REVIEW OF VALUATION CASES

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BR O'Connor,
Judicial Registrar
Land Court.

This year's review includes the following cases:

1. **Chermside Shopping Centre**

In this major shopping centre test case, the Land Appeal Court overruled the decision of the Land Court (noted last year). Retrospective legislation amending the *Valuation of Land Act 1944* introduced in March 2008 negated key aspects of this decision for cases not yet decided.

2. **Marriott**

A Land Appeal Court decision on whether structures on land (a hotel), which are not suited to the land's highest and best use (high rise residential), were "improvements" or a "worsement".

3. **Edgarange**

A Land Appeal Court decision on whether a resumee's right to compensation under the *Acquisition of Land Act* was limited because the local planning scheme also gave a right to "down-zoning" compensation. Were separate claims necessary? Did the "Pointe Gourde in reverse" principle apply?

4. **Chang**

A High Court decision on whether compensation was payable for a decrease in land value from a "down-zoning" by the South East Queensland Regional Plan.

5. **Astway**

A Court of Appeal (Qld) decision on when a resuming authority is required to offer back resumed land to the former owner. (Under s. 41 of the *Acquisition of Land Act*)

6. **Commonwealth Bank**

A Court of Appeal (NSW) decision on permissible methods of valuation for a heritage restricted property in the Sydney CBD.

7. **Walker**

A High Court decision on whether a local Council's inhibiting conduct (not to re-zone land) was part of a proposal to carry out the public purpose for which the land was ultimately acquired by a separate authority. Did the "Pointe Gourde" principle apply?

CHERMSIDE

The landowner (PT) appealed to the Land Appeal Court from a decision of the Land Court on the unimproved value (for rating and taxing purposes) of a large retail shopping centre at Chermside in the northern suburbs of Brisbane. The Land Court had determined such valuation at $112,000,000; the appellant argued for a figure of $21,000,500. There was no cross appeal by the respondent.

The key issue before the Land Court was whether a valuation determined under s.3(1)(b) of the *Valuation of Land Act 1944* (*VLA*) (the primary method) was exceeded by one determined under s.3(2) (the subtraction method). The primary method essentially involved the analysis and application of comparable sales, purchased primarily for redevelopment. The more complex and less conventional subtraction involved the initial determination of an improved value and then deducting from that value the value of improvements. The *VLA* s.3(2) provides that the higher of the valuations determined by the primary method or by the subtraction method, shall be the unimproved value of the land.

Improvements included not only physical improvements (including site improvements) but also (as a result of the 2003 *VLA* amendments) "intangible" improvements. The latter included items such as the value of the benefit leases and goodwill. Whether intangible improvements should be deducted in a s.3(1)(b) approach as well as a s.3(2) was a key issue before the Court.

The Land Court found that the primary method was applicable in the current case.

The appeal related to findings of the Land Court on three critical matters:

a. Whether "intangible" improvements, as defined by s.6(5) of the *VLA*, had application to the statutory valuation process under s.3(1)(b).
b. Whether, in valuing the subject land, the successful trading history of the shopping centre on the land should be bought into account. This raised the question of whether the subject land should be treated as being essentially "risk free" in its potential to realise its highest and best use as a shopping centre.

c. Whether the best evidence of the unimproved value of the subject land was the improved sale of that land, as it was in 1996, as an established shopping centre.

The Court held:

Construction of s.3(1)(b)

1. "Intangible" improvements should be deducted in valuations under both s.3(1)(b) and s.3(2). It is a fundamental principle of statutory interpretation to give the same meaning to the same word appearing in different parts of the legislation unless there is reason to do otherwise. Here there was no such reason. The Act requires the valuer to treat all improvements, including intangible improvements, as if they did not exist at the relevant date of valuation.

Treating Potential as Certainty (the *Nathan* point)

2. The valuation exercise required under s.3(1)(b) required the valuer to proceed on the basis that the improvements, including intangible improvements, did not exist and had never existed. However, the land was to be otherwise valued at having regard to the environment in which it does exist.

