REVIEW OF VALUATION CASES

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BR O’Connor
Judicial Registrar
Land Court

This year's review includes the following cases:

1. **Springfield**

   A highway acquisition case on the meaning of "enhancement" to adjoining land under s.20(3) of the *Acquisition of Land Act 1967*.

2. **Commonwealth Bank ("Money box")**

   A New South Wales Land and Environment decision (confirmed by the Court of Appeal) on a more refined methodology for ascertaining site value of a large CBD heritage building.

3. **Riverside / AMP**

   Whether development approvals and infrastructure credits should be included in unimproved value (in Queensland).

4. **ISPT**

   A Victorian Court of Appeal decision on site value in the Melbourne CBD. Several important issues of valuation principle were considered in detail and are of relevance to certain Brisbane CBD appeals before the Land Court.

5. **Pacific Fair**

   The Land Appeal Court considered, in light of the 2008 amendments to the *Valuation of Land Act 1944* the following issues:

   - should the value of leases be included in the UCV?
   - should the notional creation of the shopping centre at the relevant date be considered risk free (the <u>Nathan</u> point)?

6. **LGM**

   Whether loss of access to leased retail premises entitled the lessee to claim for loss of custom to his video store. Was an interest in land established?

7. **Griffiths**

   A High Court decision (from the Northern Territory) on whether acquisition of land by the State has to be for a "public purpose".

8. **Effingham**

   What items are claimable under injurious affection to the remaining land when an easement (for gas pipeline) is taken through the parent parcel?

1. Springfield

This acquisition case followed a rather unusual legal course. Rather than refer an unresolved acquisition dispute to the Land Court, the parties elected to refer the resolution to a commercial arbitrator but to follow the provisions relating to compensation in the *Acquisition of Land Act*. Dissatisfied with the arbitration decision, the resuming authority appealed to the Supreme Court– which could only hear such a case under the *Commercial Arbitration Act 1990* where there had been an error of law in the decision.

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 there was an 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.

Enhancement

The first key issue in the case was whether there was any enhancement to the SLC adjoining land for the purposes of s20(3) of the *Acquisition of Land Act*. This section stated-

> "In assessing the compensation to be paid, there shall be taken into consideration, by way of set-off or abatement, any enhancement of the value of the interest of the claimant in any land adjoining the land taken or severed there from by the carrying out of the works or purpose for which the land is taken."

Opposing arguments

The applicant's case was that the value of the SLC land would be enhanced by the carrying out of the works, which were the extension of the transport corridor west from the Springfield Town Centre. The Transfer Land was being taken for the carrying out of that work or for that purpose, although it would constitute only a very small part of the overall land required. The respondents' case was that the purpose for which the Transfer Land was being taken was merely to effect a realignment of the designated transport corridor, which, of itself, would cause no enhancement in the value of their land. That argument was upheld by the arbitrator.

What were the relevant works

In considering s20(3), the arbitrator was required to identify the works or purpose for which the land was taken. The Court held that the "purpose" within s20(3) would appear to correspond with the "purpose" for which there is a power of compulsory acquisition, *Acquisition of Land Act* (s.5). That indicated that the purpose was to be understood as the public benefit or end to be achieved, rather than some means to that end, and that the arbitrator's identification of the purpose was incorrect.

In finding as to what were the relevant "works" for enhancement purposes, the Court referred to the High Court decision of *Marshall v The Department of Transport* for support; that held that in the operation of s20(1)(b) of the Act, the relevant exercise by the constructing authority of its statutory powers was not to be confined to what occurs on the land acquired from the claimant. Although *Marshall* concerned injurious affection, and not enhancement under s20(3), it strongly indicated that the purpose of s20(3) would not be served by limiting its operation to the effect of such of the works as are carried out upon the acquired land.

The Court concluded the arbitrator erred in identifying the relevant works or purpose. In particular, the arbitrator did not properly consider what constituted the relevant works for which the land was taken. But for the proposal to construct the road west from the town centre, the Transfer Land, consisting of some 7 hectares, would not have been required. The *works* for which this land was required could not be realistically defined in terms of part of the width of a relatively small section of a proposed road. As to the relevant *purpose,* it was not to realign something depicted upon a map, but to provide some of the land which was required for the construction of a single road, (which the applicant was prepared to accept was the road yet to be constructed from the town centre westwards.)

What was the "adjoining" land?

The second issue involved the interpretation of s20(3); what was the extent of the "land adjoining the land taken" for the purpose of valuing the enhancement. The Transfer Land was made up of parts of four lots. SLC argued, and the arbitrator accepted, that the balance of these four lots constituted the adjoining land. The applicant argued that the adjoining land included other land owned by SLC which in turn adjoined those lots. The extent of that land was much greater and consequently so too the likely betterment for the purposes of s 20(3). It was that betterment which was the subject of the applicant's valuation evidence in the arbitration.

The applicant accepted that, in this statutory context, "adjoining" does mean physically contiguous. The question was whether it was relevant that SLC's land had been subdivided into several lots, and that not every lot was contiguous with the land which was taken.

The Court held that the starting point was that s20(3) made no reference to a "lot " or "lots" but to "land". The purpose of s20(3) should be unaffected by whether the adjoining land consists of several parcels, each capable of separate disposition, or of but one parcel. The effect of any "betterment" should be limited to land which has a certain connection with that which is taken. There was no evident reason why that connection should be according to how the land has been surveyed. The Court thus accepted the applicant's argument.

