Land Court-Legal Update

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Mekpine Pty Ltd v Moreton Bay Regional Council [2014] QCA 317

The applicant, a lessee of a retail shop applied to the Land Court for compensation under s 12(5) of the *Acquisition of Land Act 1967*.

When granted, the lease concerned land registered as Lot 6 with the common areas under the lease being defined by reference to and within the boundaries of Lot 6. In 2004 the lessors purchased land which adjoined to Lot 6, this land was registered as Lot 1 (original Lot 1). The lessors obtained development approval to expand the shopping centre conditional upon the amalgamation of Lot 6 and original Lot 1 to create one new lot (new Lot 1).

After the lessors amalgamated Lot 6 and old Lot 1, customers of the centre, including the applicant's, used part of the land that was resumed for car parking, this was the case at the date of the resumption. No further lease referring specifically to the new Lot 1 was executed or registered, however, the applicant's lease was endorsed on the survey plan which created new Lot 1 as an "*existing lease allocation".*

A preliminary issue was tried in the Land Court as to whether the applicant had an "interest" in the land resumed within the meaning of s 12(5) of the *Acquisition of Land Act 1967*, the Court found that that the applicant held such an interest.

Following an appeal by the Council, the Land Appeal Court reversed the Land Court ruling and held that the applicant was not entitled to compensation as it had no interest in the resumed land on the basis that despite the amalgamation, the applicant's interest in the amalgamated land related only to the land previously referred to in its lease of the old Lot 6, which did not include as a common area, any of the land outside of Lot 6 i.e. the common area was as defined in the applicant's lease (which lease had been registered prior to the amalgamation of Lot 6 and old Lot 1) and related only to that part of the land that had been the old Lot 6.

Although the resumed land did form part of the "common areas" as defined in s 6 of *the Retail Shop Leases Act 1994*, the Land Appeal Court held that the definition did not have *substantive* operation so as to confer any interest in the resumed land on the applicant and no other provision of the Act did so.

The applicant/lessee was granted leave pursuant to s 74 of the *Land Court Act 2000* to appeal to the Court of Appeal.

Court of Appeal-allowing the application for leave to appeal (per curiam) and allowing the appeal (Margaret McMurdo P and Morrison JA; Holmes JA diss) Held:

(1) That the applicant had an interest in the resumed land within the meaning of s 12(5) of the *Acquisition of Land Act 1967* as at the date of resumption. (Margaret McMurdo P and Morrison JA; Holmes JA diss)

(2) That the registration of the survey plan under the *Land Title Act 1994* effecting the amalgamation of Lot 6 and old Lot 1 transferred or created a leasehold interest on the part of the applicant in the new amalgamated Lot 1, and had the effect that the reference to "land" in the definition in the lease of "common areas" became a reference to the land in the new amalgamated Lot 1. (Margaret McMurdo P and Morrison JA)

Per Margaret McMurdo P:

That, the old Lot 6 ceased to exist when it was incorporated into the new amalgamated Lot 1 upon registration of the survey plan on which the applicant's lease was noted as an "existing lease allocation". The "instrument" for the purposes of applying s 182 of the *Land Title Act 1994* was the survey plan. Section 182 had the effect that the registration of the survey plan, with the lease noted on it, transferred or created a leasehold interest in the applicant in the new amalgamated Lot 1. As the old Lot 6 had ceased to exist upon registration of the survey plan, the reference to "land" in the definition in the lease of "common areas" then became a reference to the land in the new amalgamated Lot 1, not the old Lot 6. As the resumed land was not leased or licensed by the lessor, it formed part of the "common areas" under the lease.

Per Morrison JA:

That once the survey plan was registered Lot 6 ceased to exist as its title was cancelled. At that point the lease could not remain registered over a lot that no longer existed. The plan of survey was the "instrument" in s 182 that, upon registration, created new Lot 1. It was the "instrument" that created the applicant's leasehold interest in new Lot 1, and not the applicant's earlier registered lease. The applicant's leasehold interest became, on registration of the survey plan, an interest in new Lot 1.

Per Holmes JA (dissenting):

That s 182 of the *Land Title Act 1994* did not apply to create an interest in the lessee in the resumed land which was part of amalgamated Lot 1. Section 182 deals with the effect of registration on an interest which the relevant instrument is "expressed to transfer or create". The survey plan was expressed to create Lot 1 from the existing Lots 6 and 1. It was not expressed to create the lease interest – which had already been created by registration – but to encumber it on Lot 1. Literally then, s 182 did not apply to the lease interest so as to create or vest it; rather, the interest created for the purposes of s 182 upon registration of the survey plan was not the lease but the registered owner's interest in the new Lot 1, subject to the existing interest in the lease. Section 182 did not apply to the lease interest so as to vest or create it.

That nothing in the *Land Title Act 1994* suggests that registration of an instrument is meant to have the effect of re-creating every existing interest referred to in it. It would be an extraordinary result if registration of a survey plan could operate so as to alter, unilaterally and retrospectively, the terms of an agreement between the parties; in this case, rights and obligations under the lease. [53].

