REVIEW OF VALUATION CASES

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This year's review includes the following cases:

1. ***Waters***: A House of Lords decision of the rationale and application of the Pointe Gourde principle. Indicators providing guidance as to the "extent of the scheme" were detailed and considered.

2. ***Bowers***: A local application of some of the Pointe Gourde issues discussed in *Waters* – was the instant resumption (for rubbish depot) part of a wider scheme commenced in 1978 or part of a new and separate scheme only approved in 1992.

3. ***Credit Union House***: Alternative valuation methods prescribed by s.3(1)(b) of Valuation of Land Act – use of unimproved sales bases – and s.3(2) – subtracting improvements from the improved value of the subject – were considered. Analysis of the improved value of the subject property were found to be unsatisfactory on various grounds.

4. ***Maurici***: A reconsideration of this matter by the New South Wales Land and Environment Court (after remittal by the High Court), analysing improved sales and how the analysed unimproved values compared with valuation of scarce unimproved sales.

5. ***Hegira***: The appropriate method of determining the freeholding value of a Crown Special Lease – should a liberal or a conservative valuation approach be adopted.

6. ***Haber***: A Court of Appeal decision on "accrued rights" – whether a local authority development permit granted in 1975, but not yet exercised, was negated by later legislation.

7. ***Sorrento***: A Land Appeal Court decision whether the holder of certain "car parking" rights on a resumed area was entitled to claim compensation under the Acquisition of Land Act.

WATERS

It is relatively rarely that an appropriate case arises enabling the House of Lords (England's highest Court) to consider in depth some fundamental principles of resumption law. *Waters v Welsh Development Agency* was such a case where the rationale and application of the *Pointe Gourde* principle was broadly discussed. Perhaps of most assistance is the provision by the Court of a list of pointers providing guidance with the difficult task of defining the extent of a scheme.

General observations

Certain general observations by the Court on the nature of compulsory land acquisition are of interest at the outset:

> "Compulsory purchase of property is an essential tool in a modern democratic society. It facilitates planned and orderly development. Hand in hand with the power to acquire land without the owner's consent is an obligation to pay full and fair compensation."

The rather complex and obscure state of the relevant law (perhaps more so in the United Kingdom), together with its historical development, was also alluded to by the House of Lords. One of the most intractable problems was seen as the *Pointe Gourde* principle or, as it is sometimes known, the "no scheme" rule. The Court referred to its daunting task in the current case of considering the content and application of this principle. It saw its task, within proper limits, to simplify the relevant law bearing in mind that the aim of compensation was to provide a fair financial equivalent for the land taken.

Background facts

This appeal concerned the basis on which compensation should be assessed for the compulsory acquisition of 225 acres of land belonging to the claimants. The land consisted of low-lying farmland.

The catalyst for the acquisition was the construction of the barrage across the mouth of Cardiff Bay. This project was under active consideration for many years before construction commenced.

The gestation period of the project was prolonged by problems. One item of controversy concerned the effect the barrage scheme would have on inter-tidal mudflats in the estuary designated as a site of special scientific interest (SSS1). The permanent inundation of Cardiff Bay would destroy these mudflats.

The initial proposals involved an unacceptable loss of nationally important bird habitats. The European Commission also exerted pressure for an acceptable environmental outcome.

Work on the barrage started in June 1994. The project proceeded on governmental assurances that compensatory provision would be made by creating suitable new

wetland habitats. In January 1996 a proposal for the Gwent Levels Wetland reserve (some distance from the barrage area) was produced. It included the claimants' land.

Further factual detail is not material on the appeal. The dispute between the parties was primarily one of legal principle.

The Issue

The principal issue was whether the scheme underlying the acquisition was the intended use of the subject land as a nature reserve or the construction of the Cardiff Bay barrage; and whether or not it was necessary to discount for the purposes of valuation any increase in the value of the subject land due to the need to acquire it as a palliative measure because of the environmental consequences of the Cardiff Bay barrage, (applying *Pointe Gourde*).

The initial Land Tribunal hearing answered this issue in favour of the acquiring authority. The Tribunal President added that the scheme underlying the acquisition was the Cardiff Bay barrage.

Meaning of "Value"

In considering the meaning of 'value' of resumed land, the Court noted:

- In an arm's length sale in the open market, a seller would normally expect to realise any enhanced value possessed by the land because its location made it specially valuable to a particular buyer or class of buyers.

- In principle, subject to one qualification, this approach is equally applicable when assigning value for the purposes of compensation. It is this qualification which has given rise to much difficulty. The qualification is that enhancement in the value of the land attributable solely to the particular purpose for which it is being compulsorily acquired, and an acquiring authority's pressing need of the land for that purpose, are to be disregarded.

- When granting a power to acquire land compulsorily for a particular purpose, Parliament cannot have intended thereby to *increase* the value of the subject land to be acquired. Parliament cannot have intended that the acquiring authority should pay as compensation a larger amount than the owner could reasonably have obtained for his land in the absence of the power. For the same reason there should also be disregarded the 'special want' of an acquiring authority for a particular site which arises from the authority having been authorised to acquire it.

