SUPREME COURT OF QUEENSLAND

CITATION:	*Quinn & Anor v Pioneer Australia Pty Ltd & Anor* [2019] QCA 266
PARTIES:	**RORY ANN QUINN** (first appellant) **YIC INDUSTRIAL PTY LTD** ACN 139 276 627 (second appellant) **v** **PIONEER AUSTRALIA PTY LTD** ACN 073 498 905 (first respondent) **SPA INVESTMENTS PTY LTD** ACN 134 314 631 (second respondent)
FILE NO/S:	Appeal No 4290 of 2019 SC No 1550 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2019] QSC 72 (Bond J)
DELIVERED ON:	22 November 2019
DELIVERED AT:	Brisbane
HEARING DATE:	24 September 2019
JUDGES:	Sofronoff P and Gotterson and Morrison JJA
ORDERS:	**1. The appeal is dismissed.** **2. The appellants pay the respondents' costs of the appeal.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE'S FINDINGS OF FACT – OTHER MATTERS – where the second appellant borrowed money from the first and second respondent to acquire land in Yeppoon for development – where the loan was secured by a mortgage and a personal guarantee given by the first appellant – where the second appellant defaulted in making repayments and a Deed of Compromise was subsequently executed – where the deed made various provisions for the calculation of interest on the debt in certain contingencies – where the land was eventually sold by the first and second respondents as mortgagees to the Livingstone Shire Council – where the price for the sale of the land was $3.33 million – where the making of the sale by

the mortgagees breached their duty to exercise reasonable care – where the issue arose as to the proper construction of the provisions in the deed relating to interest – where the issue arose regarding the true value of the land at the time of the mortgagees' sale – where the issues relating to the construction of the deed and the true value of the land were resolved in the first instance in favour of the first and second respondents – where the appellants challenge the findings in the first instance – where the first ground of appeal concerns the construction of the Deed of Compromise and the amount owing pursuant to the deed and the calculation of interest – where the second ground of appeal concerns the market value of the land and the correct valuation of the land when it was sold in March 2014 – where it is contended that the learned trial judge erred in the rejection of the opinion on valuation of Mr Murphy and adopt that of Mr Sheehan – whether the Deed of Compromise, properly construed, provided for simple interest or capitalised interest from 31 January 2013 – whether the learned trial was in error to reject the evidence of Mr Sheehan as to the correct land value

COUNSEL: A J H Morris QC, with L A Jurth, for the appellants
M D Martin QC, with D V Ferraro, for the respondents

SOLICITORS: CI Legal Services for the appellants
Gall Standfield & Smith for the respondents

[1] **SOFRONOFF P:** I agree with Morrison JA.

[2] **GOTTERSON JA:** I agree with the orders proposed by Morrison JA and with the reasons given by his Honour.

[3] **MORRISON JA:** In 2009 YIC Industrial Pty Ltd borrowed money from the respondents, Pioneer Australia Pty Ltd and Spa Investments Pty Ltd. YIC was a developer and the money was to acquire land at Yeppoon for development. The loan was secured by a mortgage and a personal guarantee was given by Rory Quinn.

[4] YIC defaulted in making repayments in 2011. A deed of compromise was executed on 5 February 2013. The deed made various provisions for the calculation of interest on the debt in certain contingencies.

[5] On 11 March 2014 the land was eventually sold by Pioneer and Spa as mortgagees to the Livingstone Shire Council. The price was $3.33m. The contract for sale was completed on 21 March 2014. In making that sale the mortgagees breached their duty to exercise reasonable care.

[6] Two issues arose at first instance: (i) proper construction of the provisions in the deed relating to interest; and (ii) the true value of the land at the time of the mortgagees' sale. Both issues were resolved in favour of Pioneer and Spa. Quinn and YIC challenge those findings.

The loan

[7] The terms agreed between the lenders (Spa and Pioneer), the borrower (YIC) and the guarantors (Quinn and her husband) were set out in a Security Deed and a registered mortgage.

The Security Deed

[8] Under the Security Deed[1] the loan was $3.5m to be repaid in 12 months: clauses 1(g), 2 and 3. The payment of interest was the subject of clause 4:[2]

> "The Borrower will pay to the Lender interest … on the moneys hereby secured, as hereunder computed, at the rate of fifteen percent (15%) per centum per annum (hereinafter called "the lower rate") and payable on the due date and calculated:
>
> In the first place on the Primary Advance and upon any other moneys becoming moneys hereby secured, as from the date of the making of such Primary Advance, namely 21 October 2009 calculated monthly in arrears **and then capitalised on the then balance of the moneys hereby secured as provided for in the Interest Schedule**;
>
> PROVIDED THAT if the Primary Advance and any other moneys becoming moneys hereby secured are not paid to the Lender on the due date and default has been made by the Borrower during that period and default by the Borrower has been made during any previous period which continues to exist on the due date, then the Borrower shall pay and the Lender shall accept interest at the rate of twenty percent (20%) per centum per annum (hereinafter called "the higher rate") on the moneys hereby secured, provided that the interest at the lower rate is paid on the due date, in full satisfaction of interest for that period, and payment of interest at the lower rate shall not constitute default hereunder, notwithstanding any other provision herein to the contrary. …"

[9] The Interest Schedule[3] referred to in clause 4(1) reveals that interest was to be capitalised each month.

[10] Quinn and her husband personally guaranteed the repayment of the moneys secured, and indemnified the lenders against loss and damage sustained by YIC's default: clauses 6 and 7.

The mortgage

[11] The mortgage secured a loan of $3.5m, of which $3m was the drawdown amount. The loan was to be repaid (together with interest) in 12 months: clause 39.[4] The mortgage provided for the payment of interest. Item 5 of the schedule specified the rate as: 15% (Higher Rate of Interest 20%) Per Annum.[5] The Epitome of Mortgage and Schedule 1 provided that interest was to be capitalised on monthly rests, whether on the lower or higher rate.[6]

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1 AB 1303.
2 Emphasis added.
3 AB 1324.
4 AB 1328, 1343, 1346, 1348.
5 AB 1328, 1346, 1348.
6 AB 1346-1347.

