IN THE LAND APPEAL COURT

TOWNSVILLE

Re: A94-92; A94-93
Appeal from a Decision of the Land Court -
Determination of Compensation -
Resumption of Land by the Crown for
National Park Purposes -
Acquisition of Land Act 1967.

BETWEEN:

Geoffrey G and Hilary R Kuhn

Appellants

and

The Crown

Respondent

AND

Geoffrey G Kuhn

Appellant

and

The Crown

Respondent

REASONS FOR JUDGMENT

Delivered this Twelfth day of August 1998

This is an appeal from a decision of the Land Court whereby compensation in the sum of $1,295,150 was determined for the taking, as from 11 December 1992, of the below-described land:

> Lot 998 on Registered Plan 852235, County of Solander, Parish of Mowbray, containing an area of 65.15 ha, being part of Lot 108 on Plan SR146, the registered proprietors of which were Geoffrey G Kuhn and Hilary R Kuhn.
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> Lot 999 on Registered Plan 852235, County of Solander, Parish of Mowbray, containing an area of 80.3 ha, being part of Lot 109 on Plan SR146, the registered proprietor of which was Geoffrey G Kuhn.

The hearing was conducted in the Land Court on the basis that there was one resumption of one aggregation of land. There was no suggestion that this Court should treat the matter differently.

The land is situated near Julatten, on the Atherton Tableland, about 30 minutes' drive from Port Douglas and about 75 minutes from Cairns. By the time the matter was heard in the Land Court, the parties had agreed that the highest and best use of the parent property had been for development for eco-tourism purposes.

The nature of the land, its features which gave it eco-tourism potential, including its location in the "Black Mountain Corridor", adjacency to a State Forest Reserve and the Mowbray River with its Big Mowbray Falls ("Mowbray Falls"), original and existing timber cover, bird life and the like, are fully described by the learned Member in his judgment. It is unnecessary to say more about the physical description of the property except that the question of pedestrian access from the parent property through the State Forest to the Mowbray River and the Mowbray Falls became an issue of significance in the Land Court and is now the central, although not the only, issue before us.

The grounds of the appeal are as follows:

> "1. The learned member's finding with respect to the value of the entire property before resumption was against the evidence and the weight of the evidence;
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> 2. The learned member's finding with respect to the value of the two remaining blocks after resumption was against the evidence and the weight of the evidence;
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> 3. In comparing the subject land with the Mungalli Falls land, the learned member failed to give sufficient weight to the fact that the development of that land had required the expenditure of $250,000 towards the obtaining of the necessary permits (which fact was misstated by the learned member in his decision at page 41).
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> 4. In comparing the Coconut Beach sale to the subject, the learned member relied upon the erroneous statement by the valuer for the Respondent that that property had approximately 300 metres of beach frontage.
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> 5. The learned member's finding (at page 26 of the decision), that 'a properly informed prudent purchaser of the subject land at the date of resumption would not have assumed that a Commercial Activity Permit would have been granted along the existing route, or some other route, between the Falls and the subject land' was against the evidence and the weight of the evidence, being based on the opinion of the witness MacLeod and discounting the opinions of the two valuers and the two tourism consultants.
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> 6. The learned member erred in acting upon the evidence of the witness MacLeod as 'relevant and persuasive' when that evidence was patently unreliable, in particular, but not exclusively, when his evidence

> was that the Department would act contrary to the principles of administrative law."

At the time the appeal was filed, the appellants gave notice that approval was proposed to be sought to call further evidence. They made formal application accordingly. That application was refused by the Court, but more will be said of that later.

The learned Member had found that the "before resumption" value of the land was $1,578,000 based on a calculation of 197.1788 ha @ $8,000 per ha. The assessment had been discounted, to an unidentified degree, because of the Member's concerns about how difficult it would have been to obtain a Commercial Activity Permit, and the possibility that a Permit may not have been granted, to allow direct walking access from the parent parcel through the State Forest to the Mowbray River. (Record p.68 (Reasons)).

