REVIEW OF VALUATION CASES

2010

Australian Property Institute/University of Qld. Seminar

July 2010

Brisbane

BR O'Connor
Judicial Registrar
Land Court

This year's review includes the following cases:

1. **Pacific Fair**

   The Court of Appeal considered, in light of the 2008 amendments to the *Valuation of Land Act*, the following issues:

   - Should the value of leases be included in the unimproved capital value
   - Should the notional creation of the shopping centre at the relevant date be considered risk-free (the *Nathan* point)

2. **Springfield**

   A Court of Appeal decision on the meaning of "enhancement" of adjoining land under s.20(3) of the *Acquisition of Land Act 1967*. The appellant resumee has been granted special leave by the High Court to appeal.

3. **LGM**

   This involved the assessment of economic loss suffered by a business (a video store) as a result of partial loss of access caused by a road construction.

4. **Dux**

   The key issue was: whether the "hypothetical sale" (including reasonable conditions) envisaged under the *Valuation of Land Act* for determination of unimproved capital value could include a condition that it was "subject to development approval" when the subject land did not have such approval in place.

5. **Mio Art**

   This involved the partial resumption of land at South Brisbane for the construction of the Hale Street cross river bridge. A key issue was whether a confidential sale could be used as a basis of comparison.

6. **Jackman**

   Could a property (at Hedges Avenue, Broadbeach) undergoing extensive and lengthy renovations causing the owner to live elsewhere still be classified as the "principal place of residence" for *Land Tax Act* purposes.

7. **Thiess**

   This involved the assessment of the unimproved capital value for a former open-cut mine site, now used as a waste-receiving dump and a recycling facility. "Worsement" was a key issue.

Pacific Fair

Background[1]

1. The Land Appeal Court determined the unimproved value as at 1 October 2002 of the site of the Pacific Fair Shopping Centre at $47,490,000. The unimproved value was determined under s 3(1)(b) of the Valuation of Land Act 1944 (VLA). The appellant appealed to the Court of Appeal against that determination; the notice of appeal contained some 33 grounds.

2. The Land Appeal Court had concluded that the valuation should proceed on the basis that, if the improvements are to be assumed as not in existence when the unimproved value is to be determined, so too must it be assumed that <u>leases</u> of premises contained within the improvements do not exist at that time. That Court also rejected the Land Court member's view that land did not have a highest and best use as a major regional shopping centre unless major tenants had been secured. This finding was not challenged.

3. The Land Appeal Court further concluded that the exercise which had to be carried out was to value the notionally vacant Pacific Fair site, being mindful that, up until 1 October 2002, it accommodated a successful super regional shopping centre; and that it was a matter of valuation evidence to identify how the past trading history would affect the value of the land.

4. The legislative history of the 2008 *VLA* amendments reveals that, at one point, consideration was given to requiring that the unimproved value of land include any increase in the value of the land as a result of the making or <u>use</u> of an improvement of the land, and also requiring that it should be assumed that there is <u>no risk</u> in realising the use of the land, or continuing its use, for any purpose for which it being used at the valuation date. However, a deliberate decision was subsequently made to omit both requirements.

Appellant's Argument

- The appellant contended that the unimproved value of improved land was to be calculated as if improvements were not in existence at the time when the land is to be valued; but that no other assumption affecting the land is to be made. Thus, the "established suitability" of the land for the purposes for which it is actually being used is to be taken into account; as was the fact that valuable leases have been granted in respect of it. The difference between the improved value of land and its unimproved value was to be confined to the value attributable to the actual *existence* of the physical improvements.

- The appellant's submissions also included criticisms of the use made by the Land Appeal Court of extrinsic material in construing s 3; of its consideration of s 3(2); and of its treatment of a number of authorities.

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[1] For a more detailed background to this Court of Appeal decision, it is suggested the case note on the Land Appeal decision in *Pacific Fair* be referred to (in the 2009 Cases Review on Land Court website).

Respondent's Argument

- The respondents submitted that the unimproved value of the Pacific Fair site was to be determined as if the leases did not exist at the date of valuation. They also contended that the Land Appeal Court did not exclude from its consideration the fact that the Pacific Fair site had been successfully developed as a regional shopping centre.

Court of Appeal Decision

In dismissing the appeal, the Court made findings or observations on a range of issues listed below:

1. Court of Appeal's Function

- The Court of Appeal noted its supervision of the Land Appeal Court's functions was confined to questions of law (s.66 *VLA*). Even accepting that questions of valuation principle may be characterised as questions of law, this Court's function did not extend to correcting the impression formed, as a matter of fact and degree, by the Land Appeal Court as to the extent to which a sale was a useful indicator of the unimproved value of the subject land.

2. Section 3(1)(b) of Valuation of Land Act (VLA)

- Section 3(1)(b) required reference to a "hypothetical sale". Such a transaction would involve both a vendor and a purchaser. A purchaser would not be prepared to pay an amount for land which, together with the actual costs of improvements, would equate to the value of the improved site. It is therefore not consistent with s 3(1)(b) to say that the only difference between the improved value of a site and its unimproved value would be the cost of the improvements.

