* (1934) 51 CLR 694 at 707 per Starke J.

74 See *Nischu Pty Ltd v Commr of State Taxation (WA)* 90 ATC 4391 at 4398-9 per Commr Zestis.

acceptable indicator of market value.⁷⁵ It has even been said that if no general market exists for a particular asset, such as shares in a closely-held private company, such a market is to be assumed.⁷⁶ On the other hand, the terms of a particular provision may require or justify that market value be determined by reference to a particular market.⁷⁷

75 *Brisbane Water County Council v Commr of Stamp Duties (NSW)* 80 ATC 4051; there it was held that it was not proper to determine the market value of a used car by reference to a market in which there were only sales tax-exempt buyers.

76 *Ibid* at 4054 per Waddell J.

77 The trading stock provisions require that reference is to be made to market value in the taxpayer's particular market. For example, s 31(1) provides a taxpayer with trading stock with an election of valuing it at year end at either its cost price, market selling value, or the price at which it can be replaced. The long term administrative practice has been to allow a taxpayer to use the marketing selling value of its inventory in its own particular selling market and not that of the general market. See *Australasian Jam Co Pty Ltd v FC of T* (1953) 88 CLR 23 and *Taxation Ruling* TR 93/3 dealing with the value of a goldminer's trading stock. The equivalent provision in the United Kingdom has also been interpreted as allowing reference to the particular market in which the taxpayer sold his stock; see *BSC Footwear Ltd v Ridgway (Inspector of Taxes)* [1972] AC 544 at 545 per Lord Morris, at 562 per Lord Guest, and at 571 per Lord Pearson.

Section 36 provides that where a taxpayer disposes of any trading stock not in the ordinary course of business, the value shall be the market value at date of disposal or if, in the opinion of the Commissioner there is insufficient evidence of market value, the value which, in his opinion, is fair and reasonable. In New Zealand a provision to the same effect has been interpreted as allowing the market value to be determined by reference to a market in which a farm, including its trading stock, is sold on a going concern basis. In *Commr of IR (NZ) v Edge* [1956] NZLR 7 the issue was whether the purchaser could apply his buying price as his opening value. At first instance, Henry J said (at 804): The proper inquiry here is, first, to ascertain the market on the day of the sale. The legislation does not stipulate any particular market and must be held to have in contemplation all markets upon which the taxpayer in his manifold activities might trade or dispose of his goods, as well as the various markets upon which trading stock is bought and sold. The market upon which this particular sale took place was by a public auction properly conducted, at which the live stock was sold as part of a farm as a going concern. Such a market for disposing of trading stock, either live stock or otherwise, is a well recognised market, and is a market which, in my opinion, is within sec 9. This live stock, in the ordinary and by no means unusual course of events, was mortgaged together with all the other items which comprised the farming business of a taxpayer. As the result of default it came on to the market in its then state, namely, as part of mortgaged premises, and was realised on the open market by public auction at the best price obtainable. This was a market which must be held to be within the contemplation of the legislature when dealing with the markets upon which trading stock might be sold. The only evidence by which it is sought to prove that the market price was more than the consideration received is evidence that if this stock had not been subject to the mortgage, or if the mortgagee had otherwise elected, it could have been sold separately for a higher price at the saleyards. That may be so, but, in fact, that market was not chosen. It would be monstrous if every taxpayer had to run the risk of selecting the best market and be penalised if the market chosen turned out not to be the best. On the day of sale this taxpayer's live stock could not be sold by him as a separate item. It was then qua him not available for separate sale, and its market was then limited to a market as part of a farm as a going concern. As such, on that market it has not shown that it did not fetch the market price on the day of sale.

In the appeal all (*Edge v Commr of IR (NZ)* [1958] NZLR 42) the Court agreed with this view.

In discussing this issue and the above cases Waddell J in *Brisbane Water County Council v Commr of Stamp Duties (NSW)* 80 ATC 4051 drew a distinction between 'price' and 'value'; he was of the view although *price* might be determined by reference to a particular market because of the context of a provision or the terms in a contract, it might not be possible to say that an asset has a different *value* by reference to particular markets. He said (at 4055): 'But the word 'value' points to something inherent in the item in question rather than to the price at which it might change hands in particular circumstances. It might be more difficult to read 'market value' as meaning value in a particular market'.

Antecedent and subsequent actual sales may be a strong indicator of market value at a particular time provided that the factors which make up the hypothetical market place at the relevant time were the same as those which existed at the time of the actual sale

Where the only issue is whether a price received in an actual sale was at market value, the relevant enquiry will be to determine whether the seller and buyer were willing, not anxious and properly informed arm's length parties. On the other hand, where the issue is simply to determine the market value on a particular day of an asset which has not been sold, it may be useful to consider the price at which that asset or a comparable asset was sold either before or after the relevant date in an arm's length dealing. Unless there are exceptional circumstances, such a sale price will be a good indicator of market value in the hypothetical market place.⁷⁸ However, where between the valuation date and the time of the actual sale there have been significant events, such as a substantial change in demand, a change in interest rates, the outbreak of war, or even a change in the weather, which might affect the price of an asset, it would not be proper to place any weight on the actual sale price.⁷⁹

The seller is assumed to be one to whom the asset has adaptability and potential

It follows from the principle that market value is to be ascertained from the perspective of the willing but not anxious seller that the hypothetical seller would not sell an asset without considering all of the uses to which the asset could be reasonably applied. Thus land which is currently used for farming but for which a permit for residential subdivision could be obtained would have a market value determined not by its current use but by reference to its adaptability or potential as a land development.⁸⁰ In the assessment of market value it may be proper to consider the actual subdivision of the land and the sale to numerous buyers.⁸¹

This aspect of the market value standard is also reflected in the inclusion in the market place of all those buyers of an asset who could obtain added value from it because of its special adaptability or usefulness to them or because of the synergies which could be obtained from it. This aspect is fully discussed in Part III below.

However, the notion that the market value to the seller includes the value from its adaptability or potential does not include any additional value of the asset which is peculiar or unique to the actual owner since that person

78 *Spencer v Commonwealth* (1907) 5 CLR 418 at 440 per Isaacs J; *McCathie v FC of T* (1944) 69 CLR 1 at 16 per Williams J; *AMP Society v OTC (Aust)* [1972] 2 NSWLR 806 at 823-4 per Hutley AJA.

79 *IR Commrs v Marr's Trustees* (1906) 44 Scot LR 647.

80 *Minister v Thistlethwayte* [1954] AC 475.

81 See *Maori Trustee v Minister of Works (NZ)* [1959] AC 1 and *Turner v Minister of Public Instruction* (1956) 95 CLR 245.

is not the hypothetical seller. Thus the market value will not include any compensation for disturbance or for the special or peculiar purposes of the seller.⁸² For example, where a farmer owns two properties which are in close proximity, the economics of his business may warrant the purchase of special equipment; if one of the properties were to be sold, the use of the equipment might not be economic because of the reduced scale of the overall business. The value of that property to the farmer includes a special value which would not be reflected in the market value of either.⁸³ The exclusion from market value of any special value to a seller is recognised in compulsory acquisition of land laws which provide compensation for this head of loss, usually under the rubric of 'disturbance' or 'special value'.

On the other hand, as will be seen below in Part III, if it were reasonable to assume that the range of buyers would include other neighbouring farmers who would also obtain economies of scale from acquiring the farm, and they would factor that element into their purchase bid, then the synergistic advantages would necessarily be reflected in the market value of the land.

No potential purchaser is excluded from the market place; known and identifiable possible purchasers are specifically included

The hypothetical market place for an asset includes all possible buyers. Thus the adjudicator would have to consider the existence and identity of persons who, on an objective standard, could reasonably be expected to bid. These parties might, depending on the particular circumstances, include investors, speculators and, possibly, the actual owner. In *Estate of Lady Fox v IR Commrs*⁸⁴ (a United Kingdom capital transfer tax case) Hoffmann LJ said that while the hypothetical seller was anonymous the 'hypothetical buyer is slightly less anonymous' and that he 'reflects reality in that he embodies whatever was actually the demand for that property at the relevant time'.⁸⁵ Consequently the market value inquiry 'will often focus on what a relatively small number of people would be likely to have paid. It may have to arrive at a figure within a range of prices which the evidence shows that various people would have been likely to pay, reflecting, for example, the fact that one person had a particular reason for paying a higher price than others, but taking into account, if appropriate, the possibility that through accident or whim he might not actually have bought. The valuation exercise is thus a retrospective exercise in probabilities, wholly derived from the real world but rarely committed to the proposition that a sale to a particular purchaser would definitely have happened'.⁸⁶

82 *Pastoral Finance Association Ltd v Minister* [1914] AC 1083. See the discussion in the text below at 22.

83 See *Lodge v Water Conservation & Irrigation Commission* (1967) 14 LGRA 88.

84 [1994] STC 360.

85 *Ibid* at 372.

86 *Ibid* at 372.

These parties will also include those who *in fact* could obtain value from the asset because of its special adaptability or usefulness to them and who are known and identifiable at the relevant date. Such buyers are sometimes said to be prepared to pay a premium which is a 'special value'. The question of whether or not these special purchasers are to be excluded from the market place because they are unrepresentative of others and consequently whether the special value which they might otherwise pay is to be excluded from the market value is the subject of detailed discussion in Part III.

The hypothetical market assumes cash on delivery - there are no instalments or credit terms

The notion of a hypothetical market is underpinned by a notional payment of cash on a notional delivery. To imply that a seller would give instalment terms or even provide credit would cause an adjudicator to embark upon an unending enquiry such that the market value standard would become a subjective rather than objective one. In any event, the market value of the instalment terms or credit could be determined by a discount for a present net value which, presumably, would bring the hypothetical sale to one of hypothetical cash on delivery.

All parties are assumed to have a reasonable degree of knowledge

The *Spencer* test can only work if both sellers and buyers have a common standard of knowledge. In that case, Isaacs J described the required knowledge of the hypothetical buyer⁸⁷ but there is no reason to suppose that knowledgeable sellers would also not be driven by self-interest. For example, a hypothetical buyer of shares would be assumed to have access to the company's financial statements and other publicly available information.⁸⁸ A hypothetical buyer of land would be assumed to have knowledge of mining information relating to the land available from public records but not information which was privately held and which could only be obtained at considerable expense.⁸⁹

A self-interested seller would thus make all proper enquiries to learn about the advantages, special adaptability and potentialities of the asset and inform all potential buyers of them in order to elicit as high a price as possible. Conversely, the self-interested buyer would, at the least, make all proper enquiries so as to catalogue the disadvantages of the asset; in the

87 'We must further suppose both to be perfectly acquainted with the land, and, cognisant of all circumstances which might affect its value, either advantageously or prejudicially including its situation, character, quality, proximity to conveniences or inconveniences, its surrounding features, the then present demand for land, and the likelihood, as that appearing to persons best capable of forming an opinion, of a rise or fall for whatever reason soever in the amount which one would otherwise be willing to fix as a value for the property.' ((1907) 5 CLR at 441).

88 See *Findlay's Trustees v IR Commrs* (1938) 22 ATC 437 and *Lynall v IR Commrs* [1972] AC 680.

89 *Nischu Pty Ltd v Commissioner of State Taxation* (WA) 90 ATC 4391.

hypothetical market place the catalogue would be presented to the potential seller so that the buyer could obtain the asset for the least possible price.