(3) (Margaret McMurdo P and Morrison JA) That the general principle applicable to definitions in a statute that the function of a definition was no more than an aid to the construction of the statute and nothing more, was not an absolute rule and could be modified by a clear contrary legislative intent. The legislative intent of the *Retail Shop Leases Act 1994* was that the s 6 definition of "common areas" was to be incorporated into retail shop leases and to replace any inconsistent definition in the lease.

Gibb v Federal Commissioner of Taxation (1966) 118 CLR 628, 635 distinguished.

(4) (Margaret McMurdo P and Morrison JA) That the *Retail Shop Leases Act 1994* amended the lease so that the common areas under the lease were as defined in s 6 and the resumed land formed part of the common areas of the shopping centre under the lease.

Per Holmes JA (dissenting):
That the *Retail Shop Leases Act 1994* evinced no legislative intention in ss 18 to 20 or elsewhere to convert the definition of "common areas" in s 6 into an operative section. The definition of "common areas" in the lease, while different from s 6, was not inconsistent with the provision, so as to fall within the compass of s 20.

Decision of the Land Appeal Court reversed.

NB-(This decision has since been overturned by the High Court of Australia see *Moreton Bay Regional Council v Mekpine Pty Ltd [2016] HCA 7)*

GPT RE Limited v Valuer-General [2015] QLC 14

GPT Limited, the owner of 123 Eagle St Brisbane (the Riverside Centre) lodged an appeal pursuant to the *Land Valuation Act 2010* against the assessed site valuation of $ 87,000,000 for 1 October 2012. The Valuer-General brought interlocutory proceedings seeking to restrict the sales evidence to sales other than those sales identified in the Notice of Appeal for the 1 October 2010 valuation date and relevant to that valuation date and also to restrict the facts "*to facts relevant to the valuation of the subject land which occurred or first existed after 1 October 2010*".

The basis of the application was that the grounds of appeal were effectively identical to the grounds lodged for the 1 October 2010 valuation date and as that appeal was resolved by a *consent order in an amount of $ 87,000,000* on 19/11/2012 those earlier identical grounds must necessarily have resolved the present identical grounds for the 1/10/2012 appeal and from that an issue estoppel arises.

The main issues that were required to be determined were

1. What effect, if any did the 1 October 2010 consent determination have on the current proceedings?
2. What issues were determined by the 1 October 2010 consent determination?
3. Was the relevant issue identified with the required precision by the VG?
4. Were the grounds of appeal in the nature of indispensable or ultimate facts as required?
5. Did issue estoppel arise in the circumstances?

***The Court Held*:**

1. By way of declaration, that GPT is bound by the fact that the statutory valuation of the subject land pursuant to the LVA as at 1 October 2010 was $87,000,000 as determined by the Court.

2. The 1 October 2012 appeal relates to a new, different question than that determined in the 2010 appeal i.e. the 2010 appeal relates to the question of site value as at 1 October 2010.

3. As a question of fact, the Land Court on 19 November 2012 determined the site value of the subject land as at 1 October 2010 at $87,000,000. That determination is clearly made pursuant to the provisions of the LVA and is a site valuation as at a specific date for a specific parcel of land in accordance with the LVA.

4. A statutory valuation at an earlier point in time does not dictate how the market will approach the question of a subsequent valuation of the same property at a later point in time.

5. The weight that should be afforded an earlier Court determination [e.g. *consent order*] as to the value of land under the LVA will be a matter for the Court when considering a subsequent appeal. This principle applies whether or not consideration is being given to the valuation of an entirely different property owned by different parties, or to the same property owned by the same parties. The Court referred to the following extract from the judgement of *Bignell v Chief Executive, Department of Lands* (Unreported, Land Appeal Court 4 March 1996] concerning consent orders:

> "…..*Land Court determinations, even in uncontested cases, are admissible, 'but the weight to be given them will vary in different cases and obviously is not the same as the weight given to determinations in contested cases'. The judgments of the Land Court and the Land Appeal Court in those cases indicate that there was no true joining of issue on valuation between the parties. We accept that the decisions properly disposed of each appeal in accordance with law. However the process by which they were reached means that they have relatively little weight when compared with valuations based on sales evidence from the relevant time."*

6. There are three essential elements to issue estoppel as confirmed by the Victorian Supreme Court in re *GE Mortgage Solutions v Whild* [2013] VSC 503 , namely:

   (a) The parties in the previous litigation and the present litigation must be the same.

   (b) The particular issue of act and/or law sought to be litigated in proceeding has already been litigated and decided in the initial proceedings i.e. the issue or issues must be identical and must have been "ascertained with some degree of precision".

   (c) The court or tribunal in the first proceeding actually decided the fact or point of law which was directly in issue in the case and was a ground of the judgment i.e. what is determined must be necessary and fundamental to the judgment.