3. History of 2008 Amendments

- Assistance in construing *VLA 2008* could be obtained from the history of the passage of the 2008 Amendments; and from the Explanatory Notes. The original Bill, together with the amendments to it, for the 2008 Amendments, as well as the Explanatory Notes, constituted extrinsic material.

- Where a formulation of a statutory provision has been proposed, and then changed, or abandoned in favour of a different formulation, and that course of events sheds light on the intended meaning of the provision adopted by the Legislature, that is relevant to the construction of the provision as adopted. When that course of events is recorded in material which is extrinsic materials for the purposes of the Acts Interpretation Act, the court can have regard to it in determining the construction of the provision.

- The original Bill, if adopted, would have required the unimproved value of land to include any increase in the value of the land that had happened in connection with the making or <u>use</u> of an improvement to the land. It would also have required an assumption to be made that there was <u>no risk</u> in realising the use of the land, or continuing the use of the land, for any purpose for

which it is being used at the date to which the valuation relates. The Explanatory Notes do not suggest that the decision to omit provisions having that effect was because the effect was achieved by other provisions of the Bill.

- The changes to the Bill make it clear that it was the intention of the legislature that benefits conferred by a local planning instrument or a development approval would affect the unimproved value of land; but that an increase in the value of the land that has happened in connection with the making or use of an improvement to it is not required to be included in the unimproved value of that land. Nor is it necessary to assume that there is no risk in realising or continuing its current use.

- These changes have a significant effect on whatever support the appellant might otherwise have drawn from the Explanatory Notes or the Bill as originally drafted.

- The value which leases bring to a shopping centre are part of the value of the land that has happened in connection with the making or use of improvements to the land. A choice was made <u>not</u> to require the inclusion of this aspect of value in the unimproved value of land.

- Leasing out, and maintaining leases of, a shopping centre form part of the risk of realising the use of land suited for shopping centre development, and continuing that use. Since a decision was made not to require the assumption that there is no risk in doing these things when determining the unimproved value of the land, it would be strange to interpret the section as requiring the unimproved value to be determined on the basis that the leases in fact existed.

4. Use of extrinsic material

- An examination of s 3 of *VLA 2008* raises sufficient doubt about its meaning to warrant recourse to extrinsic material.

- Greater assistance in construing s 3 of VLA 2008 is to be derived from the changes to the Bill, than from the contents of the Explanatory Notes.

- Given the identity of the bodies who raised the concerns that led to the changes in the Bill, it seems to me likely that the changes were intended to be for the benefit of shopping centre owners.

- The Land Appeal Court did not err in law in the use it made of extrinsic material to construe *VLA 2008*.

5. Profit and Risk

- It is inevitable from the fact that s 3(1)(b) requires consideration of a "hypothetical sale" that some allowance for profit is to be recognised. That would follow from the fact that such a transaction assumes a purchaser, for otherwise no sum would be realised from the sale. Someone purchasing an unimproved site because of its development potential would not be prepared to carry out the development without the expectation of some <u>profit</u> from doing so. Equally, that person is likely to make some allowance for <u>risk</u>; or at least

the legislature has chosen not to exclude such risk from a consideration of those responsible for the determination of the unimproved value of the land.

- A consideration of the profit to be achieved from the development of the land can not be properly achieved, without making allowance for the time that it would take for a development to occur. Inevitably there would be holding costs incurred in that time which would affect the profit.

6. Leases

- It may be accepted that the existing leases add significant value to the developed shopping centre. However, the statute did not require that their effect on value be taken into account in determining the unimproved valued of the Pacific Fair site.

- The whole purpose of the lease is to provide a right of occupation in a structure, related to other parts of the structure including carparking, malls and access ways, stairwells and lifts, and, significantly, other occupied parts of the building. Even in the hypothetical context created by s 3(1)(b), it would be artificial to associate leases of tenancies in a shopping centre with land where the improvements do not exist.

- The Land Appeal Court did not value Pacific Fair by assuming it to be a "greenfield" site. It follows that it cannot be said that the Land Appeal Court interpreted VLA 2008 as requiring an assumption that the improvements on the Pacific Fair site never existed.

7. Section 3(2) (VLA)

- A comparison of s 3 (1)(b) and s 3(2) indicates that they require the carrying out of quite different exercises and perform quite different functions. The former requires consideration of a notional sale of the land, based on the assumption that at the time of that sale, the improvements did not exist. That exercise identifies directly the unimproved value of improved land.

- Section 3(2) however, is not intended to define the meaning of the term "unimproved value" for the purpose of the VLA. Rather it identifies a lower limit or "floor" on the figure derived by the application of the definition of s 3(1)(b). The exercise that s 3(2) calls for is the "deduction method".

- When s 3(1)(b) and s 3(2) are considered together and in context, it seems very unlikely that the legislature intended the exercise to be carried out under s 3(1)(b) to be the same as that to be carried out under s 3(2). If they are intended to be different exercises, it is difficult to see how a consideration of the exercise called for by s 3(2) provides assistance in an understanding of the exercise to be carried out under s 3(1)(b).

8. Valuation Method

- There are a number of different ways in which the task of approaching valuation can be undertaken, each of which is perfectly rational. More than one means may be adopted for the purpose of checking the value arrived at by

any other means. This Court should be very slow to interpret legislation so as to exclude a rational mode of valuing land, particularly in view of the difficulties that may attend any single mode of valuation.