A proper enquiry does not have to be an exhaustive one and the depth and professionalism of the investigation will be determined by the nature of the particular asset being valued.⁹⁰ The appropriate level of knowledge of the hypothetical parties involved in the sale of a used Ford car will be that of ordinary people in the retail used car market where the buyers are not professional car dealers. On the other hand, where the market value of a Rembrandt painting is at issue it could be expected, in view of the high value of the item (relative to a used Ford car), that both the parties, even if well informed about art, would have obtained independent professional advice about values.

There is no assumption that the market place necessarily has accurate and reliable information

The hypothetical seller and buyer are assumed to be in a general market, each possessing reasonable knowledge of the facts having made proper enquiries. However, it will often not be possible to discover information which, if known, would have been relevant to making a decision to buy at all and, if so, at what price. Clearly, the market place for shares in publicly listed companies is not always properly informed about the activities and potential of their companies - a fact to which shareholders in the entrepreneurial corporations which collapsed in the 1980's could attest. During that period, the market place was often not informed about improper management practices and accounting, sometimes because of the negligence or dishonesty of auditors. Yet the market value of shares in these companies prior to their collapse would have been their quoted price because the market worked on the basis of specious financial statements and dishonest public reporting. The publicly quoted price of these shares would have been their market value even if the market, as whole, was in error.⁹¹ This type of malfunction of the stock market has been recognised in the United Kingdom where the valuation rules in tax legislation provide that the quoted

90 See the observations in *Housing Commission of NSW v Falconer* [1981] 1 NSWLR 547 at 576 per Mahoney JA.

91 This issue has arisen in one Canadian capital gains tax case. In *Henderson Estate and Bank of New York v MNR* 73 DTC 5471 an estate argued that the quoted price for shares in a mining company was not their fair market value for Dominion death duties because the market was not in possession of accurate and reliable information about the company's ore reserves and because there had been market manipulation. It was held that the quoted price was the best indicator of market value since it was impossible to assess the influence of inaccuracies in the ore estimates and exaggerated earnings forecasts on the market price of the shares. The decision was affirmed by the Federal Court of Appeal (75 DTC 5333).

The issue has also arisen in Canada in other contexts. In *Little v MNR* 76 DTC 6210 the revenue argued that the quoted market price was not the fair market value for the purpose of levying gift duties. There, a shareholder sold shares in a listed company to his son at the quoted market price of \$24. A month later, there was a takeover offer which valued the shares at \$68. The Federal Court of Canada held that the sale was not a gift and that the quoted price was to be taken as the market value. In *Lawson v MNR* 64 DTC 5147 the quoted market value of shares was held to govern the market value for the valuation of closing inventory.

price on a particular day may be ignored 'where in consequence of special circumstances prices so quoted are by themselves not a proper measure of market value'.⁹² It is interesting to note that in the 1970's it was accepted as not unusual that directors would fail to properly inform the market and that, in any event, the stock market worked 'in blinkers'.⁹³

No hypothetical buyer will be assumed to have improperly acquired knowledge

There will often be circumstances which, if made public, will affect the market value of an asset. The management of a company might be planning a takeover of another company; if that plan were made public the market value of the shares could well be affected. Until the board approves the decision and the offer is made public that information would be confidential to management and the board and it would be improper for a shareholder with inside knowledge to act upon it. Consequently, it would not be proper to value shares on the basis that the parties have any information which is not publicly available or which the parties could not obtain through asking reasonable questions to directors or management about the company.⁹⁴

Special Purchasers And Special Value

The preface to this article referred to a principle that the process of determining market value of an asset requires the exclusion from the hypothetical market of every person who could obtain, and would pay for, any value from that asset because of its special adaptability or usefulness to them. Such persons are said to be prepared to pay a premium which is a 'special value' and are thus excluded from the market place because they are 'special purchasers' who are unrepresentative of others. Consequently, the proposition is that special value is excluded from market value.

This theory is propounded in a leading Australian valuation text⁹⁵ where it is stated:⁹⁶

92 UK *Taxation of Chargeable Gains Act* 1992 s 272(3), which is traced to *Finance Act* 1965 s 44(3).

93 In *Crabtree v Hinchcliffe (Inspector of Taxes)* [1972] AC 707 the House of Lords treated a failure by directors of a public company to notify the London Stock Exchange about a takeover of which they had knowledge, and where such knowledge in the market would have affected the quoted prices of the shares as not unusual even though there was unchallenged expert opinion that the directors should have notified the Exchange about the takeover. Consequently, the market value on a particular day was the quoted price even though, had there been public notification of the takeover on that day, the price would have been greater.

In *The Queen v National System of Banking of Alberta Ltd* 78 DTC 6018 the Federal Court of Canada refused to depart from the quoted price of a thinly traded stock as its market value because the taxpayer's investment counsellor was of the opinion that the share was worth more because of a possible takeover offer.

94 *Lynall v IR Commrs* [1972] AC 680.

95 Loneragan W, *The Valuation of Businesses, Shares and Other Equity* (2d ed) 1994.

96 *Ibid* at 5.

Special value is the additional value which a purchaser is prepared to pay, which reflects such factors as potential economies of scale, reduction in competition, the securing of a source of supply or outlet for products, and which additional value is unique to that purchaser. The existence of this special value means that the purchaser is prepared to pay a consideration which is over and above the value which other purchasers are prepared to pay.

The principle is expressed again in the same text with respect to the share market:⁹⁷

In some cases, a valuation may be affected by the presence of a special buyer with a particular interest in obtaining the shares in question or whose stock market activities have materially influenced the prevailing level of share prices. However, the presence of a special purchaser may not necessarily increase the value by a material amount if this special interest is not readily apparent (in which case the purchaser would need pay only marginally more than the prevailing market price to secure the shares). If there are several 'special purchasers', their bids would recognise each other's interest and a valuation should take this into account.

Because of the difficulty in objectively assessing how large a premium a special purchaser might pay, valuations are normally prepared on the basis that any special value is ignored.

Despite statements by Australian judges which are antithetic to the this position (*'all possible purchasers are to be taken into account, even a purchaser prepared for his own reasons to pay a fancy price'*⁹⁸) it is true to say that, in the revenue context, the issue has only been incidentally considered in one reported Australian decision. However, this precise issue has been directly and comprehensively considered in the United Kingdom with respect to valuation for rating and capital gains taxes, and in Canada for the application of capital gains tax. The issue has also arisen in market valuations in compulsory land acquisition cases in Australia, New Zealand and Canada.

The position which is put forward in this article is that the proposition that special value is excluded from market value, especially for the purposes of the application of the *Act*, is incorrect - indeed, it is contrary to well developed judicial doctrine in Australia, the United Kingdom and Canada.

The following sections consider the development in the United Kingdom and Canada of the principle that market value *includes* the special value to any person who, it would be reasonable to assume, falls within the

97 Ibid at 337.

98 *Brisbane Water County Council v Commr of Stamp Duties (NSW)* 80 ATC 4051 at 4054 per Waddell J.

class of potential hypothetical buyers for an asset because of its special adaptability or usefulness to them or because of the synergistic advantages which they can obtain from the asset.⁹⁹ Thereafter, the development of the same principle in Australian and British Commonwealth compulsory land acquisition jurisprudence is briefly examined. Finally, there is reference to practical aspects of the inclusion in the market value of an asset of all special value to a special purchaser.

United Kingdom rating decisions

The hypothetical market place test of value was judicially developed in the 1850's to provide a workable valuation standard for United Kingdom 1836 rating legislation;¹⁰⁰ this legislation merely required that the levy be on the value of the rent at which the property might reasonably be expected to let from year to year.¹⁰¹ It was said that market value was determined through a process of the 'higgling of the market'.¹⁰² Perhaps, not unexpectedly, the workings of the hypothetical landlord and tenant market soon became an issue and a number of principles emerged that are relevant to the special purchaser/special value issue.

First, the range of hypothetical tenants was taken to be so wide so as to include all possible tenants, including an owner who occupied the property and who could not make any profit from the use of the property. Thus in assessing the rate for a property occupied by a non-profit school, the school itself was to be considered as a tenant paying a commercial rent.¹⁰³

99 A leading Canadian valuer has described the synergies from a takeover of a business in the following terms (in Campbell IR and Kai GD, *Business Valuations: Some Current Thoughts* (1975) 23 Can Tax J 373 at 373-4, quoted in *Lakehouse Enterprises Ltd v MNR* 83 DTC 388 at 390): The premiums paid by such purchasers stem from their ability to realise greater earnings through combination of the acquired and their own operation than the two businesses could generate separately and/or to the reduced risk experienced by such a purchaser following acquisition (operating and/or financial 'synergies'). In general terms the following may be cited as major factors potentially influencing the level of operating and financial synergies to be realized on a post acquisition basis and thus influencing the quantum of a special purchaser premium:

(a) the ability to horizontally integrate the purchasing and acquired companies; that is, the ability to consolidate the management, sales and production functions of two like entities. For example, the purchase of one steel company by another steel company;

(b) a reduction in the dispersion of cash flows i.e., anticyclical diversification. For example, the purchase of a company producing snowmobiles by a company producing boats and motors;

(c) a reduction of input and output risk as a result of obtaining secured inputs and/or a locked-in market for outputs i.e., vertical integration. For example, the purchase of a rubber plantation by a tire manufacturer; and,

(d) a reduction in the cost of financing operations; that is, a reduction in the purchaser's cost of capital. For example, the purchase of a company with a substantial tax loss carry forward which can be utilized by the acquiring entity in lieu of likely more costly forms of financing in the future.

100 See, for example, *R v West Middlesex Waterworks Co* (1859) 28 LJ (MC) 135, 120 ER 1078; *Sheffield United Gas Light Co v Sheffield Overseers* (1863) 32 LJ (MC) 169, 122 ER 1291.

101 Rates for the relief of the 'poor' were levied under the *Parochial Assessments Act* 1836 (UK). Section 1 required that the rate 'be made upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes ...'.

102 *Mersey Docks and Harbour Board v Liverpool* (1873) LR 9 QB 84 at 96 per Blackburn J.

103 *R v School Board for London* (1886) 17 QBD 738.

Secondly, the class of hypothetical tenants was extended so as to include an owner occupier of a property even though that owner was prohibited by law from even being a tenant. In *London County Council v Churchwardens of the Parishes of Erith and West Ham*,¹⁰⁴ the House of Lords had to consider the rateable annual value of a sewerage pumping station owned and occupied by the London County Council. It was assumed that the council was the only possible tenant of the works and that it was illegal for the council to be a tenant. Nevertheless, the council was treated as a hypothetical tenant for the purpose of valuing the annual rent of the sewer works. *Thirdly*, the financial position of all possible members of the class of hypothetical tenants was a relevant fact to be considered in assessing the annual rent. Thus the annual rental value of a football field would have to be considered in light of the financial strength of football clubs.¹⁰⁵

Fourthly, it was early well established that the market value of the annual rental of a property was to reflect the synergies which are available to a range of persons whom it would be reasonable to include as being tenants of the particular property. That is, no potential bidder (as a hypothetical tenant) was to be excluded from the market place because the occupation of the particular property added value to that person's other existing properties where it was reasonable to include that tenant in the class of potential tenants.¹⁰⁶ In *R v London and North-Western Railway Co*¹⁰⁷ the market rent of a branch railway line owned by a railway company was held to be determined by reference to other railway companies whose lines also connected with the branch line as being possible tenants of the branch line. Thus the market rent was determined as if the branch line were added to the other lines and thus increased a railway company's network.¹⁰⁸

In 1893 the House of Lords held that the market value of the rent of a sewer pumping station was held to reflect the value to a person who owned the adjoining sewerage system because the pumping station was important as an adjunct to the system and its owner was included as a hypothetical tenant.¹⁰⁹ Similarly, the market value of the annual rent of a sewage farm which was used by a sewerage authority to discharge waste was held to reflect the benefit accruing to the authority as a means of enabling it to carry

104 [1893] AC 562.