7. In light of Bignells case, the fact that the 2010 appeal was determined by way of a consent order is problematic for the VG in identifying the issues determined and the circumstances behind the 2010 consent order which must be taken into account. Being a consent order this Court has no way of knowing what essential issues were determined, let alone put some degree of precision to those issues. The VG has failed to identify with any precision the issues decided by the 2010 appeal which cause an issue estoppel to arise in respect to those same issues in the 2012 appeal and as a consequence issue estoppel is not established.

Bresnahan v Coordinator-General [2015] QLC 15

On 1 December 2009, the date of resumption, the respondent, pursuant to the *State Development and Public Works Organisation Act 1971*(the SDPWOA) took a critical infrastructure easement over the applicant's land for the purpose of an underground water pipeline. The compensation payable by the respondent as a consequence of taking the easement was required to be assessed under the *Acquisition of Land Act* 1967 (ALA).

The principal issues before the Court were:

1. Should the applicant be granted leave to make submissions to objections by the respondent concerning the admissibility of certain evidence?
2. Should the Court receive as evidence parts of an affidavit objected to by the applicant as being documentary hearsay, hearsay and "without prejudice" communications?
3. Should the Court receive as evidence statements contended by the respondent to be scandalous or inflammatory, irrelevant, repetitive, based on hearsay and assumed facts or scandalous or inflammatory?
4. What percentage diminution in land value should the Court assess in respect of the easement area?
5. What percentage injurious affection should the Court assess in respect of the balance land area?
6. Does the rule in *Jones v Dunkel* preclude the respondent making submissions regarding the veracity or reasonableness of the applicant's disturbance claims?
7. Does the rule in *Brown v Dunn* preclude the respondent making submissions regarding the veracity or reasonableness of the applicant's disturbance claims?
8. Are the applicant's legal costs, valuation and other professional fees claimed pursuant to s 20 ALA, limited to those amounts reasonably incurred in relation to the preparation and filing of the claim for compensation?

The Court held:

1. That leave be granted to the 'applicant to make written submissions to the respondent's objections on the basis that any extra costs incurred be paid by the applicant. Relevant factors considered by the Court included the applicant's explanation, the interests of justice, prejudice, the Court's need to control its processes to encourage the finality of litigation and the overriding philosophy of the Court to facilitate the just and expeditious resolution of the real issues with a minimum of expense.

2. (i) That the applicant's objections based on *documentary hearsay* be rejected, s 7 of the *Land Court Act 2000* and s 92 of the *Evidence Act 1977 was* examined by the Court.

   (ii) That the applicant's objections based on *hearsay* be rejected as the hearsay complained of was nothing more than a summary of the exhibited documents.

   (iii) That the applicant's objections to "without prejudice" communication be allowed as the relevant part of the letter was clearly marked *"without prejudice".*

3. (i) That the statements contended by the respondent to be irrelevant should generally be accepted and although there must be some nexus between the claims made pursuant to the ALA and the evidence, a conservative approach in favour of the applicant should be adopted in accordance with s 7 of the *Land Court Act 2000* where there is some doubt as to relevance.

(ii) Repeating inadmissible evidence does not make it admissible and if admissible evidence already given by another source is repeated, then the repeated evidence is equally admissible.

(iii) The receipt of hearsay evidence will not unfairly advantage or disadvantage one party over the other in the circumstances of this case. There must be direct evidence of an assumed fact, otherwise the evidence will not be admissible or, if admitted, of such little weight to be of virtually no assistance.

(iv) The respondent's objection to scandalous or inflammatory evidence is upheld, evidence of a witness which imputes criminal activity on another, based on nothing more than suspicion is scandalous and not admissible.

4. The subject pipeline easement is of a more onerous nature than the existing electricity easement and accordingly a 35% allowance is appropriate in circumstances where with the impact has been overstated by the applicant's valuer (50%) and understated by the respondent's valuer (25%).

5. That an allowance of 12.5% be determined in respect of injurious affection to the balance land area and apportioned 5% due to the easement and 7.5% due to the associated pigging pit.

6. The rule in *Jones v Dunkel* does not prevent the respondent making submissions concerning the veracity or reasonableness of the applicant's disturbance claims. How the respondent conducted its case did not absolve the applicant from establishing that the disturbance items under s 20(5) *ALA* were both reasonable in their quantum and reasonably incurred.

7. The rule in *Brown v Dunn* did not prevent the respondent making submissions concerning the veracity or reasonableness of the applicant's disturbance claims as the applicant was put on notice that her disturbance claims were challenged by an extensive Points of Defence, filed by the respondent on 20 September 2013.

8. The applicant's legal costs, valuation and other professional fees pursuant to s 20 ALA are limited to those amounts reasonably incurred in relation to the preparation and filing of the claim for compensation.

The Court determined total compensation in the amount of $ 131,833.00

Mahoney v Chief Executive, Department of Transport and Main Roads **[2014] QCA 356**

The applicants sought leave to appeal a decision of the Land Appeal Court, claiming that Court had erred in accepting the evidence of the Ipswich City Council's town planner involved with the resumed land's rezoning.

