LAND COURT

BRISBANE

2 SEPTEMBER 1998

Re: A97-71
Determination of Compensation -
Resumption by Brisbane City Council
Acquisition of Land Act 1967

Antonio and Ingrid M Jimenez

Claimants

v.

Brisbane City Council

Respondent

J U D G M E N T

The claimants own land at Grassdale Road, Gumdale, in the local authority area of the Brisbane City Council. A Notice of Intention to Resume an easement over part of that land issued on 31 December 1996 and the Notification taking the easement was published on 25 July 1997. An earlier acquisition process had been initiated, however, apparently because of an error in the description of the area to be affected, was discontinued.

The claimants seek compensation in the amount of $16,000 for the impositions arising from the easement over their land, whilst the respondent's position is that compensation ought to be in the amount of $1,650. The parties settled that part of the claim relating to disturbance compensation which was formally amended before me. Legal and valuation fees of $2,068, together with $1,650 representing the respondent's assessment of compensation and an allowance for interest in the amount of $57 was paid by way of an advance totalling $3,775 on 24 December 1997.

The claimants' land comprises 19,104 m² of cleared rural residential home site with a southerly aspect. There is a recently completed low-set brick dwelling built on the rear of the land which is supplied with the usual services other than sewerage. An earlier dwelling in the form of a small timber cottage has been retained on the land and is sited near the front of the allotment towards the western side. The land falls gently north to south and has a slight cross-fall to the west towards a creek which touches the claimants' land at the south-west corner. Michael Ronald Iveson, a registered valuer,

provided a written valuation in support of the claimants' contended figure, whilst Graeme John Bertenshaw, also a registered valuer, provided a valuation report in support of the respondent's case.

The easement published as part of the Notification in the Government Gazette is probably in a standard form used by the respondent and in summary provides in its terms for works in excess of that actually carried out to date. The easement relevantly provides for the grantee, the Brisbane City Council, to "lay, construct and thereafter forever to use and maintain on, over, through or under the land described in the schedule hereto … drains, pipes, conduits and channels including open cut drains and channels, rainwater conduits and pipes and covered and uncovered drains for the passage or conveyance of rainwater and together with all associated drainage and stormwater runoff and all manholes, manhole chambers, inlets for the purpose of obtaining free and uninterrupted access to the said drains, pipes, conduits and channels, manholes, manhole chambers, inlets, equipment and fittings from the surface of the said land and for the purposes of changing the size and number of operating, inspecting, patrolling, altering, removing, replacing, reconstructing and/or repairing the said drains … to enter upon and to go, pass and repass over, along and under the said land … and free right at all times and from time to the time to the uninterrupted flow of rainwater and associated drainage and stormwater run-off … without (1) any obstruction … (2) any ponding of waters caused by or consequent upon (a) any use to which the said land may be put, or (b) the erection, raising, making, placing or suffering to stand or to remain of any building, fence, wall, structure … paving or vegetation (except grass which is kept properly mown at all times) or thing whatsoever upon the said land, or (c) any alteration in level or gradient of the said land or any change to the surface of the said land or to the natural or artificial features of the said land which contain or direct or assist in containing or directing the flow of stormwater drainage over the said land along and within a defined course, other than as is or are permitted in writing by the said Council … ." The Council may remove any structure or vegetation placed on the easement area without its permission. It may, in turn, alter the grade of the easement area and has extensive powers of entry for the carrying out of works.

The natural watercourse which crosses the south-west corner of the claimants' land in what Mr Iveson called a "nominal" way, travels under Grassdale Road. The City Council demolished and removed a timber bridge on Grassdale Road and replaced it with three rows of concrete culverts. The culvert crowns were laid on a reinforced

concrete slab and wing walls were constructed by stone pitching. Concrete aprons were then constructed upstream and downstream and a concrete apron was then constructed extending approximately 4 metres into the Jimenez property, necessitating the acquisition of the easement. The easement itself covers an area of 1,269 m² being approximately triangular in shape with a frontage to Grassdale Road of 31.9 metres and a depth along the western boundary of the claimants' land of about 73.48 metres. The front boundary of the claimants' land has a length of about 100 metres so the easement as surveyed occupies a little less than one-third of that frontage.

