Land Court - Legal Update

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Review of Valuation Decisions 2019

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1. Body Corporate for Allure CTS 37607 v Valuer-General [2019] QLC 15

BACKGROUND

This decision concerns the costs of an interlocutory application by the Valuer-General during an appeal by 'Allure'.

Following the withdrawal of the appeal by Allure, costs were ordered to be determined on the papers following the filing of submissions. The Valuer-General seeks its reserved costs of an application for disclosure. Allure seeks no order as to costs. The Valuer-General asserted that the Court can infer from Allure's decision to withdraw the appeal that it was wholly unmeritorious and caused the Valuer-General to incur unreasonable and unnecessary costs and time.

The Court noted that it is preferable for the Member who determines a contested matter to deal with any questions of costs.

ISSUE: What is the Court's power to award costs in an appeal against the valuation of land?

HELD

- Section 171 of the *Land Valuation Act 2010* (LVA) excludes the operation of both s 34 of the *Land Court Act 2000* (LCA) and r 18 of the *Land Court Rules 2000* (LCR) in an appeal under the LVA. Rule 18 provides the Court may order an appellant to pay costs if it withdraws an appeal without the respondent's consent. A broad discretion is conferred on the Court and r 18 like s 34 of the LCA, is inconsistent with s 171 of the LVA, which constrains the Court's discretion to award costs, except in specific circumstances.
- Section 171(2) specifies requirements that must apply before the Court's power to award costs is enlivened. Further, there is a strong presumption against a construction of a rule that would practically negate a statutory provision. To rely on r 18 to make an award of costs would practically negate the effect of s 171 of the LVA. A rule of court cannot be inconsistent with a statutory requirement.

Should the Court award the reserved costs against the appellant?

ISSUE: Did Allure fail to comply with procedural requirements?

HELD

- The starting point for this application, therefore, is that each party bears its own costs, unless the Court considers any of the circumstances set out in s 171(2) of the LVA apply.
- The Valuer-General asserts Allure did not comply with its duty of disclosure and therefore s 171(2)(d) applies. It relies on the fact that Allure provided amended particulars and a supplementary list of documents on 5 June 2018.
- The Valuer-General submits Allure might have avoided the application had it provided an affidavit swearing there were no further documents to disclose. However, Allure was not obliged to do so in the circumstances of this case. Unless ordered by a Court, a party who has disclosed all relevant documents is not obliged to file an affidavit stating documents sought by another party do not or have never existed. The Valuer-General persuaded the Court that there was an objective likelihood that Allure had in its possession some relevant documents. The Court reserved the costs of the application, accepting the submission by counsel for the Valuer-General that the extent of further disclosure would be an important discretionary factor in deciding costs.

- Allure then filed an affidavit confirming it had disclosed all relevant material and the Valuer-General made no complaint in response. No further disclosure resulted from the Valuer-General's application. The Court is therefore not satisfied Allure failed to comply with procedural requirements.

ISSUE: Did Allure fail to discharge its responsibilities for the appeal?

HELD

- The Court should decide whether s 171(2)(f) applies by reference to Allure's conduct in the appeal, not just in relation to the disclosure application. The question is whether the Court should compensate the Valuer-General for disadvantage caused by unmeritorious conduct by Allure in the appeal. (See *Chrismel Pty Ltd v Department of Natural Resources and Mines* re an analogous provision of the *Water Act 2000*)
- Six days after the Valuer-General refined its case, Allure took steps to alter its position in the appeal. Both parties refined their cases to add comparable sales for valuing the property. The frequency of these changes is surprising and concerning, given there can be no appeal without prior objection and internal review of the valuation and in cases exceeding $5m such as this, an independently chaired conference. The Court expects that the parties would fully explore questions such as comparable sales during that conference.
- The Court's revised directions regarding statements of facts, matters and contentions and the preparation of expert evidence are intended to focus the parties' minds on such issues as early as possible. In this case, the Valuer-General's further comparable sales, identified in response to the additional sale notified by Allure, seems to have prompted a change in Allure's position. The Court accepts that it then acted promptly in ending the appeal.
- The Valuer-General has not contended that the appeal was frivolous or vexatious. Withdrawing the appeal does not indicate the appeal was wholly unmeritorious. The outcome of litigation is uncertain and there can be many reasons why an appellant decides not to pursue their appeal. The Court should not discourage parties from taking and acting on advice about their prospects.
- The Valuer-General has not established that Allure did not properly discharge its responsibilities for the appeal.

ORDERS: 1. The application is dismissed. 2. Each party must bear their own costs of the appeal.

2. Body Corporate for Nautilus Gold Coast CTS 5710 v Valuer-General [2019] QLC 5

BACKGROUND

This matter concerns an appeal against the site value of 39 Garfield Terrace, Surfers Paradise as at 1 October 2016. The Valuer-General's issued site valuation was $12,500,000 but was reduced to $11,500,000 following an objection by the appellant. The appellant contends that the appropriate valuation of the subject land should be $10,500,000. The site is approximately 1 km south of Surfers Paradise and comprises 1,154 m² of beachfront land. The appellant called no valuation evidence but relied upon the lay evidence of the chairman of the body corporate, Mr G. McIlwain. The respondent called registered valuer Mr P. Smith.

ISSUE: How should the Court approach Mr McIlwain's evidence?

HELD

Placed at its highest, the evidence given under oath by Mr McIlwain is to be regarded as informed lay evidence, he not being a qualified valuer. Mr McIlwain is in fact an experienced engineer as was apparent by the professional and didactic manner he gave his evidence to the Court.

ISSUE: Can the Court accept the appellant's challenge to the mass appraisal methodology utilised by the Valuer-General?

HELD

- It is for the Court to determine what value should be ascribed to a particular lot of land, it is not for the Court to rewrite the valuation exercise for an area or an aggregation of individual lots.
- No evidence was provided during this appeal which supported the appellant's contention that an error was made in regard to the general factor of 1.44 that was applied to 35 oceanfront properties and that the correct market-based factor should have been 1.35 instead. The Court does not accept that proposition.
- Mr McIlwain has focused too much upon the notion of general market movements influencing the factor adopted for the mass valuation exercise and has placed insufficient focus on the utility of the comparable sales identified by Mr Smith. In so doing, he has failed to discharge the onus to satisfy the Court that the valuation for which he contends is the correct one.

ORDER: The Court dismissed the appeal.

3. Drivas Lakes Pty Ltd v Valuer-General [2019] QLC 42

BACKGROUND

This appeal concerns the site value of land situated at Yarrabilba within the Logan City Local Government Area. The land has an area of 9,904 m^2 and as at 1 October 2016 had a site value of $2,000,000. During his testimony the respondent's valuation expert conceded that the appellant's valuation expert was correct when deducting an amount of $457,996 in respect of an "Infrastructure Benefit" or "Headworks Credit" when analysing the sale of the subject land. As a result of this concession the difference in valuation opinion was removed and the un-contradicted evidence before the Court became that the site value was $1,800,000.

