SUPREME COURT OF QUEENSLAND

CITATION:	*Heavey Lex No 64 P/L & Anor v Chief Executive, Dept of Transport* [2002] QCA 13
PARTIES:	**HEAVEY LEX NO 64 PTY LTD** ACN 010 684 410 **S PAINO** (claimants/appellants) **v** **CHIEF EXECUTIVE, DEPARTMENT OF TRANSPORT** (respondent/respondent)
FILE NO/S:	Appeal No 3124 of 2001 Land Court Appeal No. A97-43
DIVISION:	Court of Appeal
PROCEEDING:	Appeal from the Land Appeal Court Miscellaneous Application - Civil
ORIGINATING COURT:	Land Appeal Court at Brisbane
DELIVERED ON:	8 February 2002
DELIVERED AT:	Brisbane
HEARING DATE:	30 October 2001
JUDGES:	Davies and McPherson JJA and Ambrose J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – NATURE OF RIGHT – APPEALS IN THE STRICT SENSE AND APPEALS BY WAY OF REHEARING – appeal from decision of Land Appeal Court – where Land Appeal Court found that Land Court member erred in assessing compensation by relying on facts not in evidence – where appellants claim that Land Appeal Court attempted to substitute its own assessment of compensation – whether Land Appeal Court sufficiently indicated nature of error of Land Court member – whether Land Appeal Court made error or went beyond permissible limits REAL PROPERTY – CROWN LANDS – QUEENSLAND – ADMINISTRATION – APPEALS FROM THE LAND APPEAL COURT

Land Acts 1962-1965 (Qld), s 41(5), s 44(13), s 44(14), s 44(15)
Land Act 1962-1988 (Qld), s 45(1)

Ahmedi v Ahmedi (1991) 23 NSWLR 288, distinguished
Boland v Yates Property Corporation Pty Ltd (1999) 74 ALJR 209, considered
Charan Das v Amir Khan (1920) LR 47 Ind App 255, considered
Commissioner of Succession Duties (SA) v Executor Trustee and Agency Co of South Australia Ltd (1947) 74 CLR 358, considered
The Commonwealth v Reeve (1949) 78 CLR 410, considered
David's Holdings Pty Ltd v AG for the Commonwealth & Anor (1994) 49 FCR 211, distinguished
Devries v The Australian National Railways Commission (1993) 177 CLR 472, distinguished
The Queen v Rigby (1956) 100 CLR 146, considered
Rosenberg v Percival (2001) 75 ALJR 734, distinguished
Warren v Coombes (1979) 142 CLR 531, considered
Wilsher v Essex Area Health Authority [1988] 1 AC 1074, distinguished

COUNSEL: D Jackson QC, with DR Gore QC, for the appellants
RM Needham, with RS Jones, for the respondent

SOLICITORS: Connor O'Meara for the appellants
C W Lohe, Crown Solicitor for the respondent

[1] **DAVIES JA:** I have had the advantage of reading the reasons for judgment of Ambrose J. I agree with him that this appeal must be dismissed. I also agree substantially with his reasons for that conclusion but would like to add some reasons of my own. In doing so I adopt his Honour's statement of the relevant facts and of the course of litigation so far.

[2] As his Honour has pointed out, the question before this Court is whether the Land Appeal Court erred in law in concluding that the Land Court member wrongly concluded that the highest and best use, after resumption, of such part of the subject land as could be substituted for the area which, before resumption, was zoned medium density residential, which part may be taken to be an area west of the resumed land identified as parcel A, was not as medium density residential land. The starting point for consideration of this question is the fact that, apart possibly from the evidence of Mr Gould, a valuer called by the respondent whom the Land Court member substantially accepted, there was no evidence before that Court that parcel A should be valued, after resumption, on any basis other than that its highest and best use was the same as the highest and best use of the land which, before resumption had been zoned medium density residential.

[3] The Land Court member's conclusion that, after resumption, parcel A should be valued on the basis that its highest and best use was not medium density residential was plainly based on his understanding of the evidence of Mr Gould. However it seems to me, as it did to the Land Appeal Court, that the Land Court member misunderstood Mr Gould's evidence in this respect. Indeed not only did Mr Gould not say that, but his evidence was to the contrary; that there was possibly more reason for adopting a medium density residential valuation for part of the subject land after resumption than before it; "there's possibly more reasons in the after to push it towards medium density … ". Mr Gould was not asked to and did not explain this statement in his oral evidence but his reason seems to have been, as he said in a report which he gave, that the visual and noise impact of the by-pass road which would be built over the resumed land "would not be as widely felt with two and three storey unit development as end buyers or occupants of multi unit developments in this type of suburban location tend to have lower expectations with regard to their visual amenity and noise"; that is, it seems, lower expectations than those of single unit residential dwellers.

