

REVIEW OF VALUATION CASES

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Introduction:

This review contains an outline of five significant cases. Two are decisions of the High Court – one originating from New South Wales, the other from the Land Court in Queensland; the third case concerns a long-running high-profile Queensland resumption matter; the final two cases are very recent Land Appeal Court cases on issues of important principle under the *Valuation of Land Act*.

The cases discussed are:

1. *Durham Holdings* Can the State acquire private property rights without just compensation?
2. *Marshall* An overruling of the *Edwards* principle as it applies to Queensland.
3. *Starcke* The resumption of the *Starcke* property in North Queensland for environmental and Aboriginal purposes; did such land have potential for subdivision into wilderness lots?
4. *Landel* The Lakes multi-purpose development in Townsville; how should fill on individual lots be valued when they were originally bulk filled as part of a wider development?
5. *QNI* Yabulu Nickel Refinery north of Townsville – an assessment of the highest and best use of unimproved land under the *Valuation of Land Act* where the original server mine (Greenvale) has now been closed.

1. DURHAM HOLDINGS

The power of a State Government to compulsorily acquire an interest in property without payment of full compensation was the central issue before the High Court in *Durham Holdings*.

Unlike the just terms provision in the Federal Constitution governing Commonwealth acquisition, there is no equivalent provision binding the States. The property owner, Durham, argued there existed some "deeply entrenched constitutional right" which prevented a State from legislating to oust just terms.

Facts

By special legislation in 1981, the New South Wales Government vested all coal in its natural state in the Crown. Durham previously owned very extensive deposits valued at some \$93,000,000. The legislation imposed a cap on compensation to specified parties, effectively limiting Durham's claim to \$27,000,000.

Issues

Two issues were raised by Durham. First, that there was a fundamental common law presumption of statutory construction that legislation will not interfere with prevailing property rights without just compensation. This principle was accepted by the High Court – but it held the presumption was rebutted by clear and unambiguous statutory language in the present case. In the Parliamentary debates, the Government indicated the deliberate policy decision to pay fair and equitable compensation except "to the big fellows". This was said to be because of the needs for budgetary constraint. The Court held that the discrimination that was effected and the compensation paid on less than just terms were all deliberate acts of the Government and Parliament of the State. The rule of construction could not thus be invoked to validate the Act.

The second and key issue focused on the power of the State Parliament. Durham argued the Act was outside the powers of the State Parliament and therefore unconstitutional; that the right to just compensation was such a fundamental right deeply rooted in the common law that Parliament could not enact the Act in question.

Decision

The High Court decided that it was within the power of the New South Wales Parliament to make such laws. The power to make laws for the peace, welfare and good government of the State was to provide as wide as possible an operation. The Act was not inconsistent with the express terms of the Constitution or any applicable federal law. It was not invalid as incompatible with the State Constitution.

The Court decided that decisions about the appropriateness or otherwise of the law and of the compensation provided were matters for the elected Parliament and Government of New South Wales. The complaints of discrimination and injustice were thus complaints of a political and not a legal character. They should be addressed by members of Parliament and ultimately the electors. The political process should ultimately produce just laws on significant topics.

Two wider aspects to which the Court alluded are of interest. First, it observed that *Mabo* relied on a similar principle by holding that Native Title can be extinguished (subject to the *Racial Discrimination Act*), without compensation, by a positive act inconsistent with the continuation of Native Title. Second, an attempt in 1988 to amend the Federal Constitution to provide a provision on "just terms" to bind the States was rejected by the electors. (This was but one of four matters all rejected at this referendum). The Court regarded this rejection of some significance in the overall picture.

Queensland Situation

From a Queensland perspective, two observations should be made (ie ~~compensation is payable~~). First, while the *Acquisition of Land Act 1967* generally governs State acquisition, special legislation is occasionally introduced to vary such general powers. Second, the *Legislative Standards Act 1992* includes a fundamental legislative principle that property can only be acquired on "just terms". However, such principle can be overridden by Parliament where it is considered politically justifiable to so do. In short, the issue before the High Court could ultimately be applicable to property in Queensland acquired by the State Government.

2. MARSHALL

In assessing compensation under the *Acquisition of Land Act 1967* (Q), s.20(1)(b) requires regard to be had to any damage caused by the constructing authority (exercising its statutory powers) to any remaining land (including businesses conducted thereon) of the resumee. Queensland Courts have traditionally applied the *Edwards* principle and restricted compensation to the impact of the work done on the actual land taken (and the precise use to which that land is put).