Mr Iveson's approach was to value the land as it was before the resumption without the easement encumbrance and then to reduce that value in the manner that I discuss in detail below, on the basis of the easement being in place. In both his "before" and "after" valuations he proceeded on the notional basis that there was no house on the land. His "before" value was $247,000, whilst Mr Bertenshaw said that the unencumbered value was $245,000, though each valuer, I must say, arrived at their respective figures in different ways. Mr Iveson said the land was worth $12.95 per m² before the resumption, whilst Mr Bertenshaw employed what is often called the "site" value approach. I discuss this difference in methodology below.

In deciding how much to reduce the "before" value, having regard to the encumbrance of the easement, Mr Iveson continued with the use of the price per m² approach in considering some land sales that he had researched. His approach, described generally, was that by comparing a sale with an easement with two sales without easements he discerned a depreciation of land value for land encumbered by an easement in each of two separate case studies. He expressed that depreciation as a percentage in each case then settled upon a factor of 6.5% which he then applied to the "before" value of $12.95 per m² that he had placed on the claimants' land. He therefore depreciated the land value at 85 cents per m² for the whole of the land, that is $16,000 overall.

In his case study called "Easement 1" Mr Iveson referred to three sale properties. The first of these (265 Boston Road) sold in September 1995 for $180,000. The sale land was vacant, had an area of 10,120 m² and had a stormwater easement across the front of the block and down one side exiting at the rear. After deducting $750 for a building pad constructed on the land at the time of purchase, Mr Iveson calculated a value for the land at $17.71 per m². Number 553 London Road sold in December 1995 for $187,000. This land was said by Mr Iveson in his written valuation to have been

vacant at the time of sale and, based on the land's area of 10,130 m², he calculated an analysed value of $18.46 per m². He wrote that this sale land was similar to 265 Boston Road excepting that it had no easement and, as in the case of the Boston Road property, required a bridge over the watercourse to provide access to the house site. He calculated a percentage drop in value due to the easement at 4.01%.

A property at 308 London Road was also compared with 265 Boston Road. The London Road property sold in July 1995 for $190,000, was vacant and had a full length stormwater drain running from the front at an angle to the rear of the land, however, bridging to gain access to the house site was not required. Mr Iveson said that the sale property was not as well located as 265 Boston Road and the watercourse was inferior to that found on the Boston Road property. He analysed the sale price to a figure of $19 per m², however, employed an approach which did not take the actual area of the land of 8,094 m², but assumed the block to be 10,000 m², a size common in the area, and deduced the analysed rate on that basis. A rate calculated in accordance with the actual area of the block would result in a figure of $23.47 per m².

Mr Iveson's method of calculating the value per m² based on a standard 10,000 m² block recognises, in effect, the significance of "site" value in the purchase of a rural residential block of land. It is not appropriate, however, for a valuer to make such an adjustment to a sale. He must take the sales evidence as he finds it. It may be convenient if I now deal with the issue as to whether a rate per m² or whether a price for a "site" is the appropriate method of valuation, though my final treatment of Mr Iveson's valuation does not depend on whether a "site" value or pro-rata method is appropriate. Mr Iveson said that "as the land area increases the rate per m² does fall". I think that what Mr Iveson observed is a market where land is purchased on a "site" value basis, that is one where the characteristics of the land are important and where allowances will be made for size along with locality, shape, topography, aspect and other relevant features in arriving at a purchase price, but adjustments will not be made for size on a pro-rata basis. It does appear to be the case that a common land size found in the area is around 10,000 m² and that price adjustments up or down for variations in size from that benchmark are made by purchasers but not, as I appreciate the evidence, on a mathematical basis. For a valuer to convert such market processes to a rate per m² formulation adds, I think, a level of precision not demonstrated by the market evidence. The pro-rata approach results from a valuer's understandable desire to demonstrate an objective appreciation of the market. Without doubt, an express amount per m² appears

