

FEDERAL COURT OF AUSTRALIA

Kilgour v Commissioner of Taxation [2024] FCA 687

File number: QUD 99 of 2022
QUD 100 of 2022
QUD 101 of 2022
QUD 102 of 2022

Judgment of: **LOGAN J**

Date of judgment: 26 June 2024

Catchwords: **TAXATION** – where the applicants appeal from objection decisions made by the respondent Commissioner concerning the inclusion in their taxable income of the capital gain proceeds from the sale of shares in a company, Punters Paradise Pty Ltd (Punters), to News Corp Investments Australia Pty Ltd (News Corp Investments) – where there was no formal relationship, in terms of shareholding, directorships or control, between Punters and News Corp Investments or any other News Corp related entities (News Corp) – where the applicants contended that there was “internal championing” for the purchase of Punters within News Corp that caused a price higher than “market value” to be paid and that, as a result, the parties did not deal with each other at arm’s length – where the ultimate approval for the purchase of Punters was made by a head office in New York that was removed from News Corp’s Australian operations – whether the applicants were at arm’s length to News Corp Investments within the meaning of s 116-30 of the *Income Tax Assessment Act 1997* (Cth) – appeal dismissed

TAXATION – where the applicants contended that News Corp included “special value” in its purchase price for Punters that resulted in a price that was not “market value” – where the applicants led expert evidence that excluded this “special value” from the valuations of the Punters shares on the basis of valuation guidelines issued by the respondent Commissioner – whether “special value” forms part of the “market value” of an asset – whether the Commissioner’s valuation guidelines misstated the law

Legislation: *Evidence Act 1995* (Cth) s 140
Income Tax Assessment Act 1936 (Cth) ss 26AAA, 97, 102AG
Income Tax Assessment Act 1997 (Cth) ss 102-5, 102-20,

104-5, 104-10, 108-5, 110-25, 116-5, 116-10, 116-20, 116-25, 116-30, 152-15, 995

Property for Public Purposes Acquisition Act 1901 (Cth)

Taxation Administration Act 1953 (Cth) ss 14ZZ, 14ZZO

Cases cited:

Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation [1983] 1 NSWLR 1

Barnsdall v Federal Commissioner of Taxation (1988) 19 ATR 1352

Bradford-on-Avon Assessment Committee v White [1898] 2 QB 630

Briginshaw v Briginshaw (1938) 60 CLR 336

Commissioner of Taxation v Consolidated Media Holdings Ltd (2012) 250 CLR 503

Commissioner of Taxation v Miley (2017) 106 ATR 779

Davis v Seisdon Union [1908] AC 315

Earl Cadogan v Sportelli [2010] 1 AC 226

Healey v Federal Commissioner of Taxation (2012) 208 FCR 300

Inland Revenue Commissioners v Clay [1914] 1 KB 339

Inland Revenue Commissioners v Clay [1914] 3 KB 466

Jones v Dunkel (1959) 101 CLR 298

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

McDonald v Deputy Federal Commissioner of Land Tax (NSW) (1915) 20 CLR 231

Mersey Docks and Harbour Board v Liverpool (1873) LR 9 QB 84

MMAL Rentals Pty Ltd v Bruning (2004) 63 NSWLR 167

Northern Territory v Griffiths (2019) 269 CLR 1

Promenade Investments Pty Ltd v New South Wales (1992) 26 NSWLR 203

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

R v West Middlesex Waterworks Co (1859) 28 LJ(MC) 135

Robinson Brothers (Brewers) Ltd v County of Durham Assessment Committee (Area No 7) [1938] AC 321

Spencer v The Commonwealth (1907) 5 CLR 418

Trustee for Estate of AW Furse No 5 Will Trust v Federal Commissioner of Taxation (1990) 21 ATR 1123

Vyricherla Narayana Gajapatiraju v Revenue Divisional Officer, Vizagapatam [1939] AC 302

Marks B, 'Valuation Principles in the Income Tax

Division:	General Division
Registry:	Queensland
National Practice Area:	Taxation
Number of paragraphs:	154
Date of hearing:	9 June 2023 12 – 16 June 2023 22 – 23 June 2023
Counsel for the Applicant:	Mr P Hack KC with Mr P Bickford
Solicitor for the Applicant:	Small Myers Hughes Lawyers
Counsel for the Respondent:	Ms A Wheatley KC with Ms J FitzGerald
Solicitor for the Respondent:	McInnes Wilson Lawyers

ORDERS

QUD 99 of 2022

BETWEEN: **SARAH ALICE KILGOUR**
Applicant

AND: **COMMISSIONER OF TAXATION**
Respondent

NEWS CORP AUSTRALIA PTY LTD
Interested Person

QUD 100 of 2022

BETWEEN: **MELISSA PETTETT**
Applicant

AND: **COMMISSIONER OF TAXATION**
Respondent

QUD 101 of 2022

BETWEEN: **TAMARA LOUISE ISTERLING**
Applicant

AND: **COMMISSIONER OF TAXATION**
Respondent

QUD 102 of 2022

BETWEEN: **LUCAS DANIEL PETTETT**
Applicant

AND: **COMMISSIONER OF TAXATION**
Respondent

ORDER MADE BY: **LOGAN J**
DATE OF ORDER: **26 JUNE 2024**

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The applicant pay the respondent's costs of and incidental to the appeal in a lump sum, that lump sum to be fixed by a registrar, failing agreement by the parties.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

LOGAN J:

- 1 These four taxation appeals concern a capital gains tax controversy arising out of the sale of all the shares in Punters Paradise Pty Ltd (Punters) to the Australian incorporated News Corp Australia Investments Pty Ltd (News Corp Investments) pursuant to a written Share Sale Agreement dated 4 October 2016 (Share Sale Agreement). News Corp Investments appears to be part of an Australian group including News Corp Australia Pty Ltd and News Pty Ltd (collectively, News Corp Australia) News Corp Australia’s ultimate holding company is the United States incorporated News Corporation (News Corp). News Corp’s principal office is in New York, New York State in the United States of America.
- 2 As its corporate name suggests, Punters carried on business in that part of the gaming industry long associated with the horse racing industry. It operated an online social platform which allowed users to exchange racing tips. It had two sources of income:
 - (a) selling advertising space on its website; and
 - (b) commissions from bookmakers via “affiliate deals”.
- 3 The “affiliate deals” were arrangements made by Punters with sundry bookmakers, whereby the bookmaker concerned paid a commission to Punters when a user of its website clicked on a hyperlink on that website which directed the user to that bookmaker. Such commissions were paid monthly, based on the net loss of each individual user.
- 4 The four taxation appeals, and the related applicants, are as follows:
 - (a) QUD 99 of 2022, commenced by Sarah Alice Kilgour (Mrs Kilgour);
 - (b) QUD 100 of 2022, commenced by Melissa Pettett (Mrs Pettett);
 - (c) QUD 101 of 2022, commenced by Tamara Louise Isterling (Mrs Isterling);
 - (d) QUD 102 of 2022, commenced by Lucas Daniel Pettett (Mr Pettett),(collectively, the Applicants).
- 5 Pursuant to the right of access to an exercise of Commonwealth judicial power, necessary for the validity of a law imposing a taxation liability, conferred by s 14ZZ of the *Taxation Administration Act 1953* (Cth) (TAA), each of the Applicants has appealed to the Court against an objection decision of the respondent Commissioner of Taxation respectively issued

to them on 1 February 2022. By the objection decision, a related objection dated 15 October 2021 was disallowed. Because the “taxable facts” are common to each of the appeals, they were heard together.

6 As with any taxation appeal, the onus lies on the Applicants to prove that the assessments which were the subject of the respective objection decisions were excessive: s 14ZZO, TAA. Insofar as discharging that onus entails proof of particular facts, they need only prove those facts on the balance of probabilities: s 140, *Evidence Act 1995* (Cth) (*Evidence Act*).

7 As at 4 October 2016, Punters had 120,000 issued ordinary shares. These were held by the following shareholders in the following percentages:

- (a) Raymond Gordon Pty Ltd (RG) as the trustee of the Pettett Family Trust (Pettett Family Trust) – 60% of the issued ordinary shares;
- (b) Kilgour Investments Pty Ltd (KI) as the trustee of the Heath Kilgour Investment Trust (Kilgour Trust) – 20% of the issued ordinary shares;
- (c) Reuhl Corp Pty Ltd (RC) as the trustee of the Reuhl Trust (Reuhl Trust) – 20% of the issued ordinary shares

(collectively, the vendor shareholders).

8 RG and the Pettett Family Trust are associated with Mr Lucas Pettett and his wife, Mrs Melissa Pettett.

9 KI and the Kilgour Trust are associated with Mr Heath Kilgour and his wife, Mrs Sarah Alice Kilgour.

10 RC and the Reuhl Trust are associated with Mr Nathan Isterling and his wife, Mrs Tamara Isterling.

11 On 4 October 2016, the vendor shareholders, together with Mr Pettett, Mr Kilgour and Mr Isterling as guarantors, entered into the Share Sale Agreement with News Corp Investments. Pursuant to that agreement, and in total, the vendor shareholders received the sum of \$31,057,722 in respect of the disposal of the whole of the shares in Punters. Reflecting the proportion of the shares in Punters until then respectively held, that amount was paid as follows:

- (a) \$6,211,544 to KI as the trustee of the Kilgour Trust;

- (b) \$6,211,544 to RC as the trustee of the Reuhl Trust; and
- (c) \$18,634,634 to RG as the trustee of the Pettett Family Trust.

Basis of Challenged Assessments

- 12 The challenged assessments are premised upon the respective trustee distribution resolutions in the 2017 income year as applicable to the net income of each trust of which a vendor shareholder was trustee. The amounts respectively paid to those trustees arising from the sale of the shares in Punters have been assessed, pursuant to s 97 of the *Income Tax Assessment Act 1936* (Cth) (ITAA 1936), as forming part of the taxable income of the respective applicants as presently entitled beneficiaries of those trusts. This explains how Mr Pettett and his wife, Mr Kilgour's wife and Mr Isterling's wife were assessed. They challenge the inclusion of the amounts assessed in their taxable income.