Conclusion

1. The applicant had established that the arbitrator erred in law.
2. The effect of that evidence was that the enhancement was of such an extent as to easily exceed the value of the Transfer Land.
3. The award should be varied by substituting "nil" as the assessed compensation.

2. Commonwealth Bank ("Money box")

Last year's review referred to a NSW Court of Appeal heritage valuation decision relating to land occupied by the Commonwealth Bank on Martin Place (Sydney CBD) -sometimes known as "the Moneybox". This same property was again the subject of a significant Land and Environment Court decision for subsequent valuation periods.

This new decision is now noted because of the different (more refined) valuation approaches adopted and accepted by the Court.

The earlier decision

The Valuer-General's approach proceeded on the assumption that the primary use of the property was not materially different from that of a typical modern office building in the Sydney CBD unaffected by heritage restrictions. His first step therefore, was to derive a land value of the property, unaffected by the heritage restrictions, of $1,900m2 of net lettable area (NLA), based on comparable sales evidence of similar unaffected sites.

His second step was to adjust that figure to take into account the heritage restrictions on the property, including the design and layout inefficiencies of the building, by comparison with modern office buildings. He identified areas of the building which would not attract the same commercial rentals as other parts of the building due to the restrictions, and applied various discounts to various parts of the building, resulting in an average figure of $1,749 m2 of NLA.

An alternative approach by the appellant in the earlier case based on first determining the improved value of the building from a capitalisation of rent was rejected by the Court as legally impermissible.

The present case

Originally constructed between 1913 and 1916 and extended or refurbished at various times thereafter, the Moneybox is a twelve storey commercial office building, including a ground-floor retail banking chamber and mezzanine, with two basement levels. The net lettable area (NLA) of the Moneybox was 24,530.30 m2, representing a building design efficiency of 77.66 percent, somewhat less than a new modern building.

The court made an initial observation that a valuation approach of making adjustments to the previous valuation from subsequent market conditions had much to commend it in an appropriate case. It stated these earlier valuations had been forged in the heat of adversarial contest and confirmed on appeal.

The background and rationale of the special approach to heritage-listed properties was alluded to by the Court. Land on which there was a building of heritage significance was generally subject to legislation or planning controls which impeded demolition and redevelopment. It would be unjust to value such land as though all its potentialities were free from heritage restrictions when, owing to heritage restrictions

upon its use, the land is of lesser value. Recognising this, the NSW legislature has created a regime for valuing heritage-restricted land.

It ensured that land was not overvalued when heritage restrictions on the land have the effect that continuing its existing use was less valuable than any use to which the land could be put if the improvements on it had not been made.

What the valuers were required to do was to value the property as vacant land upon the basis that: first, that it would only be used for the purpose for which it was being used at the date of valuation;[1] and, second, that the only building in which that use could be continued was the existing building upon the land, with all its perceived benefits as a heritage building on the one hand and its perceived deficiencies in terms of its design, internal layout etc., on the other.

Value unrestricted by heritage

Where no heritage restrictions are taken into consideration, the highest and best use of the land at the valuation date coincided with its existing use for the purpose of office accommodation, ground floor retail and basement uses including parking – albeit in a new, modern building of the same height as the Moneybox (by reason of non-heritage planning restrictions). That was typically the highest and best use of sites in the Sydney CBD. It was to be assumed that a developer would seek the largest amount of income-producing NLA in a new, modern building, as this would produce the greatest capital value on completion of the building.[2]

The valuers agreed on a figure of $2,155.00 per m² metre of netable area (NLA) for the land value of such a site without the heritage restrictions.

Rental differential adjustment

The valuers calculated the net rental differential, expressed as a percentage, per square metre of NLA for a new, modern building on the land and for the Moneybox. This differential was then deducted from the agreed non heritage rate of NLA.

In the present proceedings neither valuer relied on the rentals actually achieved for the Moneybox because those leases contained unusual provisions and the rentals actually achieved were significantly in excess of their market rental valuations. Accordingly, the rental actually achieved for the Moneybox was of no assistance.

The valuers expressed their opinions as to the net effective rent for each floor, the basement areas and carpark in the Moneybox at the respective valuation dates. They derived the average net effective market rental per square metre of NLA by dividing the total net effective rental of the Moneybox by its total NLA. In this way, they allowed for the impact of heritage restrictions on the rental value of any affected parts of the Moneybox.

The proper comparison was to assess the rental differential by comparing (a) the rent for a hypothetical new, modern building on the land at the valuation date with (b) the

[1] This is not a requirement under Queensland Legislation.
[2] Issues of what is economically feasible may also impact.

rent for the Moneybox in its actual condition at the valuation date. In order to make a meaningful comparison of rent for a hypothetical new, modern building and rent for the Moneybox, it was necessary to do so as at the same date.

The legislation required regard to be had to the Moneybox in its existing condition - it was the very building with all its perceived benefits and deficiencies that attracted the heritage restriction.

The Court adopted the Valuer-General's rental rate of $475/m2 for a hypothetical new, modern building, and the appellant's rate of $300/m2 for the Moneybox in its actual condition. That represented a differential of 36.84 percent.

The Valuer-General's assessment of $475m2 net effective rent of NLA for a new, modern building on the land was based on a rental analysis of a substantial number of specific leasing transactions for Sydney CBD buildings where binding leases had been entered into. The Court considered that this assessment is reliable and adopted it.