105 *Tomlinson v Plymouth Argyle Football Co Ltd* (1960) 6 RRC 173; *Marylebone Cricket Club v Morley* (1959) 6 RRC 258.

106 The added value must be inherent in or be an intrinsic quality of the property and not appear only from the personal qualities or peculiarities of a potential tenant. One judge has referred to an advantage being one which was available to a 'hypothetical average tenant in occupation', *Watney Mann, Ltd v Langley* [1966] 1 QB 457 at 458 per Thompson J.

107 (1874) LR 9 QB 134.

108 The market rent of railway lines was first considered in *R v London & South Western Rwy Co* (1842) 1 QB 558, 113 ER 1246 and *R v Grand Junction Rwy Co* (1844) 4 QB 18, 114 ER 804.

109 *London County Council v Churchwardens of the Parishes of Erith and West Ham* [1893] AC 562.

out its statutory duties on the basis that the authority was a possible tenant.¹¹⁰

It was in setting the market rental value of licensed premises that the issue of the synergies from, or advantages inherent in, the property to a class of special tenants became a major legal and political issue and that the market value principles established in earlier cases were, for a forty year period, set aside. Under the 'tied-house' regime which existed in the United Kingdom at the end of the nineteenth century, a brewery would rent licensed premises which it owned to independent publicans. One condition of the lease was that the publican tie the purchases of beer and ales of the premises to that brewery.¹¹¹ If a brewery could be included in the range of possible tenants in the hypothetical market place, the market rental value of the premises would reflect not only the rental paid by the publican tenant but, in addition, would include the additional profit which a brewery would make through having the exclusive sale of its product at those premises because it was a tenant. On this basis, a brewery would pay more to rent such premises than others tenants because of the advantage to a brewery of being able to restrict the sale of its competitors' beer and supply its own product. It was early decided that the market value of such premises could only be determined through the market negotiation or 'higgling' process. Thus a court could not examine the profits actually made by the tenant in order to determine rental market value of particular premises;¹¹² nor was it proper to ignore the tied restriction so that the premises would be valued as though they were a free house.¹¹³

In an 1898 case, *Bradford-on-Avon Assessment Committee v White*,¹¹⁴ a rating body argued that the market rental of a licensed premise should include the premium which a brewery would pay to rent the premises in order to sub-let them as a tied house. The Court of Appeal rejected this argument. It was held that the only test was what would the annual rental be which could be obtained in the market place and, for this purpose, it was accepted that there would be competition between breweries. In excluding from market rental value the advantages which a brewery would have if they were a tied house, Channell J merely stated, without explanation, that it was wrong to include in the determination of market rental 'the special values which the brewers may, for reasons connected with their own business, be willing to give' to rent the premises.¹¹⁵

110 *Davis v Seisdon Union* [1908] AC 315.

111 Thus the real market rent which a publican would pay for the same premises where the premises were a 'free house' would be greater than for a 'tied house' because there would be no subsidy provided by the landlord as consideration for the covenant to only sell the landlord's beer.

112 *Dodds v South Shields Assessment Committee* [1895] 2 QB 133.

113 *Sunderland Overseers v Sunderland Union* (1865) 18 CB (NS) 531, 144 ER 551. See also *Poplar Assessment Committee v Roberts* [1922] AC 93 at 114 per Lord Atkinson.

114 [1898] 2 QB 630.

115 [1898] 2 QB at 639.

The exclusion of the special value to a tenant in determining market rental remained unchallenged until the 1930's, by which time the tied houses owned by the breweries were operated by them through their own employees. In a much celebrated House of Lords rating test case dealing with the newer type of arrangement, the exclusion of special rental value from market rental value was held to be wrong in principle, *Bradford-on-Avon* was overruled, and the market value principles earlier established in *R v London and North-Western Railway Co*¹¹⁶ were, in effect, reinstated.¹¹⁷ In *Robinson Bros (Brewers) Limited v Durham County Assessment Committee*,¹¹⁸ it was accepted that if no special value was recognised for the advantage to a brewery of having market access through a tied house, the annual market rental of the White Lion Hotel in Houghton-le-Spring was £95. On the other hand, if the special value was included, the annual market rental was £112.¹¹⁹ It was also accepted that as between competing brewers, whether or not the premises were 'free' or 'tied', the market rental without regard to the special value would not have been as high as £112. In unanimous decisions both the Court of Appeal¹²⁰ and the House of Lords¹²¹ rejected the exclusion from market value of any special value of demand to a tenant arising from the use of the property as an incorrect market valuation principle.

In the Court of Appeal, Scott LJ (with whom Slesser LJ agreed) said that the exclusion of special value was an 'economic paradox' and a 'contradiction in terms'.¹²² He added that the proper enquiry was primarily an economic and not a legal one (it was only 'legal in so far as logical relevance is the measure of legal admissibility'), and thus 'every factor, intrinsic or extrinsic, which tends to increase or decrease either demand or supply is economically relevant and is, therefore, admissible evidence'.¹²³ In his view the exclusion of any element of demand was a misconception of the market place;¹²⁴ he observed that:¹²⁵

... to speak of a hereditament possessing both a market value of £X and a higher value of £X plus £Y due to a special factor of demand is a contradiction in terms. In my opinion, the higher value is, in that event, the

116 [1874] LR 9 QB 134.

117 In addition, *Sunderland Overseers v Sunderland Union* (1865) 18 CB (NS) 531, 144 ER 551 was in effect overruled.

118 The valuation issue arose for the purpose of the poor rate under the *Parochial Assessment Act* 1836 (UK).

119 The special value feature was described in the agreed statement of facts as follows ([1936] 2 KB at 285): (c) A brewer taking a tenancy of the said hereditament would be able thereby to secure the use of the premises for the sale of beer from his own brewery and thus to secure a larger output and profit thereon over and above the retail profit which a tenant other than a brewer might reasonably expect to make.

120 [1937] 2 KB 445.

121 [1938] AC 321.

122 [1937] 2 KB 445 at 470.

123 *Id* at 470-1.

124 *Ibid* at 485.

125 *Ibid* at 470.

market value in the only sense in which that phrase can properly be used in such a case.

Greer LJ (with whom Slesser LJ also agreed) analysed the elements of the market place and held that it was not proper to exclude any element of demand. He noted that 'You cannot find the value due to the higgling of the market by excluding those who are nowadays the principal higglers - namely, the brewers'.¹²⁶

In the House of Lords, Lord Macmillan (with whom Lords Maugham LC, Atkin, Thankerton, and Russell concurred) stressed that the proper enquiry to determine value in the hypothetical market place included an examination of the objectives of the parties in renting the premises. It was to be accepted that the objective of making a profit from the premises was 'an ordinary motive which actuates competitors in a letting market'.¹²⁷ The role the special tenant plays in the market place and the incongruity of excluding the special value from the market value was strongly expressed by Lord Macmillan:¹²⁸

The hypothetical tenant may reasonably be expected to pay the rent which in the letting market for such premises would be offered as the result of the competition existing in that market. The valuing authority must gauge both the extent of the competition in the market and the rent likely to be offered and accepted in that market. In the case of a public-house I can see no justification for including brewers among the competitors but excluding the rent which they would offer. The motives which actuate buyers in a market may be of all kinds, but it is not their motives but their bids that matter. In the case of trade premises the competitors for the tenancy are presumably always actuated by a consideration of the profit which they think they can make by utilising the premises, and they will have this in view when they make their bids. The brewer who wishes the premises because he thinks he can make money by sub-letting them to a tied tenant is influenced by perfectly legitimate business considerations; he offers the rent which he thinks it worth his while to pay to obtain the tenancy. Why should the rent which he is prepared to pay be excluded from consideration in fixing the market value of the tenancy? He is one of the competitors in the market, and the figure which he is prepared to pay is an element which ought clearly to be taken into account in arriving at the market price.

Since 1938, market rent has been assessed in the United Kingdom on the basis that all special value to a special tenant is *included* in market value. Indeed, the courts have gone further by holding that, in determining the additional market rental value of a property to a possible tenant because of its special adaptability or use to him, it is proper to refer to all alternative

126 Ibid at 462.

127 [1938] AC 321 at 337.

128 Ibid at 336.

uses which the property in its existing state could be put and which might be considered by all possible hypothetical tenants.¹²⁹

United Kingdom tax decisions

In view of the considerable body of case law dealing with market and special value in United Kingdom rating law, and the importance of valuation issues in liability to taxes, especially where capital transfers are involved, it would be reasonable to assume that taxpayers and the revenue would have been engaged in many taxation disputes about special value and that the taxation jurisprudence on special value would have been quite significant. Yet, surprisingly, but for a pair of capital gains tax appeal decisions in 1914 (which arose from the first attempt to tax increases in land value in the Lloyd George 1909 Budget)¹³⁰ and a number of estate duties cases in which the issue was incidentally raised, the tax jurisprudence on the special purchaser/special value issue is quite bare.

In *Glass v IR Commrs*¹³¹ the Scottish Valuation Appeal Court had to consider the value of land for the purposes of the increment value tax under the *Finance (1909-10) Act*; the value to be determined was defined to mean 'the amount which the fee-simple of the land, if sold at the time in the open market by a willing seller in its then condition, free from encumbrances, and free from any burden, charge, or restriction (other than rates and taxes) might be expected to realise'.¹³² The relevant valuation date was 30 April 1909, at which time the land was a farm, rented to a tenant, but within a water authority's catchment area. At that time, it was reasonably well known that the water authority would in the near future have to acquire the land because the pollution from running animals on the farm affected the water quality in the catchment area even though the authority had no powers of compulsory acquisition. In fact, two years later, the authority negotiated with the owner to acquire the land for £5000. The point at issue was whether, in fixing the value of the land as at 30 April 1909, it was proper to reflect the expectation that the water authority would in the future have to acquire the land either through negotiation or obtain statutory powers of compulsory acquisition. It was accepted that if the land was only valued on the basis of agricultural value its market value was £3379 and the water authority would have been the only purchaser which would have paid a higher price. The Appeal Court held (by a majority) that as at the 1909 valuation date the needs of the water authority to acquire the land were more than a remote contingency and the because of the special adaptability of the land as a supplier of water to a water authority the consequent special value

129 See *Midland Bank Ltd v Lanham* [1978] RA 1.

130 *Finance (1909-10) Act* 1910 (UK). The taxing point was the transfer on sale of land after 30 April 1909. By virtue of s 2, tax was levied on the increment in value between the value of the consideration for the transfer and the original site value (as at 30 April 1909). To determine 'original site value' it was necessary to determine the open market value of the land at the 1909 date.

131 (1915) 52 Scot LR 414.

