SUPREME COURT OF QUEENSLAND

CITATION:	*Townsville CC & Anor v Dpt Main Roads* [2005] QCA 226
PARTIES:	**TOWNSVILLE CITY COUNCIL** and **DELFIN LEND LEASE LIMITED** ACN 000 966 085 (claimants/respondents/applicants) v **CHIEF EXECUTIVE, DEPARTMENT OF MAIN ROADS** (respondent/appellant/respondent)
FILE NO/S:	Appeal No 10757 of 2004 LAC No 2004/0093
DIVISION:	Court of Appeal
PROCEEDING:	Miscellaneous Application - Civil
ORIGINATING COURT:	Land Appeal Court at Townsville
DELIVERED ON:	24 June 2005
DELIVERED AT:	Brisbane
HEARING DATE:	6 June 2005
JUDGES:	McMurdo P, Keane JA and White J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Application for leave to appeal granted** **2. Appeal dismissed** **3. Claimants to pay the costs of the resuming authority of the application and appeal to this Court to be assessed**
CATCHWORDS:	REAL PROPERTY - CROWN LANDS - QUEENSLAND - ADMINISTRATION - THE LAND COURT - JURISDICTION AND POWERS - where appellants had brought claim for compensation in Land Court in relation to resumed land - where resumed land part of larger parcel being developed by the appellants - where important integer in determination of compensation amount was the difference in the costs of development as a result of the resumption - where both sides tendered expert reports as to the magnitude of this difference - where report tendered by the respondent made criticisms of the methodology adopted in the report tendered by the appellants - where the experts from both sides met and prepared a document entitled "Areas of Agreement and Disagreement" which did not mention this criticism in terms - where this criticism was not put to the appellants'

expert in cross-examination - where Land Court proceeded to render its decision on the basis that this criticism was not maintained by the respondent - where Land Court refused application for leave to rehear the evidence sought to be adduced by the respondents in relation to this criticism - whether Land Court had erred by refusing to grant leave for a rehearing on the basis that there was no misapprehension "patent on the face of the record" and that any misapprehension arose solely from the failure by the respondent to cross-examine the appellants' expert about his methodology

STATUTES - INTERPRETATION - PARTICULAR WORDS AND PHRASES - SPECIFIC INTERPRETATIONS - "EQUITY, GOOD CONSCIENCE AND THE SUBSTANTIAL MERITS OF THE CASE" - where s 12 *Land Court Act* 2000 (Qld) allows application to be made for a rehearing - where s 7 *Land Court Act* 2000 (Qld) provides that, in the exercise of its jurisdiction, the Land Court must "act according to equity, good conscience and the substantial merits of the case" - where Land Court refused to grant an application for rehearing after delivering its decision in compensation proceedings - where Land Court refused application without considering whether the additional evidence proposed to be adduced on the rehearing would have any effect on its decision as to compensation - whether Land Court had complied with the statutory requirement that it "act according to equity, good conscience and the substantial merits of the case"

REAL PROPERTY - CROWN LANDS - QUEENSLAND - ADMINISTRATION - THE LAND APPEAL COURT - JURISDICTION AND POWERS - where Land Appeal Court allowed appeal against decision of Land Court not to grant a rehearing - where Land Appeal Court took into account that the alleged misunderstanding that was said to necessitate the rehearing was not the fault of the party seeking the rehearing, that any prejudice to the other parties involved could be remedied by costs orders and that, in the circumstances, a rehearing was preferable to dealing with the matter on appeal - whether the decision of the Land Appeal Court to exercise its discretion and grant a rehearing was made with proper regard to relevant considerations

Land Court Act 2000 (Qld), s 7, s 12, s 54, s 55, s 56, s 57

Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation [1983] 1 NSWLR 1, applied

Amalgamated Television Services Pty Ltd v Marsden [2002] NSWCA 419; CA 40502/99 and CA 40499/01, 24 December 2002, cited

Autodesk Inc v Dyason (No 2) (1993) 176 CLR 300, considered
Bulstrode v Trimble [1970] VR 840, applied
Bungaree Corporation (now Moorabool Corporation) v Hancock (1996) 24 MVR 472, applied
Browne v Dunn (1894) 6 R 67, cited
Featherston v Tully [2002] SASC 243; (2002) 83 SASR 302, cited
Flower & Hart (a firm) v White Industries (Qld) Pty Ltd [1999] FCA 773; (1999) 87 FCR 134, cited
Minister for Immigration and Multicultural Affairs v Eshetu [1999] HCA 21; (1999) 197 CLR 611, cited
Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355, applied
Qantas Airways Ltd v Gubbins (1992) 28 NSWLR 26, cited
Smith v Advanced Electronics Pty Ltd [2003] QCA 432; [2005] 1 Qd R 65, cited
Trittenheim Pty Ltd, Heaney & Heaney v H & H Gill Nominees Pty Ltd (1994) 63 SASR 434, applied

COUNSEL: P J Lyons QC, with D P O'Brien, for the applicants
M D Hinson SC for the respondent

SOLICITORS: Wilson/Ryan/Grose (Townsville) for the applicants
C W Lohe, Crown Solicitor, for the respondent

[1] **McMURDO P:** I agree with Keane JA's reasons for dismissing the appeal with costs to be assessed.

[2] **KEANE JA:** Townsville City Council and Delfin Lend Lease Limited ("the claimants") seek leave to appeal to this Court pursuant to s 74 of the *Land Court Act* 2000 (Qld) ("the Act") from a decision of the Land Appeal Court. That decision reversed a decision of the Land Court refusing an application by the Chief Executive, Department of Main Roads ("the resuming authority") pursuant to s 12 of the Act for a rehearing after the Land Court had given judgment in compensation proceedings between the claimants and the resuming authority. Because of the importance of the issues which arise on the application relating to the operation of s 12 of the Act, leave to appeal was granted at the hearing and full argument was heard on the merits of the appeal.

[3] The claimants contend on appeal that the Land Appeal Court's decision involved errors of law in two respects:

(a) in proceeding on the footing that the Land Court had erred in its application of the principles relevant to the exercise of the discretion to order a rehearing under s 12 of the Act; and
(b) in proceeding to order a rehearing upon a misunderstanding of the principles relevant to the exercise of that discretion.

[4] In order to appreciate the claimants' arguments in this Court, it is necessary to summarize the facts of the case and the decisions of the Land Court and of the Land Appeal Court.

Background

[5] The claimants sought compensation for land resumed in Townsville for the purpose of the Douglas Arterial Road. The land resumed was part of a larger parcel, the balance of which was developed by the claimants.

[6] Compensation was assessed on a "before and after basis", that is, the difference between the value of the parent parcel for subdivisional development immediately before the resumption, and the value of the retained portion for such development immediately after the resumption. An important integer in the determination of these values was the difference in the cost of development as a result of the resumption.