Principal Issues and Outcome

- 13 The underlying taxable facts concerning the business conducted by Punters prior to the Share Sale Agreement, the negotiations which preceded that agreement and the making of that agreement are not, in themselves, controversial. However, flowing from what is known as the "market value substitution rule", found in s 116-10(2) of the *Income Tax Assessment Act 1997* (Cth) (ITAA 1997), what is very much controversial is whether, in the sale of the shares, the vendor shareholders in Punters dealt with News Corp Investments at arm's length? If they did not, there is a consequential controversy as to the market value of the shares immediately prior to their disposal. It will be necessary, later in these reasons for judgment, to set out at length the provisions of the capital gains tax regime in the ITAA 1997 which give rise to these issues.
- 14 In relation to Mrs Kilgour's and Mrs Isterling's taxation appeals only, a subsidiary, consequential issue concerning the application of the small business concession found in Division 152 of the ITAA 1997 may arise, if the threshold arm's length dealing issue and the market value issue in relation to the market value of the shares in Punters are each answered favourably to them. This issue is whether the requirements of the maximum net asset value test in s 152-15 of the ITAA 1997 are satisfied?
- 15 For reasons which follow, and notwithstanding the ingenuity of the submissions made on behalf of the Applicants by Mr Hack KC and Mr Bickford, my conclusion is that Punters and News Corp Investments dealt with each other at arm's length in connection with the Share

Sale Agreement. The evidence offered by the Applicants exposed the internal decision-making processes in relation to the purchase of the shares in Punters not just of News Corp Australia but also within the News Corp group hierarchy up to News Corp's Head Office in New York. That evidence reveals that, ultimately, the decision to purchase the shares was made in New York, following significant internal analysis within the News Corp group of companies of the worth of the shares, as reflected in Punters business. The share acquisition was a corporate group-level, strategic decision made at a corporate group headquarters, not subordinate, Australian operational level. In this Head Office decision, there was neither collusion with any of Messrs Kilgour, Pettett or Isterling (or their respective wives) or Punters' appointed agent, nor a mere rubber-stamping of an analysis offered by a not disinterested, local operational level subordinate within News Corp Australia.

- 16 What follows from this is that the "market value substitution rule" was inapplicable. Hence, the consequential market value issue and the related small business concession issue are, strictly, unnecessary to decide. This notwithstanding, because each issue was fully argued and against the contingency that my conclusion as to arm's length dealing may be in error, I have nonetheless addressed these issues below as well.

An Arm's Length Dealing

- 17 "Arm's length dealing" and, for that matter, "market value" are each terms found in the "market substitution rule" specified in s 116-10(2) of the ITAA 1997. Neither term is defined in the ITAA 1997, although that Act does offer guidance in respect of the reaching of a conclusion as to what is or is not an "arm's length" dealing. Thus, by s 995 of the ITAA 1997, it is provided, in respect of "arm's length", that, "in determining whether parties deal at arm's length, consider any connection between them and any other relevant circumstance".

- 18 As with the construction of any statutory provision, the task of giving that provision meaning must commence with the text approved by Parliament, having regard to the context in which it is found and its evident purpose: *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, at [39].

- 19 Materially, the text of s 116-10 of the ITAA 1997 is as follows:

116-10 Modifications to general rules

(1)

Explanation of modifications

- (2) The first is a market value substitution rule. It is relevant if:
- you receive no capital proceeds from a CGT event; or
 - some or all of the capital proceeds cannot be valued; or
 - you did not deal at arm's length with another entity in connection with the event.

It is the last of these alternatives which the Applicants contend is applicable.

20 It is immediately obvious that s 116-10 provides for a modification of general rules applicable to a CGT event. This makes it contextually necessary to chart out what are the applicable general rules.

21 The statutory pathway in the ITAA 1997 to those general rules is as follows.

22 An entity's assessable income for a given income year includes that entity's net capital gain (if any) for the income year: s 102-5. That section also sets out how a "net capital gain" is worked out. An element of doing that, and the only one presently relevant, is calculating whether a capital gain has been made.

23 A capital gain is made if and only if a CGT event happens: s 102-20. The gain is made at the time of the event: s 102-20.

24 Section 104-5 sets out the various CGT events. One such event is the disposal of a CGT asset, referred to as a CGT event A1: s 104-10. A share in a company is a CGT asset: s 995 definition and s 108-5, note 1. Interpolating the facts of this case into the statutory pathway thus far detailed, the shares in Punters were CGT assets and their sale to News Corp Australia under the Share Sale Agreement was the disposal of a CGT asset by the shareholders concerned, thereby constituting CGT event A1. The time of the event was when that agreement was made, 4 October 2016.

25 In turn, a capital gain is made if the capital proceeds from the disposal of a CGT asset are more than that asset's cost base: s 104-10(4). A CGT asset's cost base is worked out as provided for in s 110-25 of the ITAA 1997, but it is not necessary, in order to resolve this case, to delve into that aspect.

26 Section 116-5 of the ITAA 1997 directs attention to s 116-20 with respect to the general rules for working out what are the capital proceeds from a CGT event and also makes reference to s 116-25.

27 Section 116-20 provides:

116-20 General rules about capital proceeds

- (1) The *capital proceeds* from a *CGT event are the total of:
- (a) the money you have received, or are entitled to receive, in respect of the event happening; and
 - (b) the *market value of any other property you have received, or are entitled to receive, in respect of the event happening (worked out as at the time of the event).

Note 1: The timing for each event are in Division 104.

Note 2: In some situations you are treated as having received money or other property, or being entitled to receive it: see section 103-10.

Note 3: If you dispose of shares in a buy-back, the capital proceeds are worked out under Division 16K of the *Income Tax Assessment Act 1936*.

28 Section 116-10 instructs that there are 6 modifications to the general rules that *may* be relevant and that, “The table in s 116-25 lists which ones *may* be relevant to each CGT event listed in the table.”

29 Thus, the modifications specified in s 116-20 are potentialities. Regard to s 116-25 is necessary to determine whether a potential modification is applicable to a particular disposal. As already mentioned, the only potential modification identified by the Applicants is the first of the six specified modifications, the “market value substitution rule” as found in s 116-10(2), set out above.

30 Within s 116-25, and in respect of CGT event A1, it is provided that modification 1 (the market value substitution rule) is one of the modifications which can apply to that event and for special rules that can apply, “If the disposal is of * shares... : see s 116-80”. There is no suggestion in this case that any such special rules are applicable.

31 When, if at all, the potentiality of modification 1 becomes an actuality is specified in s 116-30 of the ITAA 1997. Because in this case there were capital proceeds received in respect of the disposal of the shares in Punters, whether that actuality came to pass is determined by reference to s 116-30(2), which provides:

116-30 Market value substitution rule: modification 1

No capital proceeds

- (1)

There are capital proceeds

- (2) The *capital proceeds from a *CGT event are replaced with the *market value of the *CGT asset that is the subject of the event if:
- (a) some or all of those proceeds cannot be valued; or
 - (b) those capital proceeds are more or less than the market value of the asset and:
 - (i) You and the entity that *acquired the asset from you did *not* deal with each other at *arm's length in connection with the event; or
 - (ii) The CGT event is CGT event C2 (about cancellation, surrender and similar endings).

(The market value is worked out as at the time of the event.)

32 So it is that both in potentiality (s 116-10(2)) and actuality (s 116-30(2)) that whether there was an arm's length dealing between the entity disposing of the asset and the entity acquiring the asset is a critical pre-condition to modifying the general rule in s 116-20 for the determination of what are the capital proceeds in respect of that disposal.

33 A consideration of text and context therefore instructs that the determination of whether there is a capital gain in respect of the disposal of a CGT asset is premised upon the *prima facie* position that the total of the consideration, the "capital proceeds" received or to be entitled to be received, will usually reliably supply one element in the calculation of any gain. That reliability entails implicit assumptions. One is that the parties have dealt with each other at arm's length. Another is that, ordinarily, those capital proceeds received or entitled to be received in respect of the disposal of a CGT asset will, ordinarily but not necessarily, represent the market value of that asset.

34 Modification 1 is therefore in the nature of an exception to a *prima facie* position. In relation to that exception, regard to the text of s 116-30 also discloses that the fact that the capital proceeds are more or less than the market value of the asset is not to be equated with a conclusion that the entity disposing of the asset and the entity that acquired the asset did not deal with each other at arm's length in connection with the event. Outcome is not to be equated with such a cause. Instead, that the capital proceeds are more or less than the market value of the asset may or may not be indicative of a non-arm's length dealing.

35 There is therefore both accuracy and error in a submission by the Commissioner that "arm's length" and "market value" are discrete subjects. Having regard to the analysis just offered, it

is more accurate to state that they are separate, but potentially not unrelated, subjects. There can be an interplay.

36 In turn, that takes up a point made for the Applicants in submissions. It was put that capital proceeds which do not represent the market value of an asset can be an indicator that the parties to a disposal of that asset did not deal with each other at arm's length. I agree. That circumstance sounds an interrogative note about a dealing.

37 Textually and contextually therefore, given the definition of "arm's length", an examination of whether the parties to a disposal have dealt with each other at arm's length should commence with an examination of what, if any, connection existed between the parties "in connection with" the dealing. It is the dealing which supplies the prism through which one views whether, and, if so, to what extent, there was any connection between the parties. Flowing from the phrase "in connection with", the statutory criterion is not whether the parties to the disposal were at arm's length but whether, in relation to the disposal concerned, they dealt with each other at arm's length.

38 Further, enlarging upon a point already touched upon, a feature of the definition of "arm's length" is that it does not so much define the term as offer subjects for inquiry as to whether the term as ordinarily understood is applicable on particular facts. That the one definite subject for inquiry is the existence of any connection between the parties shows that Parliament is not using "arm's length" in any sense different to the term's meaning as a matter of ordinary English. That meaning is, "conducted or agreed by independent parties not able to coerce or control each other; characterized by distance, independence, or impartiality" (Oxford English Dictionary, Online Edition). That ordinary meaning also indicates what subjects which might, in terms of the definition of "arm's length", be a relevant circumstance in relation to a dealing, apart from a "connection".

39 So construing "arm's length" also advances an evident purpose of modification 1 in supplying a basis for displacing a *prima facie* position as to the reliability of looking to the specified capital proceeds in working out whether there has been a capital gain as a result of a particular CGT asset disposal.

40 Flowing from the discussion in the preceding paragraphs, another relevant circumstance might be that the capital proceeds did not represent market value. It is possible that an examination of the circumstances of a dealing in respect of the disposal of a CGT asset might

reveal that a price which was impressionistically above or below expectation. That impression might be based on an investigation of the asset concerned and its features, of the market and sales which appeared comparable, or disclosed features of the dealing between the parties or of a particular party which might explain that impressionistically aberrant price. This is no more than common sense. Unsurprisingly and as will be seen, it also accords with the practice of valuers. That same investigation might also disclose that a higher than expected price was referable to what valuers term “special value”. A truly difficult issue, explored below, is whether the term “market value” as used in s 116-30, and s 116-10(2), of the ITAA 1997 does or does not include special value.

41 Thus far, and deliberately, I have sought to derive a meaning for “arm’s length” dealing by reference to statutory text, context and purpose, uninformed by authority.

