LAND COURT

BRISBANE

6 OCTOBER 1998

Re: Appeal against a review decision -
Land Act 1994
Application for conversion of tenure -
Lease: SL 01/53048, Atherton District
Lessee: Teresa M. Davis

(Hearing at Atherton)

D E C I S I O N

Subsequent to an application to convert the tenure of the above lease, the lessee has appealed against a decision on review of the purchase price.

Special Lease 01/53048 issued under the provisions of s.203(a) of the *Land Act* 1962 over land described as Lot 578 on Plan NR 6271, Parish of Dirran, County of Nares, containing about 1.29 ha. The lease was granted for the land to be used for "rural residential purposes and for purposes incidental thereto ……". The term of the lease is 30 years commencing on 1 March, 1994.

Section 170 of the *Land Act* 1994 (the Act) relevantly provides as follows:

" (1) Unless a price or formula has already been stated in the lease to be converted, the Minister decides the purchase price for the conversion of a lease to a deed of grant.

(2) The lessee may appeal against the Minister's decision on the purchase price.

(3) The purchase price is an amount equal to the total of -

(a) the unimproved value of the land being offered, as if it were fee simple; and
(b) the market value of any commercial timber that is the property of the State on the land.

(4) The unimproved value of the land is calculated at the day the Minister receives the conversion application."

The Court was informed that the purchase price (unimproved value) was assessed in the sum of $40,000 as at 3 May, 1996 - the date of receipt of the application. There was no commercial timber on the land. On review, the unimproved value assessment was reduced to $37,000. It is against that amount which Mrs Davis has appealed to this Court. The grounds of appeal are interpreted as follows:

(1) In its original state access to the block was for cattle only - no road. Any road when constructed would have to either be concrete or bitumen because of the steep gradient.

(2) The land was completely covered in noxious weeds (lantana, giant bramble etc) - a condition prohibiting sale of private land in Eacham Shire.

(3) The small "so called" dam, better described as a filthy mud hole, needed to be worked on with large machinery costing in excess of $4,500. As you would appreciate without good water - self supplied in Tarzali - the block would be of little value.

(4) Added to the other water problem we find an undisclosed 600 mm cement drainage pipe coming from an old railway cutting into the middle of the block, depositing a filthy rusty substance into, as we hoped for, clean water supply. Test has been taken of this substance to assert damages to our domestic water and possible usage.

(5) Even allowing for extensive earth works carried out only about 5% of the total block area can be used for building purposes - house, shed etc, and only about 10% of area can be mowed with side on mower and that only after many tons of top soil has been placed over the existing "so called" soil..

(6) With the little usable land recovered by use of machinery we are still unable to find an area suitable or large enough for the septic seepage trenches as required by the Eacham Shire Council, which in reality will mean a much more expensive toilet system will have to be installed.

The Notice of Appeal also contained reference to the cost of fencing, surveying, eradication of remaining noxious weeds, "useless" nature of the land as a building site, and the valuation being excessive in comparison with a sale of one particular site (Lot 31 Lake Barrine Road, Malanda).

The lease is situated adjoining to the west, the southernmost residential allotments of the Village of Tarzali, about 9 km by road south of Malanda. The land is zoned "Village", in which zone a dwelling house is an as of right use. Electricity, telephone and refuse disposal services are available.

When the matter came on for hearing Mrs Davis was represented by Mr A.W. Dawson (J.P. Qual) who acted as her agent. Evidence was called through Mrs Davis; her husband Mr S.J. Davis; Mr R.J. Nightingale, who described his occupation as grazier and builder; Mr D. Jenkins who appeared in his role as an environmental health officer as part of his duties as manager, Community Services, Eacham Shire Council; and Mr I.M. Gordon, registered valuer. Mr M.L. Bermingham, registered valuer employed by the Department of Natural Resources, was called by way of subpoena. A Statutory Declaration by a local property owner, Mr G.D. Shaw, was tendered.

Mr J. O'Rourke, barrister, appeared on behalf of the Chief Executive, Department of

Natural Resources, as the respondent. Witnesses called to give evidence for the respondent were Mr J.W. Fowler, a registered builder accredited as a building certifier; Mr M.A. Cavicchiolo, principal environmental officer, employed by the Department of Environment and Heritage; and Mr R.G. Moroney, registered valuer employed by the Department of Natural Resources based in Atherton.