[7] The development of the retained portion necessitated the construction of a major connection road ("Riverside Boulevard"). For the claimants, a civil engineer, Mr Hailey, gave evidence that there would be no difference, whether before or after the resumption, on a "per square metre basis" in the cost of subdivisional works within the retained parcel, including "internal roadworks". His evidence was, however, that the additional costs associated with Riverside Boulevard amounted to $1,717,187. This reflected the opinion expressed in his written report, which became Exhibit 13 in the proceedings in the Land Court.

[8] A number of schedules were appended to Mr Hailey's report. Schedule 1, which was headed "Subdivision Construction Costs", set out the costs of subdivision, which included the cost of "roadworks". Schedule 2 contained a table which set out the total costs of different types of "general scheme works" to be undertaken for the development before and after resumption. These general scheme costs were said to include "major roads". In Schedule 2, the costs of constructing Riverside Boulevard in the after resumption development scenario were calculated at $3,125,922. The costs of constructing "major roads" in the before resumption development scenario totalled $1,408,735. The figure of $1,717,187 was derived by deducting the costs of constructing the "major roads" in the before resumption scenario from the total cost of Riverside Boulevard on the after resumption development scenario.

[9] The resuming authority tendered a report in reply (which became Exhibit 30) by another engineer, Mr Woodman of Maunsell Australia Pty Ltd. Mr Woodman said that six sections of Riverside Boulevard, described in Exhibit 30 and totalling 1126 metres, in the after resumption scenario were common to road elements in the before resumption scenario. Accordingly, he said that the costs of these sections of road should have been included in Mr Hailey's before resumption scenario in order to make a proper comparison of the development costs of Riverside Boulevard in the before and after resumption development scenarios.

[10] Prior to the hearing in the Land Court, Mr Hailey and Mr Woodman conferred, pursuant to the court's directions, and prepared a joint report (which became Exhibit 56) entitled "Areas of Agreement and Disagreement". Under the sub-heading, "Areas of Agreement", Mr Hailey and Mr Woodman referred to Mr Woodman's comments on Schedule 1 of Mr Hailey's report and noted: "The costs exclude the cost of Riverside Boulevard". They went on to refer to Mr Woodman's comments on Mr Hailey's Schedule 2, and said:

> "All road costs other than those noted as Riverside Boulevard or major road costs are included in Schedule 1 costs.
>
> …

> Brent Hailey's costing [sic] are based on actual construction costs of Riverside Boulevard in the 'After' Case, and of major roads within the Development in the 'Before' case.
> Direct comparisons of cost estimates by Maunsell on the Road Network 'Before' and 'After' cases, and Brent Hailey's 'Before' and 'After' cases cannot be made as both parties have used a different methodology and road network layouts to compare costs."

[11] The criticism made by Mr Woodman in Exhibit 30 of Mr Hailey's approach to the costing of all roads including minor roads associated with what became Riverside Boulevard was not otherwise expressly referred to in Exhibit 56, either under the sub-heading "Areas of Agreement" or "Areas of Disagreement".

[12] At the hearing, Mr Hailey's evidence was that Schedule 1 of Exhibit 13 set out the costs of the civil works involved in the before resumption development scenario. These were said to include the costs of roads providing direct access to the developed lots produced by the subdivision. Schedule 2 was said to "set out the difference in the costing of - the major roads - before to afterwards, the difference being $1,717,187". Mr Hailey said that this costing was not now in dispute.

[13] Mr Hailey addressed the issue raised in Mr Woodman's report that, in Mr Hailey's before resumption development scenario, for various parts of Riverside Boulevard "[the claimants] would have been building a road in the same location and that [Hailey] should have allowed that costing in the before [resumption development scenario]". Mr Hailey agreed that this issue was "no longer in dispute between the engineers". Mr Hailey did not say in terms that the dispute had been resolved on the basis that Mr Woodman's criticism had been withdrawn.

[14] Mr Hailey went on to explain the "matter" further as follows:

> "It - it comes about as a - by reason of the - the different methodologies that we used. Um, Maunsells have actually gone through and done a detailed cost assessment across each road - road length for different types of roads and costed up the whole of the scheme. What we have done is used a - or what the valuer has done in our case, has used a different methodology in that we have separated out the major roads that don't provide access and the roads that do provide access are contained within each area that has been identified for subdivision. Now - slightly different methodologies."

[15] Mr Hailey went on to accept the proposition put to him by counsel for the claimants that "the roads that would have been there in the before situation would have been in your schedule 1 costings". That proposition does not sit easily with the passages from Exhibit 56 set out at [10] above; which tend to suggest that minor roads ultimately absorbed in Riverside Boulevard were not costed by Mr Hailey in the before resumption scenario.

[16] Mr Hailey was not cross-examined directly in relation to the proposition referred to in the preceding paragraph, but he was cross-examined to the effect that, although he and Mr Woodman had adopted different methodologies in costing the works, there was no dispute about the actual costs used by each.

[17] The resuming authority submitted in its final address that Mr Hailey's figure of $1,717,187, as the additional sum to be spent on Riverside Boulevard in the after

resumption development scenario, overestimated the additional costs because parts of Riverside Boulevard corresponded to roads which had not been costs in the claimants' before resumption development scenario.

[18] The claimants, on the other hand, submitted that Mr Woodman had agreed that the figure of $1,717,187 represented the additional costs of the construction of Riverside Boulevard in the after resumption development scenario.

[19] The learned Member brought the parties back before him so that they might reconsider their positions on this issue. Neither party resiled from the position put in its final address; ultimately, the resuming authority formally asked the Land Court to "consider the evidence as it stands". In the various exchanges between the parties about this issue, it is clear that the resuming authority asserted that Mr Woodman's criticism of Mr Hailey's approach was being maintained in the face of the claimant's assertion that the criticism had been withdrawn by agreement. The resuming authority's position was stated unequivocally to this effect in its solicitor's letter of 3 September 2003 to the Registrar of the Land Court. This letter became Exhibit 117.

[20] In giving his decision the learned Member accepted that the language of Exhibit 56 was not free from doubt. He said that "one understanding" was that it expressed acceptance by Mr Woodman of Mr Hailey's methodology including the cost estimates.[1] It was this "understanding" on which the learned Member ultimately acted in his assessment of the compensation to be awarded to the claimants. He did so on the footing that Mr Hailey had not been cross-examined by the resuming authority putting a contrary "understanding" to him in terms of that which the resuming authority sought to maintain in its final submissions. It is desirable to set out in full the relevant passage from the reasons of the learned Member.

> "**Riverside Boulevarde**
>
> [687] On the claimant's layouts the cost of constructing the road network would be the same in the after as in the before, apart from the cost of Riverside Boulevarde. The parties acknowledge, however, that given the smaller area to be serviced in the after, the cost per lot or per ha will be greater following the loss of the resumed land.
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> [688] In his report Mr Hailey estimated that the additional cost of constructing Riverside Boulevarde in the after was $1,717,187.
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> [689] That estimate was criticised by Mr Woodman in a reply report he wrote. That criticism included the suggestion that Mr Hailey had not carried out a complete before and after comparison of costs as in the after scenario the cost estimate included areas of Riverside Boulevarde that were common to certain road areas in the before situation. The effect of that criticism, if correct, would be that the extra costs of Riverside Boulevarde in the after would be reduced.
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> [690] Following the provision to the claimant of Mr Woodman's reply report, the two engineers conferred, then produced a document 'Areas of Agreement and Disagreement'. Item 1.2 of that document does not include any expressions that I construe as maintaining

1 *Townsville City Council & Anor v Department of Main Roads* [2003] QLC 0068, No A2002/0013, 10 October 2003 at [690].

