

SUPREME COURT OF QUEENSLAND

CITATION: *Chief Executive, Department of Transport and Main Roads v The Young Men's Christian Association of Brisbane* [2012] QCA 311

PARTIES: **CHIEF EXECUTIVE, DEPARTMENT OF TRANSPORT AND MAIN ROADS**
(applicant/appellant)
v
THE YOUNG MEN'S CHRISTIAN ASSOCIATION OF BRISBANE
(respondent)

FILE NO/S: Appeal No 5997 of 2012
LAC No 5 of 2011

DIVISION: Court of Appeal

PROCEEDING: Appeal from the Land Appeal Court

ORIGINATING COURT: Land Appeal Court at Brisbane

DELIVERED ON: 13 November 2012

DELIVERED AT: Brisbane

HEARING DATE: 30 October 2012

JUDGES: Fraser and Gotterson JJA and Daubney J
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS: **1. Grant leave to appeal.**
2. Appeal dismissed.
3. Appellant to pay the respondent's costs of the application for leave to appeal and the appeal on the standard basis.

CATCHWORDS: REAL PROPERTY – COMPULSORY ACQUISITION OF LAND – PROCEEDINGS FOR COMPENSATION – QUEENSLAND – APPEAL TO LAND APPEAL COURT – where the respondent is a body corporate – where by a Deed of Grant in Trust (DOGIT), an estate in fee simple (Lot 713) was granted to the respondent under the now repealed *Land Act* 1962 (Qld) – where on and after 1 July 1995, the respondent's DOGIT was taken to have been issued under the *Land Act* 1994 (Qld) – where Lot 713 contained an area of 2,053 square metres – where respondent undertook development of this land involving construction of substantial premises – where in 2008 the Governor in Council declared pursuant to s 9(7) of the *Acquisition of Land Act* 1967 (Qld)

(“AL Act”) that Lot 713 was taken for the Airport Link Project, and busway and busway transport infrastructure for the Northern Busway (Windsor to Kedron) Project – where respondent lodged a claim for compensation for a total amount of \$11,624,000 (+ GST) – where respondents referred matter to the Land Court for hearing and determination of the amount of compensation to be paid – where Land Court ordered preliminary hearing to determine the proper interpretation of s 18(5) of the AL Act – where appellant and respondent appealed to the Land Appeal Court – where the Land Appeal Court allowed the respondents appeal – whether the Land Appeal Court erred in its interpretation of s 18(5) of the AL Act and whether when land subject of a DOGIT is resumed, the trust is terminated or it continues only for limited purposes and not for a purpose relating to the relocation of the trust operation to other land

Acquisition of Land Act 1967 (Qld), s 9(7), s 12(4), s 12(5), s 18, s 18(5), s 20, s 20(1), s 20(2), s 24(1)

Associations Incorporation Act 1981 (Qld), s 144

Land and Other Legislation Amendment Act 2007 (Qld), s 4
Land Act 1962 (Qld)

Land Act 1994 (Qld), s 38E(d), s 38E(e), s 38F(1), s 38G(1), s 38G(2), s 38G(3), s 78, s 508(1)(b), Chap 3 Pt 1 Div 3, Chap 3 Pt 1 Div 6, Chap 3 Pt 1 Div 9, Chap 5 Pt 1

Land Court Act 2000 (Qld), s 74, s 74(1), s 74(2)

The Religious Educational and Charitable Institutions Act 1861 (Qld)

Trusts Act 1973 (Qld), s 105

Brady v Stapleton (1952) 88 CLR 322; [1952] HCA 62, distinguished

COUNSEL: D R Gore QC, with J M Horton, for the appellant
G R Allan with M van der Walt for the respondent

SOLICITORS: Clayton Utz for the appellant
Anderssen Lawyers for the respondent

- [1] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Gotterson JA. I agree with those reasons and with the orders proposed by his Honour.
- [2] **GOTTERSON JA:** The appellant, Chief Executive, Department of Transport and Main Roads, applies for leave to appeal to this Court against the whole of the orders of the Land Appeal Court of Queensland made on 15 June 2012, reasons for which were published on 27 April and 15 June 2012. The proposed grounds of appeal are set out in a Notice of Appeal document which is exhibited to an affidavit of Mr P J Dwyer sworn on 6 July 2012.¹
- [3] Section 74 of the *Land Court Act 2000* permits an appeal to the Court of Appeal from a decision of the Land Appeal Court on grounds of error or mistake of law, or

¹ Exhibit PJD-3 thereto.

absence or excess of jurisdiction, subject to a grant of leave to appeal by the Court of Appeal or a judge of appeal.² The Court heard submissions on the application for leave to appeal and at the substantive appeal concurrently. The merits of the proposed grounds of appeal are, of course, relevant to whether leave to appeal ought to be granted.

