REVIEW OF VALUATION CASES

2013

Australian Property Institute/University of Qld. Seminar

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Brisbane

BR O'Connor,
Judicial Registrar
Land Court.

This year's review includes the following cases:

1. **Mio Art**

   To what extent must events (e.g. a proclamation of a Town Planning Scheme) subsequent to an acquisition be ignored in assessing market value for compensation purposes. Can they be used to confirm a "foresight"?

2. **Ostroco**

   - Can a resumee (lessee) claim for relocation expenses if allowed to stay on in the resumed premises after the date of resumption?

   - Can a resumee claim for loss of profits incurred prior to the date of resumption when caused by the announcement of the resumption project?

3. **Van Byron**

   Can injurious affection (under s 20(2) *ALA*) be claimed where the allegedly affected lot is not immediately adjoining the resumed land?

4. **Xstrata**

   A range of compensation claims by landowners affected by the proposed Wandoan Coal Mining Lease to Xstrata was considered by the Court.

5. **Peabody West Burton**

   What compensation was payable by a miner to a landowner for authorised activities on land under the authority of an Exploration Permit (Coal). This was the first case before the Land Court under the new Land Access provisions.

6. **Savimaki**

   This analysed the application of the *Pointe Gourde* principle to property acquired for a major extension to the Sunshine Coast airport. Was there one scheme or two?

7. **Mahoney**

   Also considered the application of the *Pointe Gourde* principle to property acquired for the South-West Transport Corridor. Was down-zoning of the acquired land many years prior to the resumption part of the scheme of resumption?

8. **Agreedto**

   In determining the conversion value to freehold of a perpetual lease, should existing sub-leases and easements be considered. (The latter interests were a "burden" on the land rather than a "benefit" to it).

Brisbane City Council appealed to the Court of Appeal against a decision of the Land Appeal Court, essentially on a narrow but most important legal issue – could an event occurring subsequent to the date of valuation be used in the assessment of market value for compensation purposes under the *Acquisition of Land Act*. The subsequent event was the publication of the draft Kurilpa 2 Plan which provided more generous height limits for a hypothetical development.

Background

The subject land, part of a larger parent parcel, situated at West End, was acquired in August 2007 for the southern approaches to the Hale Street bridge.

The parties agreed that the "before and after" approach to valuation was the appropriate one, and that the value of the residue after the acquisition was $9 million. They also agreed that the highest and best use of the land before resumption was for commercial office development; that it was appropriate to use a "hypothetical development" method of valuation; and that a prudent purchaser would value the land on the basis that the relevant hypothetical development would be one which required a code assessable development application rather than an impact assessable one. They differed as to the type of building which would have been approved for the land.

The Land Appeal Court allowed an appeal from the Land Court on one ground only. It held that the Land Court had wrongly disregarded a planning proposal (Kurilpa 2), published subsequently to the date of resumption, in its consideration of the size of the development which a prudent vendor and purchaser would have expected to have been approved.

The Land Court, in calculating the plot ratio on the parent parcel, was required to make a determination of the largest gross floor area which would have been contemplated by the hypothetical prudent purchaser. That, in turn, required some estimation of the type of development, and in particular the height of development, which that purchaser would have anticipated would be permitted on the site. Each of the parties had given evidence of such a development. The Land Court identified the function of the court to be to determine:

> "how the hypothetical prudent purchaser referred to in the judgments in *Spencer* would have viewed the potential financial return if a proposal were considered that included one or other of the proposed plans. "

The Land Court made a finding that the perceived maximum average height of buildings which would have been approved on the site was 10 storeys. That finding in turn depended in part on the relevant planning instruments.

Kurilpa 2 was published some 3 or 4 months after the date of resumption. That Plan indicated a building height of 12 storeys in the vicinity of the subject; a building height of 10 storeys was previously permitted under Kurilpa 1.

However, at the date of resumption there was no evidence as to the content of any Plan review at that time and in particular as to whether the proposal to raise the relevant height limit to 12 storeys was in circulation.

The Land Appeal Court held:

1. It was foreseeable in August 2007 (the resumption date) that the building heights allowed under the Kurilpa 1 would be increased (at some unspecified future time); that evidence of events subsequent to acquisition was admissible if it confirmed what was foreseeable at the date of acquisition, citing *Thorpe v Brisbane City Council* and *CMB No 1 Pty Ltd v Cairns City Council*; that Kurilpa 2 confirmed what was foreseeable at that date; and that therefore:

   > "… it was erroneous to exclude Kurilpa 2 from consideration, and to assess the development potential of the site, and ultimately to determine compensation, on the basis that building heights would, on average, not exceed 10 storeys. "

2. The application of sales evidence would have been affected by any significant change to the Land Court's finding about the development potential of the land.