> Mr Woodman's criticism. Whilst the language employed in that item is not free from doubt, one understanding is that it expresses acceptance by Mr Woodman of Mr Hailey's methodology including the cost estimates. That understanding is reinforced by the fact that the criticism in Mr Woodman's report in reply is not referred to under the heading 'Disagreements'.
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> [691] Mr Hailey was not cross-examined concerning Mr Woodman's original criticism, nor was Mr Woodman asked about it in examination-in-chief, yet in submissions senior counsel for the respondent relied on that criticism as a basis for my reducing Mr Hailey's estimate of the additional costs of Riverside Boulevarde. No figure was extracted from Mr Hailey by either side as to what a lower cost estimate would be.
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> [692] All that I have said thus far points to at least some of those in Court proceeding on the basis that there was no issue with respect to this matter. That, however, does not dispose of the item. What does dispose of it, however, is that Mr Hailey confirmed quite clearly in evidence-in-chief (Transcript 332) that the figure of $1,717,187 comprises the difference between the before and after costings of the major roads. It is not the independent cost of Riverside Boulevarde.
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> [693] Now in the face of that quite clear evidence it was, I think, a matter for the respondent to cross-examine on it if it wished to maintain a different view. It did not.
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> [694] On that basis I accept Mr Hailey's figure as representing the greater cost that Riverside Boulevarde would place on the estate than did the road system before."[2]

[21] The resuming authority then sought to have the Land Court give leave to rehear the matter under s 12 of the Act on the footing that the cost overlap in respect of minor roads identified by Mr Woodman had not been taken into account by the learned Member.

[22] The learned Member refused the application by the resuming authority for reasons which are best discussed after referring to the relevant provisions of the Act.

The Act

[23] Section 12 of the Act provides as follows:

> "(1) A party to a proceeding which is dissatisfied with the Land Court's decision may apply to the court for leave to have the matter reheard.
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> (2) The application must be made within 42 days after the court's decision is given to the party.
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> (3) If the application is granted, the matter must be reheard, if practicable, by the member who gave the decision on which the rehearing is sought."

[24] The considerations relevant to the exercise of the discretion conferred by s 12(1) of the Act must be understood by reference to the subject matter of the discretion and its statutory context. The High Court has made clear that the "primary object of

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2 *Townsville City Council & Anor v Department of Main Roads* [2003] QLC 0068, No A2002/0013, 10 October 2003 at [687] - [694].

statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute" and that a "legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals".[3] In this latter regard, the following sections of the Act are material:

(i) section 7, which provides:

"In the exercise of its jurisdiction, the Land Court -
(a) is not bound by the rules of evidence and may inform itself in the way it considers appropriate; and
(b) must act according to equity, good conscience and the substantial merits of the case without regard to legal technicalities and forms or the practice of other courts.";

(ii) section 54, which confers jurisdiction on the Land Appeal Court;

(iii) section 55, which provides:

"In the exercise of its jurisdiction, the Land Appeal Court -
(a) is not bound by the rules of evidence and may inform itself in the way it considers appropriate; and
(b) must act according to equity, good conscience and the substantial merits of the case without regard to legal technicalities and the forms or the practice of other courts";

(iv) section 56, which provides:

"(1) An appeal in the Land Appeal Court must be decided on the evidence on the record of the proceeding in which the decision appealed against was made.
(2) However, the court may admit new evidence if -
(a) the court is satisfied admission of further evidence is necessary to avoid grave injustice; and
(b) the party applying to have further evidence admitted gives the court an adequate reason for the evidence not previously being given; and
(c) application to have further evidence admitted is made before the hearing of the appeal.";

(v) section 57, which provides:

"The Land Appeal Court may remit a matter to the court or tribunal that made the decision appealed against -
(a) because of an error or mistake in law; or
(b) for the matter to be heard and decided again either with or without the hearing of further evidence."

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3 *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28 at [69] and [70]; (1998) 194 CLR 355 at 381 - 382.

The Land Court's decision

[25] The Land Court proceeded to exercise the discretion under s 12 of the Act on the footing that:

(a) "the public interest in the finality of litigation … informs the exercise of the discretion of courts to reopen or as in the present case to rehear in accordance with s 12";[4]

(b) the issue was whether he had apparently "proceeded according to some misapprehension of the facts or the relevant law", which he took to mean "some error that is patent on the face of the record";[5] and

(c) he could find no error patent on the fact of the record. His "preference for Mr Hailey's evidence on this issue was based on the failure of the [resuming authority] to cross-examine on the matter" with a view to establishing that Mr Hailey's reference to "major roads" did not include all the road elements which were common to the before and after development scenarios.[6]

[26] In proceeding in this fashion, the learned Member did not regard the failure of the resuming authority to cross-examine Mr Hailey on this matter as tactical, ie a step deliberately taken in the pursuit of forensic advantage. Nevertheless, the learned Member characterized the application of the resuming authority as an "attempt by the [resuming authority] to supplement the evidence after an adverse finding". It is useful to set out in full the concluding paragraphs of the reasons of the learned Member. He said:

> "[67] Whilst I do not perceive any tactical reason for the respondent not calling the evidence it now wishes to and, for that matter, not electing to cross-examine Mr Hailey on his understanding of the import of Exhibit 56, it is clear to me that the respondent made a decision with respect to those matters at the trial and subsequently.
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> [68] It is clear from the contents of para 33 of the respondent's outline of submission that it had at the trial grasped the significance of Mr Woodman's contentions in Exhibit 30.
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> [69] It cannot be said that the first time the respondent became aware of the claimants' view that Exhibit 56 covered the field with respect to the issues between Mr Woodman and Mr Hailey was when it received the claimants' outline of submission. Mr Hailey had said quite clearly in examination-in-chief that he understood the issue of before and after road costs was settled. He also said that he understood Mr Woodman's criticism of his methodology and that he maintained his position.
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> [70] As my outline of the sequence of events shows, the respondent was again alerted to a possible conflict between para 33 of its submission, the evidence of Mr Hailey concerning that issue and Exhibit 56 when the matter was raised by the Court in August and September 2003. The respondent did not at that time choose to

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4 *Townsville City Council & Anor v Department of Main Roads* [2004] QLC 0017, No A2002/0013, 19 March 2004 at [49].

5 *Townsville City Council & Anor v Department of Main Roads* [2004] QLC 0017, No A2002/0013, 19 March 2004 at [52].

