ASSESSING COMPENSATION IN APPLICATIONS FOR EASEMENTS

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Access to Neighbouring Lands Act and Compensation

1. Application under the *Access to Neighbouring Land* Act ("*ANLA*") in the Local Court can take significantly longer than a Sec 88 K *Conveyancing Act* application in the Supreme Court. In the SC, Equity Division, there is a special list where an application can be made for expedition. This list, coupled with the facts that applications for easements are generally 1-2 day hearings and that such slots often "open up" in the Court's lists when other matters settle, mean that some degree of expedition is on the cards as likely to be granted, upon a properly made application.

The Local Court has no such set up.

On the flip side, one advantage to an applicant of proceeding in the Local Court is that under the *ANLA* [Sec 26], *no* compensation is payable for loss of privacy or inconvenience caused solely by the imposition of the order (although compensation for loss or damage, including to property, and injury to persons, is compensable; and indeed, if such loss or damage is likely to be beyond the jurisdiction of the Local Court, the matter must be transferred to the Land and Environment Court: Sec [29].)

cf Sec 88 K *Conveyancing Act*, where compensation is payable, on the basis of the principles set out below.

However, under the *ANLA*, terms can be imposed aimed to minimise the inconvenience to neighbours, and one can contemplates terms as to matters including: hours of access; noise, dust and possibly other "nuisance" limits; to limit loss of privacy; as to taking out insurance; making good any loss and bank guarantees to back same. This is not an exhaustive list – terms will be guided and informed by the nature of the access sought, e.g. whether for hoarding; or crane swing, or something else.

Sec 88 K Conveyancing Act NSW provision for compensation

2. Sec 88 K is the pathway for applicants to seek orders for easements of necessity e.g. for access via a right of way; or for services e.g. electricity and storm water.
See Schs 4A, 8 & 8B of the *CA* for the usual types of easements granted.

An applicant must demonstrate a number of matters, including that they have tried to obtain the easement but failed; and that it is *reasonably necessary* for the *effective development or use of their land*; that the grant would be consistent with the public interest and what compensation would be reasonable were the easement to be granted.

3. *Sec 88 K provides as follows:*

(1) The Court may make an order imposing an easement over land if the easement is reasonably necessary for the effective use or development of other land that will have the benefit of the easement.

(2) Such an order may be made only if the Court is satisfied that:

(a) use of the land having the benefit of the easement will not be inconsistent with the public interest, and

(b) *the owner of the land to be burdened by the easement and each other person having an estate or interest in that land that is evidenced by an instrument registered in the General Register of Deeds or the Register kept under the Real Property Act 1900 can be adequately compensated for any loss or other disadvantage that will arise from imposition of the easement*, and

(c) all reasonable attempts have been made by the applicant for the order to obtain the easement or an easement having the same effect but have been unsuccessful.

(3) The Court is to specify in the order the nature and terms of the easement and such of the particulars referred to in section 88 (1) (a) - (d) as are appropriate and is to identify its site by reference to a plan that is, or is capable of being, registered or recorded under Division 3 of Part 23. The terms may limit the times at which the easement applies.

(4) *The Court is to provide in the order for payment by the applicant to specified persons of such compensation as the Court considers appropriate, unless the Court determines that compensation is not payable because of the special circumstances of the case*.

(5) The costs of the proceedings are payable by the applicant, subject to any order of the Court to the contrary.

(6) Such an easement may be:

(a) released by the owner of the land having the benefit of it, or

(b) modified by a deed made between the owner of the land having the benefit of it and the persons for the time being having the burden of it or (in the case of land under the provisions of the *RealProperty Act 1900*) by a dealing in the form approved under that Act giving effect to the modification.

(7) An easement imposed under this section, a release of such an easement or any modification of such an easement by a deed or dealing takes effect:

(a) if the land burdened is under the *Real Property Act 1900* , when the Registrar-General registers a dealing in the form approved under that Act setting out particulars of the easement, or of the release or modification, by making such recordings in the Register kept under that Act as the Registrar-General considers appropriate, or

(b) in any other case, when a minute of the order imposing the easement or the deed of release or modification is registered in the General Register of Deeds.

(8) An easement imposed under this section has effect (for the purposes of this Act and the *Real Property Act 1900*) as if it was contained in a Deed.

(9) Nothing in this section prevents such an easement from being extinguished or modified under section 89 by the Court.

4. I have delivered previous papers on the application of Sec 88K *CA*, e.g. what does "reasonable efforts" mean; what does "public interest" mean and how to prove it up for trial; and generally how to run a Sec 88K case. These papers are available on my website for Thirteen Wentworth Selborne Chambers; and this presentation will not rehearse the matters in those papers, but rather will explore one aspect only of Sec 88K: *compensation*.