No quantitative assessment was made of the likelihood (apparent to the hypothetical vendor and purchaser as at the date of acquisition) of an increase in the building heights in the West End Woolloongabba District Local Plan or Kurilpa 1 or in the height limit likely to be accepted by the Council upon consideration of development applications for the subject site; nor did it make any finding as to when those parties would have perceived that any such change was likely to occur.

Key ground of appeal

Whether events arising subsequent to acquisition must be ignored in assessing market value for compensation purposes.

The Court of Appeal stressed that this was an important point, which must arise frequently in Land Court cases, and that the decision of the Land Appeal Court was binding on the Land Court in future cases. If that decision was wrong, it had the potential to result in numerous future miscarriages of justice.

Mio Art's submission

Mio submitted that the Land Appeal Court was correct in ruling that, at least to the extent that it confirmed what was foreseeable at the date of acquisition, subsequent events could properly be taken into account in assessing market value. It submitted that the decision in *CMB* resolved the question in its favour. That case applied the decisions in *Thorpe* and *Housing Commission of NSW v Falconer.*

Council's submission

The Council submitted that events arising subsequent to acquisition must be ignored in assessing market value for compensation purposes. However, they may be taken into account in the assessment of special value to the owner, damage sustained by disturbance, and the application of the reinstatement principle, to the extent to which they were foreseeable by the hypothetical prudent purchaser at the date of acquisition. Subsequent sales of comparable properties are also admissible as evidence as to the value of the subject land at the relevant date.

The Court of Appeal held:

1. The assessment of compensation for the acquisition of land in Queensland is controlled by s 20 of the *Acquisition of Land Act 1967*. That section must be the starting point in any consideration of the issue dividing the parties.

2. It is important to keep the text of the section firmly in mind, and not to replace it with judicial dicta from cases dealing with differently worded provisions. In this area of law, statutes do not always, nor in all jurisdictions, use words, even terms of art, in a uniform sense.

3. Two points follow from the text of s 20. The first is that "value of the land taken" is quite separate from damage caused by severance or injurious affection and disturbance costs. They are not elements of land value under the Act. The second is that, unlike compensation for the value of the land taken, compensation for severance, injurious affection and disturbance is not explicitly required to be assessed by reference to the date of acquisition. They are indirectly connected to that date by the requirement for causation ("damage … caused by", "costs attributable to"), but the section gives no indication of the appropriate test of remoteness of damage.

4. Compensation for severance, injurious affection and disturbance is awarded in respect of matters which often will arise or be quantified after the taking.

5. None of these types of compensation had to be assessed as at the date of resumption, either by the terms of the legislation or by reason of the decision in *Spencer's* case.

6. In the context of statutes containing express provision for compensation for disturbance, severance and injurious affection or enhancement, recent authority has emphasised that these heads of damage should be excluded from the unified notion of value to the owner.

7. "Value" is not a defined term in the Act. It has long been accepted in Queensland and, indeed, throughout Australia that the value referred to in the section is value to the dispossessed owner. Ordinarily that value is the market value determined in accordance with the decision of the High Court in *Spencer*.

8. In *Thorpe*, the market value component of the compensation had been agreed. In calculating the balance of the compensation it was appropriate to take post-acquisition events into account. However, in assessing market value, it is relevant to take into account the likelihood of future events to the extent that such likelihood would have been known to the parties to the hypothetical transaction (or to appropriate experts whom they might reasonably have been expected to have engaged). Future events such as *unexpected* prosperity or *unanticipated* depression were to be ignored. There is no support in *Thorpe* for the proposition that subsequent events can be directly taken into account in assessing market value.

9. Thorpe was a not case about market value. *CMB* was about market value, but in a very different context.

10. Neither of these cases provides authority for departing from what was said in *Spencer's* case in relation to assessing market value.

11. The previous authorities show that where no statutory provision for compensation for disturbance exists, such compensation is given as an element in the assessment of value to the owner, and in that assessment events subsequent to the date of acquisition can be taken into account. So too may compensation be given for severance, injurious affection, reinstatement costs and special or additional value to the owner in the absence of statutory provision. In such cases, subsequent events may similarly be taken into account.

12. None of the cases discussed demonstrates that, where statutory provision is specifically made for elements once encompassed in the "unifying concept" of value to the owner, there is any limitation on the extent to which regard may be had to events subsequent to the date of acquisition (subject, of course, to proof of causation). Section 20 of the *Acquisition of Land Act 1967* makes specific provision for injurious affection, severance and disturbance.

13. None of the cases discussed demonstrates that events subsequent to the date of acquisition can be taken into account in assessing market value.

14. Mio submitted that Kurilpa 2 could be taken into account in assessing market value under s 20 "not to prove a hindsight, but to confirm a foresight" of the likely approval of a 12 storey development. The meaning of that catchy dictum is unclear. So is its logic. For direct proof of market value, it is an expression best forgotten.