9. Use of Telstra Sale – use of sales generally

- While a sale must be comparable before it can provide evidence of value, the two properties (i.e. sale & subject) need not be identical. Nor need the sale occur at or about the date of valuation. Whether a sale may be regarded as comparable will depend upon a number of factors. Likewise, its application may require a recognition of differences between the sale property and the property to be valued, and the recognition of the circumstances of the sale.

- There will be gradations of comparability: from identical to irrelevant. As this scale of comparability approaches the irrelevant end, there will be many sales that offer so little assistance that they ought be disregarded. Further, there will be circumstances where there is a sale or sales that are strongly comparable; in which case, there will be no need to closely analyse other sales, even though these may be comparable in some way."

- Whether a sale is truly comparable will depend upon whether the circumstances of the sale, and the similarity of land to which it related to the land to be valued, provide a sufficient basis for the determination of value. That decision will involve questions of judgment. The existence of sufficient factors of comparison is generally a question of fact, not law. The Land Appeal Court expressly identified points of comparison for its use of the Telstra sale to determine the unimproved value of the Chermside site.

- The fact that the Land Appeal Court applied the Telstra sale to determine the value of the Chermside site, does not mean that the sales evidence was not sufficient in volume. What volume of sales is sufficient will depend on the facts and circumstances of each case.

10. Comparison between sites (Chermside and Pacific Fair)

- Save for a dispute about the differential, there has been no serious suggestion that the Chermside site and the Pacific Fair site were not sufficiently comparable to enable the unimproved value for the Pacific Fair site to be derived from the unimproved value of the Chermside site.

- The value of each site, as a "site improved" site, is related to its potential for development. Where in each case the consequences of the realisation of that potential are known, it seems logical to use that knowledge to establish the relationship between the site values.

11. Nature of Land Appeal Court

- The Land Appeal Court is itself a specialist court, with the capacity to form its own views about matters related to value, and employ its own expertise in coming to its conclusions.

- Once satisfied that an appeal should be allowed, the Land Appeal Court was entitled to form a judgment about the relativity of the Pacific Fair site to the Chermside site; or to adopt, as it did, the relativity which the Land Court member had applied.

12. Time to secure leases

- In deriving the unimproved value of the Pacific Fair site from its "site improved" value, the Land Appeal Court assumed a period of eight and a half months as part of the period prior to the commencement of site works, attributable to securing leases in the notionally proposed shopping centre. No error of law occurred here.

13. Interest Allowance

- The Land Appeal Court accordingly has treated the interest as part of the cost of bringing the notionally unimproved Pacific Fair site to a site improved state; so that in deriving the unimproved value from site improved value, the interest was to be deducted. This was held a proper approach, as was the selection of the interest rate.

14. Development Approval

- The Land Appeal Court recognised that under *VLA 2008*, the unimproved value is to reflect the benefit of a development approval. It did so for the Pacific Fair site, by allowing a figure of $3,900,000, which was attributed to the avoidance of delays which would otherwise have occurred to allow for the time necessary to obtain development approvals. This was held a proper approach.

15. Role of Appellate Courts

- Appellate courts are not excused from the task of weighing conflicting evidence and drawing their own inferences and conclusions, though they should always bear in mind that they have neither seen nor heard the witnesses, and should make due allowance in this respect.

- They enjoy advantages as well: for example, the collective knowledge and experience of no fewer than three judges armed with an organised and complete record of the proceedings, and the opportunity to take an independent overview of the proceedings below, in a different atmosphere from, and a less urgent setting than the trial."

- A review of the statutory provisions regulating an appeal to the Land Appeal Court may well give that court greater freedom in reviewing a decision of the Land Court. In that context, its constitution, including a judge of this court and two members of the specialist tribunal, is not without significance.

- The Land Appeal Court was in at least as good a position as the Land Court member to form its own views about the utility of the sales evidence.

- In so far as the Land Court member's valuation might be described as being a judgment which is discretionary in nature, when such a judgment proceeds on a basis which is wrong in law, it will be reviewed. The Land Appeal Court did not err in law in failing to apply the constraints applicable to an appeal involving a discretionary judgment.

16. Duty to give reasons

- A failure by a court to comply with its duty to give reasons for its decision is an error of law. However, there is no formula, the application of which, in each case, will identify what reasons a judge is required to provide.
- Reasons need be given only so far as is necessary to indicate to the parties why the decision was made and to allow them to exercise any appeal rights.
- The judge is obliged to expose the reasons relied upon for resolving a point critical to the contest between the parties.
- The reasoning process by which the Land Appeal Court came to apply the Telstra sale in the Chermside case, and thereafter in the Pacific Fair case, is apparent from the Court's reasons. Overall, the Land Appeal Court reasons were adequate.

Springfield

The Supreme Court decision (Single Judge) in Springfield was noted in last year's Review. Since then, the resumee, Springfield Land Corporation (SLC) appealed to the Queensland Court of Appeal. The latter unanimously upheld the appealed decision, determining compensation in the amount as nil.

