IN THE SUPREME COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M. 337/79

BETWEEN : GEORGE LEITH SWAN
of Brixton,
Nurseryman

Objector

A N D : THE COMMISSIONER OF INLAND REVENUE

Commissioner

Hearing: 21 22 23 November 1979

Counsel: Somerville for Objector.
Bridger for Commissioner.

Judgment: 13 December 1979

JUDGMENT OF THORP, J.

The objector, Mr G.L. Swan, took over his family's hill country farm at Te Rata in Taranaki in 1950. It was a cold and steep property, subject to erosion, suitable for grazing dry stock and for some breeding, but not for fattening live stock. Early in 1973 he was advised for health reasons to move to a warmer area. In October of that year he purchased for $30,000 a block of just under 29 acres of high quality flat land on the outskirts of Waitara township, the resale of which has resulted in these proceedings. It had no substantial improvements upon it. Just over half was within the Borough of Waitara, and the remainder was in the Clifton County. Its only road frontage was a narrow access way to Princess Street, within the Borough. This meant that it could only be subdivided by purchasing additional land for road access, or by a joint development with an adjacent land owner who had road access.

At that time Mr Swan's elder son, Ian, had recently married. He had completed an apprenticeship as a nurseryman

with Duncan and Davies Limited, and wished to set up a nursery. Mr Swan's younger son, Trevor, was still at high school, but was expected to take over the Te Rata farm in due course.

In addition to providing him with a site for a new home, Mr Swan intended the Waitara block to be used as to part for fattening stock from Te Rata, as to a further part to provide a house site for Ian, and as to the balance to establish a nurse business which it was intended he and Ian should operate in partnership.

At all relevant times the Commissioner seems to have accepted that these were purposes for which Mr Swan purchased the Waitara block, and that it had not been purchased for the purposes of resale or development.

Early in 1975 Trevor Swan decided that he did not want to make farming his career, and that he would not be interested in taking over the Te Rata property. At the time Mr Swan was finding it increasingly difficult to cope with the Te Rata farm, and he immediately put the property on the market. Although the market for flat land, particularly around the New Plymouth and Waitara areas, was very buoyant, the market for high hill country properties was not. He was approached by an Auckland resident, Mr Idoine, whose interest in Te Rata was as a site for a farm/forestry development. Mr Idoine had considerable experience as a subdivider of land for building sites, and was himself at the time subdividing two smaller blocks in Waitara, having noted the keen demand for sections in the New Plymouth and Waitara areas. When he learned that Mr Swan had the Waitara block as well as the Te Rata property he advised that he would only purchase the latter with the former. In the result, after quite brief negotiation, Mr Swan sold both properties to Mr and Mrs Idoine "or their nominee" under agreements for sale and purchase both dated 2 July 1975.

each made conditional upon the completion of the other, and very shortly thereafter purchased a smaller block at Brixton to take the place of the Waitara property. He is still living at Brixton, where he and his son conduct a nursery business.

The sale price for the Waitara block was $92,200. From Mr Swan's evidence I gathered that the main factors which affected his negotiation of the price for the Waitara property were his knowledge of sales of other properties in the area (from which he inferred a sale value by a fairly general comparison of those properties and without any consideration of individual zonings or practicability or economics of subdivision, the advice of his solicitor, (to whom he looked not only for lega and taxation advice but also for general advice on the level of prices in the area,) and the skill in negotiation which he had developed from a life time of buying and selling livestock.

His solicitors considered the possible imposition of property speculation or income taxes, fixed the effective date of the contracts to avoid property speculation tax, and decided that there was no likelihood of any income tax arising from the sale. I do not doubt that they correctly interpreted the tax law as it then stood, and I do not think it can be contended that they, or any other advisers Mr Swan might have chosen, could have been expected to think otherwise.

However, two days after completion of the contracts the Land and Income Tax Amendment (No.2) Act 1975 was enacted, and s.3(5) of that Act provided that it should apply to sales or disposition of land made "on or after 23rd October 1974," thereby making it retrospective for some eight and a half months, and applicable to the contracts completed by Mr Swan subject to their falling within the criteria of the new enactment.

The precise effect of the 1975 Amendment is set out at lengt later. Stated briefly, it added a new paragraph (ca) to s.88AA(1) of the Land and Income Tax Act 1954, and thereby provided that if land were resold within ten years of its

acquisition and the resulting profit was significantly increased by reason of zoning changes or like matters, then that profit could in certain circumstances be deemed assessable incom of the vendor of the land.

