REVIEW OF VALUATION CASES

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BR O'Connor
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INTRODUCTION

The cases covered in this year's Review include:

1.	*HTW Valuers*	-	a High Court decision on liability for misleading and deceptive conduct under the *Trade Practices Act*. How damages should be calculated.
2.	*AMP Henderson*	-	a New South Wales Court of Appeal decision on the proper approach to adopt in calculating depreciation rates and also reviewing the scope of *Maurici*.
3.	*Robertsons Furniture*	-	a claim for alleged business loss incurred by a lessee (of partially resumed land) during the time when road widening operations were proceeding.
4.	*Atkin*	-	a resumption on Russell Island of a lot for Council drainage purposes; should the highest and best use of the lot be assessed in its natural or altered state?
5.	*Pajares*	-	a Land Appeal Court decision on the resumption of potential cane land to preserve the mahogany glider habitat. Issues involved included the application of the *Pointe Gourde* principle; the effect of Interim Conservation Orders on the resumption scheme; the relationship of special value and severance; and the cut-off date for the payment of legal and professional fees.
6.	*Davidson*	-	a resumption for a Council waste management processing plant. How injurious affection should be calculated and the relevance of certain contracts of sale which did not settle.
7.	*Nimmo*	-	the determination of the unimproved capital value of a heritage listed residential property in inner Brisbane; should a premium apply to scarce unimproved sales.

1. HTW VALUERS

Astonland, a small property investor, relied on valuation advice (on rental levels) from HTW (Central Qld) in purchasing a shopping centre at Sarina, south of Mackay. A year after Astonland purchased the shopping plaza, a competing shopping centre (Beach Road Shopping Complex) opened, causing the profitability of Astonland's plaza to collapse. Competition from the new Beach Road complex was reasonably anticipated by at least as early as April 1997, the time of the valuation advice and the execution of the contract of sale for the plaza.

Astonland sued HTW for breach of contract, in tort for negligent advice and for misleading and deceptive conduct under s.52 of the *Trade Practices Act*. The case proceeded on the last basis, that is *Trade Practices Act*, as this was likely to provide the greatest level of damages to the plaintiff.

The trial judge found in favour of Astonland; he noted HTW should have qualified its advice by cautioning Astonland about the uncertain effect that the new shopping centre would have on the plaintiff's profitability.

The trial judge also found that the relevant measure of damage was the difference between the price paid by the plaintiff for the plaza ($485,000) and the value of the plaza as at the date when the new shopping centre had been operating for a year ($130,000). On this basis the trial judge awarded $355,000.

On appeal to the High Court, the defendant, HTW, challenged this conclusion. It argued the correct measure of damages was not the loss that the plaintiff suffered when the relevant contingency occurred - that contingency being when the new shopping centre was trading at full strength - but rather the loss in market value arising at the time of sale because of the <u>risk</u> associated with the contingency.

In a unanimous decision the five judges of the High Court held:

1. The correct measure of damages, apart from consequential losses, was to deduct the "real" value (as opposed to the market value) of the plaza at the date of acquisition from the purchase price. In assessing that real value, post acquisition events should be borne in mind.

2. In many fields of law, assessments of compensation or value at one date are commonly made taking into account all matters known by the later date when the Court's assessment is being carried out. This approach was appropriate when assessing damages under s.82 of the *Trade Practices Act* where the Court is comparing the price and the real value of the asset at the date of acquisition.

3. In the present case, the Court was not limited to the assessment of risk as at the date of sale, but was entitled to take into account how those <u>risks</u> had evolved into <u>certainties</u> at dates after the date on which the comparison of price and real value was made.

4. The Court must distinguish amongst possible causes of the decline in value of what had been bought. If the cause was inherent in the thing itself, then its existence must be taken into account in arriving at the real value of the land at the time of purchase.

If the cause be "independent", supervening" or "extrinsic", then the additional loss was not the consequence of the inducement.

Here, the cause of the decline was what the defendant was found liable for not warning about (ie the likely effects from the opening of the competing Beach Shopping Centre). While unexpected competition would be a "supervening" event, expected competition is not and competition from the Beach Road Shopping Centre was expected by at least as early as April 1997.

5. Contrasting approaches to the task of valuation and that of assessing loss were noted:

> "The task of valuation is to be conducted without hindsight - that is, without knowledge of events which would have not happened by the date at which the value is to be ascribed, though they had happened by the date on which the valuation takes place. The task is different from the task of assessing loss because the latter is to be conducted with hindsight."

6. The "market" values arrived at by the plaintiff's valuer may well have been entirely accurate; if so, they demonstrated, not that he was in error, but that the market assessment of the risk was erroneous. In short, the market value in 1997 was not a true value, but a mistaken estimate of value.

7. Figures worked out by analysing what willing but not anxious buyers and willing but not anxious sellers would agree on, without taking account of subsequent events, may correspond with market value; but they do not necessarily correspond with true value because the market can operate under some material mistakes; in particular, some material factor may not be apparent to it.