5. I will say one thing only to give some context for those unfamiliar with Sec 88K, by way of extracting the essential principle from a case where I successfully obtained an easement for drainage, so as to allow a dual occupancy to be constructed.

In *Stepanoski v Chen* [2011] NSWSC 1573 Bryson AJ explained the operation of s 88K in terms with which I respectfully agree:

"14 The terms and subject matter of section 88K show that its primary purpose relates to the public interest in effective land use. The purpose of section 88K is illustrated by the nature of an easement as a right annexed to land irrespective of who may from time to time own it, a right which touches and concerns that land, and to which another piece of land is servient, again irrespective of who from time to time may own it. The advantages for the proposed dominant land, and the disadvantages for the proposed servient land are the most prominent considerations. As shown in the words of section 88K, that the proposed easement is reasonably necessary for the effective …use or development of the dominant land is not enough to produce a positive exercise of the discretion in section 88K(1); There is discretion, and the effect on the servient land is also relevant and important.

[15] The power in subsection (1) is discretionary, and in my opinion the discretionary considerations include consideration of matters personal to the owners of pieces of land,

which may extend more widely than considerations affecting land use. Such considerations are likely to be less cogent than considerations which bear on effective use or development of land, and on the subjects expressly mentioned in subsections (1) and (2). As subsection (2) shows, satisfaction of each of the matters in subparagraphs (a), (b) and (c) is a necessary precondition for the making of an order imposing an easement. It is an important consideration that an order imposing an easement is an invasion of property rights made without the consent (and in this case against the wish) of the owner of property; those rights require respect and protection; and an order should not be made unless grounds clearly exist within statutory authorization."

Compensation: principles under Sec 88K

6. In terms of s 88K(4) NSW *Conveyancing Act*, the Court must be satisfied that the respondents can be adequately compensated for "any *loss or other disadvantage* that will arise from the imposition of the easement".

7. It will immediately be seen that the section is not restricted to pure economic loss. It says there must be compensation for "any loss *or other disadvantage"*.

8. In this seminar, I will deconstruct what types of things are considered "*loss";* and what other types of things are considered "*disadvantage".*

9. In *Wengarin Pty Ltd v Byron Shire Council* [1999] NSWSC 485; 9 BPR 16, 985 at [26], the heads of compensation pursuant to Sec 88 K CA were set out; and were adopted by Preston CJ in *Rainbowforce Pty Limited v Skyton Holdings Pty Limited and Ors* [2010] NSWLEC 2 at [111].

Ordinarily, compensation will have three elements:
(a) the diminished market value of the affected land;
(b) associated costs that would be caused to the owner of the affected land; and
(c) an assessment of compensation for insecurity and loss of amenities, such as loss of peace and quiet. Against these losses and disadvantages should be allowed, as an

offset, compensating advantages (if any).

See also *Owners Strata Plan 13635 v Ryan* [2006] NSWSC 221; 12 BPR 23,485 at [85].

10. That requires a causal connection between the imposition of the easement and the compensation: *Mitchell v Boutagy* [2001] NSWSC 1045; 118 LGERA 249 at [27]. That is a question of fact to be determined in each case. The common law of causation should be applied, namely that causation is a question of fact to be determined by applying common sense to the facts of each particular case: *Rainbowforce* para [109].

11. The adequate compensation referred to in s 88K(2)(b) is the same as the compensation that the Court may order under s 88K(4): *Rainbowforce Pty Limited v Skyton Holdings Pty Limited* [2010] NSWLEC 2, para [106].

12. Young JA said in *Tanlane Pty Ltd v Moorebank Recyclers Pty Ltd* (No 2) [2011] NSWSC 1286 (4 November 2011) paras [49] ff:

> *"Assessing compensation is usually an exercise of some difficulty, not the least of which is the fact that valuation is not an exact science.*
>
> *Section 88K(2)(b) provides that the Court may only make an order for the grant of an easement if it is satisfied that the owner of the land to be burdened can be adequately compensated for any loss or other disadvantage that will arise from the imposition of the easement.*
>
> *The meaning of s88K(2)(b) has not, as far as I am aware, been fully fleshed out in the decisions on the section. Just reading the words in a natural way the Court must consider: (a) what loss; and (b) what other disadvantage will arise because of the easement.*
>
> *"Loss" appears to include loss of intangible benefits, Khattar v Wiese [2005] NSWSC 1014; 12 BPR 23, 235 at 23,248 [49], and to include the suffering of potential loss of privacy as a result of strangers using the easement: Hanny v Lewis [1999] NSWSC 83; (1998) 9 BPR 16,205 at 16,209.*