15. The *Spencer* test postulates hypothetical parties in full possession of knowledge generally available on the date of acquisition. That knowledge includes knowledge of future possibilities, but <u>only as possibilities</u>, and with the weight which prudent persons would ascribe to them. It is difficult to imagine how the fact that a possibility subsequently becoming a reality could be directly relevant to that knowledge.

16. There is no inconsistency between this approach and that which enables subsequent sales to be taken into account in assessing market price. Those sales are not taken into account as matters which would be present in the minds of the hypothetical parties. They are simply evidence of an event from which an inference can be drawn about the position at an earlier (but not very much earlier) time.

17. The Land Court did not err in excluding Kurilpa 2 from consideration in assessing the market value of the land acquired by the Council.

18. The effect of the approach by the Land Appeal Court was to treat what would have been only a possibility in the minds of the hypothetical purchaser and vendor as a *fait accompli*. There was no attempt to assess the level of likelihood of the possibility of approval of the 12 storey development. Even if Kurilpa 2 had been public knowledge on the date of acquisition, it would still have been necessary to make allowance for the risks that the Council might not adopt the views of its planning officers after public comment was taken into account, that the government might not approve the Council's proposal and that there would be substantial delay in implementing the proposal.

19. The evidence about the hypothetical development did not take these risks into account. In the absence of such evidence there was no scope for Kurilpa 2 to have any effect on the determination of market value of the land acquired.

Order

1. The appeal was allowed with an order that the matter be returned to the Land Appeal Court for decision in accordance with the reasons for judgment of the Court of Appeal.

**** <u>NOTE</u>: On remittal, the Land Appeal Court assessed the compensation at $18 million – see *Mio Art Pty Ltd v Brisbane City Council (No 2); Greener Investments Pty Ltd (In Liquidation) v Brisbane City Council (No 2)* [2012] QLAC 5.**

The Land Court had previously decided that Ostroco's claim (here remade) was barred due to the operation of section 18(3) of the *Acquisition of Land Act* (ALA) which provides that:

> "(3) Compensation shall not be claimable by or payable to a person who is lessee, tenant or licensee of any land taken if the constructing authority upon written application allows the person's estate or interest to continue uninterrupted."

The Land Appeal Court decided that Ostroco's estate was not allowed to continue uninterrupted as the nature and terms of its tenancy changed and it was therefore not precluded from claiming compensation. The Land Appeal Court remitted the matter to the Land Court to determine Ostroco's claim for compensation.

Ostroco, as lessee of the property resumed, claimed compensation for:

(i) relocation costs
(ii) economic loss in relation to its business as a real estate agent:
  (a) prior to the taking of the land
  (b) after the taking of the land
(iii) loss of subletting income for the period 1 July 2007 to 30 June 2011
(iv) disturbance

Ostroco did not make a claim based upon s 20(2) of ALA concerning the "estate in land" that it has lost. There was no evidence led of the value of Ostroco's leasehold estate in the land resumed. Rather, it made claims for "costs attributable to disturbance", as contemplated by s 20(1)(b).

On remittal, the Land Court held:

Relocation costs

1. Relocation costs reasonably incurred by Ostroco as a tenant were allowed. Costs claimed that should properly have been borne by the landlord to establish a new premises were rejected.

Economic losses <u>prior to</u> and <u>after</u> taking of the land

2. Section 20(5) of ALA states that "costs attributable to disturbance, in relation to the taking of land, <u>means</u> …" and goes on to use the phrase "a direct and natural consequence of the taking of the land" in sub-paragraphs (e), (f) and (g). A plain reading of those words can only lead to them being understood as meaning that they refer to consequences of the taking of the land as a consequence is normally understood. A consequence can only occur <u>after</u> the taking.

3. The provisions considered in paragraph 2 above are not ambiguous or obscure. Applying the ordinary meaning would not lead to a result either manifestly absurd or unreasonable. It may nevertheless lead to a result that is unfavourable to the applicant.

4. It does not have jurisdiction in respect of Ostroco's claim for economic loss while trading prior to the taking of the land.

5. The claim for economic loss after the resumption was not established as being caused by the resumption in 2009 (as is required by s.20(5)(f) and (g)).

Loss of rental income

6. The same reasoning noted in paragraph 2 above also applied to the claim for loss of rental income. Section 20(5) can only apply after the date of resumption and not before. Purchase of the new premises in 2007 could not come within the scope of s.20(5)(g). The Court did not have jurisdiction in respect of this claim.

The issue of whether economic losses incurred prior to resumption date are claimable (even if causation can be established) was heard by the Land Appeal Court in late March 2013. A decision is expected shortly.