6 *Townsville City Council & Anor v Department of Main Roads* [2004] QLC 0017, No A2002/0013, 19 March 2004 at [57].

apply for the matter to be reopened in order that further evidence be provided. It was not until a judgment had been handed down that the respondent identified a need to adduce further evidence.

[71] In *Autodesk*, Brennan J said that to entertain an application to reopen an appeal after judgment in order to consider further argument on an issue already decided would be to subvert the finality of litigation (p.310).

[72] Here, the issue of additional cost associated with the construction of Riverside Boulevarde in the after-resumption scenario is a matter which has been litigated and decided. To reopen the case to receive further evidence on that issue, and to hear further argument about it, would be to 'subvert the finality of litigation'.

[73] An important question for consideration in this application is '… whether the interests of justice are better served by allowing or rejecting the application' (*Nweiser* at p.478, and *Nevis* at para [25]).

[sic [74] omitted in original]

[75] On this issue Gaudron J said in *Autodesk* at p.322:

> 'Judgment has not yet been entered and, in my view, should be set aside if the interests of justice so require. However, the circumstances in which justice requires that course are, in practice, extremely rare, particularly if there has been an opportunity for full argument.' (footnotes deleted)

[76] The Explanatory Notes to the *Land Court Bill 1999*, point out that the power is likely to be used in 'relatively rare' situations (*Nevis* LAC paras 14, 28). Also in *Nevis* (para 14) reference was made to the following passage from *Compagnie Noga D'Importation et D'Exportation SA v Abacha* (2001) 3 All ER 513:

> 'Clearly, it cannot be in every case that a litigant should be entitled to ask the judge to think again. Therefore, on one ground or another, the case must raise considerations, in the interests of justice, which are out of the ordinary, extraordinary, or exceptional. An exceptional case does not have to be uniquely special. 'Strong reasons' is perhaps an acceptable alternative to 'exceptional circumstances'. It will necessarily be an exceptional case that the strong reasons are shown for reconsideration'. (p.526)

[77] That is not the case here. There is nothing exceptional identified to me. The application is simply an attempt by the respondent to supplement evidence, after an adverse finding.

[78] To grant the rehearing application would in my view 'provide a backdoor method by which' the respondent could reargue its case. Whilst the interests of the respondent may be well served by the granting of the application 'the interests of justice are better served' in my opinion by its refusal. The claimants presented and conducted their case taking into account the case as presented by the respondent. Justice would, in my view, not be better served by requiring it to now meet another case.

[79] I will not direct my mind to the question of whether the Exhibit 30 criticism as to Mr Hailey's methodology would produce a

different result in the before and after costings from that found by me in the substantive matter. Not only would that be a matter for consideration on appeal in the substantive matter given my conclusion on the present application; but it would be an exercise carried out without the benefit of Mr Hailey's cross-examination on the issue.

[80] The failure of the respondent to cross-examine Mr Hailey on the issue of development costs and to not call the evidence which it now wishes to did present a difficulty in my dealing with the issue of before and after development costs. My conclusion on the application for rehearing is one that does not remove that difficulty for the Land Appeal Court. That is not a circumstance that I prefer. It means not only that the respondent will be confronted with a challenge in presenting its case on appeal, but that the claimants may have difficulty in responding to such submissions as the respondent makes given that it does not have cross-examination of Mr Hailey to rely on to the extent that Mr Hailey might have maintained and fully explained the view expressed in his examination-in-chief that his methodology was valid.

[81] The position that the claimants have adopted in this application was presumably one taken following consideration of such implications as there may be. It is not for the Court to tell either party how it should conduct its case.

[82] The application for rehearing is refused, with costs."[7]

[27] The learned Member had earlier referred to the availability of an appeal to the Land Appeal Court as a consideration tending against the grant of lease under s 12 of the Act; but he did not regard the difficulties which might attend the reception of further evidence on appeal to the Land Appeal Court as being a consideration tending in favour of the positive exercise of the discretion conferred by s 12 of the Act.[8]

[28] It is apparent that the learned Member reached his conclusion on the basis that he would not "direct [his] mind to the question whether the Exhibit 30 criticism as to Mr Hailey's methodology would produce a different result in the before and after costings from that found by [him] in the substantive matter".[9] In so concluding, the learned Member recognized that his "conclusion on the rehearing is one that does not remove that difficulty [scil, the failure of the resuming authority to cross-examine Mr Hailey on the issues of development costs] for the Land Appeal Court".[10]

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7 *Townsville City Council & Anor v Department of Main Roads* [2004] QLC 0017, No A2002/0013, 19 March 2004 at [67] - [82].

8 *Townsville City Council & Anor v Department of Main Roads* [2004] QLC 0017, No A2002/0013, 19 March 2004 at [63].

9 *Townsville City Council & Anor v Department of Main Roads* [2004] QLC 0017, No A2002/0013, 19 March 2004 at [79].

10 *Townsville City Council & Anor v Department of Main Roads* [2004] QLC 0017, No A2002/0013, 19 March 2004 at [80].

The Land Appeal Court

[29] The Land Appeal Court held that the learned Member erred in failing to consider the potential impact of a rehearing on the final outcome of the substantive proceedings. In this regard, the Land Appeal Court said:[11]

> "[32] This is a case where the appellant says that there has been an error in the findings as to the difference between the before and after road costings. It appears from the material before us that any error that there may be was not caused by the respondents whose evidence and submissions were consistent throughout that the difference in costings was $1,717,187. It also appears that the appellant had more than one opportunity at the hearing of the matter to challenge the respondents' evidence and submissions and failed to do so. On this basis, the learned Member refused the application for leave to have the matter reheard because of the public interest in the finality of litigation.
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> [33] In our opinion it was necessary, for the purpose of determining this application, that the learned Member consider the substance of the submissions and the potential impact of the further evidence proposed by the appellant in relation to whether the Exhibit 30 criticism of Mr Hailey's methodology would produce a different result in the before and after road costings. The interests of justice that an inadequate or insufficient finding be set aside is to be weighed against the public interest in the finality of litigation. If a court has good reason to consider that, in its earlier judgment, it has proceeded on a misapprehension as to the facts or the law, the public interest in the finality of litigation will not preclude the exceptional step of reviewing or rehearing an issue (*Autodesk Inc v Dyason* at 303, per Mason CJ). The learned Member decided not to consider the effect of the proposed evidence because of the availability of the appeal process and the failure of the appellant to cross-examine Mr Hailey. Further, Counsel for the appellant had conceded that the Land Appeal Court would be able to draw a conclusion on the issue of before and after road costs on the evidence as it stood. In many cases, those considerations would indicate that leave to rehear the matter should not be granted. However we do not consider that such a conclusion can be reached without consideration of the potential impact of the proposed evidence with a view to determining whether, if proved, it could make a significant and substantial difference to the decision in the matter (see *Nevis*, Land Appeal Court, at [25]). We note that in *Autodesk v Dyason* some members of the Court considered the merits of the submissions made in support of the application to reopen - see e.g. Mason CJ at 306, 307 and Gaudron J at 328-330."