[12] Clause 1 provided that the mortgagee may, at the mortgagor's request, make further advances:

> "The Mortgagee at the request of the Mortgagor may in the absolute discretion of the Mortgagee and upon terms and conditions wholly acceptable to the Mortgagee agree to advance to the Mortgagor and to be secured hereby such further sum or sums (if any) as the Mortgagee shall determine and this Mortgage may in the absolute option of the Mortgagee be amended or varied by mutual written agreement at any time or times."

[13] Clauses 5(c) and 40[7] provided for the rate of interest applicable in the event of default and that interest would be capitalised in the event of default. Clause 5(c) provided:

> "In the event that any interest payable hereunder or any interest payable on arrears of interest capitalised under this clause shall be unpaid on the due date thereof then in every such case the interest so in arrears shall without prejudice to the right of the Mortgagee to sue for and recover such interest and to the other rights and powers of the Mortgagee be added to the principal moneys hereby secured and shall thenceforth bear interest payable at the rate and on the interest days herein provided and all the covenants and provisions herein expressed or implied with respect to interest on the loan shall equally apply to the interest on such arrears."

[14] Clause 40 provided:

> "So long as the principal sum shall be owing or unpaid by virtue of this Mortgage … the Mortgagor will pay interest on such amount of the principal sum that has been drawn down in the manner from time to time and/or to the person or persons, firm or firms, corporation or corporations as the Mortgagee may direct at the rate of 15% per annum as follows, namely:-
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> Interest shall be calculated monthly in arrears and capitalised in accordance with Schedule 1 hereto.
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> Interest due is payable upon repayment of the principal sum or such amount thereof that has been drawn down therefrom.
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> In the event that the principal sum or such amount thereof that has been drawn down therefrom and interest due is not paid by the date provided for in clause 39 hereof, then interest shall be calculated at the rate of 20% per annum monthly in arrears in lieu of 15% per annum on the outstanding principal sum or such amount thereof that has been drawn down therefrom and interest unpaid."

The Deed of Compromise

[15] The Deed was executed on 5 February 2013. The recitals of the Deed[8] record the loan agreement, that Spa and Pioneer are mortgagees, and that the mortgagor (YIC) and guarantors (relevantly, Quinn) were in default, and that Default Notices had

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7 AB 1328, 1343, 1346, 1348.

8 AB 1355.

sent, as well as Notice of Exercise of Power of Sale.[9] Recital F stipulated the outstanding principal and interest as at 31 January 2013, $4,988,490. That was defined as the "31 January 2013 Debt"

[16] Recital G then provided:[10]

> "**Pursuant to the First Mortgage interest will continue to accrue** on the 31 January 2013 Debt **at the rate of 20% per annum calculated at monthly rests** until all monies due and owing under the First Mortgage and Security Deed have been paid."

[17] The Deed provided that YIC was to make a contribution to the 31 January 2013 Debt and procure completion of the intersection works required under the development approval it had obtained: Recital H. Those acts were defined as "the Contributions". Then, Recital I noted that YIC had procured external assistance to enable it to make the Contributions.

[18] Recital J then provided:[11]

> "In consideration of YIC making the Contributions Pioneer and Spa have agreed to forbear recovery action under the First Mortgage and Security Deed to 31 January 2014 and to pay to the direction of YIC upon final repayment of the monies due and owing under the First Mortgage and Security Deed **all monies to which Pioneer and Spa are entitled and recovered under the First Mortgage and Security Deed in excess of the sum of $4,000.000.00 plus interest from 31 January 2013 at the rate of 15% per annum calculated at monthly rests until all monies due and owing under the First Mortgage and Security Deed** have been paid."

[19] The Deed expressly provided that the Recitals were true and formed part of the Deed: clause 1. YIC agreed to pay $250,000 forthwith upon execution, and subject to that payment Pioneer and Spa agreed to "forebear any further action under the Default Notice until 31 January 2014": clauses 2 and 3.

[20] Pioneer and Spa agreed that all monies paid by or on behalf of YIC towards the Intersection Works would be "further advances made pursuant to clause 1 of the First Mortgage and form part of the principal sum secured": clause 4.

[21] Clause 5 of the Deed then provided for the calculation and distribution of funds upon eventual repayment:

> "Pioneer and Spa acknowledge and agree that on repayment of the monies due under the First Mortgage they shall firstly calculate the principal sum and interest due under the First Mortgage and Security Deed having regard to any advances made pursuant to clause 4 hereof and interest at the higher rate plus costs to the date of the repayment ("the debt due on repayment") and apply the debt due on repayment in the following manner:

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9 Recitals D, E and F.
10 AB 1356; emphasis added.
11 Emphasis added.

(i) Firstly, in paying the sum of $4M plus interest at the rate of 15% per annum until 31 January 2014 (or such earlier date as the monies outstanding are paid) and in the event the First Mortgage has not been repaid by 31 January 2014 plus Interest beyond 31 January 2013 at the rate of 20% per annum on the sum of $4,738,460.00 until the date of repayment; and

(ii) Secondly, the difference between the amount paid to Pioneer and Spa pursuant to clause 5(i) above and the debt due on repayment to YIC or as it directs."

[22] Clause 6 provided that if the debt had not been fully repaid by 31 January 2014, and Spa and Pioneer pursued a default notice, then the amount recoverable against YIC under clause 5(ii) "shall not exceed the net amount (after all default and sales costs) recovered on a sale of the Land less the amount payable pursuant to clause 5(ii) hereof".

Ground 1 – construction of the Deed of Compromise

[23] Ground 1 concerns the first issue on the appeal, namely what was the amount owing. That turns on whether the Deed of Compromise, properly construed, provided for simple interest or capitalised interest from 31 January 2013.