The Deed of Grant in Trust and the acquisition

- [4] The respondent is a body corporate established by Letters Patent entered on the record on 16 October 1905 and issued pursuant to *The Religious Educational and Charitable Institutions Act of 1861* (Qld). Despite the repeal of that Act in 1981, the Letters Patent continue to have full force and effect under that Act as if it had not been repealed.³ On 31 March 1966, by a Deed of Grant in Trust (referred to in these reasons as “the respondent’s DOGIT”), an estate in fee simple in the land then described as Portion 713 (now Lot 713) on Crown Plan B.3.832, County of Stanley, Parish of Enoggera was granted to the respondent under the now-repealed *Land Act 1962* (Qld) (1962 Act). Upon entry into the Land Register, it was given the designation of Title Reference 13856170. On and after 1 July 1995, the respondent’s DOGIT was taken to have been issued under the *Land Act 1994* (Qld) (1994 Act) which repealed and replaced the 1962 Act.⁴
- [5] The grant in the respondent’s DOGIT was expressed to be subject to the “Trusts, Conditions, Reservations, and Provisoes herein contained”, and the trust upon which the grant was made to be “for recreation (Youth Community Centre) purposes and for no other purpose whatsoever”. Payment of a quit-rent of one peppercorn if ever demanded was required under the terms of the respondent’s DOGIT. No other payment on the part of the respondent was thereby required.
- [6] Lot 713 contained an area of 2,053 square metres and had frontages to both Lutwyche Road and Truro Streets at Lutwyche in Brisbane. The respondent undertook development of this land involving construction of substantial premises where it conducted a community recreation centre including a gymnasium, and a childcare centre. It also used the premises for archival storage.
- [7] By Taking of Land Notice (No. 1444) 2008 published on 11 April 2008, the Governor in Council declared pursuant to s 9(7) of the *Acquisition of Land Act 1967* (Qld) (AL Act) that Lot 713 was taken “for transport purposes, namely, road and road transport infrastructure for the Airport Link Project, and busway and busway transport infrastructure for the Northern Busway (Windsor to Kedron) Project” as and from that date. The Notice further declared the land to be vested in the appellant’s predecessors as constructing authorities for the State of Queensland “for an estate in fee simple”. The Notice was amended on 24 July 2009 to substitute “as unallocated State land” for the reference to an estate in fee simple, effective from 11 April 2008.⁵
- [8] The statutory power to take the land was clear. In 2007, the AL Act had been amended to include a fee simple in trust under the 1994 Act but not a freeholding lease under that Act.⁶ The word “land” in s 9(7) and the other sections of the AL Act to which I shall refer has this amended meaning.

² *Land Court Act*, ss 74(1), (2).

³ *Associations Incorporation Act 1981* (Qld), s 144.

⁴ 1994 Act, s 508(1)(b).

⁵ To conform with AL Act, s 12(4).

⁶ *Land and Other Legislation Amendment Act 2007* (Qld), s 4 effective 1 January 2008.

The claim for compensation

- [9] By virtue of s 12(5) of the AL Act, upon the vesting of Lot 713 as unallocated State land on 11 April 2008, it became “absolutely freed and discharged from all trusts, obligations, mortgages, charges, rates, contracts, claims, estates, or interest of what kind soever” and the respondent's estate and interest in it was converted into a right to claim compensation under the AL Act.
- [10] The respondent duly lodged a claim for compensation dated 27 November 2008 with the respondent for the taking of Lot 713. The claim is for a total amount of \$11,624,000 (+ GST). It has two components: Replacement Land and Improvements of \$9,890,000 (+ GST) and Disturbance Items of \$1,734,000 (+ GST). The first mentioned component is comprised substantially of the following items:-
- | | |
|--|---------------------|
| Replacement Vacant Land for Gymnasium and Childcare | \$5,700,000 (+ GST) |
| Replacement New Improvements for Gymnasium & Childcare (incl fees & contingency) | \$2,775,000 (+ GST) |
| Replacement Land & Improvements (Archive storage) | \$ 650,000 (+ GST). |
- [11] An advance against compensation in the amount \$925,000 was paid to the respondent on 24 December 2008. The appellant and the respondent were not thereafter able to agree upon the amount of compensation that the respondent is entitled to be paid.