It should be noted that this question was decided in the claimant's favour in an earlier Land Court decision: *Jensim Family Pty Ltd t/a Bank of Queensland Coorparoo v Chief Executive, Department of Transport and Main Roads* [2012] QLC 58. However, in that case it was accepted by both parties, without legal argument, that the loss of profits before resumption were legally claimable.

** **NOTE: This decision was subsequently appealed to the Land Appeal Court – judgment reserved.**

The principal issue in this case was whether injurious affection was claimable - where the allegedly affected lot (5) was not immediately adjoining the resumed land. The lot adjoined the balance lot (14) from which the resumed land was taken. The two lots were in common ownership but had a highest and best use as separate rural residential lots.

Other incidental issues before the Court included:

- Whether the uncertainty as to the location of the probable works could be considered in assessing injurious affection?
- Whether a sales database with median sales prices could be used to demonstrate percentage increases?
- Could previous cases where a percentage factor had been allowed for injurious affection be used as a precedent here?
- Could a small difference in amounts in the "after" assessment of the two qualified valuers be reconciled?
- Where the claimant remained in possession, should allowance be made for interest?

The Court held:

1. The precise wording of s 20(1) of the *Acquisition of Land Act* required a severance – of the resumed land from other land of the claimant – to activate the injurious affection provisions of s 20(1)(b).

2. The words "such other land" in s 20(1)(b) were wide enough to include the lot not immediately adjoining the resumed land (on the authority of *Springfield*).

3. For severance to be established between resumed land and other land which did not physically adjoin, there must be a "connecting factor", a unity of ownership and a unity of purpose (on the authority of *Suntown*).

4. If it was necessary to establish a "connecting factor" in the instant case, this could be done. Despite individual highest and best uses, there was a proximity of situation and a unity of ownership of control between the two lots which could ensure that what was done on either could protect, advantage and not depreciate the value of the other.

On the Incidental Issues:

5. Uncertainty of location of the proposed works was likely to have an adverse impact on the mind of a purchaser of the balance land. It amounted to a present detriment at the date of resumption and was properly compensable.

6. A database of sales information of median sales prices showing a percentage increase was not acceptable evidence. Any claimed increase should be shown by sales and resales of the same properties. Averaging techniques were not standard valuation practice.

7. It was not appropriate to use percentage allowances for injurious affection in other cases to suggest some guiding principle. The discount to be applied was a question of fact to be determined on the evidence of each case.

8. A small difference in the "after" valuation assessment applied by opposing valuers may well be the result of professional judgment. Valuation is not an exact science. In a compulsory acquisition case, the benefit of doubt should be with the claimant.

9. Interest is not generally payable on an award where the claimant remains in possession. However, in the present case the claimant received minimal benefit in remaining on the land. Further, the bulk of the award was referable to injurious affection not the value of the resumed land. Full interest was awarded.

Xstrata Coal Queensland Pty Ltd & Ors v Keys & Anor;
Xstrata Coal Queensland Pty Ltd & Ors v Sky Grove Pty Ltd;
Xstrata Coal Queensland Pty Ltd & Ors v Erbacher; and
Xstrata Coal Queensland Pty Ltd & Edmonds & Anor
[2013] QLC 34

The Land Court was required to determine compensation under s 281 of the *Mineral Resources Act 1989 (*MRA) payable to four landowners upon the grant of mining leases to Xstrata. The leases were for the Wandoan coal mine in south-west Queensland.

A previous hearing before the Land Court had recommended to the relevant Minister that the mining leases and an associated environmental authority be granted subject to certain specified conditions.

Major areas of disagreement between the parties were:

- The improved rate/ha to be used in the "before" valuation.
- The appropriate treatment of the so called "balance" land, that is "restricted" land and other land recommended by the Court to be excluded from the mining leases.
- The types and quantum of disturbance items to be awarded by way of compensation.
- The percentage additional amount to be awarded under s 281(4)(e) of the MRA.
- Whether a claim for "value to the owner" should be allowed.

The Court held:

1. The highest and best use of the land was for grazing.
2. Although the proposed mining leases were for an extended term (30 years), it was appropriate to determine compensation as if the leases were in perpetuity.
3. The proper valuation methodology was the "before and after" approach but using improved sales.
4. A nominal value ($20,000) should be placed on "balance" land for one of the properties because of the restrictions placed on such balance – including the fact that no separate title was available and that it was located within the mining lease areas of a large open cut coal mine.
5. Two lots in separate ownership but worked as an aggregation could be valued as an aggregation. But separate awards were to be made to the individual owners.
6. It was permissible to consider sales to resource companies in determining compensation. However, the circumstances of each sale had to be assessed. It became a question of weight to be placed on such sale. A resource company may have paid higher than market value for a range of strategic reasons.

