

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA668/2022
[2023] NZCA 290**

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| BETWEEN | BUSHMERE TRUST Appellant |
| AND | GISBORNE DISTRICT COUNCIL Respondent |
| | VALUER-GENERAL Interested Party |

Hearing: 10 May 2023

Court: Collins, Hinton and Gendall JJ

Counsel: T Mijatov and N S C Buxeda for Appellant
H P Harwood and O J V D Maassen for Respondent
S P Connolly and N B de Lautour for Valuer-General

Judgment: 11 July 2023 at 9.30 am

JUDGMENT OF THE COURT

- A The appeal is dismissed.**
- B The respondent is entitled to costs for a standard appeal on a band A basis together with usual disbursements. We certify for two counsel.**
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REASONS OF THE COURT

(Given by Collins J)

Introduction

[1] SunGold kiwifruit¹ is a highly valued orchard fruit. Land upon which SunGold kiwifruit is grown sells for approximately \$1,000,000 per ha compared to approximately \$400,000 per ha for green kiwifruit, and \$30,000 to \$50,000 per ha for crops such as oranges, avocados and feijoas.

[2] SunGold kiwifruit can only be grown pursuant to a licence issued to a landowner by Zespri International Ltd (Zespri).² The licence is personal property and not an estate or interest in land, although it authorises the growing of SunGold kiwifruit on a specified area of land. Under the licence, when a SunGold kiwifruit orchard is sold, the vendor is required to include a transfer agreement between Zespri and the purchaser as a condition of the sale. Zespri's approval for the sale or transfer of the licence is required under the licence. Zespri has never declined to approve a sale or transfer. We will explain in further detail the terms of SunGold kiwifruit licences at [15] to [21].

[3] Bushmere Trust (Bushmere) owns a 5.86 ha block of land located about 10 km from Gisborne. SunGold kiwifruit is grown on 3.11 ha of Bushmere's land pursuant to a licence issued by Zespri to Bushmere.

[4] In 2020 the Gisborne District Council (the Council) adopted a new approach to assessing the rateable value of SunGold kiwifruit orchards. Previously the practice of valuation service providers across the country was to deduct the separate SunGold licence value from the market value of the property. Following a meeting between the valuation providers and the Valuer-General, it was agreed that the deduction was inconsistent with the requirements of the Rating Valuations Act 1998 (the Act). The Council was the first local government to implement the new approach. As a consequence, the capital value of Bushmere's property was assessed at \$4,100,000.

¹ Also called "Gold 3" and "G3 kiwifruit".

² Zespri was incorporated in 2000 pursuant to the Kiwifruit Industry Restructuring Act 1999.

The previous methodology used by the Council had the effect of assessing the capital value of Bushmere's property as if it were equivalent to a green kiwifruit orchard (no licence is required to grow green kiwifruit). Had the previous methodology been used in 2020, the capital value of Bushmere's property would have been assessed at about \$2,800,000.

[5] Bushmere objected to the Council's 2020 valuation. When the Council decided not to change its valuation, Bushmere lodged an objection with the Land Valuation Tribunal (the Tribunal), which agreed with Bushmere and concluded the value of the SunGold kiwifruit licence should be deducted from the capital value of the property, (as it had been under previous rating valuations).³ The Tribunal concluded that the capital value of Bushmere's property at the date of the Council's 2020 revaluation was \$2,800,000.⁴

[6] The Council successfully appealed to the High Court where Palmer J, sitting with Mr W Reid, a valuer, reached the following key conclusions:⁵

- (a) The capital value of land is a proxy for fair market value.
- (b) The value of Bushmere's property was enhanced by the SunGold kiwifruit licence held by Bushmere.
- (c) The value of improvements was not relevant when determining the capital value of land.
- (d) The capital value of Bushmere's property includes the SunGold kiwifruit licence.

[7] Bushmere now appeals the High Court judgment. The principal issue is whether SunGold kiwifruit which is grown on property pursuant to a licence issued to the landowner affects the capital value of the land.

³ *Bushmere Trust v Gisborne District Council* [2022] NZLVT 002 [Land Valuation Tribunal decision].

⁴ At [45].

⁵ *Gisborne District Council v Bushmere Trust* [2022] NZHC 2085 [High Court judgment] at [1] and [36].

Relevant legislation

Local Government (Rating) Act 2002

[8] Under s 13(3)(a) of the Local Government (Rating) Act 2002 a local authority may use one of three methods for setting the rateable value of land, namely:

- (a) the annual value of the land;
- (b) the capital value of the land; or
- (c) the land value of the land.