[4] How then did the Land Court member come to make this mistake? The answer seems to be in the way in which Mr Gould expressed his reservation about the potential of any part of the subject land to be developed as medium density residential, both before and after resumption. At all times it appears that there might well be, in the vicinity of the subject land, an excess quantity of land which might be suitable for development as medium density residential land, much of it more attractive for that purpose than any part of the subject land. For this reason Mr Gould had considerable doubt about whether any part of the subject land would ever be developed as such, or would ever have been developed as such even if the resumption had not taken place. Nevertheless in reliance on a dictum of Sir Owen Dixon in *Commissioner of Succession Duties (SA) v Executor Trustee and Agency Co of South Australia Ltd*[1] Mr Gould resolved his doubt in favour of the appellant. Given the opinion, to which I have referred, that supply of suitable medium density land in the vicinity of the subject land might exceed demand and that much of it was more attractive for this purpose than the subject land, then if that principle applies here, it applies as much to parcel A after resumption as it did to the land zoned medium density residential before resumption. The appellant did not contend that it did not apply to assessment of the highest and best use of the latter land.

[5] However the reason why the Land Court member adopted a different basis for valuing parcel A after resumption from that which he adopted for valuing the land zoned medium density residential before resumption appears to have been because of an inference which he drew from two passages in the evidence of Mr Gould. The first was the following exchange which took place between Mr Gould and counsel for the appellant during the course of his cross-examination:

> "Do you think it's medium density in the after case or don't you? -- Well are you talking about my assessment of compensation or my commercial advice in the real world?
>
> The latter? -- My commercial advice is no, I would think there's possibly more reasons in the after to push it towards medium density but I would think it would be high risk."

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[1] (1947) 74 CLR 358 at 373 - 374; see also *Boland v Yates Property Corporation Pty Ltd* (1999) 74 ALJR 209 per Callinan J at 279 - 280, Gummow J at 230.

The second was the following statement:

> "If I was advising a valued client of mine at the relevant date, I would not have included the medium density residential component at the higher value."

[6] From that evidence the Land Court member inferred that whereas Mr Gould was equivocal as to the likely future development of the land zoned medium density residential if part of it had not been resumed, enabling him to resolve his doubt on that question in favour of the higher use, he was unequivocal as to the likely future development, after resumption, of parcel A; that is, that it would not be for medium density residential but for some lesser use. However, as mentioned earlier, Mr Gould had expressed much the same doubts, as to the likely development as medium density land, with respect to parcel A after resumption, as he had with respect to the land zoned for that purpose before resumption, and for the same reason; and the only difference between the two which he could see was that the subject land after and because of the resumption became more suitable for medium density than for single unit residential because residents of medium density developments would be more likely to tolerate the intrusion which the by-pass will cause than residents of single unit residences. Moreover as the Land Appeal Court pointed out:

> "Mr Gould's oral evidence was to the effect that there was a clear need to take a consistent approach, because the potential use of the land was comparable both before and after resumption."

[7] For those reasons I would conclude that the Land Appeal Court did not err in law in concluding that the Land Court member was led into error because of his misunderstanding of the effect of Mr Gould's evidence. The form of order adopted by the Land Appeal Court permits the Land Court, accepting that parcel A has the same potential for medium density development after resumption as that part of the land zoned medium density residential had before resumption, to make some reduction in the after resumption valuation for the view which the Land Court member held that, in reaching his valuation on that basis, Mr Gould had not made sufficient allowance for the detrimental effect on the value of the land of the resumption and the consequent construction of the by-pass road.

[8] **McPHERSON JA:** I agree with the reasons of Davies JA and Ambrose J.

[9] The appeal is dismissed with costs.

[10] **AMBROSE J:** This is an appeal by claimants for compensation in respect of land resumed by the respondent on 22 March 1996 against the decision of the Land Appeal Court allowing an appeal by the respondent against an order made by the Land Court that the respondent pay to the claimants compensation for the loss of land resumed and for the loss of palms on that land in the sum of $3.335M. There was also an appeal to the Land Appeal Court by the appellants against the award by the Land Court of $160,362.65 for disturbance involving disallowance of certain professional fees.

[11] The Land Appeal Court ordered that the appeal by the respondent against the amount determined for compensation be allowed and the order made in the Land Court be set aside and upon the appeal by the appellants that the determination of the order for compensation for disturbance also be set aside "to the extent stated in the reasons delivered on 22 February 2001" and that the matter be remitted to the member of the Land Court whose determinations were set aside "for further consideration and determination in the light of the reasons (ie of the Land Appeal Court) delivered on 22 February 2001".