[24] The principles applicable to that task are well settled. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood it to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction.[12]

[25] The learned trial judge noted that it was common ground at the trial that the original arrangements contemplated compounding interest, whether at the lower or higher rate.[13]

[26] The contention advanced by Mr Morris QC and Mr Jurth of Counsel, on behalf of the appellants, was that the Deed of Compromise had this effect:

(a) the principal debt due and owing was fixed in the sum of $4m; and

(b) if the facility was not repaid by 31 January 2014, YIC was obliged to pay interest calculated on the $4,738,460 from 31 January 2013, or on so much of the principal and interest as remained outstanding until repayment, at the rate of 20% per annum, simple interest only.

[27] For a number of reasons I am unable to accept that as the proper construction of the Deed of Compromise.

[28] First, the parties agreed that the debt outstanding as at 31 January 2013 was $4,988,490. That sum included interest which had been capitalised from the date of the drawdown on 21 October 2009.[14] It also took into account the extension of the due date for repayment under the mortgage and Security Deed, from 21 October

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12 *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at [40]; *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151 at [53].

13 Reasons below [11](e).

14 The sum of $4,988,490 included capitalised interest at 15% from the drawdown until 21 April 2011 and thereafter at 20 per cent.

2010 to 21 April 2011.[15] The agreement to extend the due date preserved: (i) YIC's obligation otherwise to pay capitalised interest under the mortgage: clauses 1 and 2 of the Amendment to Mortgage;[16] and (ii) Quinn's obligation as guarantor of YIC's debt.

[29] Secondly, Recital G of the Deed of Compromise, incorporated into the Deed as a substantive provision, acknowledged that interest would "**continue to accrue** on the 31 January 2013 Debt at the rate of 20% per annum calculated at monthly rests until all monies due and owing under the First Mortgage and Security Deed have been paid". Immediately prior to the Deed of Compromise the interest had been accruing at 20 per cent compound, not simple. In context the reference to interest **continuing to accrue** at the same rate can only have been to capitalised interest, not simple interest. In the circumstances that the Deed of Compromise arose out of a default by the borrowers and in the face of a Notice of Default, it can hardly be the presumed intention of the parties that the borrower offered and the lenders agreed to accept interest at a lower overall rate.

[30] Thirdly, such a presumed intention would run counter to the two expressed compromises made by the lenders. One was that they would forebear taking any action of the extant Notice of Default for 12 months. The Notice of Default was not waived or given up; rather, action on it was deferred for a set period. The other was that a rebate would be given upon final repayment of the moneys secured under the mortgage. It cannot be concluded that those compromises were reached by express language but the contended interest compromise was reached indirectly, especially when the effect of that would be to fundamentally alter the provisions of the Security Deed and the mortgage.

[31] The nature of the bargain struck in the Deed of Compromise tells against the construction for which Quinn contends. YIC was the subject of a Default Notice that was issued in May 2011. By the Deed of Compromise it secured: (i) a one-year moratorium on any enforcement of the Notice of Default, (ii) an implicit promise by the lenders to fund the Intersection Works, and (iii) a substantial rebate on the money due, if the debt was repaid by 31 January 2014. In return it agreed to pay $250,000 immediately, procure the completion of the Intersection Works. The real value of the bargain from YIC's point of view (and that of the guarantors) was the moratorium and the rebate.

[32] Clause 5(i) promised the rebated figure at $4m plus interest at 15 per cent, but only if the debt was repaid by 31 January 2014. Once the $250,000 was paid off the total debt agreed as due and owing as at 31 January 2013 ($4,988,490), the remaining debt was the figure referred to in clause 5(ii) ($4,738,460).[17] If there was further default, in the sense that repayment was not made by 31 January 2014, two things followed: (i) the moratorium on the Notice of Default no longer applied; that is made explicit by clause 6 of the Deed; and (ii) the obligation to pay interest was at 20 per cent from 31 January 2013, calculated on the debt left outstanding after payment of the $250,000, namely $4,738,460. In that case the parties selected the default rate of interest on the debt as it stood because of the admitted and un-remedied default. It could hardly have been the presumed intention of the parties that, without saying so expressly, in addition YIC was to get reduced interest.

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15 The agreement to extend was on the basis of a payment of $235,000: AB 1350.

16 AB 1352.

17 There is a $30 discrepancy between the two figures but that seems plainly to be the result of a typographical error. The contrary was not suggested.

[33] Fourthly, the agreement in clause 5 to accept a rebated payout required a calculation including any advances made pursuant to clause 4, i.e. the advances made to or on behalf of YIC for the completion of the Intersection Works. YIC's obligation was to procure completion of the intersection works: Recital H. All monies paid by or on behalf of YIC towards the Intersection Works were agreed to be "further advances made pursuant to clause 1 of the First Mortgage and form part of the principal sum secured": clause 4. Advances made pursuant to clause 1 of the First Mortgage attracted interest on a compound basis.

[34] The fact that further advances for Intersection Works were expressly agreed to be advances under clause 1 of the mortgage is, in my view, a compelling indication of the presumed intention of the parties. Such advances attracted compound interest, not simple interest.

[35] This ground of appeal fails.

Ground 2 – market value of the land

[36] On the issue of the correct valuation of the land when it was sold in March 2014, the learned trial judge had to examine the competing views of two expert valuers, Mr Murphy for Quinn, and Mr Sheehan for Pioneer and Spa. It was common ground that it was appropriate to value on the basis of a hypothetical development.