[9] We make three points about s 13 of the Local Government (Rating) Act:

- (a) As we have indicated, the Council assesses the “capital value of land” when setting rates.
- (b) The “annual value of the land” method of setting rates is no longer used by any local government in New Zealand.
- (c) The “land value” method of valuation was previously described as the unimproved value of land.⁶

Rating Valuations Act 1998

[10] Under s 2 of the Act, capital value of land is defined in the following way:

[C]apital value of land means, subject to sections 20 and 21, the sum that the owner’s estate or interest in the land, if unencumbered by any mortgage or other charge, might be expected to realise at the time of valuation if offered for sale on such reasonable terms and conditions as a bona fide seller might be expected to require.

⁶ See the definition of “unimproved value” in s 2 of the Valuation of Land Act 1951.

[11] Also relevant are the definitions of land, improvements and value of improvements:⁷

[L]and means all land, tenements, and hereditaments, whether corporeal or incorporeal, in New Zealand, and all chattel or other interests in the land, and all trees growing or standing on the land.

...

[I]mprovements, in relation to any land, means all work done or material used at any time on or for the benefit of the land by the expenditure of capital or labour, so far as the effect of the work done or material used is to increase the value of the land and its benefit is not exhausted at the time of valuation;

...

[V]alue of improvements means the added value which at the date of valuation the improvements give to land.

[12] The definition of capital value of land is subject to ss 20 and 21 of the Act. Section 21 concerns the value of land that is subject to a lease and is therefore not relevant to this appeal. Section 20 is, however, pivotal. Section 20(1) and (2) state:

20 Value of trees and minerals

- (1) The value of any trees is not to be included in any valuation under this Act unless the trees are fruit trees, nut trees, vines, berryfruit bushes, or live hedges.
- (2) The value of any fruit trees, nut trees, vines, berryfruit bushes, or live hedges is not to be taken into account in assessing the land value of any rating unit under this Act.

...

[13] Thus, the value of kiwifruit vines can be included in an assessment of the rateable value of land where local governments like the Council rely on the capital value of land but not where a local government uses the land value method of assessing the value of rating units under the Act.

⁷ Ratings Valuations Act 1998, s 2.

[14] The interpretation we have summarised at [13] coincides with the response given by the responsible Minister to the following question asked by the Hon Dr M Cullen during the second reading of the Bill that became the Act:⁸

As I understand it, subclause (2) means that if one is assessing the land value of the property, then the fact that there are productive trees on the land – fruit trees, vines, berryfruit bushes or whatever – does not affect the land value, for the fairly simple reason that those productive assets could very easily be removed from the land. Potentially, they are a very temporary phenomenon, and therefore are not relevant to the value of the land itself. What is important to the value of the land is its intrinsic, productive capacity, or its value in terms of urban property, etc.

But when one looks at the valuation for capital value purposes, then the existence of things like fruit trees, or nut trees, or vines, or berryfruit bushes are to be taken into consideration. The value of those trees could be included in the capital value of the property for the purposes of the rating, but not in the land value of the property. Have I got that distinction correct? Is that what is meant by the difference between subclauses (1) and (2)?

The Minister agreed with the Members' analysis of what became s 20(1) and (2) of the Act.

Terms of the licence

[15] Ms McCarthy, the Head of Grower Services for Zespri provided an affidavit for the Tribunal. She also provided a copy of the standard Zespri SunGold kiwifruit licence and transfer agreement. Five key points emerge from Ms McCarthy's evidence.

[16] First, under cl 2 growers are required to purchase and hold a SunGold kiwifruit licence from Zespri in order to grow SunGold kiwifruit.

[17] Second, under cl 7.1(d) growers can only sell SunGold kiwifruit to Zespri, which exports and markets the fruit.

[18] Third, under cls 2.1 and 4.1 the licence authorises the growing of SunGold kiwifruit within a specified area and requires the planting/grafting of SunGold kiwifruit vines by a specified date.

⁸ (17 June 1998) 569 NZPD (Rating Valuations Bill – Second Reading).

[19] Fourth, under cl 4.3 Zespri will not approve the sale or transfer of any licence to a purchaser until:

- (a) the planting/grafting of vines has been completed to Zespri's satisfaction; and
- (b) any debt owing to Zespri for the licence has been settled in full.

