Land Court-Legal Update-Case Summaries

GJ Smith
Judicial Registrar of the Land Court of Queensland

Presented-UQ Customs House- 22 July 2016*

Table of Contents

Inglis v State of Queensland [2015] QLAC 3

On 14 December 2007, the State of Queensland (*the State*) resumed land owned by the Inglis parties (*the claimants*) for prison purposes. The State of Queensland referred the claim to the Land Court on 5 November 2012 and on 12 March 2014 the Land Court determined compensation at $2,250,000 plus disturbance costs at $189,645.09 plus interest.

Both the State and the claimants appealed against the decision of the Land Court.

The main issues before the Court were:

1. Did the Land Court err in failing to recognise that the land had additional value by reason of the interest or potential interest of an adjoining owner?
2. Did the Land Court err in not accepting the evidence of the valuer for the State?
3. Did the Land Court err in not accepting that a greater allowance should be made for risk associated with the subdivision of part of the land?
4. Was the amount awarded for disturbance excessive?
5. Did the Land Court err in not holding that the delays in delivery of the claim for compensation, refusal to provide a valuation for negotiation purposes and the conduct of the Inglis parties between 2008 and 2012 constituted sufficient grounds for limiting interest to a period of one year from the date of the resumption?

The Court held:

1. The Inglis parties failed to establish that the Land Court erred in not attributing a greater value to the land by reason of its attractiveness to an adjoining owner, Darwalla Co.

2. The State has failed to establish that the Land Court erred in assessing the value of the resumed land and did not err in not accepting the valuation assessment of the valuer for the State.

3. The Court was correct to conclude that a purchaser would consider it likely that a subdivision of Lot 238 into two allotments would be approved, such a subdivision not being in conflict with P-41 of the Reconfiguration Code.

4. The State failed to demonstrate that the Court erred in determining the amount to be allowed for disturbance. The Court noted the following:
    - The Court may have been assisted with its determination if the State had put forward evidence to demonstrate that the amount which it contended was reasonable for the preparation of the claim. There was no error by the Court in observing that the State had not produced any such evidence.
    - In such a complex case, it was open to the Court to find that it was reasonable to incur costs for the preparation of reports, particularly in light of the size of the claim, and the real prospect that it would be litigated.
    - The evidence that was available to the Court provided a sufficient basis to conclude that the rate charged by Counsel was reasonable, given the nature of the case. The State identified no error and produced no other evidence.

5. The evidence does not establish that the claimants were guilty of unreasonable delay in progressing their claim. The reasons of the Court adequately record the finding in relation to the conduct of the claimants, and the matters the Court considered relevant to the exercise of the discretion. The State has failed to demonstrate that the Court erred in relation to the award of interest.

Moreton Bay Regional Council v Mekpine Pty Ltd [2016] HCA 7

Background

Mekpine Pty Ltd (the respondent) held a retail shop lease in a shopping centre over part of what had been Lot 6 (the former Lot 6). This lot was amalgamated with the adjoining lot (the former Lot 1) to form one new amalgamated lot, the new Lot 1. The respondent's lease was endorsed on the registered survey plan of the new, amalgamated Lot 1 as an 'EXISTING LEASE ALLOCATION'.

The terms of the lease gave the respondent an entitlement to use 'Common Areas' of the 'Land'. 'Land' was defined as the former Lot 6. The Moreton Bay Regional Council (the appellant) resumed land from part of the new Lot 1 that was previously part of the former Lot 1. The resumed land was never part of former Lot 6.

The respondent brought proceedings seeking compensation on the basis that it had gained an interest in the resumed land in accordance with s 12(5) of the *Acquisition of Land Act 1967* (the ALA). In the alternative, the respondent claimed it had an interest in the resumed land as the definition of 'common areas' in the *Retail Shop Leases Act 1994* (the RSLA) should be substituted for the definition of 'common areas' in the lease agreement.

The Land Court accepted at first instance accepted the respondent's contention.

The Land Appeal Court reversed this decision, holding that amalgamation did not confer any interest beyond the land previously comprising former Lot 6.