[37] A number of suggested factual errors in the learned trial judge's findings were raised as warranting the conclusion that his Honour was wrong to accept the evidence of Mr Sheehan as to the correct value:

(a) the finding[18] that industrial development was inconsistent with rural zoning in circumstances was said to be neither the fact nor supported by the evidence;[19]

(b) the finding[20] that the 11 March 2008 Development Permit for a Material Change of Use: (i) approved a total developable area comprising 23.8 hectares; (ii) did not approve as developable area the remaining area comprising 36 hectares (including the so-called "balance lot" comprising 28.7 hectares); and (iii) excluded areas for approval that were "not approved"; whereas the approval granted by the Material Change of Use included the whole of the Land being an area of 60.80 hectares (including the so-called "balance lot");[21]

(c) the finding[22] that no Master Plan Development Document had been submitted to Council in circumstances where it had been submitted by YIC and had been approved by the Council on 11 March 2008;[23]

(d) the finding[24] that the Rockhampton–Yeppoon Road intersection had not been upgraded in circumstances where there was no obligation or necessity to upgrade the Rockhampton–Yeppoon Road intersection prior to 21 March 2014, and YIC had procured the Intersection upgrade works;[25] and

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18 Reasons below [44].
19 Appellant's outline, paragraphs 27-28.
20 Reasons below [48]-[49] and [54(a)].
21 Appellant's outline, paragraph 29.
22 Reasons below [54(c)].
23 Appellant's outline, paragraph 30.
24 Reasons below [54(d)].
25 Appellant's outline, paragraph 31.

(e) whilst the Development Permit for a Reconfiguration of a Lot dated 15 January 2009 and the Development Permit for Operational Works dated 17 February 2010 had each lapsed, the trial judge failed to proceed on the basis that each of them could have been reinstated by the hypothetical developer in a short time and at little expense, and that the hypothetical developer would have known that.[26]

[38] In addition it was contended that the learned trial judge had failed to take into account a number of matters, each of which was said to be one that a hypothetical developer would have known at the time:

(a) that the Reconfiguration Permit confirmed compliance with Condition 4 of the Material Change of Use, in that condition 4 of the Material Change of Use required the Master Plan Development Document to be submitted to the Council prior to applying for the Reconfiguration Permit;

(b) the existence of the 2012 written valuation of Mr Sheehan (which was much higher than the reports produced for this litigation);

(c) that PPY had secured a material change of use approval to proceed with a development of the land adjoining the Subject Land for a 950-lot residential subdivision;

(d) that PPY had secured a Development Permit from Council for the development of the first 101 Lots of its proposed development which required PPY to upgrade the Intersection to a 3-way signalised intersection;

(e) that, on 25 November 2013, PPY had received DTMR approval for the construction of the Intersection;

(f) that PPY was proceeding with the construction of the Intersection (a 3-way intersection) irrespective of the development of the Land;

(g) that construction of Stage 1 of the subdivision of the Development had been tendered with a construction timeframe of 24 weeks;

(h) that the Council became aware of each of the things in the course of conducting its due diligence in respect of its purchase of the Land, as contained in its Confidential Report dated 7 March 2014 (strongly suggesting that any hypothetical developer would have discovered the same matters);

(i) that comparative sales data for the period January 2013 to March 2014 reflected an average rate per square metre of $157.20 which was applicable to the Land;

(j) that the Council had recently de-amalgamated from Rockhampton Regional Council and was encouraging development and growth within the Shire;

(k) that the development represented the only approved industrial development in Yeppoon at the time and had the capacity to cater for the industrial land requirements of Yeppoon until at least 2031; and

(l) that each of the approvals referred to above ran with the Land and could be utilised by a purchaser.

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26 Appellant's outline, paragraph 32-33.

[39] Mr Morris QC accepted that the appeal was based on errors in factual findings. Essentially it was contended that the learned trial judge was wrong to reject the opinion on valuation by Mr Murphy and adopt that of Mr Sheehan.

[40] I intend to deal with the major points of challenge. A number of other subsidiary points were raised but none of them could advance the case on appeal beyond the major points, and therefore unless it is necessary I do not intend to enumerate them.

Could the Reconfiguration Permit and Operational Works permit be re-instated?

[41] The contention advanced here was that Mr Murphy's report set out that there was advice from the project engineer that it was a straightforward process to resubmit the Operational Works Permit for approval and that this would take no more than four weeks.[27]

[42] The report did refer to advice given by letter dated 19 September 2012 from Mr Scott. That letter[28] was addressed to YIC and made two points. One was that the Reconfiguration of Lot (**ROL**) was current and could be amended, or another application submitted. That process should take no more than four weeks.

[43] The other point was that the Operational Works Approval (**OPW**) had expired but could be resubmitted as to Stage 1A only, once the ROL had been amended, and that would take about four weeks.

[44] Mr Scott was right to say that the ROL was current as at the date of his letter, 12 September 2012. The ROL was approved on 15 January 2009.[29] The terms of that ROL were negotiated and a Negotiated Decision Notice issued on 2 July 2009.[30] In each case the ROL's were valid for four years, so that the latest possible date for expiry was 2 July 2013. It was common ground that it had expired as at date of the valuation.

[45] Mr Murphy's report dealt with an approval defined as "Stage 1 OPW DA", which was granted on 17 February 2010.[31] Self-evidently that is not the ROL approved on 15 January 2009. Stage 1 OPW DA was a works approval issued with respect to the ROL as modified by the Negotiated Decision Notice. Mr Murphy wrongly assumed that the ROL was still current, apparently based on what Mr Scott's letter said.[32]

[46] As the ROL had expired as at the date Mr Murphy was assessing the value of the land, and the OPW related to work under that ROL, Mr Murphy was in error to proceed on the basis that the OPW could be reinstated, and to take that into account as a relevant factor. Similarly, it was an error to take Mr Scott's first point (the ROL could be amended or renewed) into account because it assumed that the ROL was still current, when it was not. In so far as Mr Scott ventured a view as to the four week period that it might take, that also was on the mistaken basis that the ROL was current.

[47] The learned trial judge held that Mr Murphy's error in this respect was one of a number of reasons why he rejected his opinion on value.[33] An error so fundamental

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27 Murphy's report page 17, AB 718.
28 AB 923.
29 AB 1592.
30 AB 858.
31 AB 718.
32 AB 1960 lines 17-36.
33 Reasons below [58].

to the valuation process would normally give pause about acceptance of the valuer involved. In my respectful view, the error justified his Honour's finding.