132 *Finance (1909-10) Act* 1910 (UK) s 25.

was therefore to be included as part of the market value.¹³³ The fact that there was only one possible special purchaser who could use the land as a water catchment was not particularly relevant since speculators were held to be a part of the same market. Lord Salvesen expressed this point as follows:¹³⁴

I think it highly probable that in these circumstances more than one speculator would have come forward with offers substantially in excess of the agricultural value, in the reasonable expectation that they would sooner or later find a purchaser in the Water Commissioners at a figure that would yield them a profit on the transaction.

The other majority member of the Appeal Court, Lord Johnston, was particularly critical of the methodology of the valuer (who acted as a referee):¹³⁵

The referee has in theory regarded the possibility attaching to the lands in 1909 as something affecting the value. In practice he has given it no effect, but has admittedly stuck to agricultural value, because he apparently thinks that if the subjects had been sold in open market the [Water] Commissioners would have had it all their own way, and would have had no competitor, except, possibly, at agricultural value. I am unable to agree with him. The same might have been said with equal force in all cases of statutory valuation for rating or otherwise. They all perforce involve something of the hypothetical and unreal - and none more than valuations under the Finance Act 1910. In order to do justice to the appellant, I think that the referee must assume a little of the hypothetical spirit of the Act, and if he postulates an open market and a willing seller where there are none, [he] must also allow for the competing buyer where the circumstances reasonably admit of the hypothesis.

*IR Commrs v Clay, IR Commrs v Buchanan*¹³⁶ also involved the valuation of land for the increment value tax under the *Finance (1909-10) Act*. Each taxpayer owned a house on either side of a nursing home which was known to need additional land for the extension of its business. The value of each in the open market was agreed to be no more than £750 but the owner of the nursing home agreed to pay £1,000 on account of the special adaptability of the adjoining land. Since the tax charge under the *Finance Act* was on an incremental value, the Revenue argued that the special value was to be excluded from the market value and that the added value was a 'fancy price'.¹³⁷ At first instance, Scrutton J held that the market value was £1,000 since, looking at the transaction in 'the obvious business way' he could not 'exclude from the "open market" the principal buyer, though for a

133 The market value at the 1909 date was held to be £4629.

134 (1915) 52 Scot LR 414 at 419.

135 Ibid at 417.

136 [1914] 3 KB 466; appeal from [1914] 1 KB 339.

137 [1914] 1 KB 339 at 348.

genuine business reason he will pay a price higher than others'.¹³⁸ The nursing home, in paying £1,000, was not treated as an anxious or forced buyer since the judge found that 'the £1,000 actually paid was a profitable business transaction to the nursing home and not a fancy price'.¹³⁹

The Court of Appeal, which unanimously affirmed the decision of Scrutton J, propounded in the strongest terms that special purchasers are part of the market place and their special price was to be included in market value. Cozens-Hardy MR said that the open market 'presupposes a knowledge of its situation with all surrounding circumstances. To say that a small farm in the middle of a wealthy landowner's estate is to be valued without reference to the fact that he will probably be willing to pay a large price, but solely with reference to its ordinary agricultural value, seems to me absurd. If the landowner does not at the moment buy, land brokers or speculators will give more than its purely agricultural value with a view to reselling it at a profit to the landowner'.¹⁴⁰ Nor was the market value to be merely just 'one point' or 'one bid' above the market price which would have been realised but for the special buyer. Swifen Eady LJ dismissed this contention as ordinarily 'quite erroneous' because '[t]he knowledge of the special need would affect the market price, and others would join in competing for the property with a view of obtaining it at a price less than that at which the opinion would be formed that it would be worth the while of the special buyer to purchase'.¹⁴¹ The third member of the Court of Appeal, Pickford LJ, described the argument that only a small sum was to be added to the £750 to represent a final bid as a 'fallacy, and to ignore what is common experience'.¹⁴²

The special purchaser issue arose as a 'subsidiary point' in a 1937 case, *IR Commrs v Crossman, IR Commrs v Mann*.¹⁴³ That case concerned the value of shares for estate duties¹⁴⁴ where the articles of the company contained rigid restrictions on the transfer and alienation of its shares. The House of Lords affirmed a principle (the correctness of which was the principal issue in the case) that the hypothetical purchaser must stand in the shoes of the deceased so that such a purchaser could be registered as the shareholder but would hold the shares subject to the restrictions in the articles, including the restrictions on any further transfer or alienation.¹⁴⁵ The practical effect of the principle was that the value of the shares at death was greater than the sale price under the articles but less than the price

138 Ibid at 349.

139 Ibid at 348.

140 [1914] 3 KB 466 at 472.

141 Ibid at 476.

142 Ibid at 480.

143 [1937] AC 26. The issue was described as a 'subsidiary point' by Viscount Hailsham LC (at 43).

144 Estate duty was imposed under *Finance Act 1894 (UK) s 7(5)* on the value of property which passed on death; that value was the price which the property would fetch if sold in the open market at the time of the death of the deceased.

145 This principle has been established by the Irish Court of Appeal in *Attorney-General of Ireland v Jameson* [1905] 2 IR 218 and followed in Scotland in *Salvesen's Trustees v Commrs of IR* [1930] Scot LT 387.

which could be obtained if the restrictions on transfer or alienation were removed. At first instance, the trial judge admitted evidence that a trust company was prepared to purchase the shares despite the restrictions on transfer (with the consequence that a trust company might have been a special purchaser)¹⁴⁶ but he held that any hypothetical bid from a trust company was not to be reflected in the market value because there was other evidence that the directors would have refused to register a transfer of the shares of the deceased to a trust company.¹⁴⁷ The Court of Appeal reversed the decision at first instance on the ground that a hypothetical purchaser could not have become a registered shareholder because of the restrictions and thus the value of their shares was the price at which they could be sold to other shareholders as fixed in the company's articles. The dissenting member of the Court of Appeal was of the view that no one was to be excluded from the market place and trust companies 'ought to be reckoned as buyers, and as such ready to pay a higher price than individual purchasers'.¹⁴⁸ The House of Lords in turn reversed the Court of Appeal and was thus required to value the shares in the market place but with their restrictions.

It is very difficult to follow the reasoning of the various majority members of the House of Lords on the subsidiary valuation issue but it would appear to be correct to say that *Crossman* supports the proposition that trust companies were to be included as hypothetical purchasers of the shares but that the lower price which the trial judge accepted as being the one which a trust company would exceed in a bid was in fact a price which *included* the bids of a trust company.¹⁴⁹ That is, on the subsidiary issue the ratio of the decision is that the special value was a part of market value. This was made particularly clear by Lord Blanesburgh said 'I agree with, I believe, all your Lordships in thinking that any possible bid for the shares by a Trust Company was allowed for by Lord Plender [the valuer] in his estimate of £355 a share, accepted by the learned judge [Finlay J] as reliable. Had that not been so the Crown's contention on this point would have been, I think,

146 It would appear that a trust company would have been a special purchaser of the shares because the shares would have been held by a nominee company which could have transferred them from one beneficial owner to another without any notification of transfer to the company.

147 There is no authorised published report of the decision of the trial judge (Finlay J). However, a full statement appears in the report of the Court of Appeal decision (see also (1935) 152 LT 98). The view of Finlay J on whether the trust company was a part of the hypothetical market place was expressed as follows ([1935] 1 KB 26 at 35): The question of whether in these circumstances the notional theory of an open market required that a trust company should be included. With hesitation he had come to the view that the theory of the open market could not mean that every person in the world had notionally got to be considered as in the market; and he was satisfied upon the evidence that from a business point of view a trust company would not, and could not, have been in the market, because the directors with whom the discretion lay would have refused to register a trust company, and a trust company when considering a purchase could and would have ascertained that. He thought therefore that trust companies ought to be excluded from consideration.

148 Ibid at 43 and 47 per Lord Hanworth MR.

149 It is submitted that this proposition is supported by the judgments of Viscount Hailsham LC at [1937] AC 26 at 43, Lord Blanesburgh at 62, and Lord Russell (who dissented on the main issue) at 69... It would appear that the other majority member, Lord Roche, was prepared to follow Viscount Hailsham LC and Lord Russell on this issue (see at 75).

unanswered'.¹⁵⁰ On the other hand, there is a clear but self-contradictory statement from one majority member, Viscount Hailsham LC, that special purchasers are not part of the market place and that a special price is to be excluded from the market price (*I do not think that it would be right to appreciate the value of the shares because of this special demand for a special purpose from a particular buyer*¹⁵¹).

The result in the *Crossman* case can be justified either on the basis that a trust company would, because of the restrictions on share transfer, not have been in the market for the shares (and thus could not have been a special purchaser) or, if a trust company had been in the market, it would not have bid beyond the lower price fixed by the trial judge. The second alternative appears to be supported by the various members of the House. However, when the subsidiary issue of House of Lords decision in *Crossman* was first considered by the High Court of Australia, the first alternative view of the ratio was taken. In *Abrahams v FC of T*¹⁵² Williams J expressed the view that 'the trust company could not be taken into consideration as a competitor ... because the directors would have refused to register such a company'.¹⁵³

Howsoever the incidental valuation point in the House of Lords judgments in *Crossman* might be understood or rationalised, it cannot properly be said that the case supports any weakening of the decisions in *Clay* and *Glass*. The significance, if any, of Viscount Hailsham's statement in *Crossman* as establishing a special value exception to market value must be considered in light of three matters. *First*, the Lord Chancellor's statement is at odds with his own decision and that of the majority. *Secondly*, not one member of the House of Lords referred to either of the appellate decisions in *Clay* or *Glass* where the special purchaser issue was the principal issue. *Thirdly*, and most importantly, overwhelming significance must be given to the House of Lords' decision the following year in *Robinson Bros (Brewers) Ltd v County of Durham Assessment Committee*¹⁵⁴ where there was a comprehensive discussion of exactly the same valuation standard. There, the House of Lords held that the valuation standard required the inclusion of special parties as members of the market place and their special values within market value. It will be seen that at the time the House of Lords handed down their judgments in *Crossman*, the decision in *Bradford-on-Avon Assessment Committee v White*¹⁵⁵ (which led to the exclusion of special value of licensed premises which were tied

150 [1937] AC 26 at 62.

151 *Ibid* at 44.

152 (1944) 70 CLR 23.

153 *Ibid* at 47. Williams J was of the view that the headnote to the authorised report of the House of Lords decision on the subsidiary issue (at 27) was incorrect. His Honour noted that the headnote, which stated that 'the value of the shares there in question should not be appreciated by reason of the special value of the shares to trust companies although there was evidence that the value of the shares in the open market would be enhanced if trust companies were to be included amongst possible competitors' was 'too widely stated' (at 46-7).

154 [1938] AC 321.