Factual Background

In October 2005, the applicant (Department of Main Roads) issued notices of intention to resume land owned by the first respondent (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 applicant was to pay to the respondents compensation assessed at $1,468,806.

The respondents 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 respondents 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 applicant gave the notices of intention to resume in October 2005.

Issues

The principal issues in the case turned on the interpretation of the enhancement provisions of the *Acquisition of Land Act.*

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 this case three questions involving the interpretation of s 20(3) of the Act arose for determination:

- whether "the works or purpose for which land [was] taken" from the appellants 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;
- whether the value of land owned by the appellants adjoining the land taken was enhanced by the carrying out of the purpose for which the land was taken;
- whether the land which "adjoins the land" taken is only the lot or part of a lot immediately adjacent to the land taken or whether it encompasses the totality of land retained by the appellants adjoining the land taken.

Appellant's Arguments

The appellants argued that the judge erred in failing to appreciate that the resumption of the Transfer Land by the DMR for the purpose of the realignment of the road was indeed an end in itself rather than merely a means to an end; that it was only the need for the realignment which prompted the acquisition in question, and that no enhancement to the appellants' land adjoining the Transfer Land resulted from the carrying out of the realignment: any enhancement in value occurred between 1999 and 2005 prior to the taking of the land by the DMR.

The appellants argued that the only land "adjoining" the parts of the four lots which comprised the Transfer Land were the parts of those particular lots retained by the appellants.

Purpose of the taking

The Court of Appeal held:

1. The approach to the interpretation of the phrase "the works or purpose for which the land is taken" in s 20(3) of the Act put by the appellants depended upon the notion that the task of identifying the relevant works or purpose must focus upon the particular works to be carried out on the particular piece of land the subject of acquisition even though those works also serve a larger purpose.

2. A telling point against the appellants was that neither the notices of intention to resume, nor any other instrument which could be said to be concerned with identifying the purpose of the taking of the land, suggested that the purpose of the taking was other than the construction of the transport corridor. There was no suggestion that the realignment was necessitated as a response to traffic conditions

of peculiarly local significance which arose independently of the carrying out of the transport corridor project.

3. The narrow perspective advocated by the appellants is not supported by the text of s 20(3) of the Act: nothing in the text invites or encourages a piecemeal approach whereby the relevant purpose or works are to be identified as the particular purpose or works to be effected on the particular parcel of land the subject of the particular acquisition. The text of s 20(3) does not speak of "the enhancement of the value of the interest of the claimant … derived from the carrying out of works on or immediately adjoining the land taken". The course of authority in relation to land acquisition in Queensland provides no support for the adoption of such a gloss on the language of the statute.

4. If a purposive approach is taken to statutory construction, it is difficult to find in the language of s 20(3) of the Act an intention on the part of the legislature that a landowner whose land is taken to enable an unexpected obstacle to be sidestepped in the course of constructing a road well into the planning and construction should be in a better position, so far as compensation is concerned, than a neighbour whose land was always designated as land to be taken for the purposes of the construction of the same road.

The adjoining land

5. The text of s 20(3) of the Act does not reveal any concern as to the means whereby a claimant for compensation evidences its ownership of the adjoining land. Much less does it reveal concern in whether that ownership is evidenced by one or many titles under the *Land Title Act* 1994. It is the value of the land adjoining the land which is taken which is significant for the purposes of s 20(3), not the evidence by which ownership of that land is proved.

6. It is impossible rationally to attribute to the legislature an intention that the amount of compensation payable to a landowner might vary depending on whether the balance of the land retained by the landowner after the acquisition is contained in one or one hundred registered titles for the purposes of the *Land Title Act* 1994.

7. The purpose of s 20(3) of the Act is to ensure that a landowner whose land is taken for public purposes is compensated for, but not overly so, by reason of the acquisition. That purpose is not well served by an interpretation of s 20(3) under which a landowner benefited by the construction of a road adjoining its land is benefited more generously if that adjoining land has been subdivided into several lots for the purposes of title registration than if it is held under one title.

LGM

LGM was noted in last year's review on whether the claimant, the owner of a BlockBuster video franchise operating on leased premises, had a right to claim compensation. No part of the leased premises was resumed although part of the parent parcel was resumed for road purposes. Access to the video store was allegedly affected by such resumption. The Land Appeal Court held LGM had a right or interest in the land taken but remitted the compensation issue to the Land Court. The case is of particular interest as to how the Court determined the economic loss suffered by the business.

The total claim was for $606,950 with the major element of each part of the claim being for economic loss. The two principal items were: claim for business loss (actual to 30 June 2008) and estimated business loss (to end of lease 2011).

Background

Located within the resumed land were a number of pathways which provided pedestrian access to and from the shopping centre (including the video shop located within the centre). Pedestrian access was also available by a set of stairs and two vehicular entrance/exit driveways. The shopping centre had on site car parking; no loss of car parking occurred as a consequence of the taking of the land.

While the claim did not specify whether the loss of business claims fell under the heading of injurious affection, severance or disturbance, the Court held it probably came under the heading injurious affection.