The evidence of Mr and Mrs Davis related to the background to the acquisition of the lease and the conversion application. The lease had been acquired, in Mrs Davis's name, for $10,000 in May 1995. The lease had been listed for sale with a local agent. It had presented poorly, being in overgrown condition. With its steep contours and poor access, the site had not at first appealed to Mrs Davis. There was a gully through the centre of the block, containing what she described as a "mud hole". Mr Davis however had seen some potential for the site to be improved but with "a lot of work". The presence of a natural spring provided a potential water supply. After eventually agreeing to buy the lease, Mrs Davis signed a "letter of intimation" acknowledging that she had read the conditions attaching to the lease. The rent for the "first annual rental period" (to 28.2.1995) had been $1,200 per annum. A lease condition was that the "lessee shall within three (3) years from the commencement of the term of the lease" (1.3.94) "and to the satisfaction of the Minister administering the *Land Act* 1962, establish a residential dwelling on the leased land …. of a value of not less than $35,000; construction of such improvements shall be commenced within two (2) years from the commencement of the term …."

It seems that, before the purchase, the Davis's were given or obtained some misleading information as to the likely cost of freeholding the land. The agent who had sold them the lease was under the impression, according to Mr Davis, that "what you paid for the lease you would pay for the freehold price".

Mr Davis is a foreman with Eacham Shire Council. It appears that some research was carried out through Council records as to the valuation history of the lease, (under the *Valuation of Land Act* 1944) for rating purposes. There had been a previous special lease over the land for the purpose of grazing. When the use of the land had been restricted to grazing, the unimproved valuation for rating purposes had been at one time as low as $2,600 but then increased to $7,500 as from 30 June 1993. The previous lessee had sought a change of use to "rural residential" and the new lease (the subject lease) commenced for that purpose from 1 March 1994. However, the unimproved value of $7,500, for rating purposes remained in force until 30 June 1995. The valuation of $7,500 had been increased as at 1 January 1995

to $40,000 in recognition of the higher use potential (rural residential) of the new lease but that valuation did not come into effect until 30 June 1995. The new valuation had issued by public advertisement in March 1995. Although the first year's rent on the new lease had been calculated on an unimproved valuation of $40,000, the first advice that Mrs Davis received of the rental valuation for the second year's rent (also in the amount of $40,000) would have been in about July or August 1995. Mr Davis said that their inquiries of the Department at about the time of the purchase of the lease had indicated that the conversion price for freeholding the land would be "the unimproved value - with consideration given to the negatives" but before the lease could be converted, the improvement condition would need to be satisfied. Believing after the purchase that the unimproved valuation for rating purposes was still $7,500, and that the freeholding price would probably be about $10,000, as the agent had suggested, the Davis's set about improving the site to meet the lease conditions. The "mud hole" was excavated to provide a gully dam and while machinery was on site significant earthworks were carried out including the provision of extensive benching and levelling of a building platform in fairly close proximity to the external road entry access. A large round timber framed shed was constructed. Part of the shed was intended to provide temporary residential accommodation until a dwelling could be constructed. A concrete driveway was laid from external to the front entry to inside the site then to the north down inside the eastern boundary to a relatively small level area which had been selected as the main house site. Attractive Japanese themed landscaping was established between the building sites and the excavated dam. Underground power and telephone services were connected and water was reticulated from the dam.

When they first became aware of the Department's unimproved valuation in the amount of $40,000 an objection had been lodged and they "have objected ever since".

The evidence of Mr and Mrs Davis leaves me in no doubt that they would not have proceeded with the acquisition of the lease in the first place or the substantial expenditure on their particular development proposal, had they known that the offer to freehold was to be significantly in excess of $10,000. It was, no doubt, that relatively nominal amount which had encouraged them to carry out the extensive site improvements as a step in the process of creating, through their own endeavours, substantially increased asset value.

To add to their woes, the dam which was initially intended to provide a swimming-pool for use by their children, until they fell sick as a result, has been found to contain water unsuitable for drinking and swimming. The 600 mm concrete pipe was discovered, after their

clearing operations, to outlet above the dam, discharging effluent from higher ground in a neighbouring property, once used for railway and stockyard purposes. It is their belief that this drainage effluent outlet is responsible for the contamination of the water in the dam. While the aspect of water contamination was, and remains, of serious concern to Mr and Mrs Davis, it may be dealt with fairly briefly here. Mr Jenkins had been requested to have water samples taken and tested. The results were that the water in the dam was contaminated with bacteria, in particular E. coli., and consequently unfit for human consumption. Mr Jenkins was confident that the source of contamination was external to the subject lease. The pipeline discharging from the neighbouring up-slope property was a possible source as was stormwater run-off from upstream into the gully.