The *Edwards* principle, based on English authority of 1964, was abolished by legislation in England in 1972. In *Marshall*, a partial taking for the widening of the Bruce Highway near Nambour, the resumee challenged the continued application of *Edwards* in Queensland. His argument having been rejected initially in the Land Court and subsequently by the Land Appeal Court and Court of Appeal, Mr Marshall appealed to the High Court. The latter considered the issue of sufficient national importance to grant special leave for the principle to be argued before the full High Court.

Facts

The appellant owned a large area of land immediately to the west of the Bruce Highway near Nambour. Until 1985, the highway consisted of two lanes. In that year, the constructing authority (Department of Transport – Main Roads) acquired about 5500m of the appellant's land for "road purposes". Section 12(5) of the Act relevantly applied to the resumed land:

"... the estate and interest of every person entitled to the whole or any part of the land shall thereby be converted into a right to claim compensation under this Act. ..."

The appellant sought compensation, inter alia, under s.20(1)(b) of the Act because alterations to the highway drainage system rendered the appellant's residual land more susceptible to flooding. No part of the widened highway or the altered drainage system was located on the resumed land. Nor was the resumed land used to carry out the work for the widening or drainage of the highway.

Alleged Rationale of *Edwards*

PA Keane QC, Queensland Solicitor-General, outlined in the High Court hearing the alleged rationale underlying the principle in *Edwards*: that where conduct is authorised by statute, a

property owner is not entitled to compensation in respect of works carried out by a constructing authority under the authority of Parliament on adjacent land, whereby the value of the land retained by the property owner is diminished. That rationale is applicable to s20(1) of the *Acquisition of Land Act*. Provided activities carried out on adjoining land by a statutory authority are carried out entirely on land other than land owned or formerly owned by that property owner, the fortuitous circumstance that some part of the property owner's land has been compulsorily acquired by the authority carrying out that work does not alter the application of the general principle in the *Edwards Case*. The damage referred to is injurious affection, not depreciation such as in *The Commonwealth v Morison* (1972) 127 CLR 32; that was a broader conception. The compensation is for the land.

Decision

The High Court was unanimous in overruling the *Edwards* principle as it applied to the Queensland situation. Their reasoning was essentially based on the interpretation of the legislation (that is s.20 of the *Acquisition of Land Act*). Key findings or observations included:

- The term "injurious affection" is not merely a piece of jargon. It is more than that. It is a neat, expressive way of describing the adverse effect of the activities of a resuming authority upon a dispossessed owner's land. The use of this common expression serves well to distinguish the statutory right from the common law claim in nuisance.
- It was not a condition of a claim under s.20(1)(b) of the Act that the statutory power causing damage to the residual land was exercised on the appellant's resumed land.
- Section 20(1)(b) of the Act did not distinguish between the various activities carried out by a constructing authority in the exercise of its statutory powers, for example, the conduct of a survey, the construction of a road, the building of a bridge, the installation of drainage or footpaths beside the road, and the subsequent use of everything that has been done or brought into existence as, and for the purposes of, a road. All of these can relevantly and properly be characterised as part and parcel of the construction, and subsequently the use of the road. Once the constructing authority acquired land for a statutory purpose and carried out the statutory purpose, it must compensate the dispossessed owner for the injurious effect upon the residual land resulting from the undertaking and the implementation of that purpose, actual and prospective.
- However, damage must be relevant to the implementation of the purpose for which the land was compulsorily acquired.
- Having acquired the land for "road purposes" the constructing authority cannot claim its use of the land thereafter was, and is not, for any of those purposes.
- The reasoning in *Edwards v Minister of Transport*, was not adopted by the High Court in *Commonwealth v Morison* (1972) and should not be applied in interpreting s.20(1)(b) of the Act.
- Contrary to what the Court of Appeal said, *Edwards* has not been consistently applied, or at least certainly not in an unqualified way in Queensland. There are two cases in the Land Court of Queensland (*Beaver Dredging and Treston*) which

Callinan J.

demonstrate not only the unreality and the unfairness of any unqualified application of *Edwards* but also that the practical approach generally adopted by this Court in *Morison* has been preferred in Queensland.

