SUPREME COURT OF QUEENSLAND

CITATION:	*Albion Mill FCP Pty Ltd & Anor v FKP Commercial Developments Pty Ltd* [2018] QCA 229
PARTIES:	**ALBION MILL FCP PTY LTD** **ACN 166 552 996** **(first appellant)** **PAUL FRIDMAN** **(second appellant)** **v** **FKP COMMERCIAL DEVELOPMENTS PTY LTD** **ACN 010 750 964** (respondent)
FILE NO/S:	Appeal No 671 of 2018 SC No 3662 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2017] QSC 322
DELIVERED ON:	21 September 2018
DELIVERED AT:	Brisbane
HEARING DATE:	15 June 2018
JUDGES:	Sofronoff P and Philippides JA and Henry J
ORDER:	**Appeal dismissed with costs.**
CATCHWORDS:	CONTRACTS – VENDOR AND PURCHASER – DISCLOSURE OF MATERIAL FACTS – where the respondent entered into a contract with the appellant in July 2015 for the sale of a development site – where three of the lots comprising part of the development site were contaminated and included in the environmental management register – where the former s 421 *Environmental Protection Act* 1994 (Qld) required a vendor of contaminated land recorded in the environmental management register to give written notice to a potential purchaser of the particulars of the land recorded in the register and details of any site management plans prior to any agreement for disposal of the land – where the appellant attempted to rescind the contract in reliance upon s 421(3) *Environmental Protection Act* 1994 (Qld) – where, prior to entering into the contract for the sale of the development site, the respondent had been negotiating the sale of the site with a company related to the appellant – where an employee of the related company was granted access by the respondent to a data room containing documents made available as part of

a due diligence process – where the documents uploaded to the data room by the respondent included search responses from the Environmental Management Register and Contaminated Land Register for each of the contaminated lots – where evidence tendered at trial proved that the employee, or someone using the employee's credentials, had accessed the search responses – where the related company nominated the appellant to be the purchaser of the site – where the sole shareholder of the related company was the same person as the sole shareholder of the appellant – where the employee of the related company who was granted access to the data room was the sole director of the appellant – where the learned trial judge was satisfied that notice under s 421 *Environmental Protection Act* 1994 (Qld) had been given to the appellant by the respondent – whether written notice had been given to the appellant by the respondent as required by s 421(2) *Environmental Protection Act* 1994 (Qld), such that the appellant was not entitled to rescind the contract under s 421(3) *Environmental Protection Act* 1994 (Qld)

APPEAL AND NEW TRIAL – GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE'S FINDINGS OF FACT – where the respondent tendered a valuation report prepared by an expert valuer at trial – where the appellant called no contrary evidence as to the value of the site – where the appellant submits that the learned primary judge erred in accepting the expert valuer's evidence – where at trial the appellant submitted that reliance by the valuer on a property that the valuer identified as comparable was erroneous, as the sale of that property was not at arms' length – where the learned primary judge rejected this submission, finding that the appellant had not established that the sale was not at market value – where the appellant submits that the learned primary judge erred by placing the onus of proof upon the appellant – where the appellant submits that, in any case, the property relied on by the valuer as being comparable was not comparable, due to size and height limit differences with that property and the subject site – where the appellant submits that the expert valuer's evidence lacked any credibility – whether the learned primary judge erred in the assessment of damages

Environmental Protection Act 1994 (Qld), s 421

Austin v Secretary, Department of Family and Community Services (1999) 92 FCR 138; [1999] FCA 938, discussed
Capper v Thorpe (1998) 194 CLR 342; [1998] HCA 24, cited
Duffy v The Minister for Planning (2003) 129 LGERA 271; [2003] WASCA 294, quoted
Goodyear Tyre and Rubber Co (Great Britain) Ltd v Lancashire Batteries Ltd [1958] 1 WLR 857, cited
R v Secretary of State for the Home Department; ex parte Tolba [1988] Imm AR 78, cited

Re Friedlander; Ex parte Oastler (1884) 13 QBD 471, cited
Re Intex Consultants Pty Ltd [1986] 2 Qd R 99, cited
Robinson Helicopter Company Inc v McDermott (2016) 90 ALJR 679; [2016] HCA 22, cited
Secretary, Department of Family and Community Services v Rogers (2000) 104 FCR 272; [2000] FCA 1447, discussed
Secretary of State for Foreign Affairs v Charlesworth, Pilling & Co [1901] AC 373, quoted
Spencer v The Commonwealth (1907) 5 CLR 418; [1907] HCA 82, cited
Thompson v London, Midland and Scottish Railway Co [1930] 1 KB 41, discussed
Western Australian Planning Commission v Arcus Shopfitters Pty Ltd [2003] WASCA 295, cited

COUNSEL: S S W Couper QC, with M D Evans, for the appellants
M D Martin QC, with C Jennings, for the respondent

SOLICITORS: HopgoodGanim Lawyers for the appellants
Mills Oakley for the respondent

[1] **SOFRONOFF P:** The appellant, Albion Mill FCP Pty Ltd, entered into a contract with FKP Commercial Developments Pty Ltd to purchase a development site at Albion. Pursuant to a variation to that contact, the appellant became obliged to pay five per cent of the purchase price by a certain date. It failed to do so. FKP gave notice of default and, upon the failure to pay persisting, it terminated the contract. For its part, Albion Mill rescinded the contract in reliance upon s 421(3) of the *Environmental Protection Act* 1994. Section 421(2) requires an intending vendor of land that is registered in the Contaminated Land Register maintained under the Act to give written notice to an intending buyer that the particulars of the land have been recorded in the Register. If the land is subject to a site management plan, as this land was, the intending vendor must also give the intending purchaser written notice of the details of the plan.

[2] FKP says that it gave such a notice. Albion Mill contends that no notice was given.

[3] At the trial of this proceeding, Jackson J found that notice had been given and assessed FKP's damages for breach of contract (including interest) in the sum of $5,459,640.41. He dismissed Albion Mill's claim for the recovery of money that it had already paid.

[4] Albion Mill now appeals against his Honour's orders. It contends that his Honour was wrong in concluding notice had been given pursuant to the section. It also challenges his Honour's award of damages.

[5] It is necessary to understand Part 8 of the Act in order to determine the meaning of s 421 because s 421 is merely one part of a larger legislative scheme. It should be noted that s 421 of the *Environmental Protection Act* 1994 was repealed on 30 September 2015. However, the right to rescind an agreement conferred by s 421 is preserved by operation of s 20(2)(c) of the *Acts Interpretation Act* 1954 (Qld), in respect of agreements entered into prior to 30 September 2015.