42 As it happens, the meaning so derived is consistent with authorities which have considered the meaning to give to arm’s length dealing in analogous contexts. Those authorities were helpfully collected by McKerracher J in *Healey v Federal Commissioner of Taxation* (2012) 208 FCR 300 (*Healey*), at [95]:

1. Whether the parties dealt at arm’s length is a question of fact: *Trustee for Estate of AW Furse No 5 Will Trust v Federal Commissioner of Taxation* (1990) 21 ATR 1123 at 1134-1135; *Granby Pty Ltd v Federal Commissioner of Taxation* (1995) 30 ATR 400 at 403-404; 129 ALR 503 at 507; *Federal Commissioner of Taxation v AXA Asia Pacific Holdings Ltd* (2010) 189 FCR 204 at [106].
2. There is a distinction between dealing at arm’s length and an arm’s length relationship: *ACI Operations Pty Ltd v Berri Ltd* (2005) 15 VR 312 at [224]. Whether the parties did not deal at arm’s length is not to be decided by answering whether the parties were not in an arm’s length relationship. The fact that the parties are themselves not at arm’s length does not mean that they have not, in respect of a particular dealing, dealt with each other at arm’s length: *Barnsdall v Federal Commissioner of Taxation* (1988) 19 ATR 1352 at 1355-1356; 81 ALR 173 at 177; *Trustee for Estate of AW Furse No 5 Will Trust* at 1131-1133.
3. Whether the parties dealt at arm’s length involves an analysis of the manner in which the parties to a transaction conducted themselves in forming that transaction: *Granby* at 402-403; 506.
4. At issue is whether the parties have acted separately and independently in forming their bargain: *Granby* at 403-404; 507; *ACI Operations Pty Ltd* at [226] (did the parties apply “independent separate wills”); *AXA Pacific Holdings Ltd* at [105]. There should be an assessment of whether the parties dealt with each other as arm’s length parties would be expected to behave so that the outcome is a matter of real bargaining: *Trustee for Estate of AW Furse No 5 Will Trust* at 1132-1133; *Granby* at 402-404; 506, 507; *AXA Pacific Holdings Ltd* at [105].

5. It is relevant to consider the nature of any relationship between the parties: *Trustee for Estate of AW Furse No 5 Will Trust* at 1132-1133; *Granby* at 402-403; 506.
6. If the parties are not at arm's length the inference may be drawn that they did not deal with each other at arm's length: *Granby* at 402-403; 506; *ACI Operations Pty Ltd* at [225].

43 Informed by this understanding of the meaning of arm's length dealing, it is now necessary to explain, by reference to the evidence, why I have concluded that the parties to the Share Sale Agreement dealt with each other at arm's length.

44 Punters and News Corp Investments were at arm's length from one another; indeed, this is common ground. This is relevant but, as the authorities summarised in *Healey* confirm, by no means determinative. It bears repeating that the relevant question is whether the parties *dealt* with each other at arm's length?

45 There was no ownership or managerial control connection whatsoever between Punters and News Corp or any of the latter's subsidiaries, including News Corp Australia and News Corp Investments. Punters was a small, closely held, Australian proprietary company in which neither News Corp Investments nor any corporate superior in a large, multi-national group of companies ultimately controlled from New York by News Corp had, directly or indirectly, any shareholding interest.

46 Flowing from this conclusion, and the sixth of the propositions set out in the extract from *Healey*, as quoted above, the Commissioner submitted that, where parties were at arm's length, an inference arose that they dealt with each other at arm's length. As I explain below, it is unnecessary on the evidence in this case to draw any such inference; so, the point is unnecessary to decide. Further, as an element of proving the assessments concerned to be excessive, the onus was always on the Applicants to prove that the parties to the Share Sale Agreement did not deal with each other at arm's length. The Applicants' endeavour to discharge this onus was always premised on a concession that the parties were at arm's length but a contention that the evidence showed that their dealing was not. Outcomes in cases where the evidence disclosed that the parties to a dealing were not at arm's length can also be explained on the basis that a taxpayer did or did not discharge the onus of proving that the dealing between them was at arm's length. The authorities summarised in *Healey* also establish that there is no necessary antipathy between a conclusion that the parties to a dealing were not at arm's length and a conclusion, on particular evidence, that they nonetheless dealt with each other at arm's length.

47 Although there was no ownership or control relationship between any of the parties to the Share Sale Agreement, individuals in Punters and individuals in News Corp's controlled entities in Australia were acquainted with each other even prior to the dealing which led to the Share Sale Agreement.

48 That finding is necessarily dependent on acceptance of the evidence given by Messrs Pettett, Kilgour and Isterling, each of whom I had the benefit of observing upon their attendance for cross-examination on their evidence in chief by affidavit. I am well-satisfied that each of Messrs Pettett, Kilgour and Isterling gave honest evidence. There were some inconsistencies of recollection between them as to who was or was not present at particular meetings (notably an initial meeting on 17 February 2016, mentioned below) which preceded the making of the Share Sale Agreement. These differences are of no moment as to the honesty of any of them. As to those differences, none of them in 2016, at the time when meetings preliminary to the making of the Share Sale Agreement occurred with particular representatives of News Corp Australia (or some other Australian subsidiary of News Corp), had any reason to think that it would, into the indefinite future, be of any importance to place exactly who did or did not attend any particular meeting. Further, such differences of recollection as there were did not intrude upon how individual relationships between one or the other of them and individuals whom one might, without any need for greater accuracy, describe as employed by one Australian subsidiary or another of News Corp came about. Those relationships form an important part of the Applicants' case. Identifying them and how they came about is assisted by a brief excursion into the history of Punters, as revealed by the evidence of Messrs Pettett, Kilgour and Isterling.

49 The respective wives of Messrs Pettett, Kilgour and Isterling also gave evidence in chief by affidavit. Their evidence was confined to formal proofs. They did not participate personally in any engagement with any officer or employee of any Australian subsidiary of News Corp in relation to the disposal of the shares in Punters. They were not required to attend for cross-examination. Although I accept their evidence, so doing is in itself neutral on the subject of whether Punters and News Corp Investments dealt with each other at arm's length. The same may be said of the evidence offered by Punters tax agent and accountant, Mr Raymond Loulach.

50 Until 2012, Messrs Kilgour and Isterling had no association with Punters. As Mr Pettett related, Punters was formed in September 2008 on the joint initiative of him and a Mr Kagan

Powell. Although it began modestly, from the outset its business was as described above. The inspiration for the business lay in a combination of Mr Pettett's formal training and experience in software engineering and a recreational interest he had in the racing industry, also informed by having worked on building a tipping website in Australia for horse racing. Mr Pettett came to know Mr Powell via an online horse racing forum. He came thereafter to know and admire Mr Powell's work as a racing industry photographer.

51 Initially, Mr Powell had the majority shareholding interest in Punters (60% to Mr Pettett's 40% of a then issued total of 100,000 shares). From modest beginnings, the business grew, especially via Mr Pettett's initiative in obtaining affiliate deals with bookmakers. In 2010, a further 20,000 shares were issued to Mr Pettett, which gave him an ownership interest equal to that of Mr Powell. In the latter half of 2011, relations between Messrs Pettett and Powell deteriorated. It matters not to this case about the rights or wrongs in that deterioration, only that its sequel came in 2012 to be a buying out of Mr Powell's interest in Punters by entities controlled by Messrs Kilgour and Isterling and their respective wives. The end result by 2016 was the shareholding in Punters as described above.

52 Mr Pettett had come to know Mr Isterling in 2009 and, through him, in 2011, Mr Kilgour. In conjunction with his friend, Mr Isterling, Mr Kilgour had developed and operated a successful online sports tipping website named "Footy Tips". Via their successful operation of "Footy Tips", Messrs Kilgour and Isterling had the experience of interest shown in its acquisition by large public companies such as Telstra and Fairfax when they placed the business on the market. Eventually, in 2011, after a protracted negotiation both by them directly and via a representative Messrs Kilgour and Isterling appointed, they came to sell the Footy Tips business to a United States incorporated company, ESPN, for \$8,500,000. It was at an event to celebrate this sale that Mr Kilgour was introduced to Mr Pettett by Mr Isterling.

53 After he and Mr Isterling, via the respective entities mentioned above, bought into Punters, Mr Kilgour became that company's Chief Operating Officer. From the outset, Mr Isterling was remote from the day-to-day management of Punters, but took an active role in strategic discussions about the company with Messrs Pettett and Kilgour. His taking up of shares in Punters was a strategic investment decision. He was never a director of Punters. Mr Pettett remained active in the management of Punters. On the evidence, the three of them came to be, and have remained, on good terms. Also on the evidence, and as is hardly surprising in

relation to a small business, considerable informality seems to have attended director level managerial decision-making.

54 On the evidence, Mr Kilgour brought to his role in Punters not just formal study in business marketing but a definite flair for it. Drawing on his experience with the Footy Tips business, one stratagem he followed was to build relationships with racing authorities and media companies, such as News Corp's Australian subsidiaries. One of his objectives in doing this was to share editorial content. That was because the publication of Punters' articles on other websites exposed Punters and its business to a greater audience. Another driver for this relationship building was that the racing authorities and media companies owned the rights to the racing replays and footage, which it was in Punters' interest to access to play on its own website. Via these relationships, Mr Kilgour also sought to sell access to Punters' racing form guide, which contained analyses of horses and their performances. Offering a range of interesting racing industry related content was obviously important in drawing persons to Punters' internet platform.

55 It seems likely Mr Kilgour drew on experience of marketing stratagems which had proved successful when operating the Footy Tips business. He certainly drew on a contact within a News Corp subsidiary from that era. In that era, Mr Kilgour had come to know a Mr Nick Barry, who was then employed at Fox Sports (another News Corp subsidiary). Via Mr Barry and by email, Mr Kilgour was introduced on 26 June 2013 to Mr Nick Babos, the Head of Product Strategy & Distribution in a News Corp Australian subsidiary. In turn, this led in July that year to face to face meetings in Sydney between Mr Kilgour, Mr Babos, a Mr Mark Drusitis, Head of Innovation at a News Corp Australian subsidiary, and other News Corp Australian subsidiary staff. They discussed entering into a "partnership" for the publication by a News Corp controlled publication of some of Punter's web content. Exchanges between them on that subject continued throughout the balance of 2013.

56 By 2014, News Corp's relations with Punters, both via Mr Kilgour and also via a content editor at Punters, Mr Costa Rolf, had reached the point that News Corp controlled publications were occasionally publishing, with attribution and by agreement, Punters authored articles. These articles contained references back to the Punters website. In this fashion and as Mr Kilgour related, Punters was able to project itself to the much wider audience that read News Corp controlled publications.