   Any potential the notionally vacant land has for a regional shopping centre should and must be taken into account but that potential should not treated as proved and effectively cost and risk free by reference to the past trading history of the site.

Anomalous Results

3. To adopt the contrary conclusion (the *Nathan* formulation) could result in the situation where, in certain segments of the real estate market in Queensland, significantly different results of unimproved value would be attributed to similar parcels of land within the same land group category. It is unlikely that in, the absence of very clear language, the Parliament would have intended this result.

Leases and Development Approvals

4. The full benefit of "intangible" improvements had to be brought into account for the purposes of s.3(1)(b) and s.6(5). Leases, Agreements for Leases and Development Approval were all considered "intangible" improvements. However, it is the benefit of the lease and not the actual existence of the lease that must be deducted.

Sales Evidence

5. It was wrong for the Land Court to reject the adjoining Telstra sale because it could not be compared with the subject land in its unimproved condition on a like with like basis. This sale provided the best evidence of the unimproved value of the subject land.

   The Land Court also erred in applying the Burwood (Sydney) valuation and the Chermside sale in the way it did. For these transactions to be anyway useful to the s.3(1)(b) valuation and appropriately compared to the subject land, it would be necessary to take account of those intangible improvements on these sites.

   The Chermside sale provided no reliable evidence of the unimproved value of the subject land as at the relevant date.

Telstra Sale

6. Unlike the subject, the Telstra sale was not ripe for higher order regional shopping centre development at the relevant date. The subject was also superior in exposure and access, two significant benefits for a commercial retail development.

   Compared on a "site" improved basis with Telstra sale, a figure of $430/m^2$ "site" improved was placed on the subject. Site improvements were calculated at $25,000,000. The resultant figure rounded to an unimproved value for the subject of $34,000,000.

7. While not always desirable to place so much weight on one sale, in the circumstances of this appeal the Court considered the Telstra sale to be only reliable sales evidence. It was comforted by the facts that the sale occurred at a date reasonably close to the relevant valuation date and involved land which effectively adjoined the subject. It was physically comparable and enjoyed the same statutory zoning.

8. Unlike the situation confronting the High Court in *Maurici*, there was no suggestion in this appeal that the sale price of the Telstra site was or might have been inflated in some way due to <u>scarcity</u> of comparable vacant land.

9. It was also considered justifiable to adopt the Telstra sale with suitable adjustments made for differences between sale and subject: *AMP Henderson Global Investors v Valuer-General*. There was nothing new in sales having to be adjusted in order to render them comparable.

10. The intention of the 2003 amendments of the *VLA* was to provide a means by which the value of "intangible" improvements was excluded from the unimproved value of major commercial undertakings, such as shopping centres; otherwise, the value of intangibles form a substantial part.

Unimproved Value as a means for assessing Land Tax

11. The Court was conscious that sales of vacant or lightly improved land may not in the future be available to provide a guidance as to the unimproved value of shopping centres or other major commercial undertakings. Thus it would be necessary for a valuer to undertake the exercise provided in s.3(2) of the *VLA* by first ascertaining improved value and then deducting value of improvements. The present case has demonstrated how difficult and contentious such an exercise could be.

    It would be desirable for the *VLA* to provide for a mechanism by which the unimproved value of major commercial enterprises could be assessed without the need for difficult lengthy and complex evidence of the kind that was addressed before the Court below.

Appeal Procedure

12. Because of the excessive volume of material involved in the case, the Court directed that the appeal be heard electronically. That is, that the appeal record be entirely electronic but the parties make whatever arrangements were necessary between themselves to supply the Court with the disk containing the appeal record. No paper record was prepared and filed. This was the first time that any appeal in Queensland either in the Land Appeal Court or Court of Appeal has been conducted in this way. It was considered entirely successful.