[12] The order made for reconsideration of the appellants' claim for disturbance was not challenged upon this appeal.

[13] The jurisdiction and function of the Land Appeal Court under the *Land Acts* 1962-1965 was defined in *The Queen v Rigby* (1956) 100 CLR 146 at p 150 in these terms –

> "…to rehear, on evidence adduced before it, the whole matter which is the subject of the appeal – to hear it anew … It was entitled to form an altogether independent judgment on the whole case, quite irrespective of the reasons for the conclusion of the Land Court, and indeed it was bound so to do … prima facie a general appeal such as there was in the present case is a retrial. If the parties concur in using the old material, well and good; but that does not alter the substantive character of the court's function and power nor impose any limit upon them."

[14] Under ss 44(13) and (14) of the *Land Acts* 1962-1965 in force when *Rigby* was decided it was provided -

> "(13) The appeal [ie to the Land Appeal Court]… shall be by way of rehearing, and shall be brought and the proceeding shall be had in such manner as may be prescribed by rules of court.
>
> The Land Appeal Court may hear and determine any question which arises in the course of the appeal, including any question so arising which was not brought before or considered or decided by the Commissioner or the Court, or was not contained in any prescribed notice, but in such case any party to the proceedings shall be entitled to an adjournment upon such terms and conditions as the Land Appeal Court thinks just.
>
> (14) Evidence on an appeal to the Land Appeal Court may be taken in the same manner as is prescribed with respect to matters heard and determined by the Land Court, and for the purposes of the appeal the Land Appeal Court shall have the same powers as the Land Court has under this Act."

[15] The exercise of jurisdiction etc by the Land Appeal Court under s 44(15) of the Act was identical with that exercised in the Land Court by one member pursuant to s 41(5) of the *Land Acts* 1962-1965.

[16] However, the nature of an appeal from the Land Court to the Land Appeal Court was altered when s 44(13) of the *Land Acts* 1962-1965 (as amended) was further amended in 1994 by repealing ss (a), (b), (c) and (d) of s 44(13) and substituting –

> "(13)(a) The Land Appeal Court may admit further evidence only if–
>
> (i) it is satisfied that admission of the evidence is necessary to avoid grave injustice and there is adequate reason that the evidence was not previously given; or
>
> (ii) the appellant and respondent agree to its admission."

It is common ground that from 24 April 1994 upon appeal the jurisdiction of the Land Appeal Court has been "to correct the decisions of the Land Court where that court has gone wrong in fact or law upon the materials before it".

[17] It is convenient before attempting to analyse the judgment of the Land Court, which the Land Appeal Court set aside remitting parts of the claim for reassessment of compensation upon different bases, to consider briefly the characteristics of the area of land affected by the road resumption.

[18] The land affected by the resumption was of a roughly square shape located about 15kms north of Cairns comprising 37.43 ha of "fairly flat and low lying land, devoid of vegetation except for a palm plantation situated along the western side and a small group of eucalypts in the north-eastern corner." On the western boundary of the land was the Captain Cook Highway and its northern boundary was Macgregor Road.

[19] Prior to the resumption, an area of 6.2 ha towards the north-western corner of that land had been rezoned to medium density residential. On the northern boundary of that medium density residential zoned land was an area of 2.5 ha within the rural zone.

[20] The balance of the land, which was traversed by two drainage easement channels to carry stormwater, was also zoned rural.

[21] There was evidence that the land within the rural zone might be developed for low density residential purposes if rezoned. Indeed much had an "approval in principle" for rezoning to medium density residential. However the land already rezoned medium density residential could be developed for various purposes within contemplation of that zone without planning consent of the local authority.

[22] It was not in issue that land within the medium density residential zone at date of resumption was more valuable because of that zoning than most other land within the rural zone with potential for a rezoning for residential purposes – even that which had received approval in principle for medium density residential rezoning.

[23] It was argued and determined that the 2.5 ha area of land within the rural zone on the north-western corner of the land affected by the resumption had a potential for rezoning to the commercial zone although there was some doubt as to the need for commercial land in that area. The respondent resumed for road purposes a wide strip of land, which transected the claimants' land from a position near its south-eastern corner to one near its north-western corner. All told that resumed land had a total area of 5.97 ha. Its path transected the 6.2 ha of land within the medium density residential zone and cut .13ha off the south-western corner of the north-western 2.5 ha area of land within the rural zone said to have a potential for commercial use. 2.3 ha within the medium density residential zoned land was taken and 3.54 ha of land within the balance rural zone area was taken.