> *Such losses of intangible benefits are hard to value and, as Brereton J said in Khattar, may mean that compensation for such losses cannot be assessed so that no easement can be granted; although that problem was not present in Khattar.*
>
> *A problem that does arise is what semantic significance should be given to the word "will" in the phrase "disadvantage that will arise". Does this mean that the Court does not need to consider (except as to discretion) disadvantages that might possibly arise or even those which have a 50/50 chance of occurring and only consider, under this head, those that will arise as a matter of virtual certainty?"*

13. In other words, the phrase "or other disadvantage" provides for compensation for disturbance beyond the actual value of the proprietary right taken: *Wengarin Pty Ltd v Byron Shire Council* [1999] NSWSC 485; (1999) 9 BPR 16,985; (1999) NSW ConvR 55-903 at [26].

14. This point was not argued in *Tanlane*. However, it seemed to HH that the word "will" means that "the Court is only prevented from making an order under the section where the alleged disadvantage is one which is going to occur as a matter of virtual certainty if the easement is granted. Possible disadvantages that may occur will be properly considered as matters going to discretion."

15. There were a large number of uncertainties bedevilling the quantification of compensation in *Tanlane.* The defendant, Moorebank, submitted that compensation should, accordingly, be on the basis that the full value of the development potential of its land ought be awarded, because of the impact of the imposition of the easement for road access to Tanlane's site was simply not knowable at the time of the trial; and its own proposals to Council for access ramps. Young JA rejected that submission, holding at paras [61] ff:

> *"In many cases where a court has to assess damages or compensation, the Court is faced with an almost impossible task. As Menzies J said in Petroleum and Chemical Corporation (Aust) Ltd v Morris (1973) 1 ALR 269, 271, "Damages cannot, however, be perfect compensation." All a court is expected to do is to fix a fair estimate, even though it is recognized that it is not a perfect assessment: Sharman v Evans [1977] HCA 8; 138 CLR 563, 585.*

At common law that fair estimate is legitimately obtained by a combination of fact, deduction, estimation and discount for contingencies. Likewise compensation under s 88K may be assessed as adequate if a fair result can be produced by these methods.

Further, it is not uncommon in cases dealing with the valuation of land that a court has to make assumptions as to the capacity for land to be rezoned by the grant of a development application, see the classic case of Spencer v Commonwealth [1907] HCA 82; 5 CLR 418.

Thus, determining whether the potential servient owner can be adequately compensated is not stymied by the court's ordinary difficulties in the assessment process. The focus is on whether the person on the Bondi bus would recognize that, as a matter of fairness, there has been adequate compensation.

I need then to ask myself what disadvantages must, as a matter of virtual certainty, flow to Moorebank if the easement is granted. In my view, the answer is "none". Moorebank 's vast hectares can be used for whatever it wants to use them for and access is available.

It should also be borne in mind, as Ball J said in Lonergan v Lewis [2011] NSWSC 1133 at [50], that there is a real distinction between the question in s 88K(2)(b) - can there be adequate compensation and the question in s 88K(4), assuming there can be adequate compensation, what is the fair assessment of it.

I will make a conditional order below which removes the effect of most of the uncertainties. If the local authorities kybosh the ramps, etc. (preventing access to the Moorebank Land), then the easement will be extinguished and compensation refunded. Thus, compensation can be assessed on the basis that the ramp proposal, discussed in detail under E, is viable……."

Loss of amenity & privacy and other intangibles*: *sometimes, no compensation could make good loss of privacy or other intangible interests

16. There is case law that in certain circumstances, where there will be too great an impact on amenity, privacy of the servient land, or on other intangibles (e.g. loss of a view), then money may not be able to compensate. If so, the easement may well not be granted.

Compensation to be assessed once and for all

17. As a general rule, compensation should be assessed once and for all when the order is made. However, liberty can be reserved to the persons affected by imposition of the easement to apply to the Court for further compensation if some unexpected event occurs: *Rainbowforce* para [115].

Onus on applicant to prove compensation

18. *"….the applicant for the order has to establish what the relevant losses and disadvantages are as part of satisfying the Court that the persons affected by imposition of the easement can be adequately compensated……In the course of the hearing, evidentiary onuses may shift to the person affected……. Where facts are peculiarly within the knowledge of the person affected and that person does not adduce relevant evidence, it may be open to the Court to draw unfavourable inferences……": Rainbowforce* para [116]

No compensation for loss of bargaining position; and demanding the earth

19. Sec 88 (k) is not intended to compensate for the loss of bargaining position of the servient owner: *117 York Street Pty Ltd v Proprietors of Strata Plan No 16123* at 515-

516; *Owners Strata Plan 13635 v Ryan* at [85](8). The owner is "to receive a just sum and for value for what he or she has to give over, rather than being able to demand the earth": *Wengarin Pty Ltd v Byron Shire Council* at [17].