When the applicants purchased the land in 1982 it was zoned Future Urban. In 1999 the land was rezoned Rural by the Ipswich City Council. The land was resumed in 2005 by DTMR, the respondent. The parties agreed that the value of the land was $ 275,000 if valued on the basis of a Rural zoning, it was also agreed that if zoned Future Urban, the value would have been $1,707,500. The respondent contended that there was no causal connection between the rezoning and the acquisition.

The Land Court found that the rezoning related to the acquisition, and applied the *San Sebastian* principle (i.e. rezoning to be ignored) to value the land as Future Urban. The Land Appeal Court allowed the appeal and determined the value of the land on the basis of its Rural zoning

The Court of Appeal held:

1. A critical consideration for the grant or refusal of leave to appeal was whether or not the applicants advanced a viable argument which demonstrated that the Land Appeal Court erred in law.

2. It was necessary to consider whether the Land Appeal Court erred in substituting its own conclusions as to the effect of the testimony of town planner (Mr Adams) for those of the Land Court.

3. The ascertainment of the meaning and effect of a relevant letter, and of Mr Adams' oral evidence and supporting statement was not a process in which inference was drawn from facts.

4. These matters were gleaned from a perusal of the transcript of the proceedings in the Land Court and the reasons of the learned Member.

5. Of critical importance in the process undertaken by the Land Appeal Court was the overlooked oral evidence of Mr Adams. Whether it was evidence of the actual reasons for the 1999 rezoning or not fell to be determined by reading the transcript of Mr Adams' testimony and ,thereby, ascertaining its meaning. It did not depend upon an evaluation of Mr Adams' credibility or a "feeling" for the case.

6. It was plainly open to the Land Appeal Court in its appellate jurisdiction to have regard to that evidence, to ascertain its meaning and effect, and then to make a finding based on the meaning and effect which it ascertained that that evidence had.

7. The applicants had not demonstrated any error of approach on the part of the Land Appeal Court amounting to legal error in making the finding that the reasons for the 1999 rezoning of the land as Rural (as stated by Mr Adams in his oral evidence and statement) were the actual reasons for the rezoning.

8. Notwithstanding the absence of a challenge by the applicant in this respect, there were relevant facts which pointed to the unlikelihood of a relationship between the 1999 rezoning and the resumption.

9. Extensive evidence was given in the Land Court as to the unsuitability of the land for residential purposes. This evidence supported a decision to rezone the land from Future Urban to Rural in 1999.

10. Application for leave to appeal refused.

Leave to appeal against decision in *Chief Executive, Department of Transport and Main Roads v Mahoney & Ors 2014 QLAC 1,* refused.

Caseldan Pty Ltd v Moreton Bay Regional Council [2014] QLC 53

On 20 July 2012, the respondent Council resumed 10.1 hectares of land from the applicant for "recreation ground purposes".

At the hearing, the claim made by the applicant was that the market value of the land was $5,555,000, on the basis that its highest and best use was for a mix of residential, commercial and "sport and recreation" uses. It was also contended that, if the highest and best use was as playing fields, then the market value and therefore the compensation for loss of the land would have been $3,535,000. The respondent's case was that the value of the land was $1,800,000.

The parties prepared a list of issues for the Court's determination:

A. The **fundamental issues** to be determined by the Court are as follows:
   1. The highest and best use of the land at the relevant date (20 July 2012).
   2. The market value of the land as at the relevant date.

B. To inform a determination of those fundamental issues the Court will need to determine the following matters.
   1. **With respect to traffic and access issues:**
      (a) what would the hypothetical purchaser have considered to be the likelihood of obtaining appropriate access for playing field use?
      (b) what would the hypothetical purchaser have considered to be the likelihood of obtaining appropriate access for development in accordance with the Ovenden Plan?
      (c) should the Court disregard the Council's denial of access for the purposes of a Southern Loop Road as being part of a scheme to, or steps taken to, resume the subject land?
   2. **With respect to town planning issues** (and bearing in mind the traffic issues referred to above):
      (a) what would the hypothetical purchaser have considered to be the likelihood of obtaining town planning approval to use the land as playing fields?
      (b) what would the hypothetical purchaser have considered to be the likelihood of obtaining town planning approval for a mixed use development as illustrated by the Ovenden Plan?
   3. **With respect to valuation issues generally:**
      (a) What would the hypothetical purchaser have considered to be the highest and best use of the subject land on the basis of a cash unconditional contract?
      (b) Is it necessary to have development costs or estimates to determine what a hypothetical purchaser would pay for the subject land to be converted to use as sporting fields?
      (c) Having regard to the answers to the above questions, what is the market value of the land as at the relevant date?

The Court's conclusions on these issues were as follows:

Issue B.1

(a) The evidence supports the conclusion that access existing at the date of resumption would be seen as appropriate for use of the land for "general playing fields", where the use is not for something substantially more intense than the existing golf course use.

(b) For the purposes of a cash unconditional contract on the date of resumption, a hypothetical prudent purchaser would have considered the likelihood of obtaining appropriate access for development in accordance with the Ovenden Plan as being very low and, if achieved, to be at a high cost.

(c) The Court should not disregard the Council's denial of access for the purposes of a Southern Loop Road as being part of a scheme to, or steps taken to, resume the subject land.