Building efficiency adjustment

The appellant's valuer made a downward adjustment of some 10 percent from the unrestricted land value to allow for the Moneybox's lower design efficiency. The Court held that if one starts with the NLA basis, there was no reason to adjust further for building efficiency. The NLA already has building efficiency factored in.

Adjustment for differing lettable areas for the Moneybox

The Court held that if each part of the building was rental valued and therefore account taken of the heritage restrictions, then this adjustment should not be made.

Conclusion

The land value of the Moneybox was determined at anon restricted land value $2,155/m2 of NLA
Less the rental differential 36.84%
$1,361.10/m2 of NLA x NLA of Moneybox 24,530.3 m2
Resulting in a determination of $33,388,191.00

3. AMP/Riverside

This case concerned the unimproved capital value of two major CBD properties (Riverside and the AMP Centre) located in the area known as the 'Golden Triangle'. The most significant issues in the case concerned how development approvals and infrastructure credits should be addressed in light of the 2008 amendments to the *Valuation of Land Act 1944,* (VLA) (such amendments were retrospective).

Development Approval

Under the 2008 amendments, development approvals are considered part of the unimproved value of the land (section 3(2B)). The development approvals, or their earlier equivalents, related to AMP when commenced in 1978 and the Riverside when commenced in 1984. The appellant's basic contention was that, in the circumstances of the current appeals, there was no evidence that the existing approvals added any value to the land. The respondent argued that the benefits of the development approval included:

i. savings in time (because the site was able to be developed immediately),
ii. saving in consultancy fees including architects, town planners etc, and
iii. savings in council charges.

The Court held that the respondent erred in treating the approval that existed as if it where in fact a development approval lodged by the developer and approved by the council for a development consistent with the current highest and best use for the land. That was not the case. The existing authorities and / or approvals were concerned with merely affording protection for the existing use of the land and the improvements thereon.

The existing authority / approval would provide comfort for a purchaser of the land in its improved state. That was because they protected the existing commercial use of the property; but that was an entirely different situation from confronting that of the valuer valuing the land on the basis that, as at the date of valuation, the improvements on the land did not exist. Despite the recent amendments to the (VLA), that was still a fundamental requirement to a valuation exercise prescribed by section 3(1b).

The Court accepted the appellant's evidence that, as at the date of valuation, the prudent purchaser would not consider that the existing authorities or approvals added any value to the land.

The Court distinguished its finding in the instant case from the decision in the "Pacific Fair" Land Appeal Court decision. There, a significant allowance was made for the added value a development approval gave to the land. However, in that case the parties accepted that the land should be valued on the basis that a development approval was in place. The only dispute was about the quantum of such approval. This Pacific Fair conclusion is to be contrasted with the present appeals where there was quite specific evidence about the type and nature of the approvals which pertained to the land as at the date of valuation and evidence that the worth of those approvals was nil.

Infrastructure Credits

In determining whether these were part of the unimproved value of the land the Court considered two separate provisions of the (VLA).

First, section 3(2B) of the *Valuation of Land Act 1944* states that the improved value of the land includes any increase in the value of the land that has happened in connection with a development approval or other approval or authority relating to the land or improvements thereon.

The Court concluded that the existing infrastructure credits were the product of or arose out of development which was authorised by permits issued under previous town planning regimes. There was nothing to suggest that the authority permitting development to occur some decades ago had any relevant status other than to provide a springboard for the operation of the *protection* provided by the provisions of the IPA. The conclusion was that any increase in value arising from existing infrastructure credits associated with the subject lands were not caught by section 3(2B) of VLA.

Second, the Court held that it was also necessary to consider the treatment of infrastructure credits under the valuation exercise prescribed by section 3(1b), which required the valuer to value the land on the basis that, as at the date of valuation, improvements on the land did not exist.

Since the removal of "intangible improvements" from the definition of improvements in section 6(1) of (VLA), infrastructure credits could not sensibly fall within the definition of the improvements for the purposes of the Act. In this context, infrastructure credits could be distinguished from the operations of man which enhance the value of the land. While the building works which bought into existence the credits were undoubtedly the operations of man, the credits themselves were not. They existed by virtue of the operations of the policies of the Brisbane City Council under its town planning regime.

Under the artificial valuation exercise prescribed by section 3(1b), the notional prudent purchaser acquiring the land as at the date of valuation, while acquiring it absent any improvements thereon, would nonetheless be acquiring it with the benefits, if any, of infrastructure credits attaching to the land.

The evidence showed they were in, a relevant way, attached to the land to be valued and would form a part of the value of the land in its unimproved state. To ignore the infrastructure credits in the valuation exercise would be to value the land as if it were in a factual vacuum.

The credits were held to have a value in dollar terms for the prudent vendor that he would not relinquish for free. On the other hand, the prudent purchaser would have to acknowledge that the benefits to be derived from the credits are something that he should have to pay for.

In the absence of any decisive evidence about the value of the infrastructure credits in these appeals, the Court held the appropriate starting point for determining the value was by reference to what might be saved by the purchaser in developing the land. However, their value should not be treated on a cash equivalent basis as at the date of valuation. That was because the payment of credits would be deferred until the completion of the project. According to the respondent’s valuer, this could take three to four years. It was thus appropriate to discount the value of the credits to take into account the deferral of their receipt. The Court adopted a discount of about 20% for each of the properties.

Evidence of the value of the infrastructure credits was provided by the Brisbane City Council to the respondent. After the discount, the Court adopted infrastructure credit figures of approximately $390,000.00 for AMP Place and $782,000.00 for Riverside.