ISSUE: How should the appeal be resolved given the concession by the respondent's valuation expert?

HELD

The Court has the task of resolving the appeal before it. The nub of the appeal, once the objection decision is read, is that the decision to leave unaltered the valuation of $2,000,000 is incorrect. Once the concession was made, what is before the Court to decide had been directly addressed by the respondent's expert. There was then un-contradicted evidence of the correct valuation. The appeal must be allowed, and the value of the land reduced to $1,800,000.

ISSUE: Is the question of whether the adjustment that both valuers eventually made was justified an issue that remains for the Court to deal with by providing reasons?

HELD

Once the concession was made, what was before the Court to decide had been directly addressed by the respondent's expert. There was then un-contradicted evidence of the correct valuation. It is

not necessary for the Court to decide what is now a moot point in order to decide the appeal before it. It would not be helpful to express an opinion on it when that is not relevant to the function which, by the Act, the Court is required and allowed to perform. It would be of no utility to express a view, especially where it would be made in the absence of any contrary submissions. This appeal has been resolved in favour of the appellant in a way such that it is not now a suitable vehicle to resolve the previously existing legal point. The Court will not express an opinion which essentially amounts to advice on a question not in issue in the appeal before it.

ORDER: The Court allowed the appeal and determined the site value of the land at 5-27 Wongawallan Drive Yarrabilba as at 1 October 2016 to be One Million Eight Hundred Thousand Dollars ($1,800,000).

4. Irvine v Bundaberg Regional Council [2019] QLC 29

BACKGROUND

In 2016, the Bundaberg Regional Council resumed the land on which the skating rink / caretaker's residence was located. Mr Irvine (the claimant) acquired his interest in the skating rink by the transfer of a lease in 2002 for $60,000.

The skating rink (constructed in 1979) is a steel beam and concrete block commercial structure. The caretaker's residence is a cavity brick three-bedroom dwelling attached to the rink. The claimant undertook a full renovation of the property on acquisition. The lease was for an initial term of 40 years at an annual rent of one dollar per year payable. The initial term was due to expire on 30 June 2019. The claimant had an option for a further term of 30 years at an annual rent of $100 per week, adjusted for the present value by a formula provided for in the lease. The experts agree that the current weekly rental, if the option had been taken up, would be $488 per week.

The accounting experts agreed that the business had no market value and the only thing that could be valued was the balance of the lease plus the option. The valuation experts therefore had a unique task before them and approached the task by using the profit rent methodology.

The Court noted that the methodology is explained in *The Minister v NSW Aerated Water and Confectionary Co Limited:*

> *"the compensation payable to the tenant, in respect of the mere value of the tenancy itself, is regulated by the considerations stated in Cripps on Compensation, p. 101. The learned author (now Lord Parmoor) says:- It "depends on the difference between the actual rental paid by him and the improved annual rental that the property is worth. This difference must be multiplied by the number of years' purchase at which the tenant's interest should be valued. This will be determined by the character of the property and by the length of the term or tenancy." The capitalized value of the tenant's interest is the value to him…*
>
> *…As to what is the best rent the property is worth, consistently with the terms of the lease, that must be tested by what Lord Dunedin in the Cedars Rapids Cods Case termed "the imaginary market which would have ruled had the land" (here the term) "been exposed for sale" at the moment of notification.*
>
> *The supposed competition in this market will determine the best rent procurable*"

The valuers agreed that only three of the leases are relevant re calculating the profit rent of the skating rink:

1. Bundaberg Indoor Sports Centre - Issues - Comparability of improvements (superior to subject); location (not influential). Lease Option - Sale 5 year lease no options - risky or limited risk?

HELD

Overall, the Bundaberg Indoor Sports Centre is a newer building with better facilities and is a superior property with superior leasing potential.

2. FlipOut Indoor Trampoline Sports - FlipOut is located in a light industrial complex on the fringe of Bundaberg city. The current rent equates to $56.31/m^2. Both valuers considered the FlipOut building to be superior to the subject property. The council's valuer identified that FlipOut has disabled toilet facilities, roller door access, mercury vapour lighting, an internal two-level office and ducted air-conditioning. He considers the premises presents to a very high standard.

   The claimant's valuer believes that the rental potential for this property is depressed due to local market perceptions re flooding. The council's valuer accepts the complex has some flooding issues but considers this would have been factored into the rent negotiation in 2016, after the flooding and after flood mitigation work was done by Council.

   The council's valuer identified that the lessor provided a rent-free incentive equivalent to $6,250 (6.9%) and considers a deduction of 6.9% should be applied to the base rate of that when comparing rentals (legal reps agreed reduction = $52/m^2). Valuers agree that parking at FlipOut is superior to the subject property.

3. Gymfinity Gymnastics - The claimant's valuer initially calculated the rent for Gymfinity as at the date of acquisition at $78.43/m^2, but later revised his assessment to $71/m^2. The council's valuer considers that the true rental for this property (including the mezzanine) is $53/m^2 because the initial rent for the property was struck on the basis that the lessor would provide the entire fit out, all air-conditioning and upgraded bathroom finishes. The rent was adjusted down in 2017 because the escalation clauses resulted in an unsustainable rent. Further, Gymfinity is only liable for 50% of council rates. Both valuers agree that Gymfinity is superior to the subject property. In particular, the Council's valuer notes that this property is near new and does not suffer the maintenance issues of the subject property.

   Other skating rink rental evidence – The claimant's valuer provided, but did not rely on, details of skating rink venues in other locations.

   HELD

   The Court is not persuaded that the rent payable by other skating rinks in other locations assists in determining the commercial rent. To the extent that the claimant's valuer used information from skate rinks in other cities and towns to support his primary view, it is unhelpful.

   ISSUE: Rental comparability with the caretaker's residence – The claimant's valuer added $240 per week for the 3BR caretaker's residence attached to the skating rink to his calculation of commercial rent, after comparing it with other residential properties in Bundaberg (the rent being charged was well below market rate).

   HELD

   These properties are very different and provide no basis for a comparison i.e. new, well-maintained, in residential areas, not co-located with a commercial property. The Council contended that the use of the caretaker's residence is proscribed by the city planning scheme. It can only be used in connection with any other use conducted on the same parcel of land. Therefore, it cannot be rented on a stand-alone basis.

   HELD

   Given the restrictions re occupation of the caretaker's residence, the Court is not inclined to add the potential rent of the residence into an assessment of the commercial rent.

ISSUE: Did claimants valuer in effect approach the valuation as a calculation of commercial rent for alternative premises?