[6] Section 421 is contained in Part 8 of the Act. That Part deals with the subject of contaminated land. The Act defines such land as land "contaminated by a hazardous contaminant". It was common ground at the trial that the land the subject of the contract in the present case was such land. Chapter 8 contains a scheme pursuant to which the fact that land is contaminated must be notified to particular parties, including the "administering authority". Relevantly, the administering authority is the Chief Executive of the department that administers the Act.

[7] Pursuant to s 371 an owner or occupier of land who becomes aware that the land is contaminated must give notice to the "administering authority in the approved form". A failure to do so is an offence. Pursuant to s 372, a local government that becomes aware that land in its area is contaminated must also "give notice under the sub-section to the administering authority in the approved form".

[8] If the authority has been given notice by someone other than the land's owner that the land is contaminated, s 373 obliges the authority to "give written notice about the … contamination to the owner of the land". Section 373(4) sets out the matters that must be contained in the notice. These include the fact that the land is contaminated land, the grounds upon which the authority believes that to be so, and that the authority is considering including particulars of land in the Environmental Management Register. As part of the notification, the authority is required to furnish the recipient of the notice with any reports that have been prepared as a result of any investigation of the land. Submissions must be invited from the owner about whether or not the land is contaminated land. This process triggers the imposition of an obligation under s 374 of the Act. That section imposes a duty upon the authority to decide whether the land is contaminated. Subject to certain exceptions, the authority must record particulars of contaminated land in the appropriate Register. Section 374(5) requires the authority by written notice to communicate its decision to the owner and state the reasons for its decision. If the decision is to record the land in the Register then the notice to the owner must also "state the review or appeal details".

[9] Section 376 empowers the administering authority to "require" a site investigation to be conducted or commissioned by, among other persons, the owner of the land. Pursuant to s 377, such a requirement must be made "by a written notice to the person … required to conduct or commission the site investigation". Section 377(3) requires such a notice to state the grounds on which the requirement is made, outline the facts and circumstances forming the basis for those grounds, state the matters relevant for the investigation, the day by which a report must be submitted to the administering authority and, finally, state the "review or appeal details".

[10] Section 378 entitles a recipient of such a notice to apply for a waiver of the requirement to conduct or commission an investigation. The authority must "give written notice of the decision [about the waiver] to the recipient" pursuant to s 378(5). Section 378(6) requires that notice to state the reasons for the decision and, if the decision is to refuse the application, it must state the review or appeal details.

[11] Section 370 empowers a person who is obliged to conduct a site investigation to enter the relevant land for that purpose. If that person does not have the consent of the owner or occupier of the land, then the section confers a right of entry upon giving five business days "written notice to the owner and occupier". Section 380(3) provides that the notice must "inform the owner and any occupier"

of three things: the intention to enter the land, the purpose of the entry and the days and times when the entry is to be made.

[12] Section 384 obliges the administering authority to consider the content of the report resulting from a site investigation and decide whether the land is contaminated land. Section 384(3) obliges the authority to "give written notice of the decision" to certain persons. Section 384(4) requires such a notice to state the reasons for the decision and, in the notice to the land's owner, state the review or appeal details.

[13] Section 385 empowers the authority to require a further report or additional information. Such a requirement must be made "by a written notice given" to certain persons. Section 385(4) requires such a notice to state the grounds on which the requirement is made, to outline the facts and circumstances forming the basis for those grounds, to state the relevant matters for the information required and to state the day by which the information or report must be given. The review or appeal details must be included.

[14] Section 391 empower the authority to require work to be done to remediate contaminated land. Section 391(5) provides that such a requirement must "be in the form of a written notice". Such a notice must state the work that must be conducted and it must give the recipient of the notice approval to remove and treat or dispose of soil. It must state any conditions applicable to such removal or disposal. The notice must also state that the recipient must give a report to the authority within a certain time after completing the work. It must also state the review or appeal details. Section 391(5)(g) requires that the notice "be served on the recipient and the land's owner".

[15] Section 394 confers a right to enter the land upon the person who is to conduct the remediation work. Such a right will arise if "at least five business days' written notice is given to the owner and occupier". Section 394(3) requires that such a notice much inform the owner and occupier of the intention to enter the land, the purpose of the entry and the days and times when the entry is to be made.

[16] As in the case of a report about whether land is contaminated, so also in the case of remediation works the authority must give written notice of its decision whether it considers the land still to be contaminated land. This must be done by giving written notice of the decision to certain persons. The notice must state, as in the previous instance, the reasons for the decision and the details of the rights of appeal and review. The authority may, as in the previous case relating to its decision that land is contaminated land, require another report or additional information. That requirement must be "made by written notice given to the person". Such a notice must state the grounds for the requirement, outline the facts and circumstances forming the basis for the grounds and state the relevant matters for the information required as well as the time by which it is required. The review or appeal details must be included.

[17] Pursuant to s 405 and s 406, a requirement by the authority upon a person to prepare a site management plan for the land is the subject of similar requirements about the giving of notices and the content of such notices.

[18] We come, finally, to Division 6 of Part 8 which is concerned with contaminated land whose particulars have been recorded in the Contaminated Land Register and

whose owner wishes to enter into an agreement with another person about the occupancy of the land or for the sale of the land.

[19] Both s 420, which deals with notice that must be given to a potential lessee or licensee and s 421, which is concerned with notices that must be given to proposed purchasers, are in similar terms. It is sufficient to deal only with s 421, with which this appeal is concerned. It is necessary to set out that section in full.

> "421 Notice to be given to proposed purchaser of land
>
> (1) This section applies to the owner of land if—
>
> (a) particulars of the land are recorded in the environmental management register or contaminated land register; or
>
> (b) the land is the subject of—
>
> (i) a notice under section 373 informing the owner that the administering authority believes the land has been, or is being, used for a notifiable activity or is contaminated land; or
>
> (ii) a notice to conduct or commission a site investigation; or
>
> (iii) a remediation notice; or
>
> (iv) a notice that the administering authority is preparing, or requiring someone else to prepare, a site management plan for the land; or
>
> (c) the land is the subject of an order under section 458.
>
> (2) If the owner proposes to dispose of the land to someone else (the buyer), the owner must, before agreeing to dispose of the land, give written notice to the buyer—
>
> (a) if particulars of the land are recorded in the environmental management register or contaminated land register—that the particulars have been recorded in the register and, if the land is subject to a site management plan, details of the plan; or
>
> (b) if the owner has been given a notice under this part—that the owner has been given a notice under this part and particulars about the notice; or
>
> (c) if the land is the subject of an order under section 458—that the land is the subject of the order and particulars about the order.
>
> Maximum penalty—50 penalty units.
>
> (3) If the owner does not comply with subsection (2), the buyer may rescind the agreement by written notice given

to the owner before the completion of the agreement or possession under the agreement, whichever is the earlier.