Flawed assumptions in Mr Murphy's report

[48] The learned trial judge found that Mr Murphy had made two flawed assumptions in his valuation. The first was that the hypothetical developer would have concluded that the developer of the land to the north of the subject site (**PPY**) would bear 100 per cent of the costs of the intersection upgrade.[34] The second was that the whole balance area of the land could be sold as approved for development.[35]

Upgrading of the Rockhampton-Yeppoon Road intersection

[49] In respect of this contention the Court was referred to a plan entitled Preliminary Plan for Signalisation of Multi-Modal Area 3 of Rockhampton-Yeppoon Road Intersection.[36] Mr Morris QC referred to words appearing on that plan, relating to a lane on the north-west of the intersection:

> "Future relocation of Yeppoon landfill access. Subject to confirmation and approval by LSC. (not required for multi-modal area 3 access)."

[50] To the right hand side of that plan were YIC's proposed development[37] and another separate development.[38] Area 3 was identified on another plan as being the area of YIC's proposed development.[39] As the submission developed it was said that Mr Sheehan's valuation approach had wrongly proceeded on the basis that the subject land would have to incur half the costs of a four-way intersection reconfiguration. His Honour adopted Mr Sheehan's approach. By contrast it was urged that Mr Murphy's approach was correct:[40]

> "… the other development on our side of the highway [Keppel Horizons] was already underway and any competent purchaser would have ascertained that fact and known that they could take the benefit of that work without contributing to the cost or, on the worst view, from our viewpoint, there would be a liability for a half of the cost on the right-hand side of the page or technically a quarter of the total cost."

[51] Reference was made to the conditions of the approval that provided that the intersection works had to be designed and constructed in accordance with the requirements of the Department of Main Roads, and conceptually in accordance with the plan referred to above.[41] Each of the YIC development and Keppel Horizons was subject to a similar condition requiring the intersection upgrade.

[52] The contention was that the words on the plan (see paragraph [49] above should be construed as meaning that the YIC development would not be required to bear the cost of upgrading the intersection on the opposite side, as the landfill lane was not required for the multimodal area 3 access. That, in turn, led to the submission that

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34 Reasons below [60].
35 Reasons below [61].
36 AB 1562.
37 The YIC development.
38 Keppel Horizons. It was a separate development even though Mr Quinn had an interest in it.
39 AB 1755.
40 Appeal transcript T 1-4 lines 27-32.
41 Clause 2.3, AB 1596; Clause 1.1.1, AB 1604.

therefore the learned trial judge was in error to adopt Mr Sheehan's approach to valuation.

[53] For a number of reasons I cannot accept this contention.

[54] First, no evidence was given at the trial as to the significance of the words on the plan, or what they meant in a planning sense. On their face they simply state that the landfill access is not required for access to the multimodal area 3. That says nothing about being relieved of the necessity to construct that access road. It is shown on the plan, to which the design was required to adhere, at least conceptually.

[55] Secondly, reference to the plan shows that the words simply state the obvious. The planned access to the multimodal area 3 does not depend on using the landfill access lane, which is on the left (west) side. Approaching from the south there is a right turn at the intersection and approaching from the north there is a left turn, neither of which utilises the landfill lane. The approaches from the east and west do not do so either.

[56] Thirdly, the clauses in the conditions require only that the intersection be conceptually in accordance with that plan. That says nothing about excising portion of the costs of the intersection upgrade.

[57] Fourthly, when regard is had to the Overall Master Plan,[42] the multimodal part of area 3 is only a small (1.4 hectare) part of the overall land. Even if the construction urged was correct there is reason to consider that the overall upgrade costs was still intended to be borne by the balance (59.4 hectare) area of the YIC development.

The first flawed assumption

[58] Quinn contended that the learned trial judge erred in concluding that the hypothetical developer would not have assumed that it would have to pay all the cost of the intersection works.[43] The error was said to be demonstrated by the fact, as would have been known by the hypothetical developer, that as at the valuation date: (i) the developer of the neighbouring land (PPY) had secured an approval which required it to upgrade the intersection to a "T" or 3-way signalised intersection; (ii) PPY had received DTMR approval for that work, and had to complete it in six months; and (iii) construction costs had been agreed.[44]

[59] In my view, the contention cannot be accepted. First, the learned trial judge correctly found[45] that the hypothetical developer would know that any development approval would contain a condition to upgrade the intersection. It would also be aware that PPY was carrying out a development adjoining the subject land. As his Honour held, there was the potential for a stand-off between developers, each waiting for the other to bear the entire cost, as was recognised by the Council itself, in its internal report dated 7 March 2014.[46] However, the Council also recognised the potential outcome, namely a costs sharing arrangement between the two developers. Such an arrangement would make commercial sense given that each development

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42 AB 1755.
43 Reasons below [60(b) - (d)]; appellant's outline paragraph 43.
44 Appellant's outline paragraphs 44-47.
45 Reasons below [60(a) - (c)].
46 Reasons below [60(c)].

approval would include a requirement to upgrade, and neither commercially minded developer would seek to bear the entirety of the costs when they could halve it. The proposition that PPY would seek to bear the entire cost is commercially irrational. Consequently, there was ample foundation for the finding that a cost sharing agreement was what the hypothetical developer would conclude. Indeed, just such a cost sharing arrangement eventuated between the Council (which bought YIC's land) and PPY.[47]

[60] Secondly, it was suggested that YIC's position was that it would not pay for the intersection upgrade, in part because the obligation in the Deed of Compromise was to procure its completion, not undertake it itself.[48] There was no evidence from YIC that it held such an intention. In any event, clause 4 of the Deed of Compromise plainly contemplated that further advances would be made to YIC to carry out the work itself.

Valuation to include the Balance Lot?