4. ISPT

ISPT is a decision of the Victorian Court of Appeal, on appeal from the Valuation Division of the Victorian Civil and Administrative Tribunal (VCAT), concerning a "site" valuation of land in the Melbourne CBD. The subject land contained a building with a ground level foyer and retail tenancies, 25 storeys used for office purposes and two basement car parking levels. The zoning permitted a variety of uses including commercial office tower development and residential uses.

Several of the issues considered are directly relevant to the range of Brisbane CBD appeals recently before the Queensland Land Court.

Issues in the decision which warrant mention include:

1. The role of a valuation court (or tribunal) in considering evidence and making its determination; how it differs for a "specialist" tribunal.

2. How precisely does the "highest and best" use of the subject land need to be described.

3. A brief analysis of the leading authorities on how to approach the determination of unimproved land (*Tooheys* and *Tetzner*).

4. Consideration of problems in the use of <u>improved</u> sales.

5. In using unimproved sales, whether the tribunal had "pieced together" its own valuation rather than merely evaluated the evidence before it.

1. Role of the valuation tribunal

The Court considered the leading South Australian decision of *Brewarrana* (1973) on this issue. It noted that:

- The creation of a special division in a court to deal with a particular class of case is not intended to turn the presiding judge into an independent expert in the very field in which testimony will be tendered to him that he will be called on to evaluate. It would never occur to a trial judge who, for example, had heard many cases in which expert medical evidence had been tendered, to choose between the conflicting testimony of two medical witnesses by applying to it his own medical knowledge.

- The judge cannot assign to himself the role of an expert who is, in any respect, first amongst equals.

- The Tribunal must act on the evidence, and if any of it is, in any way, ineffective, incomplete or irreconcilable, then it must make

such use as it can of what other evidentiary material is available to correct, complete or reconcile the evidence.

- The Tribunal is entitled to accept part of the evidence of one expert valuer and part of the evidence of another valuer and make appropriate adjustments in arriving at the true valuation.

- Where an arbitrator is chosen for his special knowledge, eg, where a medical question comes before a medical man, or an engineering question comes before an engineer, such an arbitrator is not bound to accept evidence, even if uncontradicted, which his experience makes him think is incredible.

2. Highest and best use

The Court noted that the first task of the valuer is to determine what is the highest and best use and then value the land on that basis. It also stressed:

- the highest and best use of a particular piece of land is flexible and may, at a particular point in time, be to "bank" the land with a view to future development rather than to use it actively.

- Because the land is assumed to be without improvements for the purposes of the ascertainment of "site" value, such land may attract not simply buyers seeking to maintain land in its present condition and seek a rental return but also potentially land bankers, office developers and residential developers.

- it is not necessary to identify a precise highest and best use of the land in order to assess site value. If the highest and best use must be ascertained, it might be identified in general terms: such as an intense use for office, residential, hotel, club or retail purposes (or some combination of these), without specifying a single, precise use.

- if a sale was in respect of land with a different use profile, then it might be disregarded or be accorded less weight. But where realistic options for the development of land might be a residential tower or an office tower, the sale of such land is likely to be relevant even if the actual purchaser had another type of development in mind when the land was purchased.

- specifically rejected was the proposition that at the relevant time there were two separate and distinct markets for vacant land in the central district of Melbourne, one for office and the other for residential redevelopment.

- the pattern of development within the city (Melbourne) over the last 10-15 years has changed considerably, and can no longer be simplistically delineated between office and retail.

- it is not unheard of for developers to change their project to an alternate use during the project, say from residential to office.

3. Toohey and Tetzner

The Court addressed the leading authorities bearing on the proper approach to assessment of “site” value. *Tooheys* (1930) and *Tetzner* (1958) considered the concept of unimproved value (a similar concept to site value). In Toohey’s case the observation of the Privy Council was:

> “Words could scarcely be clearer to show that the improvements were to be left entirely out of view. They are to be taken, not only as non-existent, but as if they never had existed. It is, therefore, to approach the question from a completely wrong point of view to begin with a valuation which takes in the improvements and then proceed by means of subtraction of a sum arrived at by an independent valuation in order to find the required figure. What the Act requires is really quite simple. Here is a plot of land; assume that there is nothing on it in the way of improvement; what would it fetch in the market?”

The Court noted the qualification to this approach expressed by the Privy Council in *Tetzner* that the assumption required by the statute was that the improvements ‘had not been made’ – not that ‘they had never existed’. It followed that improvements on all other land should be taken into account in assessing the unimproved value of a particular property, even if those improvements were consequential on the improvements required to be disregarded.

4. Use of improved sales

The Court alluded to the potential difficulties inherent in the analysis of improved sales:

- the underlying difficulty with the estimation of site value by way of the deduction of the added value of improvements is that there is no separate market for improvements. If the value of a building is assessed by depreciating its cost, the adopted depreciation necessarily involves a significant element of judgment.

- The appellant’s valuer used a “cost less depreciation” method to determine the added value of improvements, which (together with other deductions in respect of existing tenancies and holding costs) was subtracted from the sale price of the property to deduce site value. There are two main problems with this method. First, the selected depreciation rate is not based upon market evidence. Second, when there are substantial improvements on the land, the method is extremely sensitive to the selection of the depreciation rate.