- 57 Towards the end of 2015, Messrs Pettett, Kilgour and Isterling resolved to sell either Punters or its business if opportunity arose. This was the result of a collective view that the business had grown as much as possible and also because of apprehended regulatory headwinds arising from concerns expressed at government level about a need for greater regulation of online gambling, because of its adverse impact on problem gamblers.
- 58 To this end, on 1 January 2016, they caused Punters to engage Mr Daniel Bernstein from Corum Group (Corum) in the United States of America to prepare an information memorandum on Punters and to start setting up an online data room for the purposes of its sale. Mr Kilgour had become aware of Mr Bernstein in 2015. Punters had been featured on the Deloitte 2015 Technology Fast 50 winners list. In turn, Corum had reached out to every company on the list by email stating they would be holding presentations in Australia for businesses interested in selling. Messrs Pettett and Kilgour attended such a presentation in Melbourne and Mr Isterling attended the like presentation in Sydney. Mr Bernstein was the presenter at both Corum presentations. They were each impressed by Mr Bernstein. They each also believed that engaging Corum for the purposes of the sale of Punters would reach a much wider audience of potential buyers.
- 59 From the outset of their collective decision to sell Punters, Mr Pettett aspired to sell the company at a price when reflected a multiple of 10 x EBITDA (earnings before interest, taxes, depreciation, and amortization). Mr Kilgour was aware of this aspiration; he, perhaps, was more sanguine but, in internal discussions between the three of them, agreed this would be a great achievement. It certainly would have been relative to the factor of 4 x EBITDA which had informed Mr Kilgour when assessing the value of Punters at the time when he decided to take up shares in it in 2012. That, of course, was prior to the growth which occurred after he joined Punters.
- 60 On the initiative of Mr Babos, and via contact with Mr Kilgour, Messrs Pettett, Kilgour and Isterling came to attend a meeting with Mr Damian Eales, who was the Managing Director of News Corp's Australian operating companies, at News Corp's Australian subsidiaries' office at Surry Hills, Sydney on 17 February 2016. It seems likely that other officers or employees of a News Corp Australian subsidiary were also present, probably Mr Babos, but nothing turns on exactly who else was present. Although recollections differ as to his attendance, it seems inherently likely that Mr Isterling was present at this initial meeting. It was after all a significant event, to be invited to attend at News Corp's office and Mr Isterling neither

otherwise participated in the operational management of Punters nor in later dealings with News Corp. So the meeting is just the type of event one might expect him to remember. Although Messrs Pettett, Kilgour and Isterling had no inkling in advance that the subject would be raised, thinking that the meeting was to further the content sharing “partnership”, Mr Eales informed them in words to the effect “News Corp is interested in buying Punters”. This occurred after Mr Kilgour had explained Punters business model, which included reference to its “affiliate” arrangements.

61 The statement made by Mr Eales at this meeting and those made by an officer or employee of a News Corp Australian subsidiary at later meetings are relevant to the determination of whether the parties dealt with each other at arm’s length in connection with the disposal of the shares in Punters. They are relevant more for the fact that particular statements were made than for the truth of the contents. That is not to say that any officer or employee of News Corp’s Australian subsidiaries set out to mislead Messrs Pettett or Kilgour in dealings with them any more than Messrs Pettett and Kilgour set out to mislead any officer or employee of News Corp or an Australian subsidiary. To the contrary, when measured against the whole of the evidence, negotiations by News Corp (or a subsidiary) with Messrs Pettett and Kilgour were conducted with a candour which was reciprocated. The statements made form but part of an overall factual matrix, which notably includes the internal analysis within News Corp and its Australian subsidiaries as that evolved during negotiations which culminated in the Share Sale Agreement on 4 October 2016.

62 Mr Pettett’s response to this expression of interest by Mr Eales was to this effect, “We’re interested in selling if it is a 100% cash deal. We are not interested in an earn-out structure”. The meeting concluded with Messrs Pettett, Kilgour and Isterling agreeing to send News Corp (ie its Australian subsidiaries) Punters’ financial statements and to host representatives of News Corp’s Australian subsidiaries on a visit to Punters’ Melbourne office for the purpose of gaining a better understanding of Punters’ operations. There was no discussion at that stage about a buyout price. However, Mr Kilgour was left with the impression that Mr Eales was enthusiastic about an acquisition. Mr Pettett’s recollection, which I accept as accurate, was that Mr Eales stated, “Horse Racing will be the next big thing for News.” It seems likely that this statement was one source of Mr Kilgour’s impression.

63 A sequel to this meeting was that, on 8 March 2016, Mr Pettett, Mr Kilgour and Mr Rolfe hosted a Mr Tom Salom, the Victorian Editorial Manager, and a Mr Nathaniel Bane, each of

a News Corp Australian subsidiary, on a tour of the Punters office in Melbourne and gave them a related briefing about Punters' operations. Mr Babos was given a like tour of Punters Melbourne office (and briefing) by Mr Pettett. During this, Mr Babos stated to Mr Pettett that he was "available to support Punters throughout the process".

64 Later that month, on 21 March 2016, and by email, Mr Kilgour put Mr Eales in touch with Mr Bernstein. As a result and on Mr Bernstein's initiative, Mr Eales came on 22 March 2016 to sign on behalf of News Corp and its Australian subsidiaries a non-disclosure agreement relating to the possible acquisition of Punters.

65 On 23 March 2016, Mr Eales and Mr Salom attended Punters Melbourne office and conducted further discussions with Messrs Pettett and Kilgour about the possible acquisition. During this meeting, Mr Eales said words to this effect:

News Corp typically only buys businesses on an earn out structure, but I know that you want a cash deal. I will drive that conversation with News Corp head office in New York to get approval. I'm sure I can work something out.

66 On 13 April 2016, employees of News Corp's Australian subsidiaries again attended Punters' Melbourne office. On this occasion, those who attended were a Mr Simon Anderson, Mr Salom and a Mr Michael Lamont. They met with Messrs Pettett and Kilgour. This was the first occasion on which Messrs Pettett and Kilgour had met Mr Anderson. In the course of this meeting and with reference to Mr Eales, Mr Anderson said to them words to the effect that "Damien [sic] is a mad punter and loves horse racing. We think it's important for us to work on our wagering strategy" and "It is my responsibility to put our wagering strategy together".

67 When additional regard is had to the evidence of the internal deliberations within News Corp and its Australian subsidiaries in relation to the acquisition of the shares in Punters, it is clear that Mr Anderson became and remained one (but not the only one) "internal champion" of that acquisition. It is also evident that there was a career opportunity for Mr Anderson with this, related to increased involvement by News Corp and its subsidiaries in online gaming as an adjunct to its sporting news coverage. Statements by Mr Anderson during negotiations with Messrs Pettett and Kilgour, as just related and as related below, were, I find, external manifestations of his internal championing. Mr Eales was probably also an "internal champion" of the acquisition. There are two necessary caveats in relation to these conclusions. One is that they do not, for reasons I give below, carry with them any finding of impropriety by Mr Anderson or Mr Eales (neither of whom gave evidence). The other is that

it is clear to the point of demonstration from these same internal deliberations that neither Mr Anderson nor even the more locally senior Mr Eales had any determinative role in relation to the acquisition. Each of them was only ever a News Corp Australian subsidiary subordinate.

68 Given my noting of the absence of Mr Anderson and Mr Eales from being called to give evidence, it is convenient at this point to deal with a submission by the Commissioner that I should, in light of Mr Anderson's absence and that of any other News Corp (or subsidiary) witness, notably also Mr Eales, draw an inference that evidence from such persons would not have assisted the Applicants in discharging their burden of proof, consistent with the principles in *Jones v Dunkel* (1959) 101 CLR 298. Having regard to enduringly influential observations made about that case and the drawing of such an inference by Hunt J in *Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation* [1983] 1 NSWLR 1, at 13, I am for the following reasons only disposed to accept this submission to a limited extent. It was not put either to Mr Pettett or Mr Kilgour, who were the active, Australian resident, in-house negotiators for Punters, that they were mistaken (or worse) in their evidence as to what was said to them by Mr Anderson or Mr Eales from time to time. The Applicants, via deliberate tender in their evidentiary case, exposed, for better or for worse, the internal deliberations of News Corp and its subsidiaries, in relation to the proposed and ultimate acquisition of the shares in Punters under the Share Sale Agreement. The Applicants also tendered, deliberately, and again for better or for worse, the email exchanges which occurred either between Punters, its solicitor, Mr Di Francesco (who gave evidence) and Mr Bernstein on the one part and News Corp (and its subsidiaries) and those who acted for it in relation to the Share Sale Agreement on the other part. In circumstances where the contemporaneous negotiating and transactional documents were so fully exposed and were generated at a time when no author could have had any inkling of a later taxation controversy, the statements in these documents, in conjunction with unchallenged and, as I have found, honest accounts by Messrs Pettett and Kilgour as to what was said, offer a reliable picture of the *dealing* which occurred *in connection with* the disposal of the shares in Punters. Indeed, the Commissioner in submissions urged that particular weight be given to what was revealed by the contemporaneous documents.

69 Had the Applicants just sought to rely upon "internal championing" as a factor telling against an "arm's length" dealing, without any attendant pejorative quality in relation to Mr Anderson (or Mr Eales), I would not for these reasons have been prepared to draw an inference from their absence as witnesses that their evidence would not have been helpful to

the Applicants. But the Applicants' submissions went further than this. It was put in relation to News Corp and Mr Anderson at least that "listed public companies, including this one, are operated by people who can sometimes do bad things, including acting in their own interests rather than the interests of the employer (or its members)". Even in a case where proof is but on the balance of probabilities, such a conclusion is not lightly to be made: s 140(2), Evidence Act; *Briginshaw v Briginshaw* (1938) 60 CLR 336. I am not disposed to reach it in respect of Mr Anderson (or Mr Eales) on the evidence to hand, which includes their absence from the witness box. Instead, in their absence from the witness box, I conclude that their evidence would not have been helpful to the Applicants on this subject. My conclusion that Mr Anderson and Mr Eales were "internal champions" does not carry with it any conclusion that either or each of them venally put personal self-interest over duty of faithfulness to employer in promoting the acquisition of the shares in Punters.

70 To resume the chronology, throughout the balance of April 2016, May 2016 and up to 3 June 2016, either via Mr Bernstein or directly from Punters, News Corp and its Australian subsidiaries were provided with further financial information about Punters financial performance and forecasts and website traffic.

71 On 17 June 2016, Messrs Pettett and Kilgour met with Messrs Eales and Anderson for some two hours, initially at Punters' Melbourne office and then at a nearby restaurant. This was the first occasion when, from Punters' end, the expected price and basis of sale was raised. As to this, Mr Pettett used words to this effect:

We are only interested in a 100% cash deal. Our expectation is 10 x EBITDA. We're expecting to finish the 2016 year at about \$ 3 million.

Related to this, Mr Pettett made it clear that the shareholders expected around \$30 million cash to sell Punters. Also at this meeting, Mr Eales asked Messrs Pettett and Kilgour, in effect, whether they would like to "stay on as News Corp employees". Each of them expressed interest in this. Post-sale employment came to be one feature of the Share Sale Agreement and the precise basis of this did feature later in exchanges about the wording of that agreement but this was the only occasion when the subject was informally discussed.