- This approach is encapsulated in the phrase that value in this context means "value to the owner", not "value to the purchaser".

- In identifying any enhanced value which must be disregarded, it is always necessary to look beyond the mere existence of the power of compulsory purchase. It is necessary to identify the use proposed to be made of the land under the scheme for which the land is being taken. Hence, the introduction of

the concept of the 'scheme' or equivalent expressions such as project or undertaking.

The Indian case (*Sri Raja*)

An analysis of the *Sri Raja* principle – where the resuming authority may be the sole possible purchaser for the potential highest use – was undertaken by the Court. Key observations included:

- The possibility that the acquiring authority, as a willing buyer in a friendly negotiation, might be willing to pay more for land with its potentiality than without was not to be disregarded. That would not be to allow the existence of the scheme to enhance the value of the land.

- Potentiality is part of the market value of land and must be taken into account when assessing compensation. Potentiality should be valued even if the only likely purchaser is the acquiring authority itself.

- But market value does not include enhanced value attributable solely to the particular use proposed to be made of the land <u>under a scheme</u> of which compulsory acquisition of the subject land is an integral part. This element of value is not part of market value because it is not an element the owner could have realised in the open market.

- Potentiality is to be assessed and valued as matters stood before the particular scheme, of which the subject land's acquisition is part, came into being.

- 'Value to the owner' principle is a sound basic principle, although in recent years some difficulties have arisen. Subject to statutory provision to the contrary, it should continue to be applied generally.

The *Pointe Gourde* case

The Pointe Gourde case and resulting principle were then considered. Points of interest were:

- The 'value to the owner' principle concerns cases where the value of the subject land is enhanced by the acquiring authority's proposed use of *that* land. But it would be artificial to confine the scope of the principle to such cases. It would be irrational to exclude cases where the value of the subject land is enhanced by the authority's use or proposed use of *other* land which is being acquired as an integral part of a single scheme.

- The courts, rightly, have regarded this wider application of the 'value to the owner' principle as a self-evident aspect of the same principle. *Pointe Gourde* concerned enhanced value arising from the proposed use of other land.

- Lord MacDermott in *Pointe Gourde* said, in quite general terms, that compensation for the compulsory acquisition of land cannot include an

increase in value which is entirely due to the scheme underlying the acquisition.

- 'the *Pointe Gourde* principle' is not a reference to a principle separate and distinct from the 'value to the owner' principle. It is no more than the name given to one aspect of the long established 'value to the owner' principle.

- Notoriously, the practical difficulty with the *Pointe Gourde* principle lies in identifying the area of the 'scheme' in question. Regard is had to the authority's use or proposed use of other land.

Identifying the extent of the scheme

The Court then proceeded to provide some indicators in identifying the extent of the schemes as well as pointing to problems.

- Undoubtedly the present state of the law gives rise to serious valuation difficulties. It is unreal to require land to be valued on the basis of what would have been the position if a major development which took place years ago had not been carried out.

- There is an even more fundamental problem. This goes to the very fairness of the *Pointe Gourde* principle as currently applied. The wider the scheme, the greater the potential for inequality between those outside the area of acquisition, whose land values rise by virtue of the scheme, and landowners whose properties are acquired at a value which disregards the scheme. Conversely, the narrower the scheme, the greater the potential for an authority being called upon to pay compensation inflated by its own investment in improved infrastructure or other regeneration activities.

- A scheme essentially consists of a project to carry out certain works for a particular purpose or purposes. If the compulsory acquisition of the subject land is an integral part of such a scheme, the *Pointe Gourde* principle will apply accordingly. Both elements of a project, the proposed works and the purpose for which they are being carried out, are material when deciding which works should be regarded as a single scheme when applying the *Pointe Gourde* principle to the subject land.

- The extent of a scheme is often said to be a question of fact. Certainly, identifying the background events leading up to a compulsory purchase order may give rise to purely factual issues of a conventional character. But selecting from these background facts those of key importance for determining the ambit of the scheme is not a process of fact-finding as ordinarily understood.

- In the present case, the purpose for which the claimants' land was acquired can be identified at two different levels of generality: for use as a nature reserve, or for use as a nature reserve to compensate for loss of the Taff/Ely SSSI through construction of the Cardiff Bay barrage. Factually, each of these stated purposes is correct. Which of these purposes is to be regarded as the

more appropriate when identifying the scheme within the meaning of the *Pointe Gourde* principle is a matter for the tribunal's judgment.

- Resumees are to receive fair compensation but not more than fair compensation. This is the overriding guiding principle when deciding the extent of a scheme.