[24] The land resumed for road purposes passed between a stormwater drainage channel easement across the south-western corner of the land and another stormwater drainage channel easement across the north-eastern corner of the land.

[25] The cases before the Land Court mounted by both the claimants and the respondent were based upon a before and after valuation approach. The claimants case that the highest and best use of its land was for its development as an integrated tourist facility was rejected. Its potential for mainly residential development with a small area with potential for commercial development was accepted.

[26] There was evidence called as to the injurious affection of the proposed road construction on the balance of the subject land. As the road approached the north-western corner of the land affected it was elevated to such a height that it would pass over the Captain Cook highway intersection with Macgregor road and it was proposed that noise attenuation would be achieved by the construction of walls to a height of about 3 metres on the edges of the roadway where it passed through the appellants' land.

[27] The evidence led was generally to the effect that having regard to need for medium density residential land, the 6.2ha of land within that zone near the north-western corner of the land could have been relocated (of course with ministerial consent) to any part of the subject land within the rural zone. The evidence generally as I have indicated, was that the land was flat and of marginal quality. Its value for residential/commercial development was attributable principally to its proximity to Cairns and nearby development and proposed developments.

[28] While as it happened, the claimants' land within its current medium density residential zoning could more readily be used for medium density residential development than the other land within the rural zone, that consideration did not

impinge upon the real valuation question which was whether there was sufficient demand for land zoned medium density residential on any part of the claimants' land to permit its value to be compared with the value of other medium density residential parcels of land in other areas in and near Cairns. The respondent's valuer had reservations about the market demand for 6.2ha of land zoned medium density residential within the boundaries of the appellants' land having regard to the supply of undeveloped land within that zone in the area to the north of Cairns, however, he explained that he adopted the approach that the highest and best use of the 6.2ha of land already so zoned was for development for purposes compatible with that zone because the valuation was for compensation purposes and he was prepared to give the appellants the benefit of his doubts. The extent to which he was influenced by the current zoning of that land to adopt this approach while not being prepared to give similar weight to the "approval in principle" given to rezoning of the balance of the appellants' land to that zone does not emerge.

[29] All valuers referred only to englobo sales of residential land for the purpose of making an englobo valuation of both the claimants' medium density residential zoned land and their rural zoned land with potential for rezoning to single unit residential development in conducting their before and after valuation exercises to determine the loss suffered by the claimants as a consequence of the road resumption.

[30] The Land Court member determined that before resumption the 6.2ha area of land zoned medium density residential had a value of $2,205,000. He determined that the 2.5ha of land within the rural zone towards the north-western corner of the land had a potential for development as commercial land and determined its value on this basis at $875,000.

[31] The balance of the land before resumption within the rural zone (of which an area of 3.54ha was resumed) was valued having regard to its potential for development for single unit residential purposes. He determined the valuation of that land before resumption at $3,053,875.

[32] With respect to the after valuation however, the Land Court member proceeded on the basis that even with its zoning, the balance of the medium density residential zoned land through which the road passed, had its suitability for medium density residential zone purposes destroyed by the resumption. Each area of the medium density residential zoned land left – 1.8ha to the north and 2.1ha to the south of the elevated road construction – was found to have had its potential for development and use for purposes contemplated in a medium density residential zone destroyed.

[33] On the after method of valuation therefore, the Land Court member valued the whole of the balance of the claimants' land left after resumption on the north-western corner (with the exception of the 2.37ha of rural land with a commercial potential) on the basis of its value as land with a potential for development and use for only single unit residences. The consequence of this approach was that 3.9ha of

the balance of the medium density residential zoned land left after resumption was valued as suitable only for single unit residential purposes.

[34] Of course the adverse effect on amenity of the balance of the claimants' land in both zones retained after resumption was reflected in the after valuation.

[35] There was no evidence given by any experts called before the Land Court to the effect that the construction of the road for which the land was resumed destroyed the potential of the balance of the land within the medium density residential zone (3.9ha) to be developed for the purposes contemplated by that zone. In fact to the contrary there was evidence that the disturbance of use of that land for such purposes by construction of the proposed road works would be less than it would be for nearby land used for the purpose of single unit residential development.

[36] Moreover it is clear on the material that there were other 6.2ha areas of land available both to the north and to the south of the 5.97ha ribbon of land resumed for road purposes which (subject to rezoning) could have wholly replaced the 6.2ha of medium density residential land which existed prior to resumption for medium density residential purposes. There also was, of course, areas adjacent to the balance of the 3.9ha medium density residential zoned land which (subject to rezoning) could have replaced the 2.3ha of medium density residential zoned land actually lost in the road resumption.