Approach is that of judicial valuer

20. "[67] The court in a case such as the present is a judicial valuer. In *Yates Property Corporation Pty Ltd (In Liq) v Darling Harbour Authority* (1991) 24 NSWLR 156 (CA) at 182-183 Handley JA spoke of a situation where a court or a valuer had to make adjustments to values deduced from comparable sales, adjustments which may be nothing more than the "*best guess*" that can be made. His Honour then said:
A judicial valuer is not required to formulate verbal reasons for such guesses or exercises of judgment. Australian courts, and in particular the High Court, have frequently referred to the statement by Lord Hobhouse in Secretary of State for *Foreign Affairs v Charlesworth, Pilling & Co* [1901] AC 373 at 391*:*

... in all valuations, judicial or other, there must be room for inferences and inclinations of opinion which, being more or less conjectural, are difficult to reduce to exact reasoning or to explain to others. Everyone who has gone through the process is aware of this lack of demonstrative proof in his own mind, and knows that every expert witness called before him has had his own set of conjectures, of more or less weight according to his experience and personal sagacity. In such an inquiry as the present, relating to subjects abounding with uncertainties and on which there is little experience, there is more than ordinary room for such guesswork; and it would be very unfair to require an exact exposition of reasons for the conclusion arrived at."

Antipas v Kutcher [2006] NSWLEC 42; (2006) 144 LGERA 289

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Compensation by reference to the Plaintiff's gain

21. The general position is as stated by Austin J stated *Mitchell v Boutagy* at [31]:

"The fact that the plaintiff is a developer is relevant, because the development provides the jurisdictional basis under subsection (1) for the Court to intervene. But apart from the exceptional cases to which Young J referred, the fact that the plaintiff/developer may generate profit, substantial or moderate, from the development in connection with which the easement is sought, does not justify any departure from what would otherwise be the principles upon which adequate compensation is assessed."

See also *Owners Strata Plan 13635 v Ryan* at [85](6)

22. Justice Young's fifth proposition in *Wengarin Pty Ltd v Byron Shire Council* (1999) 9 BPR 16,985, p 26, was as follows:

> "*There may be some exceptional cases which fall outside the net of s 88K(2)(b) yet are cases where it is extremely difficult to assess the compensation, but it is clear that the applicant is to derive a considerable benefit from the application. In such circumstances it may be appropriate to assess the compensation on a percentage of the profits that would be made*."

23. The above exception is hardly ever engaged, as noted in *Antipas's* case and also in *Tenacity Investments v Ku-ring-gai Council* at [112]; and the single engagement I can find of the principle is in *Lonergan's* case*, Phillip Edward Lonergan v Roy Lewis* [2011] NSWSC 1133 see paras [52 ff].

"In this case, it is difficult to see what loss Mr Lewis suffers if the easement is granted. On the other hand, any increase in value of the Lonergan 's land as a consequence of the granting of the easement will be directly attributable to the easement. This is not a case where the value of the easement lies in the fact that it permits the person seeking it to develop land in a way

that it could not otherwise be developed and what is sought is compensation by reference to the value of the development rather than by reference to the value of the easement itself. Taking those matters into account, in my opinion, this is a case that falls within the exception referred to by Young J….."

Compensation for permanent easements such as right of carriageway, services and drainage

24. "*In the case of a grant of a permanent easement, such as a right of carriageway or easement for drainage or services, compensation includes the loss of proprietary rights by the imposition of the easement and compensation for the disturbance effected by the carrying out of the initial work, such as construction of a road or laying of pipes in the easement, and subsequent repair and maintenance from time to time*." *Rainbowforce* para [113].