The Queensland Court of Appeal held that the respondent did have an interest in the resumed land as the reference to 'Land' in the lease became a reference to the new Lot 1. The Court of Appeal also accepted the respondent's contention regarding the RSLA .

The issues before the High Court of Australia were:

1. Does s 182 of the *Land Title Act 1994* (the LTA) confer on the respondent a compensable interest in the resumed land as a consequence of the registration of the survey plan of the amalgamated lot 1 upon which the lease was noted as an 'EXISTING LEASE ALLOCATION'?
2. Did the definition of 'common areas' in the RSLA substitute the definition of 'common areas' in the lease agreement?

The High Court of Australia held:

1. When former Lot 6 was amalgamated to form new Lot 1, former Lot 6 ceased to exist and the lessor took its interest in new Lot 1 subject to the respondent's registered interest. Section 182 of the *LTA* did not operate to increase the respondent's rights beyond the former Lot 6.

2. There is nothing in the lease agreement which suggests that the definition of 'Land' should be taken to include not only former Lot 6 but also such other land as with which former Lot 6 might be amalgamated.

3. 'Land' for the purposes of the lease agreement means the land comprised in the former lot 6 and therefore excludes so much of any common areas as may have been comprised in the remainder of new Lot 1.

4. Since there is no operative provision of the RLSA that expressly incorporates the definition of 'common areas' into retail shop leases, the definition of 'common areas' in the RSLA must be prima facie read as confined to that Act.

5. Considering s 20 of the RSLA, there is no relevant inconsistency between definitions unless there is a difference between them that is productive of a difference in the effect of an operative provision according to which definition is applied. There are no relevant provisions of which the effect would differ according to which definition of 'common areas' is applied.

6. The statutory definition of 'common areas' did not supplant the definition in the lease agreement.

7. The respondent does not have a compensable interest as defined by s 12(5) of the ALA in the resumed land.

Appeal from the Queensland Court of Appeal in *Mekpine Pty Ltd v Moreton Bay Regional Council* (2014) 35 QLCR 361; [2014] QCA 317 allowed.

McDonald v Department of Transport & Main Roads [2015] QLC 28

On 29 August 2008, the Chief Executive, Department of Transport and Main Roads (DTMR) resumed land at Lutwyche owned by Alyssa Jade McDonald (the claimant).A home was situated on the land. The claimant sought compensation pursuant to the *Acquisition of Land Act 1967* (the AOLA).

The main issues required to be determined were:

1. Is the claimant entitled to compensation pursuant to s.20 AOLA for the loss of an exemption from capital gains tax (CGT) caused by the resumption?
2. Was there a loss of the CGT exemption caused by the resumption?

The Court held:

1. Special Value-the resumed land had no special factor of the kind referred to by Callinan J in *Boland* v *Yates.* The CGT exemption arose only because the claimant had chosen to establish her principal place of residence there, this choice could have been made in respect of any residential property in Queensland. The tax is personal to the claimant as a taxpayer and is not related to the land itself so as to constitute special value. The decision of the Land Appeal Court in *Theo v Brisbane City Council* is applicable. The benefit of the exemption from CGT liability was purely personal and did not form part of the estate or interest of the claimant in the land taken. The loss of that benefit did not ground a claim for compensation for special value under the AOLA.

2. Disturbance-to succeed on this basis the claimant must establish an economic loss which results naturally, reasonably or directly from the acquisition. However, the claimant has not established any such loss as she has not incurred any liability to pay CGT and as there is no evidence that she is likely to incur any such liability at a definite time in the future, any liability to pay CGT in the future could at best be described as contingent.

3. At its highest, the claimant has lost the benefit of the CGT exemption, however that loss has not translated into an economic loss or liability incurred or likely to be incurred. Callinan J in *Boland v Yates* applied.