[30] The Land Appeal Court went on to hold that:

> "[38] Because of the different methodology adopted by each of the engineers, it is not possible to say, on the material before us, whether Mr Woodman's criticism of Mr Hailey's costings is valid. Nevertheless we consider that the affidavits indicate that there is

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[11] *Department of Main Roads v Townsville City Council & Anor* [2004] QLAC 0093, LAC2004/0093 and LAC2003/0770, 27 October 2004 at [32] - [33].

> 'good reason to consider that, in its earlier judgment, [the Court] has proceeded on a misapprehension as to the facts (*Autodesk v Dyason* per Mason CJ at 300)."[12]

[31] The Land Appeal Court went on to consider whether it should exercise the discretion conferred by s 12 of the Act. The Land Appeal Court concluded, in this regard, as follows:[13]

> "[51] We have decided, therefore, not without some hesitation, that the application for leave to have certain aspects of the matter reheard should be granted. In coming to this conclusion we have accepted the explanation of Senior Counsel for the appellant that the reason that Mr Hailey was not cross-examined and no further evidence was adduced was because the appellant had a different understanding of the effects of Exhibit 56 and also of Mr Hailey's evidence. We have also accepted that there was no tactical decision made not to adduce the further evidence and we consider that there was not, in the relevant sense, a deliberate decision not to call the additional evidence (see *Smith v New South Wales Bar Association* (1992) 176 CLR 256 at 266)."

[32] The Land Appeal Court reached an affirmative answer on this issue on the footing that:

(a) it appeared that the underlying cause of the dispute was "a misunderstanding between the engineers and, subsequently, by the [resuming authority's] legal advisers as to the extent of the disagreement between the engineers";[14]

(b) the failure to clarify this misunderstanding was not "attributable solely to the neglect or default of the [resuming authority] but was caused by the misunderstanding";[15]

(c) the prejudice to the claimants in being required to litigate the same issues twice and in the difficulties which may attend recalling Mr Hailey (who has ceased to practise as a consulting engineer) could most likely be met by appropriate orders as to costs;[16] and

(d) "although the appeal process was available to the [resuming authority]" leave should be granted because "a rehearing will enable the [resuming authority's] witness to give evidence and be cross-examined in the Court which has heard all the evidence"[17] and because, in the submission of the resuming authority, "the amount of compensation awarded to the [claimants] wrongly included

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[12] *Department of Main Roads v Townsville City Council & Anor* [2004] QLAC 0093, LAC2004/0093 and LAC2003/0770, 27 October 2004 at [38].

[13] *Department of Main Roads v Townsville City Council & Anor* [2004] QLAC 0093, LAC2004/0093 and LAC2003/0770, 27 October 2004 at [51].

[14] *Department of Main Roads v Townsville City Council & Anor* [2004] QLAC 0093, LAC2004/0093 and LAC2003/0770, 27 October 2004 at [40].

[15] *Department of Main Roads v Townsville City Council & Anor* [2004] QLAC 0093, LAC2004/0093 and LAC2003/0770, 27 October 2004 at [45].

[16] *Department of Main Roads v Townsville City Council & Anor* [2004] QLAC 0093, LAC2004/0093 and LAC2003/0770, 27 October 2004 at [48].

[17] *Department of Main Roads v Townsville City Council & Anor* [2004] QLAC 0093, LAC2004/0093 and LAC2003/0770, 27 October 2004 at [50].

$1,063,385 which is a significant sum of money".[18] If the resuming authority's submissions were ultimately accepted this would lead to a reduction in the compensation awarded to the claimant's of approximately one quarter.

[33] Accordingly, the Land Appeal Court granted leave to have the matter reheard limited to those aspects of the decision relevant to "the nature and extent of any road cost savings in relation to the construction of the lower order internal roads which resulted from the construction of the Riverside Boulevard in the after case as compared with the before case".[19] It remitted the matter to the learned Member.

The issues on appeal

[34] The claimant's appeal to this Court may be seen as giving rise to three main issues. The first is whether or not the Land Appeal Court was correct to find that the learned Land Court Member erred when he decided not to consider the possible impact of the misapprehension attributed to him by the resuming authority about the evidence of Mr Hailey and Mr Woodman on the merits of his decision. The second is whether the Land Appeal Court erred when it held that the learned Member had misapprehended the facts of the case by proceeding on the basis that any difficulty arose from the resuming authority's failure to cross-examine Mr Hailey. The final issue agitated was whether or not the Land Appeal Court erred in the exercise of its discretion to order that a rehearing take place. I will now consider each of these issues in turn.

Did the Land Court err by not considering the impact of the alleged misapprehension on the merits of his decision?

[35] The claimants' submissions on this issue proceed on the basis that the Land Appeal Court erred in concluding that the learned Member had himself erred in refusing to consider the impact of the resolution of the asserted difference between Mr Hailey and Mr Woodman on the final outcome of the substantive proceedings.

[36] The claimants argue that the learned Member at first instance did not take the firm view attributed to him by the Land Appeal Court with regard to the evidence of the two experts, and that he appreciated the potential impact of the issue on the outcome of the substantive proceedings. This argument should be rejected. In my opinion, the learned Member's reasons are quite explicit. He "would not direct [his] mind to the question whether the Exhibit 30 criticism as to Mr Hailey's methodology would produce a different result in the before and after costings from that found by [him] in the substantive matter".[20] The Land Appeal Court concluded, and in my opinion this is clear from the learned Member's reasons considered as a whole, that, although he appreciated that a resolution of the issue in favour of the resuming authority would be to its advantage, the learned Member regarded that consideration as irrelevant to the discretion reposed in him by s 12 of the Act. In this the Land Appeal Court considered that he erred. I respectfully concur with that view.

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[18] *Department of Main Roads v Townsville City Council & Anor* [2004] QLAC 0093, LAC2004/0093 and LAC2003/0770, 27 October 2004 at [52].

[19] *Department of Main Roads v Townsville City Council & Anor* [2004] QLAC 0093, LAC2004/0093 and LAC2003/0770, 27 October 2004 at [53].

[20] *Townsville City Council & Anor v Department of Main Roads* [2004] QLC 0017, No A2002/0013, 19 March 2004 at [79].

[37] The discretion conferred by s 12 of the Act is conferred to avoid an unjust outcome of proceedings before the Land Court and to ensure that the decision of the Land Court reflects the true merits of the case as between the parties. It must be exercised in accordance with that purpose. This is especially so in light of s 7 of the Act which instructs the Land Court to exercise its jurisdiction according to "equity, good conscience and the substantial merits of the case".