MARRIOTT

This case concerned the determination of the unimproved value of the site of the Marriott Resort Hotel at Surfers Paradise. Located on this site was the five star Marriott which had sold around the relevant valuation date for $60,000,000. It was agreed between the parties that the highest and best use of the site was for high rise residential with an unimproved valuation for that use of $31,000,000. It was also agreed that the existing structures could not be converted for use as high rise residential; to achieve such use it would be necessary to demolish the existing structures (and terminate the current management agreement) amounting to a cost of some $8,500,000

The appellant's argument was that it was first necessary to determine the highest and best use (high rise residential). The existing structures were not "improvements" in relation to this use and it was necessary to deduct the cost of their removal. Consequently, the appellant argued the unimproved value should be $22,500,000.

The Chief Executive's position was that to ascertain whether the land is "improved" land, the first issue was whether the structures on it add value to the land; if they do, then the land must be treated as "improved" land and the structures on it "improvements" which must, pursuant to s.3(1)(b), be notionally removed from the valuation exercise prescribed by that section

The issue before the Court was basically a question of construction of certain provisions of the *Valuation of Land Act 1944* (*VLA*). Were the existing structures "improvements" in the exercise of determining the unimproved value?

The Court held:

1. In the context of a statute such as the *VLA*, it would not be expected that the notion of whether something is an "improvement" should be settled by reference to subjective considerations. Clearly, the question whether a particular work is an "improvement" turns on whether it adds value to the land in question at the time under consideration.
2. "Improved" land is land upon which operations of man have taken place which enhance the value of the land to the extent that its value is greater than it would have been had no such operations taken place. Conversely, if

such operations do not enhance the value of the land but reduce it, they cannot be said to have improved it.

3. The appellant's approach confused the requirement to identify whether the land is improved or not by introducing a requirement to identify the highest and best use of the land first - a step not required until the valuation process is being undertaken.

4. "Improvements" do not have to add value to land for the purposes of its highest and best potential use.

5. At a practical level, the question whether a structure is an improvement is answered by asking whether a prudent purchaser would pay a higher price for the land together with the structures than he would to put the land to a use which rendered the structures redundant. On the facts of this case, the land was worth $31,000,000 without the structures but worth much more with the structures in place. The structures must therefore be "improvements" for the purposes of the *VLA* and accordingly, pursuant to s.3(1)(b), be assumed to be non-existing.

6 The reasoning of the Land Appeal Court in the *QNI* decision (2002) was endorsed by the current Court. The reasoning of the majority of the Land Appeal Court in the *Caltex Oil* decision (1996) was not followed by the Court in the current case. The Court was of the view that the majority in *Caltex Oil* fell into error in considering that the starting point for the valuation exercise contemplated by s.3(1)(b) was to determine the highest and best use of the land being valued as if the structures on the land did not exist. The Court preferred the reasoning of the dissenting Member in *Caltex Oil* (Mr Wenck).

7. Support for the current approach to be taken to s.3(1)(b) was also found in s.3(4) of the *VLA*. The proviso to this section permits the adoption of a highest and best use different from the existing use of the land as developed with improvements.

8. The unimproved value of the Marriott site was determined at $31,000,000.

EDGARANGE

The Land Court decision in this case was noted in the 2007 review. The case has subsequently proceeded to the Land Appeal Court which decision is noted here.

The key issue in this case was whether the resumee's right to compensation under the *Acquisition of Land Act* 1967 (Qld) was limited because the relevant scheme of resumption also gave rise to a statutory entitlement to compensation for down-zoning under the *Integrated Planning Act* 1997 (IPA) or its predecessor, the *Planning and Environment Act* 1990 (PEA).

The claimant's resumed land would probably have been approved for industrial development had not the Redland Shire planning scheme been altered to accommodate the proposed resumption for road works and sewerage treatment purposes. The scheme alteration came into a final effect in 1998. The resumption was effected in 2004.

The precise issue before the Court was whether the so called "*Point Gourde* in reverse" principle applied. If this principle applied in current circumstances, compensation was to be assessed as if no down zoning took place and no right to claim compensation for such down zoning arose.

The appellant Council's argument was founded on the basis of the claimant having a prior right to compensation. The landowner's response was that, as a consequence of the compulsory taking of its land, it had a statutory right to claim and have assessed compensation pursuant to the *ALA*.