155 [1898] 2 QB 630.

houses) was still good law. However, *Robinson Bros (Brewers) Ltd* overruled *Bradford-on-Avon*. In the Court of Appeal in *Robinson Bros (Brewers) Ltd*, Greer LJ was of the opinion that *Crossman* supported the view that special parties were a part of the market and their special value was a part of market value.¹⁵⁶

There have been other United Kingdom tax cases since *Robinson Bros (Brewers) Ltd* in which the special value issue was the subject of brief and incidental comment. In *Holt v IR Commrs*¹⁵⁷ Danckwerts J, in applying the share restriction rule in *Crossman*, followed *Clay* in not excluding any buyer from the market.¹⁵⁸ In *Lynall v IR Commrs*,¹⁵⁹ yet another House of Lords estate duty valuation case involving shares with restrictions, *Crossman* was not considered by Harman LJ, a member of the Court of Appeal when the case was in that court,¹⁶⁰ as supporting a rule that directors were to be excluded from the range of possible purchasers of the shares because they were 'special purchasers' (on account of the special knowledge they had about the company); rather, he was of the view that the special purchaser issue was 'not an ingredient in the *Crossman* decision'.¹⁶¹ The House of Lords held that no part of the hypothetical market place should be assumed to have had any special knowledge about a public issue of shares; one member of the House was of the view that the special purchaser issue raised in *Clay* did not arise.¹⁶²

In *Estate of Thomas v IR Commrs*¹⁶³ the market value of a leasehold interest in a terrace house was valued for estate duties by reference to the existing tenant being a special purchaser.¹⁶⁴ In *Estate of Walton v IR Commrs*¹⁶⁵ the Court of Appeal held in a capital transfer tax case that because of the nature of the deceased's interest (as a landlord as a partner in the tenant) it was proper for a tribunal to find that the co-tenant would not have been a special purchaser.

Canadian tax decisions

When Canada introduced capital gains tax in 1971 all property was valued, as at the valuation day (31 December 1971), at fair market value for the purpose of determining capital gains and losses on subsequent disposals.¹⁶⁶ In the inflationary environment of the late 1970's and 1980's,

156 [1937] 2 KB 445 at 490.

157 [1953] 2 All ER 1499.

158 See [1953] 2 All ER at 1501.

159 [1972] AC 680.

160 [1970] Ch 138.

161 *Ibid* at 151 per Harman LJ.

162 [1972] AC 680 at 706 per Lord Pearson.

163 (1970) 213 EG 1355.

164 For an estate duty case where there was no evidence that an existing tenant would have been a special purchaser of the deceased landlord's reversionary interest see *Mawson (Inspector of Taxes) v Harthan* [1981] RVR 268.

165 [1996] STC 68; appeal from [1994] 2 EGLR 217.

166 *Income Tax Act* (1970-71) (Can) s 38; see also *Income Tax Application Rules* 1971 (Can) s 26.

taxpayers sought to lessen the impact of capital gains tax by seeking to claim a high as possible 1971 market value for their cost base. One strategy to increase 1971 valuation day market values was to assert that, as at the valuation day, there were one or more 'special purchasers' who, because of the special adaptability of the particular asset or the synergistic advantages which could be obtained from it, would have paid more than what, otherwise, would have been its market value.

Canadian courts were, then, inevitably and squarely confronted with the special purchaser/special value issue. From the very beginning, and with but with one exception,¹⁶⁷ the courts and tribunals have applied a principle which supports the inclusion of special value where the evidence supports the existence of a special purchaser at the valuation date.¹⁶⁸ The basis of the Canadian decisions is that the market place is open and unrestricted and that no known potential purchaser will be excluded from it even if the location of the property makes it more attractive to one or more persons than to others.

The first reported case brings into sharp relief the special value issue. In *Laycock v MNR*,¹⁶⁹ a taxpayer owned 159 acres of farm land which was valued in 1971 at \$139 per acre as ordinary farmland. There was evidence that in 1971 a feedlot business on an adjoining site had offered to buy 40 acres of the taxpayer's land for \$400 per acre and that the offer had been refused. In 1973 the taxpayer sold the entire 159 acres to the owner of the feedlot business for \$300 per acre. The taxpayer asserted that there was no capital gain because it followed from the existence of the offer for the 40 acres from the adjoining owner and other matters that all of the land had a market value in 1971 of \$300 per acre. In a simple factual decision, in which no principle of market value as such was discussed, the Federal Court of Canada held that the 40 acres were to have had a market value of \$400 per acre in 1971 and that the remaining 119 acres should be valued at a premium of 150% of the farmland market value to reflect the special adaptability of the land should the feedlot business have decided to expand beyond the 40 acres.

A legal non-conforming polluting land use has been held to provide the basis for a local authority being a special purchaser where it was established that the authority required the land to extinguish the pollution. In *931 Holdings Limited v MNR*¹⁷⁰ the taxpayer owned a dairy in a residential area of Toronto; although the dairy was operating legally because it had been in long-term use, the city council, prior to the 1971

167 *Levitt v MNR* 76 DTC 1047.

168 *Laycock v The Queen* 78 DTC 6349; *Les Meubles de Maskinonge Inc v MNR* 79 DTC 66; *931 Holdings Limited v MNR* 85 DTC 388; *Dominion Metal & Refining Works Ltd v The Queen* 86 DTC 6311; *Attridge v The Queen* 91 DTC 5161. The special purchaser concept was applied to a 'special user' to substantiate the reasonableness of rental payments in *Wood Motors (1972) Limited v MNR* 87 DTC 290.

169 78 DTC 6349.

170 85 DTC 388.

valuation day, had listed the dairy as 'one of the six most obnoxious legal non-conforming uses in the City'. In 1974 the city purchased the dairy for a premium price (about 40% over and above the normal fair market value of the land as residential property) to rid the residential area of the pollution. The taxpayer claimed that the market value of the dairy at the 1971 valuation day should reflect the city as a special purchaser which at that time would have paid a special value to rid itself of the obnoxious use. There was evidence that the city was the only possible purchaser of the dairy. The Tax Court of Canada agreed with the taxpayer's argument and, through reference to *Clay*, firmly embedded the special value theory in Canadian tax valuation law.

Although one case has allowed the inclusion of a special value as a part of market value as at the 1971 valuation day on speculative grounds,¹⁷¹ it would appear that the Canadian courts have generally adopted a principle that a taxpayer must prove, on the balance of probabilities, that a special purchaser actually existed at that time or, at least, that there was an established use for the special adaptability of the property at that time, before any special value will be included in market value.¹⁷²

Special value from 'special adaptability' in compulsory acquisition of land decisions

The body of case law which has developed in applying compulsory acquisition of land legislation has recognised two different kinds of 'special value'. One type, which looks at the *value to an owner* of compulsorily acquired property, is a value which is beyond and not a part of market value. The second type of 'special value' is a part of market value; it is the additional *value to another party* (the hypothetical purchaser) arising from the special suitability or adaptability of the property being acquired because of the special needs of that other party. In broad terms, the value of land which is being compulsorily acquired will be the greater of the value to the owner or its market value.

It has been seen from the discussion above that this second type of special value was, by the late 1930's, treated by United Kingdom courts as a part of market value for rating and tax valuation purposes. The principles in these cases have had a direct influence on the development of both the market value standard for compulsory acquisitions and the statutory compensation rules. These two types of special value are discussed at 23 and 24 below.

171 In *Lakehouse Enterprises Ltd v MNR* 83 DTC 388 the special value was applied to increase the 1971 market value of property already rented by the taxpayer to a bank because the bank might have been interested in the land for investment or expansion purposes despite evidence from a bank official that at that time the bank was not interested in purchasing the property.

172 *Dominion Metal & Refining Works Ltd v The Queen* 86 DTC 6311.

Compulsory land acquisitions: special value to the owner is a value in addition to market value

The seminal market value case in Australian law, *Spencer v Commonwealth*,¹⁷³ concerned a compulsory acquisition of land. That case, however, did not involve a property which had any special suitability for a business or economic activity carried on by the owner, and thus the market value test was expressed only in terms of how much a prudent, willing but not anxious buyer would have been prepared to pay.

Seven years after the High Court handed down its decision in *Spencer*, the Privy Council confirmed an additional compensation principle which had developed in the application of the 1845 United Kingdom compulsory acquisition of land law.¹⁷⁴ In *Pastoral Finance Association Ltd v The Minister*¹⁷⁵ it was held that the position of the owner (as a seller) should be considered separately. The effect of this principle is that where a property has an added value to an owner (in excess of what a hypothetical purchaser would pay) because of its special suitability to the owner's business or activity or because of the disturbance of the acquisition, there is an additional component of compensation in determining the *value to the owner* of the property. Consequently, an owner can receive the greater of the market value or the special value from its peculiar use or special suitability to the owner.

This additional special value principle is both well entrenched in Australian compulsory acquisition jurisprudence¹⁷⁶ and recognised in compulsory land acquisition legislation.¹⁷⁷ It is clear that, although special value 'may be derived from an immense variety of circumstances exemplifying many forms of relationship and interdependence',¹⁷⁸ the owner of an asset cannot obtain compensation for a special value other than as a result of its special suitability to the owner's business or activity or because of any economic disturbance to the owner resulting from the acquisition. For example, special value cannot be used to compensate the owner of an

173 (1907) 5 CLR 418.

174 *Land Clauses Consolidation Act* 1845 (UK) s 63.

175 [1914] AC 1083.

176 See, for example, *Minister Administering the Heritage Act 1977 v Haddad* (1988) 67 LGRA 438; *Dangerfield v St Peters Town* (1972) 129 CLR 586; *Ryde Brick and Tile Works Ltd v The Minister* (1951) 18 LGR (NSW) 117; *Kennedy Street Pty Ltd v The Minister* [1963] NSWLR 1252; *Chong v Fairfield Municipal Council* (1968) WN(NSW) 346; *Arkaba Holdings Ltd v Commissioner of Highways (SA)* [1970] SASR 94; *Commissioner of Highways (SA) v Tynan* (1982) 53 LGRA 1; *City of Brighton v Road Construction Authority* [1986] VR 255; *Housing Commission of NSW v Falconer* [1981] 1 NSWLR 547.

Owner special value has also been accepted in Canada; see *Gagetown Lumber Co Ltd v The Queen* [1957] SCR 44 and *Assaf v City of Toronto* [1953] 4 DLR 466.

177 See, for example, *Lands Acquisition Act* 1989 (Cth) s 55(2)(a)(ii); *Land Acquisition (Just Terms Compensation) Act* 1991 (NSW) s 57; *Land Acquisition and Compensation Act* 1986 (Vic) s 40. The Victorian Act defines special value to mean 'the value of any pecuniary advantage, in addition to market value, to a claimant which is incidental to his ownership or occupation of that land'.

178 *Commissioner of Highways (SA) v Tynan* (1982) 53 LGRA 1 at 14 per Wells J.

asset which is compulsorily acquired because of its sentimental value to the owner.¹⁷⁹

Compulsory land acquisitions: special value to a special purchaser is a part of market value

It has been seen above that, in applying the hypothetical market concept in the 1836 rating law, the United Kingdom courts early held that no one was to be excluded from the market place, even where there could only be one possible tenant or where that party required the property for a special use or to obtain synergistic advantages.

In 1845, the United Kingdom enacted a law providing for the compulsory acquisition of land and the payment of compensation for the 'value' of that land.¹⁸⁰ In applying this law, the courts were, from the beginning, prepared to include, as part of the market value, compensation for the special adaptability of the land.¹⁸¹ However, in 1909 one member of the Court of Appeal limited the market place where there was only one possible purchaser. In *Re Lucas and Chesterfield Gas and Water Board*¹⁸² the Court of Appeal held that the special adaptability of land for a particular purpose (a reservoir) could be taken into account even though it could not be used for that purpose except under statutory powers provided there was a reasonable possibility of a market for the land apart from the particular scheme under which it had been acquired. In explaining the basis of the decision, Fletcher Moulton LJ drew a distinction between the existence of one possible special purchaser and a number of them; in the first instance no special value would be included in market value.¹⁸³

... where the special value exists only for the particular purchaser who has obtained powers of compulsory purchase it cannot be taken into consideration in fixing the price, because to do otherwise would be to allow the existence of the scheme to enhance the value of the lands to be purchased under it. But when the special value exists also for other possible purchasers, so that there is, so as to speak, a market, real though limited, in which that special value goes towards fixing the market price, the owner is entitled to have this element of value taken into consideration, just as he would be entitled to have the fertility or the aspect of a piece of land capable of being used for agricultural purposes. There is nothing strange or abnormal in this.