7. A schedule of resource company sales tendered by the landowner's valuer were not sufficiently analysed by the latter to establish that a premium should be placed on land acquired for mining resource purposes.

8. In compensation cases such as the present, the application of sales evidence should be made in a generous, not a niggardly, spirit. This was because of the uncertainty as to when compensation would be paid and when a replacement property would be required.

9. "Value of land of the owner" under s 281(3)(a)(ii) of the MRA meant "market" value of the owners' land with the *Spencer* test to be applied.

10. Any premium payable for the current "status and use" of the land under s 281(4)(c) of the MRA and the added value that land might have for an intended use claimable under s 281(3)(a)(vi) effectively constitute a "statutory special value" of the land. However, it was still necessary to prove economic loss to found a claim under these heads.

11. A claim for "loss of value to the owner" was disallowed.

12. In interpreting any obscure provisions in legislation, it was permissible to use extrinsic material as an aid to construction. Such could be in the form of a public document related to the legislative process. An alleged conversation between an industry leader and the responsible Minister would not qualify.

13. "The additional amount" under s 281(4)(e) was to reflect the compulsory nature of the process and not for other reasons.

14. Disturbance items that were allowable included: stamp duty, legal fees, cost of finding a replacement property, relocation costs, and contingencies (20% allowed). A claim for owner's time in finding a replacement property was not allowed, unless proven.

15. The Court had no power to index the compensation award or to include a sunset clause (to allow for uncertainty as to when the lease may be granted and compensation payable).

16. However, the Court could vary the award on application by a party if there were material changes in circumstances (s 283B).

17. The value of a piggery located on one of the properties should be separately assessed from the rest of the property. It was to be valued on a "standard pig unit" (SPU) basis. While there was limited evidence on this issue, older sales of piggeries provided some basis.

**** NOTE: This decision was subsequently appealed to the Land Appeal Court – awaiting hearing.**

The principal issue was the applicants' future compensation liability for an "authorised activity" on the respondents' land under the authority of an Exploration Permit (Coal) [EPC].

Schedule 1 of the *Mineral Resources Act 1989* (MRA) (commenced on 10 December 2010) governed such liability.

The specific dispute between the parties was what compensation, if any, was payable by the applicants under the head "diminution of value".

The applicants' valuer did not make any allowance for diminution of value because he claimed there was no evidence in the market place for rural properties in Central Queensland that would give any indication that there was a discount for such short term activities undertaken on an EPC. The respondents' valuer acknowledged that his contrary view was unsupported by evidence.

The Court held:

1. The provisions under Schedule 1 are quite different to those which apply to the payment of compensation for the grant of a mining lease under s 281 of the MRA. While compensation under the latter relates to the grant of a mining lease, under Schedule 1 a landholder is compensated for any compensatable effect the eligible claimant suffers caused by relevant authorised activities.

2. Under Schedule 1, the landholder is compensated for the "actual damage" that the explorer does to the landholder's property in actually carrying out the exploration activities. The heads of compensation in Schedule 1, (s 13(4)) must be read in light of this distinction.

3. The respondents' property had an area of approximately 15,000 ha. The proposed activities would have a direct impact on only a very small part of the property as a whole.

4. The respondents' valuer was unable to link any diminution of value to the actual exploration activities to be undertaken on the land.

5. The respondents' valuer's concept of diminution of value, in the particular circumstances of this case, more readily related to the heavy mining activities already being undertaken on and around the subject property, as well as the significant government infrastructure in the locality. Such was outside the scope of Schedule 1 considerations.

6. No compensation was able to be awarded for the future risk of mining on the subject land.

7. The respondents had not made out any claim for diminution in value of the subject land.

8. The costs recoverable under the ADR head included costs incurred by the landholders in engaging a valuer to assist in the negotiation phase of Schedule

1. However, once the matter proceeded to Court, the scheme of negotiation as contemplated by Schedule 1 is at an end. Any costs incurred by either party are recoverable, if at all, pursuant to s 34 of the *Land Court Act 2000.*

9. Minor amounts were awarded under the heads of "deprivation of possession of the surface land" and "diminution of the use of the land".

Part of the applicants' land was resumed for an extension to the Sunshine Coast (formerly Maroochydore) airport in July 2008. The purpose stated in the Notices of Intention to Resume was for aviation and associated purposes.

The initial proposal was to take only part of the now resumed land for a new east-west runway. That proposal was progressively amended so that a substantially greater area was now required; this additional area would be used for airport infrastructure and associated airport commercial activity.

The principal issue before the Court was: What was the scheme of resumption – was the further proposal a new scheme or merely a refinement of an earlier one? Under the *Pointe Gourde* rule, any advantage the scheme (or things flowing from the scheme such as superior planning designations) gave to the value of resumed land was required to be ignored. Both parts of the resumed land had been earlier rezoned from Rural to Special Purposes.