The Land Court at first instance accepted this argument. On appeal, the Land Appeal Court, by majority, held or noted:

1. This appeal raises for consideration a matter that had not previously been dealt with by this or any other relevant appellant court.
2. There was no dispute that there was a "scheme" underlying the taking of the land for road purposes (which originated in the 1988 planning scheme) and a scheme for the taking of the land for sewerage purposes, which originated in the 1998 strategic plan.

3. Although variously expressed, the *Point Gourde* principle has received statutory recognition in every Australian resumption statute, except Queensland.
4. But even in Queensland, as a matter of statutory construction, the courts have concluded that the legislature may be assumed to be aware of the long held and widely accepted construction of what is meant by "value at the time of acquisition" and consequently, an acceptance of *Point Guorde*.
5. Any windfall concerns relating to "double compensation" – should two separate claims be made – can be dealt with by the compensating court and the opposing party being alert to such an issue as well as abuse of process.
6. Although not applicable at the time of down zoning, the current *Integrated Planning Legislation* 1997 now provides that, if a matter for which compensation is payable under this Part is also a matter for which compensation is payable under another Act, the claim for compensation must be paid under the other Act.

   This means that where there is potential for claims under both local government provisions and the *Acquisition of Land Act*, the claim must be made first under the *Acquisition of Land Act.* Further, compensation is to be recorded on the land title.
7. The *Acquisition of Land Act* is the principal means in this State whereby land is compulsory acquired for public purposes and compensation is paid for that dispossession in accordance with the methods set out. The "*Point Gourde* principle in reverse" applies to the current situation.
8. The appeal by the Council was dismissed by the majority.

Dissenting decision

9. A right to claim compensation for injurious affection as a result of down zoning is a right <u>independent</u> of any subsequent right to claim compensation following a resumption of the down zoned land.
10. Where the process is employed is such that no right to claim compensation for down zoning has come into existence and where the grounds for applying *Point Gourde* in reverse are present, that principle would apply and it would be just and fair to do so.
11. There can be no justification in principle for applying *Point Gourde* in reverse in circumstances where the right to claim compensation separate from the right to claim for resumption exists with respect to a down zoning which <u>precedes</u> the resumption.

12. The consideration to avoid two possible applications and two possible trials is one based on pragmatism and not principle. It could lead to an unjust outcome of the constructing authority being required to pay enlarged compensation. The constructing authority could be required to pay compensation based on 2004 values for land down zoned in 1988 and 1998. It is apparent that there would be a substantial difference in values between the earlier dates and 2004, given the substantial industrial development in the vicinity of the resumed land.

CHANG

In *Chang*, the High Court was required to address the question of whether compensation was payable for a decrease in land value resulting from "down-zoning" by the South East Queensland Regional Plan (SEQRP).

The specific issue was whether the potential right to subdivide land existing prior to the SEQRP coming into operation (such subdivision was prohibited under this Plan) entitled the landowner to claim compensation for loss in value.

Under the *Integrated Planning Act 1997*, an owner of land devalued by a scheme change, by which a "Superseded Planning Scheme" (SPS) arises, became entitled to compensation if a "Development Application (Superseded Planning Scheme)" (DASPS) is assessed under the changed provisions and not fully and unconditionally approved. A DASPS can be made within two years from the scheme change. The local council also had an alternative of assessing the application under the Superseded Planning Scheme to avoid payment of compensation.

Chang owned land that could only be subdivided under an SPS. He lodged a DASPS for subdivision late within the two year permissible period but shortly after the coming into force of amendments introduced by the *Integrated Planning Act and Other Legislation Amendment Act 2004* (the *IPOLA* Act) and of draft regulatory provisions under the draft South East Queensland Regional Plan, an instrument authorised by *IPOLA*.

When the DASPS was lodged, the amended *Integrated Planning Act* provided that an application for development contrary to the draft provisions was not a "properly made application"; the council's discretion to accept an application "not properly made" was excluded if the application was contrary to the draft regulatory provisions.