to be more objective than the adoption of an "allowance for size", but the decision to adopt the rate per m² approach as the explanation of the selected transactions and the consequent need to explain variations in the rate per m² by reference to variations in size is itself subjective. Mr Iveson's rate per m² approach assumes that each m² of the land is equal in value, yet Mr Iveson expressed the view himself that the loss of land for beautification at the front of the property on the waterway was more significant than a loss of land at the rear. It follows that a loss of land from one part or another of a rural residential site could have a quite different effect on value. This is not consistent with a valuation based on a price per m² which, in Mr Iveson's written valuation, proceeds on the basis that each m² of the Jimenez land is of equal value.

There are many instances in this jurisdiction where the "site" value method for valuing rural residential lands has been recognised and adopted as reflecting the market approach to pricing such lands. (See, for example, *Kneiling v. The Crown* (1978) 5 QLCR 162, *Dewar v. The Valuer-General* (19809) 7 QLCR 112, and *Hutchins and Cunnington v. Shire of Woongarra* (1992) 14 CLR 286). Having regard to these authorities; to Mr Bertenshaw's view that properties such as the claimants' land and the sales referred to by Mr Iveson and himself demonstrate the "site" value method in operation; to the absence in the evidence of any clear support for adopting a rate per m² approach in assessing value, I find that the sales evidence is best understood on the basis that purchasers are buying a "site" and that it is inappropriate to analyse sales on the basis of a rate per m². For Mr Iveson to successfully propose a new approach to such valuations requires more than was placed before me.

Mr Iveson also said, however, that as the claimants' land falls just short of being 2 ha in area, and as lands in the area which are greater than 2 ha can be subdivided, then there is some warrant for adopting a pro-rata approach. There are two things that I would say about this: first, his own adoption of $12.95 per m² for the subject land compared with higher unit area prices for smaller parcels contradicts this proposition; and second, given that the prospect of a relaxation by the local authority to allow subdivision of lands less than 2 ha is more of a hope than a prospect demonstrated by reference to evidence, a pro-rata value rate would not be adopted, but any such prospect would probably sound in the addition of a premium to the site value if the market perceived such a premium to be appropriate. I might add that any such potential remains unaffected in the after resumption situation, given that the easement is an encumbrance on title and not a reduction in the land area;.

I was invited by counsel for the claimant to put aside Mr Iveson's use of a rate per m² if I found it unacceptable and consider his approach at the broader level. His "Easement 1" case study and "Easement 2", which I will discuss shortly, proceed on the basis that the sole material difference between the land with and without easements is the presence of the easement. That is, using a "site" approach the reduction overall evidenced by comparing 553 London Road and 265 Boston Road is, using Mr Iveson's figure, 4.01%. In other words, there was no need in calculating the percentage reduction to analyse the sale lands to a rate per m² basis. Now the 4.01% appears to be calculated on the basis that 553 London Road (that is the property without the easement) sold for a price of 4.01% higher than 265 Boston Road (that is the property with the easement). I understand the structure of Mr Iveson's method to be, however, one of asking how much one would pay for land with an easement in place, thus the approach ought to be the obverse of that which produced his 4.01%. Put simply, the question should be: how much less is 265 Boston Road than 553 London Road, in value? On this basis the percentage rate calculates to about 3.75%. Similarly, where he calculated the figure of 6.4% in comparing 308 London Road to 65 Boston Road, the figure is closer to 5.26%.

Now as I have said earlier, for Mr Iveson's approach to be of assistance, the sole material difference between the sale properties must be confined to the presence of the easement on 265 Boston Road or any differences must be capable of being resolved into reliable quantifiable amounts or adjustments. The evidence regarding the "Easement 1" case study, however, does not support that proposition, though some of the other material considerations indicate the difference between sale prices to be conservatively in support of Mr Iveson's analysis, while others erode the reliability of the calculated discount rate. I will now mention some of this further evidence.

- In the case of 553 London Road, whilst Mr Iveson thought that land to be "a more rugged block" than 265 Boston Road, Mr Bertenshaw expressed the view that the rear of the London Road property where the dwelling has been constructed is more elevated and provided better aspect than does the Boston Road land.

