REVIEW OF VALUATION CASES

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BR O'Connor,
Judicial Registrar
Land Court.

REVIEW OF VALUATION CASES

2011

This year's review includes the following cases:

1. **Springfield**

   The High Court considered the enhancement provisions in the Acquisition of Land Act (ALA) s.20(3). Was a minor additional resumption subsequent to an earlier major resumption part of the original purpose or a separate matter.

2. **Mio Art**

   Various complex town planning issues impacting on compensation were considered by the Land Appeal Court in assessing the 'before' value of land required for the Hale Street Bridge approaches. To what extent can a foresight be used when confirmed by post-resumption events.

3. **Halcyon**

   For enhancement to apply, in what sense does the retained land have to adjoin the resumed land.

4. **YMCA**

   Can the reinstatement approach to valuation be adopted in the total resumption of a Deed of Grant in Trust.

5. **Kelsall**

   An application brought by the Brisbane Lord Mayor (Campbell Newman) to set aside a subpoena to him to appear and produce documents to the Land Court in a case where the Council was the respondent.

6. **HSH Hotels**

   How should the rent for the freehold land on which the Brisbane Stamford Plaza is situated be determined. Does unimproved capital value or site value apply?

Springfield

The Court of Appeal decision in *Springfield* was noted in last year's Review. Since then, the High Court has granted Springfield Land Corporation (SLC) special leave to appeal – a relatively unusual event. The appeal was dismissed by majority (four to one). Compensation was determined at nil.

It is convenient to briefly repeat the factual background and issues before noting the High Court's findings.

Factual Background

In October 2005, the respondent (Department of Main Roads) issued notices of intention to resume land owned by the appellant SLC at Springfield near Ipswich. The expressed purpose of the resumption was the use of the land

> "for future transport purposes including the facilitation of transport infrastructure (namely road and busway, rail or light rail) for the South-West Transport Corridor".

The total area of this land was a little less than seven hectares.

The parties were unable to agree on the amount of compensation and so the matter proceeded to arbitration. On 9 October 2008 the arbitrator made an award under which the respondent was to pay to the appellant compensation assessed at $1,468,806.

The appellant had been developing the area now known as Springfield since about 1992. On any view it was, and is, a very large residential development project, containing 2,851 hectares and expected to house at least 60,000 people. It was developed from a greenfield site.

In 1994, a draft Springfield Development Control Plan was prepared which identified a "Regional Transport Corridor". In 1998, the appellant and the Ipswich City Council entered into what was called the Springfield Infrastructure Agreement, whereby certain land within the development site was to be dedicated for road purposes, and in particular for this transport corridor.

In the course of planning of an extension of the corridor from the Springfield Town Centre to Ripley, it was found that some of the land within the corridor land earlier set aside would not be required, but that some other land owned by the SLC adjacent to the corridor land was required instead.

The newly required land was called the "Transfer Land". It was, in that context, that the respondent gave the notices of intention to resume in October 2005.

Issues

The principal issue in the case turned on the interpretation of the enhancement provisions of the *Acquisition of Land Act*(*ALA*).

Section 20(3) of the Act requires that "any enhancement of the value of the interest of the claimant in any land adjoining the land taken or severed therefrom by the carrying out of the works or purpose for which the land is taken" must be taken into consideration by way of set-off or abatement in assessing the compensation to be paid.

In the present appeal, the question that arose for determination was:

- whether "the works or purpose for which land [was] taken" from the appellant were limited to the works immediately associated with the land taken or whether they included the totality of a road building project of which those works were a part;

The other issue before the Court of Appeal of what lots “adjoin” the Transfer Land was not argued before the High Court.

The High Court held:

1. Section 7 of the *ALA*, provided for the Chief Executive to serve notices of intention to resume the Transfer Land and required that the notices "specify the particular purpose" for which the Transfer Land was required. The Chief Executive stated the intention to take the Transfer Land "for future transport purposes including *the facilitation of transport infrastructure* (namely road and busway, rail or light rail) for the South-West Transport Corridor" (emphasis added).

2. The agreed discontinuance by the parties of procedures under the *ALA* was in exchange for (i) the transfer of the Transfer Land for amalgamation with land already held by the Department of Main Roads, and (ii) payment of compensation for the Transfer Land, in accordance with the requirements of Pt 4 (ss 18-35) of the *ALA*, "as if" the Transfer Land had been taken under that statute.