Having been rejected in the Qld Planning and Environment Court and on subsequent appeal by the Qld Court of Appeal, *Chang* was granted special leave to appeal to the High Court. There he argued that a right of two years duration accrued when the SPS arose and that this right could only be extinguished by clear and express words in legislation.

The High Court held:

1. By reference only to the language of the planning law in force when the DASPS was made *Chang* must fail. This was conceded by the appellant. .

2. The *IPOLA* Act did not operate retrospectively. In no sense did the changes that it introduced provide that, at some date prior to its commencement, the law should be taken to have been what is was not.

3. The SPS conferred on *Chang* no accrued right of two year duration that could attract principles protecting vested rights. The appellants made no DASPS before the coming into force of the *IPOLA* Act and the draft regulatory SEQRP provisions. On no view of the *Integrated Planning Act* as it stood before the *IPOLA* Act amendments could it be said the appellant enjoyed a right of compensation.

Justice Callinan, while agreeing with the majority decision, was critical of the effect of the legislation and the particular process in which the outcome was effected. He was strongly critical of the statutory scheme taking away the landholder's valuable proprietary and statutory rights, suddenly, and without compensation. He stressed that that subdivision approval, subject to reasonable and relevant conditions, was a virtual certainty prior to the introduction of *IPOLA 2004*. He stated that, while the States were unfortunately not constitionally bound to provide just terms on compulsory acquisition of property, Qld planning law, at least 1936, had so provided in respect of the sorts of events which happened here.

Justice Callinan went on:

> "It is on the basis of such rights and the expectations of compensation for their destruction that transactions take place, plans are made, money expended and people order their lives. To destroy legislatively such a valuable right (here to subdivide) in some apprehended public interest is one thing, but to exonerate the public from paying the deprived landholder is entirely another and an unacceptable thing. What the public acquires or enjoys the public should pay for."

ASTWAY

Section 41 of the *Acquisition of Land Act* (*ALA*) provides that, where an authority has acquired land under the *Act* and seven years after the acquisition the authority "no longer requires" the land, it must be offered for sale to the original owner.

The Albert Shire Council (now the Gold Coast City Council) acquired land of Astway (formerly a quarry site) for rubbish dump purposes in 1994 and had not used it for such purpose some seven years later.

Astway sought Supreme Court declarations that:

1. The council no longer required the land within seven years of the resumption.
2. That the council was obliged to offer the land back to Astway at a price determined by the Chief Executive responsible for the administration of the *Valuation of Land Act*.

There were two key questions for the Court to decide:

1. The true meaning of "no longer requires" – this was a question of law.
2. Whether the council no longer required the land within seven years of the resumption date – this was a question of fact.

The Court held:

1. The onus of proving that the land was no longer required for the resumption purpose was on the plaintiff, Astway.
2. The land will be <u>required</u> if it is still needed for some end or purpose, even though there remains no need to use it immediately.
3. In the context of the legislation, the end or purpose must be the same end or purpose for which the land was acquired. (The Council had argued that it could be later required for any legal end or purpose).
4. The council interpretation would lessen the protection which s.41 offers to a landowner whose land is compulsorily acquired. The land may only be acquired for a specific lawful purpose. If it no longer required for that purpose within the seven years of its acquisition, the legislature has provided that it must be offered for sale back to the original owner.

   It would be inconsistent with the restriction on the land's acquisition that is that it must be acquired for a <u>specific</u> purpose, to hold that immediately after compulsory acquisition, the protection given to former owners would

no longer apply if the land was needed by the acquiring authority for any purpose.

5. If the land or some of it has not yet been used for the purpose for which it was acquired, it is a question of fact whether or not it is so required.

6. It may be found that the land is no longer required where:

   (a) There is some affirmative decision by the acquiring authority that it no longer requires the land for the purpose for which it was taken and that decision continues in operation. or

   (b) Where it can safely be inferred from the conduct of the authority that it in fact no longer requires the land; this is an objective test.