Of the totality of evidence as to the value of the land, the Member had gained assistance from four sales including the sales of the "Mungalli Falls" site near Millaa Millaa, and the "Coconut Beach" Resort site at Cape Tribulation. He had seen it as "clear that the sale of the Mungalli Falls site provides the most assistance in resolving the issues in this case". (Record p.49 (Reasons)). It had been noted that "By the time of the hearing the purchaser" of the Mungalli Falls site "had spent $250,000 attaining the approvals necessary for the proposed development". (Record p.49).

Counsel for the appellants, Mr Needham, pointed out that the evidence was in fact that an amount of $250,000 had been spent "on working towards the obtaining of necessary approval". While the Member had adopted the words of the Crown valuer in his remarks relating to the Mungalli Falls sale to the effect that the purchaser "Has already spent $250,000 attaining further approvals", we do not think anything turns on the money spent on "working towards" obtaining approvals. The subject land was zoned "Rural A" at the date of resumption and approval for resort development had not been obtained. The discount which the Member had applied to the valuation of the subject property was not because of the risk of obtaining rezoning approval but for the risk of obtaining approval for the desirable access to the Mowbray River and Falls.

The Coconut Beach Resort site had been described by the Crown valuer as having "300 metres of beach frontage". The Member adopted that description. In fact, the site had esplanade, rather than beach, frontage and Mr Needham suggested that the length of frontage was about 150 metres, on his interpretation of the map which had

been exhibited to show the location of the sale property. We accept that the sale property has esplanade rather than direct beach frontage, but the scale on the map suggests to us that the length of frontage is "about 300 metres". The main body of the Coconut Beach site was severed from the esplanade frontage by a road. The Member had noted that evidence had been given to the effect that the accommodation is on the western side of the land; in the rain forest; people wishing to visit the beach "have to cross the road and other land to reach it". He had found that "the presence of a beach is not essential to rainforest eco-tourism." The Member was satisfied that the sale was relevant to the valuation of the subject land, although to what extent is unclear, because of the need for "appropriate account being taken of the fact that the land is in a superior well-known and well-developed eco-tourism area and the fact that the sale to an adjoining owner probably meant that the purchase price exceeded the market value of the land (although not necessarily to the extent nominated by Mr Allan)". (Record p.60 (Reasons)).

Mr Allan, the Crown valuer, had suggested that although the Coconut Beach site had sold for $1,600,000 or $18,000 per ha, the market value, excluding the adjoining owner factor, was about $1,000,000 or $11,300 per ha.

We do not find that any mis-description of the frontage location of the Coconut Beach site, by the Crown valuer, would have caused the Member to have erred in his determination of the value of the subject land.

We see the necessity to concentrate, as the Member did, on the sale found to be most relevant - that of the Mungalli Falls land. That land comprised a total area of about 153 ha and had been purchased in two separate transactions in July 1992. One parcel of about 62 ha accommodated an existing tourist venture while the second adjoining parcel of about 91 ha had been previously used as a dairy farm. Mr Allan had analysed the combined sales to show an overall value of $6,700 per ha, while Mr Wake (the appellants' valuer) on that basis had found the sale to show $7,322 per ha. There had been no satisfactory resolution of the difference in analyses, except it was suggested by Mr Allan that Mr Wake may not have taken into account in his analysis the added value of certain items included in the sale including livestock. More to the point however was that Mr Wake had analysed the sale of the 62 ha parcel with the existing approval for a caravan park including cabin sites and a kiosk, to show about $11,000 per ha.

Mr Wake had valued the parent parcel of the subject land, before resumption, at $2,200,000 which is about $11,157 per ha. Mr Allan's valuation of the subject land,

exclusive of improvements, was $1,480,000 being $7,500 per ha. That level of value was about 10% higher than his analysis of the Mungalli Falls overall purchase. His evidence was that, although the sale lands and the subject land were not directly comparable, the various positive and negative features of each, in comparison, tended to equalise value on a rate per ha basis. Mr Wake had seen the eco-tourism development potential of the Mungalli Falls site as limited to "2½ star" compared to "4 or 5 star" potential for the subject land.

The learned Member found, correctly in our opinion, that, on the evidence, the Mungalli Falls sales evidence should be considered on the basis of the overall price for the total area acquired. He accepted nevertheless, that the component of the sale land with more rain forest eco-tourism potential, had, to some extent, "higher value than the average rate per ha for the entire site".