HELD

- It is apparent from the evidence, that the claimant's valuer was valuing a commercial property with the tenancy that was used for fitness or recreation purposes and not valuing a property the only use for which was for a skating rink or recreational purposes and which was built specifically for that purpose.
- The comparative premises he analysed had significant differences from the subject property. The comparators could be subject to other uses compatible with the local government zoning. The subject lease contained a covenant not to use or permit to be used the demised land and the premises erected thereon or any part thereof, for any purpose other than that of a skating rink or any other suitable sporting activity without the consent of the lessor first being obtained, provided always that such consent shall not be arbitrarily withheld in the case of any sporting or social activity which can be reasonably conducted on the premises.
- The subject site was built specifically for use as a roller-skating rink, and to convert it for other uses would have required great expense. However, the comparison properties relied upon by the claimant's valuer were not purpose built and could be readily modified to accommodate other uses. The claimant was required to keep the building in good and tenantable repair and was also responsible for structural defects in the building. The claimant's valuer did not take into account the additional obligations of a lessee of the subject premises when considering the comparators. Costs that would have been far more than for a commercial tenancy in a new, or near new, light industrial building (subject needs a new roof, painting and rink needed re-surfacing).
- The Court is unable to accept the claimant's valuers view that an appropriate base rent for the subject is $\$50/m^2$. To do so would ignore the significant differences between the subject property and the comparable leases, and the fact that the subject premises was in all ways inferior to the closest comparable property, Bundaberg Indoor Sports Centre.
- The council's valuer stated that he could not reliably calculate a profit rent but undertook the exercise and arrived at $\$30/m^2$. His reduction was for the subject's physical condition assessed on a "net effective basis (i.e. post allowance for incentives)" for the residual of the term certain.
- The claimant's valuer was critical of $\$30/m^2$ as he was unaware of any commercial properties in Bundaberg available at that rate. The exercise the valuers and the Court have to undertake, is not to observe the state of the rental market in Bundaberg but to put a value on this lease as it exists over this property. This confirms the view that he was valuing the market rather than the subject property.
- The council's valuer factored in the incentives when considering the comparable properties. The Court cannot see why those incentives should be factored in again. The Court accepts that there should be some discount for the difference in the physical condition of the buildings and the effect that will have on the obligations under the "make good" clause. The make good figure of $60,000 is analogous to, and probably more than, the fit-out cost for Gymfinity. The council's valuer did not provide a precise methodology for reducing the net rental to $\$30/m^2$. The Court considers on the evidence that this figure represents the better assessment of the commercial rent of the two valuation experts.
- The further reduction that was contended for on the basis of the peculiar terms of the lease is not accepted as the Councils valuer has acknowledged that the discount to $\$30/m^2$ already takes this factor into account. The claimant is entitled to $105,000 compensation for loss of the balance of the initial term.

- Discount Rate 7.5%; Skating & associated area, Rate per annum (net) $30/m^2.
- ISSUE: The residual value of the option.

  The valuers agree that weekly rent for the option period is $488 per week. The claimant's valuer maintains that the profit rent for the option period should be calculated on $50/m^2, minus the actual rent payable, plus a factor for inflation and then minus a factor for risk, giving a figure of $400,000. (Spreadsheet Annual market growth 2%, 3% & 4% per decade less rent actually paid then NPV 20% higher rate for risk).

  THE COURT NOTED

- The determined rate was $30/m^2 not $50/m^2.
- The % increases were not reflective of market growth and would be uncommon if "review to market" wasn't included. Projected market growth over term of option goes from a profit rent of $82,230 in 2019 to $195,495.82 in 2048. An extraordinary increase of 138% given the commercial leasing market in Bundaberg had been flat since 2013.
- The discount rate of 20% had not taken account of capital expenditure and maintenance.
- The claimant bought this lease in 2002 for $60,000. At that point there was 16 years at an annual rent of $1 plus the option. A transfer of lease from the claimant to a third party executed in October 2002, stamped in early 2003, showed the consideration for the transfer as $97,000. The transfer did not occur but the document was tendered to show what a willing purchaser might be prepared to pay for the leasehold interest. At that time, there was 15 years left on the balance term at an annual rent of $1. By November 2016, a prospective purchaser had only 2 years and 9 months to take advantage of an annual rent of $1. Because there was less time to exploit the profit rent potential, all other things equal, it must be that the value of the lease had decreased substantially over that time.
- Both valuers explored the "business" potential of the subject premises. The council's valuer used the business potential to test the economic feasibility of any market rent assessment. The Court considers that was a prudent application of a reality check. Did the profit rent calculation actually reflect the market, given the financial performance of the permitted use? He also looked at the profit rent "in the classic sense of a capitalisation approach" and identified the risk inherent in purchasing the lease.
- Taking the comments of the council's valuer into account, a figure of $117,000 for the whole of the lease is realistic for the whole lease period for the chance of an improved return on investment. If it is assumed that a willing purchaser knows the potential income for the balance period is $82,500.60, that purchaser is paying an extra $34,500 for the chance of capital gain or the ability to improve the income plus the opportunity to take up the option. Given the constraints of the subject lease, the premium seems more than generous, particularly as the actual income was generated with no labour expenses at all. The claimant told the Court that the only way to increase revenue was to operate 7 days per week, and a skating business is much more marginal once it is paying more than a peppercorn rent.
- If the claimant was not prepared to pay $400,000 for the option to lease in 2002, it cannot be worth that now. I assess the value of the option at nil.

ISSUE: What costs should be included as "disturbance"?

THE COURT NOTED

> *"The matters that fall within "costs attributable to disturbance" are set out in s 20(5) of the ALA. They include costs reasonably incurred or might reasonably be incurred relating to the use of the land taken, an amount reasonably attributed to the loss of profits and other economic losses and costs reasonably incurred that are a direct and natural consequence of the taking of the land".*

ISSUE: Loss of profits.

The skating rink had made a profit since 2012 and the claimant's valuer calculated the loss of profits at $30,000 per annum for two years and nine months being $82,500.67.

HELD

> *"The profit rent approach assumes that Mr Irvine has a lease interest of some value to a prospective purchaser. Once the purchaser acquires the lease, then Mr Irvine is not operating the business and his income stream from the business ceases. If I were to give Mr Irvine compensation for loss of profits for the balance term, I would be giving him double compensation. Mr Irvine is not entitled to claim loss of profits for the balance of the term."*

ISSUE: Relocation Costs.