3. The onus was upon the State of Queensland (acting through Main Roads) to establish that there was some relevant enhancement and its amount.

4. In the context of considering enhancement to other lands for the purposes of Section 20(3), the *Pointe Gourde* principle was not relevant.

5. The “purpose” in s 20(3) would appear to correspond with the purpose for which there is a power of compulsory acquisition. That indicates that the purpose was to be understood as the public benefit or end to be achieved, rather than some means to that end. The arbitrator's identification of the purpose was incorrect.

6. The relevant "purpose" was that for which the Transfer Land would have been taken had the statutory processes set in train by the s 7 Notices not been supplanted by the Agreement. “These were future transport purposes including the facilitation of transport infrastructure, being road and busway, rail or light rail for the South West Transport Corridor.” This was the statutory purpose and the determinative purpose.

7. The "purpose" was not identified by some factual inquiry, beyond the terms of the s 7 Notices, into the reason why the s 7 Notices were given in the then current state of planning for the road corridor – that is, a decision to realign the proposed road corridor “in minor respects”.

Mio Art

Mio Art appealed against a decision of the Land Court to award a sum of $16,600,000 for the partial resumption of land at Montague Road, South Brisbane for construction of the Hale Street Cross River Bridge (now called the Go Between Bridge). The acquired land (5,643m²) was part of a larger area leaving a balance of 3,182m².

Different development proposals for the parent parcel were prepared by the parties leading to different valuations in the "before" situation. The "after" value was essentially settled by a sale of this area after resumption (such value was conceded to include any injurious affection or enhancement caused by the bridge resumption "scheme").

The Court was required to wrestle with extensive and, at times, conflicting town planning evidence in order to assess the development potential of the site and hence a value for the land in the "before" situation. The decision is most instructive on how the Court resolved such evidence. In broad terms, the issue was the likely permitted height of a development (10 or 12 storeys) and the intensity of any structures included.

A brief overview of the relevant town planning instruments and their consequences considered by the Court is as follows:

1. At the date of the resumption, (August 2007) development of the land was regulated by CityPlan 2000 (*CityPlan*). Under CityPlan, the area classification for the land was Special Purposes Centre SP13 (Office Park). Development was therefore affected by the Centre Design Code in CityPlan. The land was located in the West End Woolloongabba District; and development of it was thus affected by the West End Woolloongabba District Local Plan (*WEWDLP*), and the West End Woolloongabba District Local Plan Code (*WEWDLP Code*).

2. Under the *WEWDLP*, the land was included in the Riverside North Precinct. One performance criterion in the *WEWDLP* for this precinct included the maintenance of views to Mount Coot-tha and the Taylor Ranges, when viewed from the Riverside Expressway; and the maintenance of views of the CBD from Coronation Drive. The acceptable solution for this performance criterion was that building height not exceed 10 storeys.

3. CityPlan did not contain any designation of gross floor area (*GFA*) for the site.

4. There were other documents of potential relevance to the application of CityPlan to the land. In April 2007, the Council published a draft Kurilpa Structure Plan (*Kurilpa 1*). The relevant provisions of Kurilpa 1 dealt with built form, including building height; movement, including mid-block connections between streets; and publicly accessible open space. For the land, Kurilpa 1 identified a proposed maximum building height of 9 storeys.

5. In December 2007, the Council published a second draft of the Kurilpa Structure Plan (*Kurilpa 2*), which again included provisions relating to building heights. A map which formed part of Kurilpa 2 showed the indicative building height for the land as 12 storeys.

6. Both Kurilpa 1 and Kurilpa 2 related building heights to views of Mount Coot-tha and the Taylor Ranges from locations close to the Brisbane Central Business District (*CBD*).

7. There were, however, other documents potentially relevant to an assessment of the development potential of the land. One was a document entitled "Smart Cities: rethinking the city centre" (*Smart Cities Report*). It noted that the CBD Peninsula was being challenged in its role as the core primary activity generator of the City by commercial development in Fortitude Valley and South Brisbane. It recorded that the Council was considering permitting building heights of up to 20 levels in these areas.