Instructive is *Stepanoski v Chen* [2011] NSWSC 1573, where I successfully obtained an easement for drainage, allowing the plaintiff to develop land he purchased into a dual occupancy and thus provide accommodation for his aging parents. The first issue was whether an easement ought be granted, as I proposed, over the defendant's land or other land, viz No 57 A, whose land would be diagonally bisected by the pipe (as the defendant proposed). I persuaded HH to grant the drainage easement as I had proposed, and HH recorded the arguments as follows, at para [36]:

HH accepted by submission that the defendant's proposals were "remarkably clumsy and presents no advantages in terms of land use or engineering work over the plaintiffs' proposal. The potential adverse effect on further development on No. 57A of the diagonal bisection is in my judgment prohibitive, and the potential adverse effect of an easement taken round the boundaries of No. 57A is significant. The proposal would be more expensive. It involves intervention in the rights of the owners of two parcels of land not of one. It depends on Council approvals which are uncertain. It has nothing to commend it from any point of view except the point of view of an owner of the defendant's land who very strongly wishes to resist *an easement over her land. It is not beyond the feasible to run*

drainage through No 57 and No. 57A, but it would be a far less satisfactory solution than the plaintiffs' proposal."

Bryson AJ held as follows about compensation at para [18]:

"……While the proceedings were pending arrangements were made for a conclave among experts, including valuing experts, on issues involving expertise. The outcome included an agreement as to valuation, recorded in a letter in Exhibit 2, which assessed the value of the proposed easement if granted at $15,000 inclusive of GST. This agreement relates to land value, which is not the only element relevant to compensation. Works to put the pipe in place in the easement will involve excavation; until the work is undertaken it cannot be known how long the work will take or what subsoil conditions will be encountered, but it is likely that rock excavation will be required, there could well be some days of jackhammer work, the whole of the work will take up to a week and could well take longer, and this will involve disturbance, noise and other annoyance to the occupants of the defendant's house including the defendant herself. This will happen in circumstances where the work, and the presence of workmen are contrary to the defendant's wishes and feelings. However when the work is completed the pipe will be buried in soil, on a bed of aggregate, and is unlikely to require attention, probably none at all for some decades. It will be no more of an inconvenience or source of loss to the plaintiff than the presence of her own drainage pipes buried in her back yard. There is a prospect of further disturbance at some unknown time in the future should maintenance or replacement work be required on the pipe. An assessment of adequate compensation for loss or other disadvantage requires consideration of inconvenience and disturbance which may occur in the future……"

Compensation for scaffold & crane overhang

25. The main case I have found considering in detail compensation for crane overhang, is *Bligh Consulting Pty Ltd v Ausgrid* [2016] NSWLEC 75. Whilst not a Sec 88K case, it involved the compulsory acquisition of three easements to enable building of a substation on neighbouring land. The approach to assessing compensation in Sec

88K cases, can be guided and informed by compulsory acquisition cases.

The case is instructive as to the scarcity of evidence as to comparables, and what use can be made of such comparables as are available. The case also addresses compensation for scaffolding.

Crane swing is a growing issue in the CBD, as I can attest to from my own practice.

Compulsory Acquisition: where compulsory acquisition cases are application by analogy: where a hypothetical purchaser of the servient land would view it as an investment property

26. Sec 51 (xxxi) of the Australian Constitution empowers Federal parliament to make laws for the acquisition of property on "just terms". This power must only be exercised "for any purpose in respect of which Parliament has power to make laws:" *Bank of NSW v Commonwealth* (1948) 76 CLR 1; [1948] HCA 7. Also, "property" is widely defined to include more than simply title to a specific estate or interest in land at law or equity, but includes "*innominate and anomalous interests"*: (ibid) per Dixon J at (349-350).

27. The principal land acquisition statutes of the Commonwealth, States and territories include *Lands Acquisition Act 1989* (Cth); *Land Acquistion (Just Terms Compensation) Act* 1991 (NSW), and are more fully listed in the work by Jacobs QC *Law of Compulsory Land Acquisition* (Thomsons Reuters, 2nd ed, 2015) at p 26. Local Councils also have power to compulsorily acquire land, see e.g. Secs 186 ff of the NSW *Local Government Act 1993* (NSW). Broadly speaking, it permits a council to acquire land (*including an interest in land*) for the purpose of exercising its functions.

28. Easements can be both acquired/ created or extinguished by resumption. An example given by Jacobs QC (ibid) p 246 of an easement that is extinguished when land is resumed, is as follows: Farm A is adjacent to Farm B. Farm A enjoys and easement for right of way over farm B, but the Government resumes Farm B and thereby extinguishes the easement. The measure of compensation to the owner of farm A then depends on how easily they can acquire an alternate right of way.

29. As Jacobs QC points out (ibid, p 28), claims for compensation must be founded on statutory provisions.

30. This section is not intended to canvass the procedure whereby a statutory body can issue a notice of resumption, and how the process of compensation is then worked out. That large task is done by Jacobs QC (ibid). The sole purpose of this paper is to make general reference to the statutory framework whereby easements can be either created / acquired or extinguished by resumption, and to look at the broad principles regarding compensation that apply in those circumstances, and consider whether those principles are applicable by analogy in Sec 88 K cases (where an easement is "acquired").