- Practical difficulties in giving s 20 of the Act its ordinary meaning are illusory only. One was that the resuming authority might have a long-term purpose which is not to be carried into effect within an identifiable period. That will raise a merely factual question of the quantification of postponed damage or loss, an exercise regularly undertaken by courts today. A second difficulty, of measuring the effects of the implementation of the statutory purpose, the degree of vibration, the extent of the escape of noise, or dust or fumes, was suggested. Again, this raises a question of fact and one well capable of resolution on evidence of the kind regularly given in planning courts and tribunals, as well as those in which compensation falls to be determined.
- The language of s20(1)(b) of the Act was too clear to be read down by reference to English statutory provisions of similar, but not identical, terms. The Minister's speech proposing the Queensland Legislation provides no basis for reading the Act in a manner contrary to its unambiguous language.
- Legislation dealing with compensation for compulsory acquisition of land should be construed with the presumption that the legislature intended the claimant to be liberally compensated.
- No narrow view should be taken of what constituted the exercise of a statutory power when the acts or omissions of the constructing authority have resulted or would result in damage to the appellant's residual land. In particular, there was no scope for applying the principles that courts use in construing provisions that protected public authorities from actions arising out of the exercise of other statutory powers.
- The fact that other land may have been injuriously affected by the exercise of a constructing authority's statutory power, but the landowners have no entitlement to compensation because none of their land was resumed, provided no reason to distort the language of the Act and to deprive those who have lost land of compensation for injurious affection.

off - note.

The ultimate conclusion of the Court was that the appellant was entitled to have compensation assessed for injurious affection to his remaining land resulting from the exercise of the respondent's power in duplicating the highway. More particularly the use of the appellant's land acquired here should be taken in combination with the use of other land for the duplication of the highway, for the purposes of such assessment.

Case Remitted to Land Court

The *Marshall* case has been remitted by the High Court to the original Land Court Member to decide in accord with the High Court interpretation. Very extensive expert technical evidence has now been tendered to the Land Court particularly on the effects of flooding on the remaining land. Further evidence is yet to be adduced. A decision is not expected until the New Year.

Implications

*Main Roads
Valuers*

I do not have any accurate indication of the cost implications for Queensland constructing authorities of *Marshall*. Those most affected are likely to be the ones engaged in corridor resumption cases (example Main Roads, Railways). Now that the new law is clear, it may be that judicious planning of proposed routes can keep additional public expense for resumption payouts under control. There is, of course, still no off-site injurious affection allowed. Statutory authorities could thus avoid the effect of *Marshall* if partial takes can be minimised in major projects.

3. STARCKE

The "Starcke" aggregation – comprising 190,464 ha including 24,464 ha of freehold, the largest freehold parcel of land in Cape York – was compulsorily acquired by the State in 1994. Special legislation (the *Starcke Pastoral Holding Acquisition Act 1994*) was enacted to effect the resumption, although the principles of compensation under the *Acquisition of Land Act* were to be adopted.

The property had been held by George Quaid Holdings (Quaid) since 1972. It was situated north of Cooktown and 9 km frontage of freehold bordered the Coral Sea. The primary purpose of the acquisition was to preserve significant environmental values of the lands; however the land also encompassed traditional estates of two separate Aboriginal language groups.

The claimant formally sought a figure of \$25,000,000 although this amount was considerably higher than the valuation as tendered by its experts. The Crown valuation was \$4,150,000 plus disturbance and interest.

Parties' Approaches

Quaid

Quaid's approach was that the freehold portion – where the real dispute lay – could be marketed in subdivision in the form of 240 by 100 ha "wilderness" lots. This approach was basically founded on the evidence of Mr Ian Beattie, a most experienced real estate agent and a long-term business associate of Mr Quaid, the resume's principal. Supporting Mr Beattie were experts in environmental marketing, environmental science, town planning, engineering, road construction operations and valuation. The principal valuation expert, Mr Brett, essentially relied on the projected selling prices and selling rates of the proposed subdivision, as provided by Mr Beattie.

Crown

The Crown called a similar range of experts, as well as an anthropologist who provided evidence on cultural heritage and possible Native Title impediments on any proposed subdivision. Much of the Crown evidence was to rebut the viability of the proposed subdivision. The primary approach of the Crown was that the pastoral holding would continue to be used for grazing with the prospect of a higher eco-tourism use on the freehold land in conjunction with grazing.

The essential difference between the parties related to the highest and best use of the freehold land. The Crown argued the land could not be valued as subdivision because:

1. A hypothetical prudent purchaser would entertain serious doubts that the Cook Shire Council (CSC) acting properly and guided by its planning scheme and relevant principles of town planning would approve subdivision of the land.
2. On the assumption that subdivision approval would be forthcoming, the subdivision would not be economically viable, particularly having regard to:
 - the expected sale prices of the lots;
 - the period over which the sales were expected to occur;
 - the cost of the development; and
 - the prospect of delay in receiving CSC approval.