8. While it is true there was no direct evidence placing true value in the vicinity of $130,000 at April 1997, there does not have to be. Provided there was some evidence of damage, a tribunal of fact must do the best it can in assessing damages.

9. Although the reasoning of the court below was erroneous, the overall judgment figure had not been shown to be unjust to the defendant or unduly generous to the plaintiff. It was confirmed.

2. AMP HENDERSON

This decision of the New South Wales Court of Appeal provides detailed analysis of three topical issues. They are:

- considerations in the application of depreciation rates;
- the essential principles for which *Maurici* stands;
- what prerequisites do after-date sales need to qualify as comparable bases.

Background Facts

The case was an appeal against the Valuer-General's unimproved valuation of certain high-rise properties in the Sydney Central Business District (CBD). Both parties adopted the comparable sales method of valuation.

The appellant relied on some post-date CBD sales of improved land. This evidence was rejected by the lower Court for failure to establish that the sales were made in similar economic circumstances. This resulted in the only comparable sales being two sales of improved land (only relied on by the appellant) and one sale of vacant land (relied on by both).

The primary Judge rejected the use of improved land due to the appellant relying on a single depreciation rate for improvements. He held that a reliable depreciation rate would need to consist of various depreciation rates, taking into account all the separate components of an improvement. The adoption of a single depreciation rate was too simplistic and would not enable an accurate assessment of unimproved land to be derived.

The primary judge also rejected the single vacant sale, apparently applying *Maurici* principles.

Depreciation Rate

The appellant argued that the lower Court erred in stating, as a universal proposition, that deducing the land value component of an improved sale by the adoption of a depreciation rate and, particularly a single depreciation rate, was likely to lead to an unreliable assessment of the value of the improvements; and this could only be overcome if a separate depreciation rate was applied to each of the various components of the improvements, the cost of which it sought to depreciate.

The Court held:

1. It was an error in valuation principle to state that a single depreciation rate for improvements could never be used, whether in respect of all buildings or even all high-rise buildings.

2. The appellants' evidence based on a single depreciation rate (which would no doubt take the components of the improvements into account) ought not to have been rejected.

3. In considering the correct approach to depreciation, the Court of Appeal referred to various passages in the standard valuation text Rost &Collins "Land

Valuation and Compensation in Australia". (It acknowledged Rost & Collins as a well-known and highly regarded valuation text.)

The Court stated that:

"It is clear from the part of Rost & Collins referred to that the depreciation of improvements is one of the skills that a qualified valuer is required to bring to bear in an appropriate case in the valuation exercise. In terms of that exercise, the learned authors state that depreciation

> May be measured by the difference between the value which a building or other improvement adds to the land at the time of valuation and the amount it would cost to replace it (new) at the time.

Physical deterioration, functional and economic obsolescence must all be taken into account. At page 125 the authors make this statement:

> In assessing loss as a value due to physical, functional or economic depreciation, the objective is to ascertain the market value of the improvement. If market transactions do not provide evidence of such value, the valuer must rely largely on his own judgment and experience supported by such tests as may be practicable and taking into account wear and tear, standard of maintenance and degree of obsolescence of each improvement.

Nowhere do the learned authors suggest or comment upon the wisdom or otherwise of adopting a single depreciation rate or as to whether there are differences between depreciating the value of buildings of different types. In particular, they do not suggest that it is outside a valuer's expertise and/or unreliable to adopt a single depreciation rate in respect of a high-rise commercial office building. Although the third and latest edition of the text was prepared in 1984, albeit that it has gone through a number of reprints since, nevertheless high-rise commercial office buildings in CBDs were well known and understood at that time."

4. The assessment by a valuer of an appropriate depreciation rate is a matter of judgment based on his experience and supported by such tests as may be practicable.

A valuer is required to make inferences and apply experience and judgment to determine what are really hypothetical questions. These questions may involve subjective judgment and must inevitably leave room for differences of opinion.

In the present case, there was no doubt as to the experience of Mr Jackson (valuer for the appellants) in valuing improved and unimproved CBD land.

5. It may well be, theoretically at least, for an accurate assessment to be made, separate depreciation rates should be applied to 40 or 50 components of a high-rise office building. But such an approach would be to counsel perfection. It would not, in the type of valuation exercise required to be undertaken here, be practicable in the sense in which Rost & Collins use the term.

6. It is trite to say that valuing property is not an exact science. Obviously the valuation must be as accurate as practicable. In determining a single depreciation rate for a high-rise building, the valuer will no doubt take into

account that the building does comprise many components whose residual life will differ.

***Maurici* Principles**

The appellant argued that the Court was in error in holding that *Maurici* stands for the proposition that if at the end of the day, there is only one comparable sale and it was of scarce vacant land, it must be disregarded and the comparable sales method of valuation rejected.