In comparison with the subject parent parcel, which retained more natural features, he gave consideration to the question whether, if it was more valuable for eco-tourism development, that superiority translated into greater "tourism value". He satisfied himself "that the subject land is significantly superior to the Mungalli Falls site" then went on to consider the other sales evidence.

He clearly did not find that the sales evidence supported Mr Wake's valuation, but at the same time found assistance from only three of the six sales offered as evidence by Mr Allan. Included in his conclusions concerning market value, at pages 59 and 60 of his judgment (pages 67 and 68 of the record), were the following comments:

> "The determination must be made bearing in mind the conclusions which I have reached concerning other matters relevant to this case. In summary they are that, at the date of resumption the highest and best use of the subject land (that is, the original Lots 108 and 109) was for eco-tourism purposes - a potential, but unrealised, use of the land. Permitted access to Mowbray Falls via a safe and approved route from the subject land would have been an important and attractive (though not essential) feature of any commercial eco-tourism enterprise developed on the subject land. There was no guarantee that the operator of a commercial eco-tourism venture on the subject land would have secured a Commercial Activity Permit for people to walk across the State Forest land between the subject land and Mowbray Falls. The risk that commercial access to Mowbray Falls across State Forest land might not have been permitted would have been a consideration for the properly informed prudent purchaser of the subject land at the date of resumption.
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> The relevant points of comparison between the Mungalli Falls site and the subject land demonstrate that the subject land is significantly superior to the Mungalli Falls site in what it could offer by way of eco-tourism

> development, assuming that a Commercial Activity Permit could be secured along an agreed route between the subject land and Mowbray Falls. I consider that, if such a Permit had been assured, the value of the subject land would have been somewhat more than that assessed by Mr Allen. That conclusion is supported by comparing the subject land with those of the other parcels of land which have some relevance in these proceedings, allowing for such factors as a greater value in the marketplace at the date of resumption for comparable properties north of the Daintree River.
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> The concerns about how difficult it would have been to obtain a Commercial Activity Permit, and the possibility that a Permit may not have been granted, mean that some discount must be made when assessing the value of the subject land by reference to those other properties which have, or have ready access to, significant natural features.
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> Taking all relevant factors into account I have concluded that the subject land should be valued at the date of resumption at $8,000 per ha, giving a total value of $1,578,000."

It is clear that the Member was concerned as to the uncertainty of pedestrian access being available directly from the subject land through the State Forest to the Mowbray Falls. He found that "some discount" must be made for that uncertainty.

It would seem to follow that the less certain the chances of obtaining any necessary permission, the greater the discount which should be made to reflect that risk and, as a consequence, the price a prudent well-informed purchaser would be prepared to pay for the land.

Before us, Mr Needham submitted that if any discount was to be made it should be "very small", and only because, at the date of resumption, there had been no approval obtained to directly access the Mowbray Falls through the State Forest from the subject property.

In our view, the valuation of the subject land needs to be considered on a "top-down" approach. Some guidance is available in that both valuers had conducted their valuations on the basis that direct, rather than some circuitous access was in fact available. It is clear that the Member preferred to base his valuation findings on Mr Allan's valuation rather than Mr Wake's.

There can be no doubt that the Member's considerations were influenced, as they reasonably should have been, by the evidence of a Mr MacLeod - a local officer of the relevant State department who, at least at the time of the Land Court hearing, would have made recommendations whether or not an application for a Commercial Activity

Permit, or approval to construct a suitable walking track from the property through the State Forest to the Mowbray Falls, should be given. The actual decision would have been made by another officer in Brisbane after consideration of Mr MacLeod's recommendations. Mr MacLeod had not been the relevant officer who would have made the recommendation at the date of resumption having been appointed to his position which embraced that responsibility, about 2½ years later. He had never visited the site but claimed familiarity with it through mapping and aerial photography. It was his evidence that "if an application had been made in 1992 for a commercial activity permit to access the Mowbray Creek and Falls from a non-gazetteer (sic) access as in this case from lot 998 it would almost certainly be (sic) refused." (Record p.495 - Exhibit 13). His reasons for forming that opinion were contained in his tendered statement. In his verbal evidence he had said that his opinion as to the almost certain refusal was based on a decision made in 1994 by the relevant officer in head office, refusing approval of an application for the construction of a walking track from a freehold property in south-east Queensland to an adjoining State Forest. The freehold property had been identified as a Deer Park at Conondale. The Member referred to this evidence in his judgment. (Record p.31).