5. Was the Tribunal determination improperly pieced together?

It was held that the Tribunal had not improperly "pieced together" its own valuation because:

(a) It stated at the outset that it did not propose to act other than on the basis of the evidence;

(b) it went on to describe its approach to the valuation issues as "considering the intellectual foundations of each valuation and the evidence supporting each valuation"; and

(c) it summarised the evidence of each valuer and proceeded entirely by reference to comparable sales identified in the valuers' evidence;

It was clear that the exercise undertaken by the Tribunal was one of evaluation of the valuers' evidence. Its ultimate conclusion was that the evidence of two valuers for the respondent as to value, insofar as they relied upon the sales of vacant or near vacant land, should be accepted.

5. Pacific Fair

The landholders appealed the decision of the Land Court determining the valuation of Pacific Fair "super regional" Shopping Centre on the Gold Coast at $128,200,000 (relevant date 1.10.2002). The landholders now argued for a figure of $39,400,000 (best case) or $46,700,000 (worst case).

Pacific Fair was initially heard substantially in conjunction with Chermside "regional" Shopping Centre (Chermside). Separate Land Court decisions were given for each of these cases and an appeal by Chermside to the Land Appeal Court was determined in 2007, overturning a number of key findings of the Land Court. Since the Chermside decision, the *Valuation of Land Act 1944* (VLA) was substantially amended in 2008 with retrospective affect.

Certain key issues decided in the Chermside decision were raised again in the current Pacific Fair appeal. The Court was required to consider the effect, if any, of the 2008 amending legislation on these issues. These included:

- Should the value of leases be included in the unimproved value of the land?
- Should the Court consider the specific successful trading history of the shopping centre and assume that the notional creation of such centre at the relevant date would be "risk free" (the Nathan point)?

The proposed 2008 VLA amendments were subsequently amended in important areas after introduction into Parliament following representations to Government by peak industry bodies representing the landholder interests.

The Court was required to determine to what extent the history of the 2008 legislation, especially the changes to the legislation first introduced, could be used in considering the meaning of the legislation as finally passed.

It was also noted that under the new "indexed" valuation provisions introduced in the 2008 amendments, the Chief Executive issued an amended figure of $47,800,000 in the case of Pacific Fair – that figure would apply if less than the figure determined by the Court under appeal.

In this appeal, the position of the respondent was essentially that the amendments to the VLA meant that Chermside appeal was no longer good law and the VLA amendments had the effect of reinstating the full force and effect of the decision of the Land Court. The appellants disagreed.

Central to the case for the appellants were the following propositions:

(a) As the valuation exercise under s.3(1)(b) of the VLA required, as at the date of valuation, the assumption that the improvements did not exist, then too it must be assumed that the leases associated with the improvements did not exist.

(b) The valuation exercise urged by the respondent ignored the requirement for the valuer to assess the value of the fee-simple of the land in the notional unimproved state required by 3(1)(b).

(c) Under the same valuation exercise it would be wrong for the valuer to assume that, despite the successful trading history of the shopping centre, any improvements on the land (deemed not to exist on the valuation date) would be capable of being replaced immediately after that date free of any business risk.

(d) The construction of s.3 of the VLA contended for by the respondent would amount to an unintended imposition of a tax on entrepreneurial skill and effort.

The Court held:

1. As the VLA (as amended) was retrospective in its operation, it was the Act as amended that the appellants now had to contend with, not the Act as it was at the time the appellants' case was heard in the Land Court and the Chermside appeal was determined by this Court.

   The Court was not aware of any previous examples of legislative amendment targeted at specific tax payers in Queensland, and none were identified during the conduct of this appeal.

2. Whatever may have been the position in the past, there was now no general rule which prevented this Court having regard to the history of the amendments of the VLA where appropriate. Section 14(b) of the *Acts Interpretation Act 1954* governed the approach which this Court ought to adopt in deciding whether or not it should have regard to extrinsic material.

3. In the circumstances of this appeal regard could be had to the following extrinsic material:

   - The Minister's second reading speech of 26 February 2008.
   - The first version of the *VLA Amendment Bill 2008*.
   - The explanatory notes to the first version of the Bill.
   - The second version of the *VLA 2008*.
   - The explanatory notes to the second version of the Bill.

4. While it was a task of the Court to construe the language of the legislation and not the language of extrinsic material, the circumstances and history of the 2008 amendments to the VLA and the ambiguity associated with the words used in the Act justified the reliance placed on extrinsic material.

5. The valuer must ignore the existence of leases associated with improvements on the land because, if the improvements must be assumed not to exist under

s.3(1)(b), so to must the leases associated with those improvements be assumed not to exist.

6. The exercise prescribed under 3(1)(b) required the valuer to take as a given that the notional sale of the land was to take place on 1 October 2002 and then proceed on the basis that at that date that the improvements to the land did not exist. The valuer should take a snapshot in time of the subject land absent the improvements. It was the facts that exist at that time that were relevant and the most significant fact (albeit an assumed one) here was that there are no improvements on the land.

7. Had Parliament intended to include the added value that leases give to the land, it could have followed through with all the amendments to the VLA originally proposed in 2008. Instead, the then proposed ss 2(B)(a) and 4(c) were expressly abandoned for the stated purpose of clarifying that "invisible improvements related to the value of the business that is conducted on the land are not to be included in the value of the land".

8. When the historical background of the amendments to the VLA were put in context, it seemed quite clear that Parliament did not intend that the amendments construed in a way the respondent now contended. To conclude otherwise would render the legislative responses to representations made by the various business representatives little more than a sham.