[37] The Land Appeal Court therefore, considered the approach taken by the Land Court member in his after valuation in the context of the evidence, which he accepted and other evidence unchallenged in relevant respects and concluded in effect, that the road resumption did not destroy the suitability of any part of the balance of the claimants' land for development of a 6.2ha area for sale for medium density residential purposes.

[38] In effect the Land Appeal Court came to the conclusion that upon the evidence before him the Land Court member erred in concluding that a consequence of the resumption was the destruction of the suitability of the balance of the land or at least of 6.2ha of the balance of the land to be sold and/or developed for medium density residential purposes.

[39] There is no evidence to which reference was made on appeal where such a contention had been even advanced by any expert witness in the Land Court. In fact there was evidence not in dispute, that the potential for sale and development for medium density residential purposes of the 3.9ha of land left within the medium density residential zone after resumption had not been destroyed – albeit that its englobo value may have been lessened by the extent to which its residential amenity may have been injuriously affected by the road works to be constructed.

[40] For the appellant it is contended that the function of the Land Appeal Court under s 44(13) of the *Land Acts* is now limited to a rehearing of the evidence before the

Land Court in the technical sense – ie. a rehearing on the record. This was the very function which the High Court in the *Queen v Rigby* (supra) held that the provisions of the *Land Act* as it then stood did not envisage. At page 150 their Honours observed –

> "A valiant attempt was made on the part of the respondents to establish that questions of law were discoverable in all this material. To no small extent the attempt was based on a false hypothesis. The hypothesis was that the function of the Land Appeal Court was of the same kind as that of the Court of Appeal in England and was designed to correct the decisions of the Land Court where that court had gone wrong in fact or law upon the materials before it."

[41] The essential function of the Land Court in this matter in my view, involved not so much making findings of facts in dispute as making an assessment of compensation for the loss of 5.97ha of land taken from a 37.43ha parcel of land based upon evaluation of expert evidence advanced to demonstrate the value of that land at date of resumption quite undeveloped for any of the purposes for which various experts expressed opinion as to its suitability for potential development, and only 6.2ha of which the owners had procured a rezoning to medium density residential some years before.

[42] It was contended on behalf of the appellants that the Land Appeal Court in setting aside the determination of the Land Court on the ground of its error or mistake did itself, make an error or mistake in law which of course is the only ground upon which an appeal lies to this court from a decision of the Land Appeal Court. Section 45 of the *Land Act* 1962 – 1988 provides –

> "(1) A party, including the Crown, aggrieved by a decision of the Land Appeal Court on the ground of error or mistake in law on the part of the Land Appeal Court or that it had no jurisdiction to make the decision or exceeded its jurisdiction in making the decision may appeal against that decision to the Full Court."

[43] To succeed on their appeal to this court therefore, the claimants must show that the Land Appeal Court went beyond the limits of s 45 of the *Land Act* and beyond what was permissible upon a "rehearing" of the claim upon the record.

[44] This is not a case where the Land Appeal Court has attempted to substitute its own assessment of compensation for that which it set aside. It determined simply, that on the material the Land Court member erred in principle in determining upon the only evidence before him that any part of the balance of the claimants' land which had a pre-resumption potential for medium residential development, had had that potential destroyed by the effect of the road resumption and as a consequence his determination of compensation was "entirely erroneous".

[45] The Land Appeal Court had before it all the material that was before the Land Court member who made the assessment challenged by the respondent. It had never been suggested before that Land Court member that any potential for medium density residential development which the balance of the claimants' land had prior to resumption was destroyed by that resumption – whether it be the balance of the land within the medium density residential zone or any of the land adjacent to that area – of which there was something in excess of 30ha.

[46] In *Warren v Coombes* (1979) 142 CLR 531, there was a careful review of the authorities relating to the limits upon an Appellate Court interfering with findings made by a court of first instance. The majority members of the court at 541 observed –

> "This Court has in a number of cases stated and applied similar principles and has recognized that where the question is whether particular inference should be drawn from proved facts the appellate court has the right and duty to decide the question for itself."

[47] After an extensive review of relevant authorities their Honours at 551 concluded –

> "There is in our respectful opinion no authority that entitles us to depart from the doctrine expounded in this Court in cases before and including *Paterson v Paterson* [(1953) 89 CLR 212]…and in the House of Lords in *Benmax v Austin Motor Co Ltd* [[1955] AC 370]... The balance of opinion in cases since *Edwards v Noble* inclines in favour of adherence to that doctrine. Shortly expressed, the established principles are, we think, that in general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge, but, once having reached its own conclusion, will not shrink from giving effect to it. These principles, we venture to think, are not only sound in law, but beneficial in their operation."