Valuing easements by resumption: "before and after" and "piecemeal" approaches—when appropriate

31. There are various approaches taken to valuing easements that are created or extinguished by resumption. These include:

(i) the *"before and after"* method: on this approach, one asks what a willing but not anxious purchaser would pay for the property without the easement; and what such a buyer would pay for the property burdened by the easement.

(ii) the *"piecemeal approach*": Under this approach, elements of the affected property are broken into separate components and the impact of the creation of an

easement is then determined piecemeal as regards each of those components. Compensation is then the aggregate of the amounts determined as the depreciation of the "piecemeal" component parts of the land. This approach is really a refined version of the "before and after" method: see generally, Jacobs QC (ibid) p 252.

As noted in *Rainbowforce* para [145], *"the piecemeal approach was also adopted to assess the compensation for imposition of other easements under s 88K, including a right of way in Wengarin Pty Ltd v Byron Shire Council, an easement over land to allow access for parking in Owners Strata Plan 13635 v Ryan and easements to drain water or sewerage in Mitchell v Boutagy; King v Carr-Gregg; Property Partnerships Pacific Pty Ltd v The Owners of Strata Plan 58482 and Tenacity Investments v Ku-ring-gai Council."*

32. In resumption cases concerning easements, the "before and after" method of assessing value is applicable: *Heislers v Melbourne Water Corporation* [2014] VCAT 632 at [25], referring to the seminal case of *Spencer.* This test was also applied in *Chino Pty Ltd v Transport Infrastructure Development Corporation* [2006] NSWLEC 768. There is a long line of cases applying this method, e.g. *Arrow v Electricity Comm (NSW)* (1994) 87 LGERA 363.

33. The "piecemeal approach" has also been used to value just compensation in easement resumption cases, as Jacobs QC (ibid) notes at p 252. He cites various cases including *Mobbs v The Minister* (1960) 5 LGRA 276, where an easement for a transmission line was created over an orchard. Hadie J held that the highest and best use of the land was for subdivision into two lots, with the orchard comprising the third residual lot. HH discounted the value of each of these potential lots because of the impact on them of the transmission lines.

34. Of course, a court does not have to choose between the "before and after" and "piecemeal" methods; and one is not necessarily preferable to the other: *Kater v Electricity Transmission Authority (NSW)* [1996] NSWLEC 19.

35. *Rainbowforce* involved a claim for easement of right of carriageway, to allow significant development to occur. Paras [137] ff indicate the types of matters that the court will have regard to, in choosing one method over the other. In that case,

the learned CJ preferred the "piecemeal" method, i.e. focusing on the loss in value of the residue, because, in essence, the servient and was affected by site specific zoning restrictions which in effect, imposed a *de facto* easement in the before position. Thus the *de facto* "before" position looked much like the *de jure* "post" position.

Paras [160] –[163] contain the key reasoning:

"[160] In my opinion, there is considerable force in Mr Wood's reasons for stating that the imposition of the easement on Lot 101 and Lot 2 does not greatly diminish the value of the land burdened by the easement. It is true that imposition of the easement makes the restrictions on the use of the land burdened legal; it puts a "blot on the title". However, the planning restrictions, including in the site specific DCP for the Skyton land and in the Skyton development consent, require the creation of an easement over the Skyton land and severely restrict the use of that part of the land that would be burdened by the easement.

[161] Nevertheless, I consider that Mr Wood's estimate of 15% for Lot 101 and Lot 2 is too "minimal" and a more appropriate figure is 20%. The imposition of the easement formalises the restrictions and creates the blot on the title. It will result in the construction of the permanent works of the access road, footpath and bridge in the easement, thereby foreclosing Skyton's options for use of the land burdened, such as greater areas of landscaping to benefit any development on the Skyton land.

[162] -[164] In relation to Lot 3, the proposed location is through the middle of the Lot. This location accords with the requirements of the site specific DCPs for the Rainbowforce land and the Skyton land, in both the text and the plans. The Skyton development consent is more equivocal because the conditions refer to a plan that shows a "possible future road" that crosses in the north-eastern corner of Lot 3. If Lot 3 itself were able to be developed for residential purposes, the developable area would include the middle of the lot through which the proposed easement passes. The easement would, therefore, restrict the potential of Lot 3 to be developed itself for residential purposes…… I accept Mr Wood's analysis that, even without the easement being imposed, Lot 3 would not be able to be developed itself but rather would be used for open space and have its building entitlement

transferred to Lot 101 and Lot 2. The imposition of the easement will not alter this position. However, the location of the easement and the construction of the access road may have some adverse effect on the amenity and usability of the open space. Mr Wood provided for a 10% diminution. I consider this to be a fair estimate."