Mr Cavicchiolo had been requested by the respondent to obtain water sample tests. In the end result that sampling confirmed that the water in the dam was contaminated. However he did not find such contamination unusual. It was consistent with results of water sampling of streams in various other locations, including those with relatively unpolluted rainforest type catchments. Mr Cavicchiolo, who was an impressive witness both in terms of his academic qualifications and practical experience, was of the opinion that the readings in the Davis dam, and from a dam in a water permit area immediately upstream, were most likely to have derived from:

- cattle dung located up slope of the top dam (which he had observed to be present, external to the lease);
- ducks or other water birds periodically using the dams or roosting there;
- ground dwelling native mammals utilising the gully upstream on the verges of the dams.

Mr Jenkins had also commented in a letter to Mr Davis as follows:

> " Due to the topography of the block there will also be problems with the installation of a normal septic system to meet the requirements of the relevant legislation *(Sewerage and Water Supply Act*). It will be necessary to either:
>
> a) install extra soakage trenches to eliminate any chance of pollution to the watercourse or
> b) to install an alternative disposal system other than a septic.
>
> In either case considerable extra costs are likely to be incurred and Council will have to approve any design that is chosen."

Mr Nightingale is a long-term resident of Tarzali and has experience in residential and rural farm building. He has known the subject land since his school days. He offered an opinion as to the relatively nominal worth of the land because of its topography, prevalence of

underground springs and its general unsuitability for building purposes.

Mr G.D. Shaw, another local identity, in his statutory declaration, referred to the difficulty he had experienced as a result of the topography of the land when he had been engaged by the real estate agent to "clean up" the block in its preparation for sale of the lease. It was his opinion that the land had no value for building purposes. He was unable to attend the hearing.

The Department had obtained a report from Mr Fowler addressing various matters, said to have been raised by the lessee, including the steepness of the land relative to provision of access, lack of available house sites, increased building costs due to topography and seepage, and septic installation problems. He had been requested to make comparisons with various sites, the sales of which had provided Mr Moroney's valuation basis. In broad terms, Mr Fowler did not see the topography of the site as causing unusually difficult problems, particularly in comparison with the majority of the sale lands. He was somewhat critical of the site preparation and retention techniques which had been employed preparatory to the siting and construction of the shed on the subject land. In his opinion, there had been a lack of appropriate consideration to the establishing of the septic installation when the building site had been selected and developed. However, the site works which had been carried out, including the construction of the concrete driveway, indicated to him that, with appropriate siting and design of construction, the land was capable of residential use. He agreed that retention of the shed site as developed, would be an expensive exercise but then he would not have recommended that location on the subject site for that type of building. He spoke of his experience with much steeper sites having been utilised for the construction of dwellings and the different building designs and techniques, including pole construction, which might have been more appropriate, than, for example, slab foundations.

Mr Bermingham's evidence was that he had been involved in the review process, having been requested to review the first decision to reduce the unimproved value to $37,000. He had prior knowledge of the land when the purpose of the lease had been limited to grazing. In the review process he had discussions on site with the lessee and her advisers. He was questioned by Mr Dawson as to his recollection of comments he had made about the appeal process, the existence of the drainage pipe, and the degree of improvement to the site following the development works which had been effected by Mr and Mrs Davis. It had been his opinion, however, that an unimproved valuation of $37,000 was reasonable and supported by the sales evidence used by Mr Moroney.

Mrs Davis had obtained the valuation services of Mr Gordon, who had prepared for her a brief report in which the "unimproved value for freeholding purposes" was assessed in the amount of $16,000. That amount appeared to have relied on an opinion that the land, unimproved, had a worth of about one-third of the unimproved value of three properties in the Tarzali locality which had been subject of sales. Brief details of those sales are as follows:

(1) Norris-Smith to Clarke - Lot 439 NR 5444, 2.603 ha, zoned "Village Residential", sold 8 August 1997 for $65,000 - "U.C.V. $49,000 (30/6/96)" - described as "An elevated parcel with views to surrounding farmlands from homesite. Gradual slope to all boundaries with small gully to east of area."