The Daintree Project as a Precedent

Quaid had successfully developed and marketed the "Daintree Freehold Rainforest" project with the sale of some 900 lots from 1979 to 1996. Net profit revealed an amount of some \$27,000,000. The claimant argued that a similar sophisticated marketing plan could achieve similar results with the "Starcke Freehold Wilderness" project. The Court found that the marketing campaign played a significant role in the success of the "Daintree" project, contributing both to the rate of sale and sale prices. However, also most important was the existence of a relevant market and prevailing market conditions, particularly for a large part of the 1980's. The "Daintree" marketing plan was accepted as a suitable blue print for marketing a large-scale subdivision located away from urban centres (as "Starcke" would be).

X Mr Beattie argued the main difference for "Starcke" would be the number of lots and the narrowing of the target market to reflect the higher prices being sought. He argued he could safely predict the successful development and marketing of "Starcke" at prices he proposed and at the sale rate he proposed. The acceptance, rejection or modification by the Court of this conclusion of Beattie's was crucial to the claimant's case.

Key Areas of Difference - "Daintree" and "Starcke"

The Court found similarities suggested by Beattie between "Daintree" and "Starcke" gave little inkling as to the product of each site or the identified markets for that product. Rather, the Court viewed as much more relevant the differences, particularly lot size, price and location.

The bulk of the "Daintree" lots were 1 to 2 ha in size compared with "Starcke's" at 100 ha; average price for "Daintree" was \$44,500, "Starcke's" projected price averaged \$190,000. The Court concluded each development concerned a quite different market.

Also in the main sales period for "Daintree" buoyant market conditions prevailed, but by 1994 a more sober and stable atmosphere existed in the market. There was also difference in vegetation types (rainforest versus wilderness) and topography was also significant. "Daintree" was some two hours from Cairns; "Starcke" six hours. "Starcke" was significantly inferior in location. The Court was of the view that a hypothetical prudent purchaser would

have serious doubts as to whether subdivision and marketing experience in one project could be taken as a valid guide to the other.

Town Planning

The Court concluded that a hypothetical prudent purchaser would recognise a significant risk in obtaining CSC approval and would take that into consideration in the price he would pay for the land.

Reasons for such doubts included:

1. Generally, the subdivision proposal was an incongruous use of the land in the context of the planning scheme, the qualities of the land and its location. The proposal was not obviously in contemplation of the scheme. Despite CSC's pro-development stand, the application would need to be considered according to law and according to the planning scheme.
2. The "**Statement of Intent**" did not envisage a subdivision in the manner proposed by the claimant. The Statement was more directed at maintenance of farm enterprises by allowing a wide range of rural pursuits.
3. The size, shape and utility of the proposed lots.
4. **Services** - Not only were they absent or distant, but the eventual provision of many would be difficult, if not unwise, commercially.
5. **Economic Benefits** - No obvious economic use for the proposed lots existed. None would support grazing, the most common farming activity throughout the Cape.
6. **Reticulated Electricity** - Such would cost \$7,000,000 to \$8,000,000 to provide. A developer would be concerned that he may be required to contribute to the cost of installation of reticulated electricity; a potentially costly downside should it feature in the assessment of risk associated with the project.
7. **Environmental Impact Statement** - Such was estimated to take 183 days for preparation, including consultation with State Government referral agencies such as DEH, Family and Community Services, Education, Health, Transport and DPI. The issues of concern would be the effect of the proposed development on the natural environment, on the Aboriginal cultural landscape and the Hopevale Community. There would be concerns not so much with the terms of reference of the EIS, but with the level of detail needed, the time that may be taken and the probable cost.
8. **Natural Environment** - The effect on water bodies, adjacent National Parks, on vegetation and the dune system would need to be considered. (The Voluntary Conservation Agreement (VCA) proposed by the claimant registered against individual lots could alleviate some environmental concerns.)
9. **Cultural Heritage and Aboriginal Issues** - Costs and delays in carrying out relevant cultural heritage survey and consultation work in relation to:
 - the existence and location of archaeological (cultural heritage) sites;
 - the impact on local Aboriginal communities at Hopevale;

Planner
+ Engineer

- whether traditional owners of "Starcke" attached values to the land that would be compromised by subdivision or settlement.

10. **Legal and Extra-legal Issues** – While there would have been no right of objection under the *Planning and Environment Act* to the subdivision approval, objectors may challenge via judicial review, declaration and injunction, or make a Native Title claim. A hypothetical prudent purchaser would consider such risks and time delays particularly as Native Title over freehold land had not been decided by the High Court until 1998, "Starcke" could have become a test case resulting in substantial expense and delay.