- The Boston Road property and 553 London Road both needed bridge access to provide vehicular access to the house. In the case of the Boston Road property there was no bridge included in the sale, according to the evidence, but whilst Mr Bertenshaw estimated that one costing between $6,000 and $10,000 is to be now found on the land, Mr Iveson expressed the view that such a bridge would cost between $1,800 and $2,000. At the time of the sale of 553 London Road, an old timber bridge was on the land, but that was

replaced later and, according to Mr Iveson, would have cost about triple that of the bridge now found on the Boston Road property.

- The 308 London Road property did not require a bridge as the watercourse there is found running almost parallel to the side boundary.

- Mr Bertenshaw said that the 553 London Road property had a house on it at the time of sale and that was occupied for approximately one year after settlement. Mr Iveson agreed that he should have made some allowance for the house.

- Whilst Mr Iveson was of the view that the topography on 308 London Road was inferior to that of the Boston Road property and the watercourse was unattractive, Mr Bertenshaw said that it was the same watercourse on each of these blocks and was similar in form on each.

Mr Iveson provided another set of three sales in a case study entitled "Easement 2" with the rationale being similar to that which I have already described in "Easement 1". In "Easement 2" the easement block, 204 Stanborough Road, has an area of 10,010 m² and sold in February 1997 for $190,000. A stormwater easement is located commencing at the frontage of the land and travels along one boundary until it dog-legs exiting part way along the rear boundary. There is a house on the land which Mr Iveson described as being well below the standard for the suburb. He proceeded on the basis that a developer would remove the house and estimated its worth at $5,000. Number 247 Grassdale Road has an area of 10,090 m² and sold in March 1997 for $200,000. The land was vacant at the time of sale and is affected by a watercourse, but no easement, at the rear south-west corner. Mr Iveson made an allowance of $3,000 for the removal of a house and debris from the land. He calculated the percentage difference between the easement affected block and 247 Grassdale Road at 8.2% which was less than the 8.86% that I calculated in the manner that I have described earlier.

Number 433 Grassdale Road sold in September 1996 for $215,000, the block having an area of 10,690 m². There is a creek that enters the sale property at one corner and travels along a side boundary, then veers towards the rear boundary and exits. An old style low-set brick home was on the land at the time of sale and Mr Iveson applied a value of $15,000 to that house on the basis that it was sub-standard for the suburb and would be either demolished or extensively renovated. The sale land was described as being on a busy corner of Tilley and Grassdale Roads and being under threat of road widening with the introduction of a new Moreton Bay Road. Mr Iveson calculated the percentage discount for the 204 Stanborough Road sale compared with 443 Grassdale

Road at 6.4%, whilst my calculation was 5%. The various comments made in evidence by the respective valuers on the "Easement 2" sale properties were as follows:

- Mr Bertenshaw said that 204 Stanborough Road was an inferior property to the other sale properties included in the Easement 2 exercise because of its location on the corner of Stanborough and Grassdale Roads. He said that such a position was not favoured in a rural residential usage because of the intrusion of noise from such a location. Mr Iveson, on the other hand, saw an advantage in the corner location as it would allow the orientation of a house away from the western aspect.

- Both valuers agreed that the watercourse on 247 Grassdale Road had limited impact on that property as it is located touching the rear south-west corner only. Mr Bertenshaw said that by comparison the easement on 204 Stanborough Road is very large, having an area of 2,581 m² covering virtually the whole of the eastern boundary of the land and cutting across to the north-west exiting at the rear. On this basis he asserted that 247 Grassdale Road was substantially superior.

- Mr Bertenshaw did not value the house at 433 Grassdale Road, but his observation from the outside led him to the view that it was worth substantially more than $15,000. In any event he offered the criticism that the $15,000 value was a subjective view.

- It was generally agreed that the creek on 433 Grassdale Road had little impact on the frontage of the land in the sale.