179 *Wilson Bros Pty Ltd v Commonwealth* [1948] SASR 61.

180 *Land Clauses Consolidation Act 1845* (UK) s 63.

181 *In re Countess Ossalinsky and Manchester Corporation* (unreported 1883 Queen's Bench decision referred to in *Re Lucas and Chesterfield Gas and Water Board* [1908] 1 KB 571 at 579 per Bray J); *Tynemouth Corporation v Duke of Northumberland* (1903) TLR 630; *Re Gough and The Aspatria, Silloth and District Joint Water Board* [1904] 1 KB 417.

182 [1909] 1 KB 16; appeal from [1908] 1 KB 571.

183 *Ibid* at 31.

However, another member of the Court of Appeal, Vaughan Williams LJ, was not prepared to draw such a distinction:¹⁸⁴

I agree ... that the fact that no buyer for reservoir purposes can be found except a buyer who has obtained parliamentary powers does not prevent the special value being marketable...

Following the 1914 Court of Appeal decision in *IR Commrs v Clay*, *IR Commrs v Buchanan*,¹⁸⁵ it would have been reasonable to assume that any acquirer of land under compulsory acquisitions would have been included as a part of the market place and that the special value from the adaptability of the land to such an acquirer because of the exercise of statutory powers (although not the profits from the use of the land) were to be included in market value, even if there was only one such possible acquirer. However, the intervention of the First World War prevented any judicial examination of the conflict between *Clay* and the dictum of Fletcher Moulton LJ in *Re Lucas and Chesterfield Gas and Water Board*.

Prior to the end of the war, the Scott Committee¹⁸⁶ recommended a change in the law so that the special suitability or adaptability of the land for any purpose could not be taken into account if that purpose was a purpose for which there was no market apart from the special needs of a particular purpose; in so recommending, the Committee made the point that the additional price paid in *Clay* was in its view an excess over market value.¹⁸⁷ Thereafter, the United Kingdom land compulsory acquisition compensation law was amended to limit the market place and reduce market value to nullify the effect of *Clay* and give effect to the dictum of Fletcher Moulton LJ in *Re Lucas and Chesterfield Gas and Water Board*.¹⁸⁸

However, in jurisdictions such as Australia, New Zealand and Canada, where compensation for special value for suitability or adaptability for a sole special purchaser has not been restricted in the compulsory acquisition of land regimes, the courts have, as perhaps the Scott Committee

184 Ibid at 21.

185 [1914] 3 KB 466; appeal from [1914] 1 KB 339. This decision was handed down on 28 May 1914; twenty-one days earlier the decision in *Sidney v North Eastern Rwy Co* [1914] 3 KB 629, which directly applied the sole special purchaser limitation in *Re Lucas and Chesterfield Gas and Water Board*, had been handed down.

186 Ministry of Reconstruction, *Second Report of the Committee dealing with the Law and Practice relating to the Acquisition and Valuation of Land for Public Purposes* (1918) Cmd. 9229. The Committee was appointed in 1917 and was chaired by Mr Leslie Scott MP, KC, who later became Scott LJ, a member of the Court of Appeal in *Robinson Bros (Brewers) Limited v Durham County Assessment Committee* [1937] 2 KB 445 discussed in the text above at 19.

187 Ibid at p 9.

188 *Acquisition of Land (Assessment of Compensation) Act 1919* (UK) s 2, Rule 3 (now enacted in *Land Compensation Act 1961* s 5, Rule 3). See *In re Naylor Benzon Mining Co Ltd* [1950] 1 Ch 567 at 580-1 per Wynn-Parry J.

Rule 3 provides: The special suitability or adaptability of the land for any purpose shall not be taken into account if that purpose is a purpose to which it could be applied only in pursuance of statutory powers, or for which there is no market apart from the special needs of a particular purchaser or the requirements of any authority possessing compulsory purchase powers.

anticipated, applied *Clay* to include the special value which a special purchaser would pay for property as a part of market price. In a 1939 Privy Council case on appeal from an Indian court, *Raja Vyricherla Narayana Gajapatiraju v Revenue Divisional Officer, Vizagapatam*¹⁸⁹ a statutory authority which was building a harbour compulsorily acquired adjoining malarious swamp land because it was a source of fresh water which was required for industrial users of the harbour as well as to carry out anti-malarial works. It was determined that the statutory authority was the only possible purchaser of the land which, to other parties, had no value, that is, its only value came from the scheme for which the acquisition was made. The Privy Council applied the principles established in *Clay* and *Glass v IR Commrs*¹⁹⁰ and held that the land was to be valued by reference to uses which it was reasonably capable of being put to in the future and which included the uses of a compulsory acquirer who, but for speculators, was the only possible purchaser.¹⁹¹

The *Raja Vyricherla Narayana* principle has become established in Australia,¹⁹² New Zealand¹⁹³ and Canada¹⁹⁴ and thus the principles developed by the United Kingdom appellate courts in 1914 in *Clay* and *Glass* have become embedded in the market value standard for compulsory acquisitions. The special value aspect, which is reflected in the best and most advantageous use of a property, has often been applied where the owner has been able to establish the probable existence of a special purchaser with such a use¹⁹⁵ but has been limited in such a way as not to include any increase arising from the actual implementation or carrying out of the statutory scheme for which the compulsory acquisition was made.¹⁹⁶ The *Raja Vyricherla Narayana* case has also been expressly referred to and applied in taxation cases.¹⁹⁷

189 [1939] AC 302.

190 (1915) 52 Scot LR 414.

191 Consequently, the Privy Council disapproved of the dictum of Fletcher Moulton LJ in *Re Lucas and Chesterfield Gas and Water Board* [1909] 1 KB 16 at 31 and approved of the views of Vaughan Williams LJ at 25 referred to in the text above; see [1939] AC at 302 at 318.

192 *Geita Sebea v Territory of Papua* (1941) 67 CLR 544; *Ryde Brick and Tile Works Pty Ltd v The Minister* (1951) 18 LGR (NSW) 117; *Turner v Minister for Public Instruction* (1956) 95 CLR 245; *Collins v Livingstone Shire Council* [1972-3] ALR 404, *River Bank Pty Ltd v Commonwealth* (1974) 4 ALR 651; *Universal Land and Investments Ltd v Commonwealth* (1987) 87 FLR 220; *Goold v Commonwealth* (1993) 114 ALR 135. Consequently, the decision in *Latimer v North Coast National Agricultural & Industrial Society* (1938) 14 LGR (NSW) 30, where the special potentiality to the sole purchaser was ignored, must be treated as bad law.

193 *Tawharanui Farm Ltd v Auckland Regional Authority* [1976] 2 NZLR 230; *Jacobsen Holdings Ltd v Drexel* [1986] 1 NZLR 324.

194 *Fraser v The Queen* [1963] SCR 455.

195 See, for example, *Adelaide Clinic Holdings Pty Ltd v Minister for Water Resources* (1988) 65 LGR 410; *Hill v R* (1980) 7 QLCR 128, *Brighton City v Road Construction Authority* (1985) 59 LGR 262.

196 The application of the Privy Council decision in *Pointe Gourde Quarrying & Transport Co Ltd v Sub-Intendent of Crown Lands (Trinidad)* [1947] AC 565. See *Fraser v The Queen* [1963] SCR 455 and *EA Woollams v The Minister* (1957) 75 WN (NSW) 103, 489.

197 See, for example, *Perpetual Trustee Co Ltd v FC of T (Murdoch's case)* (1942) 65 CLR 572 at 579 per Williams J; *Abrahams v FC of T* (1945) 70 CLR 2 at 44 per Williams J; *Dominion Metal & Refining Works Ltd v The Queen* 86 DTC 6311 at 6315 per Joyal J.

Evidentiary issues

The converse of the principle that the special value to a purchaser of an asset derived from its special adaptability, usefulness or synergistic advantages is to be included in its market value is that there be one or more actual parties to whom the asset has such a special value. The *Spencer* notional market place hypothetical sale standard essentially deals with hypothetical parties. The inclusion of a special value in market value required the courts to specifically include known and possible purchasers who, on the balance of probabilities, would have bid a special price to obtain the asset because of its special adaptability or usefulness to them or because its possession or control would yield synergistic advantages.

In many cases the evidentiary issue will not arise. For example, in *IR Commrs v Clay*, *IR Commrs v Buchanan*¹⁹⁸ the existence of the special purchaser was not in question since the proprietor of the nursing home had already bought the two adjoining properties the market value of which was in question. But in the majority of the cases where the special purchaser/special value issue has arisen the courts have had to consider whether or not it was reasonable to assume that special purchasers would have actually bid in the market place for the particular asset because of its adaptability or usefulness to them or because its possession or control would yield synergistic advantages.

In *R v London and North-Western Railway Co*,¹⁹⁹ where the market value of a branch railway line to a railway company had to be determined, the court found that three other railway companies could have used the branch line as part of their own network and thus it was reasonable to assume that they would have bid for the branch line. The special value of the branch line was described as the 'enhanced value by reason of its facility of communication with other railways'.²⁰⁰ In *Glass v IR Commrs*²⁰¹ the court had to determine whether a water authority, which acquired a farm in 1911 for the purpose of its water catchment, would have been a purchaser in 1909 to justify a market value in 1909 in excess of its value as agricultural land at that time. The Appeal Court held it reasonable to consider that it was common knowledge at that time that the water authority would eventually have to acquire the land (this was seen as 'by no means [a] remote contingency'²⁰²) and thus it was proper to assume that speculators would also have been interested parties. The farm would have had a special advantage to a speculator since it could be resold to the water authority at a price in excess of its farm value. In *Robinson Bros (Brewers) Limited v Durham County Assessment Committee*,²⁰³ where the issue was the market rental value of

198 [1914] 3 KB 466.

199 (1874) LR 9 QB 134.

200 (1874) LR 9 QB at 146-7 per Quain J.

201 (1915) 52 Scot LR 414.

202 *Ibid* at 418 per Lord Salvesen.

203 [1938] AC 321.

'tied' licensed premises because of possible competition for the premises among different breweries, the existence of competition because of the special synergies to a brewery from having a tied-house was held to have been established.²⁰⁴

Indeed, the evidentiary issue has probably been the dominant one in the Canadian tax cases referred to at 21 above. In one case the tax tribunal appears to have held that a bank was a special purchaser of commercial real estate of which it was a tenant at the 1971 valuation date paid because, at that date, it paid a rental considerably more than market rental at that time.²⁰⁵ The courts, however, have generally imposed a relatively heavy evidentiary burden on taxpayers who have claimed the existence of special purchasers. They have, naturally, rejected a principle that a special purchaser can emerge after the valuation date.