- Some pointers may be useful. (1) The *Point Gourde* principle should not be pressed too far. The principle is soundly based but it should be applied in a manner which achieves a fair and reasonable result. Otherwise the principle would thwart, rather than advance, the intention of Parliament. (2) A result is not fair and reasonable where it requires a valuation exercise which is unreal or virtually impossible. (3) A valuation result should be viewed with caution when it would lead to a gross disparity between the amount of compensation payable to the market values of comparable adjoining properties which are not being acquired. (4) Normally the scope of the intended works and their purpose will appear from the formal resolutions or documents of the acquiring authority. But this formulation should not be regarded as conclusive. (5) When in doubt, a scheme should be identified in <u>narrower</u> rather than broader terms.

Ransom Value

The concept of ransom on 'key' value was also considered.

- If a premium value is entirely due to the scheme underlying the acquisition, then it must be disregarded. If it was pre-existent to the [scheme] it must be regarded. To ignore the pre-existent value would be to expropriate it without compensation and would be to contravene the fundamental principle of equivalence.

The present case

The principles discussed above were applied by the House of Lords to the present case:

- The acquisition of the claimants' land for a nature reserve was an integral part of the barrage project. The claimants' land was thus acquired to meet a need generated by the barrage project.

- Although the acquisition of the claimants' land was not identified at the outset of the barrage project, the project proceeded throughout on the basis that some such compensatory measures would be provided. In the absence of governmental assurances that a compensatory nature reserve would be provided, it is unlikely the *Cardiff Bay Barrage Act* would have become law.

- When assessing compensation payable for the claimants' land the authority's need to acquire the land as a palliative measure, necessary as a result of the environmental consequences of the Cardiff Bay barrage, is to be regarded.

BOWERS

Pine Rivers Shire Council resumed an area of some 16 hectares from Bowers in 2003 for the purposes of a "rubbish depot". The resumed land was to be added to an existing tip which had been established since 1978. Any town planning restrictions on the resumed land relating to the scheme of resumption were required to be ignored (the *San Sebastian* principle). However, the Court was required to first determine what was the scheme of resumption; was the current Bowers resumption part of a wider scheme commenced back in 1978 (the claimants' argument), or was it a new and separate scheme only approved in 1992 with the Hills Development Control Plan (Council's argument).

The claimant argued that, disregarding the scheme of which the resumption formed part, the highest and best use of the resumed land was Residential A subdivision. Experts called by the claimant stated there were no town planning, engineering, ecological or traffic impediments which would prevent the hypothetical subdivision development from proceeding. On this basis, the Bowers made claim for an amount of $2,821,000, excluding interest and disturbance.

The respondent argued the highest and best use was for a large rural home site with potential for up to six rural residential allotments. $490,000 was the figure contended.

After a detailed analysis of the historical background to the establishment of the rubbish dump and related town planning instruments, the Court held that:

1. The *Bowers* resumption was for the extension or expansion of the existing rubbish depot. The instant scheme commenced at or about 1988, some time prior to the adoption of 1988 Strategic Plan. That part of the 1993 Hills District Plan and its effect had to be ignored in relation to the current resumption area.

2. The fact that the resumption of the subject land was for the same purpose as that underlying the first resumption did not necessarily mean they were acquired as a part of the same scheme. Using an analogy, the Court stated that:

   > "If land was resumed in the 1970's for a road and, due to traffic growth in the area, more land is resumed in 2000 to increase the road from 2 to 4 lanes it could not be necessarily said that both resumptions were part of the same scheme solely on the basis that the purpose stated in the Notice of Intention to Resume and Proclamation in both cases was "road purposes". Conversely, the fact that the first resumption occurred in 1978 and the last in 2003 does not necessarily mean they were not taken as a part of the same scheme."

3. The difficultly with accepting that the scheme underlying this resumption was the same as that underlying the first resumption commencing in 1978 is that there was no convincing evidence to that effect.

4. There were two important matters that needed to be kept in mind when applying the so-called "rule" in *San Sebastian*. First, it was not authority for the proposition that, where it does apply, it was then necessary to assume and apply a superior zoning or land use potential to the land. Second, there must be sufficient connection between the scheme underlying the resumption and the restrictions imposed.

5. The principle applied in cases not only where there was a "direct" relationship but also to cases where there was merely an "indirect" relationship, provided that the planning restriction could properly be regarded as a step in the process of resumption.

6. The role of the Court was to decide how a hypothetical prudent purchaser and vendor, properly advised and acting reasonably and prudently, would come together at a price for the land. That necessarily required the Court to determine how would they assess the development potential of the land. It was not necessary to make a final determination on each and every issue raised by each expert for their parties.

7. The prudent purchaser, particularly since the introduction of *Integrated Planning Act 1997* (IPA), would no doubt find the zoning of the land to be a matter to consider; however, he would be far more interested to know how likely it was that, as a matter of fact, approval would be given for his development by the relevant local authority.

8. A critical issue to be resolved was whether, <u>but for</u> the scheme underlying the resumption of the land, water and sewerage would have been reasonably available for connection on or before the date of resumption.

9. The Court was not required to disregard all of the respondent's town planning instruments; it was only those about where it could be fairly said there was a direct relationship between the town planning restrictions they imposed and the scheme, or where the restrictions could be properly regarded as a step in the process of resumption, that are required to be ignored.