72 On 30 June 2016, Messrs Pettett and Kilgour met with Mr Anderson and a Mr Richard Skimin (also of a News Corp Australian subsidiary) at News Corp's Australian subsidiary office at Surry Hills. During this meeting, Mr Anderson told them, in effect, that he was "working on getting approval" to make an offer.

- 73 On 4 July 2016, without, I find, prior authorisation from any of Messrs Pettett, Kilgour or Isterling, Mr Bernstein sent an email to Mr Skimin in which he referred to a potential competitive bid for Punters coming out of New York. As far as anyone in Punters in Australia was aware, there was no such competitive bid. I draw no adverse inference about this in relation to Mr Bernstein. He was not called. It is possible that he was aware of such a bid but saw no need to advise anyone in Punters, because events in relation to News Corp's interest overtook things. Further, exploration of whether there was such a bid is something of a sidewind. It is enough to have exposed what was put by Mr Bernstein to News Corp and its subsidiaries.
- 74 As to News Corp related events, on 14 July 2016, Mr Bernstein (who passed this on to Punters) was advised by Mr Skimin that he had submitted the proposed offer for the acquisition of Punters for approval from News Corp's CEO in New York and that he expected to revert to Mr Bernstein the following week with the offer.
- 75 In the meantime, it was announced to the world at large on 15 July 2016, and the fact was that, Mr Anderson, whose formal position within News Corp's Australian subsidiaries had hitherto been executive general manager of The Daily and Sunday Telegraph, had been appointed to the newly-created role of group director - wagering, reporting to Mr Eales.
- 76 What followed was a series of "non-binding indicative offers" (NBIO) from News Corp concerning the acquisition of all the shares in Punters. Before offering some details of these, it is instructive, in my view, in determining whether there was an arm's length dealing in connection with the disposal of the shares in Punters, to understand what had, by then, occurred internally within News Corp in relation to the subject of the possible acquisition of those shares.
- 77 At local level in Australia, initial views about the acquisition of Punters were expressed in an internal memorandum authored by Mr Salom following the Punters office visit he and Mr Bane made on 8 March 2016. By early April 2016, News Corp's Australian subsidiaries had formed a team, headed by Mr Anderson, to examine and report upon a possible acquisition of the shares in Punters.
- 78 By 20 April 2016, investigations on this subject within News Corp's Australian subsidiaries had progressed to the point where the following topics were canvassed and views expressed

in an internal memorandum of that date to which Mr Eales and Mr Anderson were addressees:

- (a) EBITDA multiples – For “Best Bets”, it was stated that a 3.5- 4x comparable for an affiliate business without substantial assets was appropriate, whereas gambling comparables were said to be 10-12x EBITDA.
- (b) The valuation for Punters was accordingly said to fall within a range of \$14.5M (5x) to \$34.4M (12x), including a net cash position of \$0.2M on trailing commissions.
- (c) There was discussion of the digital racing wagering market and various ways in which News Corp could enter the market (including by partnering or acquiring Punters)

The memorandum sought approval to progress the subject of acquisition to the point of making a NBIO.

79 On 28 April 2016, a further internal memorandum was prepared addressed to Mr Eales and, amongst others, Mr Anderson and Mr Salom in which, among other things, the following is stated based on updated information:

- (a) valuation – “The owners and their advisors have not provided an expectation for lack of comparables.”
- (b) multiples – “Indicative DCF analysis suggests an Enterprise Value of \$30.2m representing a trailing EBITDA multiple of 10x.”
- (c) range – “Initial valuation range for PP of \$15.5m (5x) to \$38.3m (13x) including net cash position of \$1.3m on trailing EBITDA.” [“PP” is, inferentially and obviously, “Punters Paradise”]

80 The valuations were stated not to take into account cost synergies with News Corp due to cost savings and related improvement of the value position. It was stated these would be considered during a due diligence phase. One possibility canvassed in this memorandum was the acquisition of 51% of the shares in Punters. Once again, approval to progress the subject of acquisition was sought.

81 I consider these April 2016 internal memoranda to be highly significant with respect to whether there was an arm’s length dealing in connection with the disposal of the shares in Punters to News Corp Investments. They disclose that, well before Mr Pettett revealed at the meeting in June 2016 the expectation of the Punters shareholders of a price for all of the shares in Punters based on 10 x EBITDA, which translated to a total purchase price of \$30

million, internal deliberations within News Corp's Australian subsidiaries had already identified \$30 million as an enterprise value for Punters, based on an EBITDA assessment. There is no suggestion of any prior collusion between anyone in Punters (or Mr Bernstein) and anyone in News Corp or its Australian subsidiaries informing the views as to value expressed in these April 2016 internal memoranda. Those views were all the internal work of personnel within News Corp's Australian subsidiaries alone.

82 In May 2016, News Corp's internal team working on the Punters' acquisition put a submission by memorandum dated 13 May 2016 to News Corp Australia's Executive Chairman, Mr Michael Miller, and its Chief Financial Officer (CFO), Ms Susan Panuccio. This memorandum took up the analysis in the 28 April 2016 memorandum. It was also stated that News Corp had been provided by Punters with a price indication of \$28.5M. It was stated that the team had determined that this represented an EBITDA multiple of 10x or a revenue multiple of 5.1x and that this value had been verified value through the team's own discounted cash flow analysis. The source of this indicative price seems to have been Mr Bernstein. In response to the 13 May 2016 memorandum, Mr Miller responded to Mr Eales (and copied to Ms Panuccio) by email, "Let's discuss in London. In particular ... we should understand and list the risks and competitive response..". By mid-May then, News Corp Australia's Executive Chairman had become involved in deciding whether and in what way a News Corp subsidiary would acquire some or all of the shares in Punters.

83 In early July 2016, the News Corp Australia executives were preparing a further memorandum for consideration by the Office of the Chief Executive Officer (OCEO). This memorandum was finalised and sent by Ms Panuccio to a Mr Robert Thomson and a Mr Bedi Singh of the News Corp OCEO on or around 17 July 2016.

84 It is unclear on the evidence before me what specific roles Mr Thomson and Mr Singh held in the OCEO, or for that matter the other recipients of Ms Panuccio's email. However, I am prepared to draw an inference on the evidence before me, including Ms Panuccio's email and its metadata, the content of the memorandum sent by Ms Panuccio, the content of a later memorandum to the OCEO dated 19 September 2016 (in particular the information under the "Transaction Background" section) and News Corp Australia's subsequent actions after the sending of each OCEO memorandum (discussed below), that at least one of Mr Thomson and Mr Singh was an authorised decision-maker for News Corp within the OCEO in New York and that the OCEO made decisions for News Corp at a global level.

85 In this involvement, and unsurprisingly in terms of the evidence as to the News Corp hierarchy, the OCEO was dealing with high-level Australian management including Mr Miller, Ms Panuccio and Mr Eales. There is no hint in this high-level internal deliberation that Mr Anderson had any direct input to the OCEO. Instead, Mr Anderson's role was to furnish his superiors with information and analysis for the latter's discussions with the New York based corporate group superiors.

86 The evidence discloses that, after further internal deliberations and obtaining further information from Mr Bernstein, Mr Skimin advised Mr Miller (and Ms Panuccio) on 21 July 2016:

We plan to submit a bid by COB tomorrow for Punters Paradise with the following terms:

- 100% cash offer for \$28.5M
- Three year employment contracts for CEO and COO with non-competes
- Intention to integrate Punters Paradise with our digital wagering offering

We believe \$28.5m (representing 10x EBITDA) is an appropriate bid given the signals we have received about what price will grant us exclusivity while also giving us some headroom up to the agreed \$30M approval from OCEO. We understand there is also another bidder but we are the preferred party.

Attached is the NBIO and the internal project kick-off document we will use should we be successful.

87 This memorandum appears to be the immediate, consequential response to a formal approval decision made in New York by Mr Thomson and/or Mr Singh on or around 21 July 2016 which became known to Mr Skimin in Australia that day.

88 The following day, 22 July 2016, News Corp made its first NBIO. Features of this NBIO included:

- (a) News Corp would acquire up to 100% of the shares in Punters for cash;
- (b) the offer attributed an enterprise value of \$28.5m to Punters on a "debt free, cash free basis" and on the basis of the business having a normal level of working capital at closing;
- (c) Punters management team including Mr Pettett and Mr Kilgour would continue their employment with Punters for a minimum of three years after the acquisition.

89 As foreshadowed in [84], the making of the first NBIO by News Corp Australia, is only explicable on the basis that the OCEO approved the action recommended in the

memorandum sent to Mr Thomson and Mr Singh on or around 17 July 2016. It is of no moment that a written response from the OCEO is not in evidence.

90 Via an email sent by Mr Bernstein to Mr Skimin, the Punters shareholders rejected the first NBIO. At the same time, Mr Bernstein put an alternative to News Corp in which he reiterated a need for a cash price set at a 10 x EBITDA multiple with 10% thereof being in escrow for 12 months, all liabilities capped at the value of the escrow, working capital fixed at \$400,000 and senior employment roles for Mr Pettett, Mr Kilgour and Mr Isterling.

91 Mr Skimin's reply to Mr Bernstein described the first NBIO as a "no nonsense offer" and emphasised that the Punters' EBITDA was not normalised.

92 On 8 August 2016, News Corp made a second NBIO. Features of this NBIO included:

- (a) all of the shares in Punters would be acquired at an increased price of \$29.3 m;
- (b) warranty claims would be capped at the level of the purchase price; and
- (c) a hitherto 3-year post-acquisition minimum term of employment for Mr Pettett and Mr Kilgour was deleted.

93 Although the Punters shareholders signified that this second NBIO was acceptable, that remained subject to the drawing up of a mutually acceptable share sale agreement and the undertaking by News Corp, to its satisfaction, of due diligence inquiries. For this purpose, the Punters shareholders engaged external legal advisers on 9 August 2016. These lawyers then exchanged draft share sale agreements (8 in all) with those acting for News Corp. For the purposes of the due diligence inquiries, a "data room" was operated between 11 August and 27 September 2016. Mr Kilgour in particular within Punters also dealt with numerous related inquiries by News Corp and those acting on its behalf.

94 The exchanging of drafts and due diligence inquiries having occurred, on 19 September 2016, Ms Panuccio made a submission via memorandum to the OCEO New York, copied to, amongst others, Mr Miller, to make a binding offer to acquire all the shares in Punters. As with the first NBIO, a formal response from the OCEO to this memorandum is not in evidence. However, I draw an inference that such approval must have been given by the OCEO due to News Corp Investments' subsequent conduct in entering the Share Sale Agreement for Punters on 4 October 2016. Settlement under this agreement occurred in December 2016. Also under this agreement, a working capital adjustment payment was made in February 2017.