Mr Swan's tax year ended on the 31st March. Accordingly the question of assessability of any profit resulting from the sale of his Waitara block came to be considered in the assessment of tax for the year ending 31 March 1976, to which year the Land and Income Tax Act 1954 still applied.

Following receipt of the objector's income return for that year, the Commissioner by letter dated 4 February 1977 advised that he considered the profit from the sale of the Waitara block was assessable income for tax purposes under para.(ca), apart from the 10% which Mr Swan was entitled to deduct in terms of s.88AA(2B). This view was contested by the objector's advisers, but on 30 August 1977 the Commissioner assessed the objector for tax on the stated basis, the assessment being made up as follows:

Income as returned	$9,591.33
Add profit on sale of Princess Street property	$53,145.79
Amended assessable income	$62.737.12
Income tax before rebates	$32,851.16

Mr Swan objected to such assessment, and upon his objection being disallowed the Commissioner was required to state a case for this Court.

At the commencement of the hearing Mr Somerville, as

leading counsel for the objector, stated that he was making three main submissions in support of the objection, namely:

1. That the profits received from the sale of the Waitara block did not fall within the ambit of para. (ca), and that the assessment was accordingly defective at law:

2. If that submission was not upheld, then the objector was entitled to be exempted in whole or in part under s.88AA(2A), a provision under which residential or farming property bought for that purpose and sold to a person whose primary and principal purpose for purchase was the continuation of such use, in cases where the sale or disposition was due to circumstances arising after the acquisition of the land by the vendor, was excluded from the ambit of para.(ca): and

3. If profits arising from the sale of the Waitara block or any part of it were assessable as income for tax purposes, then the method adopted for assessment of profit was incorrect.

During the course of the evidence of Mr Idoine, who was called as a witness for the objector, it became clear that although one of his reasons for purchasing the Waitara block was to use it as a fattening area for stock running on Te Rata, that was a secondary purpose, his primary purpose being to develop the Waitara property as residential sections. In those circumstances Mr Somerville understandably felt compelled to abandon his second main submission.

I was informed by counsel that the only previous decision known to have involved a consideration of the 1975 Amendment, was the decision of Beattie J. in Chittick v. Commissioner of Inland Revenue (Wellington M. 546/78 an unreported decision of 25 May 1979). That decision considered only the question whether or not the sale or disposition of the land there in question by the objector to the Crown was completed prior to the 23rd

October, 1974, and did not consider the scope or effect of the new provision, and accordingly is of no assistance in this case.

Mr Somerville appeared rather to welcome this absence of authority. Certainly, having disclaimed any attempt to apply equitable principles to the interpretation of the Income Tax legislation, he repeatedly emphasised the "iniquitous" effect of this particular legislation on the objector if it were interpreted as it had been by the Commissioner. From this main theme he developed a set of variations, each in some way calling on me to apply a strict or limited interpretation to the 1975 Amendment.

I confess to a real sympathy for the objector, who took all sensible steps to assess his obligations to the revenue before completing the contract for sale of the Waitara block, yet now finds himself asked to pay approximately $30,000 additional income tax, which neither he nor his advisers anticipated could result from that contract. I do not doubt that if he had known that any such result was likely he would not have entered into the contract.

Quite apart from any question of the appropriateness of the imposition of income tax on the type of profits here involved, this case certainly provides a classic example of the inequity which tends to arise from retrospective legislation.

Those matters having been said, my duty is of course to determine and apply the law irrespective of considerations of equity or fairness. I do not doubt that Mr Somerville would hasten to disclaim any contrary approach, but because of the numerous submissions and authorities he tendered on the question of the correct approach to the interpretation of this legislation, it is necessary that I commence by stating the principles which in my view should be applied to such interpretation.

I take the basic principle to be that stated by Lord Halsbury L.C in Tennant v. Smith (1892) A.C. 150 at 154 where he said:

> "In various cases the principle of construction of a taxing Act has been referred to in various forms, but I believe they may be all reduced to this, that inasmuch as you have no right to assume that there is any governing object which a taxing Act is intended to attain other than that which it has expressed by making such and such objects the intended subject for taxation, you must see whether a tax is expressly imposed.
>
> Cases, therefore, under the Taxing Acts always resolve themselves into a question whether or not the words of the Act have reached the alleged subject of taxation."