10. A number of the policies or criteria set out in the strategic plan were too broad and of general application to be seen as directly linked to the scheme or a step in the resumption process.

11. It was not accepted that, <u>but for</u> the scheme, the subject land would have had town water available or reasonably available as at the date of resumption, whether by extension of the water catchment boundary or by way of infrastructure agreements.

12. As a result, it was not accepted that, regardless of zoning and, if the scheme was ignored, there were reasonable prospects of a Residential A development gaining the necessary approvals under IPA. The valuation of the claimant based on a Residential A subdivision of the land was rejected.

13. However, the resumed land had greater potential than merely a single large rural home site with capacity for subdivision made up to 6 Rural Residential lots (minimum 2 hectares). It could be divided into smaller "park" lots (minimum 6,000 m2) with necessary infrastructure being supplied by a developer as a condition of development approval. The water supply problems, seen as a barrier to Residential A subdivision, were not seen as an impediment to this park subdivision.

14. Some sales evidence (provided by respondent) on which to base a park subdivision value was available. While not ideal, the Court was entitled to make a "best guess" as to the per hectare rate to be applied to the resumed land, derived generally from the sales evidence.

PERPETUAL TRUSTEE (CREDIT UNION HOUSE)

This case concerned the unimproved value (for 2001 and 2002) of the site of Credit Union House (175 Eagle Street), an L-shaped lot of some 3,345 square metres fronting the Brisbane River and adjacent to the historic Customs House. Two-thirds of the site accommodated at 20 storey commercial building (constructed in 2002), whilst the remainder contained a subterranean parking area and light and air easements in favour of the adjoining 167 Eagle Street. Capacity to develop this smaller southern part was obviously very limited.

For purposes of this note only the 2002 value will be considered. The initial NRM figure appealed against was $9,500,000. The appellant's estimate was $3,500,000. However at the hearing NRM led evidence to a figure of $22,090,000.

The case is of primary interest in the approach taken by the Court to the analysis of the improved subject sale presented by both parties. NRM's purpose in doing so was to trigger s.3(2) of the *Valuation of Land Act* which states:

> **3.(2)** … the unimproved value shall in no case be less than the sum that would be obtained by deducting the value of improvements from the improved value at the time as at which the value is required to be ascertained for the purposes of this Act."

An accepted analysis under this section would have set a minimum valuation, notwithstanding that a valuation based on the vacant sales evidence may have revealed a much lower figure. The appellant's valuer tendered a section 3(2) valuation in his reply report revealing a figure of $3,170,000 (slightly lower than his earlier valuation based on vacant sales).

The Court rejected the analysis of the 2002 improved subject sale by both valuers. There were considered to be many inconsistencies and uncertainties associated with the exercise from both sides. (Serious difficulties generally arose when highly improved sales were relied upon for purposes of determining unimproved value.) The Court also observed the need for supporting expert evidence. This lack of supporting evidence in other relevant fields was seen to be a problem for both valuers and the parties in these appeals.

The Court indicated its immediate concern with the use of the highly improved sale (sale price $95,950,000) with the very large difference between the two valuers analysed unimproved values. It was also concerned with a fact that the NRM valuer's analysis bore no resemblance to the other unimproved values applied to other comparable CBD properties nor to the actual values initially attributed to the land and appealed against.

After rejecting the s.3(2) approach for the above reasons (essentially unreliable evidence), the Court then sought to apply rates based on comparable unimproved sales (these included Riparian Plaza, Aruora and the Felix development). Although the latter two sales were for high rise residential rather than commercial purposes, the two markets were seen as fairly comparable.

A further complicating factor was the premium which ought to be attributed to the subject because of its river frontage. A premium of 20% was eventually allowed which also took into account site difficulties with construction on river front land.

An additional exercise was necessary to determine a value to be applied to the southern area of the site (that is, the underground car park and the light and air easement area). The Court acknowledged that there was no reliable evidence that would justify some sort of exact assessment of what the incumbent area of the subject may be worth. However, it recognized that sometimes it was necessary to do the best it could with the available evidence even though it involved a "best guess" estimate.

A discount of 45% (from the northern area) was applied. This recognized the considerable access advantage of the subterranean car park gave to the main northern (high rise) area; also the light/air easement area provided clear benefit to the northern area from the very fact that no structures were permissible on such southern area.

A number of wider issues covered in the decision also warrant mention:

1. **Presumption of correctness**

Section 33 of the *Valuation of Land Act* deems the valuation of the Chief Executive to be correct until proved otherwise on objection or appeal. In the current case no attempt was made to formally alter the valuation at the hearing even though DNR led evidence to a substantially higher figure. The Court rejected the DNR submission that the further evidence of the higher figure could not be considered in disturbing the presumption of correctness where the evidence led on behalf of the appellant was not sufficient on its own to disturb this presumption. The Court stated:

> "… where the respondent department elects to lead positive evidence of a figure different to that actually attributed to the land, that evidence may lead to the conclusion that the presumption is unjustified. It is the totality of the evidence that must be taken into account in determining whether or not the valuation appealed against ought be affirmed or altered."