(2) Caravella to Farrow and Veronese - Lot 1 RP 728931, 2.025 ha, zoned "Rural General Farming", sold 27 February 1997 for $62,000 - "U.C.V. $44,000 (30/6/96)" - "Parcel falls away gradually to a large flat area. Excellent views of surrounding farmlands from elevated homesite."

(3) Keating to Millgate - Lot 398 NR 5530, 1.821 ha, zoned "Rural General Farming", sold (improved with dwelling) 2 August 1996 for $145,000 - "U.C.V. $44,000" - "The homesite is elevated with the land falling sharply to a large gradually sloping area to the western boundary. Access is available from both a subsidiary road adjacent to the Millaa Millaa/Malanda road and a road to the northern boundary."

With some reluctance, due to other engagements, Mr Gordon attended the hearing. Under cross-examination he did not agree that his basis of comparison with the sales evidence had been related to the "U.C.V." applied to the sale lands under the *Valuation of Land Act* 1944. Rather, important points of comparison, in Mr Gordon's opinion, were firstly that the sale properties each had easy access directly onto the land from the road, whereas the subject land sloped steeply away in its unimproved state. Secondly the quality of views available from the sale properties were far superior to the limited outlook available from the subject land.

Had this been a matter where relativity between the valuation of the subject land and the valuations applied to the sale properties, under the *Valuation of Land Act*, were under review, then there may have been grounds for a successful appeal. There is seen, on the evidence, assisted by an inspection by the Court, which took place at the specific request of the lessee, to be a greater degree of inferiority attaching to the subject land in its unimproved condition than the "U.C.V." relativity examples, derived from the sales mentioned by Mr Gordon, would indicate. However, the meaning of "unimproved value" pursuant to the *Land Act* 1994 is provided by s.434 as follows:

"**(1)** In this Act, the `**unimproved value'** of land is the amount an estate in fee simple in the land in an unimproved state would be worth if there were an exchange between a willing buyer and a willing seller in an arms-length transaction after proper marketing, if the parties had acted knowledgably, prudently and without compulsion.

(2) The unimproved value must be decided without regard to the commercial value of the timber.

(3) To remove any doubt, it is declared that the *Valuation of Land Act 1944* does not apply to the meaning of unimproved value in this section.

……."

Inherent in the cross-examination of Mr Gordon was criticism of his reference to valuations made of the sale properties under the *Valuation of Land Act*. In my opinion, it would be wrong to interpret s.434(3) of the *Land Act* 1994 so narrowly as to suggest that mere reference to a valuation of unimproved value under the *Valuation of Land Act* caused some fatal flaw in Mr Gordon's valuation. Indeed, the evidence of Mr Moroney was that if a lessee considering making an application for conversion of tenure sought from him some guidance as to the probable purchase price, his response would be - "Well, what sort of level of valuation are you paying for your rates? That's a general guide. That's based on sales of unimproved freehold properties." (Transcript p.114)

There are, of course, circumstances when the rating valuation provides no general guide, and pursuant to s.434(3) of the Act, when a valuation of unimproved value is conducted for conversion purposes, it is wrong to adopt as a ***basis of valuation***, either the unimproved value assessed under the *Valuation of Land Act* or relativity with valuations of other lands made under that Act. Regardless of his evidence to the contrary, I am persuaded that Mr Gordon did in fact use as a comparison basis, the unimproved value which had been applied by the Department to the sale properties under the *Valuation of Land Act*. Otherwise, for example, the sale of the improved property was incapable of any cogent comparison with the subject land.

While Mr Moroney had not used the vacant land sales (1) and (2) to which Mr Gordon made reference, he had investigated those sales. Sale (1) (applied U.C.V. as at 30 June 1996 - $49,000) had been analysed to show an unimproved value of $60,000. It was encumbered by an access easement and part of its area comprised a closed railway. Access to the site is gained passing a sawmill which is in close proximity to the east. Sale (2) (applied U.C.V. as at 30 June 1996 - $44,000) had been analysed by him to show an unimproved value of

$58,500. There was "a question of highway noise", because that land adjoined the highway. Also, in Mr Moroney's opinion, only fair access had been available through a cutting in an embankment.