Compensation for injurious affection was to be assessed by bringing into account the damage caused by the constructing authority exercising its statutory powers that injuriously affected the balance land; it was not a condition of a right to compensation for injurious affection that there be actual works undertaken <u>on the resumed land</u> (*Marshall* – High Court 2001). Here the bulk of the roadworks carried out by the respondent which caused the vast majority of the economic loss to LGM occurred on existing public land (road and footpath) and not on the resumed land.

Issues

The actual nature of the works was not the real issue. The real issue was whether or not the roadworks carried out by the respondent, whatever they were, interfered with the business of LGM; that impact should be able to be derived from an analysis of the trading figures and business projections of LGM.

The differences between the trading figures of the company pre, during and post the roadworks up to 2009 were significant.

Evidence was given for both sides by chartered accountants as to business losses. The main issues were:

i. The duration of the works;

ii. Whether all of the losses incurred by the business in that period ought be sheeted home to the works or whether some allowance had to be made for other external influences.

iii. Whether or not the losses of the business extended beyond the actual construction period.

Mr Calabro for Brisbane City Council argued revenue losses which occurred over the construction period, could to a large extent, be attributed to factors other than roadworks (external factors). These included the highly competitive nature of the industry, a general downturn in the industry in 2006, the introduction and development of alternate entertainment sources including pay television, computers and other electronic diversions. LGM's accountant made no allowance for any external factors; according to him, all of the identifiable losses could be attributed to the roadworks.

The Court held:

1. The roadworks carried out by the respondent, both during and after the actual construction phase, had a material and deleterious impact on the business of LGM. So too did the interference with and changes to pedestrian access via the pathways through the landscaping bordering the car park.

2. Upon arriving at a figure for business losses to LGM during the construction period (approx. 10 months), it was appropriate to discount this figure by 30% to allow for the 'external' factors referred to by Mr Calabro. $36,800 was awarded for this period.

3. While accepting LGM's case that business losses caused by the roadworks extended beyond the actual construction dates, its estimate of economic loss after this date was exaggerated.

4. With a strong marketing and promotional campaign, there would be no reason why LGM could not expect to recover most of its original customers. Such a campaign would also be likely to generate an increase in new membership enrolments. Such an advertising campaign could cost up to $40,000 over a period of 6 months. However, due to LGM's financial state at the time of construction completion, it was not able to fund such an intense exercise.

5. It would not be reasonable to assume that, but for the works, the business would have continued to grow at a steady rate of 10% per annum. This approach was far too simplistic and tended to ignore the competitive nature of the industry and ignore or misunderstand industry trends.

6. The best guide to the likely post roadworks losses suffered by LGM was the evidence of the losses suffered during construction.

7. As was the case in determining compensation during the construction phase, external factors could not be wholly responsible for such a dramatic shift in membership numbers and revenue. This was confirmed by the significant

difference between the fall in revenue of the business of LGM when compared to the fall in the average revenue of BlockBuster stores.

8. The economic losses caused to LGM as a consequence of the activities of the respondent through the 2006/07 and 2007/08 financial years (i.e. post construction) would have been in the order of those for the 2005/2006 financial year. The base rate of $44,000 per annum was also applied for each of those years.
9. Losses 2007-2008 would decrease at an accelerating rate through to mid 2010. A roughly linear rate of loss for the 2008/09 and 2009/10 financial years of $30,000 and $15,000 respectively should be adopted.
10. The base rate of $3,680 per month ($44,000 p.a) has already built into it a discount component of 30% to bring into account the risks and vagaries of the video industry including the state of the industry at the relevant time and its competitive nature.

Owner's time

An amount of $46,000 was claimed for losses of owner's time in dealing with the resumption.

The claim was essentially one for the time spent by Mr McGinn (the company's owner) on the company's proceedings against the respondent from 2004 through to 2009. The amount claimed was calculated at a rate of $23 per a ten minute unit of time. According to Mr McGinn, this was the apparent charge out rate for a first year solicitor.

The Court rejected the claim on the basis that is no evidence that LGM has paid any of these monies to Mr McGinn or was under any legal obligation to do so.

The Court further observed that, should the claim be allowed, it would have to be very substantially discounted. Many of the items claimed were for time that was properly spent on preparing for trial rather than on matters preceding the referral to Court.

The Court determined compensation at $152,250 made up as follows:

- Business losses during construction $36,800
- Business losses after construction $115,450
- The disturbance claims Nil

Dux

Background

The key issue in Dux, requiring determination of the unimproved value of a large in-globo parcel of land at Bribie Island was: whether the hypothetical sale referred to in s.3(1)(b) of the *Valuation of Land Act* (*VLA*) including reasonable conditions could include a condition "subject to development approval" when the subject land did not in fact have such an approval in place.

The Chief Executive's valuer proceeded on the assumption that the type of sale envisaged in s.3(1)(b) of the Act was one which, in the circumstances of this case, was conditional upon a development approval becoming available before settlement of the contract of sale was required.