2. **Grounds of appeal limitation**

Section 45 of the *Valuation of Land Act* constrains the appellant to relying on his original written grounds of appeal. However if the Chief Executive elects to give evidence in support of the valuation appealed against or a higher valuation, the appellant is entitled to seize on any perceived weakness in supporting that figure in relation to any ground of appeal and throw that also into the scales to add weight to his own evidence.

3. **Credit of valuer**

The Court was critical of the appellant's valuer for withholding a substantial matter (a s.3(2) valuation approach) for inclusion in his "report in reply" when such matter should have been addressed in his primary report. The respondent had earlier sought to disclose such a s.3(2) report but was told that no such document was in existence. The Court stated that it was left with the impression that the appellant's valuer deliberately withheld the s.3(2) report for tactical reasons and such an approach warranted criticism.

4. **Two possible levels of CBD values**

While not necessary to decide in this case, the Court observed that, based on the respondent's argument where a s.3(2) approach was adopted, it may result in two levels of unimproved values in the Brisbane CBD: one level, probably higher, applicable to land highly improved to achieve its highest and best use; another for vacant and lightly improved land but having the same highest and best use potential. This could result even when respective lots were side by side and, apart from one being highly improved and the others not, in all other respects the same. The consequence of this might be that the owner of the highly improved land would be taxed on a higher unimproved land value than that applicable to the owners of the adjoining land. The Court doubted that Parliament would have intended to establish a statutory regime designed to impose a higher tax and rate burden on one class of owners when compared to that imposed on others in such circumstances.

5. **Need to establish basis for expert opinion**

The Court was critical of both valuers for not having furnished sufficient evidence about improved sales (eg reports of quantity surveyors) to allow a meaningful evaluation of the validity of the conclusions reached. An important passage from a recent West Australian Court of Appeal decision was adopted to convey the point:

> "an expert giving opinion evidence must provide the tribunal of fact with sufficient information to enable it to evaluate the validity of the expert's conclusions. That means that the expert should state the facts or assumptions upon which his opinion is based. That is because the tribunal of fact must examine and assess the substance of the opinion. It cannot merely rely upon the expertise of the expert".

MAURICI

The High Court *Maurici* decision was noted in the 2003 Review of Valuation cases; its application in Queensland in *Spender v Department of Natural Resources and Mines* was also noted in the 2003 Review.

The 2005 Review noted the NSW Court of Appeal decision of *AMP Henderson*. It was there held that *Maurici* stood for the following propositions only:

> (a) Section 6A(1) of the *Valuation of Land Act* (NSW) does not require when utilising the comparable sales method of valuation, that only sales of vacant land should be considered; (the relevant Queensland section s.3(1)(b).
>
> (b) Confining one's consideration to only sales of scarce vacant land and disregarding sales of improved land which would otherwise be as comparable as the vacant land sales in terms of timing, location, outlook and other relevant features, offends the principle that a reasonably representative group of comparable sales should be considered when applying that methodology.

After determining such important issues of legal and valuation principle, the High Court in *Maurici* remitted the case back to the New South Wales Planning and Environment Court to redetermine the valuation.

The case essentially related to a valuation for land tax purposes of a waterfront residential property at Hunters Hill on Sydney's north shore.

Key matters to be considered on this remittal by the Court included:

1. Given the apparent scarcity of vacant land sales, the need to analyse improved sales so as to consider a sufficient range of relevant evidence.

2. The appropriate manner of analysing such improved sales.

3. Should the limited number of vacant sales have their sale price adjusted downwards to allow for a scarcity factor?

Sales evidence was presented to the Court on remittal additional to that tendered to the original hearing. Some 8 vacant sales and 19 improved sales covering a period of about 18 months before and 18 months after the relevant valuation date were tendered.

Improved Sales – Analysis

The Court initially considered the sales of improved waterfront properties. It stressed the difficulties associated with analysing improved properties generally: there were a number of variables or matters of discretionary opinion that could lead to a wide margin of error in the unimproved value.

The steps to be followed to arrive at an unimproved land value from improved sales included:

1. Replacement Value

The replacement cost of the improvement as at the date of sale should first be determined. "Replacement cost" was defined as the estimated cost to construct, as of the effective appraisal date, a building with utility equivalent to the building being appraised using contemporary materials, standard design and layout. When this cost basis was used some existing obsolescence in the property was assumed to be cured.

2. Depreciation

A deduction was to be made for depreciation: the latter included three elements –

- Physical deterioration.

"Physical depreciation" was described as a tangible depreciation that can be seen upon inspection of the building, (for example, the need to paint and repair); it was caused by aging, structural wear and tear deterioration and disintegration; it was increased by poor maintenance and/or a badly designed building.

- Design and Functional Obsolescence.