The requirement that the tax must be "expressly imposed," and the test "whether or not the words of the Act have reached the subject of taxation," both involve a presumption against the imposition of tax by inference. This presumption still remains. Although the vigour with which the Courts have applied the presumption may have relaxed since 1892, when the proposition that "income tax is a tax on income" was an accurate statement of the law, there is no basis in law for adopting a different principle of interpretation merely because a tax is novel in kind, or involves the conversion of what would normally be regarded as a capital gain into assessable income. Such circumstances may give emphasis to the need for "clear and unmistakable language," to adopt the phrase used by Haslam J. in Smith v. Commissioner of Inland Revenue (1969) N.Z.L.R. 565 at 570 I do not accept, however, that it is appropriate to apply a "strict"or "limited" interpretation to tax legislation for any such reasons, if those terms imply any additional restriction on the operation of the statute beyond that which is involved in the principles enunciated in Tennant v. Smith (supra).

I accept that a further rule of interpretation is to be applied in the case of this particular legislation, namely that its retrospective effect must be limited to that extent which is rendered necessary by its language: see Reid. v. Reid

(1886) 31 Ch. D. 402, Lauri v. Renad (1892) 3 Ch D. 402 and Re 14 Grafton Street (1971) 2 All E.R. 1. However, the extent of the retrospective operation of this legislation is clear beyond doubt, so that giving its retrospective application a "limited" construction in no way alters the meaning one would otherwise attain. Indeed, Mr Somerville conceded that he could not contend that this factor in the end had significance in the interpretation of the 1975 Amendment.

The significance of any conversion of what would normally be regarded as capital into taxable income must also be measured both against the general increase in the use of such provisions, and the particular context of this provision.

I noted with interest that two of the authorities cited by the objector on the subject of interpretation dealt with provisions taxing profits which would normally be regarded as capital, and that neither suggested that any particular emphasis should result from that circumstance. Those decisions were

(a) Russell (Inspector of Taxes) v. Scott (1948) A.C. 422. Mr Somerville referred to the speech of Lord Simonds at the foot of p.433 of that report where he said:

> "My Lords, there is a maxim of income tax law which though it may sometimes be overstressed, yet ought not to be forgotten. It is that the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him. It is necessary that this maxim should on occasion be reasserted and this is such an occasion."

The use of the term "unambiguously" seems to me to do no more than restate the same principles as had been propounded in 1892 by Lord Halsbury. However, of equal interest is the last paragraph of the speech of Viscount Simon which appears at the top of p.433 and reads:

> "I must add that the language of the rule is so obscure and so difficult to expound with confidence that - without seeking to apply any different principle of construction to a Revenue Act than would be proper in the case of legislation of a different kind - I feel that the taxpayer is entitled to demand that his liability to a higher charge should be made out with reasonable clearness before he is adversely affected."

(b) Watkins v. Kidson (1979) 2 All E.R. 1157 in which Lord Wilberforce at p.1160a said:

> "But it seems clear that some anomalies must arise on either view of the paragraph and this is not surprising in new and uncharted legislation. They are not so startling as to influence interpretation either way. I think it safe to say that the Crown's argument for the application of para 23 is rather more rational than the taxpayer's for its exclusion."

The relevance of the first of these decisions to New Zealand is probably greater than the second, in that the second dealt with a situation where a capital gains tax was operating.

The significance ofthe context of this provision as part of s.88AA also in my view has a bearing on whether or not any conversion of what would clearly be capital gain into assessable income is to be regarded as specially significant.

Section 88AA was analysed by Roper J. in Lowe v. Inland Revenue Commissioner (1979) 9 A.T.R. 912, and I should like to adopt with respect and gratitude his careful analysis of s.88AA as it was prior to the addition of the paragraph (ca), this analysis commencing on p.916 of the cited report and continuing through to p.921. In the course of such analysis the learned Judge noted that s.88AA was enacted by reason of the difficulties which the Commissioner had encountered in obtaining the classification of profits from sales or dispositions of land as assessable income, the previously relevant s.88(1)(c) having been restricted to dealings in the nature of trade or business, or to cases where land was acquired for the purpose of profit. He considered whether or not s.88AA (1d) and (1e) in particular

were intended to tax profits on the types of dealing with land considered in those provisions, irrespective of whether those profits would normally be considered as having the character of capital or income, and concluded that at least in the case of S.88AA(1d), with which he was directly concerned, that was the case.