It was common ground between the parties that sales of land such as the subject where a purchaser might generally purchase for the purpose of development (and where there is no development approval in place for the land) usually involved a contract being subject to a development approval condition. Such a condition might be said to be usual or normal in the relevant market. On that basis it was suggested for the respondent that the language of s.3(1)(b) accommodated a valuation being carried out on the basis of such a condition. Section 3(1)(b) provides:

> (1) For the purpose of this Act-
> **unimproved value** of the land means-
> (b) in relation to improved land – the capital sum which the fee simple of the land might be expected to realise if offered for sale on such reasonable terms and conditions as a bone fide seller would require, assuming that, at the time at which the value is required to be ascertained for the purposes of this Act, the improvements did not exist. **(added emphasis)**

The respondent emphasised words in the statutory provision were relied upon as indicating that a contract subject to a development approval condition might be properly characterised as being one with a "reasonable … condition", particularly given that sales of land such as the subject property are generally transacted by way of contract subject to such a condition. Indeed, the appellant's valuer made it clear that such land would not sell unless such a condition was included.

The Court observed:

1. Both the statutory provision and the expression of principle in *Spencer* proceed on the footing that a sale is assumed to have taken place as at the date of valuation. In other words, whatever bargaining might have occurred between the parties leading to the finalisation of the transaction, the value of the land is taken to be that achieved by the sale of the land as at the date of valuation, not a sale which eventually takes place upon the satisfaction of a condition subsequent such as one requiring development approval.

2. One of the *"circumstances which might affect"* the value of the subject land (prejudicially in this case) would be the fact that it does not yet enjoy a development approval for the development option which both parties thought

to be the most appropriate type of development for the subject land. The absence of that development approval had a depreciating affect on the value the land would have if development for such option had been given. Were it otherwise, the respondent's valuer would not have required a contract to be subject to such a condition, and transactions in the market place would not require the inclusion of such a condition.

3. The primary task in a matter such as this was to value the land at the relevant date as it stood at that time, and to include the value of any potential for any use higher than the use at that date.

4. The nature of the transaction envisaged in the Act and described in Spencer was one that assumes that time was available to market the property, to attract buyers and for buyers to investigate the circumstances of the land before deciding to buy it.

5. The type of transaction envisaged in the Act which refers to "reasonable ….. conditions", would assume the payment of the deposit; a condition permitting the purchaser to enter the land; would allow for reasonable enquires to be made and time for that to take place; and provide for a time and date for settlement, amongst other conditions. That is, it would assume those things that facilitate the conclusion of the hypothetical sale.

6. But it does not assume the inclusion of a condition of contract which has the effect, for example, of removing any element of risk attached to the land for a potential use or for development for a higher use as at the date of valuation. This is so, notwithstanding that contracts for the sale of land such as the subject would invariably be subject to a development approval condition.

7. The reasons such conditions are included was because the obtaining of development approval constitutes a risk and the vendor seeks a price on the assumption that the risk is removed while the purchaser will not pay a price based on an assumption that a development approval may be obtained risk free.

8. The respondent's valuation at $21,000,000, on the assumption made by him that the sale would be conditional upon development approval, would be too high, assuming for the moment that the valuation evidence in the form of sales comparison would otherwise support that valuation figure.

9. In assessing the risk associated with obtaining a development approval, regard must be had to the "process risks" - that is, those associated with the process of obtaining approvals from various authorities involved in dealing with the application to develop - and risks in "physical aspects" of the development.

10. The prospect of a development in accordance with the assumed development option was sufficiently probable that a price would be established on the basis of a "top down" rather than a "bottom up" approach. In other words, the value would be arrived at by allowing a discount for risk rather than in striking a value for a lower use and adding some allowance for potential.

Mio Art

The Brisbane City Council resumed land at Montague Road, South Brisbane for the construction of the Hale Street cross river bridge. The acquired land (5,643 m²) was part of a larger area, leaving a residual area of 3,182 m². The land was owned by Mio Art but subject to a number of mortgages. Despite a Court Order to appear, one of the mortgagees failed to comply with such Order and did not lodge a claim for compensation. Another of the mortgagees was represented at the hearing.

All parties agreed that: the appropriate method of valuation was the "before and after" method; that the highest and best use of the parent parcel before resumption was commercial office development and that use also applied to the residual land.

Proposed different development schemes of the parties for the land led to different valuations in both the before and after case.

Apart from the competing valuation evidence, there was also extensive expert evidence led by the parties relating to town planning and other related areas: as to the town planning instrument applicable to the site, the likely approved development, the optimum development and likely restrictions to be imposed on such.

The town planners agreed that the subject was a major development site and that there was more than one design outcome possible on the site; and that residential development would be problematic because of nearby industrial activities.

The parties' valuers agreed that the market for office buildings at the relevant date were strong and that the "residual approach" was an appropriate check method. However, there was dispute between the parties as to whether a particular sale (later rescinded) - the Parmalat Multiplex contract - was a sale able to be used in the valuation comparison. The claimants had submitted that the contract should not have been used because of the confidentiality clause in the contract had the effect that the details of the sale would not be available to the prudent purchaser as at resumption date.

The respondent's valuer primary approach was on a rate per m² of land area direct comparison whereas the resumees valuer valued the subject land in the before case on a rate per m² of GFA.

The Court held:

1. The Land Court may hear and determine the matter of the amount of compensation in the absence of a claimant. This determination would bind all the parties to all matters before the Court including the non-attending mortgagee.