Mr Moroney had considered that the subject land in its unimproved state would have provided a choice of building sites either near the entry where the shed had been constructed or in the position of lower elevation which had been selected by the lessee, accessed now by the concrete driveway. He agreed that the site preparation for the shed and any necessary retention of that site would reflect significant expense. However in his opinion the works carried out by the Davis's were a specific result of their personal choice of development. The shed itself was unusually large (about 300 m²) for a rural residential site. The extent of actual earthworks involved reflected the site location selection and the size of the shed.

Mr Moroney's original assessment of unimproved value under the *Land Act* 1994, had been in the amount of $40,000 (as it had also been under the *Valuation of Land Act* 1944, as at 1 January 1995). The valuation under the *Land Act* had been reduced to $37,000 in recognition of any additional costs for normal rural-residential development caused by the topography of the land and any difficulties which might be involved in siting septic installations.

Mr Moroney's description of the land was as follows:

> "A former scrub timbered Lot intersected at mid point by a gully traversing from the north to the south with moderate slopes falling from the west and the east to that gully. The land is irregular in shape and comprises red-brown clayey soils with quartz pebbles throughout. A site area has been developed in the eastern severance and a dam built across the gully." His report stated that "a connection to the Village's reticulated Town Water supply is also available."

Mr Moroney's valuation had been based on a direct comparison with six sales, details of which were provided in schedule form, with relevant comments as to the nature of the land sold and its comparison with the subject land. Two additional sales were introduced at the hearing, to provide, in Mr Moroney's opinion, further support to his valuation.

Brief details of those sales are extracted, for discussion purposes, as follows:

(1) 8,807 m², zoned "Rural General Farming", sold 17 May 1996 for $42,700, analysed unimproved value $39,900, highway frontage but poor access, irregular shape, hilltop area offers good outlook, but only fair site areas available, telephone and electricity, water supply easement; private sale, vendor had purchased two/three years earlier for $49,000; "overall slightly superior after making allowance for higher development costs attributed to the appeal property".

(2) 1.22 ha, zoned "Rural Residential", sold 20 September 1995, for $51,500, analysed unimproved value $49,000, irregular (fan) shaped, steady easy rise from road to rear, broken gullied area at frontage, good road access, easement access to permanent water, "overall superior to appeal property".

(3) 1 ha, zoned "Rural Residential", sold 18 September 1996, $43,500, analysed unimproved value $40,500, falls easily to moderately, fair local outlook, bitumen road, easement access to water supply, "smaller overall area, but superior access and topography. Comparable location, provision of available services and water supply. Overall superior to the appeal property".

(4) 3,159 m², zoned "Rural Residential", sold 31 October 1996, $24,000 (unimproved). Level to slightly sloping and requires building pad to be raised, triangular shape (33 metres maximum depth, main road frontage 193 metres), electricity connection cost of $4,200, rainwater and/or bore water only, "significantly smaller area … superior access and topography … inferior site selection and lot utility … comparable distance from Malanda … overall inferior."

(5) 3,689 m², zoned "Rural Residential", sold 9 August 1995, $32,500, analysed unimproved value $31,000, resold 17 February 1997 $35,000, easy to partly moderate fall to rear adjoining creek, bitumen road, services include reticulated water, corner position adjacent main road, "smaller overall area with comparable topography. Superior lot access and services, but fronts a busy road, overall inferior to the appeal property".

(6) 1 ha, zoned "Rural Residential", sold 26 September 1996, $53,500, analysed unimproved value $45,435, irregularly shaped, level to gently sloping, broken by deep gully at rear, bore installed, encumbered by access easement over small area, "smaller surveyed Lot area but superior site area and topography. Similar available services. Superior access but fronts a much busier road. Comparable shape hinders lot utility. Overall superior to the appeal property." (This was the sale referred to in the lessee's grounds of appeal).

(7) 1.314 ha, zoned "Rural General Farming", sold 12 October 1996, $53,000, analysed unimproved value $50,500, steady easy fall to about .5 ha broken gully area, corner position off main road, "larger overall area with similar available services. Superior site area but inferior location. Overall superior to the subject property".

(8) 2,692 m², zoned "Rural Residential", sold 27 February 1994, $34,000, analysed unimproved value $32,500, regular shaped lot, steady easy to steeper fall to rear, bitumen access off now deviated main road, easement access to permanent creek, "smaller survey area with similar services and location. Comparable zoning and topography. Overall inferior to the subject property".