I have endeavoured to ascertain what significance can be given to the appellation of the new provision "paragraph (ca)." One would assume from that appellation that in some way it should be related to paragraph (c). However I can find no such relationship, whether by way of amendment, or supplement or otherwise, and have concluded that in fact the new provision simply adds a sixth class of transactions in land to the five already described in paragraphs (a), (b), (c), (d) and (e), of s.88AA(1).

But in the context of the overall purpose and significance of s.88AA as analysed in Lowe's case it is surely less a matter for surprise than might otherwise be the case to find that paragraph (ca) appears to tax profits from the particular type of dealing in land with which it is concerned irrespective of whether these profits would normally be classified as capital or income in nature. This of course was found to be the effect of s.88AA(1d) in Lowe's case.

Turning now to a direct consideration of paragraph (ca) the provision, put into the context of s.88AA, reads as follows:

> "88AA. Profits or gains from land transactions - (1) For the purposes of paragraph (cc) of subsection (1) of section 88 of this Act, the assessable income of any taxpayer shall be deemed to include -
>
> (a) ...
>
> (b) ...
>
> (c) ...

(ca) All profits or gains, not being profits or gains which are included in the assessable income pursuant to any of the paragraphs (a), (b), (c), or (d) of this subsection, derived from the sale or other disposition of land where that land was sold or disposed of by the taxpayer within 10 years after the date on which it was acquired by him and, in the opinion of the Commissioner, at least 20 percent of the amount of those profit or gains was due to any one or any combination of 2 or more of the following:

"(i) Any zoning or change of zoning in relation to that land under the Town and Country Planning Act 1953 after the acquisition of that land by th taxpayer; or
"(ii) The likelihood of any such zoning or change of zoning; or
"(iii) Any consent granted in relation to that land pursuant to any provision of that Act or any decision of the Town and Country Planning Appeal Board made in relation to that land pursuant to that Act, where that consent was granted or that decision made after the acquisition of that land by the taxpayer; or
"(iv) The likelihood of any such consent being granted or of any such decision being made; or
"(v) The removal of any condition, obligation, restriction, prohibition, or covenant imposed under that Act in relation to that land, where that removal occurred after the acquisition of that land by the taxpayer; or
"(vi) The likelihood of the removal of any such condition, obligation, restriction, prohibition, c covenant; or
"(vii) Any change or occurrence of a similar nature to any of the changes or occurrences referred to in any of the foregoing subparagraphs of this paragraph or the likelihood of any such change or occurrence in respect of or in relation to that land:". "

(d) ...

(e) ... "

Mr Somerville made very careful and lengthy submissions on the construction of paragraph (ca), and it is convenient to indicate my interpretation of this provision by reference to his submissions upon it.

The first portion of the paragraph to which he gave particular attention was the opening phrase, "all profits or gains." It was contended that the apparent generality of that phrase was illusory, and that the profit or gain must be restricted to that arising from whatever part of the land sold

came within the classes or criteria set out in sub-paragraphs (i) to (vii) of (ca.)

I am not attracted by that argument. Although some support for it can be gained from the use of the single phraise "that land" in the operative portion of the paragraph and in each of the sub-paragraphs, they must be considered in the total context of s.88AA, and in particular with regard to s.88AA(7).

However I do not need to reach any firm conclusion on that point, as on the finding of facts which I later make it has no relevance in this case, my finding being that in respect of the whole of the land sold there was at the relevant time the likelihood of one or both of the criteria set out in sub-paragraphs (ii) and (iv) in the form of zoning, change of zoning, or consent to specified departure, permitting the use of the land for residential development. The reasons for that finding will be set out later.

The second point to which Mr Somerville paid particular attention was the time at which any of the criteria (i) to (vii) must be found to exist, it being the objector's submission that such criteria must be found to exist at the time of sale because at that time the profit or gain from the sale or disposition becomes fixed. I have no doubt that this submission is well founded, and indeed I did not understand Mr Bridger as counsel for the Commissioner to submit otherwise.

However, there was a strong difference between the parties as to the matters to which the Court could properly give attention in deciding whether or not such likelihood existed at the time of sale. The objector maintained that the Court's horizon was limited to facts existing at that time, whereas the Crown contended that matters occurring after the sale could be considered if they were logically relevant to the existence or otherwise of a likelihood at the date of sale.