[61] The submissions on appeal addressed the question whether, as the learned trial judge held, it was right to value the land without including the Balance Lot. Mr Sheehan excluded it on the basis that it was likely to remain as rural land. Mr Murphy, however, valued on the basis that the entire land, including the Balance Lot, could be sold as approved for industrial development. Mr Morris QC called the question as critical to the appeal.[49]

The second flawed assumption

[62] The learned trial judge correctly recorded Mr Murphy's second assumption as being that the whole balance area could be sold as approved for development notwithstanding two constraints expressed in a previous (11 March 2008) approval: (i) over 26 hectares was not approved for industrial development and was still zoned rural with no extant approval to override the planning scheme; and (ii) the approval was subject to constraints in terms of vegetation removal, imposed by the Department of Natural Resources and Minerals.[50]

[63] Quinn challenged that finding, and pointed to several factors in an attempt to support Mr Murphy's valuation opinion that the best and highest use of the land was future industrial rather than rural. One was the 2008 Decision Notice Approval for Material Change of Use,[51] and the other was the lack of constraints from the DNR.

[64] In the 2008 DA the development approval itself was identified: "Development Permit for a Preliminary Approval Overriding the Planning Scheme for a Material Change of Use for an Industrial Estate comprising Industrial, Multi Modal and Open Spaces Uses".[52] Clause 1.1.13 of the 2008 DA contained a definition of the Subject Land: "**Subject Land** means part of Lot 4 on RP6188080, Parish of Yeppoon, having a total area of 279.8 hectares of which 60.80 hectares is subject to this development".[53] The justification for the approval notwithstanding conflict with the Planning Scheme was:[54]

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47 Reasons below [60(d)].
48 Appellant's outline paragraph 47.
49 Appeal transcript T1-22 line 1.
50 Reasons below [61].
51 To which I shall refer as the 2008 DA.
52 AB 1537.
53 AB 1541.

> "The site is in a strategically suitable location despite the inconsistency with the current rural zoning of the site. The specific area has been identified in the explanatory notes to the *Livingstone Planning Scheme 2005* as investigation area for future general industrial and multimodal uses (as detailed in Map 2.10)."

[65] Analysis of the 2008 DA confirms the finding of the learned trial judge. It contains the responses from referral agencies and concurrence agencies. The DNR response stipulated that there would be no clearing of land within "Area C" nor anything other than underground services, roads and fences on "Area D".[55] In my view, it does not matter that the plan referred to in that response[56] does not appear elsewhere in evidence. The annexed plans SK 23J and SK 48B show that the remnant vegetation, which (it had been accepted by the developer)[57] would not be cleared but remain as a buffer to neighbouring rural uses, surrounded the lot to be developed, and was part of the Balance Lot.[58]

[66] More importantly, the annexed plans SK 23J and SK 48B reveal that the "Total Developable Area" was only 24.8 hectares. Clause 8 of the 2008 DA provided that the approved development "must be completed … generally in accordance with the approved drawings", and listed plan SK 47B as one of those drawings.[59] Plan SK 47B showed the "Balance Lot" of 60.8 hectares was designated as "no longer part of the application".[60]

[67] That evidence does not permit the conclusion that a hypothetical developer would have proceeded on the basis that the 2008 DA indicated likely approval of the Balance Lot for industrial uses. Rather, the plans annexed to the 2008 DA suggested the contrary, and that the Balance Lot was not only not part of the approval, but likely to remain rural.

[68] That error on the part of Mr Murphy was critical to his valuation exercise. As the learned trial judge noted,[61] Mr Murphy assumed the whole of the land could be sold as approved for industrial development, and valued on that basis.[62] That in turn was based on the incorrect assumption that the 2008 DA was still current, and the misapprehension of the extent of the approval. As noted above the approved plans for the 2008 DA excluded the Balance Lot.

[69] It was submitted that the learned trial judge failed to take into account the Council's confidential minute which stated: "The reality is that much of the vegetation and hence hazard, will be removed in association with the establishment of an industrial estate. From a planning perspective, there are few impediments to the development of the site for industrial purposes."[63] That minute was of a report considered confidential under s 275(1)(e) and (h) of the *Local Government Regulation* 2012 (Qld), because it contains information relating to "contracts proposed to be made

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54 AB 1537-1538.
55 AB 1566.
56 Referral Agency Response Plan 2006/008258/2.
57 AB 1566.
58 AB 1574.
59 AB 1538.
60 AB 1576.
61 Reasons below [61].
62 Mr Murphy's report valued the whole of the land, AB 711, 713.
63 AB 1769-1770. Appellant's outline paragraph 56.

by" the Council, and "other business for which a public discussion would be likely to prejudice the interests of the local government or someone else, or enable a person to gain a financial advantage". That being so, it is unlikely that it was a document of which the hypothetical developer would have become aware.

[70] Mr Morris QC conceded that it was not a document to which the hypothetical developer could have had access.[64] However, he sought to submit that nonetheless it evidenced the Council's planning intentions which could have been ascertained by the hypothetical developer with the exercise of due diligence simply by asking a council planning officer.[65] However, beyond that assertion there was no evidence to give credence to the suggestion. And, nothing explored at trial suggested it was likely. In fact, Mr Sheehan's evidence was that he spoke to Council officers in 2017 about the Council's 2014 intentions, and was told that the Crown would not approve the rear of the land (the Balance Lot) to be rezoned and developed as industrial land.[66]

[71] The contentions also challenged the learned trial judge's criticism of Mr Murphy based on a report by GHD as to demand for industrial land.[67] Mr Murphy had relied upon the report as showing that in 2010 the area in which the subject site was located was recommended as suitable for future industrial land. His Honour noted Mr Murphy's concession in evidence that the GHD report had been based on assumptions as to population increases which had not materialised. His Honour then went on: "… and, in any event the terms of the report suggested that it would not be until the year 2031 that there might be a demand for an area of vacant industrial land in the Livingstone Planning Area (38 hectares) similar to the area the subject of Mr Murphy's assumption".[68] The submission was that the report suggested the opposite, namely that there would be such a demand "up to" the year 2032.