The Council contended that, because the business had no value, there was no justification for compensating the claimant for the cost of relocating the business. *Horn v Sunderland Corporation* and *Commonwealth v Milledge* were cited as authorities for the proposition that compensating the claimant for both profit rent and disturbance costs would result in double compensation. Both cases referred to, involved situations where the landowner was not using the subject property for its highest and best use. In *Horn v Sunderland Corporation,* the Court stated that the landowner was "asking to be compensated, not for any work real pecuniary damage, but for the loss of the opportunity to indulge in its idiosyncrasy". In *Horn v Sunderland Corporation,* the landowner was claiming the cost of purchasing alternative land.

HELD

Whether or not anyone else thinks it is a sound business proposition to continue with a skating rink in Bundaberg, the claimant was entitled to relocate the business and, because relocation was only necessary because of the resumption, he was entitled to be compensated for the relocation costs. The Court awarded $26,000 in respect of the following items:

Advertising to advise of relocation $5,000
External signage at new premises $5,000
Safety compliance signage $1,000
Additional lighting for skate areas $3,000
Lighting protection covers $1,000
Communications (phone, internet, etc) $1,000
Power upgrades $5,000
Security lighting $1,000
Security systems (cameras, etc) $4000.

In respect of internal construction, the following items were allowed after a deduction of 30% deduction (enhancement):

Claim Compensation Construct DJ console $10,000
Construct First-Aid room $3,000
Construct skate hire/sales, repair, admin, etc $5,000
Construct and fit-out canteen area $10,000
Construct games/party room $5,000

An amount of $108,000 in respect of floor re-finishing was declined as the existing floor required re-finishing due to its condition and floor marking was also disallowed as it was a necessary incident of floor re-finishing. These items were not supported by specific quotes but were compiled by the claimant's valuer using his experience/life skills and were accepted given their modest amounts. The claimant was also awarded $27,500 costs of claim plus interest.

5. ISPT Pty Ltd v Valuer-General (No 3) [2019] QLC 40

BACKGROUND

The appeal concerns the site value of 3,365 m^2 of land situated at 170 Queen Street, Brisbane City with dual frontage to Adelaide Street. The respondent valued the land at $59,500,000 as at 1 October 2015 without having determined its highest and best use. The land, which was impacted by easements, was substantially improved and had a heritage listed façade situated at the Adelaide Street frontage. Given the absence of suitable sales both valuation experts relied on the sale of the subject land, which sold improved as Broadway on the Mall in July 2011 for $62,500,000.

ISSUE: What was the consequence of the site value of the subject land issuing without a highest and best use of the land having been decided?

HELD

This was an error since the highest and best use must be identified before embarking on the process of ascertaining and considering comparable sales in order to determine the site value. A consequence of this is that the objection decision process suffers from the same error as the process which led to the issued site valuation.

ISSUE: Did these errors demonstrate that the appellant has discharged its onus of proving that the decision on objection was wrong?

HELD

It is not enough to show that the issued valuation and objection decision process were conducted erroneously. The Court's first step is to determine if "the evidence in its totality" shows that the onus of proof has been discharged.

ISSUE: Was the Valuer-General's amendment of the site value pursuant to s 163 of the *Land Valuation Act 2010* (the Act) from $53,000,000 to $52,500,000 proof that the valuation was excessive and the objection decision wrong?

HELD

The respondent's amendment under s 163 of the Act does not assist the appellant as s 163(4) provides that, in circumstances where the appellant does not accept the amended valuation, the valuation as amended is taken to be the valuation appealed against.

ISSUE: What was the highest and best use of the land at the date of valuation?

HELD

The highest and best use of the land on 1 October 2015 was for retail development on a scale similar to that which existed at the date of valuation. There is nothing in the evidence of the town planning experts which requires consideration in order to reach this conclusion. The same may be said of the evidence of the engineering experts.

ISSUE: What weight could be given to Exhibit 9, a commentary dated Spring 2015 by m3property which discusses the "Brisbane CBD office market". Mr Jackson, the appellant's valuation expert, was chief executive of m3property at the date of hearing.

HELD

The Court is unwilling to place any reliance on it, in view of the disclaimer at the end which states, inter alia that "m3property makes no representation that any information or assumption contained in this material is accurate or complete". The sworn evidence is more likely to be reliable.

ISSUE: Should the improved sale of the subject in 2011 be relied upon to determine the site value of the land as at 1 October 2015?

HELD

An analysis of the 2011 sale of the subject was conducted, as, in the opinion of the valuers there were no suitable sales of sites for retail or commercial use. The sale has the advantage of being perfectly comparable in regard to its attributes. That the parties to the sale never had a meeting of minds regarding the site value is not significant as this would apply to most if not all improved sales. It is for the valuers to exercise their skill and deduce the land value from the improved sale.

ISSUE: Was the respondent's valuation expert correct to depreciate holding costs and loss of interest at the rate of 75% for half of the development period?

HELD

The purpose of the deductions which the valuers have made is to find the value of the land in an unimproved state, by allowing for the reduction of the value of improvements. The Court accepts the evidence of the appellant's valuation expert as it accords with principle. The Court will not allow for depreciation of rates, land tax or interest.

ISSUE: Can the increase by the appellant's valuation expert of 10% to account for the increase in value between the June 2011 sale and the October 2015 valuation date be accepted by the Court?

HELD

On the evidence available, there is on balance, a sufficient basis for the Court to accept the allowance for time, made by appellant's valuation expert.

ISSUE: What reduction should be made to the rate applied to the unaffected land area to allow for the burdening effect of the easements on the subject land?

HELD

The allowances made are very much a matter for the professional judgment of the valuers. The respondent's valuer explains that Easement A prevents the subject land from using this area for access, goods delivery or garbage collection adding that this is "somewhat offset" by benefiting Easement A, which is on the adjoining Brisbane Arcade and allows for pedestrian and fire escape egress. This evidence allows the Court to find that the important aspects of access and egress should be balanced so as to recognise that the loss of availability of this area for access, goods delivery and

garbage collection should be seen as quite significant in the commercial environment. The overall allowance should be considerably greater than 10% applied by the respondent's valuation expert. The Court accepts the 75% allowance adopted by the appellant's valuation expert as appropriate.

ISSUE: How should the heritage-listed facade be allowed for in determining the site value of the subject land?

HELD

In the circumstances of this case, the global 5% allowance proposed by the respondent's valuation expert is not explained sufficiently for the Court to be able to accept it. On the available evidence the best option is the costing of $4,073,911, being the additional cost of construction which the preservation of the facade will demand. That allows for the limitation or restriction of use.

ISSUE: What should the site valuation of the subject land be as at 1 October 2015?

HELD

For the preceding reasons, the valuation of the subject property as at 1 October 2015 will be $35,195,000, which is the rounded figure of the appellant's valuation expert. The alternative assessment by the respondent's valuation expert was made on the basis that there was no potential for a tower. On the basis of his brief consideration of that alternative, he contends for a site value, in the circumstances which the Court has found to exist, of between $39,000,000 and $42,500,000. It is a range reached in reliance on the assumed correctness of a previous valuation and is not of assistance.