I consider that the Commissioner's contention is the only sensible and logical one, and that it is a question of relevance rather than any chronological limit which determines the matters to which the Court should pay regard.

The vigour of the objector's submissions on this point no doubt had regard to the fact that very shortly after the completion of the contract Mr Idoine made applications both to the Waitara Borough and the Clifton County for consent to specified departure from the then rural zoning of the land to enable him to carry out a residential subdivision of it, and that such applications were consented to by the Borough Council on the 12 November 1975, and the County Council on the 14 November 1975. The schemes to which consent was given covered the whole of the land in question, but detailed plans for development were limited to approximately one half of the property. This limitation was the result of Mr Idoine's view that immediate development of a larger area would merely flood the market..

No doubt it would be wrong to say that, because a specified departure was obtained after the sale, this established that a likelihood existed at the time of sale. The fact that applications were made almost immediately after the sale is however in my view relevant as indicating that the applicant, a very experienced subdivider, concluded that it was worth his while at that time to make such applications. The fact that the applications were granted in November has less relevance, because of its greater distance in time from the effective date. Both matters taken together would be inadequate in my view to establish likelihood, but each in my view is a relevant matter to likelihood of zoning or re-zoning or the granting of a consent to a specified departure at the relevant date, just as refusals of the applications in November would have been relevant.

The evidence of matters prior to the completion of the sale, which are of much greater significance than those just mentioned, and which have led me to the conclusion that there clearly was a likelihood of one or more of the circumstances described in sub-paragraphs (ii) and (iv) of paragraph (ca) are:

(a) The evidence of a meeting between the Waitara Borough and the Clifton County in 1973, at which meeting both bodies agreed to promote the residential development of certain areas, in particular the area including and surrounding the Swan property. The meeting in question was held on the 29th June 1973 and that is to say some four months prior to the acquisition of the Waitara block by Mr Swan. At the time the Borough portion of the property was zoned rural. The Borough had previously considered zoning it residential, but had been prevented from doing so by an objection by the Ministry of Works. The County portion had not been zoned but the minutes of the meeting show that the County agreed that both bodies engage a surveyor to prepare a roading pattern covering the area proposed to be made residential, that the Borough indicated that it had no objection to the County zoning the area residential in its proposed Scheme Plan, and that the Borough agreed that when its Town Plan came up for review "in approximately three years," its portion of the area would also be zoned residential.

(b) At a date which was not clearly defined, but was either in 1973 or 1974 and accordingly before the sale of the Swan property to Idoine, the owners of an area of 5 acres fronting Princess Street, which was immediately adjacent to the Swan property and like it zoned rural but within the area proposed to be rezoned residential upon review of the Borough plan, made application for consent to a specified departure to permit the land to be used for residential development. In

accordance with the normal procedures notice of such application was given to the Ministry of Works and advertised . There were no objections to the application, and consent was granted by the Borough Council.

(c) On the 17 April 1975 the Clifton County advertised its proposed District Scheme Plan in the Taranaki Press, showing the County portion of the land as "Residential 1980 Deferred."

These factors taken in combination, together with the fact of increasing residential development of the areas more immediat ely adjacent to the Waitara township and lying between the Swan property and the township, whether considered alone or in the light of the subsequent applications by Idoine, appear to me to prove beyond doubt the existence of a likelihood of a new or changed zoning such as is contemplated in sub-paragraph (ii), or of a consent being granted to an application for specified departure as contemplated in sub-paragraph (iv), to allow the use of the land for residential purposes.

The objector made a number of submissions as to the proper meaning to be given to the term "likelihood," which counsel pointed out was a term of some novelty in New Zealand tax legislation. Counsel for the objector referred to the decisions in:

(a) Carmichael v. Cockburn & Co. Ltd (1955) S.C.487 where the phrase "likely to be injurious" was considered. It was held that such phrase was to be assessed objectively in the first instance, but that the employer's knowledge of likelihood could be a factor of relevance in considering whether all practical measures had been taken by him to avoid injury:

(b) Dowling v. South Canterbury Electric Power Board (1966) 1 N.Z.L.R. 676 where Henry J. considered the phra se "is likely

to cause damage" under s.324 of the Public Works Act 1928, which is concerned with the removal of trees which may cause damage to electric lines. In that case the learned Judge thought that the phrase "likely to cause damage" was plain in its meaning, although not necessarily easy to apply to different factual situations. He equated the term "likely" with "reasonable probability": and

(c) Transport Ministry v. Simmonds (1973) 1 N.Z.L.R. 359 where McMullin J. considered the word "likely" as it appears in regulation 36 of the Civil Aviation Regulations 1963. At p.363 l.29 he said:

> "In my view the meaning to be given to the word "likely" where it is used in a statute or regulation will depend upon the statute or regulation and the context in which the word is used. An event which is likely may be an event which is probable but it may also be an event which, while not probable, could well happen. But it must be more than a bare possibility."