9. There were also unattractive practical ramifications associated with the construction of s.3(1)(b) contended for by the respondent concerning the treatment of leases. First, it would impose a tax on the end product or value generated by the individual entrepreneurial skills and efforts of the taxpayers. Such consequences would be at odds with that which has been recognised broad policy which has underpinned taxation based on unimproved value of land in Australia for many decades.

10. Had Parliament intended such a radical change to the State's rating and land tax system, it would have said so in clear and express terms, as for example the manner in which included the increase in value associated with planning instruments and development approvals. Not only was such an intention not to be found in the words of the Act, it was clearly inconsistent with the stated objectives of the amendments to the VLA.

11. The second consequence was the impact the approach contended for by the respondent might have on the relativity of unimproved values assigned by the respondent to materially similar parcels of land. It would not be limited to major shopping centre sites. All manner of commercial properties could be affected, ranging from shopping centres of varying sizes to central business district properties and various tourist attractions.

    In the Chermside appeal, the Court commented on how the application of such an approach could lead to significant anomalies in the unimproved values being assigned to vacant sites in comparison with commercially improved properties; but for the improvements, the sites would otherwise materially be the same.

12. Also, on the respondents' approach, the unimproved value assigned to commercially improved parcels of land could be significantly affected by the standard of management skills applied to the business conducted on the land by the individual owners.

13. Once the value of a business conducted on the land was excluded from the concept of improved value when used in the Act, many of the conceptual difficulties associated with the application of ss3(2) and 5(2) of the VLA evaporated.

14. In the past, the term "improved value" when used in the VLA may have become confused with or merged with the concept of market value or capital value. Under the VLA, the valuer is required to value, calculate and estimate the worth of things which have been statutorily defined. Concepts of full market value of a property as discussed in *Spencer* may be somewhat misleading (*Spencer* was a compulsory acquisition of land case).

15. The assemblage of major tenants on the land did not confer on it its highest and best use. The latter would be largely determined by external objective criteria. In the case of a regional shopping centre these would include:

    - Appropriate town planning designations or the probability of achieving them.

    - The physical characteristics of the land (access, exposure etc), proximity and extent of competition and the socio economic profile of its catchment.

    Absent the right mix of those elements, no prudent developer would bother approaching prospective tenants. While the assemblage of major tenants might demonstrate or prove highest and best use, it was not a pre-requisite for the identification of that use.

16. There was no persuasive argument which would cause this Court to overturn what it said about the application of *Nathan* in the Chermside Appeal.

17. The VLA (as amended) required to be brought into account the value added by the development approval (DA), not merely the cost of obtaining it.

18. Interest rates: The cost to make the (site) improvements and the proper allowance for loss of interest on all outlays until such improvements become productive was a matter of evidence. The best evidence was that for projects such as regional shopping centres as they are typically drawn down fully on debt funding. Evidence that the minimum opportunity cost in such circumstances was the actual cost of borrowing the necessary funding. The appropriate interest rate applicable in the subject exercise was 7%.

19. Consistent with the conclusions that the land was to be valued at the relevant date as if it were effectively vacant and absence the tenants and leases, it was appropriate to allow for a period for securing leases. The program flowchart

indicated that process would take about 8½ months from the completion of the design phase to the time the owner would commence site works.

20. The unimproved value for Pacific Fair was ultimately determined at $47,490,000.

6. LGM

The claimant *LGM* was one of five lessees in a small suburban shopping centre on Brisbane north side. It conducted a video store on the leased land. Customers accessed the store, in part, by using walkways through a garden located between the existing roadway and a paved area outside the video shop.

The garden and access were resumed in part by the Council, thus depriving the claimant lessee of pedestrian access routes for customers through this area. No part of the leased land or the adjoining car park was included in the resumed area.

According to the lessee, it would now be difficult if not impossible to replace the four pedestrian access points taken by the resumption. This was because the works carried out by the respondent Council made the bank up to the shops too steep to be used by pedestrians.

LGM contended that, as a consequence of the resumption and the associated works, it had lost and continued to lose custom at its video store to a significant degree.

The preliminary issue of jurisdiction to be determined before the hearing of an application for compensation was: whether LGM had a right to claim compensation, under the *Acquisition of Land Act* (*ALA*) for the loss of pedestrian access points.

The Land Appeal Court held:

1. The *Retail Shop Leases Act 1994* applied to the lease in question and its provisions supplemented those of the lease and prevailed if there was any inconsistency.

2. Under the *Act*, “common areas” were areas used or intended to be used by the public. The walkways between the shrubs in respect of which the landlord provided pavers are or were used by the public. Those walkways were a feature of the shopping centre when *LGM* entered into the lease. To the extent that the landlord placed pavers as access points, they can be said to have been intended for use by the public. Section 6(2)(b) of the *Act* included, as an example of a common area, a “walkway”.

3. As the walkways were part of the common area of the shopping centre, the tenants had certain contractual rights under the lease and statutory rights under the *Act*. Those rights in respect of the walkways through the shrubs may be characterised as an “interest” in land pursuant to s.12(5) of *ALA*. *LGM* had a “right or privilege” in respect of the land resumed.

4. The recent Court of Appeal decision in *Sorrento Medical Service Pty Ltd v Chief Executive, Department of Main Roads* was followed in holding that the definition of “interest” in land was a much broader description of the nature of the interest than the common law applied.