Quantifying compensation in resumption of easement cases

36. There are many cases where land is resumed for the provision of electricity transmission towers and the like. One of the main cases in that line is *Arrow v The Electricity Comm of NSW* [1994] NSWLEC 91, where Bignold J cited with approval from Brown's "*Land Acquisition"*, as follows:

"Where an easement is compulsorily acquired the principles to be applied in assessing compensation are no different from those applying when the full fee simple is acquired*. For practical purposes it becomes a matter of assessing the extent to which the claimant has been disadvantaged as a 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 person the claimant has suffered diminution in the value of his property* resulting, in the case of an easement for an electric transmission line, from the erection of the transmission line and the creation of an easement including, where appropriate, severance and injurious affection damage."

37. The manner in which the wildly competing reports of the two valuers were dealt with by HH, is with respect, instructive. HH in effect said neither report told the whole story, as follows:

"I have already stated my conclusion that the sales of "Porters Station" and "Bunnamagoo" do not support either of the competing theses advanced by Mr Robertson and by Mr Hopcraft. Much attention was directed at the hearing, by the parties (and their consultant valuers and their agronomists) to these properties and to the sales of them. Ultimately I have

not found this evidence to be very helpful in the determination of the issues in dispute in this case. So far as the two properties are concerned the evidence establishes that they are very different both in location and climate. The detailed consideration of their respective carrying capacities or agricultural productivities almost became overwhelming, if not bewildering. In any event it appears from the evidence of the sales that they were transacted independently of each other and without detailed comparative analyses such as were presented to the Court. Indeed when it comes to understanding the sale transactions, the evidence assumed the uncertain qualities of hearsay on hearsay and re-interpretation of these transactions. In a word, I found quite inconclusive, both the sales and the competing analyses of them that the parties proffered……..".

38. A central matter then explored by HH was whether the potential for sub division of Foxlea, the lot in respect of which the easement was resumed, add value to it over and above its value as a grazing property. HH then explored the planning evidence and concluded that Foxlea could have obtained sub division approval i.e. a hypothetical sub divisional exercise was undertaken; and concluded as follows:

"…..I am satisfied by the case presented by the Applicant that the resumption has entirely destroyed the extra value of $70,000 that the concessional lot subdivision potential of "Foxlea" possessed prior to the resumption …"

39. This approach in resumption matters, was expressly applied in assessing compensation pursuant to a Sec 88 K application, in *Antipas v Kutcher & Anor* [2006] NSWLEC 42.

A commissioner in the L & E Court had approved a DA for a mixed residential and commercial development, subject to the applicant obtaining easements as follows: for right of way over neighbouring sites to increase an existing ROW by 3 m's to about 6 m's in width, so as to allow for a turning bay; and also for creation of a new right of way for access.

The applicant then successfully sought those easements in the L & E Court, pursuant

to Section 40(2)(a) of the *Court Act* which allows the court to make an order imposing an easement over land if it is satisfied that: "*the easement is reasonably necessary for the development to have effect in accordance with the consent*

The respondent resisted on the grounds *inter alia*, that there would be additional noise and traffic on a permanent basis; associated increase in noise, fumes, dust and interruption to business; the possible loss of tenants and associated difficulty in finding new tenants; loss of quiet enjoyment of the property; subjective but real worry about the possibility of accidents; and loss of bargaining position and the legitimate economic advantage in maintaining the *status quo.* This, submitted the respondent, meant that no compensation would be adequate.

40. However, these concerns were overcome and over $100,000 awarded as compensation.

41. When it came to compensation, the Court said this:

"36 The parties' valuers have attempted to determine the diminished market value of the respondents' land as a consequence of the extension of the benefit of the right of way to lot 31. As noted above, they have each adopted a different approach to the assessment, with different results.

37 The applicant's valuer, Mr Gothard, is of the view that the right of way should be assessed against the value of the land only and relies upon amounts of compensation allowed upon the acquisition of easements in other cases. In this way he derives a value of $13,000 for the easement, which represents the applicant's alternative contention as to the appropriate amount of compensation.

38 The respondents' valuer, Mr Dobrow, has adopted a different approach. He has adopted a "before and after" method of valuation – that is, by asking what a willing but not anxious purchaser would pay for the property without the right of way benefiting lot 31, and then asking what such a purchaser would pay for the property burdened by the right of way benefiting lot 31. In Mr Dobrow's view, the hypothetical purchaser would most likely be an investor, in which case the appropriate method of valuation is by capitalisation of the net

returns on a "before and after" basis.