Other Elements of "Starcke" Freehold Subdivision on basis that Subdivision approval was given

1. Lot Prices and Selling Rate

The claimant's valuer (Mr Brett) based prices and rate of sale of the "Starcke" lots on what was proposed to be established as the result of the marketing campaign (Mr Beattie was to advise). However, normal benefit of market sales guidance was not used by Mr Beattie.

The Court found Beattie's suggested prices as being without any reliable foundation. Also, prices proposed for "Starcke" were much higher than "Daintree". The Court found price would be a discriminating factor; the higher the price, the smaller the market, the lower the rate of sale. Further, no amount of marketing genius could create buoyant market conditions.

More generally, the Court observed that opinion evidence from valuers or marketers needs to be based on a foundation of fact put in evidence. The more sound the base and the more sound the validity of the reasoning, the more reliable will be the opinion expressed.

2. Development Works and Costs

Here there was a vast difference between the parties' estimates. Quaid's figure was \$6,329,267 against the Crown figure of \$21,800,000. Differences arose in such items as:

- bitumen sealing of the spine road;
- external road upgrading;
- bridges or causeways;
- clearing, stripping and formation;
- soil testing;
- earthworks;
- stormwater drainage.

The Court found it unnecessary to descend into precise costs of required items to adjust Mr Brett's Discounted Cash Flow. (The DCF of Mr Brett had sought to derive the net worth of the land.)

The Court also held the proposed development would be seriously analysed by CSC to ensure the Council did not inherit a liability for substantial "downstream" costs.

3. Internal Rate of Return (IRR)

This was an element in the DCF exercise, representing a return per annum on the project. (It is similar in principle to the profit and risk factor in a residual valuation project; but the profit and risk is relevant to the overall project, not an expression of annual return).

Both concepts represent a measure of the level of profit that would be required in a project by a prudent developer for him to commit to the project, having regard to the degree of risk involved.

Evidence as to what a prudent developer would require as an IRR is best obtained from the marketplace, not from completed projects but from similar in globo land developments. None were available here. The percentages ultimately adopted by the Court were as follows:

IRR 60%, converting to a profit and risk percentage of 133.9%.

The Court observed that it is not appropriate to assume that an abnormally high-risk figure will accommodate important components arrived at as a result of unusually high measure of judgment or even guesswork. Further, consideration of the risk level alone may well be sufficient to dissuade a prudent purchaser from pursuing the project.

More generally, the Court also commented on certain differences in principle between compensation valuation and assessment of damages in civil cases. The approach to compensation is not one of assessing the total financial impact of the resumption on the dispossessed owner, but rather of assessing compensation based on loss of the land.

4. Brett's DCF Adjustments

Adjustments made by the Court to Mr Brett's tendered DCF material included:

1. Average selling prices were reduced by 35% for each stage of the exercise.
2. The rate of sale was adjusted to five lots per month.
3. Opportunity cost interest adjusted to 7%.
4. Marketing costs were not changed but were spread over an extended selling period.
5. Various construction timing was changed.
6. Land costs adjusted to reveal an IRR of 60%.
7. Adjustment of rates and land taxes.
8. No allowance was made for the cost of provision of vendor finance.

5. Result of DCF Adjustments

Such showed a raw land value of "Starcke" freehold of \$2,825,000. In the Court review the DCF exercise, the best supportable case for the claimant with respect to the 240 lot by 100 ha subdivision was adopted. However, assessed as grazing land with use for eco-tourism and limited subdivision, the freehold revealed a figure of \$4,556,700 (including improvements); hence, the highest and best use was not subdivision into 240 lots by 100 ha as proposed by the claimant.

Pastoral Lease (DHH) Value

Sales evidence of other grazing properties was available to form a basis for assessing this value. The carrying capacity was held to be a critical factor in the comparison. Location, shape, aspect, etc were of secondary importance. Some tourism potential (such also existed with the sales) existed on the PDH. It was not solely necessary to rely on the coastal location for such. Fishing on inland waterways, hunting and intellectual adventures were available.

Freehold Value

No suitable sales were found to be available to value the "Starcke" freehold as an in globo site. The Court added a premium to the "Starcke" freehold to reflect some subdivision potential. This was a matter of judgment by the Court. No precise mathematical process or sales evidence was available. In the end, a figure of \$250,000 was added. Any advantage from the individual sale of the four existing freehold titles on "Starcke" would be absorbed into this premium.

Environmental Value

The Court held that bodies interested in environmental aspects of "Starcke" would not pay prices above the broader market.

The question that arose here was whether the State, having acquired the claimant's land for environmental purposes, should pay compensation based on that particular aspect. The Court held it should, to the extent that the claimant could have put the land to a use based on its environmental values. That was part of the enquiry undertaken by the Court with respect to the highest and best use of the land.