ORDER: The appeal against the Valuer-General's decision on objection was allowed and the site value determined at $35,195,000 as at 1 October 2015.

6. Lim v Moreton Bay Regional Council [2019] QLC 2

BACKGROUND

Mr Lim (the claimant) claims compensation following the acquisition of part of his land by the Moreton Bay Regional Council (the council) on 14 August 2015 for "flood prevention or flood mitigation purposes" (levee/drainage). Prior to the resumption, the claimant's property [5.1318 ha] had the real property description of Lot 3 on Survey Plan 172961. After the resumption, the claimant's retained land [2.591 ha] continued to be known as Lot 3, although its description was Lot 3 on SP 282675, and the resumed land [2.5408 ha] was known as Lot 4, with an actual reference of Lot 4 on SP 282675.

ISSUE: How should the Court approach the development potential of the resumed land?

HELD

The approach to development potential was addressed by then President MacDonald in *Mio Art Pty Ltd & Ors v BCC* [2009] QLC 177 – "*It is not the function of this Court to decide whether the planning authority would approve a particular proposal…… the function of the Court is to determine, how the hypothetical prudent purchaser referred to in Spencer would have viewed the potential financial return if a proposal were considered that included one or other of the proposed plans."*

ISSUE: Evidence of Mr Lim & "valuation reports". Mr Lim had an engineering degree and had substantial career experience in Asia as a project manager & licenced appraiser. Could he give evidence as an expert?

HELD

The Court is in absolutely no doubt that it is precluded from accepting any of Mr Lim's evidence as independent expert evidence. Whilst the Court is able to accept Mr Lim as a lay witness, his evidence is tainted throughout by his departure from referring only to facts and delving into areas of opinion evidence which are the domain of an expert witness. The only expert valuation evidence is that of the council's valuer.

Cupo v DNRW [2007] QLC 22 - Valuer appears as advocate & expert - Member Jones:

[*41] - situation that ought to be avoided in all but exceptional circumstances. Generally speaking, subject to his/her duties to the Court, opponent, client and professional governing body, an advocate's role is to persuade the Court to adopt their clients' case and reject the case for the opposition. On the other hand, the role of an expert witness is to assist the Court by giving honest and objective evidence. The failure of any expert to act otherwise would place him/her in breach of the expert witness' overriding duty to the Court. The real potential for tension arising when a person attempts to act as an advocate and expert witness is obvious.*

[44] The person who attempts to be both advocate and expert witness runs the grave risk of having the weight which might otherwise be accorded to his/her evidence significantly eroded and, in more extreme cases, even rejected entirely. It is a situation that should be avoided.

Meiers & Anor v Valuer-General [2012] QLC 19

[17] *For completeness I should point out that the position of Mr Meiers is somewhat different to that found in the Cupo decision, in that in Cupo the independent valuer was not the appellant, where, of course, in this matter, Mr Meiers is one of the appellants in the appeal, and he can hardly be expected to separate himself and leave his expertise at the door when he comes to represent himself. To that end, Mr Meiers' evidence was received by this Court in the full knowledge that he is a registered valuer and that he has expertise in this field, but such evidence could not be received by the Court, in my view, as independent expert valuation evidence, as such evidence is classically understood."*

ISSUE: Was the town planner, as an employee of the respondent at the resumption date, lacking true independence?

HELD

The Court is able to receive expert evidence from the town planner despite his pre-existing relationship with the respondent. He holds the required qualifications to be a town planning expert and his relationship with the respondent was properly disclosed. *Arkinstall & Anor v Gold Coast City Council* [1997] QLC 45 was noted as an example of a town planner giving expert evidence as an employee of a council) Although his expert evidence is able to be properly received by the Court, his pre-existing relationship with the respondent remains an issue to be taken into account when the weight to be attributed to his evidence is considered.

THE COURT NOTED

R 24C of the *Land Court Rules 2000* (LCR) which makes clear, that an expert has a duty to assist the Court and that duty overrides any obligation the expert may have to any party to the proceeding or to any person who is liable for the expert's fee or expenses.

ISSUE: Should the respondent's town planner be permitted to make amendments to his statement in the witness box without first seeking the Court's leave?

HELD

- There was at least potential from a town planning perspective for Lot 3 (pre-resumption) to receive a favourable outcome from the respondent for subdivision. (Potential for subdivision must be taken without any reference to the scheme of resumption in existence).
- The valuer's evidence casts further doubt on the amendments to Exhibit 7 proposed during evidence-in-chief by the town planner i.e. the valuers evidence of what the Council town planner told him is consistent with the unamended Exhibit 7, but not with the amended Exhibit 7.
- On the basis of the valuer's evidence from a valuation perspective there appears to be little doubt that there was an opportunity for the claimant to seek a subdivision of Lot 3 pre-resumption, particularly if the part to be subdivided in the north of the old Lot 3 included an area a little to the south of the southern boundary of the resumed land, which was outside of flood impact concerns.
- Put more simply, old Lot 3 may very well have been able to be subdivided into a block made up by the entirety of the resumed land together with a small portion in the north-westerly corner of the retained land, leaving the balance of old Lot 3 as essentially post-resumption Lot 3 with a relatively small area in the north-west removed, but with the house, shed and almost all other improvements remaining on the altered post-resumption Lot 3.
- The valuer's evidence of his discussions with the town planner when he was an employee of the Council gives rise to the clear conclusion that it was possible, leaving aside the scheme for the resumption, for the claimant's land to be subdivided into two lots. One containing the existing house and improvements and one containing predominantly the resumed land.

ISSUE: Has the respondent not complied with r 24D of the LCR in not seeking leave? Rule 24D - a person must not give, and an expert must not accept, instructions to adopt or reject a particular opinion. The claimant contends this is what the town planner has done in making his amendments to Exhibit 7.

HELD

That is a bold assertion made by the claimant which is not supported by any facts. There is simply no direct evidence to support this contention.

ISSUE: Does Rule 24H LCR apply? i.e. During examination in chief, an expert must not, without the court's leave, repeat or expand on matters contained in the expert's statement of evidence or introduce new material?

HELD

There is no doubt that r 24H is not meant to apply in circumstances where an expert seeks to do no more than correct mere slips or typographical errors in their report. The town planning expert for the respondent gave the impression that the amendments to page 26 of the report involved nothing more than clarification to avoid confusion. However, the amendments to page 26 could fundamentally change the town planners report. Whether or not the respondent should have sought leave for Exhibit 7 to be amended is dependent upon whether or not the amendments are substantive or merely for clarification/correcting typographical mistakes.