(4) On rescission of the agreement under subsection (3)—

(a) person who was paid amounts by the buyer under the agreement must refund the amounts to the buyer; and

(b) the buyer must return to the owner any documents about the disposal (other than the buyer's copy of the agreement).

(5) Subsections (3) and (4) apply despite anything to the contrary in the agreement."

[20] It can be seen that the notice referred to in s 421(2) must have the following five characteristics:

1. it must be a written notice;

2. it must notify "that the particulars have been recorded in the register";

3. if the land is subject to a site management plan, it must notify the "details of the plan";

4. the owner must "give" the notice to the "buyer";

5. the notice must be given "before agreeing to dispose of the land".

[21] If notice is given as required and if a contract for the sale of the land is later entered into, nothing follows. However, if notice has not been given as required but a contract is entered into, then pursuant to sub-section (3) upon entering into the contract the buyer immediately has a right to rescind the contract "by written notice given to the owner before completion" of the agreement or possession.

[22] A number of observations may be made about this legislative scheme.

[23] Sections 373, 377, 385, 391, 398 and 406 all confer power upon the authority to impose a liability upon a person and all of these provisions have a feature in common. Each of them requires somebody to "give notice" to another person. However, the provisions also contain differences.

[24] Sections 371 and 372 are the only provisions which require that notice be given "in the approved form". Such a notice is given to the authority. The administering authority is, of course, a bureaucracy. A bureaucracy can only function efficiently over the whole scope of its field of the operation and over time if it conforms to a set of standard operation procedures. Consequently, it is understandable why notification given to the authority has to conform to a particular standard, that is to say, it must be in an approved form. None of the other provisions involve notification to the authority.

[25] Section 373 is the provision that concerns notification to an owner of land that the land might come to be registered as contaminated land. It is the first step in a process that might lead to such registration, an event that itself might lead to the imposition of statutory liabilities upon the owner. The provision anticipates that the

owner might wish to make submissions against a decision that the land is contaminated. Accordingly, it is understandable that the notice that the authority is required to give to the owner should specify particular matters that would enable an owner to give comprehensive consideration to the potential liabilities and to the question of any submission that should be made in response. Such specification also aids the bureaucracy in the way I have referred to. Accordingly, s 373(4) specifies seven matters that have to be included in the written notice.

[26] Sections 377, 385, 387, 391 and 406 each confer power upon the authority to impose a duty upon a recipient of the notice to perform certain acts. Some of these acts, such as the conduct of a site investigation, may be expensive and inconvenient. Accordingly, the administering authority may only act under these provisions by giving a notice which contains specific matters that explain the authority's basis for its requirement. Each of these provisions also requires the authority to notify the recipient of review and appeal rights. The specified contents give utility to the recipient's consideration of rights of review or appeal.

[27] Sections 374, 378, 384, 397, 407 and 413 each require the authority to give the recipient of the notice notification of a decision or approval. In each case, the Act requires the notice to contain only two things. First, the notice must include the reasons for the decision. Second, the notice must state the review or appeal details. The inclusion of the reasons for the decision is in accordance with the general policy of the law relating to decisions made by the executive that such decisions be explained to persons affected by them. In addition, the articulation of reasons ensures the utility of any review or appeal.

[28] Sections 380, 394 and 409 concern a notice given to the owner or occupier of land before entry is made for statutory purposes. In each case the notice must contain only three matters: the intention to enter, the purpose of entry and the days and times when the entry is to be made. Communication of those matters is sufficient to inform an owner or occupier about the source of the right of entry and its limited scope.

[29] The requirements for the contents of the notice in each of these categories have been moulded to satisfy the purpose to be achieved by the giving of the respective notices.

[30] It is now possible to consider the requirements of s 421. Unlike the provisions that have just been referred to, a notice under s 421 does not impose any liability upon its recipient. Rather, the recipient gains a right to rescind an otherwise valid contract. The statute confers a right of rescission whether or not the buyer also has a common law right to terminate the contract. A buyer might have a common law right to terminate the contract on the ground of misrepresentation or, in some circumstances, non-disclosure. Nevertheless, the statute confers a distinct right of rescission if written notice in terms of s 421(2) has not been given even if the buyer might actually know that the land is contaminated.

[31] The written notice must notify only two things: that the particulars have been recorded in the register and the details of any existing site management plan. There is no requirement that the notice take any particular form provided it is in writing. There is no requirement that the notice be given within any particular time frame

provided it is given "before agreeing to dispose of the land". The "giving" need not take any particular form.

[32] The simplicity of the requirement conforms to the purpose for which such a notice is given: to inform the buyer only of the fact of the registration of the particulars of the land and the details of any plan.

[33] The requirement that the notice be in writing, even if the facts which the statute requires be notified have already been communicated orally, can be seen to serve the statutory purpose of affirmative proof of satisfaction of the statutory obligation and of precision in what has been notified. Apart from obviating uncertainty as between the owner and the buyer, it also simplifies proof because a contravention constitutes an offence as well as conferring a civil right.

[34] It is in this statutory context that the case authorities relating to the giving of written notices must be considered. Care must be taken not to accord inappropriate weight to decisions given under statutes whose provisions serve different purposes.

[35] A consideration of the cases relied upon by the parties to this appeal shows that the question whether there has been effective notice has always been answered by reference to the particular purpose to be served by a notice in the circumstances of the case.