In *Dominion Metal & Refining Works Ltd v The Queen*²⁰⁶ the taxpayer acquired the remaining three year term of a 21 year lease of a factory site in 1969 for a premium of \$42,000. In 1972 the taxpayer obtained an extension of the lease for a further 21 years. In 1976 the taxpayer assigned its interest in the lease to the occupier of the adjoining site for \$185,000. The Revenue's assessor determined that the market value of the lease interest at the 1971 valuation day was about \$68,000 and thus the difference was a taxable capital gain. The taxpayer argued that \$185,000 was the market value of the lease interest since, at that time, its neighbour was a special purchaser because it would eventually require additional space for expansion; the taxpayer, however, led no evidence that at that time its neighbour or anybody else was interested in acquiring its site. The Federal Court of Canada refused to find that the neighbour in 1971 was a special purchaser through reference to any hypothesis. Rather, it found that a special purchaser could not automatically be assumed to be a part of the hypothetical market place and a special value as part of market value could only be sustained through actual evidence of the existence of the special purchaser at the relevant time. Joyal J said that to support the taxpayer's position he would 'have to find that the special purchaser theory ... applies as well in a vacuum as in circumstances where proper inferences from known facts may be drawn. I would have to find that at all material times, [the neighbour] was a special purchaser even though its presence in the "notional" market wasn't even known to itself'.²⁰⁷ He added that 'the retroactive application of the principle [of special value] would require some evidentiary base. There must be some facts to support the notion. These

204 Lord Macmillan said that 'on the facts found in this case, it was in my opinion proper to have regard to the competition of brewers and to the rents which they might offer' ([1938] AC 321 at 339).

205 *Lakehouse Enterprises Ltd v MNR* 83 DTC 388. The bank was held to be a special purchaser at the 1971 valuation date even though there was evidence from a bank official that, at that time, that the bank was not interested in purchasing the property. It would appear that in addition to the above market rental the tribunal found that the bank was a special purchaser at that time because it could be foreseen that it would have to expand at that particular site in the future.

206 86 DTC 6311.

207 *Ibid* at 6319.

facts may not be necessarily facts dealing directly with the issue, but at least facts which would lead to an inference that speculation is warranted. Such, at least, seems to have been the foundation on which courts have applied the theory'.²⁰⁸

It is suggested the a taxpayer seeking to establish that a special value is to be included in the market value of an asset at a particular time because of its special adaptability or usefulness to a third party or because a third party can obtain synergistic advantages from it, will, at the very least, have to prove that there were one or more actual parties who could specially adapt or use the asset or obtain the synergistic advantages from its use and that there was more than a mere possibility that they would have bid for it. In most cases, that possibility will be able to be demonstrated through showing that another party would have obtained economic benefits from acquiring the asset, for example, increased profits or an increase in the value of capital assets, through such factors, as obtaining of economies of scale, horizontal integration or consolidation of management, sales or production functions, anticyclical diversification, vertical integration, a reduction in the purchaser's cost of capital, or an increase in market share.²⁰⁹

In other cases, the existence of a special purchaser might be shown from an actual offer to buy the particular asset made at about the same time as that for which the market value has to be determined. It has been decided that it would be proper for an independent adjudicator to consider an offer which is shown to be genuine along with such other matters as the likelihood that the offer would be renewed and the possibility that other prospective purchasers would make a higher offer.²¹⁰

Finally, in many cases it may be necessary to establish either that the particular use or adaptability of an asset which is alleged to produce a special value or provide synergies was a legal one or the potential purchaser or purchasers could lawfully use or adapt the asset. For example, a special value from the use of land in a particular way could hardly be said to exist if that use was illegal because of planning, building or environmental controls. Thus it would be reasonable to suppose that residential land in a metropolitan area would have no special value to a mining company because of uranium deposits beneath the subsoil. The issue of whether a potential purchaser could lawfully use land and thus be a special purchaser to increase the market value of the land has arisen in compulsory acquisition cases. In *Ryde Brick and Tile Works Pty Ltd v Minister*²¹¹ the issue was whether land which had clay content usable for making bricks had a special

208 Ibid at 6321.

209 In *Hustlers Pty Limited v Valuer-General (NSW)* (1967) 14 LGRA 269 the owner of three contingent shops claimed that they should be valued as a whole having a special suitability as a retail site rather than each shop being valued on a stand alone basis. The special value basis was rejected because there was no evidence that there was an actual demand for the site as a retail site.

210 *Phillipou v Housing Commission of Victoria* (1969) 18 LGRA 254 at 259-260 per Barber J; *Goold v Commonwealth* (1993) 114 ALR 135 at 141-144 per Wilcox J.

211 (1951) 18 LGR (NSW) 117.

value to a brick maker over and above the value of the land for industrial or subdivisional purposes. At the relevant time, such a purchase would have required a Minister's consent under post-war time economic controls and that consent would have extended to controlling the price. The court thus had to consider whether it would be proper to consider that a hypothetical purchaser could include a party who was not subject to the controls. Sugerman J was prepared to take into account the possibility that an 'uncontrolled purchaser' could, in the hypothetical market, bid for the land and offer a price in excess of what a controlled purchaser would be allowed to pay.²¹²

Market value of a business 'as a going concern': all hypothetical and actual purchasers will be special purchasers

Another 'special value' issue, and one which follows from the evidentiary matters raised in 25, is whether, in the case of the market valuation of a business as a going concern (or all of the shares of a company the sole asset of which is a business), it is proper to assume that the market place can only consist of special purchasers. In such cases the asset may consist of a number of inter-locking assets, such as land, plant and equipment, stock, and a range of intangibles such as trade names, patents, licenses, and goodwill.

It is submitted that, on any reasoned analysis, a business which is a going concern and which is not to be sold piece-meal can only attract three types of purchasers: those who are not in the particular market of the business but wish to enter it, those who are already in the market, that is, existing competitors, and, thirdly, those who are in an inter-related market and who wish to expand vertically or horizontally. *First*, a party who wishes to acquire a business to enter a new market might be expected to pay a premium to enter the market, that is, to acquire market share or presence - and hence the business will offer a special usefulness to such a purchaser.

Secondly, any party which is an existing competitor to a business will, presumably, pay a premium to acquire additional market share or additional presence whether through the continuation of that business on a stand alone basis or through its integration with the existing business. Alternatively, the market share of the party could be increased through closure of the business being acquired. In any of these ways, a person who acquires a business which is a competitor in its own market will pay a premium for its special adaptability or usefulness to the existing business or because of the synergies which could be obtained from the acquisition. *Thirdly*, a party which is in an inter-related market to that of the business which is being acquired and who wishes, through the acquisition, to expand

212 See, also, *Priestman Collieries Ltd v Northern District Valuation Board* [1950] 2 KB 398.

vertically or horizontally will, presumably, pay a premium because of the synergies of integration.

It should follow, then, that where the market value of a business as a going concern is at issue it will not be necessary, except perhaps in the rarest of cases, to establish the existence of a special purchaser since the market value, howsoever and on what basis it is determined, necessarily includes all special value. This, it is submitted, is a self-evident proposition and logically follows from the nature of the market place. Of course, where a business is being valued as a going concern but there is evidence that, because of its nature and the type of market, there would be no buyers at all for it, market value would be determined on the basis of the value of the individual parts, such as the real estate and the machinery.²¹³

It is submitted that rating cases referred to at 19 above, which dealt with the market value of an asset which was a part of the structure of a business, such a branch railway line which was added to an existing railway network²¹⁴ or a tied-house which allowed a brewery to increase market share,²¹⁵ support this contention. There is further support in the decision of the Federal Court of Canada in *Attridge v The Queen*²¹⁶ where the issue was the market value of a company whose only asset consisted of a trucking business. There, Muldoon J pondered whether it was necessary to consider the existence of a special purchaser as at the 1971 valuation date. The particular assets consisted of rolling stock, real estate and 'considerable goodwill all derived from the management skill then exhibited'.²¹⁷ Muldoon J observed that '[w]hat engages the focus of mind here is that unless [the company's] assets were to be offered and sold piece by piece, truck by truck to a variety of buyers, it would attract virtually only special purchasers, for as a going concern, it was a special acquisition, a specialized trucking enterprise'.²¹⁸

A special purchaser will bid more than 'one more bid'

Even if the hypothetical market place is one from which no potential purchaser is excluded and known and possible purchasers are specifically included, it could be contended that the additional bid which a purchaser would make for an asset which had special adaptability or potential or from which synergistic advantages could be obtained would be only enough to outbid all other purchasers. It would follow from this contention that special value would only be a small increment above the value to any other party because it would represent just 'one more bid' above any bids made by those for whom the asset had no special value.

213 Cf *CSR Ltd v Valuer-General (SA)* (1977) 42 LGRA 52.

214 *R v London and North-Western Railway Co* (1874) LR 9 QB 134.

215 *Robinson Bros (Brewers) Limited v Durham County Assessment Committee* [1938] AC 321.

216 91 DTC 5161.

217 *Ibid* at 5179.

218 *Ibid* at 5173.

This contention has been considered but rejected in both taxation and compulsory acquisition cases.²¹⁹ In *IR Commrs v Clay*, *IR Commrs v Buchanan*,²²⁰ Swiften Eady LJ took judicial notice of the fact that the market price of a particular property rises when the market is aware that there is a probable buyer because '[n]ot only is the probable buyer a competitor in the market, but other persons, such as property brokers, compete in the market for what they know another person wants, with a view to resale to him at an enhanced price, so as to realize a profit'.²²¹ His Lordship then said that the 'one more bid' assumption 'would ordinarily be quite erroneous. The knowledge of the special need would affect the market price, and others would join in competing for the property with a view of obtaining it at a price less than that at which the opinion would be formed that it would be worth the while of the special buyer to purchase'.²²²

In *Raja Vyricherla Narayana Gajapatiraju v Revenue Divisional Officer, Vizagapatam*²²³ the Privy Council approved of *Clay* and, despite the fact that there was only one possible purchaser for the land in that case, accepted that there would be more than one speculative purchaser who would be willing to bid 'more than the "poramboke" value upon the chance of being able to resell to a purchaser of the potentiality at a profit'.²²⁴

Although the sole special purchaser value has been excluded from market value for the determination of compensation in United Kingdom compulsory acquisition of land legislation since 1919,²²⁵ in other contexts, where market value has had to be determined, United Kingdom courts have rejected the 'one more bid' argument on the basis that, if the seller were to accept that one additional bid, it would indicate that the seller was a forced and not a willing one.²²⁶

Retrospective examination of arm's length sale prices under the exclusion of special value from market value proposition

It will be seen that an important practical rule necessarily follows from the proposition that special value is excluded from market value. This is that where arm's length parties agree to sell and buy an asset, and where both are willing but neither are anxious to deal, the agreed price will not be the market value of the asset where the purchaser can be identified as a special

219 However, this contention is the basis of the dissenting judgment of Lord Cullen in *Glass v IR Commrs* (1915) 52 Scot LR 414.

220 [1914] 3 KB 466.

221 *Ibid* at 475.

222 *Ibid* at 476.

223 [1939] AC 302.

224 *Ibid* at 315; see also the conclusion set out at 323.

225 See text at 224.

226 See, for example, *Lloyd-Jones v Church Commrs for England* (1981) 261 EG 471 and *Mercury Communications Ltd v London & East India Dock Investments Ltd* [1994] 1 EGLR 229.

purchaser. This would necessarily be true for private sales, public tenders and public auctions.

This secondary proposition is also inconsistent with established principles which are to the effect that, exceptional circumstances aside, it would be an error for a court not to consider an arm's length sale price as being the best evidence of the market value of an asset at the time of sale where the parties were properly informed, both were willing, and neither were anxious. Consequently, at trial, the onus of proof would be on the party who was alleging that the price obtained in an arm's length sale of an asset was not its market value at that time.