[20] Fifth, under cls 12 and 13 if a licensee agrees to sell their rights to grow SunGold kiwifruit, then the licensee must obtain Zespri's approval for the sale. Zespri will then issue a temporary licence to the purchaser for a period of 30 days to enable the completion of a new licence with the purchaser.

[21] Ms McCarthy explained that Zespri audits licensed SunGold kiwifruit orchards to ensure planting/grafting has taken place and monitors the orchards through GPS mapping services.

Expert evidence

[22] Three valuers gave evidence before the Tribunal.

[23] Mr Inder was engaged by the Council in 2020 to undertake a general revaluation of the 23,264 rating units within the Council's boundaries, including the Bushmere property.

[24] Mr Inder summarised his evidence in the following way:

- (a) An assessment of the capital value of a property requires an assessment of market value based on the property's highest and best use.
- (b) The methodology applied to valuing a licensed orchard is the same as for a non-licensed orchard. The difference in capital value between a licensed property and an unlicensed property is the anticipated returns between the two types of property.

- (c) Where a licence allows a property to be used in a more intensive way, this enhancement should be recognised in rating valuations in line with how the market treats similar properties.
- (d) Orchards with SunGold kiwifruit licences are sold inclusive of the licence and rating valuations ought to align with market realities.

[25] Mr Inder assessed the capital value of the Bushmere property as \$4,400,000 as at 1 September 2020.

[26] Mr Boyd was retained by the Council to provide expert evidence. His opinion was that as SunGold kiwifruit licences are reflected in the market price obtained when a SunGold kiwifruit orchard is sold, the licence is inherently part of the property.

[27] Bushmere engaged Mr Gross to give expert valuation evidence. He said that the correct valuation methodology for calculating the rateable value of the Bushmere property was different from that advocated by Mr Inder and Mr Boyd. Mr Gross assessed the market value of Bushmere's property as being \$4,050,000. Mr Gross, however, assigned a value of \$1,275,000 to the SunGold kiwifruit licence. He reasoned that because the licence was not an improvement to the Bushmere property, he should deduct \$1,275,000 from the market value to arrive at a capital value of \$2,775,000 for the property.

Grounds of appeal

[28] Three principal grounds of appeal are advanced by Bushmere.

[29] First, the definition of capital value of land in the Act required the Council to value Bushmere's estate or interest in its land. The licence issued to Bushmere by Zespri is personal to Bushmere and does not run with the land. Because the licence does not form part of Bushmere's estate or interest in its land, the licence must be put aside when assessing the capital value of Bushmere's property.

[30] Second, the capital value of land encompasses the value of land and improvements to land. The licence issued by Zespri is neither land nor an improvement to land.

[31] Third, the purpose of the capital value methodology is not to establish a “true” or “market” value of property. Instead, the capital value involves placing a value on components of the definition of capital value in order to achieve a uniform approach to rating properties within the boundaries of a local government.

[32] These three grounds of appeal lead to Bushmere contending that the High Court erred when it concluded:

- (a) capital value of land was a proxy for the market value of the property;
- (b) the licence issued by Zespri enhanced the value of Bushmere’s land;
and
- (c) the value of improvements was not relevant to determining the capital value of land.

[33] Bushmere argues that the value of its SunGold kiwifruit licence should be deducted from the capital value of its land and the determination of the Tribunal reinstated.

Council’s position

[34] The Council contends that the definition of capital value of land serves as a proxy for the fair market value of land. The High Court correctly concluded that the SunGold kiwifruit licence was intrinsically linked to Bushmere’s land and therefore is properly included in the assessment of the capital value of Bushmere’s property.

[35] The Council submits that if Bushmere’s property were sold, the vines and the licence would be transferred and novated to the purchaser. The sale price would reflect the value of the vines and the licence. It is therefore artificial to separate the licence from the vines.

Valuer-General

[36] The Valuer-General became an interested party in the High Court and made submissions. The Valuer-General repeated the essence of those submissions before us. The submissions from the Valuer-General were similar to those of the Council. In summary, the Valuer-General submitted:

- (a) The combined effect of the definition of capital value of land and s 20 of the Act means the SunGold kiwifruit vines must be taken into account in determining the capital value of Bushmere's property.
- (b) The definition of capital value contemplates a hypothetical market transaction, which would include the sale and purchase of the licence.
- (c) The High Court correctly concluded any "improvement" is not relevant to assessing the capital value of the land in question.