The applicants contended that the scheme changed from that as set out in the 1998 Master Plan, which included an east-west runway requiring the taking of some of the applicants' land, to a different scheme requiring the whole of the applicants' land; this was not due to any realignment of the proposed east-west runway, but because of a new proposal to relocate the airport terminal and related commercial infrastructure from its current location to that part of the applicants' land which was previously not earmarked for resumption.

For the respondent, the argument was that the scheme had not changed; simply the details relating to the placement of infrastructure within the scheme had altered and been refined over time, just as one would expect it to. The scheme was the extension and redevelopment of the Sunshine Coast airport as a whole and, when viewed in this way, the taking of the applicants' land was clearly in accordance with the long known scheme for the airport's redevelopment.

Other issues before the Court included:

- Whether the Court could consider late submissions placed before it.
- The impact of a "floating" reserve within the resumed land on compensation.
- Whether an offer made by the respondent to the applicant could be considered.
- Use to be made of a valuation report procured by the respondent but not tendered by them.
- The extent to which evidence of a commercial agent could be used.
- The application of the *Jones v Dunkel* rule to certain evidence.

The Court held:

1. The law as to what represents a "scheme" of resumption is vague and imprecise.

2. It was not necessary for the details of the scheme to be all that precise. What was envisaged from the 1970's to the 1998 Master Plan and beyond up until the mid 2000's was an expanded terminal precinct as part of the overall airport expansion. It was a mistake to think of the airport expansion as simply being linked as a key

component to the east-west runway. The east-west runway was merely one component of the airport expansion; just as the extended terminal facilities are another component; and linked commercial activities yet another.

3. The scheme, at a general level, incorporated the inclusion of new airport terminal facilities and co-existing commercial activities consistent with airport terminal facilities. The resumption of the applicants' land to the south clearly was within this broad purpose, just as the taking of the applicants' land to the north was clearly within the requirements of the airport expansion in general and, in particular, for the construction of the east-west runway.

4. The resumption was thus all part of a single scheme.

5. The broad nature of the purpose set out in the Taking of Land Notice and in the Notices of Intention to Resume was consistent with findings as to the scheme of the resumption.

6. Parts of the amended written submission presented to the Court by the respondent after completion of final oral submissions were not considered by the Court in arriving at its decision. It was not appropriate to consider such unless they related to leave given earlier. The rationale for such approach was analysed.

7. The area of "floating" road reserve within the resumed land was deducted from the resumed area in assessing compensation.

8. A valuation prepared by an independent valuation firm procured by the Council which supported an offer subsequently made by the Council could be properly considered by the Court as a "check" method in assessing the market value of the resumed land. (The full valuation was obtained by the applicant under freedom of information law). The valuation was used by the Court in the unusual circumstances of the current case where the valuations of both respondent and applicant were found to be deficient in certain areas.

9. An "offer to purchase" by the resuming authority was admissible as evidence of value in the Land Court (the Court is not bound by strict rules of evidence). It became a question of relevance and weight; of relevance was the fact that the respondent was the airport owner, the airport operator, relevant planning authority and responsible resuming authority and thus should have been fully aware of all background issues.

10. It was proper to apply the *Jones v Dunkel* rule to draw certain inferences against the respondent authority where the latter did not lead evidence to clarify certain matters apparently that were within its knowledge. The issues related to the reason for the "scheme" amendment and the basis on which the offer was put to the applicant - did such include an inducement to settle. The rule in *Jones v Dunkel* was also applicable in relation to sales where the Council purchased land for environmental purposes. The Council should have explained why a premium may have been paid by it for such land.

11. Opinion evidence from an expert witness which was outside his field of expertise was to be disregarded.

12. Despite obstacles, there was an attractiveness, from an industrial development viewpoint, to the land being physically proximate to an existing airport. The respondent valuer had not made any allowance for this advantage in his valuation.

13. Evidence provided by a commercial agent of market interest in the resumed land could not be considered as evidence of value. However, it did indicate market interest by potential purchasers for development potential.

14. Compensation was determined for the resumed land at a rate of $105,000/hectare, slightly closer to the figure led in evidence by the applicants' valuer ($125,000/hectare). The respondent's figure was $75,000/ha.

In 1982 the applicants purchased land located on Ipswich-Boonah Road, Yamanto, at the intersection with the Cunningham Highway. At that time the land was zoned Future Urban. In 1999 it was rezoned to Rural under the Ipswich City Council Planning Scheme.

In 2006 over half of the land was resumed by the respondent for future transport purposes, specifically for the South-West Transport Corridor (SWTC).