Mr Moroney had understood that reticulated town water could be made available to the subject land although he had understood from discussions with Mrs Davis that pressure would be poor. He had assumed that a pressure pump installation would have corrected the

pressure disability. Mr Davis's evidence was that the "Tarzali Water Scheme" is a private arrangement which supplies untreated water to a number of properties some of which were connected without permission. He had been told that he would not be permitted to connect to the scheme because the existing reticulation pipe was too small and, as I understood his evidence, already over-committed.

Mr Moroney had not been concerned from a valuation point of view, about the evidence of contamination of the water in the dam. He had established that the site had not been included on the Environmental Management Register or the Contaminated Land Register. With the exception of his Sale No 5, which land had reticulated water supply, all other sale sites were reliant on either bore or creek water for other than drinking water. The subject land fell within an area of relatively higher rainfall and he envisaged that drinking water would be readily obtained by tankage collection of rainwater.

Conclusions

It is clear that Mr and Mrs Davis, through a combination of poor advice and incorrect assumptions as to the freeholding criteria, have created for themselves, their financial circumstances as they exist relative to this lease. They assumed, incorrectly, that the freeholding price would be in the relatively nominal amount of $10,000. They were unable to obtain, but not unreasonably so, the actual freeholding price until the lease improvement condition had been met. In any event, once having acquired the lease, it would have been liable for forfeiture had the improvement condition not been met. The Minister has accepted that the building and associated improvements developed by the lessee, meet the relevant "residential dwelling establishment" condition. If that involved a liberal interpretation as to the description "residential dwelling" - that is to the benefit of the lessee. The development of the land to meet the improvement condition was as chosen by the lessee. There was, and is, no compulsion for the lessee to proceed with the application to freehold.

An application for conversion of the lease to freehold tenure is made in accordance with the provisions of the *Land Act* 1994. The freeholding price is the unimproved value of the land, as defined, and as earlier discussed. The task of this Court in deciding this appeal is to consider the internal review decision and in so doing, determine on the evidence before it, the unimproved value of the land.

I will proceed to summarise the evidence which was before the Court.

Mr Nightingale and Mr Shaw were prepared to declare, in support of the lessee's case, that the land has little, if any, worth as a building site. Regardless of the strength of their

views, and knowledge of the locality, their opinions of value have no evidential support and were of no assistance to the Court.

Mr Jenkins' evidence was relevant to the fact that the water in the dam was contaminated with bacteria and unfit for human consumption. He believed that effluent from the pipe discharging from up slope, was a possible cause of contamination, but there were other potential causes as well. Mr Cavicchiolo agreed generally with Mr Jenkins' opinions, except that the other potential causes were seen as the more likely. Had the subject land suffered contamination of an isolated but specific nature, and was registered as a contaminated site on the Contaminated Land Register, then that would be a consideration relevant to unimproved value. That however is not the case and contamination of the nature suffered by the water in the dam is a relatively common occurrence in the locality. Mr Jenkins raised the point of possible difficulties in the installation of a septic drainage system but that was a matter said to have been taken into consideration by Mr Moroney.

Mr Gordon, although a professional valuer with long experience, proceeded to give opinions based on incorrect valuation methodology. His opinion relied on relativity with statutory valuations, a basis expressly denied pursuant to the definition of unimproved value in the *Land Act* 1994. Nevertheless, his vacant land sales evidence, properly analysed, confirms a level of value not inconsistent with the wider evidence available. His application of the specific evidence was not however persuasive.

Mr Bermingham's evidence did not, in my opinion, assist the lessee's case. The background to the matter and any discussions which did or might have taken place have no bearing on the factual matter of unimproved value.

Mr Moroney had the benefit of having inspected the land both before and after its development by the lessee. He went about his task in a professional manner and endeavoured to make direct comparisons between the subject land and the sales evidence. The overall sales evidence indicated a range of values within which the value of the subject land should logically fall.

The inspection which the Court conducted with the assistance of the parties was found to be helpful in understanding the evidence as to comparability between the subject land and the sale sites.