This was another element in the valuation of improvements where divergent though legitimate expert opinion meant, as a general rule, a land value derived from an improved sale was not likely to be as accurate as a land value derived from a vacant land sale.

- External or Economic Depreciation.

This related to a loss in value due to influences outside the property.

3. Improvements Increment.

This was a valuation concept new to Australia introduced by the appellant's valuer. He found support for the concept in the classic American textbook "The Appraisal of Real Estate" (12th edition, 2001) published by the Appraisal Institute. This institute is the top professional association in America for real estate appraisers.

The concept of improvements increment was explained in the report of the appellant's valuer thus:

> "(1) When improvements are made to land acquired at market value, which are appropriate for that land and which are marketable, having regard to design and building standards at the time, the value added to the land by those improvements will normally exceed the costs of those improvements by an increment, the "Improvements Increment".

(2) This Improvements Increment exists by virtue of the improvements being made and accordingly forms part of the added value that those improvements adds to the land.

(3) This can be understood by considering the example of a residential property developer who buys land, constructs residences on that land and aims to sell the land and house packages for a "margin" or "profit" which exceeds development costs taking account of all relevant matters including holding costs, interest, and builder's margin.

(4) A prudent purchaser who purchases an improved property will factor into the purchase price a margin to reflect the effort, time and risk associated with improving land. If this Improvements Increment did not exist, then there would be little or no property development if the price to be paid for an improved property was limited only to the sum of the various costs and expenses in improving it.

(5) The Improvements Increment is a component included in the added value of improvements regardless of whether or not those improvements are new, or newly renovated or upgraded, provided that those improvements retain marketable value or utility."

The Court held that a further allowance should be made for "Improvements Increment", referring to it as "entrepreneurial profit", or profit and risk. It adopted an improvement increment of around + (plus) 27% for the purposes of the present case taking into account the improvements made to the particular comparable sales.

This figure was to be applied only to those costs that related to construction and not to any cost that were more properly attributable to obtaining development consent.

Improvements Increment was held to be a continuing component of improved value, remaining after the first sale of the improved property.

4. Time adjustment.

With sales occurring before and after the relevant date an adjustment was necessary for market movement. In this case comparable sales had occurred after the date at which the land value was to be determined had been used; it was thus necessary for the valuers to adjust the contract price downwards to reflect the lower prevailing market values at the relevant date; conversely for a sale occurring before the relevant date, the contract price had to be adjusted upwards.

It was seen as preferable to first deduct from the contract price the value of improvements at the date of contract to arrive at the land value for that property at that date and then adjust the land value to the relevant date.

The Australian Bureau of Statistics established House Price Index for the Sydney region was used to calculate an appropriate adjustment for movement in the market. However, less weight was to be given to sales that occurred further from the relevant date.

The Court observed there can be a greater confidence in the accuracy of a land value inferred for the subject land from a comparable sale that occurred within a month or

two of the relevant date, than a value derived from sale that occurred many months from such date all other things being equal.

5. Weighting

Not all sales were given equal weight to derive an unimproved value for the subject land.

Discretionary judgment or weighting of the evidence was required in relation to the adjusted figures of comparable sales rather than just adopting the straight average (or arithmetic mean); accordingly greater weight was given to such matters as comparable sales closer in time and distance.

In this instant case there was a tighter range of values derived from the vacant land sales than from the sales of improved land; it was thus necessary to give greater weight to those sales that were likely more accurately indicate the appropriate land value of the subject land.

Development Consent

In the analysis of improved properties, it was seen necessary to take into account the effect of a new development consent for the erection of a house on land value. Any value accruing from the consent formed part of the land value under *Valuation of Land Act* (NSW) s.6A(1).

Scarcity

The concept of a 'scarcity' factor was the second new valuation concept introduced by the appellant's valuer.

In respect of every comparable sale of vacant property the valuer for the appellant deducted 30% from the contract price to get a reduced land value for the vacant property. He then used this reduced land value to arrive at a land value for the appellant's property after making adjustments for different features of the two properties.

It was argued that buyers of scarce vacant land were likely to be a special and different class of buyer from those of improved land and were not representative of the market. It was submitted the sales of scarce vacant land may attract a premium in the market. Comparisons of improved and unimproved sales were undertaken to prove the point.

The Court approved in principle such an exercise. However, it stressed that it was important to use properly comparable vacant and improved sales. It was not acceptable to make large adjustments on account of different features of the two properties.

In considering whether the comparable sale prices of the vacant properties should be adjusted downwards because by a scarcity factor when arriving at a land value for the subject land, market evidence accepted by the Court in this case showed that there

was not a significant difference between the weighed average land values calculated from vacant land sales and the value calculated from improved land sales.

It was thus held that no adjustment for a scarcity factor was necessary.

Conclusion

Ultimately the Court placed much greater weight on vacant sales than the greater number of improved sales. The determination of the Court was only slightly less than that determined in the initial hearing. The Court also observed that, had a much smaller reasonably representative group of sales been chosen, there would have been substantial savings in costs and time rather than using every local waterfront sale in the period.