The parties agreed that the value of the land taken was either $275,000 if it was to be valued as zoned rural or $1,707,500 if it should be valued as zoned future urban and had the development potential associated with that.

The parties did not dispute that the central issue was whether the "San Sebastian" principle, (restrictions on land use made as a step in the process of resumption should be ignored in assessing compensation), applied to the facts of the matter.

The applicants claimed that the Ipswich City Council's (ICC) change to the zoning of the land in 1999 was a step in the process to resume the land in 2006 for the purposes of the SWTC.

There was no evidence called for the respondent as to actual reasons for the Council down-zoning the land. No file had been found explaining the reasons for the change. It was simply done along with all the changes in the new planning scheme which commenced in 1999. No notice was specifically given to the applicants of how the scheme would adversely affect them. It was simply advertised and displayed to the public generally and in a way that was compliant with the then-existing legal requirements. The applicants did not know about the public consultation prior to the 1999 planning scheme and did not make a submission about it.

The respondent led evidence that it does not require local governments to down-zone land to accommodate transport projects and that there is "no implied understanding that local governments will down-zone land to accommodate transport projects".

The respondent claimed that there would be no reason to down-zone the applicants' land in 1999 as no need to resume it was apparent at the time that it was down-zoned.

The map dated November 2003 of the Preferred Corridor Investigation Area clearly included the applicants' land and the precise alignment of the corridor was shown in the map dated June 2005. The respondent said that this was the time when it became known that the land would be resumed and that the map published in November 2003 showed that from then it could be said to be likely that the land would be resumed.

The applicants claimed that the ICC knew the end point of the corridor when it down-zoned the land. By contrast, the respondent claimed that the end point, the point at which the SWTC corridor would join the Cunningham Highway, was not known to anyone until years after the down-zoning.

The 1998 Regional Framework for Growth Management (RFGM) contained a principle that early provision should be made to protect the routes of high capacity corridors such as the Springfield-Ripley-Ipswich corridor. Local governments had a

lead agency role for integrated transport and land use planning in their geographic areas.

The respondent claimed that this high-level direction was "broad-scaled" and that the corridor could not be protected until at the earliest 2003 when it became clear where it would be. The evidence was that the respondent would not have sought down-zoning and ICC would not have down-zoned the land to protect the future corridor. By contrast, the applicants claimed that the high level planning decisions actually had a real and early influence and it is clear that such was intended.

Further evidence from the respondent was that it would not be suitable to make zoning changes to land unless and until there was "absolute clarity" where the transport corridor would be "by reference to metes and bounds". The "metes and bounds" of the corridor were not known until much later, in June 2005.

The Court held:

1. The onus of proof was on the applicants.

2. One purpose of the "San Sebastian" principle was to ensure that a resuming authority does not employ planning restrictions to destroy the development potential of the land and then assess compensation for its resumption on the basis that the destroyed potential had never existed.

3. It was necessary to identify what was "the scheme underlying the acquisition".

4. The effect of the evidence of the respondent was that the actual route of the SWTC was not chosen until well after the applicants' land was down-zoned and that the respondent did not seek to influence the ICC to do so.

5. It was not necessary for the applicants' case to succeed for it to prove any involvement by the respondent in the down-zoning decision and the applicants did not suggest that there was any special request from the respondent to the ICC to down-zone their land.

6. The applicants placed very great reliance on high level planning decisions evidenced by documents which they said brought about the ICC's decision to down-zone the land.

7. When it is recalled that town water was connected to the land and that it could be sewered (although a pumping station may be required), much of the respondent's case settles upon the military aircraft noise considerations as a possible justification for the down-zoning decision, the reasons for which were not documented.

8. It was unnecessary for the applicants to show that the route or any part of it had been pre-determined at the date of re-zoning. They would succeed if they showed that the rezoning was entirely due to the underlying scheme.

9. ICC was required to preserve the corridor and, at a time after that direction, it down-zoned this land which reduced its development potential, an action that could well be understood as directed to preserving the corridor.

10. It is clear that the route and end-point of the corridor were not known until years after the down-zoning action but the nature of the action was consistent with the required goal; it was possible that the land would be required even though the ICC favoured a more southerly potential route.

11. The applicants would be able to succeed if they could show that it was more likely than not that the down-zoning was intended to preserve the possible route of the corridor.

12. If the down-zoning is viewed in the light of the existence of the instruction to preserve the corridor, it is more likely than not that the down-zoning was done in pursuit of the scheme.

13. To interpret the instruction as incapable of being acted upon until the actual details of the corridor were finally settled is to interpret it as lacking the effect it clearly directed.

14. The conclusion in paragraph 12 is easier to reach in view of the fact that there is no evidence of why the decision to down-zone was actually made.