Analysis

Valuation methodology

[37] In *Re Wright's Objection*,⁹ Judge Archer, described as "a most competent and experienced Judge of the Land Valuation Court",¹⁰ said:¹¹

It is well recognized that a valuer must disregard improvements when assessing the [land value], and in assessing the capital value of land by reference to what it would realize in the open market, it seems neither necessary nor desirable to attempt to value the improvements, either individually or as a whole. Having made an assessment of the capital and [land] values, the valuer is entitled to assume that the difference between these values is the added value given to the land by improvements or, in other words, that it is the value of the improvements.

[38] Judge Archer's observations were endorsed by this Court in *McKee v Valuer-General*¹² and *Re 110 Martin Street, Upper Hutt*¹³ when it said in the latter:¹⁴

⁹ *Re Wright's Objection* [1959] NZLR 920 (LVC).

¹⁰ *Re 110 Martin Street, Upper Hutt* [1973] 2 NZLR 15 (CA) at 17.

¹¹ *Re Wright's Objection*, above n 9, at 922.

¹² *McKee v Valuer-General* [1971] NZLR 436 (CA) at 440.

¹³ *Re 110 Martin Street, Upper Hutt*, above n 10, at 17–18.

¹⁴ At 17.

... [W]hile [land value] and ‘capital value’ both depend on the valuer’s estimate of realisation, the ‘value of improvements’ is not so to be determined, but is arrived at by a process of calculation, the result being that [land] value plus value of improvements will never exceed capital value ...

Is capital value a proxy for market value?

[39] As we noted at [29], Bushmere argues that the definition of capital value of land is pegged to the value of the owner’s estate or interest in the land. Therefore, because the SunGold kiwifruit licence does not form part of the owner’s estate or interest in the land, it cannot be taken into account when assessing the capital value of Bushmere’s property.

[40] Bushmere maintains that capital value is not the same as market value. The former is the product of the statutory regime we have set out at [10] to [12] and explained by reference to leading authorities at [37] and [38]. Market value, however, may include items that relate to the business carried out on the land such as “chattels, plant, machinery, and shares” which are excluded from the net sale price of comparable sales when assessing the rateable value of a property.¹⁵

[41] We agree with Bushmere that capital value and market value are not identical concepts. The High Court, however, did not say that capital value and market value were indistinguishable. Rather, the High Court said:¹⁶

[34] ... [The] definition of capital value is a proxy for fair market value. It is not, of course, an exact proxy. No mass valuation process conducted over thousands of properties on a desktop basis can pretend to reflect the exact market value of an individual property. That is why there is an objections process. But the general rating revaluation exercise based on capital values generally reflects movements in the market values of properties. That is its point.

[42] In *Valuer-General v Mangatu Inc*,¹⁷ this Court reviewed case law concerning the meaning of “land value” as defined in s 2 of the Valuation of Land Act 1951, namely “the sum which the owner’s estate or interest [in land] might be expected to realise”. In doing so the Court made the following points that apply to the definition of capital value of land in the Act:

¹⁵ Rating Valuations Rules 2008, r 1.

¹⁶ High Court judgment, above n 5.

¹⁷ *Valuer-General v Mangatu Inc* [1997] 3 NZLR 641 (CA) at 649.

- (a) “The owner’s estate or interest” in land does not equate to a valuation of the pure fee simple.¹⁸
- (b) The legislation “envisages a notional sale by a willing but not anxious seller to the hypothetically willing but not anxious buyer”.¹⁹

[43] In *Re 110 Martin Street, Upper Hutt*, this Court also recognised that enhancement of a property achieved through the obtaining of a building consent may, depending on the circumstances of the case, influence the capital value of land.²⁰ Once however a building is constructed the consent merges into the value of the building and is incapable of separate assessment.²¹ This reasoning is consistent with a line of authorities which have held that the value of property may be enhanced by a liquor licence having been issued for the premises that are to be valued.²² In making this observation we also acknowledge there are differences between a building consent and the licence that Bushmere has to grow SunGold kiwifruit. Nevertheless, the authorities we have referred to are generally consistent with the reasons we have adopted.

Improvements

[44] The High Court held that the Tribunal erred when it inquired into whether or not the licence was part of the improvements to Bushmere’s property. The High Court said:²³

[36] ... Improvements and the value of improvements are not mentioned in, and are simply not relevant to, the statutory definition of capital value. There is no legal basis for the suggestion that they are relevant. For valuation purposes too, the value of improvements is a residual value, between unimproved land value and capital value. For that reason, the value of improvements often appears on a rating valuation. But there is no legal reason to value improvements in assessing capital value. ...

¹⁸ At 649.

¹⁹ At 649.