Issues in the appeal

The principal issues before the Court were:

1. Parmalat sale errors – should the Parmalat sale have been considered in valuation evidence. The appellant claimed that:

   (a) The use of the Parmalat contract as evidence of value was wrong, because the contract was rescinded, prior to settlement;

   (b) An analysis of the Parmalat contract demonstrated that it was "akin to an option to purchase", and it was accordingly wrong to rely on it as evidence of value of the pre-existing parcel;

   (c) Information which is ordinarily available to valuers investigating a sale was not available in relation to the Parmalat sale, and that fact, together with some unusual features in the history of the transaction, meant that it was unsafe to place any reliance on the Parmalat sale.

2. Valuation methodology:

   Whether the Land Court erred in adopting a valuation methodology based upon analysed rates per square metre of land, rather than rates per square metre of GFA.

3. Sale of retained land:

   Whether the Land Court erred in failing to give proper weight to a sale of the retained land, relied upon by Mio Art as its primary sale.

4. "Development potential" errors – Building height

   Whether the determination of the development potential of the pre-existing parcel was properly addressed. A particular focus was the fact that the Land Court did not adopt the 12 storey height proposed by Mio Art.

5. Liberal estimate

   Was this principle properly applied? It requires that, in determining the compensation to be paid for resumed land, doubts are to be resolved in favour of a more liberal estimate.

The Court determined that:

1. Parmalat sale

- The conditions to which the Parmalat contract was subject did not alter the fact that the contract was a binding contract. Indeed, they carried with them certain obligations binding on the purchaser. For example, the purchaser was required to make the development application, and pursue it diligently. Even the power of the purchaser to bring the contract to an end in certain circumstances "in its absolute discretion" was likely to have been subject to some constraint.

- Where parties have entered into a binding contract, which had subsequently been terminated before completion, there was less reason to exclude that contract from consideration as evidence of value, than there was in the case of an unaccepted offer, or an option agreement. There was no reason to think that such a contract must, as a

matter of law, be excluded from consideration as evidence of value, by reason of the fact that it was terminated prior to completion.

- The lack of information about the circumstances surrounding the Parmalat contract provided a basis for treating it with caution. For example, it would be difficult to prefer it, as evidence of value of the land, to another sale which the valuers were able to investigate fully, with the result that they were satisfied that it reflected market value. Similarly, the rescission of the contract may provide a basis for treating it with caution.

- The appellants failed to establish that the Land Court committed discretionary, factual, or legal error, in its reliance on the Parmalat contract.

2. Valuation methodology

- While it may be accepted that the GFA of a development which was achievable on a parcel of land was an important factor in determining its value, related to returns resulting from the development, its utility will be affected by the level of certainty attaching to an approval of such a development. There was no certainty about the development potential of the land. In those circumstances, there was no error in determining that it was more appropriate to value the land by reference to a rate per square metre of land area, than by reference to GFA.

3. Sale of retained land

- The Land Court did not err in holding that the value of the retained land would be affected by the proposed bridge, and that some of the effects would be advantageous to its value, and others would have a detrimental effect.

- The Land Court did not err in observing that the appellants valuer's adjustments were based on professional judgment, without the support of market evidence.

- There was no error in holding that, with such adjustments, the derived rate per square metre was substantially higher than the rates per square metre derived from other sales (whether or not the Parmalat contract is taken into account).

4. Development potential – building height

- The Land Court concluded that a prudent purchaser would expect approval for a development averaging 10 storeys across the land. 10 storeys was an acceptable solution identified in the WEWDLP Code, for the purpose of maintaining certain views. The Land Court did not accept that a prudent purchaser would consider it likely that a development 12 storeys in height would be approved.

- There was evidence, not referred to by the Land Court in this context, from an experienced town planner that an increase in the indicated height from 10 storeys to 12 storeys "would certainly be well within the realms of reasonable expectations"; that that was sufficient to ground a relevant "foresight".

- There are the circumstances in which the Land Court entitled to take into account events occurring after the resumption, which might affect the value of the land taken.

There are two decisions at what is the final appellate level in the Courts of this State, relevant to this question. (*Thorpe* and *CMB*)

- In the present case, no case has been cited which has stated that any particular level of likelihood is required to establish foresight of an event that occurs subsequent to the date at which compensation is to be assessed.

- The Land Court found that it was likely that a prudent purchaser would have been informed at the date of resumption that Kurilpa 1 was under review. There was no direct evidence of the state of that review at that time. However, the Smart Cities Report had been published in May 2007. Contributors to the report included officers of the Council. It recorded that the Council was considering permitting heights up to 20 levels in the adjoining precincts of Fortitude Valley and South Brisbane.