** **NOTE:** **This decision was subsequently appealed to the Land Appeal Court – awaiting hearing.**

The appellant held a Perpetual Lease over land at Urangan (Hervey Bay) under the provisions of the *Land Act 1994* (Qld) (*Land Act*). It applied to have the lease converted to freehold land. It appealed to the Land Court against the purchase price for the conversion determined by the respondent, and then appealed from the Land Court's decision. The key issue in the appeal is whether the purchase price is to be determined by, or without, reference to interests created by way of sub-leases and easements affecting the land. These sub-leases are a burden rather than a benefit to the land. The appellant claimed they should be considered in determining the conversion figure.

If the subleases and easements were considered to be included, the conversion value would be nil. If they were to be ignored, the conversion value would be $10,000,000. The Land Court had concluded they were to be ignored.

Background Facts

The following background facts were agreed to by the parties:

- In 1998, an earlier Harbour Lease was surrendered by Great Sandy Straits Marina (GSSM), and replaced with Perpetual Lease 209524 over land containing 7.265 ha.

- The leased land was to be used for commercial business and tourism purposes.

- Pursuant to that lease, GSSM undertook the development of 11 blocks of residential units and a Resort hotel.

- That development was completed, leaving no material part of the leased land undeveloped by 2003.

- The developed residential units and commercial premises were 'sold' to end user purchasers by way of the grant to those purchasers of long term subleases under PPL 209524, some for a term of 75 years, and most for a term for 999 years.

- The subleases were granted after construction of the buildings to which they related, and each described the leased premises as 'part of the building' identified in the lease document, or as an area 'bounded by' walls of a building identified in the lease document.

- Each sublease thus identified the leased premises by reference to a plan which depicted a volumetric space bounded by physical elements of a building.

- Under each such sublease, there was no outgoing rental payable by the sublessee. The sublessee paid a lump sum consideration at the time of the grant of the lease, which was equivalent to the purchase price which would have been paid if the purchasers were acquiring a strata titled freehold unit. In each case, the sublessee's only ongoing obligation under the lease was to pay moneys to the sublessor, paying a proportion of outgoings including cleaning,

insurance and repairs, incurred by the sublessor, including rent payable to the State under PPL 209524.

- In 2006, PPL 209524 was transferred to Agreedto Pty Ltd ('Agreedto') for a consideration of $660,000.

- On 11 June 2010, the Minister approved the making of an offer of conversion at a price of $11,500,000.

- On the valuation date, the annual rental payable under the lease was $770,000.

- The Minister, after considering the outcomes of the internal review, approved the offer of a revised purchase price of $10,000,000.

- Agreedto appealed to the Land Court against the decision on the purchase price under s 427 of the *Land Act 1994*.

The Land Appeal Court held:

1. Section 170(3) of the *Land Act* identifies the purchase price, as an amount equal to the unimproved value of the land being offered, "as if it were held in fee simple". Section 434 provides that the unimproved value of land is the amount an estate in fee simple in the land in an unimproved state would be worth, in a market transaction.

2. The value to be determined is on a hypothetical basis.

3. The issue in the present appeal is to be determined, not by relying simply on the expression "fee simple" as connoting a title unaffected by other interests, but by a consideration of the scope and purpose, and the language, of the relevant provisions of the *Land Act*.

4. If the land is to be valued "as if it were held in fee simple", then it must be valued as if it were not subject to the Perpetual Lease.

5. If the purchase price is to be determined on the basis that the land is not subject to the Perpetual Lease, it follows that interests derived from the Perpetual Lease are also to be disregarded. The sub-leases are such interests. Some of the easements were granted to provide rights to use land, ancillary to the interests created by the sub-leases. They, too, are to be disregarded.

6. The purchase price is to be determined, by reference to s 434, on the basis that the land is "in an unimproved state". Accordingly, it must be valued as if the buildings did not exist.

7. The value to be determined is by reference to "the amount an estate in fee simple in the land in an unimproved state would be worth". In other words, the task is to be performed by reference to an assumed state of the land; not by disregarding the value of improvements.

8. The differences in language on the present issue between the *Valuation of Land Act* and the *Land Act* are not material. The former expressly requires the

making of an assumption. However, s 434, although not using that term, has a similar effect.

9. The easements not associated with development on the land should also be ignored in determining the purchase price. It seems unlikely that it was intended that this purchase price should be determined on the basis that some, but not all registered interests should be taken into account.

10. All sub-leases and easements are to be ignored, (together with buildings) in determining the value a hypothetical willing buyer and seller would pay, acting knowledgeably and prudently, for the fee simple.

This case is also of interest from another wider valuation aspect. If one party to litigation, for tactical reasons, does not lead expert evidence to an approach that is finally adopted by the Court, the Court is limited in its decision to the other expert and the responses of that expert under cross-examination.