HELD

Any fair reading of Exhibit 7 in its pre-amendment state could only reasonably lead to a conclusion that the report was specifically stating that the resumed area was capable, from a planning perspective, of having a dwelling in the resumption area. That is, the retained area would retain its

dwelling and the resumed area could have had a dwelling constructed on it, albeit "on a limited part" of the resumption area. Exhibit 7 in its unamended form is of particular assistance to the Court. The unamended report is also more consistent with the evidence of the valuation expert as to his discussions with the town planning expert when he was employed by the respondent as to the possibility of the northern part of the applicant's land being capable of subdivision for residential purposes pre-resumption.

The amendments proposed by the town planner were not just typographical but were making a substantive change to Exhibit 7. Not only should leave to make the amendments have been sought, the claimant should have been provided with advance notice of the respondent's intention via the town planning expert to have the contents of Exhibit 7, which the claimant had had for many months, amended. This would have allowed the claimant a fair opportunity to consider the proposed amendments. An opportunity which he did not properly have when the amendments were proposed.

HELD

re Subdivisional Potential - on the totality of the evidence, and in particular the evidence of the valuer's discussion with the town planner, the Court is satisfied that absent the resumption, there was a real opportunity for the claimant to seek to have the northern part of his land, including all of the resumed area, subdivided in order to allow the construction of a dwelling on the northern part of the pre-acquisition land.

Valuation evidence

ISSUE: Have the key characteristics of the subject land relating to koala habitat, mature rainforest vegetation, flora and fauna which exist on the resumed land been taken into account by the Council's valuation expert?

HELD

Although these characteristics are front and centre of the claimant's case and are critical features of the resumed land, the Council's valuer does not appear to have considered sales with the same features. There are no photographs of the sale properties. On the evidence, the Court finds that these key characteristics of the resumed land are not to be found in any of the sale properties advanced by the Council's valuer. There may be a scarcity of such sales within the area of sales referred to by him, however he could have searched for properties with such attributes further afield and made relevant locality adjustments to those sales. The adjusted upper limit of the compensation contended by the council's valuer of $177,856 can be a starting point. This is because the particular attributes of koala habitat, mature rainforest, flora and fauna and creek which existed on the claimant's land in the before case have been completely removed from the claimant's land in the after case. The simple before and after calculation does not adequately take into account the loss suffered by the claimant in losing ownership of said characteristics.

Sales to public authorities

ISSUE: Is it appropriate for the Court to use the purchase of the Dale Street properties by the respondent or their valuations by the respondent's valuer?

HELD

In all of the circumstances, the Dale Street sales to the respondent are able to be considered as part of the valuation evidence in this matter, although care needs to be exercised when using those sales as direct comparators to the resumed land due to the different zoning of those sale properties.

Although sales to public authorities should be treated with caution, they are admissible.

Caution is required as public authorities may have an advantage in the bargaining process. Amounts may include injurious affection/solatium and may reflect market value. Such sales may have both a depressive and enhancing effect. Was the sale transacted on a consensual basis? [*Chaudry v Liverpool CC* [2008] NSWLEC 251 - Pain J followed].

The Court also referred to the following extract from the *Law of Compulsory Acquisition 2nd ed 2015* at 394-5 (Marcus Jacobs):

> *"Evidence of sales to the resuming authority may be admissible if a party seeking to introduce such evidence first establishes that the 'transaction may be regarded as voluntary in character'. Evidence of sales to the resuming authority may have some probative value and may be admissible as comparable sales data".*

The Council's valuation expert agreed during cross-examination that the purchase by the respondent of the Dale Street properties was as a result of voluntary negotiation between the parties.

Findings on valuation evidence

THE COURT NOTED

There was some factual evidence provided by both the claimant and the respondent that assists in arriving at the appropriate value of the resumed land, however the Court is not favoured by reliable expert opinion evidence taking all relevant factors into consideration to assist in arriving at the appropriate value for the resumed land. It is not the function of this Court to either have a guess or take a punt as to what the proper value of the resumed land is. The Court is required to adopt a reasoned, transparent approach based on the factual evidence and on so much of the expert opinion evidence that is considered reliable. Earlier in these reasons a sum of $177,856 was noted as the starting point for determining the value of the resumed land.

ISSUE: How should the Court approach the assessment of compensation given that the key characteristics of the subject land relating to koala habitat, mature rainforest vegetation, flora and fauna have not been taken into account by the Council's valuation expert?

HELD

Taking into account the real value of the koala habitat, established rainforest, flora, fauna and creek on the resumed land, as well as the added benefit of the resumed land having multiple entry/exit points, the sum of $177,856 is increased by a further 15% to take those attributes into account. This equates to $26,680 (rounded) and a total of $204,536 which is a 30% increase over the compensation amount of $152,500 put forward by the Council's valuer. To remove any doubt, an increase of 30% is considered reasonable to cover for the attributes (koala habitat, established rainforest, flora, fauna and creek on the resumed land), leaving aside subdivision potential.

ISSUE: How should the Court address the potential for subdivision of the northern part of the pre-resumed land, and the impact that any potential has on the value of the resumed land?

HELD

On the evidence, it was not a certainty that an application pre-resumption, (leaving to one side the scheme), would have been approved by the respondent. The prospects of success for any subdivision application could not be rated as any more than 50% and perhaps less. It is apparent from the council's valuer's evidence that had he been valuing the resumed land as a separate lot with approval for a residence on or nearby to it, then the value of the resumed land would have substantially increased. The best that the Court can do is take into account the council valuer's sales

1 to 5 and the land component of the Dale Street sales in order to arrive at a figure above the sum of $204,536 which takes that possibility into account. It is considered appropriate to increase the value of the resumed land to take into account the possibility of a favourable application for sub-division by 25%, which amounts to an increase of $51,134 making a total of $255,670.

ISSUE: What, if any, disturbance items should be awarded to the claimants?

HELD

The claimant has **not quantified** any costs which might be reasonably incurred by way of disturbance costs. It is **not enough** just to make a general claim for disturbance costs. The applicant is required to put some meat on the bones. In this case, there is simply nothing presented by the applicant which can enable the Court to make an award for disturbance.