4. A further compelling reason why the claim cannot succeed is that it is likely that the claimant no longer had the benefit of the CGT exemption for the resumed property as at the date of resumption because she was no longer an Australian resident for tax purposes, having lived and worked overseas for four years. Cessation of her status as an Australian resident for tax purposes was a 'CGT event' which would render her liable to CGT under s 104.160 of the *Income Tax Assessment Act 1997.*

Edgarhead Pty Ltd v Valuer-General [2015] QLC 18

This appeal pursuant to s.155 of the *Land Valuation Act 2010* (the LVA) concerned a site valuation of $510, 000 as at 1 October 2013 of land situated near the banks of Forest Lake. The land had unrestricted lake views, an area of 540 m² and was improved with a two storey, early 2000s brick home. Forest Lake is 18 km SW the Brisbane CBD. The appellant estimated a site value of $400,000, with a ground of appeal alleging that the amount was an over-valuation.

The Land Court noted the following points relating to the *Land Valuation Act (*LVA*)*:

- Section 7(a) LVA- subject land is improved non-rural land-the value to be determined is its site value.
- Section 19(1) "*If land is improved, its site value is its expected realisation under a bona fide sale assuming all non-site improvements for the land had not been made."* The *co*mbined effect of these provisions is that the current non-site improvements on the land are to be ignored.

Appellant's Case-was based on sales of improved properties in the same street. The appellant contended that the site value could be no more than $400,000 i.e. appraised value $750,000 less $ 350,000 (building value) = $400,000. The Appellant also relied on sales of vacant land at Springfield Lakes as there were no vacant sales in Forest Lake, contending that as the two improved sales and the two vacant sales with lakeside proximity in Springfield Lakes were similar, this demonstrated that the Valuer-General's valuation of the subject was excessive.

A further contention by the appellant was that the VG's valuation was out of relativity with the valuations of similar properties in the same street e.g. a much larger site had an identical value and further that a 10% increase was not justified because the RP Data statistics showed that the median land price of sales in Forest Lake has decreased each year since 2010 from $325,000 to less than $250,000.

Valuer-General's Case-VG's valuer assessed the site value by direct comparison with 5 sales of vacant or lightly improved land e.g. one sale in Westlake had river glimpses, an inferior sale in Forest Lake and three other sales in the Sunnybank/Sunnybank Hills area.

Land Court's observations re sales evidence:

- Valuation - two ways-1.comparable improved sales or 2. comparable unimproved/ lightly improved sales
- Preferred approach- are unimproved or lightly improved comparable land- avoids difficulty re assessing the value of the improvements and allows simpler comparison i.e. less room for differences of opinion re the value of improvements (*Clough v The Valuer-General* cited)
- No comparable lightly improved sales proximate to the subject-were provided by either party.
- Sales Comparability – VG relied on vacant or lightly improved sales, however the Court determined that only VG's Sale 1 was comparable with the subject. The Court noted following points from *Leichhardt Municipal Council v Seatainer Terminals* P/L:
  - DIFFERENCES- it is a question of fact and degree whether a sale cannot be regarded as comparable i.e. the differences may be so great that a Court may hold that the sale is in no sense comparable.
  - ADJUSTMENTS required to be made may be made are so great that the sale can provide no evidence of the value to be determined and no basis upon which the value can be assessed.
  - LAND COURT- decided that the differences between VG Sales 3, 4 and 5 were such that the sales were not comparable and should not be relied on e.g. differences re location, distances from subject/CBD, age/style of development, lake and greenspace views and availability of recreation areas.
  - VALUER-GENERAL'S SALE 2 in Forest Lake was inferior, had no lake views and a site value of $260,000 i.e. $250,000 less than site value of the subject, the Court observed that this alone demonstrated that the sale 2 was not comparable.

  - The absence of detailed evidence regarding the land or improvement made any meaningful comparison of the appellant's sales impossible. The two unimproved sales at Springfield Lakes took place after the date of valuation and had applied Valuer-General site values of $197,500 and $235,000. These sales do not appear comparable given the appellants estimate of $400,000 for the site value of the subject.