I would respectfully agree with the variable meaning approach adopted by McMullin J. In this case also "bare possibility" clearly would not establish likelihood, but I would myself have thought that something less than probable might suffice. However, the definition suggested by counsel for the Commissioner was that of "reasonable probability", the same meaning which Henry J. adopted in Dowling's case. While I think that may have been somewhat generous to the taxpayer objector, it is by no means so unreasonable an interpretation as to be unacceptable, and I am prepared to adopt it for the purposes of this case. Doing so, I remain convinced that the evidence establishes a likelihood to the standard of reasonable probability.

Before leaving that topic, I should specifically note that I disagree with the proposition urged by the objector that "likelihood" refers to the occurrence of change, be it by

zoning or by specified departure or conditional use or otherwise in the immediate future. In my view there is no particular time limit involved. It is sufficient if there is a likelihood of th occurrence of one of the stated circumstances occurring sufficiently soon to create a 20% share of profit resulting from the sale. If the likelihood of change is too remote, then it will not produce such a percentage of profit. The percentage arrangement itself provides an ultimate limit which in my view makes the insertion by inference of any other time limit inappropriate and unnecessary.

The next submission for the objector was that the opinion of the Commissioner that at least 20% of the profits or gains was due to one or more of the stated criteria must be based on rational grounds, and that although the onus lay on the objector in terms of S.36 of the Inland Revenue Department Act 1974, this did not over-ride the duty which remained on the Commissioner to make a rational assessment and to act with fairness and impartiality. For this proposition counsel cited Louisson v. Commissioner of Taxes (1943) N,.Z.L.R. 1 at p.10. The principal of that submission seems to me to be unobjectionable, but of course its application is the critical matter.

Here the objector maintained that a consideration of the correspondence would entitle me to infer that the Commissioner had based his opinion solely upon his discovery that applications for specified departure had been made successfully by Mr Idoine. and the substantial difference between purchase and sale prices, and accordingly had reached an "ex post facto" and unjustifiable conclusion. I certainly do not accept that the evidence indicates that the Commissioner's opinion rested on any such limited considerations.

On the other hand, I am not satisfied of the correctness of the approach made by the Commissioner to the calculation of the proportion of profit attributable to one or more of the

matters specified in paragraph (ca.)

As I understood Mr Bridger, the steps claimed to be appropriate for the determination of this percentage were as follows:

Step I. Ascertain the net proceeds of sale, and deduct from these the net cost of purchase, in order to determine the "profits or gains ... derived from the sale or other disposition ...".

Step II. Ascertain the market value of the land at the date of resale on the basis that no change had occurred and no likelihood of change existed; i.e. in this case value the land as rural land which had no prospect of a change from rural use - and then deduct that value from the sale price, in order to find the amount of profit or gain due to the circumstances listed in paragraph (ca).

Step III. By arithmetical comparison of the figures so found, determine whether the amount ascertained by Step II is at least 20% of the amount ascertained by Step I, and thereby ascertain whether "at least 20% of the amount of those profits or gains was due to any one or any combination of two or more" of the seven specified circumstances. If so, claimed Mr Bridger, then paragraph (ca) must apply.

I accept that the method of calculating the total profits or gains from the sale set out in Step I is appropriate in cases such as this where the whole property sold is affected by "zoning potential", save that I would add to the net cost of acquisition an appropriate allowance for any capital improvements effected to the land between the dates of acquisition and sale wherever the evidence justified that action. No claim was made for such costs in the present instance, although the evidence showed that some improvements had been made. It would appear that the amount involved would not be substantial. However, if, as

may be possible, that factor were likely to be important, I consider that the objector should be invited by the Commissioner to advise whether or not he contends that any such allowance should be made, and if so invited to state what allowance he claims, and submit evidence in support of such claim to the Commissioner for his assessment. Unless such a claim is made, th profit of $59,050 calculated by the Commissioner is in my view a correct calculation of the profit resulting from the resale of the land by the objector to Mr Idoine.