Issue B.2

(a) The hypothetical prudent purchaser would have considered that there was a very high likelihood of obtaining town planning approval to use the land as playing fields.

(b) A prudent purchaser would have considered, in the context of an unconditional cash contract at the date of resumption, that the likelihood of obtaining town planning approval for a mixed use development as illustrated by the Ovenden Plan was very low.

Issue B.3

(a) In view of the matters so far examined, a hypothetical prudent purchaser mindful of an unconditional cash contract at the date of resumption would have considered the highest and best use of the subject land to be for sport and recreation purposes.

(b) It is not necessary to have development costs or estimates to determine what a hypothetical purchaser would pay for the subject land to be converted to use as sporting fields; but the absence of that information would result in the valuer being less cognisant of a consideration relevant to value.

(c) For the reasons given, the market value of the land at the relevant date will be that arrived at by, the respondent's valuer, Mr Gillespie, namely $1,800,000.

Fundamental issue

A. 1 The highest and best use of the land at the relevant date, 20 July 2012, was for "sport and recreation" purposes.

Fundamental issue

A.2 The market value of the land as at the relevant date was $1,800,000.

The Court also held:

1. The land can have only one highest and best use and its value will depend on that.

2. If there is doubt as to the amount properly payable as compensation, the doubt should be resolved in favour of the more liberal estimate. However, this principle does not operate to free the Court of its duty to determine the compensation on the basis of the evidence.

3. Under the legislative scheme in place in Queensland, it would not be necessary that the step in the process of resumption (under the San Sebastian principle) be taken by the resuming authority itself.

4. In this regard legislative schemes in other jurisdictions differ from that applying in Queensland. The limitation identified by the High Court is not part of the law in Queensland, which limits the usefulness here of *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority*. This situation was recognised by the Land Appeal Court in *Ipswich City Council v Wilson*.

5. The Court is aware of the skill of a valuer to make valuations, and also that an increase in relevant data ought to bring about an increase in the accuracy of the valuation. While costs of a certain development may not be absolutely required, their presence or absence will be likely to influence the accuracy of the valuation.

6. The applicant's valuers approach to valuation of the Terrigal Street land overlooked an aspect of value, namely the potential for boundary realignment, the quantum of which is not known. This leaves the Court unable to rely on that assessment and use of such land sale.

7. The genuineness of an offer to purchase must be carefully considered in using it as evidence of value.

8. The cost of earthworks is a major matter. The contours show that there would be a need for substantial cut, fill, and retaining wall works to be carried out in order to build sporting fields.

9. In view of the likely difficulties and uncertainty involved in coming to an acceptable design for a sporting fields development on the land, and the very substantial earthworks of unknown cost in prospect, a prudent purchaser would not act on the valuation prepared by the applicant's valuer. They would proceed to make an unconditional cash offer on the basis of the respondent's valuation, it being made by a method in which more confidence could be placed.

Glencore Coal Queensland Pty Ltd & Ors v Keys & Ors [2014] QLAC 2

The appellant Glencore Coal (formerly Xstrata) appealed to the Land Appeal Court against a compensation decision of the Land Court under s 281 of the *Mineral Resources Act 1989* (MRA). The compensation was payable to four landowners upon the grant of mining leases to the appellant.

It was common ground between the parties that the appropriate valuation methodology for the determination of compensation was the "before and after" approach. It was also common ground that compensation should be assessed on the basis that the land which is to be the subject of the leases is lost in perpetuity.

Issues

(a) The nature of the appeal and the circumstances in which the Land Appeal Court could interfere with the findings made by the Land Court.

(b) Whether it was appropriate to use as sales evidence a sale to a resources company – it was suggested by the appellant a premium may have been paid by the purchaser.

(c) Should sales evidence be approached in a "generous and not niggardly spirit" as previously done in *Wills v Minerva Coal v Minerva Coal Pty Ltd* [No.2] (1998) 19 QCLR 297

(d) The correct approach to the valuation of the "balance" lands where restrictions were placed on such balance – including the fact that no separate title was available, and that they were surrounded by lands intended to be the subject of the mining leases.

The Court held:

Nature of appeal

1. While there will be cases where this Court may be in as good a position as the Land Court to reach conclusions about matters of fact, including the value of land, there will inevitably be other cases where the Land Court, having observed the valuers giving evidence, will enjoy advantages not available to this Court. It is necessary to recognise such advantages.

Sale to a resources company

2. In dealing with this sale, the starting position adopted in the Land Court was that a sale should not be disregarded simply because it was a sale to a resource company; and accordingly it did not automatically follow that the sale price exceeded the market value of the property. However, it was recognised that the sale might not reflect market value, and accordingly should be treated with some care. There was no error in this approach.

3. The fact that Mr Jinks (respondents' valuer) did not make enquiries of QGC (the resources company) does not provide a substantial basis for rejecting his evidence in relation to the sale.