Land Court proceedings

- [12] In absence of agreement, on 27 November 2009, the respondent referred to the Land Court for hearing and determination the matter of the amount of compensation to be paid. The reference was made pursuant to s 24(1) of the AL Act. The AL Act does not specify any particular methodology that must be applied in determining the compensation amount in any case. Certain provisions of the Act do have relevance for the assessment exercise. One of them, to which I shall refer shortly, much influenced the course of the proceedings in the Land Court.
- [13] Section 20 of the AL Act deals with assessment of compensation. Section 20(1) requires regard to be had not only to the value of the land taken but also to severance and injurious affection. Section 20(2) states that compensation shall be assessed according to the value of the estate or interest of the claimant in the land taken on the date it was taken. The remaining two subsections deal with enhancement and have no application to the present circumstances.
- [14] Section 18 of the AL Act is headed “By whom compensation may be claimed”. Section 18(5) is of immediate relevance. It provides:
- “(5) The claim for compensation of a trustee or trustees of any land in respect of the taking thereof shall be limited to the amount of actual damage caused to the trust by reason of the taking, and no such trustee shall have any other right, remedy, or claim whatsoever in respect of such taking against the Crown or any other person whomsoever and this Act and every other relevant Act or law or rule, practice, or process of law, or judgment of any court of competent jurisdiction, shall be read, construed and applied subject to this subsection.”

- [15] It will be appreciated that the significance of this provision lies not only in its recognition of a trustee of acquired land as having a right to claim compensation but also in the limitation of the claim that such a trustee might make to the amount of the actual damage caused to the trust by reason of the taking.
- [16] On 5 January 2010, the Land Court ordered that the following issue be determined by way of a preliminary hearing:
- “Whether, on the proper interpretation of s.18(5) of the Acquisition of Land Act 1967, in particular, of the expression ‘the amount of actual damage caused to the trust by reason of the taking’, in a case where the trust is a trust of a lot of land, and the land resumed was the whole of that lot, the compensation payable to the claimant may or may not include any costs incurred by the claimant to relocate or reinstate its operation to another site.”

As framed, the issued raised a matter of statutory interpretation of general application to claimant trustees and was not specific to the trust created under the respondent’s DOGIT.

- [17] The record before this Court does not disclose why the issue was framed in precisely this way. Quite probably, it was because the respondent’s claim was presented on a relocation and reinstatement cost basis only. The claim did not include components for the value of the respondent’s estate or interest in Lot 713 that had been taken or in the improvements that it had constructed on that land. Quite probably, also, it was considered that a determination of the issue in the negative would have had the consequence that the claim for compensation was untenable in its entirety; whereas, a determination in the affirmative would have left the way clear for the Land Court to award compensation on a relocation and reinstatement basis, if it saw fit to assess on that basis.
- [18] After a preliminary hearing before a member of the Land Court, the following orders were made on 23 June 2011:
1. The trust, pursuant to the provisions of the *Land Act* has come to an end but the *YMCA* is not precluded from claiming compensation for the actual damage suffered by them as a consequence of the resumption.
 2. The amount of actual damage caused to the *YMCA* as trustee can include the costs of reinstatement of their operations on other land.
 3. It is open for the reinstatement method to be applied in determining the compensation in this case but that is not the only approach which might be adopted.
 4. The determination of the entitlement to an assessment of compensation is to be made pursuant to the provisions of the *Acquisition of Land Act 1967*.
 5. In this case where the land resumed was the whole of the land the subject of the deed in trust governed by the *Land Act 1994* the compensation payable to the Applicant may, but will not necessarily, include any costs incurred by the Applicant to relocate or reinstate its operation to another site such as those

claimed in the Applicant's claim for compensation dated 27 November 2008."

- [19] The orders reflect answers given by the Court to a range of issues that were debated during the preliminary hearing. Whilst none of them, in terms, determined the issue for preliminary determination as formulated, the final order did provide a determination which left it open to the Land Court to compensate the respondent for some or all of the relocation and reinstatement costs in its claim.