[36] In *Goodyear Tyre and Rubber Co (Great Britain) Ltd v Lancashire Batteries Ltd*,[1] the United Kingdom Court of Appeal had to consider s 25(1) of the *Restrictive Trade Practices Act* 1956 (UK). That subsection provided, relevantly:

> "Where goods are sold by a supplier subject to a condition as to the price at which those goods may be resold … that condition may … be enforced by the supplier against any person not party to the sale who subsequently acquires the goods with notice of the condition as if he had been party thereto."
>
> (Emphasis added)

[37] The appellant sold tyres to wholesalers subject to a condition that the tyres not be resold except at a certain price. A trade association to which the respondent belonged sent out a circular to its members, including the respondent, each month. One particular circular referred expressly to the *Restrictive Trade Practices Act* 1956 and then set out a list headed "Lists and addresses of manufacturers and concessionaires who prescribe conditions as to price for their respective specified products". After explaining the effect of s 25 of the Act, the circular listed manufacturers, including the appellant, whose products were subject to such a condition. The circular then stated that the precise terms of those conditions could be obtained "on application to the manufacturer".

[38] The question for the Court was whether the content of the circular, which admittedly had been received, had the effect that the respondent had acquired "the goods with notice of the condition". Lord Evershed MR, who wrote the leading judgment, held that the section had been satisfied. He said, relevantly:

> "The word "notice" to a lawyer, in my judgment, means something less than full knowledge. It means, no doubt, that the thing of which

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1 [1958] 1 WLR 857.

> a man must have notice must be brought clearly to his attention. What, in different cases, may be sufficient notice is a matter which will be decided when those cases come before the courts; but in this case it seems to me that two things are clearly established: first, that the defendants had been told and knew (had been expressly told and clearly knew) that tyres which had been manufactured and supplied by the plaintiffs had had imposed upon them by the plaintiffs a condition as to price, including a condition that they should not be resold at other than the appropriate price which the manufacturer had prescribed. That is clear. They had, furthermore, been told … that the details of the condition, that what was the appropriate price in any given case for the resale of those tyres, could be obtained on application to the manufacturer at the address which was stated in the same circular. In my judgment, that constituted in this case "notice of the condition" within the requirement of section 25(1).
>
> …
>
> "Notice of the condition" means, prima facie, I should have thought, "notice of the fact of the condition." That is what it says; and the only question is whether the notice which here was had was clear enough to indicate and bring to bear on the mind of the defendants the conditions sought to be enforced."

[39] Lord Evershed drew support for his reasoning from *Thompson v London, Midland and Scottish Railway Co*.[2] This was one of a series of cases which concerned the question whether conditions of travel issued by a railway company, which were contained in documents held by the company, were binding upon the purchaser of a ticket who is aware of nothing more than that the contract of carriage constituted by the ticket is subject to conditions that can be examined elsewhere. Lord Evershed held that the effect of these ticket cases was that:[3]

> "…you may have sufficient notice of a condition to be bound by its terms although you have not been told or had put into your hands or under your nose a full statement of exactly what the terms of that condition are."

[40] Accordingly, as his Honour said, the question was whether the notice was clear enough to indicate and bring to bear on the mind of the defendants a condition sought to be enforced. The test to be satisfied derived from the purpose to be served by the provision.

[41] In *Austin v Secretary, Department of Family and Community Services*,[4] Drummond J had to consider s 660K of the *Social Security Act* 1991 (Cth). That provision controlled the date from which a favourable determination on review took effect by reference to when "a notice is given to the person to whom the allowance is payable advising the person of the making of the previous decision".

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2 [1930] 1 KB 41.
3 *Goodyear Tyre and Rubber Co*, supra, at 862.
4 (1999) 92 FCR 138.

[42] His Honour observed that the giving of notice "plays an important role in fixing the cut-off-date for calculating payments" that had been determined to be necessary to redress unjust decisions made in the past. Accordingly, his Honour said:[5]

> "It is therefore unlikely that Parliament intended that the answer to the question whether a notice had been given might permit an investigation into a range of information supplied by the Department to the benefit recipient over a longer or short period to determine whether an inference could be drawn from a part or from the entire body of that information that a prior decision as to the rate or the entitlement had been made. I therefore consider that a communication will only constitute a good "notice" of the earlier unjust decision … if it meets the following requirements. … it must be identifiable as a communication to the benefit recipient that a decision has been made to pay him or her Newstart Allowance at a particular rate. In the case of a decision correctable under s 660J, it must be a communication that a decision has been made to cancel or suspend the Newstart Allowance to that person.
>
> Such a reading of s 660K is, in my opinion, consistent with the interpretation frequently placed on the word "notice" in the context of statutes that provide for rights or obligations to be created or affected by the giving of notice."

[43] His Honour then referred to *Re Friedlander; ex parte Oastler*.[6] That was a case concerning bankruptcy legislation. In the context of a debtor's notice to creditors of an intention to suspend payments of debts, which is an act of bankruptcy, the court held that notice "does not mean mere casual talk; it must be something formal and deliberate …".[7]

[44] Drummond J also referred to *R v Secretary of State for the Home Department; ex parte Tolba*,[8] in which it was held that a statutory provision requiring that "notice giving or refusing leave" to enter the United Kingdom be given to a new arrival. It was held that a notice satisfying that provision had to be one that when:

> "… viewed objectively, it can reasonably be expected to convey the relevant information to the mind of the average intending immigrant …"[9]

[45] It is understandable that a debtor's notice to creditors of an intention to suspend the payment of debts, constituting the serious event of an act of bankruptcy which will have the effect of changing the debtor's civil status, should satisfy a relatively high statutory standard. A notification to an intended immigrant of a refusal or grant of leave to enter the United Kingdom need only communicate that simple fact effectively. In each case the purpose to be served by the notice dictates the standard to which the notice must conform if the statute otherwise does not specify any standard or format. In *Austin* itself, Drummond J held that the requirements of a valid notice under the legislation drew their character from the "important role" played by such a notice. That is to say, the requirements depended upon the

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5 *Austin*, supra, at [30] – [31].
6 (1884) 13 QBD 471.
7 Supra.
8 [1988] Imm AR 78.
9 Supra.

purpose such a notice is to serve. No more was required than that the communication be identifiable as a communication to its recipient that a particular decision had been made to pay an allowance at a particular rate.

[46] Another example is *Secretary, Department of Family and Community Services v Rogers*,[10] in which Cooper J held that a notice required to be given by the statute with which his Honour was concerned required two elements: the fact that a decision has been made and the content of the decision.[11]

[47] Even in the context of the law of contempt of court, which is concerned with criminal liability, notice of the court's order which has been contravened can be established with very little formality. It is the resulting state of knowledge that matters.[12]

[48] Land registered under the Act carries statutory liabilities. These liabilities include those discussed earlier and which may involve the expenditure of much time and money. Even the entry into mere possession of contaminated land may carry liabilities because the provisions referred to earlier include provisions that impose liabilities upon occupiers.