[72] Mr Murphy's concession was, in my view, enough reason to discount reliance upon the GHD report. As to the learned trial judge's comments otherwise, Mr Murphy seemed to take a similar view in his own report:[69]

> "This report identified a need for an additional 32 hectares of industrial zoned land within the Livingstone Planning Area by 2031.
>
> The report concluded that Yeppoon had a shortfall in supply of 5 hectares by 2016, 14 hectares by 2021, 23 hectares by 2026 and 32 hectares by 2031. (refer to Table 5-1, page 50 & para 5.3.4 page 60)."

[73] Reference to the GHD report shows that the learned trial judge's comment was accurate. Table 5-1 of that report lists the relevant demand as being: 3 hectares by 2016, 11 hectares by 2021, 20 hectares by 2026 and 38 hectares by 2031. That is explicit in paragraph 5.3.4 of the report.[70] That is all his Honour said. Whilst there may

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64 Appeal transcript T1-19 line 5.
65 Appeal transcript T1-19 lines 9-11.
66 AB 1935 line 13 to 1936 line 27.
67 Appellant's outline paragraph 57.
68 Reasons below [61(c)(ii)].
69 AB 720.
70 AB 1669.

have been an incremental increase, the demand for 38 hectares would not arise until 2031.

Industrial development was inconsistent with rural zoning?

[74] A contention was that the evidence established that the whole of the land was expected to become "industrial" and be rezoned as such by approximately 2020. This was said to follow from: (i) the 2005 Town Plan; (ii) the MacroPlan Report prepared at the request of the Council in December 2007; (iii) the GHD Report prepared in 2010; (iv) the draft new Planning Scheme published by the Council in April 2012; (v) the Preliminary Consultation Document prepared in November 2012; and the Master Plan Development Document, in that a road was proposed therein through the "balance lot" to Sawmill Road.

[75] The reference to the Master Plan Development Document does not seem to assist. Mr Sheehan's evidence was that one had not been done or submitted to Council.[71] There was no direct challenge to that evidence, and only an assertion by Mr Murphy in respect of the hypothetical development costs that one "had already been prepared so that it was unnecessary to incur this expense".[72] No such document was tendered by YIC, nor referred to in oral evidence. Whilst there seems to have been such a document for the 2008 DA,[73] there was no evidence of one as at March 2014.

[76] The MacroPlan Report for Livingstone Shire was issued on 18 October 2007.[74] Only three pages of the document were put in evidence. Whilst it identified the subject land as "Proposed Industrial",[75] it is not evident what that meant. In any event, this report pre-dated the 2008 DA which did not approve the rezoning of the Balance Lot to industrial.

[77] The Preliminary Consultation Document dated November 2012 concerned "Strategic Directions – Land Use".[76] It was a document prepared by the Rockhampton Regional Council, not the Livingstone Council. Its evident purpose was not as a planning instrument, but to seek feedback from constituents so that future planning would be better informed: "To ensure that the policy appropriately reflects the broader community's view, Council is seeking your feedback on this Strategic Directions – Land Use document".[77] It identified that it was before the Draft Planning Scheme was done.[78] In a section identifying "preferred areas for future development" it referred to the subject land as "Industrial Development".[79] Given it was not a planning instrument, and its consultative and non-binding nature, it is of doubtful utility.

[78] I have dealt with the GHD report above. The fact that its assumptions as to population growth proved incorrect render that report of doubtful utility.

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71 AB 516, 1016.
72 AB 1015.
73 AB 1543, 1755, 1920 lines 12-17.
74 AB 1535.
75 AB 1536.
76 AB 1772.
77 AB 1775.
78 AB 1774.
79 AB 1788.

[79] The 2005 Town Plan and the draft 2012 draft planning scheme were urged only faintly, and not separately addressed. They add little to the other points dealt with in these reasons.

[80] Further, the points raised above suffer from the more important signals about the Balance Lot. It was excluded from the 2008 DA, and the vegetation removal constraints imposed by the DNR presented real obstacles to a valuation approach that assumed the entire land could be sold as approved for industrial development. Mr Murphy's insufficient regard to the vegetation removal constraints were highlighted by the learned trial judge in the decision below.[80]

[81] I therefore reject the submission that the learned trial judge erred in finding that "over 26 hectares was not approved for industrial development and therefore was still zoned rural with no extant approval to override the planning scheme".[81] His Honour's criticism of Mr Murphy's approach was justified. Mr Sheehan was right to exclude it from the valuation process. Further, the vegetation issues and the removal of the Balance Lot from the 2008 DA suggest that Mr Sheehan was right to advance a tempered view of the approach taken by the hypothetical developer to this issue. As the learned trial judge noted,[82] Mr Sheehan's reasoning was that such a developer would consider that the balance land was presently zoned rural and any approval for future industrial use could be anywhere between 10 and 20 years in the future which inevitably would involve the developer incurring significant holding and financial costs and risk. In such circumstances a hypothetical developer would consider alternative sites immediately available for industrial use in order to secure a better return in the immediate future.

Other criticisms of Mr Sheehan's approach

[82] Mr Sheehan's approach was criticised on the basis that it was said he relied upon the Council's own reconfiguration of the land once it owned it.[83] It was pointed out that the Council's application (to itself) and approval were 18 months after that valuation date, and the survey plan for the Council's Stage 2 was in May 2017. The submission went so far as to say that it demonstrated that Mr Sheehan "was prepared to, and did, select parts of various approvals granted over the Land from time to time that best suited a preconceived outcome".[84] It was also said that this attitude was supported by Mr Sheehan's disavowal and contradiction of his 2012 valuation.