[48] At 552 they observed –

> "Again with the greatest respect, we can see no justification for holding that an appellate court, which, after having carefully considered the judgment of the trial judge, has decided that he was wrong in drawing inferences from established facts, should nevertheless uphold his erroneous decision. To perpetuate error which has been demonstrated would seem to us a complete denial of the purpose of the appellate process. The duty of the appellate court is to decide the case – the facts as well as the law – for itself. In so doing it must recognize the advantages enjoyed by the judge who conducted the trial. But if the judges of appeal consider that in the circumstances the trial judge was in no better position to decide the particular question than they are themselves, or if, after giving full

> weight to his decision, they consider that it was wrong, they must discharge their duty and give effect to their own judgment."

[49] In *The Commonwealth v Reeve* (1949) 78 CLR 410 Dixon J at 423 said –

> "In *Commissioners of Succession Duties (S.A.) v Executor Trustee and Agency Co. of South Australia Ltd* [(1947) 74 CLR 358 at 367]… the following passage occurs in the judgment of *Latham* CJ, *Rich* and *Williams* JJ.: "It would not be proper for this court on an appeal of this nature to substitute its own opinion for that of the court below unless it were satisfied that the court below acted on some wrong principle of law, or that the value was entirely erroneous"."

[50] Their Honours then refer to the statement of Lord Buckmaster in *Charan Das v Amir Khan* (1920) LR 47 Ind App 255 at 264 that –

> "…the "Board will not interfere with any question of valuation unless it can be shown that some item has improperly been made the subject of valuation or excluded therefrom, or that there is some fundamental principle affecting the valuation which renders it unsound."
>
> The rule thus laid down is almost indispensable to the administration of justice in compensation cases. For the estimation of a money sum is usually so much a result of judgment and sound discretion and so little the product of analytical reasoning, that, were it otherwise, every appeal would mean an assessment of compensation *de novo*, without any assignment of error in the reasoning or conclusions of the court appealed from."

[51] Counsel for the appellants contend that the determination of the Land Court member which was set aside by the Land Appeal Court involved "ultimately a finding of fact as to the highest and best use of the land" – both before and after the resumption. It was contended that his finding must have been based upon his appreciation of oral evidence given by various expert witnesses: reference was made to *Devries v The Australian National Railways Commission* (1993) 177 CLR 472 at 479 per Brennan, Gaudron and McHugh JJ, and *Rosenberg v Percival* (2001) 75 ALJR 734 at paras 38 and 41 per McHugh J and at para 92 per Gummow J and at para 162 per Kirby J.

[52] To my mind those cases deal with substitution on appeal of a conclusion of fact which differs from the conclusion of fact reached by the primary court upon its evaluation of evidence, which has involved an assessment of the credibility of witnesses. In my view, they give little, if any, support to the contentions of the appellants.

[53] Reference was also made to the observation of Lord Bridge of Harwich in *Wilsher v Essex Area Health Authority* [1988] 1 AC 1074 at 1091 –

> "…the primary conflict of opinion between the experts as to whether excessive oxygen in the first two days of life probably did cause or materially contribute to Martin's RLF cannot be resolved by reading the transcript…Where expert witness are radically at issue about complex technical questions within their own field and are examined and cross-examined at length about their conflicting theories, I believe that the judge's advantage in seeing them and hearing them is scarcely less important than when he has to resolve some conflict of primary fact between lay witnesses in purely mundane matters."

[54] *Ahmedi v Ahmedi* (1991) 23 NSWLR 288 at 299 – 230 and *David's Holdings Pty Ltd v AG for the Commonwealth & Anor* (1994) 49 FCR 211 at 243-244 adopt the same principle where there is a conflict of expert opinion and a primary court resolves that conflict by adopting one body of opinion. In my view, the Land Court member did not purport to resolve any "conflicting theories" of valuers in this case, which the Land Appeal Court has rejected; it has in fact adopted a view expressed by expert witnesses in respect of which there was no conflict.

[55] I am unpersuaded that the reluctance of Appellate Courts when rehearing a case in the technical sense, to interfere with findings or inferences of fact supported by evidence of observation and perception, where credibility of witnesses is important, or with the resolution of conflicting expert evidence founded or based upon those observations or perceptions, which those cases illustrate, may easily be translated to a similar reluctance of the Land Appeal Court to reject a Land Court's evaluation of unchallenged evidence which has led to an assessment of compensation which it concludes is wrong.

[56] In my view, the Land Appeal Court in effect determined that the Land Court upon the unchallenged evidence, had made an assessment on a basis not advanced by either the claimants or the respondent, and one which on its consideration of the evidence adduced before it could not be supported.