5. Although the interest of *LGM* was not as objectively ascertainable as in *Sorrento*, the combination of the terms of the lease, the provisions of the

Retail Shop Leases Act and the uncontested evidence of defacto recognition by the landlord of the areas of land on the gardens as walkways suggested that the interest was not qualitatively different and by no means in the absurd category.

6. An attempt by the lessee to introduce additional evidence at the appeal was rejected. It was held that the new evidence was not necessary to avoid "grave injustice" to the appellant.

7. Griffiths

The *Northern Territory Land Acquisition Act (LAA)* permitted resumption of an interest in land by the Crown "for any purpose whatsoever". The issue in *Griffiths* was whether this provision was wide enough to allow private property rights to be compulsorily resumed for the benefit of a private individual (as opposed to the traditional "private" to "public" transfer).

Native title rights in unallocated Crown land were resumed by the Northern Territory Government so as to enable the granting of a Crown lease to a private individual for grazing and tourism purposes.

The native title holders challenged such resumption action, primarily on the basis that the legislation, despite its apparently general wording, did not permit the compulsory "private to private" transfer here under consideration.

The case eventually proceeded to the full High Court (all seven judges sat on the matter). By a five to two majority, the High Court decided that the *LAA* enabled the resumption in question. The majority of the Court considered the history of the *LAA*, in particular the removal of the term "public" from the purpose for which land could be resumed.

The majority held:

1. The *LAA* conferred power upon the Minister to acquire land solely to enable it to be sold or leased by the Territory for private use of another person.

2. The expression "for any purpose whatsoever" in the *LAA* must at least include the purpose of enabling the exercise of powers conferred upon the executive by another statute of the Territory. Those purposes include the exercise of the power conferred on the Minister by the *Crown Lands Act* to grant an estate and fee simple or lease of Crown land.

3. The removal of the term "public purpose" from the legislation may be readily understood as a removal by the Territory Parliament of any ground for the limitation of the statutory power, by reference to considerations that had prevailed in the *Clunies-Ross* case. (High Court appeal relating to Cocos Islands resumption).

4. This was not a case where the land was being acquired for an ulterior purpose so that there would have been an ostensible but not a real exercise of their power granted by statute.

The two dissenting judges (Kirby and Kiefel) provided compelling reasons as to why public authorities should not be permitted to resume land for the aid of a private individual. They did concede that such was within the power of Parliament to so enact but such should be done in the clearest and most specific terms. In their view the legislation in question did not meet such a test.

It is of interest to note their arguments against giving power to public authorities to acquire private land to aid a private individual.

- Citizens will accept the compulsory acquisition of their interest in land if this is done according to law with payment of just compensation and for the identified public purposes of the law maker. They will accept that in such circumstances their private interest must give way to the law makers' perception of the community interest. But the acquisition from A in order to transfer its interest in land to be for B's individual commercial gain is one of an entirely different character. It seems wrong that the coercive power of the State should be used to force an unconsented transfer from A to B where the operation of the open market has failed to generate the required bargain by means of normal arms-length dealing.

- Such acquisitions present the possibility of a powerful commercial party (harnessing sub-national government power) to squeeze out business competition, a strategy which is particularly effective if coupled with a threat to relocate an anchor business (and its accompanying jobs and revenue potential) to another urban centre.

- Such acquisitions also present the danger that public funds will be used to compensate, as here, the aboriginal owners for native title interests lost whereas the land is acquired for private individuals and companies that are thereby effectively subsidised by an often opaque transfer of public funds for private gain.

Kirby J acknowledged that the use of land acquired under the compulsion by a privatised utilities has complicated the traditional rationale of compulsory acquisition for public benefit in Australia. However, such acquisitions from private to public to private are generally addressed by specific infrastructure legislation. Under such legislation, governmental authorities have ordinarily retained the acquired land, conferring rights of use on private entities on the basis of published conditions.

Kirby J also observed that it will rarely, if ever, be the case that compulsory acquisition of land will be proposed without some supposed public benefit. It is also argued that the indirect flow on effects from private gain justify the characterisation of the beneficiary of the acquisitions as the general public or community (here that of the Northern Territory) so that the purposes may be regarded as public or governmental. However, there is no legal guarantee that such hopes or expectations, however genuine, will be fulfilled.

Kiefel J referred to cases where very wide purposes have been stated in acquisition statutes but the Courts have not countenanced the use of such power to benefit private interests. Of particular interest is the reference to the Queensland case of *Prentice v Brisbane City Council* [1966] where the Council was restrained from proceeding with an acquisition because its main purpose was to assist a private developer, notwithstanding that in a broad sense the interests of the city and its inhabitants were being served by the sub-divisions and the opening of the lands. (the resumption was for road access to Centenary Bridge and related Centenary suburbs development).

8. EFFINGHAM

This case is of importance for the consideration of a range of factors relevant to injurious affection to land of a resumee outside the acquired easement area. The easement in question was to provide for a major natural gas pipeline over a grazing property in northern Tasmania (bordering Bass Strait). The pipeline was all underground apart from a large valve and marker posts. The easement area was not fenced, thus not impeding free movement of vehicles and stock.

Precedent

In considering the injurious affection issue, the Court referred to the following cases establishing governing principles:

- *Marshall v Director General, Department of Transport* (2001) High Court:

  "Injurious affection does not include damage resulting from the act of severing the land. That is a separate head of damage. But it includes any other injurious consequence, resulting from the exercise of a statutory power, which depreciates the value of or increases the cost of using the 'other land'. If the exercise of the power limits the activities on or the use of that land, interferes with the amenity or character of the land, deters purchasers from buying the land or makes it more expensive to use the land, the claimant is entitled to compensation for injurious affection."