7. Indicators as to whether the land can be considered to be no longer required include the following:

   - A decision by the acquiring authority to sell the land as acquired.
   - The absence of requirement for the land, not absence of use is the relevant criterion.
   - Evidence as to whether the land was required at a later date can be used to infer whether or not the land was required at an earlier date.
   - It is not necessary that the acquiring authority point to a specific project or use.
   - If no such intention was consciously formed or explicitly formulated, it is sufficient that the circumstances indicate a probable development and a requirement for the land to be used for the purpose within a reasonable time.
   - The Court may take account of the fact that the requirement for the use for which land was acquired may increase as time goes by.
   - A finding that the acquiring authority no longer requires the land cannot be made if it is in a state of genuine indecision.

8. GCCC's actions in the relevant seven year period which supported its case that the land was still required included:

   - Community consultation concerning the precise future use of the site.
   - Consideration of possible limitations on the use of the site as a landfill site only.
   - Budget allowances for consultation purposes.
   - Reports from consultant engineers and town planners.

9. The council could not be criticised for not calling as witnesses council officers who were the authors of relevant reports or individual councillors involved in community consultation.

Their subjective views on what the council had or had not decided would be irrelevant. The council was the body which keeps records of its decisions and those records were much more reliable than the subjective views of council officers or of individual councillors. No adverse inference could or should be drawn from the decision of the council not to call these persons as witnesses.

10. The council's specific plans for the land may have changed and been adapted to meet community needs and expectations but the purpose for which the land is to be used and for which it was acquired has not.

11. The appellant failed to demonstrate that, within seven years of the date of taking the land, the council no longer required the land. The occasion for offering the land for sale to its former owner, the appellant, therefore did not arise.

COMMONWEALTH BANK

This matter concerns a valuation made by the Valuer General (NSW) of land occupied by the Commonwealth Bank building on Martin Place (Sydney CBD) sometimes known as "the Moneybox". Extensive heritage restrictions applied to the property.

The valuer for the appellant, Mr Jackson, considered there were no comparable sales, with or without heritage restrictions, on which to base his valuation. His approach was thus to determine the improved value of the property with its existing heritage improvements and then deduct the added value of those improvements to reach its land value; he determined that improved value on the basis of capitalisation of rents. He then deducted the added value of the existing heritage improvements by reference to the building's replacement cost,, assessed by a quantity surveyor. He then depreciated that replacement cost by 25% to take account of the age of the building, its recent refurbishment, the heritage significance of the building and the major costs of its ongoing maintenance.

The Valuer General's approach proceeded on the assumption that the primary use of the property was not materially different from that of a typical modern office building in the Sydney CBD. His first step therefore was to derive a land value of the property, unaffected by the heritage restrictions, of $1,900 m² of net lettable area (NLA), based on comparable sales evidence of similar unaffected sites.

His second step was to adjust that figure to take into account the heritage restrictions on the property, including the design and layout inefficiencies of the building, by comparison with modern office buildings. He identified areas of the building which would not attract the same commercial rentals as other parts of the building due to the restrictions, and applied various discounts to various parts of the building, resulting in an average figure of $1,749 m² of NLA.

The Court observed that, at first blush, there would not seem any reason in terms of valuation principle why either of the methods described above should not be adopted. Why should the Court not be able to choose between the two, depending on its view of the reliability of each valuers' analysis of and adjustments for the various elements underpinning each valuers' final assessment: (*Seatainer Terminals*). The method adopted by Mr Jackson was a recognised method of valuing improved land, being in

effect the reverse of the summation method of valuation. It further observed that there was no legal principle that purports to close the categories of methods of valuation which might be acceptable in a particular case. So, in the present case, the method adopted by Mr Jackson could only be "closed" if the Act, properly construed, led to that result.

The issue thus before the Court of Appeal was whether Mr Jackson's method was, as a matter of law as opposed to a matter of judgment, one that was open to be considered, given the prior decisions of *Toohey* (1925) and *Fenton Nominees* (1982). It was held in these two cases that such a method was impermissible. The Valuation of Land Act s. 6A(1) required the valuation to be determined on the assumption that the improvements to the land to be valued "had not been made".