The Court of Appeal held that the primary Judge erred in his understanding that *Maurici* stood for that proposition.

The Court held that *Maurici* stands for the following propositions only:

(a) Section 6A(1) of the *Valuation of Land Act* (NSW) does not require when utilising the comparable sales method of valuation, that only sales of vacant land should be considered; (the relevant Queensland section is s.3(1)(b))
(b) Confining one's consideration to only sales of scare vacant land and disregarding sales of improved land which would otherwise be as comparable as the vacant land sales in terms of timing, location, outlook and other relevant features, offends the principle that a reasonably representative group of comparable sales should be considered when applying that methodology.

The Court held that:

Maurici does not stand for the proposition that if the only comparable sales are those of scarce vacant land, they must be rejected because they are too few in number to constitute a representative group of comparable sales. Obviously adjustments will need to be made to eliminate the scarcity factor. But there is nothing new in sales being adjusted in order to render them as comparable. Such adjustments may be nothing more than the best guess that can be made.

After Date Sales

The appellants argued that the primary Judge erred in finding that there was no evidence had been adduced to establish that economic circumstances had not changed between the relevant date and the date of Mr Jackson's subsequent sales.

The Court held:

- Subsequent sales are just as admissible in evidence as prior sales, provided they are in all the circumstances comparable.
- The whole tendency of the courts is to admit evidence of any events prior to the date of trial which will throw any real light on the issues.
- Both parties had produced evidence to the effect that economic circumstances had not changed between the relevant date and each subsequent sale.
- Such sales should then have been admitted.

3. ROBERTSONS FURNITURE

Background Facts

Robertsons Furniture and Design were lessees of premises in Bundall Road, Southport, on which they operated an upmarket furniture business. Part of the lease land (62 m^2) was resumed for road widening purposes. Robertsons claimed an amount of $790,443 for business losses allegedly incurred during the time of road widening operations were proceeding (a period from November 2000 to October 2001).

The furniture business was divided into retail, project and design components, with the retail allegedly incurring substantial losses during the relevant construction period (although the overall business gross earnings increased). The claimants adopted a categorisation system whereby each ultimate sale was classed as either retail or project. Project involved some input from the design operations of the business.

Part of the claim included an amount for loss of anticipated growth during the construction year.

The claim was really confined to retail losses in the relevant construction period, not for subsequent future losses.

Issues

Two issues required determination by the Court:

1. Could all or part of the losses claimed by Robertsons be substantiated; that is, did the claimant suffer any loss attributable to the roadworks?

2. If so, was the claim valid in law?

The Claimant's Argument

Robertsons argued that because of the ongoing categorisation scheme, a fairly precise calculation could be made of the difference in retail sales between the construction year and the preceding year.

Evidence showed retail sales demonstrated substantial growth for the years November to October for the six years prior to October 2003, except for the roadworks year when retail sales fell by 41% from sales the previous year.

The internal company accountant gave detailed evidence to this end, making necessary allowances for commissions, delivery and administration to arrive at a loss of net profits. A significant amount of time was spent on training sales consultants who became too valuable to the company to be put off when the value of sales fluctuated.

Robertsons claimed that the business was adversely affected during the whole period, not only when the roadworks were immediately in front of the premises. Regardless of where the work was in the road, with traffic congestion, dust and construction noise and general inconvenience, clients either avoided the business or did not find the urgency to return. The types of clientele that were attracted to a top-end furniture retail showroom were likely to be deterred by construction work anywhere in the vicinity. Mr Robertson

believed the image of the business suffered during the construction period with the removal of signs, digging up the road and laying new mains and telephone lines with constant dust and trucks and long delays along Bundall Road.

The claimant argued that no enhancement was created by the road widening. The extra traffic made Bundall Road no longer a shopping destination, but rather a main thoroughfare.

Respondent's Argument

The respondent argued that no loss was suffered by the claimant and that the claimant's land had been substantially enhanced, as it was now more accessible to more customers more safely and the environment was more attractive. Also, any alleged loss in the relevant year could have been caused by other factors including increased expenditure on furniture in the previous year to beat the effects of GST. Any claimed loss should be based on total sales figures, not retail sales alone. On total sales basis, the claimant had suffered no loss attributable to the roadworks. (The claimant argued only retail sales required entry to the showroom. Other sales did not, therefore only retail sales were affected by the roadworks.) The respondent challenged the correctness of categorisation into retail project and other categories.

Decision on whether loss incurred

The Court held:

1. The claimant served the top end furniture market, thus any analysis of the entire furniture industry was not representative of the business of the claimant.

2. None of the factors mentioned by the respondent's witnesses, for example, GST concerns, interest rates, etc., would have affected the claimant's business.

3. Overall profit and loss accounts of the company were an unreliable basis for the assessment of whether or not there was a downturn in retail sales.

4. The type of shopper attracted to the claimant's store would not want to run the gauntlet of construction machinery or other roadwork activity.