The Court observed that there were insufficient lightly improved sales to determine site value and noted the following extract from the High Court decision in *Maurici v Chief Commissioner of State Revenue:*

> *"A fair estimate [of the value of the subject land] could only be made here on the basis of a fair, that is to say, a reasonably representative group of comparable sales. A group of comparable* ***sales cannot be representative if it does not go beyond sales of scarce vacant land****."*

The Court considered that the VG's valuer should have analysed improved sales in the area of the subject, for the purpose of this valuation. The Court again noted *Maurici*:

> *"But that does not mean that the respondent is entitled to ignore reasonably contemporaneous sales of comparable improved land. Such sales, particularly in the case of a scarcity of vacant land cannot be disregarded. The contrary approach is required by the Act."*

The Court, while noting the difficulty in assessing the value of the improvements, observed that such difficulties can be dealt with by an experienced valuer with reference to s.25 of the LVA.

The Valuer-General's sales evidence was insufficient to support the applied valued. The Court was unable to conclude from the appellants sales or other evidence that the valuation was incorrect i.e. to succeed the appellant must prove the grounds of appeal, as required by s 169(3) of the LVA.

Other matters

- The appellant's analysis of the subject land ($750,000 – $300,000 = $400,000) was not supported by sufficient evidence as the *"professional valuation"* was an agents appraisal and there was insufficient evidence re the value of the improvements.
- The Court concluded that the RP data report did not demonstrate that the increase was incorrect as:
  i. the RP statistics are averaged rather than specific to subject
  ii. the data was described very generally
  iii. there was no evidence from whoever compiled the data and
  iv. data not tested
- The specific contention re a larger lot with an identical value to the subject was not sustained as that lot, although larger, had inferior lake views and adjoined a public carpark. The evidence did not establish that the subject was out of relativity with the properties identified.

Dr Yvonne Collen Pty Ltd v Valuer-General [2015] QLC 41

- This appeal, pursuant to *Land Valuation Act 2010* concerned the Valuer-General's valuation of a rural home site located near Beaudesert.

- The appellant was self-represented and had engaged a valuer to prepare a report prior to the appeal being filed. The valuer conceded in cross-examination that his report had not been created for the purpose of the Land Court hearing and was not meant to be responsive to the issues identified in the notice of appeal i.e. flooding & sales evidence.

- The valuer's report did not address the issue of flooding and all except one sale were improved sales. Several sales were mortgagee sales.

- In contrast, the sales evidence relied upon by the Valuer-General's valuer were either vacant or only lightly improved sales.

The Court held:

1. The only grounds of appeal able to be contemplated are those grounds stated in the valuation appeal notice. The hearing is therefore limited to those matters which are recited in the notice of appeal by the appellant.

2. It is difficult to place any weight upon the evidence adduced by the appellant's valuer as supporting the grounds of appeal identified in the notice of appeal. The valuer's report makes no reference to the apparently flood prone nature of the subject land or the extent of flooding impacting his comparable sales. The report was not prepared for the purpose of evidence in the appeal and relies upon improved sales with analyses producing an unimproved value which are not in any way explained.

3. The direct comparison approach taken by the Valuer-General's valuer is consistent with the approach approved by the Land Appeal Court.

4. The Court will prefer the guidance of sales of unimproved or lightly improved land where such sales are available.

5. The appellant failed to discharge the onus which the *Land Valuation Act 2010* places upon her.

6. Appeal dismissed.

Duncombe & Anor v Valuer-General [2015] QLC 4

This case concerns an LVA appeal against the issued unimproved value as at 1 October 2011 of grazing property situated at "Clarke Hills", approximately 249 km north-west of Charters Towers.

The main issues before the Court were:

1. Should the Court accept the evidence of the Valuer-General's valuer or that of the appellant as to whether the vendor of "*Goldsborough"* was an anxious vendor*?*

2. Was the sale of "Goldsborough" a bona fide sale in terms of s.18 of the *Land Valuation Act 2010* given that the buyer was an adjoining owner, said to be eager to purchase the property?

The Court held:

- The appellant's evidence of having spoken with the vendors regarding the circumstances/sale of "Goldsborough" should be preferred as it was more direct than the valuer's evidence which was based on what another valuer had told him.