- These facts made it foreseeable in August 2007 that the building heights in the WEWDLP Code and Kurilpa 1 would be increased. That foresight is confirmed by the obvious development pressures existing in the vicinity of the CBD; and by the fact that planning for South Brisbane was in a state of transition.

- Kurilpa 2 <u>confirmed</u> what was a foresight at the date of resumption, namely, that there would be an increase in building heights for the site in relevant planning instruments.

- The application of *Thorpe* and *CMB* to the facts of this case would mean that it was erroneous to exclude Kurilpa 2 from consideration, and to assess the development potential of the site, and ultimately to determine compensation, on the basis that building heights would, on average, not exceed <u>10</u> storeys.

- Compensation should have been assessed on the basis of the case presented on behalf of Mio Art, namely, that the prudent purchaser would consider that a development with a height of 12 storeys would be accepted by the Council.

- Given the attention paid to this matter in the reasons of the Land Court, it seems clear that the application of sales evidence would have been affected by any significant change to that Court's finding about the development potential of the land.

5. <u>Liberal estimate</u>

- This principle does not mean that a court determining compensation must necessarily favour the evidence advanced on behalf of the claimant. The principle is not to be resorted to by the Court as a substitute for the undertaking of its duty to adjudicate on disputed issues of fact (including of course, conflicting expert opinion).

- Although generally favouring the approach of the Council, the Land Court made some adjustments to reflect a greater development potential for the land than the Council contended for. The reasons do not suggest that the Court was left in any doubt which called for the application of the principle, nor that, having regard to the view which it took of the evidence including the relevant planning instruments, its approach was ungenerous. There is no reason to think that the principle should have been applied to alter the assessment of compensation.

Further conduct of appeal

The appeal was allowed. If the Court came to that conclusion, the parties asked for the opportunity to make submissions about the further conduct of the matter. They are to be given the opportunity to do so, before the Court's disposing of the appeal.

Halcyon Waters

The respondent Council resumed part of the claimant's land for road, park and recreation purposes. A balance land area comprising the allegedly enhanced "Flebus" lots (the enhanced land) and an adjacent unenhanced lot (the retained land) was left in the hands of the claimant. Such ownership was assumed for purposes of this hearing, although the ownership of the enhanced land remains in dispute. None of the balance land physically adjoined the resumed land but was separated from the latter by an existing dedicated road.

The Land Court held the allegedly enhanced land had to be physically adjoining the resumed land for the enhancement provisions of the *Acquisition of Land Act* (*ALA*) to apply. The Council appealed.

The question of enhancement (governed by s.20(3) of the *ALA*) on appeal was whether the word "adjoining" should be construed narrowly, requiring "physical contiguity", or more widely, extending to land which "is or lies close to or neighbours on" the land taken.

The Court held:

1. The narrow view or the natural meaning of the word "adjoining" with respect to s.20(3) should be adopted.

2. The proper interpretation of "adjoining" in respect of land is physical contiguity. It requires a common boundary, or at least a common boundary point.

3. The "Flebus" land did not come within the description "land adjoining the land taken" in s.20(3) of the ALA. As a result, the Council was not entitled to assert that any of the enhancement of the value of the Flebus land from the resumption scheme could be relied upon by way of set-off or abatement, in the assessment of compensation for the taking of the resumed land.

4. The appellant's claim for a set off for enhancement be struck out.

5. To come within the term 'severance', the resumed land did not have to be physically contiguous to the retained land. However, common ownership in the resumed and retained land was not sufficient to establish severance. Some additional 'connecting factor' was necessary.

6. In view of the conclusion that the Flebus land was not adjoining the resumed land, it was unnecessary to consider whether the retained land also had to be enhanced to trigger any enhancement claim for the Flebus land which adjoined it.

The case is also of interest for observations made by the Court on the degree of arbitrariness in the statutory provisions relation to compensation.

This was in response to an example provided by Council of a case where a landowner might have some land resumed, and some of the landowner's retained land is benefited by the project for which that land is resumed, but any resultant enhancement in the value of some of the retained land would not be available by way of set-off or abatement, unless a wide meaning is given to the word "adjoining" s 20(3).