DETERMINATION: **With respect to the claimants claim for compensation in this matter for the resumed land (known as Lot 4 on SP 282675 post-resumption land) as at the date of resumption to be $255,670 plus interest.**

7. Pfeiffer Nominees Pty Ltd v Dept of Transport and Main Roads [2019] QCA 101

BACKGROUND

- In 2007, the applicant's land, which fronted the Captain Cook Highway north of Cairns, was resumed. The purpose of the resumption was to upgrade the highway at that point. By s 12(5) of the *Acquisition of Land Act 1967* (the Act), the applicant became entitled to compensation to be assessed according to s 20(2) of the Act, by reference to the value of the estate or interest of the applicant in the land taken on the date when it was taken.
- Although adjacent to the highway, a Limited Access Declaration by the Commissioner of Main Roads (made in 1983 "the Declaration") was a legal impediment to accessing the highway from the subject land. By s 11A(5)(a) of the *Main Roads Act 1920-1979 (Qld)*, the effect of the Declaration was that direct access could not be obtained from the applicant's land unless the Commissioner first gave consent.
- The applicant claimed compensation for the resumption, upon the basis that it should be assessed by disregarding the effect of the Declaration. The respondent contended that what had to be assessed was the actual value of the land, affected as it was by the Declaration. The difference between those two positions was the issue for determination in the proceedings before the Land Court and the Land Appeal Court.
- At the hearing in the Land Court, the valuers who gave evidence agreed that, if the Declaration was brought into account, the value of the land (and thereby the amount of the compensation) should be assessed at $580,000, whereas if the Declaration was to be disregarded, the amount should be $2,170,000.
- The Land Court held that the Declaration should be disregarded and assessed compensation in the higher amount. The Land Appeal Court allowed the appeal, holding that the Declaration should be brought into account and that the compensation should be the lower amount.

APPEAL TO COURT OF APPEAL

Pfeiffer applied for leave to appeal to the Court of Appeal on a question of law. The basis of the proposed appeal is that the identification of the relevant scheme was a question of fact determined by the Land Court and consequently Land Appeal Court made an error in law as it was inappropriate

for an appellate court to substitute its own view or conclusion because it saw the matter differently i.e. an appeal court must first identify that the primary decision maker (Land Court Member) acted on some wrong principle of law or that the valuation under challenge was entirely erroneous. (s 74 *Land Court Act 2000*).

ORDER: Leave to appeal granted - appeal dismissed.

HELD

[1] What had to be assessed under s 20(2) *Acquisition of Land Act 1967* was "the value of the estate or interest of the claimant in the land taken on the date when it was taken", however this assessment is qualified by the *Pointe Gourde* rule and any increase or decrease of the actual value of the land being resumed affected by the very "scheme" of which the resumption forms an integral part is to be disregarded.

[2] The authorities have frequently expressed this rule by reference to a "scheme, e.g. in *Pointe Gourde*, what was to be disregarded was said to be the *"scheme underlying the acquisition".* In *Melwood Units*, it was "the very scheme of which the resumption forms an integral part". And in *Queensland v Murphy*, the High Court referred to *"the scheme of which resumption is a feature".* The High Court also said in that case that the rule requires a disregard of planning restrictions which *"can properly be regarded as a step in the process of resumption",* citing its judgment in *Housing Commission of New South Wales v San Sebastian Pty Ltd.*

[3] The controversy in many cases applying the *Pointe Gourde* rule, (as in this case) is in the identification of the relevant "scheme". A precise definition of the term, which would largely avoid the controversy, has not been developed or at least widely and authoritatively accepted.

[4] It may be accepted that the question of what is the scheme, in the application of the Pointe Gourde rule, is a question of fact. But as Lord Nicholls said in *Waters v Welsh Development Agency*, *"the extent of a scheme is often said to be a question of fact. … But selecting from these background facts those of key importance for determining the ambit of the scheme is not a process of fact-finding as ordinarily understood."* Rather, it involves the exercise of judgment. In this case, therefore, it was necessary for the Land Appeal Court to find an error in the exercise of that judgment. Member Stilgoe [LAC] clearly identified that as the task for the Land Appeal Court.

[5] The Land Court appears to have concluded that the relevant scheme is one which may have been in existence before the making of the Declaration in 1983, but which existed at least from that date. The Court referred to this as "the "scheme" created by the declaration". On no reasonable basis could it be thought that the "scheme" for which this land was resumed was one which was created by the making of the Declaration. This land was not resumed to further a purpose for which the Declaration had been made. It was resumed to upgrade a highway, which had long been used. It is only by characterising "the scheme" in the general sense that the scheme was the ongoing improvement of the highway, that it could be said that the scheme had existed as early as 1983. But if that was the case, the scheme existed even earlier than the Declaration. The purpose of the Declaration was to facilitate a better use of the highway; it was not an end in itself. And it could not be said that the resumption of the applicant's land was an "integral part" of such a "scheme". As Member Stilgoe reasoned, the restriction imposed by the Declaration, with or without this resumption, could and did apply, as it had for decades.

[6] On a high level of generality, it could be said that both the Declaration and this resumption were part of a scheme for the ongoing upgrading of the Captain Cook Highway. But that would not warrant the application of the Pointe Gourde rule in this case for two reasons:

i. The rule will operate only where the value of land is enhanced or diminished "by the very scheme of which the resumption forms an integral part". When the reasons for the existence of the rule are understood, it can be seen why that is so. In essence, it is because of the unfairness, either to the resuming authority or (in cases which are said to involve "*Pointe Gourde* in reverse") the landowner. There is no evident unfairness in compensating the applicant for this resumption according to the actual value of its land.

ii. If the Pointe Gourde rule is to be applied in this case, it would only be by identifying the scheme at that very high level of generality, namely a scheme to continuously upgrade the highway. But upon that premise, what is the effect of the scheme, as distinct from only one component of that scheme (i.e. the Declaration) upon the value of the land? As I have said, the Land Court Member at first instance was wrong to identify the scheme only as the Declaration. If the scheme was the ongoing construction and upgrade of the highway, the impact overall of that scheme upon the subject land would have to be considered, which it was not in this proceeding.

8. F A Pidgeon & Son Pty Ltd v Valuer-General; 310 Ann Street Nominees Pty Ltd v Valuer-General (No 2) [2019] QLC 25

BACKGROUND

This decision relates to three appeals pursuant to s 155 of the *Land Valuation Act 2010* (LVA) against the respondent's decision on objection for site values as at 1 October 2015. LVA073-17 concerns land owned by 310 Ann Street Nominees Pty Ltd comprising as Lot 1 on Crown Plan AP 3495 (leasehold) and Lot 2 on RP 124155 (freehold). The relevant objection decision reduced the site value from $31 Million to $26 Million. The appellant contended for a site value of $19,200,000. LVA074-17 relates the freehold component of LVA073-17 namely Lot 2 on RP 124155 in which the objection decision reduced the site value from $30 million to $25 million. The appellant's contended site value was $18,460,000. LVA075-17 relates to land located at 300 Ann Street, Brisbane City owned by F A Pidgeon and Son Pty Ltd. The objection decision decreased the site value from $12 million to $11.5 million. The appellants contended site value was $9,290,000.

ISSUE: Was the opinion of the appellants valuation expert, that 100% of the student accommodation concessions be deducted when analysing sales 1 and 2 properly based on facts?