This finding was based on the *Sri Raja* principle that a potentiality in the acquired land, which can be taken to fruition only by the acquiring authority, is to be considered in valuing that land for the purpose of assessing compensation. Thus, if there is, for example, an attribute of the land or a structure or part of a structure on it which would be of value to the acquiring authority only, then the value of that attribute, structure or part of a structure must form part of the market value.

Sri Raja was distinguished from the principle that the value to the acquiring authority is not the proper measure of value (*Re Lucas and Chesterfield Gas and Water Board* (1909) 1 KB 16): *Sri Raja* is to do with some economic value in the land. Thus, for example, an acquisition of land by the State to add to a poorly shaped parcel of land it owned and to therefore improve its shape so that it could be sold for shopping centre purposes would lead to compensation based on the potential of the acquired land to become part of that larger shopping centre site - not its value based on its previous use as a house. In contrast, an acquisition by the State for sewerage

farm purposes, would not fall into this category as this would be a service/utility use, not a commercial or economic use.

Reasonable Compensation

The description of "reasonable compensation" in the *Starcke Act* was held not to introduce a new category or test of value to the owner, nor did it erect a statutory test which displaces s.20 of the *Acquisition of Land Act*. Consequently, the Court found there was no basis for Quaid's claim of \$25,000,000, based on an asking price in 1993.

Tax Advantage

The amount of \$6,840,000 was claimed by the resumee on the basis that it equated to the income tax that a developer company would pay on Mr Brett's assumed profit and risk allowance of \$19,000,000. The argument was that the claimant was in a position to subdivide and sell the "Starcke" freehold land and sell the PDH without a requirement to pay any income tax for the same reasons that it was not required to pay tax on the proceeds of the subdivision of "Daintree". Since the resumption denied the claimant the opportunity to subdivide and sell the land, it is said that the tax advantage of \$6,840,000 interest in the land is lost to the claimant.

This item of claim failed for a number of reasons.

- no expert evidence was provided to show that the claimant:
 - Would not be required to pay income tax were it to have subdivided and sold the land, and
 - Would be required to pay income tax in the amount of \$6,840,000 (or any other amount) as a consequence of the resumption.
- No cogent reason was advanced as to why the measure of loss should be referable to an assumed development of the land rather than by reference to an assumed sale of the land in globo

Conclusion

The Court found the value of the PDH at \$1,130,000, the value of the freehold \$3,750,000 and the value of the improvements at \$806,700. The total compensation awarded amounted to \$5,686,700 plus interest and agreed disturbance.

4. LANDEL

In *Landel*, the Land Appeal Court was required to determine the unimproved value (under the *Valuation of Land Act*) for filled lots in "The Lakes" development in Townsville. This multi-purpose project was completed under an arrangement between the developer, Townsville City Council, and the State Government. The subject land was originally low lying and was reclaimed with bulk fill from a lake created on the site. Use of the fill obtained from such a

source was obviously considerably cheaper (\$10 per m³) than from external sources (\$15 per m³)

The key question for the Court was whether, under the requirements of the *Valuation of Land Act*, it was permissible to use the current costs of the "lake fill" (which in fact was no longer available) or whether it was necessary to go to external sources of fill.

Previous Land Appeal Court authority (the *Alfred Grant* case) had stood since 1966 despite some concerns as to its reasoning at Land Court level in the intervening period. The wider effect of that decision had not been altered by legislation during this time.

Similar in principle to the *Lakes* case, *Alfred Grant* concerned a parcel of land which formed part of a canal development which was filled with material taken from the overall development site. The Land Appeal Court in that case outlined its reasoning as to the appropriate methodology to be adopted:

"It seems to us that when a development scheme is put into operation, involving the filling and top-dressing of large areas of country, and the work is carried out as one operation, the cost of developing one unit, should be assessed on the contractor's price, which is applicable to the whole of the area being developed. It would not seem reasonable to us, in calculating the cost to a subdivider of developing one residential site, the development of which involved filling and top-dressing, carried out as part of a scheme of development, to envisage that site alone as unfilled while all around it were filled sites, and to base costs of filling the block upon bringing plant and equipment and labour specially to that site for the sole purpose of filling it and then departing. If it is unreasonable in the case of a small unit, it seems equally unreasonable in the case of a larger area such as we are dealing with here. Accordingly, we think the cost of filling and top-dressing the appeal land should be based on actual cost which in this case showed no variation between the date when the work was done and the relevant date."