- *Spencer v The Commonwealth* (1907) High Court:

  "the test of value of land is to be determined, not by inquiring what price a man desiring to sell could actually have obtained for it on a given day, *ie*, whether there was in fact on that day a willing buyer, but by inquiring 'What would a man desiring to buy the land have had to pay for it on that day to a vendor willing to sell it for a fair price but not desirous to sell?'"

- *Joyce v Northern Electrical Authority of Queensland* (1974) QLD Land Appeal Court:

  "The principles to be applied in the compulsory taking of an easement are no different from those applying when the full fee simple is taken. This Court must restore, as best it may, the claimant, in money form, to the position which he enjoyed prior to the taking of the easement. For practical purposes it becomes a matter of assessing the extent to which he has been disadvantaged as the natural and reasonable consequence of the taking of the easement.

  The test is the attitude of the hypothetical prudent purchaser and the extent to which in the opinion of such a person the claimant has suffered diminution in the value of his property resulting from the erection of the transmission line over his land, the creation of the easement including where appropriate severance and injurious affection damage."

The Easement and the Adjacent Land

In assessing the claim for injurious affection the Court was quick to discount any effects that were directly related to the "easement area"; the amount of compensation

to be awarded for acquiring the “easement area” had already been agreed by the parties.

INJURIOUS AFFECTION ON CLAIMS

The Court considered a range of factors on this issue dismissing some and making allowance, as part of a composite award, for others.

Restriction on Use by the owner

The Court held that there was insufficient evidence that any restrictions imposed by the easement would affect use of area outside the easement.

Safety Risks

There was sufficient evidence that the probability of a catastrophe such as a rupture or leak of the pipeline was “less than likely” and “practically hypothetical”; “the hypothetical purchaser must be supposed "to be perfectly acquainted with the land, and cognizant of all circumstances which might affect its value".” Furthermore, there was no evidence of the respondent having to pay higher insurance premiums as a result of the presence of the pipeline.

No amount was awarded for alleged safety risks.

Occupational Health and Safety

Conflicting amounts were put forward by expert witnesses on this issue. It was held that only a minimal amount of compensation for updates on a worker’s instruction manual and training would be required.

Visual impact

The visibility of the valve site, protection boxes and markers constructed on the easement might have a significant detrimental effect on the sale price of the property.

Sound and smell

The small amount of gas discharge producing a hissing sound and slight smell, as well as a monthly helicopter inspection of the easement, was of no significant impact on the land.

Security

There was found to be an increased risk of trespassers and resulting theft or damage caused to the land.

Privacy

As the homestead was approximately 450 metres from the pipeline, the privacy of the homestead was significantly affected. The Court described it as follows:

> "As a result of the pipeline being there, some 36 visits per year need to be made to the valve site; there are the monthly aerial and annual vehicular inspections that I have referred to; and workers will need to come onto the easement for various other purposes at irregular intervals. For example, workers will need to come to a point quite near the homestead to construct a culvert over a creek in the near future. The presence of workers undertaking tasks related to the pipeline is likely to be more disruptive during lambing and calving than at other times."

The court made a separate allowance (5% reduction in the value of the homestead) under this sub-head.

Contamination

The increased number of visitors to the property was found to increase the risk of weeds, plant diseases and stock diseases (such as footrot); however the risk was assessed as minimal.

Digging near the easement

The restriction of digging on the "easement area" should not be considered in injurious affection; however, as reasonable and prudent caution required the resumee not to engage in digging near the easement, further compensation was required for the land adjacent to the easement. Also, drains may in the future have to follow a less direct course around the pipeline.

Heavy Machinery

Injurious affection resulted from the restriction on heavy machinery being used on or near the pipeline (machinery over 30 tonnes). Also, special precautions were needed in case a vehicle became bogged near the pipeline.

Restriction on Mining

A sand mining lease was renewed on the resumees land but with a restriction that mining not be conducted within 100 metres of the pipeline. It was held that the demand for the sand deposits was not high enough to cause injurious affection in this case.

Fencing

An increase in the number of gates was held to cause injurious affection, despite the fact that the gates might not be the responsibility of the resumee.

The Blot on the Title

The Court held that it was common ground that the registration of a pipeline easement was likely to have an adverse impact on the market value of the land. This was found to be significant since many farmers enjoy autonomy, and might be put off by having to liaise with a pipeline operator in relation to farming activities.

Final Award

The compensation for injurious affection was quantified as $50,350 for the reasons stated above. This was ordered in addition to compensation for the easement, GST and interest.

Table of Cases

1. State of Queensland v Springfield Land Corporation [2009] QSC 143

2. Commonwealth Custodial Services Ltd v Valuer General [2008] NSW LEC 130 *

3. GTP RE Limited v Department of Natural Resources and Water [2009] QLC 0078

4. ISPT v Melbourne City Council [2008] VSCA 180

5. Kent Street Pty Ltd v Department of Natural Resources and Mines [2008] QLAC 0021 **

6. LGM Enterprises Pty Ltd v Brisbane City Council [2008] QLAC 0214

7. Griffiths v Minister for Lands, Planning and Environment [2008] HCA 20

8. State of Tasmania v Effingham Pty Ltd [2005] TAS GL 55

* Confirmed on Appeal by NSW Ct of Appeal

** Under Appeal to Qld Ct of Appeal