[49] If there is a site management plan, it may restrict the use or development of the land.[13]

[50] The Registrar of Titles is obliged to record the fact that land is registered on the Contaminated Land Register.[14] A search of the title will reveal that fact. However, such a search may not necessarily take place before a contract is entered into or before possession is taken.

[51] The requirement in s 421 for written notice serves the purpose of warning an intending purchaser of land about the liabilities that may attend acquisition. That purpose will be achieved if the fact of registration has been communicated in writing. Nothing more is required by a written notice before the contract has been entered into.

[52] I turn to the facts of this case. FKP owns land at 60 Hudson Road, Albion. This land has an area of 5,559m^2. FKP obtained a Preliminary Approval to develop the land for a variety of uses with maximum building heights of 20 storeys. Fridcorp Pty Ltd is a land development company. It was interested in buying the Albion site for development. On 14 April 2015 its director, Paul Fridman, wrote to Mr Walsh, a representative of Deloitte on behalf of FKP. Mr Fridman proposed that Fridcorp might buy the land for $25,000,000. He said that, should FKP wish to proceed with the proposal, then it should furnish Fridcorp with "all current and past documentation and reports pertaining to" certain matters that Mr Fridman then enumerated. These included "Environmental Site Assessment and Hazardous Materials Reports".

[53] Mr Fridman also proposed:

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10 (2000) 104 FCR 272.
11 Supra at [33].
12 *Re Intex Consultants Pty Ltd* [1986] 2 Qd R 99 at 106-7 per Thomas J.
13 Section 417.
14 Section 422.

> "Exclusive 60 Day Due Diligence period conditional upon receipt of all information listed in "Documentation" within 2-3 days from the date of acceptance of this Letter of Offer."

[54] On 6 May 2015 Mr Fridman, by his administrative assistant, sent an amended proposal to Mr Walsh. The due diligence clause now provided:

> "Exclusive 45 day Due Diligence period commencing on receipt of all information listed in "Documentation" (as extended, if applicable, in the manner set out below).
>
> If the Purchaser is not satisfied with the results of its due diligence investigations (in its absolute discretion) at any time during the Due Diligence Period, it can elect to end this agreement by notice in writing to the Vendor to that effect. If this agreement is ended in this manner, each party will be released from any future obligations under this agreement (except in relation to any prior breach of this agreement)."

[55] The documentation clause now provided, relevantly:

> "Promptly after acceptance of this letter of offer, the Vendor will provide to the Purchaser copies of the following documents relating to the Property to the extent held by the Vendor or within the Vendor's control:
>
> …
>
> Environment Site Assessment and Hazardous Materials Reports".

[56] A deposit was to be payable at the end of the Due Diligence Period.

[57] The proposed purchaser was expressed to be:

> "Fridcorp Pty Ltd ACN 087 864 891 or a wholly owned subsidiary of Fridcorp Pty Ltd ACN 087 864 891 nominated by Fridcorp Pty Ltd ACN 087 864 891 before the Contract of Sale is entered into.
>
> The Purchaser may not assign its interest under this agreement (except by nominating a wholly owned subsidiary as mentioned above)."

[58] Promptly on 11 May 2015 a representative of Fridcorp, Mr Chris Roche, its development director, wrote to Mr Andrew Hall, a representative of FKP, asking him to send "the following data to enable us to conduct our due diligence". Among the information requested was "Environmental Contamination Reports". Mr Roche suggested creating a data room or Dropbox file to share the files. Such a facility was created. Mr Hall responded on 11 May to inform Mr Roche, relevantly, that the "Environmental Contamination Reports" could be found in the Land Contamination Folder in the database.

[59] On the evening of 11 May, Mr Roche was sent the necessary instructions to enable him to gain access to the documents that had been provided in that manner. On the following morning, 12 May 2015, Mr Roche wrote to Mr Hall of FKP to inform

him that he did not have a password. Mr Hall instructed him how to establish a password. To this message Mr Roche responded:

> "I'm in – cheers."

[60] The "Land Contamination Folder" to which Mr Roche gained access contained a report prepared for FKP in April 2007 by Butler Partners, a firm of geotechnical and geo-environmental consultants. The report was entitled "Stage 1 Environmental Site Assessment" for the land. Butler Partners reported that three of the lots comprising the site were contaminated and that a "Statutory Site Management Plan would need to be developed … and Remediation Action Plan … will need to be developed and approved by the EPA for the three lots on which contamination has been identified".

[61] The Land Contamination Folder also contained a certificate of approval of a site management plan issued under the Act in respect of each of these lots. Each of these certificates stated the obligation of an owner under s 421 of the Act. Each certificate of approval stated that the lot the subject of the respective approvals was recorded on the Environmental Management Register. The site management plan for each respective allotment was annexed to each certificate. The copy of each plan set out the terms of that plan.

[62] In addition the Land Contamination Folder contained the written results of a search of the Environmental Management Register and the Contaminated Land Register showing that each of the relevant lots had been registered. The Land Contamination Folder also contained search results for the remaining lots which were shown not to be included in any register.

[63] Evidence was tendered at the trial that proved which of the documents in the data room had been accessed by use of Mr Roche's access credentials. This evidence showed that access had been gained to, among other things, the report prepared by Butler Partners, to the certificates of approval to which I have referred and to the Remediation Action Plan that Butler Partners had prepared. Mr Roche, or somebody using his credentials, had also had access to the Environmental Register search results.

[64] The time limit for the conclusion of the due diligence process had been extended by agreement. A due diligence report dated July 2015 was prepared. A contract in the form of a put and call option was executed on 17 July 2015 and the report must have been prepared before then. Paragraph 7.4 of the due diligence report deals with the subject of contamination. It states:

> "7.4 **Contamination**
>
> Butler Partners completed an Environmental Site Assessment on Albion Mills in 2007. A Remediation Action Plan has also been prepared for the site. In recent discussions with Susan Walker, one of the Principals of Butler Partners, Susan believes on average there would be a 0.75m^3 layer of fill across the site. The cost estimate within the feasibility for remediation involves the extra cost to cover transport and disposal of this contaminated fill.
>
> Whilst there were some concentrations of contaminated soil across the layer of fill, Butler and Partners was comfortable that this would

> not amount to more than 5-10% of the total fill removed. Fridcorp has adopted a conservative allowance of 10% within the feasibility based on Susan's advice.
>
> Fill is classified via 2 methods for disposal:
>
> 1. Unlined landfill (90% of the Albion Mill site) $14.70 per tonne;
>
> 2. Lined Landfill (10% of the Albion Mill site) $45 per tonne.
>
> Once excavated the contaminated fill is transported to one of the 4 tips in Ipswich at a rate of approximately $25 per tonne."