Appeal to the Land Appeal Court

- [20] The respondent to the appeal to this Court appealed to the Land Appeal Court against orders 1 and 2 on 3 August 2011; whereas on 14 September 2011, the appellant appealed against orders 2, 3 and 5. In those proceedings, the appellant's appeal was referred to as the cross-appeal. The respondent applied to strike out the cross-appeal on the footing that it was made out of time. That application was referred to as the general application. Both the general application and the substantive appeal and cross-appeal were heard together.

- [21] The reasons of the Land Appeal Court deal with four topics. The first is the general application which, for reasons which are not under challenge in this Court, the Land Appeal Court determined should fail. The second topic was whether the trust of which the respondent in this Court was trustee had come to an end. The view of the Land Appeal Court differed from that of the Land Court on this topic. The third topic was the interpretation of s 18(5) and reinstatement costs, on which the Land Appeal Court reached a conclusion that was similar to the one that the Land Court had reached. The final topic related to the desirability of a reformulation of the issue for determination and to the opinion of the Land Appeal Court on the reformulated issue.

- [22] The orders made by the Land Appeal Court on 15 June 2012 included the following:-

- “1. The general application is dismissed.
2. The cross-appeal is dismissed.
3. The appeal is allowed.
4. Set aside the orders of the Member below made on 23 June 2011 and order in their place that the preliminary issue defined in the Order of 5 January 2010 be answered as follows:

Section 18(5) of the Acquisition of Land Act 1967 (Qld), on its proper interpretation, does not preclude, in a case where land was held by a trustee under a Deed of Grant in trust under the Land Act 1994 (Qld), the assessment of compensation for the resumption of that land by reference to the costs of the reinstatement of the claimant's operation to another site.

...”

A further four orders were made relating to costs. In summary, the respondent in this Court was ordered to pay the appellant's costs of the general application, whereas the appellant was ordered to pay the respondent's costs of the appeal and the cross-appeal.

The appeal to this Court

[23] As mentioned, the appellant's application to this Court is for leave to appeal against the whole of the orders of the Land Appeal Court. The proposed grounds of appeal are:

- “(a) The Land Appeal Court erred in concluding that, in a case where land is held by a trustee under a Deed of Grant in Trust (“DOGIT”) under the *Land Act 1994*, and the whole of the land is resumed, s 18(5) of the *Acquisition of Land Act 1967* does not preclude the assessment of compensation for the resumption of that land by reference to the costs of reinstatement of the claimant's operation to another site.
- (b) The Land Appeal Court erred in failing to conclude that, when the whole of the land the subject of a DOGIT is resumed, either the trust is terminated or, if it continues, it does so only for limited purposes, and not for a purpose relating to the relocation of the trust operation to other land.”

The orders sought on appeal by the appellant are that the appeal be allowed, that the orders of the Land Appeal Court be set aside, that orders in lieu be made that the preliminary issue as formulated in the order of the Land Court made on 5 January 2010 be determined in the negative, and that the respondent pay the appellant's costs of the appeal to this Court and to the Land Appeal Court. The respondent has not applied for leave to cross-appeal.

[24] The appellant's written outline of argument referred extensively to provisions of the 1994 Act which restrict the interest of a trustee in land held under a Deed of Grant in Trust (DOGIT), preclude any entitlement to compensation upon a termination of such a trust pursuant to the provisions of the 1994 Act, and confer a right to payment for improvements upon termination in certain circumstances only. The appellant submitted that in view of these provisions, the three components of the compensation claim set out in paragraph [9] of these reasons were not compensable.⁷

[25] However, during the course of oral submissions, senior counsel for the appellant indicated that the issue that his client wished to have judicially determined was more focused than the ones which the Land Court had formulated or the Land Appeal Court had reformulated. Nor was it raised expressly by the proposed grounds of appeal. This issue is whether the respondent is “entitled to compensation assessed directly or indirectly by reference to the land the subject of the DOGIT” or to replacement vacant land.⁸ It is centred upon the first item listed in paragraph [9] of these reasons. The Court heard submissions from both parties on the issue during the course of oral argument.

Approach to this appeal

[26] Given that the issue to which I have just referred is limited to one particular item of compensation only and, in that sense, goes beyond what was determined by the Land Appeal Court or the Land Court, I consider that, the appropriate course to take

⁷ At paragraph 26.