[38] The precise effect of a provision such as s 7 of the Act will depend on the nature of the decision to be made by the relevant tribunal. In *Qantas Airways Ltd v Gubbins*,[21] Gleeson CJ and Handley JA noted that:

> "The words 'equity, good conscience and the substantial merits of the case' are not terms of art and have no fixed legal meaning independent of the statutory context in which they are found …"

[39] A statutory exhortation to have regard to "equity, good conscience and the substantial merits of the case" must be given effect. As Olsson J pointed out in *Trittenheim Pty Ltd, Heaney & Heaney v H & H Gill Nominees Pty Ltd*:[22]

> "What must firmly be borne in mind is that what is appropriate in a particular case must derive from a consideration of the nature of the issues involved and, where appropriate, the clear intendment of any statute applicable. These may patently demand an application of strict principles of law or of a statute either because the notion of equity, good conscience or the substantial merits of the case unerringly points to the need or desirability of so doing, or the statute expressly or impliedly mandates such an approach …
>
> However, in certain types of case … there remains scope for the court … to adopt a broad approach of common sense and common fairness, eschewing all legal or other technicality. If it were otherwise then a mandate to 'act according to equity, good conscience and the substantial merits of the case without regard to technicalities ... ' would have little or no room to operate at all."

[40] The view that the inclusion of such a provision widens rather than restricts the discretion available to a decision-maker has received support in the High Court. In *Minister for Immigration and Multicultural Affairs v Eshetu*,[23] the High Court was concerned with construing s 420 of the *Migration Act* 1958 (Cth), which provides:

> "(1) The Tribunal, in carrying out its functions under this Act, is to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.
>
> (2) The Tribunal, in reviewing a decision:
>
> (a) is not bound by technicalities, legal forms or rules of evidence; and
>
> (b) must act according to substantial justice and the merits of the case."

[41] Gleeson CJ and McHugh J noted that such provisions:

> "… are intended to be facultative, not restrictive. Their purpose is to free tribunals, at least to some degree, from constraints otherwise applicable to courts of law, and regarded as inappropriate to

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21 (1992) 28 NSWLR 26 at 30.

22 (1994) 63 SASR 434 at 442.

23 [1999] HCA 21; (1999) 197 CLR 611.

> tribunals. The extent to which they free tribunals from obligations applicable to the courts of law may give rise to dispute in particular cases, but that is another question."[24]

[42] An example of how effect may be given to such a provision is provided by the decision of the Full Court of the Supreme Court of South Australia in *Featherston v Tully*.[25] The case concerned the operation of the Supreme Court of South Australia when sitting as the Court of Disputed Returns under s 103(1) of the *Electoral Act* 1985 (SA). Section 106 of the same Act provides that:

> "(1) The Court is to be guided by good conscience and the substantial merits of each case without regard to legal forms or technicalities.
>
> (2) The Court is not bound by the rules of evidence."

Bleby J, with whose judgment Mullighan J agreed, said, in relation to s 106, that:

> "The court is obliged to act judicially, to apply the requirements of the Act and the common law and to afford all parties and legitimate interveners the principles of natural justice. However, the common law criteria which I consider are applicable, as well as the requirements of s 107(3) and s 107(4), require a judgment to be made about whether there has been an election at all, whether the statutory electoral procedures have been so abused that there has been no election and whether, in the circumstances stated in s 107(3) and s 107(4) the result of the election was affected by the relevant defect or irregularity. Without the provisions of s 106, some might take the view that the only way of reaching a conclusion on those requirements is to hear evidence from every relevant elector as to their inability to vote, how they would have voted, how they in fact voted or, if the relevant circumstances had been different, how they would have voted. It might be said that at least a sufficient number of such people would have to give evidence in order to reach such a conclusion.
>
> **Section 106 avoids the need for any such requirement. It means, in the context of this Act, that the Court must exercise its judgment according to its good conscience and according to what it considers to be the substantial merits of the case as to whether the respective common law or statutory criteria have been met. It permits resort to a common sense judgment in all the circumstances.** However, the court's judgment cannot be merely arbitrary. It must still apply the common law principles. In the case of s 107(3) and s 107(4) it must apply the well known standard of being satisfied on the balance of probabilities that the result of the election was affected by the defect, irregularity or defamation as the case may be.
>
> The section therefore has a useful function, but it does not, as was suggested in the course of the petitioner's argument, allow the court to create new law." (emphasis added)

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24 *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] HCA 21 at [49]; (1999) 197 CLR 611 at 628.

25 [2002] SASC 243 at [156] - [158]; (2002) 83 SASR 302 at 341 - 342.

[43] The authorities suggest that a statutory obligation to have regard to the "substantial merits of the case" means that the merits may not be able to trump a countervailing rule of law but that they are one factor that must be taken into account when exercising a discretion.

[44] In my opinion, where there is reason to suppose that the outcome of the rehearing may substantially affect the parties in terms of the ultimate result, then the possibility of injustice in the sense of a decision which does not reflect the "substantial merits of the case" if leave is not granted, inevitably emerges as a consideration material to the exercise of the discretion conferred by s 12 of the Act.

[45] It may be that, in the circumstances of a particular case, considerations of justice require that the desirability of a "perfect" outcome give way to the practical consideration that "justice delayed is justice denied"; and, in some cases, the conduct of the applicant may have been so egregious as to lead to a refusal of a rehearing without considering the impact of the resolution of the issue sought to be reagitated. But to say this is merely to acknowledge that the discretion falls to be exercised as a matter of balancing competing considerations having regard to all relevant circumstances. Generally speaking, the likely impact of the alleged error on the outcome of the case will be a consideration relevant to that balancing exercise.

[46] For these reasons, I consider that the Land Appeal Court was correct in holding that the learned Member erred in failing to regard this consideration as material to his exercise of the discretion under s 12 of the Act.

Did the Land Court err by proceeding on the basis that any misapprehension arose from the failure to cross-examine Mr Hailey?

[47] Next, the claimants sought to argue that at the threshold of the discretion conferred by s 12 of the Act was a requirement that an applicant for leave must demonstrate that leave to reopen was necessitated by reason of a misapprehension on the part of the Land Court which arose without neglect or default on the part of the applicant for leave. In other words, one does not become entitled to the benefit of s 12 of the Act if one's own "neglect or default" has contributed to the occasion for seeking the exercise of the discretion.

[48] The learned Member's approach to the issue of "misapprehension" was, in my respectful opinion, erroneously confined insofar as the learned Member was willing to have regard only to misapprehensions patent on the face of the record. In the context of a discussion of the exercise of a power conferred to correct misapprehension on the part of the tribunal or the parties in order to achieve a decision which more closely reflects the true merits of the case, to speak of an "apparent misapprehension" is to speak of a misapprehension which can be seen as such by the tribunal charged with the exercise of the power to correct the consequences of such misapprehensions.[26] In the decision of the High Court in *Autodesk Inc v Dyason (No 2)*[27] on which the learned Member principally relied, there was no suggestion that only errors apparent on the face of the record may be

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[26] Cf *Autodesk Inc v Dyason (No 2)* (1993) 176 CLR 300 at 302 - 303, 328.
[27] (1993) 176 CLR 300.

corrected. There is no reason to import from another field of legal discourse[28] the requirement that the error be patent on the face of the record. That this is so is made abundantly clear, in my respectful opinion, by the circumstance that s 12(3) contemplates that the same Land Court Member will deal with the original proceeding and the rehearing. Section 12(3) serves to ensure that the Land Court Member will be able to take advantage of his or her comprehensive understanding of the evidence and the course of proceedings. For these reasons I consider that the learned Member erred in proceeding to exercise the discretion by reference to irrelevant concerns about what constitutes "the record".