[65] A Feasibility Study contained in an annexure to the report, dated 30 June 2015, provides an estimate of cost of "remediation".

[66] In its defence, the appellant admitted that Mr Roche's assistant accessed the data room. The appellant also admitted that on 13 May 2015 the search results were downloaded. By its Amended Rejoinder the appellant admitted that it "had the benefit of and received the disclosure provided by the plaintiff through the Data Room and the documents downloaded therefrom before entering into" the contact. It specifically admitted that it "had access to the EMR CLR search results before entering into 'the contract'".

[67] Nevertheless, the appellant denies that it was given notice as required by the Act.

[68] It seeks to support this contention by a number of different submissions. First, it submits that the obligation imposed by the Act is one to notify a present fact, namely that the particulars of the land are on the Register but the disclosed documents merely stated a historical fact, that as at the date of the issue of the certificates of approval the land was on the Register. Second, the appellant submits that an adequate notice must state the fact plainly; here the documents disclosed could only be used to support an inference that the land had been notified on the Register. Third, the appellant points to the fact that, when the parties began to negotiate the terms of the contract, FKP's solicitors expressly required the following to be added to the clause in the contract that dealt with the Due Diligence Material:

> "FKP CD does not agree to provide any warranty as to the contents of any Due Diligence Material. The Due Diligence Material is provided to the purchaser on a 'no responsibility' basis, and is not to be relied on by the purchaser. The purchaser has been given access to the vendor's consultants to assist the purchaser satisfy itself as to the contents of the Due Diligence Material."

[69] However, this proposed clause did not make it into the final version of the contract. The relevant clause in the executed agreement provided:

> "**36.9 Due Diligence Material**
>
> The Purchaser acknowledges that, save as expressly provided for in this Contract, it:
>
> (a) has made its own enquiries in relation to the Due Diligence Material;

> (b) accepts title subject to, and is not entitled to *rescind, terminate* or delay Completion of this Contract, nor to object, *requisition* or make any Claim in connection with any matter, fact or thing referred to, contained in or arising out of or in relation to the Due Diligence Material."

[70] Finally, the appellant submits that, even if the disclosed documents were capable of constituting statutory notice, they were given to Fridcorp Pty Ltd and not to the appellant, a company associated with Fridcorp but which had not been nominated as the purchaser until the contract came to be settled and executed.

[71] These submissions cannot be sustained.

[72] As I have said, there is no formality required by the statute for a notice under s 421. Provided the notice is in writing and communicates the two relevant facts – that the particulars of the land have been placed on the register and the details of any site management plan – the form of written communication is immaterial.

[73] The essential matter is that there is a writing which reaches the attention of the buyer and informs the buyer that the relevant facts exist. It is sufficient if the efforts of the seller have resulted in the buyer receiving a written document, thereby becoming aware of the essential facts required to be communicated.[15]

[74] The appellant's submissions might have had more force if they had been made in a case in which there was no evidence that the appellant's representatives had read and understood what the documents signified. It might then be argued that it is insufficient for a notice to be constituted by a document included in a wider delivery of documents containing much other information.

[75] However, in the circumstances of the purpose served by Chapter 8 of the Act and the facts of this particular case, the inescapable inference is that the documents pertaining to the state of the register in 2010 were understood by Mr Roche and those working with him as communicating the present fact that the land had been and remained registered and that the site management plans remained current. This is clear from the content of the due diligence report to which I have referred. It can also be seen from an email Mr Roche sent on 2 July 2015, two weeks before the contract, which set out the following, taken evidently from the due diligence report:

> "Butler and partners completed an Environmental Site Assessment on Albion Mills in 2007. A Remediation Action Plan has also been prepared for the site. In recent discussions with Susan Walker, one of the Principals of Butler Partners, Susan believes that as an average across the 5,566m2 site, 0.75m2 would be a layer of fill. The cost estimate within the feasibility for remediation involves the extra/over to transport to dispose of this contaminated fill.
>
> Whilst there were some concentrations of contaminated soil across the layer of fill, Susan was comfortable that this would not amount to more than 5-10% of the total fill removed. We have adopted a conservative allowance of 10% within the feasibility base based on Susan's advice.
>
> Fill is classified via 2 methods for disposal:

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15 *cf. Capper v Thorpe* (1998) 194 CLR 342 at [21] per Gaudron, McHugh, Kirby, Hayne and Callinan JJ.

1. Unlined landfill (90% of the Albion Mill site) $14.70 per tonne

2. Lined Landfill (10% of the Albion Mill site) $45 per tonne

Once excavated the contaminated fill is transported to one of the 4 tips in Ipswich at a rate of $25 per tonne."

[76] The plain meaning of the email and the due diligence report is that the documents that the respondent revealed for the purposes of due diligence were read, understood, believed and acted upon as disclosing the statutory facts that s 421 requires to be notified. That is, after all, the whole purpose of the process called "due diligence".

[77] The submission that no notice of these facts was ever given to the actual purchaser nominated by Fridcorp to enter into the contract must also be rejected. Apart from the particular requirements of the notice and that it be in writing this case is similar to any case in which it is necessary to prove that a representation of fact has been made by one person to another. The device of entering into a contract as a principal, while reserving the right to nominate a "nominee" to become the actual contracting party, is very common. It permits commercial matters to proceed efficiently while postponing a purchaser's decision as to the identity of the eventual contracting party. This indulgence allows consideration to be given to the identity of the ultimate purchaser while other matters progress. The identification of a particular purchaser, other than the present contracting party, may be important to a buyer for many reasons. It hardly lies in the mouth of a party that has bargained for and obtained such an indulgence later to assert that everything that was done before a new purchaser was nominated was foreign to the resulting contract.

[78] This is not a matter of law; it is a matter of fact. In this case the original contract, pursuant to which the due diligence process was to be conducted, provided for liberty to Fridcorp to nominate a subsidiary as purchaser of the land. In fact, Albion Mill is not a subsidiary but is an associated company. FKP did not object. Prior to the contract the sole director and shareholder of the nominee was one Nigel Givoni. He remained the company's sole shareholder but on 10 July 2015 Mr Roche replaced him as the company's sole director. As Fridcorp's developments director he became the relevant corporate mind for the purposes of this project irrespective of the corporate carapace that would be chosen to contain that mind.