Because of that inspection, I have had some difficulty in understanding the criteria adopted by Mr Fowler, in particular, and in some instances, Mr Moroney, in their descriptions of degree of slope on the sale lands, particularly when topography was described as

comparable. I have been led to the conclusion that, as Mr Gordon had observed, the subject land should have been seen, in its unimproved state, as having topographical difficulties at the immediate point of entry from the road and difficulties more severe than any of the sale lands, with the possible exception of Mr Moroney's Sale 1. Some of the sale lands may have had broken areas with moderately steep slopes in part, but not necessarily where the logical building site would have existed.

I do accept that the subject land possessed building sites to which access was available, or capable of being provided, at cost, but the topography and access slopes were such as would have required, as Mr Fowler suggested, appropriate building design and construction. The fact that, for example, "pole house" construction was unsuitable for the lessee's particular requirements, does not mean that there is no market for land requiring such building techniques, or land with other negative features.

In the comparison process, the sale lands put forward by Mr Gordon, are so superior as to make comparison with the subject land difficult. I would place Mr Moroney's Sales (2), (3), (6) and (7), in a category of clear superiority. Mr Moroney's wide experience in the Tableland area indicated to him that a market existed at a base level of rural-residential value, below which sales did not occur under open market conditions, regardless of negative features, such as size, shape and usage utility. Mr Moroney drew attention to, in particular, his Sales (4), (5) and (8) which are much smaller sites with no particularly attractive features. Sale (4) is of a site with little to recommend it, except possibly to some purchasers, its timbered environment. I accept that Sale (4), even with electricity connected and with its relatively easy topography, is less attractive as a rural-residential site than would be the subject in its unimproved state. I am persuaded by Mr Moroney's evidence that although of sites much smaller in area, Sale (5) even with reticulated water, and Sale (8) provide a base level of value for the subject land. I question their description however as being comparable in topography - the subject land being seen as steeper - but then it has a quieter, less exposed location.

That leaves Mr Moroney's Sale (1). If it was the only evidence of value, then it would be difficult to argue that Mr Moroney's valuation of the subject land was excessive, the main superiority of the sale land being the outlook and degree of slope on the prime building site. Sale (1) has very poor shape, worse than the subject land, and inferior location and immediate access. Although the site had been earlier sold at a higher price, it appears to be, except for the probable extent of view, so much inferior for example, to Mr Moroney's Sale (3), that I

am not prepared to place any particular reliance on it, in isolation.

In the end result, I am left with the impression that, while Mr Moroney's reviewed valuation is said to have given full consideration to questions of topography, slope and possible difficulty in the siting of septic drainage, the subject land is of the unimproved nature which would be difficult to market except at a sale price in the range of the "base" levels of value indicated by some of the sales evidence. I accept on the evidence of Mr Davis that it would be unlikely for a prudent purchaser of the subject land to expect to receive "town" water supply.

I have decided to adopt an unimproved valuation of $33,000.

Freeholding Offer - Survey Costs

A condition of the lease was that the lessee "shall pay the cost of any required survey". The Court was informed that a condition of the Minister's offer to freehold was that the land was to be surveyed at the lessee's expense.

A question which has been raised is whether the cost of that survey should be deducted from the purchase price. It is paradoxical when the purchase price (s.170(3)(a) of the *Land Act* 1994) is to be "the unimproved value of the land being offered, as if it were fee simple" which assumes the existence of registrable title, but then the offer is made subject to the survey costs, enabling title to issue, being borne by the lessee.

With such a condition, a lessee is clearly placed at a market disadvantage in comparison with purchasers of land already held in fee simple. There was no precise evidence in this matter as to the actual cost of the necessary survey, although that cost could well be extraordinarily high because of the topography of the land and its remnant type irregular shape.

Nevertheless the intent of the legislation is clear. Where survey of the land to be freeholded is necessary, regardless of the basis of calculation of the conversion offer or the cost of the survey, that cost is at the expense of the lessee.

The policy leading to the terms of an offer to purchase, as enshrined in the legislation, is not open to review by the Court. However the paradox to which attention is drawn is indicative of a mandatory "take it or leave it" attitude. Such an attitude seems, prima facie, to be partly in conflict with the meaning of unimproved value (sub-section (1) of section 434 of the *Land Act* 1994).

Finding

Pursuant to s.429(3)(b) of the *Land Act* 1994 the review decision is set aside and the amount of Thirty-three Thousand Dollars ($33,000) is substituted as the amount of the purchase price.

RE WENCK

MEMBER OF THE LAND COURT