- The evidence of the sale of Goldsborough shows that it was passed in at auction and then sold many months later for a considerably greater sum. In the absence of definitive evidence regarding the purchaser's intentions, the Court is prepared to accept the sale as meeting the *Spencer* test/s 18 LVA definition of a bona fide sale.

The appeal was allowed and the unimproved value determined in an amount of $2,100,000 as at 1 October 2011.

Gosden v Valuer-General [2015] QLC 45

The appellants commenced two LVA appeals concerning land 25 km north-west of Dalby as at 1 October 2011. Appeal LVA666-12 comprised a 13 lot term lease with a combined area of 1.3156 ha. Appeal LVA722-12 concerned freehold land having an area of 1,012 m^2.

The main issue in each appeal was whether any of the grounds of appeal were proven by the appellants sales evidence, relativity comparisons and the adequacy of the valuation evidence presented by the VG's valuation expert.

Held:

1. All of the appellants' sales occurred in late 2012, 2013 or early in 2014 and accordingly, as sales evidence, they are not of great assistance to the Court.

2. An examination of the properties with 1 October 2011 valuation dates does not support the appellants' contention, in a relativity sense, that the subject lands should be reduced in value.

3. None of the valuation evidence before the Court was of any particular assistance. Nowhere in the respondent's valuation report was there any information which allowed the reader to glean the basis upon which his analysis was founded, nor is there any basis described or explained for the valuation which he ultimately applied for the purpose of the hearing of this appeal. In short, they are not "speaking valuations".

4. The effect LVA s 169(3) is that the appellants in the present appeals bear the onus of proving each of the grounds of appeal. The appellants have failed to discharge this onus of proof and accordingly the appeals must be dismissed.

Leacy v Sunshine Coast Regional Council [2015] QLC 8

On 18 February 2005, 86.13 ha of the claimants' land was resumed by the Council of the City of Caloundra for "recreation grounds, park, flood prevention and flood mitigation purposes", pursuant to the *Acquisition of Land Act 1967* (the Act).

As at the date of resumption, the *Caloundra City Plan 2004* (CCP) applied, and the subject land was included in the Open Space – Sport and Recreation Precinct of the Caloundra West Planning Area. It was agreed that this zoning reflected the scheme underlying the resumption, and was therefore required to be ignored when assessing compensation. Previously, under the *Caloundra City Planning Scheme 1996*, the land was in the Rural zone.

Pursuant to the *Integrated Planning Act 1997,* a development application could have been lodged to be assessed against either CCP, or an application (superseded planning scheme) could also have been lodged requesting assessment under the *Caloundra City Planning Scheme 1996.* (This application would have been required to be lodged within two years of the date upon which the CCP came into effect i.e. before 29 September 2006).

The claimants' assessment of compensation were all based on three scenarios involving a highest and best use of residential subdivision for part of the land, and rural uses for the balance area. The third scenario, which proposed a 145 lot subdivision was not pursued upon the hearing of this matter.

The respondent contended that the claimants' development scenarios involved issues that were fatal to the likely approval of any related development application and, as a consequence, the highest and best use of the subject land was limited to a single, rural lot with the right to accommodate a single, detached dwelling and other farm structures.

Expert evidence was given on behalf of each party by traffic engineers, hydrologists, civil engineers, and town planners regarding the impact of these issues on the likelihood of each development scenario being approved.

Ultimately, the resolution of these issues formed the basis of the valuation approach to be adopted in determining compensation, as required by s 20 of the *ALA 1967*.

The issues before the Court were:

1. highest and best use of the resumed land at the date of resumption
2. town planning conflicts between the claimants' development scenarios and the *Caloundra City Planning Scheme 1996, the Caloundra City Plan 2004,* and the *Integrated Planning Act 1997* i.e. were there sufficient planning grounds to justify approval of the impact assessable development scenarios, despite the conflicts?

Relevant sub-issues included the likely views of a prudent purchaser in respect of the following:

1. lack of access to the subject land;
2. flooding risks associated with the approval of proposed development;
3. earthworks and civil engineering costings;
4. the need for residential land;
5. valuation methodology.