HELD

An expert's opinion, in itself, has little weight. What is important, is the full exposure (and testing where required) of the reasoning process whereby the expert starts with proved or admitted facts and then reaches a reasoned conclusion. The appellant's valuation expert did not have a sufficient factual or evidentiary basis on which to base the 100% allowance for the concessions he contended for in respect of sales 1 and 2. There was sufficient factual evidence to support a partial allowance for the concession, but not the full 100%.

ISSUE: May an error in the reasoning of a decision on objection be logically probative of the grounds of appeal anticipated by s. 169 (3) of the LVA?

HELD

In Tennyson Reach it was successfully argued before the Land Appeal Court by the Valuer-General that the proper construction of the LVA required that an appellant to first discharge its onus of proof, before the Court would be permitted to go on to consider the appropriate site value for the land in question. The objection decision maker gave evidence relating to highest and best use which

was relevant to the appellant's discharging their onus of proof of the grounds of appeal. This evidence will be given such significance as is warranted in determining if the appellants have discharged the onus in each appeal.

THE COURT NOTED

These comments should not be taken as in any way endorsing a fishing exercise by an appellant in seeking to call LVA decision-makers (as witnesses). The grounds of appeal must relate to the decision on objection and the evidence that can be given by a decision-maker must be pertinent to a ground or grounds of appeal. Any appellant who seeks to call evidence from an LVA decision-maker, in circumstances other than those I have identified, would run a severe risk of either being found to embark on a fishing exercise or acting frivolously and vexatiously and would run a considerable risk of an award for costs being made against it.

ISSUE: Did the decision-maker for the notice of objection err in having regard to the "merged market" theory i.e. that at the relevant date, purchasers of development sites in the CBD, whether commercial or for residential purposes, were competing in the same market?

HELD

Properties in the Brisbane CBD in 2015 did not neatly fall into a one-size-fits-all category. The subject properties are clear examples of this. Their highest and best use is for relatively low-rise commercial buildings. The general location at 300 and 310 Ann Street on the fringe of the CBD is well away from the Brisbane River and any river views. These two properties have the added burden of a railway tunnel passing underneath. It is common ground that these factors resulted in the highest and best use designations. It cannot be accepted, given the market conditions existing in 2015, that a sale site having a highest and best use of a residential tower of 80-storeys, with commanding views of the Brisbane River, can be seen as directly comparable to the subject properties because they are all located in the Brisbane CBD, with the same planning scheme (CCNP) and are thus, part of the same "merged market". To so find, given the facts of this case, and the market evidence at and around the valuation date, would be an absurd result.

ISSUE: Are sales 3, 4 and 5, being residential apartment sales in July 2014, reliable for comparison to the subject sites?

HELD

The evidence of the appellant's valuation expert that these sales are not reliable for comparison to the subject sites is accepted.

ISSUE: Was Sale 4 (30 Albert Street) reasonably exposed to the market?

HELD

Sale 4 (30 Albert Street) was an off-market transaction and in light of s 18 of the LVA, not reasonably exposed to the market. Such a sale must therefore be excluded from consideration.

ISSUE: Was Sale 2 (97 Elizabeth Street) reasonably exposed to the market?

HELD

Notwithstanding s 18 of the LVA, both valuers were of the view that the sale was bona fide as it was negotiated by experienced agents and the purchase price was considered to reflect the market. On what evidence there is before the Court it does not appear to be in dispute that the sale was not marketed and, for that reason alone, the same conclusion regarding s 18 of the LVA applies.

ISSUE: Did the infrastructure credits received by developers of student accommodation result in those developers paying a premium of equal value to the amount of the infrastructure credit when purchasing land for student accommodation developments?

HELD

No, the evidence shows that the developers of the student accommodation paid market value. There is no evidence before the Court that shows that those purchasers were in any way overanxious, from a bona fides perspective.

ISSUE: Alternatively, did the limited number of sites suitable for generating the required demand for student accommodation sites, combined with the increased demand created by the existence of the concessions, drive developers of student accommodation to pay more for the sites than would a commercial or residential developer to whom the reduced development costs were unavailable, thus creating a market for student accommodation sites as a separate and distinct part of the general Brisbane CBD market at the time the concessions were in existence?

HELD

During the time of the concessions (at least), there was a separate market in the Brisbane CBD for sites suitable for development for student accommodation. As the highest and best use of the subject properties does not include student accommodation, it is not appropriate to compare sales within the CBD student accommodation market with the subject properties unless there is an assessment of those sales for the purpose of undertaking a proper comparison with the subject properties. The market for student accommodation may have been so different to the commercial market at the relevant date and the comparative analysis as a result so difficult, as to make the student accommodation sales unhelpful for the purpose of valuing commercial sites. (Brewarrana)

ISSUE: Did the appellant's valuation expert err in attempting to amend a purchase price on the basis of a "premium to market"?

HELD

It was a significant error to have attempted to amend a purchase price paid for a property per se. It may well be the case that a purchaser has paid much more for a property than they should have paid, that however, is not a reason to adjust the purchase price. A sale either reflects the market and is a bona fide sale or does not reflect the market and has questionable bona fides. (*Liat)*

ISSUE: Was there any factual basis for the opinion of appellant's valuation expert that the total amount of each concession was, in effect, added to the price that the purchasers were prepared to pay for the respective sale properties in order to secure the sales?

HELD

There was no factual basis to support the valuation expert's opinion.

ISSUE: What adjustment for comparability purposes should be made to the student accommodation sales to account, to reflect the fact that the purchasers paid more than they otherwise would have due to the more favourable feasibility as a consequence of the concessions?

HELD

It is necessary to consider the facts of the particular sale to determine the extent of any adjustment that needs to be made when undertaking the comparison. There is no evidence to support a conclusion that the full amount of the concession should be taken into account, but there is evidence that for comparison purposes some of the concession should be accounted for. Taking all of the evidence into account, including the confidential evidence it is clear that Sales 1 and 2 contain a market value attributable to the existence of the concessions in the student accommodation market

not available to purchasers of commercial development. It is considered that $1 million of the concession should be taken into account as a superior quantitative factor in comparison to each subject parcel.

ISSUE: Should the Court exercise greater caution before considering any market movement without the benefit of relevant market evidence?

HELD

Although caution should be exercised, in circumstances where there is an absence of sales, it may be acceptable for the Court to take such an approach. It is noted that the respondent's valuation expert accepted in evidence that it was reasonable to consider secondary evidence in order to reach conclusions about the state of markets over time.

ISSUE: Could sale 8 be relied upon for comparison with the subject despite the passage of almost five years?

HELD

Given the Courts finding that the commercial office market overall showed little movement between November 2010 and October 2015, sale 8 may be relied upon for comparison notwithstanding the passage of almost five years.