2. It was not the function of the Court to decide whether the planning authority would approve a particular proposal. Rather the function was to determine, how the hypothetical prudent purchaser would have viewed the potential financial return if a proposal were considered that included one or other of the proposed plans.

3. In relation to the draft Kurilpa Area Plan (which related to the subject land), such had been in circulation for some months prior to the date of resumption and a prudent purchaser, as at that date, would have been aware of its content and its potential impact on the subject site.

4. This plan depicted Kurilpa as an urban renewal area where approvals for higher and more intensive developments, particularly in the core area, had been granted and were likely to continue to be granted.

5. Evidence of events occurring after the resumption date is not generally relevant to the assessment of compensation unless it is evidence which confirms a foresight held by the prudent purchaser at the date of resumption.

6. The resumees architect's proposal reflected a design for an owner who wished to develop the site to its greatest extent rather than being a design which reflected the highest and best use that a prudent purchaser could reasonably expect to achieve. The respondent's proposed design more closely resembled the type of development that would receive Council approval.

7. Evidence given by a Director of a mortgagee claimant was on the basis of his knowledge of the property market acquired through experience as an investor and developer but not an expert witness. Less weight should be placed on his opinion evidence than given to the opinion evidence of registered valuers.

8. The prudent purchaser would consider that a rate per m^2 of GFA should not be used in this valuation. It would be reasonable for the prudent purchaser to adopt a valuation method based on a rate per m^2 of land as it provided a more reliable guide to the value of the subject land.

9. In comparing sales, various adjustments should be made to enable a property to be compared on a similar basis. This would include allowance for various differentials such as demolition costs, Council headworks, contamination charges, piling costs and GST to reach an adjusted sale rate per m^2 of land.

10. The Parmalat contract, while eventually rescinded by agreement, was initially a binding agreement and while on foot, neither party was at liberty to withdraw at will.

11. This contract was negotiated between two commercial entities each of which, the evidence indicated, had obtained independent valuation advice.

12. There was no evidence as to the reasons or circumstances surrounding the recision of the contract. The contract appeared to be evidence at market value.

13. Although the contract was executed two months after the date of resumption, "after date sale" may be used as evidence of value provided they are in all respects comparable.

14. Evidence of comparable confidential sales was admissible to establish the price that a vendor and purchaser would be prepared to pay and to infer from that what the market would have paid for the subject land.

15. There was some difficulty in using the sale of the residual land to establish the before value of the subject site because for the adjustments necessary to allow for the injurious affection and the enhancement of the site resulting from the resumption. While some allowances were made for injurious affection and enhancement by the valuers, not too much weight should be placed on the sale applied in that way.

16. The valuation approached by one of the resumees involving averaging of sales was not a valid methodology.

17. The resumee could have subpoenaed their original valuer who had withdrawn from the case prior to the hearing; he had allegedly given, in an email, advice contrary to what he had verbally told them.

Jackman

This case concerned a decision of the Commissioner of Land Tax not to exempt the appellants' land from land tax on the basis of it being their principal place of residence. The land consisted of two lots located at Hedges Avenue Mermaid Beach. One of the lots had an existing house on it which had been the principal place of residence of the appellants since 1986; the adjoining second lot was acquired by the appellant's in July 2006.

In May 2007, the Jackmans entered into a construction agreement for major renovations of the existing house including extension onto the second adjoining lot. Work was to be completed by December 2007 but in fact was not completed until November 2008. The Jackmans were held not to be responsible for the delays. Further, the Jackmans took up residence in the renovated dwelling almost immediately after the works were completed.

Over a period of about four months from the start of construction, the Jackmans progressively moved into a nearby holiday home owned by them. They subsequently moved into a separate unit in a nearby apartment building leaving the holiday home as a base for storing items from the Hedges Avenue location. The appellants remained in occupation of the unit until after the construction of Hedges Avenue was complete in November 2008.

The Commissioner did not allow the deduction for the 2008/09 financial year as he claimed the Jackmans did not use the Hedges Avenue property continuously for a six month period prior to June 2008.

No definition of principal place of residence appears in the *Land Tax Act* but the latter refers to a person "using" a property as a principal place of residence.

In allowing the appellants' exemption claim, the Court held:

1. "Use" of land as principal place of residence must be considered in the context of the facts and circumstances of each case.

2. As the relevant statutory provision provides an exception from tax in certain circumstances, it ought to be given the fullest relief that the language fairly and reasonably allows.

3. The word "used" involves the land being put into service for the purposes of providing the principal place of residence of the taxpayer.

4. The Act does not require that the land be occupied.

5. Regardless of the intentions of the owner of land, a dwelling situated thereon could not be a principal place of residence where it had never been occupied, in the sense of providing the location where the person usually or ate and slept, or had been voluntary unoccupied by the owner for an extended period.

6. It is clear that the appellants always considered Hedges Avenue to be the site of their home or, to put it another way, to be the location of the usual or ordinary place of residence.

7. The appellant's considered the other places where they resided from time to time as being nothing more than providing temporary accommodation.

8. Apart from the contractual obligations under the building contract concerning possession of the site, at no time did the appellants part with possession and control of the land and the house located thereon.

9. The only uses to which it could be said that the land was being put at the relevant times were either the appellants' principal place of residence or a building site of some sort.