HEGIRA

The principal issue in Hegira concerned the proper valuation approach to be adopted in determining a freeholding value of reclaimed land at Pacific Harbour, Bribie Island. Should a more liberal approach (as with compensation cases) be adopted or the alternative conservative approach (as with rating). There was no precedent where this specific issue had been considered; the Court thus resorted to application of wider principles.

Background

The special lease Hegira held from the State of Queensland was able to be converted to freehold title when the land was reclaimed and developed for residential purposes. The appeal to the Land Court was from an "unimproved value" freeholding purchase price decided upon by the Minister.

The "unimproved value" defined by the *Land Act 1994* for freeholding purposes was seen by the Court to be entirely compatible with the classic test of market value applied by the High Court in *Spencer* (1907). The *Spencer* test was then applied by the Court to determine the required value. The *Valuation of Land Act* definition of "unimproved value" was not applicable in the freeholding matter.

The Court observed that process of determining freeholding value has some similarity to the assessment of compensation following the compulsory acquisition of land; a resuming authority taking land was required to pay compensation in order to restore the landowner, as far as money can do so, to the equivalent financial situation that he or she enjoyed prior to the resumption.

In the present case, it was the landowner that required the land and it was the State that was being deprived of it.

Valuation Assessment

The before and after method of assessment was considered appropriate to value the freeholding land. The Court stated:

> "Although the method is used principally for the assessment of compensation for compulsory acquisition of land, I can see no reason why the method cannot be used to assess the value of the subject land in this case. Although the circumstances are different, the principles are the same. Here it is the State, represented by the Minister, who holds the land. Hegira requires the land to optimise its development of that particular stage of its estate. In that sense, it is similar to a resumption, but with the roles reversed and without the element of compulsion. However, that is not to say that the Minister can set an unreasonable price, or hold Hegira to ransom. The definition of "unimproved value" contained in s.434 of the *Land Act*,

> together with the principles of *Spencer's* case, assumes that both parties behave reasonably, the willing buyer/willing seller concept."

The Court accepted the hypothetical development exercise by the appellant's (Hegira) valuer, Mr Rodney Brett, which revealed a difference of $90,000 between the development with the subject land and without it. The $90,000 represented the value which the subject land added to the designated area of the Pacific Harbour development.

Morts Dock application

However, Mr Brett did not adopt $90,000 as the market value of the land. He reasoned that the vendor would know that, unless the subject land could be sold to Hegira, it had no value, while Hegira would know that the vendor could not sell it to anyone else. Therefore, he contended, it was likely that the parties would split the difference and arrive at a market value of $45,000.

The land had no road access and, he contended, little or no market value. He expressed the opinion that the principles applied in *Mort's Dock and Engineering Co. Ltd v The Valuer-General* should be applied. In that case, the Court was considering the unimproved value of land below high water-mark. That land adjoined land above high water-mark and both could be used in conjunction. It was there held that as there was no other possible purchaser of the wet land, a prudent vendor and purchaser would "split the difference" between them.

The Court did not accept such reasoning. It stated:

> "*Mort's Dock* involved the determination of the unimproved value of land below high water mark under the provisions of the New South Wales *Valuation of Land Act 1916*. Cases such as the present are in some ways more analogous to compensation cases than to revenue valuation cases. Since that case was decided, the Privy Council in *Raja Vyricherla Narayana Gajapatiraju v The Revenue Divisional Officer, Vizagapatam* (1939) AC 302, considered the compensation that should be payable following the compulsory acquisition of land where there could be no purchaser of the land's potentiality other than the acquiring authority. The Privy Council established that in such circumstances, compensation must be ascertained at the price that would be paid by a willing purchaser to a willing vendor of the land with that potentially, even though that potentiality could be exploited only by the acquiring authority, in the same manner that it would be ascertained where there were other possible purchasers. There was no suggestion in that case of some compromise or "splitting the difference"."

Compensation principles apply

The appellants submitted that the *Raja* case has no application to the present matter, because the principles relating to the determination of compensation following the compulsory acquisition of land were different. However, the Court held that while not all the principles should be applied, there was sufficient similarity for some principles to apply. In the present case, the State was to be assumed to be a willing but not over-anxious vendor and Hegira a willing but not over-anxious purchaser. The State was entitled to obtain the best possible purchase price for the land, consistent with the "market value" definition in the *Land Act*.

Conclusion

The Court concluded that the State, as a prudent vendor, would require Hegira to pay the "unimproved value" of the land, not half that value. The exercises which were carried out by Mr Brett demonstrated the value which the subject land added to the overall development. In those exercises, Mr Brett allowed for an appropriate profit and risk factor which a prudent developer would take into account in determining the price that he would pay for the land. No further discounting was thought necessary.

In summary, the Court determined this freeholding valuation exercise called for the adoption of a more liberal valuation approach rather than a more conservative one.