[49] Further, and contrary to the claimants' submissions, it seems to me to be to be wrong to approach the operation of s 12 as if a favourable exercise of the discretion is subject to a condition precedent that the kind of misapprehension which might attract the grant of leave under s 12 cannot be one which was due to a mistake on the part of a party or its legal advisers. I have noted that the learned Member did not regard the conduct of the case by the resuming authority as "tactical". It may readily be accepted that the extent to which a party is more or less culpable for allowing the misapprehension to arise may affect the exercise of the discretion conferred by s 12[29] but, in my respectful opinion, proof of an entirely blame-free error by a party is not a *sine qua non* of the exercise in that party's favour of the discretion conferred by s 12 of the Act. To approach the discretion in that way is to read s 12 as if it was subject to conditions with which the legislature has not seen fit to fetter it. To the extent that such conditions are drawn by analogy from "the practice of other courts", s 7(b) of the Act provides clear instruction that they are not to be regarded by the Land Court as governing the exercise of its jurisdiction under the Act.

[50] It may be accepted that, while the principles derived from the general law provide relevant guidance in relation to the exercise of the discretion under s 12 of the Act, they cannot be regarded as conditioning the exercise of the discretion. That having been said, it also needs to be acknowledged that the principles relevant to the exercise of the jurisdiction to correct an error under the general law (which arguably applies a stricter standard in determining whether the power to rehear a case where a judgment has yet to be perfected than is applicable in the case of s 12 of the Act which operates irrespective of whether the judgment has been perfected) require only that the misapprehension which arose not "be attributed solely to the neglect or default of the party seeking rehearing".[30]

[51] In this regard, I would observe that, if one thing was clear as between Mr Hailey and Mr Woodman, it was that they had different views of the development costs in the before resumption scenario. That these different views arose because they differed as to their methodologies was also clear. In my respectful opinion, the Land Appeal Court was correct in holding that the Land Court misapprehended the facts of the case in proceeding on the footing that there was no such difference and in doing so on the basis, as the learned Member said, of the resuming authority's failure to cross-examine Mr Hailey.

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28 Cf *Commissioner for Motor Transport v Kirkpatrick* (1988) 13 NSWLR 368 at 389 - 393, 394 - 395; *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656 at 667; *Craig v South Australia* (1995) 184 CLR 163 at 180 - 181.

29 *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 168 - 169. *De L v Director-General, NSW Department of Community Services (No 2)* (1997) 190 CLR 207 at 215.

30 *Autodesk Inc v Dyason (No 2)* (1993) 176 CLR 300 at 303.

[52] This was not a case where the rule in *Browne v Dunn*[31] obliged the resuming authority to cross-examine Mr Hailey to alert him or the claimants to Mr Woodman's continuing criticism of Mr Hailey's methodology. That was clear from Exhibit 30 and the resuming authority's persistent reliance upon it. To treat Exhibit 56 as indicating that there was no difference between them in relation to the development costs in the before resumption development scenario seems clearly to be unjustified having regard to the passages excerpted therefrom at [10] above. For present purposes it is sufficient to say I agree with the conclusion of the Land Appeal Court that the uncertainty which the Land Appeal Court's order is designed to clarify is not one which can be laid exclusively at the door of the resuming authority or those representing it.

[53] It is desirable at this point to explain more fully my reasons for taking the view that the failure on the part of the resuming authority to cross-examine Mr Hailey beyond eliciting his acknowledgement that he and Mr Woodman had employed differing methodologies did not have the significance which the learned Member attached to it.

[54] In *Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation*,[32] Hunt J identified the rationale of the rule in *Browne v Dunn* as being:

> "It has in my experience always been a rule of professional practice that, **unless notice has already clearly been given of the cross-examiner's intention to rely upon such matters**, it is necessary to put to an opponent's witness in cross-examination the nature of the case upon which it is proposed to rely in contradiction of his evidence, particularly where that case relies upon inferences to be drawn from other evidence in the proceedings. Such a rule of practice is necessary both to give the witness the opportunity to deal with that other evidence, or the inferences to be drawn from it, and to allow the other party the opportunity to call evidence either to corroborate that explanation or to contradict the inference sought to be drawn. That rule of practice follows from what I have always believed to be rules of conduct which are essential to fair play at the trial and which are generally regarded as being established by the decision of the House of Lords in *Browne v Dunn* (1894) 6 R 67." (emphasis added)

[55] The principle that contrary evidence need not necessarily be put to a witness in cross-examination, if clear notice has already been given of the cross-examiner's intention to rely on that evidence, has been applied generally in Australia.

[56] In *Flower & Hart (a firm) v White Industries (Qld) Pty Ltd*,[33] a Full Court of the Federal Court comprising Lee, Hill and Sundberg JJ noted that:

> "As a general rule, before an adverse finding is made against a witness in contradiction of sworn testimony given by that witness, a matter in issue, the subject of that finding, must be put to the witness in cross-examination to enable him or her to give an explanation. **However, there can be no need to put such an issue to a witness who has notice that there is other material in the proceedings**

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31 (1894) 6 R 67.

32 [1983] 1 NSWLR 1 at 16.

33 [1999] FCA 773 at [51]; (1999) 87 FCR 134 at 148.

> **that will be relied upon to contradict the evidence of the witness**: see *Allied Pastoral Holdings Pty Ltd v FCT* [1983] 1 NSWLR 1 at 16; 44 ALR 607; R Cross, *Cross on Evidence*, 4th Aust ed, Butterworths, Sydney, 1991, para 17445." (emphasis added)

[57] In *Amalgamated Television Services Pty Ltd v Marsden*,[34] a court comprising Beazley, Giles and Santow JJA summarized one of the submissions made to them as follows:

> "The respondent certainly made inconsistent statements as to when he first saw D18. In his memorandum to Rainey (set out above) the respondent stated that 'he could have met D18 but not in 1990'. The appellant submitted that the word 'met' in context included a sexual encounter. That is an available although not necessary interpretation. In the letter to Ball (set out above), the respondent said he had 'now seen him'. In his evidence, however, he said the first time he saw him was when D18 gave evidence [T 6751.19]. The trial judge appears to have dismissed the appellant's use of this inconsistency to attack the respondent's credit on the basis of a failure to comply with the rule in *Browne v Dunn*, commenting, 'I could not however find any cross-examination of [the respondent] on this point' [J 1528].
>
> The appellant submitted this was an error. The documents in which the inconsistent statements were made were in evidence before the respondent gave evidence. The respondent advanced the inconsistency in his evidence in chief. The appellant argued that there was no requirement in that circumstance to cross-examine on the documents - he could have dealt with them in his examination in chief and he did not - and it was open to the appellant to rely upon the inconsistency as going to a matter of credit."