5. The claimant provided no satisfactory evidence to substantiate any meaningful distinction between retail sales and project sales. Regardless of classification, both of them involved sales of furniture.

6. Despite some concerns, the Court was prepared to accept that the business was adversely affected by the roadworks and that this effect would logically fall mainly on retail sales. The difficulty was in assessing to what extent.

7. Net profit was calculated as if the company had received the same gross return as in the previous 12 months. An allowance was then made for savings on commission, delivery, and administration. No deduction was made for staff costs adjustment. Trained staff was considered too valuable to be dismissed when a downturn in sales occurred and then re-engaged when sales improved.

8. On the state of the evidence the claimant had not proved it could expect continued growth in retail sales; thus no allowance was made for growth.

9. No allowance for enhancement was made due to improved road access. There was no evidence that the upgraded road enhanced the business.

10. There remained the unresolved question as to the accuracy of the categorisation of the sales reports.

11. Potential loss of profits should be discounted by 50% because of the uncertainty of correctly assessing the loss.

12. If the claimant had a valid claim, compensation for loss of profits was determined at $220,515.

Validity of the Claim

This was not a claim for loss of profits for relocation of a business or where the taking of the land had reduced the profit-making capacity of the business in the future. It was simply a claim for loss of profits for the 12 months of the roadworks. The respondent argued, as a matter of law, the claimant had no valid claim for compensation. The claim involved a naked claim for loss of profits.

The claimant was not claiming a loss of profitability (affecting the value of its interest in the land) but for a loss of profits in a particular year on the basis of inconvenience.

Decision on Validity

The Court held:

1. Damages for injurious affection were payable irrespective of whether the damage was caused by the permanent or temporary interference with property.

2. Under Queensland legislation (s.20 *Acquisition of Land Act*), no compensation for injurious affection is payable unless part of the land is resumed. Compensation is assessed on different principles under the UK Act where such a restriction is not in place.

3. English authorities (*Wildtrees*) recognised that:

    - a claim cannot be made for loss of profits as such;
    - but a claim can be made if the interference which caused a loss of profits had effect on the open market letting of the premises.

    A plaintiff who can prove such a reduction in value for whatever period is entitled to compensation.

4. In Queensland, to have a valid claim, a landowner must demonstrate that it comes within one of the statutory heads under s.20 *Acquisition of Land Act*.

5. In Queensland, there is no specific provision for disturbance as a separate statutory head of claim. Where there is no statutory provisions, disturbance is part of the value of the land to the owner.

6. A claimant is entitled to recover the value which the land has to him for the precise purpose for which he was putting it at the date of acquisition.

7. Disturbance is recognised as part of special value to the owner. A similar test can be applied (*Pastoral Finance*).

8. Two requirements must be satisfied before a claim for injurious affection under s.20(2) can be allowed:

- the constructing authority must, by exercise of its statutory powers, injuriously affect the retained land;
- that injurious affection must cause damage in the *Harvey v Crawley* sense.

9. Damage so caused is not limited to damage to the retained land per se, that includes damage which is not too remote and is the natural and reasonable consequence of the activity causing the injurious affection. So approached, damage to a business conducted on the retained land could be encompassed.

10. By providing for entitlement to compensation for damage arising out of injurious affection, the legislation provided a remedy which is broader than compensating for the mere effect of the value on the retained land (*Barns*).

11. Many cases cannot be comfortably accommodated if recovery is dependent solely on a link to market value.

12. If s.20(1)(b) is given its ordinary meaning, loss of profits in the present case, (as with the loss of stock in the *Barns* case) complies with the *Harvey v Crawley* test.

13. Since the claimant has demonstrated that, on the balance of probabilities, it did suffer loss of profit during the period of road construction, in accordance with the reasoning of the Land Appeal Court in *Barns*, it is entitled to compensation under s.20.

14. Although the claimant's right to compensation in this case depended on the interpretation of s.20 rather than its characterisation as disturbance, the dominant principle is that a claimant is to be compensated fairly, regardless of precise characterisation.

4. ATKIN

The Redland Shire Council resumed a block of land (721 m²) on Russell Island from the claimant for drainage purposes. The Notice of Intention to Resume the property stated that the land was required to provide an outlet for stormwater run-off from adjacent roads when they were constructed in the future.

The major issue between the parties concerned the highest and best use as at the date of resumption. The claimant argued such use was for a single residential dwelling with a value of $75,000. The respondent argued that the land would be subject to flooding in a Q100 event and thus construction of a dwelling would not have been approved by the Council. On that basis the respondent suggested a highest and best use was only an amalgamation with the adjoining block for additional yard and garden or ownership by the Council for drainage purposes with a value of $10,000.

The resumed land, in its natural state, was affected only slightly by stormwater run-off. Two later activities, for which the landowner was not responsible, caused a concentration of water of on the claimant's land.