I do not accept that Step II is equally appropriate, and this for two reasons. The first is that it compares the "sale price" of the land in its actual condition, (i.e. with its zoning potential) with its "market value" without that potential. It may well be proper for the Commissioner to assume, unless special circumstances are shown, that the sale price is sufficient prima facie evidence of market value. But if there are circumstances suggesting that the land had a special value for the purchaser, and certainly where as here there is evidence that it had such special value, the correct comparison must be between market value of the land with the zoning potential and the market value of the same land without it.

When I put this proposition to Mr Bridger his response was that he could see no logical criticism of or objection to the idea of using market value for both sides of the comparison and excluding special value, but he submitted that even if this were done the figure then resulting would clearly exceed 20% of the total profit from the sale.

The second objection in principle to regarding the procedure set out in Step II as a principle of general application is that it fails to take account of any zoning potential existing at the time of acquisition of the land.

Mr Somerville argued that "if the likelihood of rezoning wa

in existence at the date of acquisition, then paragraph (ca) cannot apply". In support of that proposition he noted that sub-paragraph (i) of paragraph (ca) refers to zoning or change o zoning "after the acquisition of" the land by the taxpayer, and sub-paragraph (ii) refers to the likelihood of "any such zoning or change of zoning". Similarly he referred to the like language in sub-paragraphs (iii) and (iv) and again in sub-paragraphs (v) and (vi). He contended that because the circumstances noted in paragraphs (i) (iii) and (v) had to arise or occur during the period between acquisition and resale, so also must the likelihood of any such event. If it were not so, he argued, the same degree of likelihood could result in successive vendors of one property being taxed on profits which each in turn derived from sales even though the whole of the profit from all sales after the first could be shown to be referrable not to the likelihood of any change of zoning, but solely to the general inflation of land values in the area.

In my view this is the one area of paragraph (ca) where the principles in Tennant v. Smith (supra) and Smith v. Commissioner of Inland Revenue (supra) requiring that the tax must be "expressly imposed" and that "the words of the Act reach the alleged subject of taxation," and that the meaning of the words implying the tax obligations must be "clear and unmistakable", have application.

I do not consider that on the ordinary grammatical meaning of sub-paragraph (ii) (iv) and (vi) it is necessary to place a limit upon their application in the manner urged by Mr Somerville. But equally I consider it can be argued that, when the paragraph talks of profits "due to" the likelihood of zoning potential, it wpuld be inappropriate to apply sub-paragraphs (ii) (iv) and (vi) as if the mere existence of such likelihood at the date of sale proved that any profits were "due to" that factor.

I consider that profits can only be "due to" something if caused by that factor, and that in this case the consideration whether or not profits were due to zoning potential involves considering:

(a) Whether any such potential existed at the date of sale

(b) If so, whether any like potential (even though it migh be in lesser degree) existed at the date of acquisition: and

(c) If both (a) and (b) are answered in the affirmative, the extent of the increase in value of such likelihood between the date of acquisition and the date of sale.

In other words, while I do not accept Mr Somerville's submission that the fact that a likelihood exists at the date of acquisition automatically involves that the requisite proportion of the profits on resale cannot be due to a similar likelihood existing at the date of sale, I do hold that the essential question is the increase in value of such potential, if it did exist in any significant form when the property was acquired, over the period between acquisition and sale.

I consider next the question of special value.

In this case it seemed reasonably clear to me from the evidence that the land had a special value to Mr Idoine, and I invited Mr Larmer (the valuer called for the objector,) to advise me what he considered the market value of the land in question to have been at the time of sale. He was unable to express any definite opinion at that time, but with consent of the Crown was later recalled, and expressed the opinion that the market value was of the order of $87,500 to $90,000.

By the time that Mr Johnston, the valuer called for the Commissioner came to give his evidence he had notice of this matter. He calculated the market value at a figure of $82,000 which of course would have given a special value figure of $10,200.

Largely because of the additional time which had been given to him to consider his valuation, and because of the two methods of approach to the market valuation of the property including it subdivisional potential, I prefer that adopted by Mr Johnston, I accept his figure of $82,000 for market value.