The "generous" approach

4. The obvious justification for the approach is the potential movement in market prices before compensation is paid. That justification does not depend upon the existence of a depressed market at the time of valuation. Moreover, the approach is consistent with the "liberal estimate" approach referred to by Dixon J in *Commissioner of Succession Duties (SA) v Executor Trustee and Agency Co of South Australia Ltd*. In principle, and subject to a consideration of the effect of s 283B of the MR Act, the approach might be adopted without error.

5. The explanatory memorandum for the amending legislation which introduced s 283B identified "operational change" as the circumstance which would make an adjustment to compensation appropriate. These considerations suggest the section is not made applicable simply because of a change in market value over time. Once the "operational change" condition is satisfied, questions of then current market value become relevant.

6. There is real reason to doubt that s 283B would become available, simply because of a movement in the market for land between the date of the determination, and the date when compensation is paid.

7. The Land Court member did not err by taking the approach identified in *Wills*.

Balance lands

8. The balance lands are a series of somewhat irregular corridors of land, together with occasional isolated parcels of land. They are generally surrounded by lands intended to be the subject of mining leases.

   The Land Court concluded that the only way the balance lands could be offered for sale was by offering the <u>whole</u> of the land for sale, subject to the mining leases. The balance lands were likely to retain some nominal value, assessed at $20,000 for each of the five properties.

9. It was not demonstrated that the Land Court erred in determining the value of the balance lands.

Conclusion

10. Appeal against decision of Land Court in *Xstrata Coal Queensland Pty Ltd & Ors v Keys & Anor; Xstrata Coal Queensland Pty Ltd & Ors v Sky Grove Pty Ltd; Xstrata Coal Queensland Pty Ltd & Ors v Erbacher; Xstrata Coal Queensland Pty Ltd & Ors v Edmonds & Anor* [2013] QLC 34 was dismissed on all grounds.

Vass and Lambert v Coordinator-General (No. 2) [2014] QLAC 9

The appellants operated a hairdressing and beauty business in leasehold premises at Stanley Street, South Brisbane. The property from which the business operated was resumed for the new Queensland Children's Hospital in 2009. A press release in September 2006 gave notice of the intention to build the children's hospital. Throughout 2007 representatives of the constructing authority visited the appellants' business to discuss the resumption. The appellants' business suffered a downturn from about the time of the September 2006 notice. The Land Court found that the downturn was not related to the notice. The appellants closed the beauty component of the business in 2007 due to finding smaller premises to relocate to after the resumption. The Land Court was critical of the evidence of one of the appellants, Mr Vass, and certain findings (now challenged) of the Land Court turned on this aspect.

The appellants argued that compensation should have been awarded for both business losses and destruction of the beauty component. Notwithstanding these effects, they claimed it was reasonable to relocate the business because of its potential, the achievement of which had been impaired by the effect of the proposed resumption; the evidence called as to the cost of relocation should have been accepted, and this amount awarded (in lieu of the amount of $80,000, the value of the business at the date of resumption).

The Land Appeal Court held:

1. The primary issues in the appeal were:
   (a) whether compensation should have been assessed on the basis that the business was substantially adversely affected by notice of the proposed scheme and the resumption, before the resumption occurred, so that losses relating to the business should have been included; and
   (b) whether the compensation should have included relocation expenses.

2. The nature of the claims for compensation make the financial records of the business conducted at the resumed premises documents of considerable importance.

3. Where there were significant discrepancies in financial records, the financial statements and tax returns, being likely to be the final result of the work of an accountant, should be preferred to the other documents.

4. The trend which Mr Calabro (business analyst for the respondent) accepted as commencing at about the time of the September 2006 announcement led to a downturn in the business, which was firmly and permanently established by the beginning of the 2007 calendar year.

5. The fact that at least the downturn in the beauty side of the business was a consequence of the resumption, the prospect of staff communicating to clients that there was uncertainty about the future of the business, the evidence of Mr Wright (business consultant to the appellant) and Mr Vass (proprietor), and the absence of any other credible explanation led to the conclusion that the downturn was the result of the then proposed resumption.

6. This was a case where this Court, as an appellate court, was required to consider for itself the correctness of the conclusion of the Land Court (which, ultimately, was in any event a matter of inference), notwithstanding that Court's observations about the credibility of Mr Vass.

7. Business losses (excluding losses related to the beauty component of the business) should be determined at the level calculated by Mr Wright as the lost profit ($85,000).

8. It was appropriate to resolve any doubt about the adoption of Mr Wright's approach for the beauty component loss in favour of the appellants. $29,000 was thus awarded as compensation for this aspect of the claim.

9. The submissions of both sides proceeded on the basis that compensation should include the cost of relocation only if it was reasonable for a person in the position of the appellants to have taken that course.

10. The proposition, that the appellants had to demonstrate that the whole of the amount claimed for relocation had in fact been paid, was erroneous.

11. The amount for relocation rejected by the Land Court was supported by a quotation. It was open to the respondent to seek to establish that items included in the quotation were not reasonably required for the relocated business, or that the amounts set out were excessive.