The Court held:

1. Under certain town planning provisions of the Redland Shire Scheme, the landowner had a right to use the land for construction of a dwelling-house without the consent of the Council, but subject to reasonable and relevant conditions which the Council may impose.

2. However, additional performance standards for development on Russell Island were to be considered as part of the overall planning scheme. Such standards imposed further specific prohibitions and limitations on the owner's right to construct a dwelling. If the landowner had no right to construct because of the prohibitions in these standards, the development application would be refused.

3. As at the date of resumption the whole of the subject land would be under water in a Q100 event, generally to a depth of .02 metres or more.

4. In deciding whether land is below the Q100 flood level within the meaning of the planning scheme, the Redland Shire assumed land to be in its natural state rather than at the time the application for development approval was made.

5. There was nothing in the planning scheme to indicate whether the question of inundation in a Q100 event was to be considered at the date of the development application or with the state of the land in its natural state.

6. The interpretation on timing adopted by the Council in relation to land generally is one open under construction of the plan. Council should be consistent and apply such approach to a development application in this matter.

7. After considering competing engineering evidence, the overall evidence did not establish that the subject land would have been extensively

inundated in a Q100 event, prior to work which altered the stormwater flow.

8. There was nothing in the Town Plan preventing Council from allowing a development application, but also requiring the existing levels below Q100 to be altered.

9. At the date of resumption it was likely that the Council would have approved a development application for the construction of a house over the subject land of a type identified by the engineering evidence from the claimants. The land should, therefore, be valued on that basis.

10. A prudent purchaser would realise he would be responsible for remedial drainage works on the subject land. An allowance of $10,500 was made for such.

11. In relation to a disturbance claim, certain professional fees were challenged:

    (a) Counsel's fees prior to the hearing. The complexities of the case caused by conflicting engineering evidence and disputes as to the construction of the Shire Town Plan warranted this preliminary advice from Counsel being obtained.

    (b) Valuation fees. As the subject land was a vacant residential property, it was not reasonable for two valuers to be involved for the length of time claimed. The valuation should have been completed by a senior valuer in 15 hours, including travel time.

    (c) Solicitors fees. A challenge was made to the 43.5 hours at $250 an hour. As this was supported by an itemised account calculated using the time costing method, the claim was allowed. (No claim was made for the relevant work carried out by previous solicitors).

5. PAJARES

Both constructing authority and claimant appealed against a decision of the Land Court in awarding an amount of $3,696,000 for the resumption of part of the Pajares property for National Park purposes. The more specific objective of the resumption was to preserve the habitat of the endangered mahogany glider.

While the land had not been formally resumed until 1999, development work had been effectively prohibited since 1995 by a series of Interim Conservation Orders (ICOs) issued by the Minister for Environment and Heritage under the Nature Conservation Act 1992. Separate claims were made for damage suffered by having these ICOs in place.

Principal issues before the Land Appeal Court were:

1. Town Planning Restrictions

The major part of the resumed area had been zoned "Nature Resource Protection" zone under the 1997 Cardwell Shire Town Plan. Under that zone, agriculture and animal husbandry were permitted subject to conditions. The prior plan gazetted in 1983 permitted such uses without consent. The Crown argued that development of the resumed land would have been severely restricted under the provisions of the 1997 plan. The Court had to consider competing valuation law principles, namely the *San Sebastian* principle as against the *Murphy (Mon Repos)* approach in assessing the Crown contention.

In *San Sebastian* the High Court found that, when zoning or planning restrictions on the use of the resumed land were simply a step in the process leading to the resumption of that land, those restrictions on use should be ignored in valuing the land for the purposes of assessing compensation.

The respondent had argued that there was no *San Sebastian* issue in this case as it was analogous to the *Mon Repos* turtle rookery case. In that case, after discussing the principle in *San Sebastian*, the High Court stated:

> "a characteristic or attribute of the land which affects its value must be taken into account in the assessment of compensation even if the planning restriction which is a step in the process of resumption is dependent upon or directed to that characteristic or attribute."

The Land Court held it was not valid to compare the possibility that the subject land was the habitat of the mahogany glider with a world recognised turtle rookery confined to a specific part of the Queensland coast. The Land Court concluded that the zoning to "Natural Resource Protection" had been influenced by the State and there was a direct relationship between the zoning restriction and the proposed resumption. The Court concluded that any consequent effect of the zoning on the value of the land at the date of resumption had to be ignored.

2. Effect of the ICOs

The Land Court held that also to be ignored (again in terms of the *Pointe Gourde* principle) were the restrictions attaching to the clearing of the land at

the date of resumption. Imminent legislative obstacles, namely the Commonwealth *Environmental Protection and Biodiversity Act* and the Queensland *Vegetation Management Act* would have been in the mind of a prudent purchaser. In the absence of ICOs Mr Pajares would have been able to have cleared all development land to improved pasture before being prevented from doing so by the relevant legislation. Issuing ICOs was a step in the resumption process.