[83] In my view, the submission should be rejected. The learned trial judge set out the approach taken by Mr Sheehan and said:[85]

> "(c) In his valuation opinion, Mr Sheehan adopted a hypothetical development configuration based upon the 2014 approval obtained by Council after it acquired the property. He assumed that the hypothetical willing developer would have considered the value of the land by reference to 3 component parts, namely the reconfigured area (divided into 23 industrial lots);

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80 Reasons below [61(d)].
81 Reasons below [61(a)]; Appellant's outline paragraph 53.
82 Reasons below [82].
83 Appellant's outline paragraphs 35-41.
84 Appellant's outline paragraph 38.
85 Reasons below [57(c) and (d)].

the balance of the area which had been approved for industrial development in the 11 March 2008 approval; and the remaining balance area which was not approved for development.

(d) The defendant criticized this choice and contended that it was contrary to appropriate valuation methodology. But Mr Sheehan justified not using the configuration contained in the 15 January 2009 and 2 July 2009 approvals because they had lapsed. And he justified using the configuration based on what the Council did in fact approve later in 2014 as preferable, because he thought that you would not use the lapsed configuration if a better one was available and given that Council did in fact approve a different configuration (albeit for itself as developer) and subsequently implemented that configuration, it was appropriate to use that configuration."

[84] As can be seen, neither Mr Sheehan nor the learned trial judge proceeded on the basis that the hypothetical developer would have known of the Council's approval and plans. Mr Sheehan merely used what the Council did as a basis for inferring what the hypothetical developer could have established as at the valuation date. In fact, Mr Sheehan did not adopt the Council's plans completely, but modified them.

[85] Mr Sheehan's 2012 valuation was in evidence and he was cross-examined on it, albeit fleetingly. It did not feature greatly in the submissions below, perhaps because of Mr Sheehan's evidence as to the changes in the market, such as that there had been a drop in demand for vacant industrial land since 2012, and only six such sales in that period.[86]

[86] A subsidiary point on the appeal was that Mr Sheehan's approach revealed no transparency as to how he arrives at a valuation for each lot in the hypothetical subdivision. It was said that if one had reference to the experts' joint report[87] it could be seen that there was no sufficient justification for the selection of comparable sales, or the distinguishing of those selected by Mr Murphy, by way of response to what Mr Murphy said about them.[88] The criticism was also that in Mr Sheehan's report there was nothing, or too little, offered to justify the selection of the sale prices, i.e. the rate per square metre.

[87] The challenge is misplaced. Mr Sheehan's report identified the sales to which he had regard, and in particular the ones that he said were truly comparable.[89] Various observations were made as to the adjusted value attributed to them, such as the fact that the assessed value for rating and land tax purposes had dropped by 10 per cent over the previous three years. There were also particular comments about whether the land was superior or inferior to the subject land, and why. The sales he relied upon (Plover Drive) were set out with similar commentary.[90] Then followed an analysis

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86 Summarised and accepted in the Reasons below at [70]-[72].
87 AB 1003.
88 Examples were said to be at AB 1029, 1032 and 1034.
89 AB 524 -533.
90 AB 526.

of the sales evidence, a summary of small industrial sales, leading to his opinion of gross realisation.[91] All that led to the opinion of an appropriate square metre rate.[92]

[88] In addition to those matters Mr Sheehan was cross-examined as to his selected sales, the value adjustments and comments, and the square metre rate he applied.

[89] With the benefit of that evidence,[93] and having seen the two valuers in the witness box, the learned trial judge was well placed to make a finding as to which approach his Honour accepted. The criticism raised in this point was but one of many factors weighed by the learned trial judge in that process. It cannot be demonstrated that there was error in his preference for Mr Sheehan's evidence over that of Mr Murphy on this area.

[90] Ultimately the leaned trial judge gave a set of cogent reasons for his Honour's acceptance of Mr Sheehan over Mr Murphy, which included:

(a) Mr Sheehan's approach was on the basis that the 2009 ROL had expired, whereas Mr Murphy wrongly assumed that the ROL was still on foot;[94]

(b) Mr Sheehan's use of sales evidence in his the assessment of gross realisation and his opinion as to the market were supported by other evidence;[95]

(c) Mr Murphy's first flawed assumption as to the costs of the intersection works;[96] in this respect his Honour found that Mr Murphy had been influenced in his uncommercial assumption by instructions given directly by Mr Quinn; that course was "imprudent",[97] and "sounded adversely to my assessment of the reliability of his opinion evidence";[98] the error led to the costs of the intersection upgrade being excluded from his hypothetical development costings;

(d) Mr Murphy's second flawed assumption as to the balance land, that is the assumption that the whole of the balance area could be sold as approved for development;

(e) Mr Murphy's approach to the market was: subjective; not supported by data; contained the illogical proposition that the decline in prices for industrial land in Yeppoon was not relevant to assessing value, and provided no evidence to illustrate economic circumstances in Yeppoon; and contained unrealistic assumptions as to the construction and selling phase;[99] and

(f) Mr Murphy conceded that he had made an error by not deducting the cost of financing the acquisition; his Honour found that this was "another significant methodological failure".[100]

[91] That catalogue more than amply justifies the rejection of Mr Murphy's valuation and the adoption of that of Mr Sheehan.

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91 AB 534-535.
92 AB 563-564.
93 Which his Honour summarised at [69] of the Reasons below.
94 Reasons below [58].
95 Reasons below [67]-[72].
96 Reasons below [60].
97 Reasons below [62].
98 Reasons below [60(e)].
99 Reasons below [74].
100 Reasons below [88].

[92] The justified rejection of Mr Murphy's evidence based on the two flawed assumptions highlights a fundamental difficulty with the challenge mounted on the appeal. It is this: even if the attack in respect of Mr Sheehan was successful that does not mean that Mr Murphy's evidence and opinion as to value would therefore automatically be adopted. Only if Mr Murphy's evidence and valuation approach were accepted would that occur. For the reasons above there were grounds to reject Mr Murphy's valuation.

Conclusion

[93] For the reasons above I have concluded that the grounds of appeal lack merit. The appeal should be dismissed.

[94] I propose the following orders:

1. The appeal is dismissed.

2. The appellants pay the respondents' costs of the appeal.