The Court's findings and observations:

- The subject land is to be valued based on its highest and best use i.e. "the most advantageous purpose for which it was adapted". ***ISPT Pty Ltd v Melbourne City Council*** [2008] VR 447, applied.
- Post-resumption events cannot be taken into account in assessing the value of the estate or interest of the claimant in the land taken, as s 20(2) of the Act requires that value to be assessed as at the date of resumption. ***BCC v Mio Art Pty Ltd*** (2011) 32 QLCR 285, applied.
- As a compulsory acquisition case, the ***liberal estimate approach*** should be adopted. *Commissioner of Succession Duties (SA) v Executor Trustee and Agency Co of South Australia Ltd* (1947) 74 CLR 358, followed.
- The evidence was not sufficient to establish that, in the absence of the scheme underlying the resumption, the high ground of the subject would have been included in the Emerging Community Precinct within the *Caloundra City Plan 2004.*
- Given that the purpose of s 4.14(ii) of the Development Control Plan is to prohibit development in the floodplain, it is considered that the part of the proposed 66-lot development below the Q100 line would create a major conflict with the planning scheme, as referred to in *Weightman v Gold Coast City Council (*2002) 121 LGERA 161.
- The valuation of the subject based on the hypothetical subdivision method should be discarded as there is authority that the method should not be used where the development is being carried out within a reasonable time. It is also well recognised that changes to the profit and risk factor can significantly alter a valuation based on this

methodology. *Brewarrana Pty Ltd v Commissioner of Highways* (1973) 32 LGRA 170 followed.

- The prudent purchaser would:
    i. conclude that suitable access could be obtained, but would know that there was some risk involved and that a delay in obtaining access was likely. That risk and delay would adversely affect the price that such a purchaser would pay for the subject land.
    ii. be aware of the advice from a hydraulic engineering perspective that the necessary cut and/or fill on the floodplains for the 4.082 ha and 6.252 ha proposals could be carried out with no adverse effect on flood levels or adjacent lots.
    iii. consider that there are sound reasons for adopting either of the engineer's costings, as both appear reasonable. Therefore, in an acquisition case, the liberal estimate approach should be adopted and the claimants' experts costings used.
    iv. be satisfied that there would be a market for the lots resulting from the residential subdivision of the subject.
    v. consider that an application for a material change of use could be made pursuant to the *Caloundra City Planning Scheme 1996* for residential use on the 4.082 ha of flood-free land that would be likely to succeed. Further, an application for development approval of a 42-lot residential subdivision would also be likely to succeed as there are sufficient planning grounds to warrant approval.
    vi. expect some risk and delay, and take these matters into account when fixing a price based on the 42-lot residential subdivision.
    vii. conclude that there would have been a significant risk that the approval regarding the 6.252 ha proposal to develop 66 lots under the *Caloundra City Planning Scheme 1996* would be refused, due to the additional 2.17 ha within the floodplain. A prudent purchaser would be unlikely to enter into an unconditional contract at a price calculated on the basis of such a development being approved.
    viii. consider that the 42-lot proposal does not conflict with, or compromise, the Desired Environment Outcomes in the *Caloundra City Plan 2004* and, further, that there are sufficient planning grounds to justify approval of such an application, for the same reasons given regarding the 1996 Planning Scheme.
    ix. be advised that development in the floodplain would be allowed, provided the specific outcomes in the Planning Area Code and Flood Management Code are met by development that maintains the flood conveyance capacity of floodplains and waterways, and the natural hydrological systems, so that the natural landforms and drainage lines are protected.
    x. consider it likely that under the *Caloundra City Plan 2004,* Council would approve the 66-lot development, although the risk of refusal is greater than in relation to the 42-lot development and, further, that an appeal to the Planning and Environment Court may be necessary, and may well involve significant time, cost, and resources to obtain approval. A prudent purchaser would take these factors into account in calculating the profit to be made from the proposed development and the price to be paid for the subject land.