The Court stated:

> "A landowner, none of whose land is resumed, and who is adversely affected by the project for which the resumption is carried out, has no right of compensation; whereas a landowner who suffers the loss of a very small portion of land may be awarded a large amount of compensation, principally for injurious affection. Equally, a landowner whose land is resumed, and who has other land which could in no sense be said to be adjoining the resumed land, or severed from it, may enjoy a great enhancement of the value of that other land by reason of the project for which the land is resumed. Again, the statute does not provide for that to be taken into account in the assessment. The provision of an example where, on one construction of the section, some enhancement is not taken into account, is not particularly persuasive. It is of considerably less weight than an examination of the statutory language in context, in the light of long-standing authorities dealing with a closely related topic.

YMCA

It is most unusual for land held under a Deed of Grant of Trust (under the *Land Act 1994*) to be resumed for public purposes. The current case is one where the Court had to consider, as a preliminary point of law, the appropriate approach to assessing compensation in such instance. Was reinstatement a proper approach and, if so, what, if any, limitations applied?

Background Facts

In 1966, a Deed of Grant in Trust was issued to the Young Men's Christian Association (YMCA) upon trust for recreation (youth and community centre) purposes. YMCA conducted a gymnasium and child-care centre in buildings it constructed on the land situated at Lutwyche. The land was resumed in 2008 for the Airport Link Project.

The effect of the Deed of Grant in Trust was that, so long as the trust continued, the YMCA had the right to occupy land rent-free conditional on observing the terms of the trust. YMCA sought compensation in the total sum of $11,624,000. Principal items claimed were: replacement land for a gym and child-care centre and replacement new improvements for the existing buildings.

With no directly applicable precedent in Australia or even in overseas jurisdictions, the Court had to consider the competing arguments from a close analysis of the relevant legislation with assistance from some broadly comparable case law.

Issue

The Court had earlier ordered that the following issue be determined by way of a preliminary hearing:

> "Whether, on the proper interpretation of s.18(5) of the *Acquisition of Land Act 1967* (*ALA*), in particular, of the expression 'the amount of actual damage caused to the trust by reason of the taking', in a case where the trust is a trust of a lot of land, and the land resumed was the whole of that lot, the compensation payable to the claimant may or may not include any costs incurred by the claimant to relocate or reinstate its operation to another site."

Section 18(5) of the *ALA* provides that:

> "The claim for compensation of a trustee or trustees of any land in respect of the taking thereof shall be limited to the amount of actual damage caused to the trust by reason of the taking, and no such trustee shall have any other right, remedy, or claim whatsoever in respect of such taking."

Parties Contentions

At the hearing of the preliminary point, the Applicant (*YMCA*) contended that the following four findings should be made:-

1. That the Trust has not come to an end.

2. That "the amount of actual damage caused to the Trust" in s.18(5) of the *ALA* can include loss of land.

3. That it is open for the reinstatement method to be applied in determining the compensation in this case.

4. That the determination of the entitlement to, and assessment of, compensation is to be made pursuant to the provisions of the *ALA* only.

The Respondent submitted that the preliminary issue should be answered along the following lines:

> "In this case where the land resumed was the whole of the land the subject of the Deed of Grant in Trust governed by the *Land Act 1994*, the compensation payable to the Applicant may not include any costs incurred by the Applicant to relocate or reinstate its operation to another site, such as those claimed in the Applicant's claim for compensation dated 27 November 2008."

The Court held:

1. There is nothing in s.20 of the *ALA* to expressly provide for reinstatement; however, it has been generally held that an approach to assessing compensation by employment of the reinstatement method is appropriate in assessment of 'value to the owner' of the land taken.

2. Where there is no appropriate market or for some reason a market sale is not seen as the appropriate measure of compensation, other approaches may be adopted e.g. (the conventional capitalization formula).

3. The employment of the reinstatement principle is appropriate only where other approaches to assessment of value have been shown to be inappropriate or as not producing a fair result. Reinstatement is not a method of first resort.

4. There is no suggestion that one has regard to the fairness of assessment in a general sense, but only in the sense that traditional methods of valuation do not give proper effect to the principle of compensation on the basis of value to the owner. It is thus not a matter of simply having regard to all of the evidence, and based upon that, determining that a reinstatement method of valuation ought to be employed. The essential question which must be asked in a case of this nature is: what is the 'value to the owner' of the land acquired compulsorily.

5. Four categories of application of the concept for reinstatement have been adopted by the Land Appeal Court in Queensland:

    1. Application in the classical sense as it applies to churches, schools and the like where reinstatement of the whole of the structure may be the subject of the award.