Both valuers were obviously experienced and competent valuers. Each had only been asked to value the Waitara block at the date of the sale to Idoine upon the basis that it then be regarded as having no potential for subdivision: in other words, as rural land. On this basis Mr Larmer had valued it at $60,000, and Mr Johnston at $58,000. Both regarded the differen between their assessments as relatively insignificant, and in my view sensibly so. There is little doubt that no land valuer can be accurate to within 2 to 3%. I can see no reason for preferring either valuation to the other, and accordingly take the average of the two, or $59,000, as being the value of the la at the date of sale, disregarding any potential for subdivision.

On that basis it would appear that $23,000 is properly attributable to the "subdivisional potential," or "zoning potential," whichever term be considered the more appropriate, at the date of sale.

The next matter for consideration is whether the evidence does disclose a "likelihood", in terms of sub-paragraphs (ii) an (iv), at the time of acquisition of the land by Mr Swan in Octob 1973. I consider it does show such likelihood, though to a lesser degree, to have existed at that time. It will be recalled that by that time the County and Borough had already agreed to promote the development of this area for residential subdivision. However, there was no evidence called which enables me to estimate in any proper fashion the value of that likelihood at the date of acquisition. It may be that the amount will not be of such magnitude as to be relevant, but I am not prepared to prejudge that matter.

I note that the Government capital valuation of the Waitara block (stated to have been made in 1972 and 1974, presumably because part had been valued for the County and part for the Borough,) is set out in Exhibit 2 at the total figure of $21,000. Clearly this area was changing rapidly in character and value from multiple factors, and in my view the objector is entitled to require examination of all the relevant factors before he is called upon to pay the very considerable amount of tax here involved.

Summarising the results of the different findings to this state:

1. Subject only to the question of any claim for capital improvements I find the profits or gains from the sale of the Waitara block from the objector to Mr Idoine on the 2nd July 1975 to be correctly assessed at $59,050, this of course being before any allowance under s.88AA(2B):

2. I find ~~that~~ the value of the "likelihood of development" potential at the date of sale to be $23,000, that is the difference between the $82,000 market value including potential and the $59,000 market value disregarding such potential.

3. I find that there was a likelihood in terms of sub-paragraphs (ii) and/or (iv) at the date of acquisition which will require to be quantified, by applying the principles indicated above, and then deducted from the figure of $23,000 in order to find the amount of total profits or gains due to the factors set out in paragraph (ca.)

For these various reasons it seems to me that the appropriat course is not to attempt myself to determine the liability of the objector, but to exercise the powers given to me by s.32 11 (b) of the Land and Income Tax Act 1954, and to direct the Commissioner to make an assessment on the basis of the principles and facts found. This will necessitate his assessing the value

of the likelihood of a zoning change or specified departure, conveniently called "zoning potential", at the date of acquisition,and inviting the taxpayer to specify whether or not it claims an allowance for capital improvements made during the period between acquisition and resale, and then completing an assessment on the basis of his determination of those matters, and in accordance with the principles set out above.

If the net value of zoning potential after deducting the value of such potential at the date of acquisition equals or exceeds 20% of $59,050 less the value at the date of sale of any capital improvements as mentioned above, then in terms of the previous findings the profits from the sale of the Waitara block to Mr Idoine will be assessable income of the objector. Equally, if the net figure so found is less than 20% of such profits, then none of the profits are assessable income of the objector.

Before completing this judgment I ought to note and deal with submissions made by Mr Somerville about the possibility of exclusion of profits arising from inflation. It was understandable he should do so as both valuers accepted that there had been something of the order of 100% inflation in the value of rural land over the 1973-1975 period.

The same question was considered in Lowe's case by Roper J. who did not accept that inflation could be brought into account.

The only authority cited to support such a contention was Secretan v. Hart (1969) 3 All E.R. 1996, which in fact is an authority against the bringing of inflation into account. At p.1199 paragraph H. Buckley J. summarised the extraordinary difficulties which would follow any attempt to introduce inflation accounting into taxation and said that any such claim "would involve complicated research and complication to arrive at the amount of profit made in respect of any particular asset." I feel bound to follow the same course as was followed by Roper J

in Lowe's case, and hold against the introduction of inflation accounting in the assessment of profit in terms of paragraph (ca.

Leave is reserved to either party to apply for further directions, in the event that those contained in the judgment are not sufficient.

DSP J.