The appellant argued that these precedents no longer applied in view of a 2000 amendment to the Act relating to allowance for heritage. This new provision required the valuer to assume that, where the land was heritage listed, the use of the land at the time of the valuation was the only allowable use and that no further improvements could be made (beyond continuation and maintenance of those already existing).

The Court held:

1. The provisions of the Act applying to heritage restricted land do not negative the assumption that improvements upon the land to be valued "had not been made". It is only once the improvements are notionally removed from the land to be valued that the notional sale called for by s. 6A(1) can occur. The assumption required under the heritage provisions (2000) refers to the continuance of the improvements existing upon the land at the date of valuation only for the purpose of enabling the land to be valued on that basis that its highest and best use is the continuation of the heritage use.

The conclusion of the Court was that the appellant's valuation approach was not legally permissible to ascertain unimproved value under the Valuation of Land Act.

2. It was still permissible to use comparable sales of improved land for the purpose of deducing therefrom an unimproved value of the same land which

is then applied, with or without adjustments, to the land to be valued.

3. The use of such improved sales is far more reliable than directly valuing the relevant land as improved land and this is so for two reasons:

   (a) With sales, the improved value of the sale has actually been determined by the market. Only one exercise is then required, the deduction of the added value of the improvements to arrive at the bare land component of the sale price.

   (b) Mr Jackson's method requires the additional and primary exercise of determining the improved land value without reference to the market generally or to market sales of comparable land in particular. The weakness of this method is that this primary exercise of determining the improved value has not been tested, let alone determined, by the market and for that reason alone is more likely to give rise to greater problems of unreliability.

This observation in (b) suggests it would not favour Mr Jackson's approach even if it was legally permissible.

Although not directly addressed by the Court, there does not appear to be any legal restriction on the use of an improved sale of the subject land to help derive the unimproved value for that land for statutory purposes. Such sale really falls into the same category as other comparable improved sales (use approved by High Court in *Maurici*) meeting the "market test" noted in 3(a) above.

WALKER

In 2002, a site of 2.5 ha at Ballast Point on Sydney Harbour's western corridor was resumed for public parkland purposes. The resumption was effected under the New South Wales Land Acquisition Act 1991 (ALA) by the Sydney Harbour Foreshore Authority.

The acquired land had been used for some 80 years as a bulk fuel depot (by Caltex in more recent years). Walker Corporation purchased the land from Caltex in 1997, the contract being uncompleted at the resumption date.

Caltex was paid compensation, with some reduction for remediation, for the amount agreed in the contract to purchase ($16,000,000) between it and Walker. Caltex was not a party to the current dispute; the dispute fixed on the entitlement to Walker. The latter contended the market value of its interest was some $89,000,000. The case proceeded to the High Court after determinations by the New South Wales Land and Environment Court and subsequently the New South Wales Court of Appeal.

From 1991, the local Leichhardt council, in whose the area the resumed land was situated had resisted attempts to rezone the land from industrial to residential development. While the council could have acquired the land in its own right, it could not have done so without the approval of the State Government Minister. Funding was also an issue. It was not until the Carr Labor Government was elected in 1995 that the State Government showed interest in returning the site to parkland.

The issue before the High Court was whether the affect of the council's conduct on the value of the land should be disregarded in determining market value.

Section 56(1) of the ALA provided that any increase or decrease in value of the land caused by the carrying out, or the proposal to carry out, the public purpose for which the land was acquired should be disregarded. This essentially adopted the Pointe Gourde principle, although altering the reference in Point Gourde from "scheme" to "proposal".

The specific issue before the Court was whether the council's conduct was part of a proposal to carry out the public purpose for which the land was ultimately acquired by the foreshore authority.

The Land and Environment Court initially found that the maintenance of industrial zoning by the council had reduced the value of the land at the time of its eventual resumption in 2002 from what would have been its value at that date for residential development.