    2. Reinstatement of business premises of a type where there is no general demand in the marketplace for the type of property under consideration.

3. Reinstatement applying where the reconstruction of part of an essential component within a single undertaking is appropriate.

4. In the case of the resumption of a lease, or of possession, for a limited period, of fee simple land.

6. The right to claim compensation and the heads under which it can be claimed depend exclusively upon the terms of the relevant statutory provisions. It is purely a question of construction of the particular statute, and consequently judicial decisions on statutes in different terms are only of limited application.

7. Little assistance is gained from the detailed review of the previous Acts in England and in New Zealand because the language of the Acts which have been passed in Queensland is in different terms and evidences a different approach to the question of calculating compensation.

8. Compensation for compulsory land acquisition is a matter of statutory entitlement and does not rest on the common law. At the same time, case law has provided considerable scope for development of the law where the statute sometimes uses concepts and not precise rules in addressing the question of compensation.

9. It remains a matter to construe the intended affect of s.18(5) which, on its face, clearly seems to contemplate some restriction on the rights of trustees seeking compensation to receive only what is expressed to be their "actual damage caused to the trust by reason of the taking".

10. The Deed of Grant of land to the *YMCA* land contained no provision whereby the consent of the Governor-in-Council or any other entity could permit the sale of the land.

11. The inclusion of s.18(5) into the *ALA* in *1967* was a completely new addition, there being no derivation from the older compensation statutes. Equally, s.18(5) was not substituted for a provision that had been interpreted by the court so as to produce an unsatisfactory result.

12. There is no explanatory note or observation in the Second Reading speech which provides any guidance as to how s.18(5) is intended to be applied. Accordingly, it falls to the usual rules of statutory interpretation to ascribe some meaning to the provisions.

13. It would be a mistake to import into the construction of a statutory provision an entitlement to compensation which was not intended by the legislature.

14. It appears that the legislature was trying to implement a statutory regime which prevented parties holding land on trust from being compensated by way of payment for the value of land which they never owned or, possibly, preventing them from gathering windfall gains by recovering the current value of land for which they never paid. (No finding was made on this point).

15. The following factors appear to be determinative of the entitlement of the Applicant to compensation:-

    (a) The Applicant holds the land pursuant to a statutory trust.

(b) The Applicant holds the land in fee simple subject to that trust.

(c) Pursuant to s.12(5) of the *ALA* upon the gazettal of the resumption notice, the trust is dissolved.

(d) The *ALA* has a limiting provision which is clearly intended to limit the amount of compensation to which a trustee is entitled.

(e) The legislature, it might be assumed, has carefully chosen the words "actual damage" in s.18(5).

16. The *ALA* distinguishes between the "value of the land taken" and the "actual damage" suffered by a trustee in circumstances where land is resumed. [*ALA* s.20(1) and s.18(5).] Had the legislature intended that the phrase "actual damage" should be construed so as to include the "value" (used in its widest sense) of the land taken it might be thought that it would have said so.

17. By the insertion of the phrase "actual damage" in s.18(5) the legislature may be taken to be indicating that a trustee is not entitled to the broad ambit of compensation which may be available to the owner of a fee simple.

18. The *Lang Park Trust* case exemplifies a circumstance in which the Court has been inclined to allow for the costs of some reinstatement so that the trustee could re-establish parts of their operation on the remnant trust land.

19. The consequence of the resumption is the Applicant has been dispossessed of its buildings and forced to vacate the entirety of the land granted to it on trust on which it carried out its operations.

20. So long as the Applicant continues to carry on operations in accordance with its aims, there seems to be no statutory requirement that it must purchase replacement land. However, an inability to demonstrate that it has or intends to purchase replacement land may inhibit a Court from contemplating reinstatement costs as part of or an appropriate methodology to determine compensation.

21. There is nothing in the *ALA* which precludes the adoption of the reinstatement principle in appropriate circumstances. Although, of course, it may not be the only method available to assess the appropriate compensation.

22. As to actual damage suffered by the *YMCA*, it seems clear that can adequately be described under three headings:

    1. The loss of the buildings constructed on the subject land together with the fixtures therein.
    2. The loss of an entitlement to occupy the land essentially rent-free in perpetuity.
    3. Any properly identified disturbance items.

23. The amount of 'actual damage' caused to the *YMCA* as trustee can include the costs of reinstatement of their operations on other land.