Mr Iveson provided a further case study entitled "Easement 3" in which provided sales indicating the level of diminution reflected where easements for electricity purposes are imposed. He indicated that this exercise was not relied upon directly by him, but was included to show the level of impact of electricity easements on value. I see no benefit in discussing the "Easement 3" exercise further.

There was no mention in the evidence dealing with the "Easement 1" and "Easement 2" exercises of the terms of the easements in each case, nor of the practicalities associated with the grantee exercising rights under either easement or the impact on enjoyment of the servient tenement. It would have been necessary, in my view, for a valuer relying on the methodology employed in Mr Iveson's valuation for evidence of this type to be adduced to ensure that the lines of comparison are appropriate. In the instant case, Mr Iveson thought it to be of particular importance that the claimants would be denied the opportunity to beautify the easement area as others had beautified watercourse surrounds in the surrounding area. Photos were tendered showing such works of improvement on other properties. Mr Iveson also thought that the terms of the easement on the claimants' land conveyed the threat of further works or

intrusion by the grantee onto the grantor's land. It was not made clear to me whether these two issues were significant in the cases discussed in the "Easement 1" and "Easement 2" case studies.

Additionally, I have concluded that, given what both Mr Iveson and Mr Bertenshaw had to say about the sales in "Easement 1" and "Easement 2", I cannot be confident in adopting Mr Iveson's 6.5% or any other percentage allowance as fairly representing a diminution in value which should apply to the claimants' land. Not only is there a number of adjustments and judgments that need to be made in attempting to identify the percentage rate, there is a requirement to assume that variations in sale price are not referable to any market idiosnycrasies. It is not unusual for small variations in sale price to result from those human elements which influence transactions and the percentage rates sought by Mr Iveson or one indicated by adjustments made by me are too close to what might constitute a normal market variation to be adopted with any confidence. In addition, I have no basis upon which I might select an appropriate percentage factor in the range provided, assuming for the moment that the revealed rates properly reflect the depreciating effect on value of an easement, only.

There may be cases where a percentage diminution can be ascertained from the sales evidence and the identified factor applied to a property which has been the subject of an easement resumption. I note with interest that in *Kater v. Electricity Transmission Authority of New South Wales* (unreported 9 February 1996) the Land and Environment Court of New South Wales also considered this method, but in that case also found on the evidence that the method could not be reliably employed.

There is a further reason why I would not adopt a percentage diminution method in the instant case and that relates to the difference in size between the claimants' land and the lands which were considered in each case study. The adoption of a percentage rate ascertained from much smaller blocks of land produces a magnified compensation amount when applied to a larger block whereas the opposite would usually be the case. All things other than the size of the affected land being equal, an easement affecting 1,269 m² would result in a greater proportional impacted area in a small lot than in one the size of the claimants' land, thus a greater imposition on the use of the land would result. Let me demonstrate my concern this way: the application of a 6.5% reduction in value for an easement on a 10,690 m² block such as 433 Grassdale Road would, on Mr Iveson's analysed land value of $200,000, result in a depreciation of $13,000. For the claimants' land, however, valued at $247,000 and having an area of 19,104 m², a

diminution in the amount of $16,000 results. In the case of 308 London Road which has an area of 8,094 m² only, and a price of $190,000, the diminution in value would be about $12,350. Such figures indicate to me that whilst the percentage diminution method may be useful in certain cases, care needs to be taken to ensure that the properties which are the source of the adopted percentage rate, and the subject property, are comparable in the usual material respects having regard to the highest and best use of the land. It is important in the case of rural residential parcels to ensure, where the evidence supports the use of the percentage discount method, that it is employed to discount the value of the "site", not the value or each m² of the site, as if the size was a mathematical determinant of value. This is particularly important where there is no evidence of loss due to severance or injurious affection; and that is the case here.