12. Given that oral evidence was supported by a quotation, and in the absence of any other evidence, it should be accepted that the reasonable costs of fitting out the new Manning Street premises for a hairdressing salon amounted to $216,800. A question remained as to whether this amount should have been awarded as compensation.

13. A consideration of the financial statements for the business led to the conclusion that it would not be reasonable to expend $216,800 to relocate the business, given its low level of profitability. The award of compensation on the extinguishment basis should stand.

14. An application to adduce further evidence was rejected as such was not necessary to avoid grave injustice.

Appeal against decision in *Vass and Lambert v Coordinator-General* [2013] QLC 64 allowed.

BWP Management Limited v Valuer-General [2014] QLC 3

This appeal concerned the determination of site values for two large retail lots on the Gold Coast (at Molendinar and Burleigh). Bunnings warehouses were located on the lots and it was common ground that this or a similar commercial/retail use was the highest and best use of the land.

The two main issues before the Court were:

1. The preferred valuation methodology. The appellant's valuer (Mr Schultz) essentially used unimproved sales, but somewhat removed from the subject; the respondent's valuer (Mr Bale) made extensive adjustments to several of his sales in order to allow for the improvements.
2. The percentage allowance for easements over part of each property.

The Court held:

1. Substantial adjustments were made by Mr Bale to his sales, these adjusted sales were then compared to the subject. The process is open to the criticism made by Mr Schultz that, in effect, the content of the sale used for comparison is riskily diminished by the adjustment process, perhaps to the point that there is no longer a comparable sale, but really an unsupported valuation opinion.

2. The consistent line of authorities makes it clear that the Court will prefer the guidance of sales of unimproved or lightly improved land, where such sales are available.

3. The preferred method is that which requires the least allowance for improvements. The reason, the Land Appeal Court said in *Clough v Valuer-General*, is obvious. Reducing the scope for error in considering the amounts to be allowed will reduce the scope for error overall.

4. Mr Bale's sale 1 is illustrative, a sale for $8,850,000 was analysed to $14,850,000 and $3,000,000 of that was for "estimated" increased building costs.

5. Some of the sales used by Mr Schultz were relatively far from the subject land, but the reduced need to make large allowances for improvements is the decisive factor in accepting the respondent's valuation.

6. The easement is more than a mere blot on title; Mr Schultz correctly considered there to be likely risk, together with costs and time, in attempting to change it.

7. The 20% allowance made by Mr Schultz appropriately recognises the burden imposed by the easement on the land.

8. The appeals in respect of both sites were allowed.

Gold Coast City Council v Dobson [2014] QLAC 6

The respondent owned a parcel of land, part of which was resumed by the appellant. Prior to resumption, the respondent's land had potential for development for a mix of residential and non-residential purposes. The valuer for the respondent determined compensation for the resumed land on the basis that the land would be developed according to the same mix of uses in the same proportion.

The valuer for the appellant assumed that the same amount of land was available for commercial uses, both before and after resumption. He thus determined compensation on the basis that the resumed land would only be developed for residential purposes. The Land Court Member found that the prudent purchaser would wish to maximise commercial development and the planning authority would wish to maximise residential development on the remaining land.

The valuer for the respondent adopted a "blended rate" of $275 per square metre to determine the value of the resumed land, assuming the land had been approved for development for both residential and commercial uses. The sales of land relied upon by the respondent's valuer were not for mixed development. The Land Court adopted the respondent's "blended rate" to determine the compensation for the resumed land.

The valuer for the respondent adjusted the value of the land by eight per cent to account for the time and expense of obtaining a development approval. The appellant claimed that eight per cent was too low. The appellant submitted that the valuer for the respondent did not account for risk and therefore treated a development approval as a certainty rather than a potentiality. Although the appellant submitted that there was risk because of a potential challenge by a commercial rival, there were a number of features of the location of the respondent's land which would make it difficult for a rival to successfully challenge an approval for development.

There were four issues on appeal:

1. Whether the Land Court erred in finding the same proportions of residential and commercial uses should be assumed in both before and after resumption cases.
2. Whether the Land Court erred in adopting the “blended” rate.
3. Whether the Land Court erred in not making a significant allowance for risk in valuing land without approvals.
4. Whether the Land Court failed to provide “adequate reasons” for its decision.

The Land Appeal Court held:

1. The Land Court did not err in principle by adopting, for the after resumption case, the land use proportions it adopted for the before resumption case.

2. The adoption of the “blended” rate was not shown, in the circumstances, to be in error. This approach might be regarded as "arbitrary", in the sense it is the result of what might be described as "pure judgment", rather than an identifiable form of calculation; but valuation evidence often requires the formation of judgments which may similarly be described as "arbitrary". The fact that such evidence has this character does not mean that its adoption is erroneous

3. What must ultimately be determined is the likely impact of any uncertainty about a planning approval on the mind of the hypothetical prudent vendor and purchaser. It is not a rule of law that the existence of any uncertainty about the obtaining of a planning

approval means that the valuer must reduce the value which would otherwise be attributed to the land, by reference to the uncertainty.