10. This is not the case involving the construction of a new dwelling on otherwise vacant land. It involves the extension or renovation of an existing home.

11. The appellants were obliged, as opposed to freely choose, to spend time at other residences for material parts of the relevant time period.

12. An analogy to the current case may be where a person had been forced to leave their residence because it was rendered uninhabitable as a result of natural disaster or accident.

13. Cases such as these will turn very much on their own particular facts and circumstances.

Thiess

Thiess concerned the unimproved capital value of a former multi layer underground and open cut coal mine site (with surrounding buffer areas) at Swanbank (near Ipswich) as at 1 October 2004. The use at valuation date (and held to be highest and best use) was as a waste landfill site for putrescible waste (that is waste that will rot) and a recycling facility. Thiess had contracts with the Swanbank Power Station to purchase gases generated by the waste; it also had contracts with waste collection bodies to dispose of such waste on the subject land. Such contracts were obviously closely related to the land use.

Thiess appealed against the unimproved capital value of the Chief Executive of $4,000,000, claiming a proper figure to be $350,000.

Thiess called expert valuation evidence (Mr R Brett) and also a number of experts in relevant fields, e.g. town planning. The Chief Executive called only one witness, namely a valuer who was left with the unenviable task of attempting to address competing evidence of experts in non- valuation fields.

For reasons largely outside the control of the court and the parties, the proceedings ran intermittently over a lengthy period of time. However, the decision was handed down on 24 February 2010 based on the 2008 Valuation of Land Act (VLA) amendments (as interpreted by the Court of Appeal in *Pacific Fair*).

It is of interest that the 2010 interim VLA amendments (which were initially to be retrospective) were passed shortly after the date of this decision. The case is thus relevant only to the pre 2010 amendments – but depending on the new VLA proposed for October 2010, it may be of assistance in cases following.

The court acknowledged the difficulties facing the opposing valuers given the absence of reliable sales evidence. Associated legislative changes also complicated matters. The approaches of the two valuers were heavily criticised in detailed written submissions by opposing counsel. The court ultimately accepted these criticisms (without detailing which parts of such criticisms carried more weight) and rejected the valuation evidence of both sides.

A key criticism of the appellant’s valuer’s evidence was that his primary sale (the Collex sale) involved several transactions between a range of parties over an extended period of time, involved an aspect of “payback of royalties” and related to a greenfield open cut site (as opposed to a ‘worsened’ old multi layered mine site as was the subject). Attempts to allow for these factors seemed, in the court’s view, to have been too problematic.

The Chief Executive’s valuer used another sale (Twigg) which included components of land and business. There was unsatisfactory evidence as to whether the figures assigned in the contract for land and business were in proper proportion. Also, the Chief Executive had not made appropriate allowances for worsement on the site.

The court was assisted by the non-valuation experts on aspects such as town planning, environmental engineering and quantity surveying and also on the assessment of

worsement. The latter included: voids; unextinguished fires; uncollapsed mineshafts; tailings; prior contamination; fill to date; new and ongoing contamination created by land fill operation; need to relocate trunk water main and regional power lines; risk and cost of remediation obligations as a result of mining operations; risk and cost of remediation obligations created by landfill approvals. Worsement allowance as then deducted from the ucv.

Improvements were also identified and subsequently deduced from the ucv.

Other aspects the court considered necessary to make allowance for (under the 2008 amendments) were:

- Infrastructure credits – no firm evidence was given as to the value of these from the relevant Ipswich City Council although, in the court's view, this would have been of considerable assistance. Allowance was made (added to the ucv) based on infrastructure payments made for a development approval many years earlier

- Development approval allowance (added to ucv) of $500,000 was made for these being in place at the date of valuation

- Recent level of industrial development in the surrounding Swanbank area.

The court rejected the beneficial contracts to the Thiess land relating to supply of gas and dumping of landfill as being part of the ucv (these were considered akin to <u>leases</u> relating to the land held not to be part of the ucv under the *Pacific Fair* decision).

In the absence of substantial valuation evidence, the court was left to make a somewhat broad approach in its determination: using the previously assessed 2001 ucv figure as a base, it applied a multiplier of four basing such increase on other related valuations in the area. As a check approach, it took a quite dated sale of the subject and added amounts for such things as infrastructure credits and development approvals. The two approaches were seen to be broadly consistent with the figure arrived at. A determination of $1,760,000 was made.

Neither side appealed this figure.

Table of Cases

1. Chief Executive, Department of Natural Resources and Mines v Kent Street Pty Ltd [2009] QCA 399

2. State of Queensland (Main Roads) v Springfield Land Corporation [2009] QCA 381 *

3. LGM Enterprises Pty Ltd v Brisbane City Council [2009] QLC 0178

4. Dux v Chief Executive, Department of Natural Resources and Water [2009] QLC 0081

5. Mio Art Pty Ltd & Ors v Brisbane City Council [2009] QLC 177 **

6. Jackman v Commissioner of Land Tax [2010] QLC 0003

7. Thiess Services Pty Ltd v Department of Natural Resources and Mines [2010] QLC 0030

* Under Appeal to High Court

** Under Appeal to Land Appeal Court