Comment

The question of how reinstatement is to be assessed will be dealt with at the next stage of proceedings. Presumably detailed evidence will be led by both parties.

Assuming *YMCA* provide evidence of an intention to reinstate, two key matters that will need to be addressed by the Court are likely to be:

1. Will reinstatement value of the buildings be assessed on a new basis but only to the standard of the existing buildings?

2. If *YMCA* can only be reinstated on unencumbered fee simple land, will there be some discounting of this value, given the resumed land was subject to a Trust and unable to be sold. (However, it did have the advantage of being able to be mortgaged to secure loans for development on the Trust land).

Kelsall

The applicant Kelsall had issued a subpoena against Campbell Newman, Lord Mayor of Brisbane, to appear and produce documents in a preliminary hearing. Such was part of a wider resumption matter involving Kelsall and the Brisbane City Council (BCC).

Mr Newman brought an application seeking to have the subpoena set aside on the basis that it was oppressive, that the subpoenaed person could give no relevant evidence and that it was an abuse of process.

The subpoena did not specify which documents were required to be produced and did not generally conform with the *Uniform Civil Procedure Rules* (*UCPR*) requirements. Further, no conduct money or witness expenses were provided to the person subpoenaed.

The Court held:

1. The fact that the *UCPR* requirements were not strictly complied with did not void the subpoena. There had to be some further "complicating" factor.

1. In the current case, the complication was that it was difficult to see how an individual, let alone the Brisbane Lord Mayor, could be expected to simply turn up in Court and produce a vast array of documents in answer to a subpoena which clearly failed to identify any documents whatsoever.

2. This additional complication of itself justified the setting aside the "production of documents" part of the subpoena.

3. A subpoena for production, whether addressed to a party or a stranger to the litigation must specify the document required to be produced to the Court with sufficient precision to enable the witness to identify the documents sought. Should the subpoena not do so, it was oppressive and would be set aside.

4. Once the Court became aware of the nature and detail of the documents sought, it became clear that part of the subpoena had no utility whatsoever. It was not a case of Kelsall trying to obtain documents which he otherwise did not have.

5. An application to set aside a subpoena may be made not only by the person to whom the subpoena was directed but also by a party to the litigation and any other person or party who might be shown to have a legitimate interest in having the subpoena set aside.

6. A Court may also act of its own motion to set aside an oppressive subpoena which is addressed to a non-party.

7. Even though this application was expressed to have been bought by the subpoenaed person Campbell Newman, it was at all times open to the Brisbane City Council to bring an application to set aside the subpoena.

8. Where a subpoena has not been served bona-fide for the purpose of obtaining relevant evidence and the witness named therein is unable to give such relevant evidence, that constituted an abuse of process.

9. It was also an abuse of process where a subpoena was being used as a substitute for discovery against a party or an attempt to obtain discovery from a stranger to litigation. The proper party in the current litigation was the Brisbane City Council which was a corporate entity in its own right and, as an individual, the Lord Mayor was a stranger to the litigation.

10. The Court adopted the extensive list of relevant principles relating to issue of subpoenas sent out by senior counsel for the applicant.

11. The subpoena to produce documents and to appear was set aside.

12. Costs of the application were awarded to the Brisbane City Council but on the basis of appearance of one counsel only (two counsel – senior and junior appeared at the hearing).

HSH Hotels

HSH Hotels (HSH) is the current lessee from the State of Queensland under a lease over freehold land, on which the Stamford Plaza Hotel is constructed. The clause determining the current rental does so by reference to a statutory valuation. HSH sought a declaration in the Supreme Court that rent was to be determined by reference to the statutory provisions in force at the commencement of the lease, rather than the provisions currently in force. The State argued the contrary position.

The lease is for a term of 75 years, commencing on 1 August 1990.

The rent was fixed by the following clause:

> "2.01.6 The rental for each year of the balance of the term shall be a sum equal to 7.5% of the Valuer General's unimproved capital value of the said land at the respective dates that the annual rental becomes due and payable."