Overruling Previous Decisions

The Land Appeal Court held in *Landel* that the finding on the appropriate method of filling the lakes was an issue of valuation principle, rather than mere finding of fact. Valuation principle being a question of law, it became necessary for the Court to consider what constraints existed on an appeal court such as the Land Appeal Court in overruling its own previous long-standing authorities. 1989 High Court authority proved valuable guidance, justifying overruling in certain cases. The High Court stated:

"Where a Court of Appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong. The occasions upon which the departure from previous authority is warranted are infrequent and exceptional and pose no real threat to the doctrine of the precedent and the predictability of the law:"

In *Landel*, the Land Appeal Court considered such principle applied equally to an appeal court such as it.

Analysis

The Land Appeal Court thus felt free to consider the important "fill" issue from initial principle and the scheme of the legislation. The starting point for the Court was that the authorities establish that, in assessing the unimproved value of land, it is necessary to regard that land in its unimproved state but in its existing circumstances so that its neighbourhood and surrounds are taken to be as they are at the relevant date.

Then, if the first step in arriving at the unimproved value is the ascertaining of an improved value by comparison with sales of comparable improved land, (and this is what was done in *Landel*), then the least the unimproved value, in terms of the Act, can be is the sum obtained by deducting from the improved value the amount that should reasonably be involved in effecting, at the relevant date in the existing circumstances and conditions then prevailing in relation to the subject land, improvements of a nature and efficiency equivalent to the then existing improvements on that land. Actual cost is not the criterion, and not even reasonable cost alone, but reasonable cost of effecting the improvements to the particular block at the relevant date.

As to the actual cost of the improvements, the owner may have been fortunate in getting them at a specially low cost or unfortunate in having had to pay an abnormally high sum. But the material fact is that there they are, whatever they originally cost; and the question is how much their presence adds to the natural value of the land. And in ascertaining that, the cost of replacing them if they were then annihilated is a most material factor for a prospective buyer to consider, in determining what he would give for the land, and if for a buyer, so for the Court.

The Court concluded that it was very clear that the appellant is entitled to have his land valued unimproved as though it were an unfilled block at the date of valuation, surrounded by filled blocks; and the value of the filling and top dressing as an improvement is to be measured not by actual cost, but by the added value the improvement gives to the subject block, viewed in this light as at the valuation date.

Conclusions

Applying the above principles to the *Landel* circumstances, the Court found:

- (a) The fill which was taken from the development site to form the land would not be available as at the date of valuation as the lake must be taken to be in existence. For a number of reasons the fill would not at the relevant date have been obtained in the way in which it was when the development work was carried out.
- (b) The added value which a reasonable purchaser would ascribe to the improvements constituted by the fill at least to RL 3.5 may be established at the relevant date by reference to what the purchaser would incur to acquire the fill, that is, the costs of acquiring the fill from the most readily available source at a reasonable price. On the evidence before the Land Court that exceeded \$10 per cubic metre, and was \$15.46/ m³.

Implications for Future

Under the current "unimproved value" system operating in Queensland, the decision will have significant impact, particularly in the development of land filled from a cheap source now no longer available. Unimproved levels of such lots for rating and taxing purposes particularly will generally be considerably lower than presently assessed. The case could well prompt a reconsideration of the need for site value, or some form of such, as it exists in other Australian States.

Value of Excess Fill

Certain of the lots in *Landel* were filled to a level (RL4.2) considerably in excess of a minimum acceptable deemed development level – that is, in excess of a level necessary to ensure immunity from say, a one-in-20-year flood. Part of the reason for this higher level was to make economic use of the excess spoil removed from the lake in the overall development, rather than dispose of it to an external site.

The question was how this ^{ex}cess was to be valued – at the same commercial cost as the other fill (that is that below RL 3.5) or at some lesser rate. The Court held that, a hypothetical purchaser would be aware of the possibility yet remoteness of flooding beyond the one-in-20-year occurrence and pay some premium for the higher level. The premium was able to be deduced from sales evidence and was less than the commercial rate. Further, the premium payable in the marketplace for that preferred physical state did not equate the cost of creating the increased elevation, even by the original development method.

5. QNI METALS

QNI was concerned with the unimproved value (under the *Valuation of Land Act 1944*) of the Yabulu Nickel Refinery, located on the coast some 25 km north of Townsville. The refinery was originally located on the subject land to serve the nearby Greenvale Nickel Mine; this mine was closed in 1995. The refinery continued to operate (essentially now servicing an overseas market) and an upgrade was proposed because of its existing structures (valued at some \$2 billion).