95 The Commissioner submitted that the facts just related disclosed that there had been “real bargaining” between the Punters shareholders and News Corp (and its subsidiaries). Although that description is used in some cases, one must be careful not to substitute it for the text of the statute. It is nothing more than a turn of phrase in which the adjective “real” provides the intended elucidation. In particular, the subject is not to be approached as if an arm’s length dealing can only occur if it is attended with an atmosphere of higgling, haggling and hassling which one might perhaps find in the purchase of a carpet in the Grand Bazaar. I respectfully doubt that the description “real bargaining” was ever intended to convey that understanding. One might equally say genuine offer and acceptance. The chronology offered above shows there was bargaining and that bargaining was certainly not a mere façade or sham. It was “real”. But it is perfectly possible for a dealing at arm’s length in connection with the disposal of an asset to occur in circumstances where the only outwardly evident bargaining is an offer made to buy or sell at a particular price which is accepted without demur. That bargaining can also be “real”. The definition of arm’s length envisages a multi-factorial, inherently dealing specific, factual analysis in which but one factor, which may or may not be determinative, is a connection between the parties.

96 On the evidence, News Corp considered an acquisition of some or all of Punters or its business to be in its commercial interest. It took the initiative, without any prompting by or on behalf of anyone in Punters or its agent, Mr Bernstein, to raise that prospect with the shareholders (or strictly their representatives) in that company in February 2016. Because of its own internal deliberations, News Corp had a value range in mind for the whole of the shares in Punters (or its business). As it happened, the shareholders in Punters, quite independently, had in mind not just to sell their shares but also a price for the whole of those shares which fell within this range.

97 Of course, there was an “internal champion” or two within News Corp’s Australian subsidiaries. But no disposal of an asset ever occurs in the absence of interest by a buyer. Given his early involvement and local seniority, it is more likely than not that Mr Eales, rather than Mr Anderson, was the major champion or “business lead”. It is highly unlikely that it was mere coincidence that the initiative in raising an acquisition with Messrs Pettett, Kilgour and Isterling in February 2016 came from Mr Eales. That is not to say that Mr Anderson did not also later embrace the promotion of the acquisition. That a perception of coincident corporate and personal advantage may have attended Mr Anderson’s promotion of the acquisition does not mean that the dealing was not at arm’s length or that he acted

improperly. For reasons already given, no pejorative quality attends my allowance for such a coincidence.

98 Also revealed by the evidence of News Corp’s internal deliberations is that Mr Anderson never had sole responsibility for production of the analysis that Ms Panuccio chose to put to the OCEO in New York. Mr Skimin, in particular, took a very active role in relation to the possible acquisition.

99 The “internal championing” dimension in the Applicants’ submissions offered a possible explanation for why it was, according to the Applicants’ principal submission, that the sale price was not the outcome of “real bargaining” and, hence, that Punters and News Corp Investments had not dealt with each other at arm’s length in connection with the disposal of the shares in Punters. Evidence which was said to support this sale price based submission came from two experts, Mr Andrew Fressl and Mr Michael Churchill.

100 Mr Fressl is a chartered accountant, business valuer and mergers and acquisitions specialist. He has over 20 years’ experience in the field of business valuation and mergers and acquisitions. He furnished reports dated 25 August 2022, 11 November 2022 and 17 February 2023 and adopted and elaborated upon the opinions expressed therein in his oral evidence.

101 Mr Churchill is a business, securities and intangible asset valuation specialist of Value Adviser Associates Pty Ltd with over thirty years of experience. He furnished reports dated 22 December 2016, 22 August 2017, 27 April 2018, 10 May 2018, 27 February 2020, 14 November 2022 and 16 February 2023. He, too, adopted and elaborated upon the opinions expressed in these reports in his oral evidence.

102 Each of these gentlemen was an impressive witness whom I am quite sure endeavoured faithfully to discharge his obligation of candour and impartiality as set out in the Court’s practice note concerning expert witnesses. Both were advantaged by their eventually coming to have the benefit of considering the evidence as to News Corp’s internal deliberations.

103 I make these observations concerning their evidence having expressly taken into account a critique offered by Ms Meredith Chester, a chartered financial analyst and business valuation specialist of Price Waterhouse Coopers both in her report of 22 December 2022 and in her oral evidence. I use the term “critique” deliberately, because, although she has valuation expertise, albeit not in the mergers and acquisitions context, Ms Chester did not furnish her own opinion as to the market value of the shares in Punters. She did, however, opine, for

reasons she detailed in her report, that a 10 x EBITDA multiple “appears to be a reasonable metric to determine the market value of Punters”. Those reasons included multiples she derived from comparables she found cited in Mr Churchill’s reports.

104 It was put for the Applicants that Ms Chester’s critique was, overall, one of form not substance. I agree. A supporting example cited by the Applicants is apt. Ms Chester opined that the weight to be afforded to Mr Churchill’s opinions was diminished because he did not specify the type of valuation engagement. She also considered that the Coram financial forecasts ought to have been briefed to Mr Churchill because it was “required by the standard”. Ms Chester did not explain how or why a valuation undertaken by reference to forecasts made available to potential purchasers was likely to be more reliable. Ms Chester’s views about the adequacy of the testing of the financial forecasts to a degree she would have expected was also influenced by her reference to an Australian Securities and Investments Commission regulatory guide which was not applicable to the valuations furnished by Mr Churchill.

105 Mr Fressl was not much impressed by the rigour of the internal News Corp analysis. He calculated that the net present benefit of the revenue synergies less the integration costs as a result of the acquisition of all the shares in Punters was \$13.1 million. He also saw News Corp as a “price taker”. These factors and others he mentioned were, he opined, features of a non-arm’s length dealing. I do not doubt that they could be, but, on the whole of the evidence and in light of what I have related above, they were not in this instance. Mr Fressl’s overall opinion on analysing the Punters share sale transaction was that it was unlikely to have resulted in market value having been paid. That may or may not be true but as far as the applicable provisions in the ITAA 1997 are concerned, if the parties dealt with each other at arm’s length, it would be nothing to the point that market value was not paid. The “capital proceeds” would be what was paid or payable under the Share Sale Agreement.

106 Mr Churchill, I thought, was always genuinely troubled by what seemed to him a price which reflected a premium or special value to News Corp in the acquisition of all the shares. With the benefit of reviewing the internal News Corp deliberations, he found that feature present. There is no substance in the criticism offered of Mr Churchill in relation to extrapolations he made from Punters own data. Further, a human error which occurred in relation to the briefing of some information to Mr Churchill was fully and benignly explained in his

evidence and that of the Applicants' solicitor, Mr Konrad Wojtasik. It is not necessary to descend into detail about that.

107 Drawing together the various opinions as to value expressed by Mr Churchill, they were:

- (a) the "enterprise market value" of all the shares in Punters immediately prior to the sale was between \$15.5 million and \$21.9 million, with a median value of \$18.2 million;
- (b) the market value of the RG (Pettett) 60% interest immediately prior to the sale was between \$9 million and \$12 million;
- (c) the market value of each of the 20% KI (Kilgour) and RC (Isterling) interests immediately prior to the sale was \$2.4 million to \$3 million;
- (d) the purchase price paid by News Corp was inflated and included a "special" or "strategic price", in the order of \$12.5 million.

108 For reasons which, in the circumstances, it is unnecessary to detail, it was put for the Applicants that the result of adopting these market values was that gross proceeds of \$4.95m were attributable to each of Mrs Pettett and Mr Pettett and \$2.7 million to each of Ms Kilgour and Ms Isterling. It was also put that Mrs Kilgour and Mrs Isterling were entitled to the benefit of the small business relief provided by Division 152 of ITAA 1997 because "just before" the CGT event constituted by the share disposal, the net value of CGT assets connected to each of them did not exceed \$6 million, the maximum net asset value test amount (see s 152-15 of the ITAA 1997).

109 The Applicants submitted that I should conclude that the parties to the Share Sale Agreement, although at arm's length, had nonetheless not dealt with each other at arm's length in relation to the disposal of the shares in Punters. The submission was an ingenious one and should be set out exactly:

This case is one of the rare examples where a conclusion that the parties did not deal with each other at arm's length is reached by examining the acts and omissions of the parties, here the purchaser, to determine whether the parties acted in the transaction as parties do when they are dealing with each other at arm's length. That conclusion might be rebutted by a tribunal of fact being satisfied that the sale and purchase price represented market value; where the tribunal of fact is not so satisfied, the conclusion of the absence of arm's length dealing may be more readily drawn.

110 As I have already concluded in relation to the construction of "modification 1" in the context of the general rules, a price in respect of a disposal of a CGT asset which is seemingly not at market value can sound an interrogative note as to whether the parties dealt with each other at

arm's length in connection with that disposal. So the evidence of Mr Fressl and Mr Churchill is not irrelevant. But even if accepted their views were not determinative.

111 The Applicants' submission is just a version of one considered and rejected by Davies J in *Barnsdall v Federal Commissioner of Taxation* (1988) 19 ATR 1352 (*Barnsall*). Materially, his Honour had to determine (in the context of a satisfaction based criterion) whether an error of law had attended the meaning given by the Commissioner to the then s 26AAA(4)(b) of the ITAA 1936, which included the analogous language, "having regard to any connection between the taxpayer and the person to whom the property is so sold or any other relevant circumstances, the taxpayer and the other person were not dealing with each other at arm's length". Evidence was tendered that the grant of options concerned was not an unusual transaction in respect of shares and it was submitted that it was not shown that the prices fixed by the options were not fair. In rejecting the submission that it followed that the dealing was at arm's length, Davies J stated in *Barnsall*, at 1357:

However, the effect of this evidence was to show no more than that the price fixed by the option agreements between Mr Hains and Corporate Investments Pty Ltd may well have been a fair price. Proof that a transaction was fair is not sufficient to show, in the context, that the dealing was at arm's length. The term "at arm's length" in s 26AAA(4)(b) is not to be construed as meaning "for a fair price". Indeed, this provision did not turn its attention primarily to price, though the price paid may be a relevant factor. The provision did not purport to fix a fair price for the transaction but rather, when a finding had been made that the dealing was not an arm's length, fixed and arbitrary consideration, the value of the property at the time of its sale.

112 In the same way, and in relation to "modification 1", the proof that a disposal was "fair", or at market value, is not sufficient to show that the dealing was at arm's length, so, too, is proof that a disposal was not "fair", or not at market value, is not sufficient to show that the dealing in connection with the disposal was not at arm's length. What in hindsight, and sometimes even in prospect, are advantageous or disadvantageous disposals of assets can occur between parties who have dealt with each other at arm's length. This is just a feature of business and private life in relation to the disposal of assets. A "price taker" is not necessarily a purchaser who has dealt with the vendor other than at arm's length in connection with the disposal of an asset. He may just want the asset for some reason, have the requisite means and be content to pay the price requested.