It was argued before him "that if experienced experts in their fields (particularly those called by the Crown) had failed to consider the possibility that direct legal access from the subject land to the Falls would have been difficult or even impossible to obtain, it could not have been a relevant factor to the valuation of the subject land." The Member however was satisfied "that Mr MacLeod's evidence was relevant and persuasive".

Much of the argument before us related to whether the evidence of Mr MacLeod should be regarded as relevant ***and*** persuasive.

Due to their perception as to the degree which Mr MacLeod's evidence had adversely affected the determination of compensation, the appellants had made the application to adduce further evidence, much of which they were endeavouring to collate, at the time the application was heard by the Court as a preliminary matter. For reasons given in its decision delivered on 25 June 1998, the application was refused, although opportunity was given the appellants for a further application to be made. When the appeal came on for hearing, with the agreement of the respondent, the Court accepted as an exhibit a facsimile transmission tendered by Mr Needham, relating to the status of the request for a Commercial Activity "licence" for the Conondale Deer Park.

The Senior Project Officer, Administrative Review, Department of Natural Resources, had forwarded the information to Mr Needham. The information was to the effect that the operator of the Conondale Deer Park had made inquiries about applying for a Commercial Activity licence. He had been advised by the relevant resource management overseer of the procedure involved in making application for such a licence. However, there was no record of any application having been made let alone one being refused.

Part of Exhibit 42 before the Land Court was a copy of an office memo which referred to the Conondale Deer Park, and which set out, as interim guidelines only, the key principles to be profiled in negotiations and the stages involved in dealing with an application to commercially access a State Forest. There was reference in that memo and in attached "Commercial Activity Guidelines" to "exclusive use" considerations. Mr MacLeod apparently had formed the opinion that planned/constructed access onto a State Forest other than by way of a "gazetted road" might constitute exclusive use of "areas, facilities, services, etc" which as a general principle the department "does NOT encourage". It was submitted by the appellants that there was nothing in the access proposal associated with the subject land which should have attracted a perception of exclusive use, either of the waterfall site or the walking path.

However, it is noted that even in the event that an exclusive use was proposed, the guidelines also make provision for approval for such a purpose, particularly "where facilities have been built by or for the operator to meet the operators needs in a planned fashion. It is also noted that any private interest in facilities on State Forest should be arranged as far as possible to ensure that equal opportunity is available to all park visitors. (Record p.694).

The alleged refusal of the Conondale Deer Park application had been the basis of Mr MacLeod's opinion that an application for a Commercial Activity Permit over the adjacent State Forest to service the subject land "would almost certainly have been refused". No other evidence of any application for Commercial Activity Permits having been refused had been provided by Mr MacLeod. There had been evidence from Mrs Kuhn in the Land Court that the appellants themselves had been granted Commercial Activity Permits to access State Forest reserves from adjoining freehold land. Mr MacLeod had no knowledge of any such permits having been granted. There had however been ample time for Mrs Kuhn's evidence to have been investigated before Mr MacLeod was called to give his evidence.

Mr MacLeod's evidence related to matters and information peculiarly within the knowledge of a State department. The Member was entitled to be persuaded by a correct interpretation of such matters. Had the basis of Mr MacLeod's opinion been shown to be unsound in the Land Court, as it was before us, doubts must have emerged as to the credibility of his evidence generally. His "robustly negative" opinion, as it was described by Mr Gibson before us, as to the chance of success of an application for a Commercial Activity Permit, would have warranted closer examination. His lack of inspection of the site, his lack of appreciation of the nature of the approval which would have been sought, particularly with regard to "exclusive use" considerations, and his lack of knowledge of detail of other Permits granted for State Forest access in the locality, as examples, may reasonably then have weighed more heavily in the Member's considerations.