39 Mr Gothard agreed, in cross-examination, that the respondents' property is an investment property rather than a potential development site. The difficulty I have with Mr Gothard's approach is that the comparable cases in which easements have been acquired, upon which he relies, are not truly comparable. With a few exceptions, they are mainly cases involving the acquisition of drainage easements through residential properties, for which the compensation payable under s 88K of the Conveyancing Act has varied from about $12,000 to about $30,000. A drainage easement is not, in my opinion, comparable to a right of way. Once drainage pipes have been laid and covered over, there is no ongoing interference with the surface of the land within the easement. A right of way, on the other hand, involves an ongoing disturbance in the form of vehicles coming and going which is both visible and generates noise and fumes and it limits the use to which the surface of the land may be put.

40 Mr Gothard places particular reliance, however, on one case involving a right of way at Taren Point Road, Caringbah. That was an intensification of a right of way through a commercial property, where the parties negotiated a price of $10,000 for the additional right. Mr Dobrow, however, states that this is an unreliable indicator: it was an intensification of an existing right of way, the price was negotiated between the parties and was not an amount determined by the court.

41 In my opinion, the approach of Mr Dobrow is to be preferred. Since both valuers have agreed that a hypothetical purchaser of the respondents' land would view it as an investment property, the "before and after" method of valuation involving capitalisation of net returns is a legitimate and reliable method of valuation. It is a method which is well supported by authority in cases involving the acquisition of an easement : Mobbs v The Minister (1960) 5 LGERA 276; Joyce v Northern Electric Authority (Qld) (1974) 1 QLCR 171; Longeranong Pty Ltd v Electricity Trust (SA) (1990) 55 SASR 493; 71 LGRA 316; Electricity Commission of New South Wales v Arrow (1994) 85 LGERA 418.

42 Mr Dobrow considers that the rentals of the shops and office in the respondents' property will be reduced following the imposition of the easement. Tenants will be affected at peak times and would negotiate for a lower rental in the order of about five per cent. Mr Gothard, however, considers that there would be no reduction in the shop rentals due to their

remoteness from the right of way. I am, however, persuaded by the logic of Mr Dobrow's reasoning – tenants of the shops will want to come and go at peak times, which will coincide with the peak times of use of the right of way.

43 …… A prudent hypothetical purchaser would, in my opinion, have regard to the rents likely to be obtained, namely, current market rent.

44 The valuers both agreed that if one were to employ the capitalisation of net rentals in the "before" or present situation, then the appropriate capitalisation rate is seven per cent. Mr Dobrow, however, would increase the rate to 7.5 per cent in the "after" situation, because, according to him, the property may take longer to rent and if so it may become "stigmatised". In that case, Mr Dobrow says that a hypothetical purchaser would look for a higher yield of 7.5 per cent rather than seven per cent. Again I am persuaded by the logic of Mr Dobrow's approach.

45 Accordingly, I prefer the evidence of Mr Dobrow to that of Mr Gothard. I adopt Mr Dobrow's figures: a value of $1,010,000 in the "before" situation and a value of $895,500 in the "after" situation, resulting in a compensation figure of $114,500.

46 Mr G Newport, appearing for Mr Antipas, submits that such a sum is out of step with sums that have been awarded in other cases involving the acquisition of a right of way, in particular, Wengarin ($12,000) and Marshall v Wollongong City Council [2000] NSWSC 137 ($13,600). In both of these cases, however, the right of way was created over vacant land, and in the case of Marshall there was a resultant benefit to the servient tenement. I do not derive any assistance from these cases.

47 Both valuers agreed that the determination of compensation is not merely a calculation exercise. One also needs to step back, look at it realistically and compare the figure with actual sales. Since there are no truly comparable sales, however, I am prepared to adopt Mr Dobrow's figure of $114,500.

48 The respondents also seek other items of compensation, such as the need for double glazing, additional cleaning costs and surge protection. One of the benefits of adopting the "before and after" method, however, is that it takes into account all the adverse

consequences in the "after" situation, so that no special items need to be further considered."

Adopt a practical view

42. In *Joyce v Northern Electric Authority of Queensland* (1974) 1 QLCR 171 at 202, the Court observed that:

"...the correct approach is not one of reading the grant of easement document and assuming the worst, but adopting a practical view of the matter and conducting enquiries which would lead to an intelligent assessment of the risk of future intrusion..."

Comments and constructive criticism welcomed to:

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