I have already introduced Mr Bertenshaw's "before" value and have mentioned that it was based on a "site" value approach. This is how he assessed the diminution in value resulting from the imposition of the easement:

> "The only loss in value is attributable to a 'Blot on Title', and in accordance with Court precedents, this has been assessed at 10% of the freehold land value on a rate per square metre basis. No attempt has been made to discount the value of the affected area due to the existence of the watercourse.
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> **VALUATION**
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> | | | |
> |---|---|---|
> | VACANT LAND VALUE ASSESSED AT | | $245,000 |
> | RATE PER SQUARE METRE | | $12.82/m² |
> | EASEMENT AREA | | 1269 m² |
> | | | |
> | 1269 m² @ $12.82/m² x 10% = | | $1,627 |
> | **DIMINUTION IN VALUE** | (Say) | **$1,650** |
>
> "

In Mr Bertenshaw's view, as expressed in his written valuation, the natural watercourse was common in the before and after situations, the only difference being that after the easement was taken a small concrete apron was constructed on the claimants' land and an easement encumbered the title. Implicit in this is the proposition that the watercourse did not provide any particular advantage which was lost by the imposition of the terms of the easement.

Two of the "Court precedents" he referred to were *Bullivant v. The Minister* (1936) 4 The Valuer 160 and *Joyce v. Northern Electric Authority of Queensland* (1974) 1 QLCR 171. Both of these cases were concerned with lands which were farming properties and the valuation method used in each case reflected the value of the parent

lands on a price per unit area basis. They do not, in my understanding of the reasoning presented in the reported decisions, indicate an approach which should be employed in the case of a rural residential site valued on a "site" basis.

Mr Bertenshaw also referred to *Standfield v. Brisbane City Council* (Land Court unreported 16 June 1995). This case involved the acquisition of an easement for water supply purposes over a rural residential block of land, however, is readily distinguished from the present case as the land over which the easement was imposed was treated as surplus grazing land to the rear of the residential parcel and was valued by the Court and by the valuer for the resuming authority (Mr Bertenshaw in fact) as grazing land having a value expressed on a per unit area basis.

In short, I see none of the authorities referred to by Mr Bertenshaw as being of assistance in the manner suggested by him. Apart from distinguishing those cases in the manner that I have, I should point out as a general proposition that factual conclusions in earlier cases cannot provide anything but general guidance. That is, they are not evidence to be used in a later case and, of course, a conclusion on the level of diminution in value is a conclusion of fact.

It is generally useful to recall the principles that guide us in a case such as this and I can find no better expression of such principle than that which is to be found in *Joyce v. The Northern Electric Authority of Queensland*:

> " The principles to be applied in the compulsory taking of an easement are no different from those applying when the full fee-simple is taken. This Court must restore, as best it may, the claimant in money form, to the position which he enjoyed prior to the taking of the easement. For practical purposes it becomes a matter of assessing the extent to which he has been disadvantaged as the natural and reasonable consequence of the taking of the easement." (at 177)
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> " Each case must be considered according to the terms and conditions of the easement created and the frequency and magnitude of the disturbance likely to result in consequence to the claimant's proprietary rights." (at 178)

It would, in my view, be incongruous to assume that a hypothetical prudent purchaser would view the land, encumbered by the easement as being a piece of rural residential land, a small part of which has had its value reduced by a particular or even an approximate amount as if its unencumbered value was the same per m² as every other m² of the land. Consistent with the observation that a parcel of rural residential land is purchased as a "site" is the proposition that the "site" price is arrived at having

regard to the positive and negative features of the land including, where relevant, the presence of an easement. I agree with Mr Bertenshaw's proposition that it is only the 1,269 m² of land over which the easement has been taken which has diminished in value, however, I do not consider that it is consistent with the "site" value method to attempt to assign a value to the affected part and to diminish that value following the resumption. In my view the proposition is better expressed by saying that the overall value with the easement having depreciated part of the land would be less than the overall value with no easement. I therefore find that the approach adopted by Mr Bertenshaw, whilst appropriate for grazing or farming land, is not appropriate for land purchased as a "site".

I can sympathise with both valuers in their respective attempts to produce their valuations based on a methodology which is discernible and capable of analysis and criticism. In the absence of suitable "before" and "after" sales evidence, their desire to produce reasoned outcomes is understandable. Nevertheless, I am of the view that neither method is valid. The best that I can do is to adopt what I think would be the perspective of the hypothetical prudent purchaser and to consider the easement from that viewpoint. The position that I have arrived at thus far is similar to that confronted in *Brancatisano & Anor v. The Minister* (1967) 16 LGRA 405.

