LAND COURT

BRISBANE

14 February 1997

Re: **Determination of Compensation - Resumption for Drainage purposes - A94-91.**

Kevern John and Robyn Kay Kennedy
v.
Council of the Shire of Redland

J U D G M E N T

Falling for determination is compensation consequent upon the resumption by the respondent Council of the Shire of Redland on 22 July 1994, under the provisions of the *Acquisition of Land Act* 1967 of a drainage easement over a "Residential A" zoned lot situated on the western side of Agnes Street, Birkdale.

The easement is more particularly described as Easement A in Lot 25 on RP 93909, County of Stanley, Parish of Capalaba, and contains an area of 30 square metres. The parent parcel, Lot 25, contains an area of 771 square metres and the easement encumbers land along its whole northern boundary with a regular width of 0.75 metres.

On 8 December 1994, the claimants, KJ and RK Kennedy, through their solicitors, filed a claim for compensation in the Land Court registry in the sum of $7,950 with interest additional. This claim is constituted as follows:

Compensation for easement taken		$ 6,950
Disturbance		
(a)	Legal fees incurred in the preparation and lodgment of the claim	$250
(b)	Valuer's fees incurred in the preparation of the claim	$750
TOTAL CLAIM FOR COMPENSATION		**$ 7,950**

At the outset of the case, Counsel for the claimant sought and obtained leave to amend the claim for compensation for the resumption of the easement to $2,000, based on evidence with which I shall deal later in this decision.

It is to be noted that the claim, insofar as the component for the compensation for the easement taken is concerned, is based on an estimate made by Registered Valuer Ian Robert Crane who was called in evidence. It is perhaps helpful if I here indicate that the respondent Redland Shire Council considers that no compensation should be payable consequent upon the resumption.

Kevern John Kennedy was called to give the background to and the circumstances leading up to the resumption. Mr Kennedy informed the Court that the claimants purchased the parent parcel Lot 25 about six years ago and commenced filling the site. The filling was required before they could build a residence on the land. Mr Kennedy says that the land was substantially filled up to the easement boundary prior to March 1992. The filled level (RL 2.0 to RL 2.2) falls a little short of Council's level requirement for the construction of a dwelling house on the land (RL 2.4) but I do not see this as being an issue in this case. The then future drainage easement area was not filled, and as a result of discussions with Council, Mr Kennedy constructed along it a 4-inch agricultural pipe and an 18-inch rubble drain to take water flowing from his neighbour's land (Lot 32 on RP 93909 situated in Bates Drive) which, it was said, was the only lot from which the subject block had to take surface water.

On 2 March 1992, Mr Kennedy received from the respondent Council a letter stating that the claimants had filled the land without the written permission of Council. He telephoned an officer in the Town Planning Department of Council, who advised him it was unlikely Council would require him to remove the fill. Nonetheless, Mr Kennedy then decided to apply for a permit to fill the land
and paid the appropriate application fee.

At this time, there was a heavy downfall of rain and the land in the area flooded for the first time during his ownership. Mr Kennedy believed this was due to blocked drains in Queens Parade to the north.

On 28 May 1992, Mr Kennedy received advice from the respondent that Council was prepared to let the claimants keep the fill provided they gave Council, free of cost, a drainage easement along the northern boundary of the lot. This would enable Council, at its own cost, to build a more effective drainage scheme on the easement. Mr Kennedy told us that on 13 July 1992, Council wrote to the claimants claiming that the overland flow path along the existing drain had not been cleared and that some extra quantities of fill which had been placed on the land should be removed. More recent advice from Council was to the effect that unless a drainage easement was granted to Council, then legal action would be taken to force the claimants to remove the fill. Mr Kennedy then contacted the Deputy Engineer of the Shire Council (a Mr

Derbyshire) and advised him that he was prepared to offer the easement to Council subject to two conditions which were subsequently confirmed in writing on 15 January 1993, by Mr Kennedy. They are:

" 1. Although I accept that buildings will not be permitted to be constructed over the easement, the existing property boundary, not the new easement boundary, will be the boundary used for the purpose of determining setbacks of future buildings under the Building Act.

2. Once Council installs pipes in the easement, Council will not have to install additional pipes in the easement without payment of compensation agreeable to both parties. However, I have no objection to Council entering the easement for the purpose of carrying out maintenance work. "

Mr Kennedy claims that at no time did he understand that no compensation was payable for the taking of the easement, the subsequent resumption of which leads to this litigation. Indeed, he feels the Kennedys are entitled to compensation since, he claims, they will have to build a rock retaining wall on the southern alignment of the easement post-Council drainage works at a probable minimum cost of $1,500, and that in addition the easement will require fencing.

In evidence is Mr Crane's valuation purporting to support the claim for compensation. There is no need for me to outline the contents of his original valuation since, as a result of a "without prejudice" conference on site on 30 January 1997, he received advice that his original approach to his valuation, particularly since he believed the fill on the site was approved by Council, was technically in error. As a result, Mr Crane was instructed to review his valuation and assessment of compensation on the basis that the filling on the subject land was notionally removed. This results in his assessment of compensation for the taking of the easement being considerably reduced. Mr Crane says that the easement is a "blot on the title" which generally reduces the value of the parent lot to some extent. He is of the view that compensation in this case is now limited to this factor and a consideration of the type of works constructed on the easement area along with the loss of the right of the owners to use the land.

Mr Crane makes the point that for drainage easements on lots such as is the subject land, his experience is that where the drainage is piped and the land on the easement is available for use for gardens/lawns, etc., then compensation is most likely to be limited to a nominal amount in the vicinity of $1,000.