After referring to *Precision Plastics Pty Ltd v Demir*[35] and *Allied Pastoral*, the court concluded that:

> "We consider that the appellant's submission is technically correct. The inconsistent material was already in evidence before the respondent gave evidence. He could have dealt with it and chose not to ... "[36]

[58] The trend of authority is the same in this Court. In *Smith v Advanced Electrics Pty Ltd*,[37] the passage from *Allied Pastoral* stating that one exception to the general rule is where "notice has already clearly been given of the cross-examiner's intention to rely upon such matters" was referred to with approval by Fryberg J, in a judgment with which McMurdo P and Jerrard JA agreed.

[59] In *Bulstrode v Trimble*, Newton J said:[38]

> "… the mere fact that one party has succeeded on an issue of fact without giving to witnesses for the other party, who gave evidence against him on that issue, an opportunity in cross-examination of explaining their evidence, will certainly not always be a reason for

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[34] [2002] NSWCA 419; CA 40502/99 and CA 40499/01, 24 December 2002 at [433] - [434].

[35] (1975) 132 CLR 362.

[36] [2002] NSWCA 419; CA 40502/99 and CA 40499/01, 24 December 2002 at [438].

[37] [2003] QCA 432 at [31]; [2005] 1 Qd R 65 at 77.

[38] [1970] VR 840 at 847. See also *Martin v Rowling & Anor* [2005] QCA 128; Appeal No 5840 and Appeal No 8644 of 2004, 27 April 2005 at [11].

> setting aside the decision on appeal; all the circumstances must be taken into account, so as to see whether the conduct of the trial was in fact unfair to the appellant … "

[60] In *Bungaree Corporation (now Moorabool Corporation) v Hancock*,[39] Winneke ACJ, in a judgment with which Phillips and Hayne JJA agreed, stated that:

> "The rule in *Browne v Dunn* is undoubtedly designed to dissuade counsel from resorting to cross-examination tactics which create manifest unfairness, but care needs to be taken to ensure that it is not pushed to the limits of excluding legitimate advocacy. As Gleeson CJ said in *R v Birks* (supra) at 686: 'Cross-examination is an art, and the means that may be legitimately employed to cut down the effect of the evidence of a witness or to put a witness or a party on notice of a point are multifarious.'
>
> If counsel makes an attack, unfounded upon the evidence, upon the character and integrity of an opposing witness, without having given that witness the opportunity to explain, the court undoubtedly will intervene: see *Cullen v Amsol Petroleum* (Court of Appeal, New South Wales, unreported, 20th October 1970). But this case, in my view, is not in that category. The rule is about fair play. If it is intended to suggest that a witness is not speaking the truth about a particular fact or matter, then fairness dictates that facts suggesting that he is speaking an untruth should be put to him. It is for this reason that the rule operates somewhat differently where a witness gives evidence of an opinion. If all that is being suggested is that the opinion, although honestly held, might not be safe to rely upon because of the existence of other facts, I do not believe that fairness to the witness or the process has been compromised by the failure to specifically put those other facts to the witness to see whether it would alter his opinion. This, in my view, is the type of circumstance to which Newton J referred in the passage in *Bulstrode v Trimble*, to which I have earlier referred."

[61] The decision in *Bungaree Corporation* also draws a principled distinction between the considerations of fairness that apply when what is being attacked is the value of an opinion expressed by an expert witness, and those that apply when it is the very credibility of the witness that is being called into question.

[62] In summary on this point, in the present case counsel for the resuming authority cross-examined Mr Hailey expressly to the effect that differences in methodology remained between himself and Mr Woodman. Mr Hailey accepted that this was so; and at no stage was it sought to be said that these differences in methodology had been overtaken by some further agreement between the engineers or the parties. In proceeding on the footing that the differences in methodology had been resolved, and resolved in favour of Mr Hailey's approach, the learned Member did, as the Land Appeal Court concluded, misapprehend the facts of the case. As I have said, this misapprehension was not due "solely to the neglect or default" of the resuming authority. Rather, as a case where there 'was a valid reason (not merely tactical) for not submitting evidence at the initial hearing but where the absence of such had an

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[39] (1996) 24 MVR 472.

important bearing on the decision', it was of the very kind of case with which the power conferred by the legislature pursuant to s 12 was intended to deal.[40]

Did the Land Appeal Court err in the exercise of its discretion to order a rehearing?

[63] In relation to the decision of the Land Appeal Court to grant leave and to order a rehearing, the considerations to which it adverted as justifying the course it took were considerations which were properly relevant to the exercise of its discretion. It took into account the possible prejudice which might be suffered by the claimants if a rehearing were to occur. In my respectful opinion, the claimants have not identified an error of law in relation to this aspect of the Land Appeal Court's decision.

[64] It is desirable to make it clear that the circumstance that s 12 is to be found in a statute which also provides for an appeal, confirms that the availability of an appeal is not a consideration decisive, or even always relevant, with respect to the grant of leave. In *Autodesk Inc v Dyason (No 2)*[41] Brennan J, speaking of the general jurisdiction of an inferior court to recall an erroneous judgment before it has been perfected, noted that in some cases "it may be preferable to recall an unperfected but erroneous judgment rather than allow it to stand until it is quashed on appeal".

[65] Section 12 of the Act permits the Land Court to prevent the perpetuation on appeal of the kind of unsatisfactory situation which arose before it in this case. Apart from the practical consideration that, in some cases, the parties may not have the financial capacity to mount an appeal, s 12 recognizes the power of the Land Court to ensure, independently of correction on appeal, that its decisions are just.

[66] To say this is not to say that finality in litigation is not an important consideration that properly informs the exercise of the Land Court's discretion under s 12. It is simply to say that the desirability of finality cannot control the exercise of a discretion, the very existence of which recognizes that a further hearing at first instance may be desirable notwithstanding the availability of an appeal. Finality must sometimes give way to achieve a just decision on the substantial merits of the case. And even where an appeal is to be pursued, a case like the present affords a good example of a situation where the advantages of the Member who heard the case recognized by s 12(3) may be utilized to remove false issues or misunderstandings from the case before it proceeds upon appeal.

[67] I emphasize that the discretion is to be exercised having regard to the particular circumstances of each case. I conclude that in the circumstances of the present case, the Land Appeal Court did not err in the exercise of its discretion.

Conclusion

[68] In my opinion, no error of law on the part of the Land Appeal Court has been demonstrated by the claimants. Because the issues involved in the application are important, and because the arguments advanced were substantial, the application for leave to appeal was granted. I would, however, dismiss the appeal and order the claimants to pay the costs of the resuming authority of the application and appeal to this Court to be assessed.

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40 See the Explanatory Memorandum to the Land Court Bill 1999 (Qld) at 7.

41 (1993) 176 CLR 300 at 308.

[69] **WHITE J:** I have read the reasons for judgment of Keane JA and agree with his Honour's reasons and the orders which he proposes.