[79] Consequently, the appellant was correct in admitting in its rejoinder that it "had the benefit of and received the disclosure provided by" the relevant documents. That admission merely accords with the indisputable facts shown by the documentary evidence in this matter.

[80] For these reasons I respectfully agree with Jackson J's conclusion that FKP gave written notice to the appellant in compliance with s 421(2) of the Act.

[81] The appellant also contends that Jackson J erred in his assessment of damages.

[82] FKP claimed damages measured by the difference between the contract price of $25,000,000 and the market value at two alternative dates, namely 5 December 2016 and 31 March 2017. The latter date was the agreed date for settlement of the contract. For the purposes of the appeal it was common ground between the parties that the relevant date for valuation purposes was 31 March 2017.

[83] The respondent tendered a valuation report by Mr Troy Linnane. He had assessed the value of the property on 31 March 2017 as $15,750,000 and on 5 December as $17,000,000. The appellant called no contrary evidence. Rather, its case was based upon an attack upon Mr Linnane's opinion.

[84] The appellant submitted at trial and on this appeal that Jackson J was wrong in accepting Mr Linnane's evidence. First, the appellant submits that Mr Linnane lacked any credibility for certain reasons. Second, it submits that Mr Linnane's use of a sale of a site on Montpelier Road, Bowen Hills as a comparable sale was unjustified for a number of reasons. Third, the appellant submits that, in relation to the use of that particular sale as a comparison with the subject site, Jackson J wrongly placed the onus of proof upon the appellant.

[85] It is convenient to deal with these points in reverse order.

[86] In his report, Mr Linnane explained that the site at Montpelier Road had an area of 15,617m^2. Its owner, Metro Property Development, decided against proceeding with any development and instead sold it to OPD Group. The sale price was $22,000,000. For the purpose of comparison Mr Linnane made these points:

> "Larger sized site. Located in superior fringe CBD location.
>
> Purchased without development approval. Inferior "code assessable" height parameters to 8 storeys. Slightly smaller scale proposed development given inferior height allowances. Inferior development potential.
>
> The improvements present in good condition. Purchased with holding income.
>
> Overall superior."

[87] In cross-examination it was put to Mr Linnane, and he agreed, that the vendor of the Montpelier Road property had sought to conduct a public float of its shares in June 2015 and that attempt was unsuccessful. It was put to Mr Linnane, but he did not agree, that once the attempted float had failed the vendor "had commitments to contracts which it was unable to meet". It was put to Mr Linnane that, knowing of the failed float, he should have been "very cautious about treating these as being normal market price sales by Metro". Mr Linnane rejected that proposition. He saw no reason why the vendor would "leave millions of dollars on the table". He was asked whether he had made any investigation to see whether the vendor had been under financial pressure at the time of the sale. He said he had not.

[88] The net result of this cross-examination was that it was proved that the vendor had sold the land after failing to float its shares publicly. Otherwise, there was no evidence that the sale of the Montpelier Road land was a distressed sale or that the sale was effected for less than a market value. The evidence remained as it stood before the cross-examination, namely that the sale was at arms' length and, in the opinion of Mr Linnane, at market value.

[89] The appellant's contention about onus of proof arises because of the following statement by his Honour about this issue:

> "[125] The defendants submits that any comparison with the 66/98 Montpelier Road sale suffers from the difficulty that the price achieved on the sale was questionable as market value

> because of the circumstances surrounding the vendor and its failed float. Whilst those considerations were raised in cross-examination with Mr Linnane, I do not accept that the defendant established that the sale was not a sale at market value."

[90] The onus of proof of value, and the associated proof of the relevance of sales that were said to be comparable, remained throughout upon the respondent.[16] However, the respondent's valuer had put forward this particular sale as a relevant comparable sale for reasons that he explained. It should be observed that in the case of land of a kind with which this appeal is concerned, it is not to be expected that land with precisely or even approximately similar configurations and location will be available for comparison. Each large parcel of development land is unique. As Mr Linnane expressed it, one of his comparative sales involved land that was "overall superior" while two of the others concerned land that he considered was "overall inferior". One of these parcels was much larger than the subject land while two of the parcels were smaller. Each had different height restrictions. These differences are not surprising.

[91] However, if it were sought to cast doubt upon the reasonableness of using the Montpelier Road land as a comparable sale because the price at which it had most recently been sold had been affected by commercial pressure, then some evidence had to be put forward to justify such a doubt. No such evidence was put forward. Questions were asked about the matter but no evidence helpful to the appellant emerged because Mr Linnane maintained his view that the sale was at a market price.

[92] I do not read his Honour's reference to the defendant's failure to establish that the sale was not at a market value as signifying any confusion in his Honour's mind about onus of proof. Rather, his Honour was stating that the cross-examination had not achieved its purpose.

[93] I would reject this submission.

[94] The appellant submitted at trial and on appeal that, in any event, the Montpelier Road property was not comparable in any way. It is almost three times larger than the subject site. The height limit is eight storeys whereas the height limit for the subject site is 20 storeys. Another site that Mr Linnane had rejected as comparable, a site at West End, was "profoundly larger than the subject" at 12,500m^2. The permitted height for the West End property was 12 storeys.

[95] The appellant submits that, for these reasons, the Montpelier Road site was irrelevant as a comparator. In addition, the rejection of the West End property and the acceptance of the Montpelier Road property by Mr Linnane were, it was submitted, irrational.

[96] Jackson J rejected this submission because Mr Linnane was not cross-examined upon it. The appellant does not say that he was but submits that it was not incumbent upon it in cross-examination to do anything more than to establish that the West End property was not directly comparable because of its size and height

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16 *Western Australian Planning Commission v Arcus Shopfitters Pty Ltd* [2003] WASCA 294 at [57]-[58] per McLure J.

restriction. Having done that, it was submitted, it was unnecessary to give Mr Linnane any opportunity to defend his reliance upon the Montpelier Road property.