[57] The Land Appeal Court did not attempt to assess compensation; it merely ruled that the Land Court adopted an incorrect approach upon the uncontradicted evidence having regard to the way the claim had been advanced and resisted before it, in determining that the pre-resumption potential for any medium density residential development on the balance of the claimants' land had been destroyed by the resumption.

[58] The form of order made by the Land Appeal Court after setting aside the assessment made in favour of the claimants, really had the effect of requiring the Land Court to proceed to assess compensation afresh on the basis that the resumption had not destroyed any potential which 6.2ha of the balance land had for development for medium density residential purposes. Obviously, an assessment of compensation on that basis will require the Land Court to give consideration to

where 6.2ha of land within the balance 31.23ha of remaining land might most successfully and profitably be developed for medium density residential purposes. The determination of where on the remaining land such potential may best be realised in the future may no doubt have some effect upon the quantification of compensation having regard to the effect which the construction of road works on the land resumed for that purpose will have upon the area of 6.2ha of land most suitably located in the "after" valuation exercise for medium density residential development. It may or may not include the balance 3.9ha of land remaining within that zone.

[59] In the course of its judgment, the Land Appeal Court commented that a valuer called by the claimants, Mr Warren, accepted that a medium density residential use on part of the appellants' land after resumption would have been appropriate, and that Mr Gould, the respondents' valuer, was of the view that if for some reason medium density residential development did not take place on one part of the appellants' land it could be accommodated on another part of it. It was observed that this view was consistent with the unchallenged opinion of Mr Challinor, the claimants' town planner.

[60] The Land Appeal Court commented upon one aspect of the evidence given by Mr Gould, that if he had been giving "my commercial advice in the real world" he would not have valued the medium density residential component of the appellants' land "at the higher value" because at the relevant date he "certainly had doubts about the need for this much medium density land", however, he observed that for the purpose of assessing compensation any doubts that he had as to the need for medium density land in the appellants' ownership should be resolved in favour of the appellants and it was for this reason that in his before valuation he had accepted that the appellants' land within the medium density residential zone should be valued on the basis that there was a demand in the market place for land within that zone in that area.

[61] The Land Appeal Court observed that –

> "…Mr Gould's oral evidence was to the effect that there was a clear need to take a consistent approach, because the potential use of the land was comparable both before and after resumption. That indicates to us that, if he was wrong in accepting that, for compensation assessment purposes, the highest and best use of parcel A after resumption was not for medium density residential but single lot density residential, then the highest and best use of parcel I before resumption should have been for single lot density residential also."

The court went on to observe –

> "The end result of the member's deliberations was that he resolved an "assumption" as to Mr Gould's degree of doubt of highest use potential in favour of the claimant in the before resumption scenario, and then used Mr Gould's oral admission as to the commercial

> reality of lower use potential in the after resumption scenario to conclude that Mr Gould accepted a different before and after potential use. If the member's approach was wrong, then an element of "double dipping" would result."

The judgment continues –

> "If potential for a particular highest and best use before resumption was not destroyed as a consequence of the resumption, but affected in some way either in a positive or negative manner, then that enhancing or deleterious effect needed to be identified in the after resumption valuation. It was clearly Mr Gould's opinion that the resumption in this case did not destroy potential for medium density residential use on some part of the subject land. It was his written valuation opinion that the medium density residential potential remained with parcel A albeit with some increased constraints compared to the before scenario. Indeed, it was his verbal evidence, earlier quoted…that he thought "there's possibly more reasons in the after to push it towards medium density" although he thought it would be "high risk". In his oral evidence, he also revealed the opinion that if, for any reason, the medium density potential attributed to parcel 1 before resumption had been lost to parcel A after resumption, then that potential would not be lost to the overall balance area, but transferred to the eastern severance. That would have had the effect of increasing the after resumption valuation of the eastern severance, whilst decreasing the value of parcel A."

The judgment continues –

> "However, there is no expert evidence including the town planning evidence, which would indicate that medium density residential potential had been destroyed on the subject land or that such potential did not remain within parcel A.
>
> We are persuaded that if medium density residential potential existed on part of the subject land before resumption as was found by the member, then it remained in some form after resumption. We are not in a position to provide an assessment in substitution for that arrived at by the member, but we see no reason, for ease of reconsideration, why the continued existence of that potential should not be restricted to parcel A in the after valuation approach.
>
> We are fortified in that conclusion by the fact that this approach accords with the case presented by both sides at first instance. We conclude also that the learned member erred in finding that the medium density residential potential which existed before resumption did not continue to exist after resumption. As we have pointed out, that conclusion was not supported by a consideration of Mr Gould's evidence as a whole or by the other valuation and town planning evidence."