Separate compensation was awarded for ICOs by the State for the specific loss associated with the temporary restriction in clearing of the vegetation. However, this fact did not influence the issue discussed in the previous paragraph.

3. Special Value

The resumed land had been of significant economic advantage to the claimant as it had been part of a large area which the claimant and his family had been progressively developing. Mr Pajares had purchased a large amount of machinery for the purpose of developing the whole of the parent parcel. That machinery, together with harvesting equipment, was housed in a large shed with a fully equipped workshop on the retained land.

The Land Court concluded that the expense and inconvenience associated with the acquisition of a replacement property, in order to achieve a greater tonnage of sugar cane, was something that a prudent purchaser in the position of the claimant would have to consider in deciding what to pay sooner than fail to obtain the subject land: *Pastoral Finance*.

Because of the special advantages the resumed land had to the owner of the retained land, the Land Court concluded that the claimant would pay some premium to obtain it if he had been temporarily deprived of it. A special value premium of 7.5% on the determined value of the resumed land was allowed by the Land Court.

4. Repurchase Costs of Replacement Property

The Land Court concluded that stamp duties and professional fees that may, in the future, be incurred in purchasing a replacement property could not be allowed as a head of disturbance.

5. Cut-off Date for determination of Legal and Professional Fees

Extensive legal and professional fees were incurred after the claim had been lodged with the constructing authority, but before lodging it with the Court. These fees were not allowed as disturbance items as the *Acquisition of Land Act* required the claim lodged in the Court to be the same claim as that lodged with the constructing authority (any amendment thereafter could only be made with the Court's leave). Thus, the Land Court held that costs for preparation and lodgement of the claim could not include checking or adding to a claim after it had been served on the constructing authority prior to lodgement.

The Land Appeal Court held:

1. It was for the tribunal of fact to consider just what activities - past, present or future - are properly to be regarded as the scheme within the *Pointe Gourde* proposition.

2. The conservation scheme under the *Nature Conservation Act* to protect the mahogany glider and the resumption scheme were inextricably linked.

3. It did not agree with the Land Court's reasoning that the site specific environmental characteristics of the turtle rookery in *Murphy* were distinguishable, in terms of the *Pointe Gourde* principle, from the environmental characteristics which led to part of the subject land, together with extensive additional areas of the Shire, being included in the "Nature Resource Protection" zone.

4. It was not convinced that the 1997 zoning was created at the behest of the State with resumption in mind. Arguably, the reasons for the resumption related to the lack of effectiveness of the town planning restrictions. *Pointe Gourde* did not apply with respect to the zoning. The State appeal on this point succeeded.

5. The finding by the Land Court that the ICOs were part of the resumption scheme was open to it on the facts. The State appeal failed on this point.

6. There was nothing in the evidence to reveal that the claimant was peculiarly advantaged over other cane farmers with respect to the potential that lay in the larger area of land. Any competent cane farmer, as the owner of the parent parcel, could have seen the potential in the timbered eastern section and could have either acquired machinery to develop that land or contracted others to do so.

7. There was no special value in the resumed land of the type described in the *Pastoral Finance* and further explained in *Boland v Yates*. That was not to say, however, that the resumed land, as part of the parent parcel, did not add a value to that parcel greater than the value revealed by the sales evidence. That added value was, however, part of the market value and its loss falls to be dealt with as severance damage.

8. Severance damage arose from the separation or division of the claimant's land as a result of the resumption. It may occur where part only of the claimant's land was taken leaving a compact parcel. Severance damage is depreciation in the value of the retained land resulting from its division into two parts or more or its reduction in area and consequent loss of value for some current or higher potential use.

9. The loss complained of was not properly special value, however it was accepted that it can be accommodated as severance damage even though that was usually referable to the land retained and not to the land taken.

   Both parties argued that some premium was justified. The Land Appeal Court was in no better position in striking a premium expressed as 7.5% of the value of the resumed land as determined.

10. Costs of purchasing replacement property.

The premium for special value (now severance) was awarded on the same basis that the claimant now submitted costs associated with a replacement property should be allowed. That was, replacement land that will provide economies of scale in sugar-cane production. Compensation for the same element ought not to be allowed under more than one head. Such "double dipping" was impermissible.

11. It was not relevant that the respondent may have allowed costs associated with the purchase of a replacement property to other dispossessed owners as part of settlement arrangements.

Where any agreement as to value, whether on sale or settlement, was made on the basis of a mistake which affects the value, then, if the agreement was to be used at all, an appropriate adjustment must be made since the agreement did not reflect the true value of the land.

12. Cut-off point for legal and valuation fees: there was no good reason why, prior to the reference to the Court, a claimant must be limited to the preparation and serving on the constructing authority of a single claim for compensation.