We heard a submission from Mr Needham that the type of activity proposed in the use of a walking track, did not, in any event, necessitate the granting of a Commercial Activity Permit, based on his interpretation of Regulation 29 of the Forestry Regulations 1987. Even if Mr Needham's interpretation was correct, it is our understanding that, ideally, the walking track should be constructed to allow physically easy access over naturally steep contours. An operator of a tourist venture would be expected to seek, if not a Commercial Activity Permit, at least approval to construct a suitable access track.

It follows, in our opinion, that precise knowledge of the conditions attaching to any approval to access the State Forest, would have been a feature influencing the market value of the property for eco-tourism development. That knowledge was not in place at the date of resumption, and in comparison with the desirable position relative to access, we agree that the market would discount the value of the property until it was corrected. However, we have gained the impression, and agree with the appellants, that there is a distinct probability that the Member was overly-influenced by Mr MacLeod's negative opinion relative to actual approval. We are inclined to the view that experienced prudent persons, either as vendors or purchasers, would be more influenced by practical considerations relative to the access situation, and in the particular circumstances surrounding the subject property, take a positive attitude to the chances of gaining access approval. Any discounting of value, would more likely relate to the risk of bureaucratic related delays and construction cost contingencies. In a top-down valuation approach, we would see that risk to be expressed in a relatively small discount.

The Role of the Land Appeal Court

It was submitted by the respondent that this Court should not interfere with the determination of the Member unless that determination could be shown to be wrong in principle or wholly erroneous. In *Director-General, Department of Transport v. Hibiscus Holdings Pty Ltd* (judgement delivered 15 August 1997 not as yet reported) the role of the Land Appeal Court was discussed with reference to various relevant judicial authorities. (*Emerald Quarry Industries Pty Ltd v. Commissioner of Highways (S.A.)* [1978-1979] 142 CLR 351; *Federal Commissioner of Taxation v. St. Helen's Farm (A.C.T.) Pty Ltd* (1980-81) 146 CLR 336; *Hawkins & Anor v. Lindsley* [1979] 49 ALJR 5; *Keefe v. R.T. & D.M. Spring Pty Ltd* (1985) 2 QdR 363; *Elford v. FAI General Insurance Company Limited* (1994) 1 QdR 258.

Although the appellants did not seek to challenge the written submissions of the respondent on this subject we do not think that it is necessary in this case to express any concluded view of the nature of an appeal to the Land Appeal Court since the amendments in 1994 to s.44(13) of the Act or the relevant principles applicable thereto.

Whilst we are content to approach the matter generally on the basis contended for by the respondent we think that having admitted additional evidence it is inevitable that in rehearing the matter the findings of the learned Member have to be examined in the light of that additional evidence and our assessment of it.

There is consistency in the application of the rule on questions of valuation that there is no justification for an appellate Court to substitute its own opinion for that of the Court below unless it is satisfied that there had been mis-application of principle or the valuation was wholly erroneous.

It is necessary for this Court to consider the evidence for itself, and we have been provided with further evidence which, in our view, would have influenced the finding of the learned Member below, had it also been available to him.

Finding - Value of Land Before Resumption

In considering the evidence before the Land Court, the determination of the Land Court and the conclusions of the Member concerning market value, it is our opinion that had there been no question as to the availability of and cost of providing walking track access to the Mowbray River, a valuation of $8,750 per ha would have been reasonable for the parent parcel before resumption, with potential for eco-tourism development.

The Member had not carried out his assessment on that basis. His discounted assessment of value was based on $8,000 per hectare. He would accept that assessment

as providing a reasonable discount of $750 per hectare if Mr MacLeod's evidence had been found to be persuasive, even if not fully accepted.

On the evidence now before us, however, we find that discount to be excessive, and would reduce it to $250 per hectare, leaving a before resumption assessment based on $8,500 per hectare rounded to a total of $1,676,000.

There is justification in amending the Member's assessment accordingly.

Value of Balance Areas - After Resumption

The second ground of the appeal alleges that the value of the two remaining blocks, after resumption, as found by the Member, was against the evidence and the weight of evidence.

The remaining land comprised Lot 108 containing 25.89 ha and Lot 109 containing 26.15 ha.