⁸ Appeal transcript 1-26 LL 10-15; 1-16 LL 10-38.

here is first to determine what the fate of the appeal would be were leave to appeal granted, and then to make observations with respect to that issue for the assistance of the Land Court and the parties. It seems to me to be neither necessary nor desirable to attempt a further reformulation of issues solely for the purpose of providing formal determinations of them.

- [27] To determine the fate of the appeal requires a consideration of the two proposed grounds of appeal. It is convenient to deal with the second of them first.

Termination of trust ground of appeal

- [28] The appellant submitted, as the Land Court had held, that upon the taking of Lot 713, the trust on which it was held under the respondent's DOGIT also came to an end. The Land Appeal Court rejected that submission. The view it took was that the trust endured with the consequence that the right to claim compensation conferred by s 12(5) of the AL Act was itself subject to the same trust.⁹
- [29] During oral submissions, the respondent pressed an argument that the right was held on that trust. It sought to draw support from the decision of the High Court in *Brady v Stapleton*.¹⁰ Its argument was supplemented with the elaboration that if the original purpose of that trust has become incapable of being carried out, then the respondent could apply to the Supreme Court of Queensland under s 105 of the *Trusts Act 1973 (Qld)* for a *cy-près* application of the compensation amount.
- [30] In my view, there are strong reasons for concluding not only that upon the taking of the land, the trust established by the respondent's DOGIT terminated; but also that the right to claim compensation was not held by the respondent subject to that trust. In the first place, pursuant to s 12(4) of the AL Act, land granted by the Crown upon trust for a public purpose - as Lot 713 was under the respondent's DOGIT - upon and by virtue of the taking, becomes unallocated State land; and, pursuant to s 12(5), such land is unallocated State land absolutely freed and discharged from all trusts. Perforce of these provisions, Lot 713 ceased to be subject to the trust established under the respondent's DOGIT forthwith upon its being taken on 11 April 2008.
- [31] Secondly, that trust was specific to Lot 713. It was a trust for use of that land, and that land only, for the purposes stipulated in the respondent's DOGIT. It had no application to property other than Lot 713. Specifically, it could not have had any, and therefore has no application to the respondent's entitlement to claim compensation. That is plainly so for the reason that the respondent could never apply the compensation amount at Lot 713 to the purposes specified in its DOGIT.
- [32] The case of *Brady v Stapleton*¹¹ concerned the continuance of beneficial ownership when trust property is converted into a different species of property.¹² The circumstance which it addressed has no application to a statutory trust of specific property for specific purposes where the trust property is not beneficially owned. Further, the provisions of Chap 3 Pt 1 Div 9 of the 1994 Act which provide for winding-up of the affairs of a trust of trust land notwithstanding cancellation of a DOGIT,¹³ are specific to that circumstance and do not provide a basis for inferring

⁹ At [37].

¹⁰ (1952) 88 CLR 322; [1952] HCA 62.

¹¹ Also referred to by the Land Appeal Court at [37] and fn 27.

¹² At 337.

¹³ Section 78.

legislative intent that the trust is to continue for any purpose other than to facilitate the winding up or that any entitlement to claim compensation upon the taking of the land is to be held upon the same statutory trust as the land was held.

- [33] The true position is that an entitlement to claim compensation is a species of property which the claimant holds free of any trust referable to the DOGIT. So here, the respondent holds its entitlement to claim compensation free of any trust referable to its DOGIT. As is the case for its other property, the respondent is at liberty to apply the compensation amount, when received, to the pursuit of the objects for which it was established as it sees fit.
- [34] For these reasons, in my view, this ground of appeal is one that would succeed. However, its success would not call for any variation to the substantive orders made by the Land Appeal Court. That is because that Court did not make any order which expressed, or gave effect to, its conclusion that the respondent holds its entitlement to claim compensation upon the terms of the trust established by its DOGIT.
- [35] I ought mention at this point that the appellant has never contended that because the trust terminated upon the taking of Lot 713, there could never have been any actual damage to the trust caused by the taking for the purposes of s 18(5). To have made the payment of the advance on compensation would have been inconsistent with such a contention. It appears that the approach of both parties has been to interpret the expression “actual damage caused to the trust” in the section as meaning, in the context of resumed DOGIT land, actual damage caused by the taking to the trustee from whom the land is taken. That, in my view, is the interpretation which is to be preferred.