[62] The Land Appeal Court then made the following orders –

> "(a) The cross-appeal of the respondent…is allowed and the determinations of compensation at first instance in respect of loss of land and palms in favour of the appellant…are set aside.
> (b) The determination of disturbance compensation payable to the appellant…is set aside to the extent stated in these reasons.
> (c) The matter is remitted to the learned member for further consideration and determination in the light of these reasons."

The reasons make clear the grounds upon which the two determinations were set aside.

[63] The evidence led before the Land Court member comprise 1369 pages of transcript and 160 exhibits and with the submissions addressed on it continued over a period of 4 weeks. It included voluminous reports from expert witnesses including those of 3 valuers who produced a total of 12 valuations of various parts of the appellants' land "on either a before or after resumption basis". The Land Court analysed in great detail all the evidence given and submissions made on the appellants' claim in a judgment that extended over 241 pages.

[64] On this appeal reference was made to much of the evidence relating to the potential of the land for residential development (including development for medium density residential purposes on 6.2ha of it) and of the potential for the balance of the land for single unit residential development.

[65] To succeed on appeal in this court it is necessary for the appellants to demonstrate that the Land Appeal Court made an error in law in concluding in effect that the assessment by the Land Court on the evidence before it was wholly erroneous or was infected by the application of a wrong principle.

[66] In an endeavour to demonstrate such an error of law, extensive reference was made to the evidence given by various of the witnesses before the Land Court to demonstrate that in rejecting the approach taken on that evidence by the Land Court, the Land Appeal Court had gone beyond the permissible limits of a rehearing in the technical sense, and had indeed embarked upon "an assessment of compensation *de novo* without any assignment of error in the reasoning or conclusions of the court appealed from" and did not make the orders for reassessment on the basis of the Land Court's departure from a "fundamental principle affecting the valuation which renders it unsound", applying the observations of Lord Buckmaster in *Charan Das v Amir Khan* (supra).

[67] I do not propose to embark upon a detailed consideration of the evidence before the Land Court which was addressed before us. It suffices to say, in my view, that it was open to the Land Appeal Court to conclude from the uncontested evidence of Mr Gould, the valuer who found most favour with the Land Court, that the market

need for medium density residential land within the boundaries of the claimants' land remained the same after resumption as it had been prior to resumption. The effect of the evidence to my mind was that the market need for land within that zone in the general area of the appellants' land was so doubtful that englobo sales of land within the same zone in the general area might need to be discounted to reflect both the pre-resumption and post-resumption market demand for 6.2ha of land within that zone within the boundaries of the appellants' land. On my reading of the evidence of Mr Gould which was largely accepted by the Land Court because it was unchallenged in cross-examination and uncontradicted by any other evidence, the market demand for land within the medium density residential zone and within the single unit residential zone both before and after the resumption may well have had its value generally reduced by reason of the effect on the residential amenity of that land by the construction and use of the road works for which the resumption had taken place. That reduction in value of course, would be reflected in the before and after valuation exercise advanced by both the appellants and the respondent before the Land Court and in the Land Court member's assessment of compensation.

[68] The Land Court member indicated that he was not satisfied that Mr Gould had made sufficient allowance between his before valuation and after valuation for the injurious affection caused by the resumption to the appellants' land.

[69] In my view upon the appeal, it was open to the Land Appeal Court to conclude that upon the evidence which it analysed, the Land Court member had erred in principle in concluding that any potential – however slight – that 6.2ha of the appellants' land had for development and use for medium density residential purposes had been destroyed by the resumption. Not merely was there no evidence from which such an inference might validly be drawn, but neither side, before the Land Court, had contended for such a consequence.

[70] In my view, it has not been demonstrated that the Land Appeal Court went beyond permissible limits in making the challenged orders upon rehearing the evidence upon the record.

[71] The Land Appeal Court sufficiently indicated the nature of the error in the approach adopted by the Land Court in making the after valuation. It clearly indicated that it would be an erroneous approach on the evidence having regard to the way the case was conducted to arrive at an after valuation on the basis that any potential which the appellants' land had for development for medium density residential use had been destroyed by the resumption as distinct from the value of that potential possibly being reduced.

[72] It was open in my view for the Land Appeal Court to remit for redetermination the compensation payable as a consequence of the resumption. That redetermination, of course, will necessarily involve what, if any, injurious effect the construction of the proposed road works will have on the after valuation of 6.2ha of land whether located within the 3.9ha of land remaining within that zone and any additional 2.3ha of land near or adjacent to it or entirely outside the existing area of land currently located within that zone.

[73] I would dismiss the appeal on the ground that the appellants have not demonstrated any error of law made by the Land Appeal Court.

[74] The appeal is dismissed with costs.