²⁰ *Re 110 Martin Street, Upper Hutt*, above n 10, at 17,

²¹ At 17.

²² *Toohy’s Ltd v The Valuer-General* [1925] AC 439 (PC); *Re Oriental Hotel* [1944] NZLR 512 (LSC); and *Dunedin City Corporation v Hames* [1948] NZLR 962 (CA).

²³ High Court judgment, above n 5.

[45] If, by these sentences the High Court meant that it is not appropriate to:

- (a) calculate the land value by reference to a hypothetical market sale; and then
- (b) calculate the improvements to the land and add those improvements to the land value in order to;
- (c) derive the capital value of the property

then we agree with what the High Court said. The approach we have summarised at (a) to (c) would not be consistent with the authorities we have summarised at [37] and [38].

[46] If, however, the High Court was suggesting that improvements do not form part of the capital value of property, then we respectfully disagree. Improvements are the difference between land value and capital value and therefore are inherently built into an assessment of a property's capital value which must be assessed on the basis of a hypothetical sale.

Reasons

[47] It is beyond dispute that the text, purpose and context of the definition of capital value and s 20(1) of the Act means that kiwifruit vines and supporting structures can form part of the capital value of an orchard property.

[48] Bushmere grows SunGold kiwifruit pursuant to a licence that is personal to Bushmere. Nevertheless, once grafted or planted the SunGold kiwifruit vines form an integral part of Bushmere's land. There is nothing in s 20(1) which purports to exclude from that section, vines or other horticultural crops that are grown pursuant to a licence. Thus, although the licence is personal property, the vines grown pursuant to that licence can become a component of capital value under s 20(1) of the Act.

[49] If Bushmere were to sell its orchard it would expect to obtain a price that reflected the fact its orchard comprises SunGold kiwifruit. The reasonable terms and

conditions of any sale would include Zespri consenting to the transfer of Bushmere's SunGold kiwifruit licence to a willing but not anxious purchaser. Absent such consent from Zespri the sale would not proceed. The hypothetical sale envisaged in the definition of capital value therefore includes the transfer of the SunGold kiwifruit licence to a hypothetical purchaser.

[50] Thus, while the licence is personal property, the price that Bushmere would expect to obtain if it were to sell its orchard would reflect, amongst other matters, the fact that the kiwifruit vines grown by Bushmere are SunGold. As we have emphasised, any sale would be conditional on the purchaser obtaining a licence to continue to grow SunGold kiwifruit.

[51] Further, this reflects the historic and current market reality. An orchard that is planted in SunGold vines sells for a materially higher price than an orchard planted in other vines. The sale is at a per hectare price, without separate attribution of value to the licence. Licences are almost invariably assigned with the planted land. On the rare occasion they are not, the sale is to a related party or of a licence to plant a very small area. We agree with the Council and the Valuer-General when they submitted that rating valuations ought to align broadly with market realities.

[52] The approach advocated by Bushmere produces a capital value for the orchard which would be the same as if Bushmere were growing green kiwifruit. Such an outcome would not only be artificial, it would defeat the whole purpose of adopting a capital value approach to assessing rateable value, namely achieving a valuation that is generally similar to market value. This should not be interpreted as us saying that capital value and market value are synonymous.

[53] These considerations lead to the conclusion that the value of the SunGold kiwifruit vines form part of the capital value of Bushmere's land. Although the SunGold kiwifruit are grown pursuant to a licence, it would defeat the text and purpose of the definition of capital value and s 20(1) of the Act to calculate and then deduct from the capital value of Bushmere's property a sum that purports to reflect the value of the licence and, as a consequence, ignore the nature of the actual vines grown in the orchard.

[54] We acknowledge that the value of SunGold kiwifruit orchards may fluctuate depending on factors such as international markets and the impacts of climate change. The Act, however, provides a process for a ratepayer to request a new valuation.²⁴ Such a request would be justified if circumstances resulted in a significant decrease in the value of SunGold kiwifruit orchards.

[55] Absent any justification for revaluing Bushmere's property, the rateable value of the Bushmere property as at 2020 was \$4,100,000.

Result

[56] The appeal is dismissed.

[57] The respondent is entitled to costs for a standard appeal on a band A basis together with usual disbursements. We certify for two counsel.

Solicitors:

Atkins Holm Majurey Ltd, Auckland for Appellant

Simpson Grierson, Wellington for Respondent

Crown Law Office | Te Tari Ture o te Karauna, Wellington for Valuer-General

²⁴ Rating Valuations Act, s 16.