Relocation and reinstatement cost basis ground of appeal

- [36] The first of the appellant’s proposed grounds of appeal contends that the Land Appeal Court erred in reaching its conclusion that s 18(5) of the AL Act does not preclude the assessment of compensation for the resumption of land held under a DOGIT by reference to the costs of reinstatement of the claimant’s operation to another site. In challenging that conclusion and in seeking an order that the issue as originally formulated by the Land Court be determined in the negative, the appellant proposes that upon the proper construction of s 18(5), **no** cost incurred by a trustee claimant to relocate and reinstate its operation to another site is payable by way of compensation upon a resumption of trust land under the AL Act. If that construction is not correct, then this ground of appeal would fail.
- [37] Section 18(5) applies to claims to compensation by trustees of land however the trust has been created or has arisen, whether under the principles of the general law or under statute. The limitation that it places upon a trustee’s claim for compensation is one that confines the amount of compensation to the amount of actual damage caused to the trust by reason of the taking by acquisition. What amount of actual damages has been caused in a particular case is pre-eminently a question of fact to be ascertained by reference to the particular circumstances of, and consequences for that trust, of the taking. That is no doubt why the section itself does not, by formula, valuation method or otherwise, prescribe how the amount of actual damage to the trust is to be assessed for all trusts or for specific types of trusts. Specifically, the section does not, in terms, preclude assessment of

actual loss to the trust by reference to all or some of the costs that a trustee may incur in relocating and reinstating the trust's operation elsewhere.

- [38] This Court has not been referred to any other provision or provisions of the AL Act which might have required s 18(5) to be interpreted as if there was such a preclusion. The following observations of the Land Appeal Court are as much apposite to the submissions before this Court as it was to those before the Land Appeal Court:¹⁴

“[47] Nothing has been identified relevant to the construction of s 18(5) which would suggest that compensation may not be assessed by reference to the costs of reinstating a claimant's operation in an appropriate case. ...”

- [39] In written and in oral submissions, the appellant has made extensive references to provisions in the 1994 Act relating to statutory trusts created under it which, it argues, influence the interpretation of s 18(5). It must be said at once that it is difficult to see how provisions relating to statutory trusts created under a particular statute could influence the interpretation of a provision in another statute which applies to trusts however created or arisen. The Land Appeal Court regarded these provisions as of no assistance in construing s 18(5).¹⁵ I am of the same view.

- [40] For these reasons, the appellant's submissions on the interpretation of s 18(5) cannot succeed. The issue as originally formulated by the Land Court cannot be determined in the negative. In my view, this ground of appeal would fail.

- [41] Before leaving this topic, I should mention that the appellant's reliance upon the provisions in the 1994 Act was also referenced to a submission that went to the recoverability of relocation and reinstatement costs when land held under a DOGIT is resumed under the AL Act. That is a matter of the application of s 18(5) to those circumstances, not one of interpretation of the section.

- [42] The provisions upon which the appellant relies apply to circumstances where a DOGIT is cancelled,¹⁶ surrendered,¹⁷ or the affairs of the trust are wound up.¹⁸ It is sufficient for present purposes to refer to such of those provisions as relate to a cancellation of a DOGIT. Upon cancellation, the land becomes unallocated State land.¹⁹ By virtue of s 38E(e), no person has a right to claim compensation from the Minister or the State for the cancellation. The person occupying the land must vacate it.²⁰ So far as improvements are concerned, the owner may apply to remove them,²¹ and may only remove them with Ministerial approval.²² If approval is refused or the improvements are not removed within the time stated in the approval, they become the property of the State.²³ If, and only if the land is then leased or sold by the State, is the owner given a right to payment for the improvements under Chapter 5 Part 1 of the 1994 Act.²⁴

¹⁴ Reasons at [47].

¹⁵ At [45].

¹⁶ 1994 Act Ch 3 Part 1 Div 3.

¹⁷ 1994 Act Ch 3 Part 1 Div 6.

¹⁸ 1994 Act Ch 3 Part 1 Div 9.

¹⁹ 1994 Act s 38E(d).

²⁰ 1994 Act s 38F(1).

²¹ 1994 Act s 38G(1).

²² 1994 Act s 38G(2).

²³ 1994 Act s 38G(3).

²⁴ 1994 Act s 38G(4).