113 The Applicants put that their invited conclusion was supported by observations made Hill J in *Trustee for Estate of AW Furse No 5 Will Trust v Federal Commissioner of Taxation* (1990) 21 ATR 1123, at 1132, in respect of another materially identical provision, s 102AG(3) of the

ITAA 1936. Those observations are the source of the “real bargaining” reference which inspired the Commissioner’s submission already mentioned. His Honour stated:

What is required in determining whether parties dealt with each other in respect of a particular dealing at arm’s length is an assessment whether in respect of that dealing they dealt with each other as arm’s length parties would normally do, so that the outcome of their dealing is a matter of real bargaining.

- 114 It bears repeating that judicial observations intended to offer guidance about the meaning of a provision are not a substitute for the text of the provision. Further, such observations are, inevitably, reactive to the way in which a case was conducted both in evidence and submissions. Neither “dealt with each other as arm’s length parties would normally do” nor “real bargaining” are to be found in the text of “modification 1”. To treat them as if they were is to afford them more weight than they can bear. Viewed as guidance, I respectfully agree with the observations. But they are not a substitute for the multi-factorial, particular dealing specific analysis I consider the text of the provision demands.
- 115 Perhaps via its subsidiary, News Corp Investments, News Corp did pay too much for all the shares in Punters, perhaps it did not. If nothing else, Ms Chester’s evidence shows that a 10 x EBITDA multiple was not necessarily idiosyncratic. In turn, there is reason to question whether her evidence is reliable. There is merit in the Applicants’ submission that, in stating that Punters “offered horse racing and betting services through its own platform”, she misunderstood the nature of its business. Further, and unlike both Mr Fressl and Mr Churchill, her multiple does not take account of a regulatory risk to Punters’ business model.
- 116 However, to explore this further in relation to whether there was an arm’s length dealing is unproductive. That is because what the whole of the evidence reveals is two unrelated parties forming their own views based on their own assessment as to what the shares were worth. They dealt with each other accordingly. News Corp’s decision was ultimately made at the very highest level, remote from Australia, based on what it considered was in News Corp’s strategic commercial interests, particularly in light of perceived synergistic benefits of News Corp’s ownership and conduct of the Punters business.
- 117 Yet further, and as explained below, the “special” or “strategic” price element excluded by Mr Churchill from his understanding of “market value” is, as that term is to be understood in the provisions concerned, just part of the “market value”.

118 For all of the reasons given thus far, I conclude that the vendor shareholders in Punters and
News Corp Investments dealt with each other at arm's length in connection with the disposal
of all the shares in Punters.

Market Value

119 Although the Applicants' contention that "modification 1" is applicable has failed at the first
hurdle, it is nonetheless desirable to express conclusions in relation to the market value issue
in the case.

120 Although it is not a defined term, the parties were at one that "market value" in s 116-20 and
s 116-30 and Division 152 was to be understood in the sense explained in *Spencer v The
Commonwealth* (1907) 5 CLR 418 (*Spencer*). The only difference, which was not shown to
be material in the circumstances of this case, is that the former two provisions look to market
value as at the time of the CGT event, whereas Division 152 looks to market value just before
the CGT event.

121 The controversy in *Spencer* arose in respect of the compulsory acquisition of land for which
compensation based on the value of the land was payable. The statute authorising the
acquisition and providing for compensation, the *Property for Public Purposes Acquisition Act
1901* (Cth), did not use the term "market value" but the expositions in that case as to how
compensation based on value was to be assessed have come to be regarded as explanatory of
the meaning of "market value" or "value" in a variety of statutory contexts. Griffith CJ stated,
Spencer, at 432:

In my judgment 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, ie,
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 desirous to sell?'

To similar effect is this statement by Isaacs J, *Spencer*, at 441:

To arrive at the value of the land at that date, we have, as I conceive to suppose it
sold then, not by means of a forced sale, but by voluntary bargaining between the
plaintiff and a purchaser, willing to trade, but neither of them so anxious to do so that
he would overlook any ordinary business consideration. We must further suppose
both to be perfectly acquainted with the land, and cognizant of all circumstances
which may 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 then
appearing to persons best capable of forming an opinion, of a rise or fall for what
reason soever in the amount which one would otherwise be willing to fix as the value
of the property.

- 122 Similar observations about the appropriate approach to assessment of compensation, which it is not necessary to reproduce, were also made in *Spencer*, at 436 – 437, by Barton J, the other judge who constituted the High Court for the purpose of the hearing of the appeal.
- 123 The valuation approach in *Spencer* posits a hypothetical in which a willing but not anxious vendor deals at arm’s length with a willing but not anxious purchaser, each perfectly acquainted with the asset concerned, and asks what resultant sale price could reasonably be expected?
- 124 This approach has been regarded as applicable to the ascertainment of “market value” where that term is used in the Division 152 of the ITAA 1997: *Commissioner of Taxation v Miley* (2017) 106 ATR 779 (*Miley*). Moreover, as *Miley* also exemplifies, it has been regarded as applicable to determining not just the market value of land but also of shares. So the position which was common ground between the parties has the benefit of support in authority. I proceed accordingly.
- 125 This same approach is evident in the reports of Mr Churchill. In turn, as made explicit by Mr Churchill in his report of 16 February 2023 and upon which he elaborated in his most helpful oral evidence, his understanding of the valuation approach to adopt was based on the International Valuation Standards Council (IVSC) conceptual framework, which is taken up in the Commissioner’s market valuation guidelines. In the latter and with reference to the IVSC framework, it is stated that “market value” is “[t]he estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm’s length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion”. The obvious provenance for this statement is *Spencer*.
- 126 Mr Churchill extracted in this report (at para 54) valuation concepts which the Commissioner in his guidelines considered flowed from the IVSC definition of market value. These included the following:

Market value **does not** reflect attributes of an asset that are of value to a **specific** owner or purchaser that are not available to other buyers in the market.

Such advantages may relate to the physical, geographic, economic or legal characteristics of an asset. Market value requires the disregard of any such element of value, because at any given date it is only assumed that there is a willing buyer, not a **particular** willing buyer.

[Emphasis in the Commissioner’s guidelines]

127 As became ever clearer in his oral evidence, it was this caveat which underpinned Mr Churchill’s view that the sum paid by News Corp Investments under the Share Sale Agreement was more than the market value of all the shares in Punters.

128 Mr Fressl similarly looked to the IVSC standard. Notably, that formed the basis of his excluding from his understanding of “market value” what is referred to in that standard as “synergistic value”. He highlighted the distinction between the two by quoting (at para 4.4.21 of his supplementary report of 11 November 2022) the IVSC definition of “synergistic value”, sometimes termed “marriage value”:

[T]he result of a combination of two or more assets or interests where the combined value is more than the sum of the separate values. If the synergies are only available to one specific buyer, then synergistic value will differ from market value, as the synergistic value will reflect particular attributes of an asset that are only of value to a specific purchaser.

129 With the benefit of reviewing the internal News Corp deliberations about the acquisition, Messrs Churchill and Fressl each considered that the price paid for the shares in Punters reflected a purchaser who saw synergistic value in those shares. Their opinions, separately reached, were well-grounded not just in that evidence but also in the reasons why, long before the subject of a purchase of the shares was broached in February 2016, those managing Punters saw advantage, as detailed above, in pursuing a content sharing “partnership” with News Corp’s Australian subsidiaries.

130 It is only natural that Mr Churchill looked to the IVSC standard and to the Commissioner’s guidelines. However, these appeals must be decided by the application of the text of the ITAA 1997 to the facts as found on the evidence, not on the basis of statements made in that standard or those guidelines.

131 The term used in the provisions of the ITAA 1997 with which these appeals are concerned is “market value”. It may be accepted that the market concerned is a hypothetical one. But there is nothing in the text of the provisions concerned which dictates either expressly or by necessary implication that one must exclude from this hypothetical market a particular willing purchaser present in that market who sees value particular to that purchaser in acquiring the asset concerned. Nor is there support for the exclusion of such a purchaser to be found in *Spencer*. A purchaser “cognizant of all circumstances which may affect its value, either advantageously or prejudicially” might well be cognizant of an advantage peculiar to that purchaser and be willing to pay for that advantage.

- 132 That the value must be *market* value doubtless does, by necessary implication, exclude from consideration any value in the asset which is peculiar to the vendor and which is necessarily lost on its disposal. Market value is thus not a value peculiar or special to the vendor alone. Care must therefore be taken when considering those acquisition of land cases where compensation is based on a value to the owner.
- 133 The hypothetical market also *assumes* a vendor and one or more purchasers. At least when acting in the same capacity, the hypothetical vendor in the market cannot also be the hypothetical purchaser.
- 134 The notion that a determination of market value as used in provisions such as those under present consideration should exclude “special value” to a particular purchaser is not unique either to the IVSC standard or the Commissioner’s guidelines or even to our times or country. This is revealed by a comprehensive and illuminating survey and analysis of authority offered by Professor Bernard Marks in his article, ‘Valuation Principles in the Income Tax Assessment Act’ (1996) 8 *Bond Law Review* 112. Professor Marks’ conclusion (at p 160), which is well-supported by authority, is that “the exclusion of special value from market value in the hypothetical market test [is] an ‘economic paradox’ and a ‘contradiction in terms’”. For reasons which follow, which draw upon Professor Marks’ article without further attribution, I agree, and for exactly the reason Professor Marks gives.
- 135 The origins of the hypothetical market formulation for the determination of value stated in *Spencer* may be traced to a need which emerged in the mid-nineteenth century in England to determine the value of the annual rent at which premises could be let and the value of property for the levying of rates and successions duty. The formulation was based on economic principles. This is evident in an early such case, *R v West Middlesex Waterworks Co* (1859) 28 LJ(MC) 135, at 138, 120 ER 1078, at 1082, Wightman J stated:
- 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 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.
- 136 These economic principles were applied in a hypothetical market with market value being determined via a process described as the “higgling of the market”: *Mersey Docks and Harbour Board v Liverpool* (1873) LR 9 QB 84, at 96, per Blackburn J.