A further claim seems allowable and of practical benefit as a dispossessed owner may have the opportunity to replace a claim for compensation by a later document which also satisfies s.19 of the *Acquisition of Land Act* in circumstances, for example, where the claimant receives improved advice.

The date on which the claim was last served on the constructing authority was the cut-off date for this head of compensation. Once that claim was served, the claim for the purposes of the head of compensation under discussion had been finalised.

There can be no warrant for any compensation for professional fees incurred later than that date.

13. Costs incurred in the process of initiating the trial were considered costs of the action; they could not be properly characterised as costs incurred in preparation of the claim for compensation.

14. The function of an appellate court in hearing an appeal on questions (including inferences) of fact was considered. If the appeal court considered that the trial Judge was in no better position to decide a particular question than they were themselves, or if they considered the original decision was wrong, they must discharge their duty and give effect to their own judgment.

6. DAVIDSON

The Beaudesert Shire Council resumed an area of some 61 ha from a parent parcel of 334 ha for the purposes of "waste management processing" and associated uses.

A claim of $515,000 (rounded) was made comprising a value of the resumed land at $7,500 per ha - $462,306 - and a diminution in value of the remaining land of $53,250. Disturbance items were agreed.

The land was located about 6.5 km west of Beaudesert. Land uses in the area included rural residential, cattle grazing, grain growing and some industrial uses.

The dominant present ambience was rural, though detracted from by some hide works, a disused feedlot and concrete works. At the date of resumption the land was used for cattle grazing purposes.

The key issues between the parties were:

1. The worth of the highest and best use of the land at the resumption date (grazing) and the extent of its industrial potential.

2. The use of sales and certain contracts of sale that did not settle.

3. How an allowance, if any, for injurious affection should be calculated.

The Court held:

1. A contract of sale for the balance of the parent parcel which was terminated by the vendor (and deposit forfeited) was to be rejected as unreliable evidence. Appropriate inquiries had not been made by the purchaser prior to entering the sale. The price revealed by the contract could not be seen as one prudently arrived at to meet the Spencer test; it was not indicative of the highest and best use of the parent parcel.

2. The question of the extent to which reliance may be placed on an offer to buy land was considered, reviewing major authorities.

   An extract from *Hall and Hedge v Department of Transport* 18 QLCR 284 was most relevant:

   > "The level of reliance which may be placed on an offer or a contract which is not settled turns on whether it is concerned with the resumed land or other land; whether negotiations were of a usual or unusual nature; whether a price and contractual terms were agreed to; whether the terms of the contract are unusual in any material way; and in the case of a determined contract the circumstances surrounding its extinguishment."

3. The failure of the contract to settle was another matter which pointed to the unreliability of the contract as evidence of the ripening of the industrial potential of either the parent parcel or the balance land.

4. With a partial taking, it was not appropriate to simply value the land taken as if it were a separate lot; the value of that land needed to be identified as part of a whole. The claimant's valuer's reasoning was largely influenced by a block to block comparison between the adopted sales and the resumed land.

5. It was only appropriate to take into account the average price that a purchaser pays for a number of lots improved or otherwise, where the purchaser intends to use the lots for a higher use. Example: housing lots acquired to become a shopping centre.

6. Where land is purchased by a constructing authority, it would be an error in principle to adopt the purpose of the resumption as the highest and best use except where that use involves the conduct of a commercial or quasi-commercial enterprise.

7. The sales to the constructing authority (used as bases by the claimant's valuer) should be viewed as individual transactions and their suitability as valuation evidence considered on that basis.

8. In deriving an unimproved value from an improved sale it is not usually appropriate to merely adopt the sale apportionment provided by the transacting parties without expressing an independent view as to the value of the improvements.

9. The question of industrial potential of the parent parcel was a difficult one. Unlike sales used by the constructing authority in evidence, there was some industrial use in the vicinity of the parent parcel.

   A 30% allowance was made to allow for the differential in the industrial potential between the parent parcel and the sales. That is, the "bottom-up" rather than the "top-down" approach was used, given that the industrial potential of the parent parcel was deferred for 10 years from the date of resumption.

10. A broad-brush allowance for injurious affection in the overall value of the balance land was made. Any attempt of a more precise calculation was nothing better than a subjective, though considered, view.

11. While injurious affection (emanating from the waste management facility) would be a major issue in a residential precinct, it would be of less impact on a grazing property or on the industrial uses included in the draft Development Control Plan for the area (particularly if the whole of the parent parcel eventually became industrial). The allowance for injurious affection was based on these considerations.

12. A final determination for loss of land and injurious affection was made at $297,500.

7. NIMMO

Nimmo was concerned with determining the unimproved capital value (under the *Valuation of Land Act 1944*) of a large residential site at South Brisbane upon which was constructed a heritage listed building (under the *Queensland Heritage Act 1992*). Very limited acceptable unimproved sales evidence was available. While the property had extensive CBD views at the date of valuation, these were being blocked out at a fairly rapid rate. The owner of the property, Mr Nimmo, conducted his own case leading evidence without assistance of any other witness (expert or otherwise).