A feasibility study was prepared by the company and tendered in evidence. The study examined notionally the worth of the building of the existing structures on the subject site in current market conditions. The study concluded, if the land were considered unimproved, there was no advantage in the refinery being located on the subject site and it would be better situated elsewhere (eg Gladstone). It only in fact continued operations in its present location because of the most extensive infrastructure in existence.

The initial Land Court hearing accepted the argument of *QNI* that the refinery structures were basically a worsenment and that the highest and best use of the subject land was for rural homesites.

The Crown appealed against this finding to the Land Appeal Court. The competing valuations were \$4,235,000 as a refinery site and \$1,225,000 as a rural homesite.

Existing Structures – "improvement" or "worsement"

The first question the Land Appeal Court had to address was whether the existing structures constituted an improvement under the Act or were really a worsement. This question was to be answered by determining whether, in the marketplace as at the date of valuation, the land with the structures in place would be worth more than it would have been without them. If the structures enhanced the value of the land, they were improvements and the unimproved value was to be determined as though the structures did not exist.

Highest and Best Use

It was accepted by *QNI* that, if the highest and best use of the site was continued use for a nickel refinery, the structures added value to the land and were improvements as defined under the Act. What was in issue was whether, if the improvements were notionally removed for the purposes of determining the unimproved value, use as a nickel refinery remained the highest and best use.

The Court initially observed that the highest and best use of land is determined by the market place where factors such as uses permitted under the planning legislation and the demand for the land are relevant. The current use may be indicative of but is not determinative of such highest and best use.

The Court further stated that, if a different use from that in place at the date of valuation was proposed as the highest and best use, the evidence was that the existing structures would be rendered useless. A purchaser would be faced with demolition costs of the buildings or, perhaps, might decide not to use that part of the land which is occupied by the buildings and tailing dams. For an alternative use to represent a higher and better use, the land would have a value greater than as currently developed for the existing use, together with costs associated with removing the existing structures.

There was no evidence to suggest that the two alternative uses canvassed at the hearing, namely to use the site for another single industrial purpose or for rural residential purposes, would bring a price higher than the value of the land and the buildings. Indeed the evidence was to the contrary. The structures were thus determined to be improvements.

Existing Use not disregarded

Although improvements were to be disregarded, the Act did not require existing use to be disregarded. The Court applied a principle accepted in the *Queensland Club*:

"But past improvements, no matter how much their presence or use has enhanced the price, are not to be deemed never to have been made; their prior existence and the effect of them are not to be ignored. So when the 'improvements', as still existing, are to be ignored, nothing is said as to erasing the effect they or their use have had in bringing the land up to its present value."

The Court in the *Queensland Club* case held that, although the Act requires that the assumption be made that the improvements do not exist, that language describes the notional physical state of the land as at the relevant date. The valuation should be made on the basis that any statutory

restrictions (or advantages) attaching to the use of the land, whatever their origin, which affect the capital sum which the fee simple might bring, are taken into account.

In the *QNI* case, application of this reasoning meant that the land should be valued for its current use, but ignoring improvements, unless it was demonstrated that a higher price could be obtained for the land to be used for some other purpose. That had not been established.

Conclusion

The Court concluded the current use of the property was its highest and best use, the buildings were improvements and the land was improved land within the meaning of s.3(1)(b) of the Act. The question then to be decided was the value of the land as zoned and used as at the date of valuation with the improvements notionally removed.

Basic Sales Evidence

In determining this question the Court conceded that sales of large industrial sites in the Townsville area would be rare. But it did point to the establishment of the subject site in the 1960's, the copper refinery in the 1970's and the Sun Metal Zinc Refinery in the late 1990's. Such rarity did not mean the site did not possess a value for its specific uses. The *Spencer* test did not require having a willing purchaser on a particular day.

The industrial use potentialities of the land would be enhanced by the current zoning ("Hazardous and Noxious Industry") and surrounding infrastructure. The value of such potential was held to be greater than rural residential use. The principal basic sale accepted was the Sun Metal purchase south of Townsville for the establishment of a zinc refinery. This sale confirmed the demand from time to time for large industrial sites in the general region.

TABLE OF CASES

1. *Durham Holdings Pty Ltd v New South Wales* (High Court) – 205 CLR 399.
2. *Marshall v Department of Transport* (High Court) 205 CLR 603.
3. *George Quaid Holdings Pty Ltd v State of Queensland* (Land Court) – 8 June 2001.
4. *Landel v Department of Natural Resources and Mines* (Land Appeal Court) – 12 September 2002.
5. *QNI Metals v Department of Natural Resources and Mines* (Land Appeal Court) – 12 September 2002