HABER

This resumption case from Mackay progressed to the Court of Appeal primarily on the issue of "accrued rights" – specifically, as to whether an earlier development approval had been effectively taken away by subsequent legislation.

In 1975 the land owner (resumee) had local authority approval to develop 250 sites for caravan park purposes. The resumed land contained 50 of these sites which remained undeveloped and to now develop this area would have required the destruction of mangroves. Since 1978, destruction of mangroves required a permit under *Fisheries* legislation and such permit was most unlikely to have been granted in current circumstances.

The applicant argued the right to fill the 50 sites (filling was a condition of the 1975 approval) could not be taken away by subsequent legislation unless the latter was clearly made retrospective to override rights already created. Section 20 of the *Acts Interpretation Act* (on accrued rights) was also argued.

In refusing leave to appeal, the Court held:

1. The 1975 development approval continued to confer rights on the applicant – but always subject to the law as enacted by Parliament.

2. To the extent that Parliament proscribes the destruction of mangroves other than pursuant to a permit, the exercise of the 1975 approval is restricted.

3. There is no retrospectivity in treating the *Fisheries* legislation as applying to activities that occur after it comes into operation.

4. There was never any legal possibility of the local authority granting a right which would be exercisable by the grantee without regard to the laws enacted by Parliament.

5. The relevant proscriptions of the *Fisheries* legislation applied to destruction of mangroves only after the legislation came into force. Such legislation did not operate retrospectively to proscribe conduct which occurred before it came into force.

6. In 1975 approval did not purport to confer a <u>right</u> to continue filling the site into the indefinite future.

7. Section 20 the *Acts Interpretation Act* was of no aid here. The subject matter of s.20 was the alteration of rights and liabilities created by an Act of Parliament as a result of an amendment or appeal of <u>that</u> Act; any right to fill arose under the *Local Government Act* and the *Fisheries Act* was not an amendment of the former.

SORRENTO

Sorrento Medical Service Pty Ltd (Sorrento) were lessees of a section of a building on land, part of which was resumed for road widening purposes. The resumed land comprised part of a car park adjacent to the building. Sorrento had no separate leasing rights on the resumed area but two clauses in their building lease gave them certain rights to use the resumed car park area.

The principal issue for the Court was whether the rights granted to Sorrento amounted to an "estate and interest" under s.12(5) of the *Acquisition of Land Act* (ALA) sufficient to found a compensation claim.

One of the lease clauses gave Sorrento exclusive rights to use two car parking spaces for doctor's parking; a second clause gave Sorrento rights to use the remaining spaces on a non-exclusive basis for patient parking.

The Land Court held that the rights to use the resumed area granted to Sorrento under the lease clauses did not constitute a lease; and thus did not come within the term, "estate and interest" under s.12(5).

In dismissing the appeal, to the Land Appeal Court held:

1. It was necessary for the appellant to establish that the car parking rights constituted an "estate and interest" of a person "entitled to the whole or any part of the land" taken as at the date of resumption.

2. The purpose of the ALA and the effect of s.12(5) is that persons who have either "an estate" in the land which is resumed, <u>or</u> "an interest" in such land have a right to compensation.

3. To come within the term "estate", rights are confined by their context to be of a proprietary nature.

4. The definition of "interest" in s.36 of the *Acts Interpretation Act* is extremely wide and cannot be applied literally. Rights, powers and privileges used in the definition should be limited to rights, powers and privileges of a proprietary or quasi proprietary nature. This limitation is suggested by the context in which words "estate or interest" are used in s.12(5).

5. "Estate" or "interest" as used in s.12(5) refer to rights of a proprietary and quasi proprietary nature. Traditionally such words have been regarded as having a proprietary connotation.

6. Rights, powers or privileges of a purely <u>personal</u> or <u>contractual</u> kind do not fall within the meaning of "estate or interest".

7. The car parking rights did not constitute a lease as:
    - exclusive possession was not granted to the doctor's parking area.
    - exclusive possession cannot be inferred from the nature of the rights granted here.

- if a leasing arrangement had been intended, the parking area could have been included in the demised area.

8. The car parking clause in the lease did not create a "license coupled with an interest" in land to give the former a proprietary status. Authorities suggest licences and proprietary rights with which they are coupled, relate to the same land.

9. The appellant has no valid claim to compensation under the *Acquisition of Land Act*. The Land Court has no jurisdiction to hear and determine the claim.

Table of Cases

1. Waters v Welsh Development Agency [2004] UKHL 19; All England Law Reports 2 June 2004.

2. Bowers v Council of the Shire of Pine Rivers [2005] QLC 0046.

3. Perpetual Trustee Company Limited v NRM [2006] QLC 0017.

4. Maurici v Chief Commissioner of State Revenue [2005] NSWLEC 559.

5. Hegira Limited v NRM [2005] QLC 0051.

6. Sorrento Medical Service Pty Ltd v Chief Executive, Department of Main Roads [2006] QLAC 0016.

7. Haber v Chief Executive, Department of Main Roads [2005] QCA 123.