- [43] The appellant's submission seeks to treat a taking of DOGIT land under the AL Act as equivalent to a cancellation or surrender of a DOGIT under the 1994 Act. It involves an argument that, on that account, the compensation to which the claimant trustee is entitled under the AL Act is limited to what it could recover if the DOGIT had been cancelled or surrendered, rather than the land having been taken under the AL Act.
- [44] This submission, too, has difficulties. Implicit in it is the assumption that the provisions of the 1994 Act operate so as to compensate the trustee for the actual damage caused to the trust when the land subject to that trust becomes unallocated State land freed of the trust. There is no basis for that assumption. In the first place, those provisions do not, in terms, purport to compensate for actual damage.
- [45] Besides, there is good reason to doubt that they do compensate for actual damage in all instances. Under them, nothing is to be paid for the value of the estate or interest that the trustee had in the land notwithstanding that it may have had some value which is lost. Moreover, nothing is to be paid for improvements which are not removed if the land is not afterwards leased or sold by the State. The significance of this for a trustee who has constructed substantial improvements on the land which by their nature are not removable, is acute. The trustee will receive no payment for them upon a cancellation, surrender or winding-up under the 1994 Act unless the State thereafter sells or leases the land. That outcome pertains notwithstanding that the loss of the improvements may cause substantial actual damage for the trustee.
- [46] It remains to note that with regard to improvements, order 4 made by the Land Appeal Court, which I would affirm, would leave it open to the Land Court to assess compensation in respect of them on a reinstatement cost basis. It would be free to do so if it considered that that basis best measured the actual damage caused by the taking of the land on which the respondent had constructed the improvements.

Conclusion as to the fate of the appeal

- [47] In summary, I consider that neither of the proposed grounds of appeal ought to succeed. In view of that, if leave to appeal were granted, I would dismiss the appeal.

Issue raised during the hearing

- [48] I now turn to the issue mentioned at paragraph 24 of these reasons which the appellant raised during the course of the hearing.
- [49] As noted, s 20(1) of the AL Act requires regard to be had to the value of the land taken and s 20(2) provides for assessment according to the value of the estate or interest taken at the date it was taken. Together, these provisions have the effect that the respondent is to be compensated for the value of the fee simple estate that it held in trust in Lot 713 at the date of the taking.
- [50] The respondent appropriately acknowledged in the course of oral argument that the value that its fee simple estate had at that date would have been much influenced by the liability of the estate to cancellation pursuant to the 1994 Act and to legal incidents of the trust under which it was held; particularly, its inalienability and the

restricted purposes for which the respondent was permitted to use Lot 713. It may well be that, having regard to those features, the value of the fee simple estate was a very low, or even nominal, amount. Even if that were so, the respondent would still be entitled to that amount by way of compensation.

- [51] The respondent has, however, claimed for the cost of acquiring vacant land to which it might relocate and reinstate the type of operation that it conducted on Lot 713 at Lutwyche. The cost of \$5,700,000 (+ GST) is evidently the cost that the respondent would incur in acquiring a fee simple estate in such land. I am in no doubt that the respondent is not entitled to this cost as an item of compensation on any basis. In the first place, it is not the fee simple estate that was taken as is referenced in ss 20(1) and (2). But also, from the perspective of relocation and reinstatement, it is not an amount which would result in reinstatement of the respondent to what it had owned before Lot 713 was taken. The fee simple estate that it had in Lot 713 was held in trust under the 1994 Act and subject to the limiting and restricting incidents to which I have referred. By its claim, the respondent seeks to be placed in the position where it is owner of a fee simple estate in equivalent land free of any statutory trust and similar incidents. Clearly, that goes well beyond reinstatement.

Disposition

- [52] This appeal has involved significant questions of statutory interpretation with substantial monetary implications for this case and potential relevance beyond it. I would grant leave to appeal, but, for the reasons given, I would dismiss the appeal.
- [53] Given that the appeal has not succeeded and also that the appellant has had the benefit of the view of this Court on the further issue that it identified during oral submissions, I consider that it should pay the respondent's costs of the appeal on the standard basis.

Orders

- [54] I would propose the following orders:
1. Grant leave to appeal.
 2. Appeal dismissed.
 3. Appellant to pay the respondent's costs of the application for leave to appeal and the appeal on the standard basis.

- [55] **DAUBNEY J:** I respectfully agree with Gotterson JA.