4. Given the particular, and rather unusual, circumstances of this case, it has not been established that the respondent's valuer erred in his treatment of risk.

5. A number of principles derived from recent decisions of the Court of Appeal relating to a court's obligation to give reasons for its decision were considered. The first was that the extent to which a court must expose its reasoning for the conclusion which it reaches will depend on the nature of the issues for determination, and the function to be served by the giving of reasons. The second was that reasons should include material findings of fact and the reasons for making those findings. The third was that in cases involving conflicts of expert evidence, a coherent reasoned opinion expressed by a suitably qualified expert should be the subject of a coherent reasoned rebuttal by the court. Finally, it was not appropriate for a trial court to decide a case merely by expressing a preference for the evidence of one side over another, particularly if that involved peremptorily shunting aside significant evidence.

6. Although the respondent's valuer gave some explanation for his assessment of risk, ultimately that was a matter of professional judgment. The appellant's valuer's evidence on this topic, which was somewhat generalised, was also of a similar nature. This evidence could not be described as "a coherent reasoned opinion" which should be the subject of "a coherent reasoned rebuttal".

7. The submission that the learned Member failed to provide adequate reasons for his decision, and thereby erred, was not made out.

8. The appeal should be dismissed.

Appeal against decision in *Dobson v Gold Coast City Council* [2013] QLC 48, dismissed.

Musumeci v Valuer-General [2014] QLC 15

An important issue of valuation methodology was before the Court: in using sales evidence to make a comparative valuation for a subject property, what figure should be used – the analysed, unimproved value derived from the sale or the figure actually applied by the Valuer-General to the sale land?

The Valuer-General's valuer did not use the applied values of the sale properties in determining the subject values. Rather, he used the analysed sales prices.

The Court held:

1. This issue was considered by the Land Appeal Court in *Chief Executive, Department of Natural Resources v Radlett Enterprises Pty Ltd* 1998 18 (QCLR) 397. The Land Appeal Court interpreted the relevant evidence to suggest that the totality of vacant or lightly improved sales evidence in the Local Government Area had been considered in deciding the range of values indicated for the various classes of land in that area.

2. The Land Appeal Court held that such an approach was desirable when all land within a particular Local Government Area is to be valued. It would be a different matter, said the Court, if the overall sales evidence had been disregarded and supplanted by unsupported valuation opinion.

3. The effect of the *Radlett* decision is that the Land Appeal Court has said that it is desirable, when valuing all land within a particular Local Government Area that the valuations should proceed on the basis of the values applied to the sales properties.

4. The advantage of that approach is that it should ensure that valuations of comparable lands, made for the purposes of the legislation, bear proper relativity to one another.

5. The valuer had been in error in using the analysed sales prices, rather than the applied values of the sales, in valuing the subject land.

6. There is some doubt about whether certain sales should be used at all, because of the difference between the analysed sale prices and the applied sale prices. The large reductions made to reach the applied values tend to point to the fact that such sales were made at above market value. If that is the case, it is difficult to see how they can be applied appropriately in the subject valuation.

7. In the absence of any other sales evidence, there is no alternative but to use these sales.

Steinberger v Valuer-General [2014] QLC 23

The appellant appealed an objection decision of the Valuer-General claiming that the respondent had failed to provide adequate reasons for the decision. The respondent submitted the application should be dismissed.

Section 151 of the *Land Valuation Act* (LVA) required the Valuer-General to provide reasons for decision. The appellant alleged the reasons provided were inadequate and did not give sufficient explanation of the actual path of reasoning.

The first issue to be determined was whether the Court had power to order the respondent to provide additional and more detailed reasons for the decision on objection, on the assumption the reasons provided were insufficient.

The Court held:

1. It did not have the power to direct the respondent to provide an additional written statement of reasons under the *Judicial Review Act 1991*.

2. Although s 151(2)(b) (LVA) may impose a duty on the Valuer-General to state the reasons for the objection decision, the section did not provide that the Land Court could enforce any such duty.

3. There was no general power given to the Court under the LVA to enforce any duties imposed by the Act on the Valuer-General.

4. Such a power could not be inferred from the Court's general power to make declarations granted under s 33 of the *Land Court Act 2000*.

5. If there were in existence documents directly relevant to the matters in issue in the appeal, the respondent would appear to be under a duty to disclose those documents to

the appellant pursuant to rule 211 of the *Uniform Civil Procedure Rules 1999* (UCPR). (The appellant had not applied for an order for disclosure).

6. The appellant would not be left in ignorance as to the evidence which the respondent intended to call to support the valuation amount. Before the substantive appeal proceeded, both parties would be ordered to exchange statements setting out the evidence on which they intend to rely at the hearing of the appeal

7. The appellant will be fully informed as to the respondent's case when the statements of evidence are exchanged, and the appellant can decide then whether to continue with the appeal.

8. The evidence then submitted is not confined to the evidence available to the Valuer-General at the time of the objection decision. It follows that the appellant will only be in a position to make an informed decision as to whether to continue with the appeal when he has had the opportunity to read the respondent's statement of evidence.

9. The application is dismissed.