- 137 In the nineteenth century rating cases, the hypothetical market was held to include hypothetical potential tenants who would bid to rent the property concerned because of synergistic benefits, for example because the resultant right to occupy that property would add value to that person's existing other properties. Thus, in *R v London and North-Western Railway Co* (1874) LR 9 QB 134, 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. That rent was determined as if the branch line were added to the other lines and thus increased a railway company's network. To like effect is *London County Council v Churchwardens of the Parishes of Erith and West Ham* [1893] AC 562, where 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. Like reasoning is also evident in *Davis v Seisdon Union* [1908] AC 315.
- 138 At odds with the inclusion of purchasers who would derive synergistic benefits in such a hypothetical market is a line of cases concerning the market rental value of licensed premises during an era when "tied houses" were a feature of the hotel or "pub" industry in the United Kingdom. A "tied house" was one owned by a brewery but leased to an independent publican on terms which included a requirement that the publican purchase the beer and ales of that brewery. A later variant was that the brewery itself operated the premises by employed staff.
- 139 The resultant valuation issue arose in this way. 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.
- 140 Such an issue arose in *Bradford-on-Avon Assessment Committee v White* [1898] 2 QB 630 (*Bradford-on-Avon*). In that case, on a case stated to a Queen's Bench Divisional Court from the Court of Quarter Sessions, the rating authority submitted that the market rental of the licensed premises concerned should include the premium which a brewery would pay to rent

the premises in order to sub-let them as a tied house. This submission was rejected. Channell J, at 638-9, dismissed it in this way and without elaboration:

Suppose the owner of a public-house, who is desirous of letting it, receives an offer from a brewer to take it as tenant from year to year at a certain rent: the owner might say to the brewer, "I will not take that rent from you; I know it is worth more than that to you; you will make large profits out of it by letting it as a tied house, and I shall not let it to you unless you will give me more." The brewer, being really anxious to make those profits, would probably give more. That sum is obviously given for reasons personal to the brewer; it has nothing to do with the market value of the premises, though the possibility of its being given may be a matter tending to raise the market value. Such a rent as that could not, in my opinion, be treated as a rent which might reasonably be expected to be obtained for the premises within the meaning of the Act ...

Although, with respect, this statement is at odds with economic concepts of supply and demand in a market, it is apparent (also at 638) from his Lordship's reasons that he considered this rejection was in accordance with the by then well-developed "higgling of the market" approach to valuation. A separate judgment to like effect was delivered by Ridley J.

141 *Bradford-on-Avon* endured as authority for some 40 years. It was over-ruled in *Robinson Brothers (Brewers) Ltd v County of Durham Assessment Committee (Area No 7)* [1938] AC 321, another licensed premises rating case, for reasons which effectively coincide with the economic principles and the hypothetical market-based reasoning evident in the nineteenth century rating cases. This is revealed, especially in the part I have emphasised, in the following passage from the speech of Lord MacMillan, at 336, with whom the other members of the House agreed:

The *Rating and Valuation Act*, 1925, s. 68, sub-s. 1, defines "gross value" to mean the "rent at which a hereditament might reasonably be expected to let from year to year," on certain assumptions immaterial for the present purpose. It is not the rent at which the hereditament is actually let, unless that happens to be the rent at which it might reasonably be expected to let. It is the rent which a hypothetical tenant might reasonably be expected to pay. 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.

[Emphasis added]

142 Outside the field of the rating of licensed premises, English authority accepted, even before *Bradford-on-Avon* was over-ruled, that in assessing market value, it was appropriate to take into account a price which a special buyer in the market would pay. *Inland Revenue Commissioners v Clay* [1914] 1 KB 339 (*Clay*) (Scrutton J), on appeal *Inland Revenue Commissioners v Clay* [1914] 3 KB 466, offers a good example of this. In that case, 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. A challenge was made to a referee's fixing of the value of each of the adjacent houses at £1000. In dismissing that challenge, Scrutton J (as he then was) at first instance distinguished compulsory acquisition cases because of their focus on value to the owner and then stated, at 348 – 349:

Under this Act one is to estimate the price which the fee simple would realize “sold in the open market by a willing seller.” The seller is not to be assumed to be making a forced sale at any price he can get, however low. He must be willing to sell, not demanding compensation for a forced sale, but he is not required to exclude the principal bidder from his market, because that principal bidder wants the house more than anyone else and will therefore give more for it. The Solicitor-General admitted that if No. 82 was taken by a nursing home, the competition between the owners of No. 82 and No. 84 for No. 83 might be taken into account; but he said that the offers of the owner of No. 84 alone, though based on real necessity, and advantageous to him as the owner of No. 84, must be excluded from the “open market” to be considered. I am unable to follow this reasoning. If the owner of No. 83 had said to an expert, “I wish to sell, but am not forced to, and can wait and negotiate; my house is worth 750l. to private owners to live in, but my next neighbour desires to extend his premises, and my house is so convenient and well built that it will pay him to go up to 1200l. rather than build elsewhere; what do you think I can realize by a sale?” I think such an expert would have answered, “Well, it depends on diplomacy in bargaining, but I should think you could be sure of selling for at least 1000l., and if you refuse to sell except at your price you can very likely get more.” I exclude the last hypothesis of refusal, as I do not think the vendor would then be a “willing seller at the time,” but I see nothing in the Act to require me to exclude the first hypothesis, which seems to me the obvious business way to look at the transaction. In other words *I cannot exclude from the “open market” the principal buyer, though for a genuine business reason he will pay a price higher than others.*

[emphasis added]

143 An appeal against his Lordship's order was dismissed by the Court of Appeal, with each judge adopting the whole of market reasoning apparent in the judgment of Scrutton J. Given the market value controversy in this case, it is desirable to quote the following excerpts from the appeal judgments. Cozens-Hardy MR, at 472 stated:

An “open market” sale of property “in its then condition” 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.

Swinfen Eady LJ, at 475, stated:

A value, ascertained by reference to the amount obtainable in an open market, shews an intention to include every possible purchaser. The market is to be the open market, as distinguished from an offer to a limited class only, such as the members of the family.

144 Although the statute in *Clay* referred to “open market”, nothing turns on this with respect to its present relevance. That is because in the provisions in question in this case, “market value” is not a reference to a restricted market. It is necessarily implicit that the market concerned is an open one.

145 What was said in *Clay* as to the need not to exclude from the hypothetical market willing buyers who might have a special interest in acquiring the land has, repeatedly, been accepted as correct. Notably, that acceptance includes by the Judicial Committee in *Vyricherla Narayana Gajapatiraju v Revenue Divisional Officer, Vizagapatam* [1939] AC 302, at 316 – 317. Unsurprisingly, given the myriad of jurisdictions for which that body once acted as an ultimate appellate clearing house, but as Professor Marks correctly notes in his article, that case has been widely influential. That influence extends to Australia: *MMAL Rentals Pty Ltd v Bruning* (2004) 63 NSWLR 167, at 180 [73] – [75] (per Spigelman CJ); *Northern Territory v Griffiths* (2019) 269 CLR 1, at 113 [251] per Edelman J. I record my gratitude to Ms Wheatley KC and Ms FitzGerald, who appeared for the Commissioner, for the latter reference.

146 Recently, and with reference to *Clay*, Lord Hoffman stated, in *Earl Cadogan v Sportelli* [2010] 1 AC 226, at 266 [2], “It is well established that the additional value to a special purchaser must be taken into account in estimating what the property would fetch in the open market. What effect it will have depends not only upon its estimated value to the special purchaser (often no easy matter) but also upon the likelihood that he would actually buy on the valuation date.”

147 A like discussion of principle is also evident in the judgment of Wigney J in *Miley*, at [94] – [98], with which I respectfully agree, and where also pertinent authorities are helpfully

collected. *Miley* also exemplifies that the non-exclusion of a special purchaser from the hypothetical market also applies to the valuation of shares.

148 In an endeavour to avoid being overwhelmed by this avalanche of authority, counsel for the Applicants put that it was the usual practice of valuers to exclude outliers from assessments based on comparable sales, that is prior sales where a price obtained could be seen to have been obtained by unusual factors. The propriety of looking to evidence of comparable sales in assessing value is long established: *McDonald v Deputy Federal Commissioner of Land Tax (NSW)* (1915) 20 CLR 231 (*McDonald*). The submission as to valuation principle is unquestionably correct but, with respect, it does not have present application. That is because it is the market value of the “outlier” which falls for determination. To use the circumstances in *Clay* as an illustrative explanatory example, although the valuation of the houses adjoining the nursing home was correctly fixed at £1000 each, because the hypothetical market for each necessarily included the proprietor of that nursing home as a special purchaser, it would not follow that homes in like condition to those adjoining homes but in an adjacent street also had a market value of £1000. All other things being equal, their market value would be £750. In the valuation of those adjacent street homes, the sales of those adjoining the nursing home would be “outliers”.

149 I have discussed this subject at length not just out of deference to counsel for the Applicants but also in deference to Mr Churchill’s ability and integrity as a valuer. It is quite clear on the evidence that he felt himself constrained by the Commissioner’s guidelines, particularly the passage I have quoted above. The passage quoted appears uncritically to have conflated two quite separate valuation principles with a misleading result. It is correct, save whether the relevant touchstone is “value to the owner”, that one excludes “attributes of an asset that are of value to a specific owner” from the hypothetical market. However, it is contrary to overwhelming authority to exclude from the hypothetical market attributes of an asset that are of value to a specific purchaser. In truth, what Mr Churchill identified as special value was but part of the market value of a purchase of all the shares in Punters by News Corp Investments. It represented a synergistic benefit, which has a similar rationale to what sometimes called a “marriage value” upon the merger of leasehold and freehold interests: *Promenade Investments Pty Ltd v New South Wales* (1992) 26 NSWLR 203, at 227 (per Sheller JA); *Miley*, at [100].

150 If, truly, the circumstances of the disposal of the shares in Punters were such that, contrary to the conclusion I have reached, the vendor shareholders and News Corp Investments were not dealing with each other at arm's length, it would be odd to take up elements of News Corp's synergistic benefit analysis and apply it as if the parties had dealt with each other at arm's length. But the very fact that that element is present in that analysis is one factor which tells against the dealing being other than at arm's length. Moreover, that beneficial potentiality always existed in relation to this particular type of purchaser in a hypothetical market.

151 The irony in this case is that a feature of the acceptance of the Commissioner's submission that the disposal of the shares in Punters has not been proved not to have been at market value has been exposure of an error in the valuation guidelines published by the Commissioner. If there be any issue as to penalty, and such an issue is not before the Court, that might be thought to have obvious, benign consequences for the vendor shareholders.

Division 152

152 As to the valuation of the majority and minority shareholding in Punters and the Division 152 issue, all that need additionally be stated is that the disposal of one did not occur in isolation from the disposal of the other. All the shares in Punters were disposed of at the same time. That being so, it is erroneous to value them as if, just before their disposal, they were being sold in isolation: *Miley*, at [102] and [104]. Immediately beforehand, they were subject to a binding offer for an overall price under what became, immediately thereafter, the Share Sale Agreement. On the evidence, there is no warrant for discounting the capital proceeds which were then received for the contingency that the disposal might not occur. True it is that it is conventional to exclude offers from valuations: *McDonald*. That does not mean that, in the circumstances of this case, the best evidence of what all the shares in Punters were worth immediately prior to the disposal is what was achieved on their disposal. Valuations which assign a different value to the shares are wrong in principle.

153 It follows that no entitlement to the small business concession under Division 152 exists.

Outcome

154 For these reasons, the assessments concerned have not been proved to be excessive. Each appeal must therefore be dismissed, with costs.

I certify that the preceding one

hundred and fifty-four (154)
numbered paragraphs are a true copy
of the Reasons for Judgment of the
Honourable Justice Logan.

Associate:

Dated: 26 June 2024