The main issues of interest before the Court were:

1. Should a premium be placed on the scarce unimproved sales when applying them to the subject?

2. What factors should be considered in making allowance, if any, for heritage listing and consequent restrictions?

3. Should potential future loss of views be allowed for in this valuation?

4. Should evidence of an expert witness automatically be preferred to that of an opposing lay witness?

Premium for Scarcity

As no acceptable evidence of unimproved values derived from analyses of relevant improved sales was before the Court, scarce unimproved sales were left as the only evidence. In *Maurici*, the High Court held it was permissible to use such sales but that it was likely that a premium would attach to such because of the scarcity factor. Such sales would be likely to attract a different buyer from that of the improved sales market.

The premium could probably only be precisely shown by a comparison of the scarce unimproved values with unimproved figures obtained from properly analysed improved sales. Such evidence was not led here.

The Crown valuer offered general opinion that a likely premium would be about 10% for a standard street and considerably higher for areas with special characteristics such as CBD views.

The Court determined that the special features of the subject block warranted a premium factor of 15% to attach to the scarce vacant sales.

This is not to say vacant land sales are always likely to attract such a premium. It was a consequence of facts of the particular case.

Heritage Restrictions

The Crown valuer made a 10% allowance for heritage restrictions primarily based on the allowance by the Land Appeal Court in a 1998 Townsville decision (*Roberts*). The Court in *Nimmo* stressed it was in no way bound by the *Roberts* percentage allowance

as such would have been based on the facts and circumstances of that particular case. The 10% could be considered broadly indicative only.

Impacts of the heritage listing here included:

- difficulty and expense in rectifying poor natural internal lighting;
- maintenance issues;
- difficulty in opening up the western part of the building and opening up internal walls to create larger rooms.

A discount of 15% was allowed for heritage listing.

The Court rejected claims from the Crown valuer that there was sales evidence to indicate that there was little or no difference between prices paid for heritage listed houses and houses of similar style and quality without such listing. Much more precise sales evidence (including analysis of improvements including internal improvements) would be necessary to support such an assertion. Also it would need to be investigated whether the claimed unlisted houses were likely to be heritage listed in the near future and such knowledge was reasonably available in the marketplace.

Loss of Views

At the date of valuation the subject property had substantial views overlooking South Bank and across the Brisbane River to the CBD. There was evidence that because of the imminent developments at South Bank and nearby such views were likely to be lost.

The Crown valuer argued that allowance for such loss of view would properly be made in the valuation when such loss materialised.

However the Court held that a prudent purchaser (under *Spencer*) would have investigated and became aware of such likely future loss of views at the relevant date and made a significant allowance at that time in settling any purchase.

Based on the evidence of very substantial difference between values paid for properties with and without views, the Court allowed a 20% discount for likely loss of future views.

Expert v. Lay Witness

The Court made certain observations on the position where the appellant is confronted with the situation where the only expert evidence before the Court is led on behalf of the respondent. It was suggested by counsel for the respondent that the Court should reject most, if not all, of the appellant's case where it conflicted with the opinions of the experienced Crown valuer. The Court observed:

> "Assessment of the unimproved value of land is an enterprise considered to be within the province of a recognised area of expertise. Accordingly, in appeals such as these, a valuer's evidence on matters of opinion relating to his field of expertise would ordinarily be preferred to differing opinions of a lay person. However, it is quite another thing to say that, because the valuation of land is the issue, the

valuer's evidence should automatically be preferred to that of a lay person.

It may be that the valuer's opinion is expressed in a manner or upon bases which are unable to be scrutinised, or otherwise lacks rational explanation. It may also be shown that in reaching his opinion the valuer has relied on information shown to be wrong or has failed to take into account relevant and material facts.

Accordingly, it is clear, in my view, that the opinions of value expressed by Mr Van Hees are not immune from challenge by the appellant. That said, in the absence of any demonstrated error of approach or reasoning on the part of Mr Van Hees, his opinions on matters within his field of expertise ought to be preferred to the opinions of the appellant on the same matters."

TABLE OF CASES

1. *HTW Valuers (Central Queensland) Pty Ltd v Astonland Pty Ltd* [2004] HCA 54, 179 ALJR 190.

2. *AMP Henderson (Global) v Valuer-General* [2004] NSWSC 264, 134 LGERA 4126.

3. *Robertsons Furniture & Design v Chief Executive, Department of Natural Resources and Mines* [2005] QLC 0001.

4. *Atkin v Redland Shire Council* [2004] QLC 0062.

5. *State of Queensland v Pajares* [2004] QLAC 0059.

6. *Davidson v Beaudesert Shire Council* [2004] QLC 0055.

7. *Nimmo v Chief Executive, Department of Natural Resources and Mines* [2005] QLC 0028.