Mr Crane further offered the view that if an overland flow path is required, the land over which the easement is taken has to remain at the original level, and then it

cannot be piped and used for gardens, etc. Then, in this scenario, the only benefit is that the boundary setbacks of any dwelling constructed on the site are unaffected. Mr Crane re-enforces the opinion of Mr Kennedy in that if the state of the land is converted from notionally unfilled to filled (the actual state) then some form of retention of the fill on the easement boundary is desirable. But with the filling notionally removed, then Mr Crane believes that a claim for the cost of a retaining wall is not justified.

Mr Crane says that the amended claim for compensation in the sum of $2,000 is supported by the decision of the Department of Natural Resources to reduce the unimproved value of the subject property due to the easement resumption by a token sum of $2,000. Mr Crane does not agree that compensation for the loss in the value of the subject land should be offset due to enhancement, and he finally concludes that the loss in value due to the easement, on the basis that the filling is not being in place, should be a nominal amount of $2,000.

The respondent Council called in evidence Mervyn Leslie Ross Elliott, who is a Registered Valuer presently employed as Property Supervisor in its employ. Mr Elliott also traced the chain of events, mainly through copies of correspondence, leading up to the resumption. He told us that the subject easement was resumed following the owners' refusal to execute easement documents which were previously part of the conditions relating to an approval being granted by Council to fill the site. He informed the Court that the drainage works carried out by Council in the easement were at a cost of about $5,360, and is of the opinion that the drainage work was necessary because of the fill on the land, and that had the works not been undertaken, ponding of the adjoining property and flooding would occur. Mr Elliott supports the respondent's submission that the easement is a lawful requirement pertaining to a consent application for filling, and as the filling is in place, no compensation should be payable. He goes further and claims the easement has enhanced the value of the property (I interpret this to mean that the carrying out of the drainage works on the easement has enhanced the value of the property) as it was Council's right to have the claimants construct the drainage as a relevant condition of approval for filling. As a result, Mr Elliott says that the easement has no detrimental effect on the value of the property, and recommends that compensation be assessed at NIL.

The letter written by Mr Kennedy to Council on 15 January 1993, offering an easement subject to the aforementioned conditions cannot be construed in such a way

as to mean that the claimants were offering the easement free of charge, and indeed Mr Kennedy told us that at no time did he make such an offer. It is clear on the evidence before the Court that the fill on Lot 25 remains unapproved by Council and any resolution of this problem is not a matter for this Court whose only function is to determine compensation under the provisions of section 24 of the *Acquisition of Land Act* 1967.

I endorse the revised approach by Mr Crane to the assessment of compensation. The subject site should be viewed for compensation assessment purposes as having the unapproved fill notionally removed, and then what has to be determined is compensation for the resumption of the easement, together with the effect on Lot 25 of the carrying out of the drainage works, on the basis that the lot is a site with a level of approximately RL 1.6 metres.

Another factor for consideration is that the work carried out by Council on the easement comprises an underground drainage scheme topped by concrete. This being the case, I cannot endorse the revised claim by Mr Crane (tantamount to an additional $1,000) nor the claim put forward by Mr Kennedy, in respect of the cost of the retaining wall to protect the filling, especially as the rock retaining wall is required as a consequence of the placing of the fill on the site and in view of my former ruling that the filling should be notionally removed for the purposes of compensation assessment.

Mr Elliott has not provided quantitative valuation evidence to support his opinion that the site is enhanced in value by the carrying out of the works on the easement. It should also be pointed out that the onus to prove enhancement lies with the respondent, and on the evidence I cannot find that this onus has been discharged. Nonetheless, Mr Elliott said, in my opinion quite fairly, during the course of his evidence, that although his records do not disclose that any offer of compensation has been made, he would have "listened to a fair nominal offer from the owner and would have been prepared to recommend that as a without prejudice settlement".

I am not influenced in this decision by the evidence that the Department of Natural Resources has reduced the unimproved value of Lot 25 by $2,000 consequent upon the easement resumption, since there is no direct evidence as to the basis for this reduction.

I adopt Mr Crane's revised estimate of compensation for the blot on title due to the resumption in the sum of $1,000. It follows, then, that I determine compensation for the resumption of Easement A in Lot 25 on RP 93909, Parish of Capalaba, in the sum of **One thousand dollars ($1,000)**.

During the course of the hearing of the matter, Counsel for the respondent Council indicated that it was prepared to admit the quantum of the claim for Disturbance and that compensation for Disturbance should be awarded.

A summary of my compensation award accordingly reads:

Compensation for easement taken		$1,000
Disturbance		
(a)	Legal fees incurred in the preparation and lodgment of the claim	$ 250
(b)	Valuer's fees incurred in the preparation of the claim	$ 750
		$ 2,000

Section 28 of the *Acquisition of Land Act* 1967 provides that interest may be ordered on an amount of compensation determined by the Court, and further that interest shall be at such rate percentum per annum as the Court deems reasonable.

I do not have evidence from the claimants as to when, or indeed if, they have paid the professional fees incorporated within the claim for compensation. Since the claim for these fees does not appear exorbitant, I propose to award interest thereupon for the period commencing on the date of resumption. Should it be established that the fees remain unpaid, or that they were paid at a point in time considerably after the date of resumption, then it is open for the respondent Council to make application to the Court for a variation in the interest component of this award.

I ORDER that in addition to compensation payable, the respondent Redland Shire Council pay to the claimants interest on the sum of $2,000 at the rate of 9 percent (9%) per annum for the period commencing on the date of resumption (22 July 1994) and ending on the day immediately preceding the date upon which compensation is paid.

(CH CARTER)
Member of the Land Court