There are numerous statements in tax and rating market value cases to this effect, even extending as far back as the 1870's.²²⁷ In a State succession duty case the Full High Court noted that 'Where property is being bought and sold in a market, there is usually no difficulty in determining its value. The value is almost invariably the market value.'²²⁸ In a case involving a deemed market value under sec. 160ZZS, the AAT rejected the evidence of valuers on market value because 'there cannot be any substitute for a price achieved in a genuine arm's length sale of the subject property itself'.²²⁹ In a State stamp duties case it has been said that: 'Where there are no abnormalities affecting a market, the price at which property changes hands in the ordinary course of business in the market is usually its true value'.²³⁰ In Canadian capital gains tax cases where the special value issue has arisen, the decision of the Supreme Court of Canada in a succession duty case²³¹ to the effect that 'market price is the best test of fair market value' has been followed.²³² Furthermore, Australian courts have held that the existence of a genuine offer from a special purchaser, although not direct evidence of market value, can properly be considered by a valuer in determining market value to demonstrate that a party might pay a special price;²³³ this would be especially the case if the offer was later accepted.²³⁴

The price in an actual arm's length sale will ordinarily be the best evidence of market value at the time of the sale. The probative worth of a price paid in an arm's length sale prior to or after the relevant valuation date will depend on the type of property, the time elapsed, and whether or not there were changes in the market or to the property. For example, in *Inland*

227 See, for example, *Mersey Docks and Harbour Board v Liverpool* (1873) 9 LR QB 84 at 96 per Blackburn J.

228 *Commr of Succession Duties (SA) v Executor Trustee and Agency Co of SA Ltd (Clifford's case)* (1947) 74 CLR 358 at 361 per Latham CJ, Rich and Williams JJ.

229 *Case Y59*, 91 ATC 502 at 510 per Dep Pres McMahon.

230 *Nischu Pty Ltd v Commr of State Taxation (WA)* 90 ATC 4391 at 4396 per Commr Zestis.

231 *Untermeyer v Attorney-General (BC)* [1929] 1 DLR 315.

232 *The Queen v National System of Baking of Alberta Ltd* 78 DTC 6018 at 6021 per Mahoney J. See also *Dominion Metal & Refining Works Ltd v The Queen* 86 DTC 6311; *Attridge v The Queen* 91 DTC 5161.

233 See *Phillipou v Housing Commission of Victoria* (1969) 18 LGRA 254 at 259 per Barber J; *Goold v Commonwealth* (1993) 114 ALR 135 at 143 per Wilcox J.

234 See *Gregory v FC of T* (1971) 123 CLR 547 at 562-3 per Gibbs J.

*Revenue v Marr's Trustees*²³⁵ the market value of a prize herd of cattle was held to have moved in four months from £9,031 to £17,722 because of an unexpected demand during that time from foreign breeders.

Probably the only other conditions which would lead a court to reject an arm's length sale price where the parties were informed, willing but not anxious, would be where the market was affected by either a transient boom or a sudden panic.²³⁶ It is unlikely that a court would reject an arm's length sale price where the market was not properly informed and thus acted on false information.²³⁷

Conclusion

It is quite evident that the proposition that the special value which a person can be obtain from an asset because of its special adaptability or usefulness or because of the synergistic advantages is excluded from market value cannot, on any proper analysis of the relevant law, be sustained. The last time an appellate court directly and definitively supported that proposition was in 1898 when the English Court of Appeal handed down its decision in *Bradford-on-Avon Assessment Committee v White*.²³⁸ *Bradford-on-Avon* was decisively overruled in *Robinson Bros (Brewers) Limited v Durham County Assessment Committee* by the Court of Appeal in 1937²³⁹ and the House of Lords the following year.²⁴⁰

It is submitted that, on proper consideration, an Australian court would both quickly and decisively recognise, as did Scott LJ in the Court of Appeal in *Robinson Bros (Brewers) Limited*, that the exclusion of special value from market value in the hypothetical market test was an 'economic paradox' and a 'contradiction in terms'.²⁴¹ More importantly, the decisions in *Glass v IR Commrs* and *IR Commrs v Clay*, *IR Commrs v Buchanan*,²⁴² which directly deal with the special value as a part of market value issue, have never been questioned nor criticised in any subsequent reported

235 (1906) 44 Scot LR 647.

236 Unreported decision in *Re Alfred Louisson* referred to in *Commr of Stamp Duties v Haynes* [1924] NZLR 337 at 339 per Sim J and *Untermeyer v Attorney-General (BC)* [1929] 1 DLR 315 at 319-320 per Mignault J. See, also, *Henderson Estate and Bank of New York v MNR* 73 DTC 5471 at 5482 per Cattanach J and *Attorney-General of Alberta v Royal Trust Company* [1945] SCR 267 at 288 per Estey J.

237 See *Crabtree v Hinchcliffe (Inspector of Taxes)* [1972] AC 707 where the House of Lords considered the application of a valuation rule to the effect that the quoted price of a share on a particular day may be ignored 'where in consequence of special circumstances prices so quoted are by themselves not a proper measure of market value' (now enacted in *Taxation of Chargeable Gains Act 1992* (UK) sec. 272(3)). See also *The Queen v National System of Baking of Alberta Ltd* 78 DTC 6018.

238 [1898] 2 QB 630.

239 [1937] 2 KB 445.

240 [1938] AC 321.

241 [1937] 2 KB 445 at 470.

242 [1914] 3 KB 466.

decision. On the contrary, they have been applied or cited in many subsequent cases.²⁴³

To reject the principle in *Clay* and *Glass* would be a mettlesome and gargantuan undertaking for any Australian court since these subsequent cases include two decided by the Privy Council, two by the House of Lords, and a number by intermediate courts of appeal. And given the extensive reliance by the Privy Council in its decision in *Raja Vyricherla Narayana Gajapatiraju v Revenue Divisional Officer, Vizagapatam*²⁴⁴ on the decisions in *Glass* and *Clay* in reaching the same special purchaser/special value principle,²⁴⁵ and given the fact that the *Raja Vyricherla Narayana* case has been extensively referred to and applied by the Full High Court of Australia,²⁴⁶ the likelihood that an appellate court in Australia would even entertain argument on the exclusion of special value from market value proposition is probably remote. In addition, that proposition runs contrary to a noticeable trend in Australian law to measure compensation for the loss of an asset by reference to any premium which would be paid by a special purchaser for that asset. For example, in a damages for breach of trust case the NSW Court of Appeal, relying on the *Raja Vyricherla Narayana* case, has said that: *'It is well-established that if property has some special potentiality which only one person would buy, it is to be valued on the*

243 *Glass v IR Commrs* and/or *IR Commrs v Clay*, *IR Commrs v Buchanan* have been applied or referred to without criticism in the following cases (in chronological order): *Valuer-General (NZ) v Wellington City Corporation* [1933] NZLR 855 (valuation of land); *Raja Vyricherla Narayana Gajapatiraju v Revenue Divisional Officer, Vizagapatam* [1939] AC 302 (compulsory acquisition of land); *Ryde Brick and Tile Works Ltd v The Minister* (1951) 18 LGR (NSW) 117 (compulsory acquisition of land); *Holt v IR Commrs* [1953] 2 All ER 1499 (estate duties); *McNamee v IR Commrs* [1954] IR 214 (estate duties); *Phillipou v Housing Commission of Victoria* (1969) 18 LGRA 254 (compulsory acquisition of land); *Estate of Thomas v IR Commrs* (1970) 213 EG 1355 (estate duties); *Lynall v IR Commrs* [1972] AC 680 (estate duties); *Blandrent Investment Development Ltd v British Gas Corporation* (1979) 252 EG 267 (compensation for restriction of development of land); *Mawson (Inspector of Taxes) v Harthan* [1981] RVR 268 (capital gains tax); *Dominion Metal & Refining Works Ltd v The Queen* 86 DTC 6311 (capital gains tax); *Jacobsen Holdings Ltd v Drexel* [1986] 1 NZLR 324 (compulsory acquisition of land); *Church Cottage Investments Ltd v Hillingdon* [1990] 1 EGLR 205 (compensation for refusal of planning permission); *First Leisure Trading Ltd v Dorita properties Ltd* [1991] 1 EGLR 133 (rent review provision in a lease); *Cameron v Nature Conservancy Council* [1992] 1 EGLR 227 (diminution of value of land as a result of notification of special scientific interest); *Goold v Commonwealth* (1993) 114 ALR 135 (compulsory acquisition of land); *Mercury Communications Ltd v London & East India Dock Investments Ltd* [1994] 1 EGLR 229 (compensation for laying cable under a private road); *Estate of Walton v IR Commrs* [1996] STC 68 (capital transfer tax); *Windward Properties Ltd v St Vincent and the Grenadines* (unreported Privy Council decision 11 January 1996) (compulsory acquisition of land).

244 [1939] AC 302.

245 *Ibid* at 316-8.

246 See *Geita Sebea v Territory of Papua* (1941) 67 CLR 544; *McClintock v Commonwealth* (1947) 75 CLR 1; *Nelungaloo Pty Ltd v Commonwealth* (1948) 75 CLR 495; *Commonwealth v Arklay* (1952) 87 CLR 159; *Turner v Minister for Public Instruction* (1956) 95 CLR 245; *Collins v Livingstone Shire Council* (1972) 127 CLR 477; *Brisbane City Council v Valuer-General (Qld)* (1978) 140 CLR 41. Other Australian courts have applied or referred to the same principle in compulsory acquisition cases, see, for example, *Ryde Brick and Tile Works Pty Ltd v The Minister* (1951) 18 LGR (NSW) 117; *River Bank Pty Ltd v Commonwealth* (1974) 4 ALR 651; *Universal Land and Investments Ltd v Commonwealth* (1987) 87 FLR 220; *Goold v Commonwealth* (1993) 114 ALR 135. *Raja Vyricherla Narayana* was expressly referred to and applied by the High Court in two estate duties cases, *Perpetual Trustee Co Ltd v FC of T (Murdoch's case)* (1942) 65 CLR 572 at 579 per Williams J and *Abrahams v FC of T* (1945) 70 CLR 2 at 44 per Williams J.

basis of a notional sale to that person. The property is not valueless or diminished in value because there would be no other buyers'.²⁴⁷

Moreover, it is most unlikely that the experience in Canada, where the issue of whether special value to a special purchaser is a part of market value was directly raised for capital gains tax purposes, will be ignored by Australian courts in tax cases. Rather, it is thought that the approach which the Canadian courts have adopted in determining the quantum of special value to be included in fair market value for the application of the Canadian *Income Tax Act* will serve as a useful guide where market value has to be determined for the application of the *Income Tax Assessment Act*.

²⁴⁷ *Mordecai v Mordecai* (1988) 12 NSWLR 58 at 68 per Hope JA. This statement has been referred to with approval or applied in *Lord v Dernacourt Investments Pty Ltd* (unreported NSW Supreme Court decision of 14 March 1994 per McLelland CJ in Eq) and *Melcann Ltd v Super John Pty Ltd* (1995) 13 ACLC 92 at 94 per McLelland CJ in Eq. See also *Flottman v NCSC* (unreported decision of the WA Supreme Court of 26 May 1992) and *Rosetex Co Pty Ltd v Licata* (unreported decision of NSW Supreme Court of 7 March 1994).