[97] In my respectful view this submission is misconceived. If it is intended to make the submission that a particular property relied upon by a valuer is not truly comparable then the witness should be given an opportunity to respond to that criticism and the reasons for it. It is true, as the appellant submits, that both the West End property and the Montpelier Road property have two features in common – their size and their height restrictions – that distinguish them from the subject land. However, in other respects those two properties are different from each other. One need only refer to their respective locations but there are also other differences. Why it was that Mr Linnane rejected the West End property but relied upon the Montpelier Road property notwithstanding that each of them differed from the subject property by reason of area and height restriction remains unknown because the appellant chose not to invite Mr Linnane to comment upon that issue. In those circumstances, his Honour was, in my respectful view, correct in rejecting the submission.

[98] Finally, the appellant contends that Mr Linnane's evidence lacked any credibility. This is because of the two matters that I have already referred to which, it was submitted, showed the unreliability of his opinion and, indeed, the irrationality of his opinion. But the appellant also points to matters that, it submits, were "deliberately omitted from his report" and that were "deliberately misrepresented".

[99] The matters that were said to have been omitted or misrepresented were not identified on appeal. There may have been the matters that Jackson J referred to at paragraph [108] of his reasons, namely further resales of a comparable property at a higher price, and the fact that one of the re-sales, Montpelier Road, had been by the same vendor.

[100] Notwithstanding these features, of which his Honour was aware, his Honour was not prepared to conclude that Mr Linnane's evidence "lacked all credibility or reliability".

[101] A further attack upon Mr Linnane's credit was based upon the fact that Mr Linnane had previously valued the subject site as at 31 March 2017 at $17,000,000. This valuation was contained in a report he prepared in April 2017. Yet at the trial he gave evidence that the value of the site at that date was $15,750,000. Mr Linnane had forgotten that he had prepared the earlier report. After analysing the earlier report, his Honour rejected Mr Linnane's evidence that the value of the property had fallen from $17,000,000 at 5 December 2016 to $15,750,000 at 31 March 2017. However, his Honour was not prepared to reject his evidence entirely.

[102] The defendant also criticised Mr Linnane's failure to expose his reasoning. Mr Linnane did give some explanation for his conclusions. He explained that he had had most regard to the sale of the Montpelier Road property and another property at Breakfast Creek Road, Newstead. In a series of bullet points he set out the relevant features of those properties. He then explained that there had been an easing in demand for high density development sites after the second half of 2015. He demonstrated this by reference to a graph. From a low rate per square metre of $1,409 (the Montpelier Road property) to a high range, based upon the Breakfast Creek Road property, of $5,071 per square metre, Mr Linnane arrived at a market value for the property, based upon the price per square metre, of $17,000,000 as at 5 December 2016.

[103] Having regard to the not unexpected absence of comparable sales that align precisely with the features of the subject land, it is not surprising that the final steps in Mr Linnane's reasoning are opaque.

[104] Jackson J referred to the reasons of McLure J in *Duffy v The Minister for Planning*[17] in which her Honour said:

> "There is no hard and fast rule by which a valuer can draw the line that clearly separates sales that are comparable from those that are not. It is a matter of degree. Some adjustment is always necessary but too much adjustment may render it unsafe to use a sale. Where the line is to be drawn is a matter for the expert valuer to determine. Further, just because a sale is excluded from use in the comparable sales reasoning process does not necessarily mean that it is irrelevant. …"[18]

[105] In any case in which the subject matter for consideration is empirical and not quantitative there comes a point in the process of reasoning at which judgment must be applied. In *Secretary of State for Foreign Affairs v Charlesworth*, *Pilling & Co*[19] there is the following passage:

> "It is quite true that 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 enquiry 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 conclusions arrived at."

[106] This passage was cited with approval by Isaacs J in *Spencer v The Commonwealth.*[20] Isaacs J also referred to the disadvantage of an appellate court in forming what is "what after all is only judicial opinion of the relative weight to be attached to the opinion of witnesses regarding the estimate they think a hypothetical purchaser would form" about the land.[21]

[107] Jackson J cited the passage I have quoted from *Charlesworth* in the course of his reasons.

[108] Between paragraphs [122] and [132] his Honour carefully considered the matters relied upon by Mr Linnane and the criticisms that the appellant had made about his reasoning. Taking those matters into account his Honour concluded:

> "Even so, taking these considerations into account, overall, in my view they do not amount to a sufficient basis to wholly reject Mr Linnane's opinion as to value of the Albion Mills site at

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17 [2003] WASCA 294.
18 *Supra* at [25].
19 [1901] AC 373 at 391.
20 (1907) 5 CLR 418 at 442.
21 *Supra* at 443.

> 31 March 2017 in the amount of $17 million. Notwithstanding the difficulties, I accept that his opinion does amount to admissible evidence of value in that sum as at the relevant date. In the absence of other evidence to the contrary, in my view, it should be found that the value of the Albion Mills site at the time of performance of the contract was $17 million."

[109] The appellant points to his Honour's statement that Mr Linnane's opinion amounts to admissible evidence of value as showing that his Honour erred in concluding that mere admissibility concluded the question whether the evidence ought to be accepted. That is a misreading of his Honour's reasons.

[110] His Honour had accepted some of the appellant's submissions about Mr Linnane's evidence. As a consequence, he was prepared to accept Mr Linnane's evidence of value in December 2016 of $17,000,000. His Honour was not prepared to accept that the value had decreased by the settlement date in March 2017.

[111] Mindful of the effectiveness of some of the attacks upon the evidence of Mr Linnane, and his own rejection of some of that evidence, his Honour was left with the question whether to accept the core of that evidence, that the value of the property in December 2016 was $17,000,000. It was in that context that his Honour referred to the fact that this evidence, which had been admitted, was uncontradicted by any other evidence led by the respondent. In those circumstances, and despite the criticisms made against it, his Honour was prepared to accept it and act upon it in finding the value of the land at the relevant date.

[112] In my respectful opinion that was legitimate reasoning and the conclusion was one which was open to his Honour. Credit findings, even of experts, ought not be the subject of appellate interference unless the judge's findings of fact are shown to be wrong by incontrovertible facts or uncontested testimony or are glaringly improbable or contrary to compelling inferences.[22]

[113] In the present case it was open to his Honour to find as he did and, accordingly, I would reject the appellant's submissions.

[114] For these reasons I would dismiss the appeal with costs.

[115] **PHILIPPIDES JA:** I agree for the reasons stated by Sofronoff P that the appeal should be dismissed with costs.

[116] **HENRY J:** I have read the reasons of Sofronoff P. I agree with those reasons and the order proposed.

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22 *Robinson Helicopter Company Inc v McDermott* (2016) 90 ALJR 679 at [43].