Section 1 of the lease, headed "Definitions and Interpretations" included the following:-

> "1.09 'Statutes and Regulations' – reference to statutes, regulations, ordinances or by-laws shall be deemed to extend to all statutes, regulations, ordinances or by-laws amending, consolidating or replacing the same." [my emphasis]

The *Land Valuation Act 2010* repealed the *Valuation of Land Act 1944* which was in force at the lease commencement. Section 205 of the 2010 Act re-established the Office of Valuer-General and made provision for the appointment of a person to that office. Section 5 of the 2010 Act required the Valuer-General to decide the value of land, as provided for under the 2010 Act, and for the purposes mentioned in s 6. Those purposes were revenue related. Section 7(a) then provided that the value of land, for non-rural land, is its "site value".

The term "site value" was defined in the 2010 Act by reference to the provisions of Chapter 2. In particular, s 19 provided that the site value of land was its expected realisation under a bona fide sale, assuming all "non-site improvements" for the land had not been made. Non-site improvements were those other than improvements which were site improvements; and those, in turn, were identified by reference to a number of improvements, which did not extend to buildings and other structures on land.

HSH's argued that:

- the parties knew what those statutory provisions were as they were in force when the lease came into existence;
- the parties had an apparent desire for certainty;

- the fact that the respondent's construction would place it in the power of one party to take steps which would vary the rent;

- the lessee was a commercial entity and would accordingly be reluctant to accept a situation where the rent might vary enormously, particularly at the choice of the other party to the lease;

- the clause, interpreted using legislation at lease commencement, could apply notwithstanding the repeal of the 1944 Act, and the abandonment of a statutory concept of unimproved value (the determination being made by an arbitrator, if necessary).

- Reference was also made to the length of the term of the lease should be considered.

The State argued that:

- clause 1.09 of the lease demonstrated that the parties intended that the law be applied as in force from time to time.

The Court held:

2. The starting point for determining the intention of the parties was the language of clause 2.01.6. That language reflected an assumption that, on each date when rent became payable, there would exist something which answered the description "Valuer General's unimproved … value of the said land".

3. One purpose of the clause was to provide a mechanism for fixing rent under the lease for each year in which the clause was to operate. Another was to ensure that the rent varied, in a way that bore some relationship to the value of the land itself (as distinct from the improvements on it).

4. The language of clause 2.01.6 made it difficult to adopt the construction for which HSH contended. That language referred to the outcome of a process for which provision was made in the 1944 Act, carried out by a person appointed under a statute; the valuation to be carried out at times identified in that Act; with provision made for the formal recording of that valuation; and for objections and appeals.

5. When the lease was drafted, the parties faced a choice: either to fix rent by reference to the legislation as it then stood; or to rely on a procedure for the determination of a specified value, which, with amendments to the legislation, might vary over time. The language chosen by the parties indicated the latter.

6. The changes made to the 1944 Act up to the time of its repeal were not such that the rental to be paid under clause 2.01.6 would not be determined by reference to a statutory valuation made under the 1944 Act as it then stood.

7. Clause 2.01.6 did not call for the determination of rent by a reference to the unimproved value under the 1944 Act, as it stood at the time when the parties entered into the lease.

8. Section 297 of the 2010 Act also lent support to the above conclusion. It stated:

"297 Leases referring to the term *unimproved value*

(1) This section applies to a reference in a lease made before the commencement to the term *unimproved value* under the repealed Act.

(2) From the commencement, the reference is taken to be a reference to a valuation under this Act."

9. Assistance was also gained by the explanatory notes to s.297. It stated:

> "There are a number of leases in Queensland that calculate rent, or other charges, by reference to the unimproved value of the land the subject of the lease. This clause is designed to ensure that valuations under the lease will continue to be made under Queensland valuation legislation."

10. The note provided strong support for taking a broad view of the intended effect of s 297. In the present case, it was clear that some interference with contractual arrangements was intended by the section; any presumption against such interference was of less assistance than it might otherwise have been.

11. Section 297 had the effect that a valuation made under the 2010 Act was the one by reference to which rent was now to be assessed.

LIST OF CASES

1. *Springfield Land Corporation v Queensland* [2011] HCA 15.

* 2. *Mio Art Pty Ltd v Brisbane City Council* [2010] QLCA 7.

3. *Gold Coast City Council v Halcyon Waters Community Pty Ltd* [2011] QLCA 0003.

4. *Young Men's Christian Association v Main Roads* [2011] QLC 0039.

5. *Kelsall v Brisbane City Council* [2010] QLC 0117.

* 6. *HSH Hotels (Australia) Pty Ltd v State of Queensland* [2011] QSC 29.

* Under appeal to Court of Appeal.