The Court said:

> "The maintenance of the industrial zone as a holding zone can be regarded as a means of freezing the development of the land until the council was in a position directly or indirectly, to arrange for its acquisition for the public purpose by whatever means became available to it. It was ultimately successful in achieving that purpose vicariously."

The initial Court finding was that there was no reason why, in the period before the change in State Government in 1995, the activity of the Leichhardt council alone could not be accepted as part of the proposal to carry out the public purpose for which the land was acquired in 2002. Accordingly, consistent refusal to rezone the land for residential purposes and the maintenance of the industrial zoning was to be disregarded.

On appeal, the Court the Appeal held that the relevant compensation statute spoke, not of the "scheme", but of the "proposal", and did not use expressions such as "steps in the resumption process". It stressed the primary task of the Court was to construe the legislative text; the consequence of this was that, whilst decisions from other jurisdictions on other legislation might assist in determining precedents (e.g. Pointe Gourde), they could not be decisive.

Upon grant of special leave to appeal to the High Court, the latter's decision made the following key observations;

1. Many historic compulsory acquisition provisions have been drawn in brief terms which required considerable fleshing out by Courts to determine appropriate principles. But as the facts of the current resumption illustrate the machinery of modern land use regulation had become more complex, its procedures protracted and the range of public bodies involved more extensive. One result, as the terms of the ALA showed, was more

comprehensively drawn legislation dealing with compulsory acquisition. It was to this that primary regard must be given.

2. It accepted the generally expressed proposition in Nelungaloo (1945) that there was to be excluded any diminution in value arising from the compulsory acquisition by governmental authority for its purposes. (In this case, Walker argued the proposition went further to draw within the disregard required by s.56(1) of the ALA the consequences of the activities of other official actors, in particular those of the council over a lengthy period).
3. The Court referred to the Crown v Murphy (1990) (based on the 1967 QLD ALA which contained much less precise provisions than the 1991 NSW ALA). The key principle in Murphy was that restrictions on land use maintained as a result of consultation with the resuming authority must be ignored for the purpose of assessing the value of land when resumed by that authority.
4. It was uncertain what was meant in Pointe Gourde and other cases by reference to "the scheme". That term was not found in the ALA 1991 but was used throughout the primary Judge's reasons. The critical provisions of the ALA must be considered.
5. The history of resistance by the council to rezoning occurred before there had come into existence "the proposal" on which Part (a) of the statutory definition (s.56(1)) turned.
6. The legislation linked "the proposal" to that of the resuming authority. It put aside prior discussions or agitations by the council and others in favour of classifying the land as public space. In this way, there was reflected in terms of paragraph a of s.56(1) a policy to require a disregard only of that increase or decrease (in this case) in value for which the resuming authority was responsible.
7. Doubts as to the outcome of controversy surrounding the use of the resumed land might affect the perception of the willing but not anxious market participants (Spencer) well before there was a "proposal" – the latter being the means selected by the resuming authority to end the controversy. How that proposition would apply to the facts and valuation process in the present case was beyond the scope of this current appeal.

Having decided the legal issue, the High Court remitted the matter back to the Land and Environment Court to determine the compensation amount according to law.

Table of Cases

1. *PT Limited and Westfield Limited v Department of Natural Resources and Mines* [2007] QLAC 0077.
2. *Surfers Paradise Resort Hotel Pty Limited v Department of Natural Resources and Mines* [
3. *Redland Shire Council v Edgarange Pty Ltd* [2008] QLAC 0109. *
4. *Chang v Laidley Shire Council* [2007] HCA 37; [2007] ALJR 1598.
5. *Astway Pty Ltd v Council of the City of Gold Coast* [2008] QCA 73. **
6. *Commonwealth Custodial Services Ltd v Valuer-General* [2007] NSWCA 365.
7. *Walker Corporation Pty Limited v Sydney Harbour Foreshore Authority* [2008] HCA 5.

* Under appeal to Court of Appeal.

** Under appeal to High Court (special leave first necessary).