Mr Wake had valued those lots as follows:

Lot 108 - as a rural residential site	$150,000
Lot 109 - as a rural residential site	$150,000

Mr Wake had commented that as an environmental resort site he would have valued Lot 108 in the amount of $200,000. "However, as all negotiations for access have been rejected the current highest and best use at the relevant date is also considered to have been as a rural residential site."

Mr Allan's valuation after the resumption was as follows:

Lot 108 - with potential for tourism-related usage - 25.8 ha @ $10,000/ha	Adopt	$260,000
Lot 109 - 26.25 ha rural residential site, including improvements		$185,000

Mr Allan's evidence had been that the improvements on Lot 109 added value to the extent of $62,000. By deduction, the land content would have been $123,000.

The Member found that Lot 108 should be valued in an amount higher than for rural residential purposes although restrictions on development, absence of extensive rainforest areas, lack of guaranteed access to neighbouring National Park and State Forest land for commercial purposes, the potential cost of obtaining that access, and the apparent desirability (if not need) for additional land, for eco-tourism purposes, were relevant to considerations. He adopted a valuation of $200,000 for Lot 108 with its eco-tourism potential as restricted, and $150,000 for Lot 109 as a rural residential site.

Mr Needham submitted that, at least with Lot 109, the land value, excluding improvements, as assessed by Mr Allan should have been adopted, based on the well-established principle that where doubt exists it should be resolved in favour of the dispossessed owner.

We can see merit in that argument. The best evidence of rural home site value had come from Mr Allan.

However, we are also of the opinion that if the question of risk of access into the State Forest had weighed too heavily in the Member's determination before resumption, then that would also have applied to his after resumption assessment of Lot 108. The further question then arose as to difficulty of obtaining access into the National Park (being the land resumed). It would seem as logical that a prudent vendor of the resumed land disposing of it by private treaty at the same relevant date would have ensured eco-tourist access into the rainforest as part of the sale negotiations

We see on balance, that any increase in the value of Lot 108 would, however, be negated by a decrease in the value of Lot 109, and we will not interfere with the Member's determination of the after resumption valuation in total.

Determination of Compensation

Before resumption	-	Lots 108 and 109		$1,676,000
After resumption	-	Lot 108	$200,000	
	-	Lot 109	$150,000	$350,000
Loss in land value				$1,326,000
Disturbance as agreed				$67,150
Total Compensation				$1,393,150

Orders

The appeal is allowed. The determination of the Land Court is set aside and compensation determined in the total amount of One Million Three Hundred and Ninety-three Thousand One Hundred and Fifty Dollars ($1,393,150).

Interest

It is necessary to vary the Order of the Land Court in relation to interest. (Record p.8). It is observed that the various calculations of interest although agreed between the parties in the Land Court, appear not to take full account of advances paid and as set out in Exhibit 7 (Record p.446) in the Land Court. It is observed that interest was ordered to

be paid on the full amount of the disturbance items. There is no submission that we should interfere with that aspect of the order, also as agreed between the parties in the Land Court.

We order that interest be paid by the respondent to the claimant/appellant at the rate of 8% per annum as follows:

(a) On the sum of $1,393,150 for the period commencing on and including 11 December 1992 up to and including 19 April 1993.

(b) On the sum of $713,150 for the period commencing on and including 20 April 1993 up to and including 10 June 1993.

(c) On the sum of $671,199 for the period commencing on and including 11 June 1993 up to and including 24 June 1993.

(d) On the sum of $573,199 for the period commencing on and including 25 June 1993 up to and including 5 October 1993.

(e) On the sum of $157,150 from and including 6 October 1995 up to and including the day immediately preceding the date on which payment of the final amount of compensation is made.

Costs

The respondent is ordered to pay the appellants' costs of and incidental to the hearing and determination of the appeal to this Court, including the application to adduce further evidence. The amount of such costs shall be ascertained and fixed by the taxing officer of the Supreme Court at Brisbane according to the scale of costs prescribed by law for the time being in respect of proceedings in the Supreme Court and in accordance with the provisions of s.44(16) of the *Land Act* 1962.

We make no order as to costs of the proceedings in the Land Court.

CULLINANE J
JUSTICE OF THE SUPREME COURT

RE WENCK
MEMBER OF THE LAND COURT

NG DIVETT

MEMBER OF THE LAND COURT