The start point is the "before" value and given my conclusion at the end of these reasons, it matters little whether $245,000 or $247,000 is adopted, however, I will comfortably use Mr Iveson's figure of $247,000 as the "before" value. Now that value is with the natural watercourse in place. There was no structure on the subject land associated with the watercourse, there being vegetation in the easement area.

The evidence is that the stream cut into the south-west corner of the land only marginally, but that the easement involved another 4 or so metres intrusion into the land. Mr Iveson's applied diminution in value is based on the claimants, after the resumption, being denied the prospect of beautifying the watercourse and its frontage. The owner of the encumbered property can in terms of the easement mow the grass on the easement area, however, the grantee has the right under the grant of easement to remove any other vegetation. The easement's location at the front of the property means that the impact, such as it is, on the potential for beautification is greater than it would be were the easement found, for example, at a rear corner. It was accepted by Mr Bertenshaw that there is some merit in Mr Iveson's point with respect to beautification, however, in his view the issue is one of only minor significance. I observe that the easement document

allows for permission to be granted to the registered proprietor with respect to the planting of trees and placing of structures on the easement area and whilst there was no evidence as to the prospect of such permission being forthcoming, I would have thought that appropriate shrubbery which supported stream stability and did not impede water flow would have a prospect of being allowed. Indeed, evidence given by Peter Edward Barnes for the respondent was that the planting of trees which would both stabilise the banks and shade out weed growth was generally an appropriate form of management along streams of the type involved. It is important that I make it clear, however, that on this particular point Mr Barnes' comments were not directed to the claimants' property, but were made as part of a more general discussion. Importantly, however, that the claimants need to seek permission to carry out beautification and cannot freely plan and implement beautification over an area of 1,269 m² at a front corner of their land. The easement area is deeper into the land than it is wide at the frontage, therefore does not impact to the extent that it would were the reverse the case, however, as I indicated earlier, it covers just under one-third of the frontage of the claimants' land. I think that Mr Bertenshaw has been a little too dismissive of this claimed loss and find that some allowance needs to be made for it. Indeed, Mr Bertenshaw's valuation appears to have been based on the proposition that the watercourse was a disadvantage before resumption and that this disadvantage persisted after the resumption. His concession during cross-examination that the stream offered a prospect of beautification is, therefore, of significance.

The other part of Mr Iveson's concerns falls under the heading of "Blot on Title". There were two aspects to this: first, the mere presence of the easement encumbrance on the title would have an off-putting effect to an intending purchaser and would deliver to that purchaser a bargaining tool; and second, the prospect that the grantee will exercise its rights under the easement to the fullest and therefore increase the level of intrusion into the claimants' land beyond that which has already occurred was seen by Mr Iveson to be a matter of major significance.

In my view the correct approach is not one of reading the grant of easement document and assuming the worst, but of adopting a practical view of the matter and conducting inquiries which would lead to an intelligent assessment of the risk of further intrusion. Such an approach is supported by the quotation I have taken from p.177 of *Joyce v. Northern Electric Authority of Queensland* included above, and also by *Standfield v. Brisbane City Council* where the then learned President had regard to

evidence of the nature of the works constructed under the authority of the proclamation, to the degree of maintenance required and to what would probably occur should duplication of the pipeline, in that particular case, be required at some stage in the future. In other words, the Court adopted a practical view and attempted to place itself in the shoes of the hypothetical prudent purchaser in considering the significance of those practical issues.

I have already mentioned Mr Barnes who is the acting supervising engineer for the Waterways Program in the Brisbane City Council. He gave evidence which led to the point that it was his view that based on the Stormwater Management Plan for the Tingalpa sub-catchment of Bulimba Creek, which covers the claimants' property, the prospect of the City Council wishing to extend works into the easement area further was remote. Mr Barnes explained that the Stormwater Management Plan is a strategic document which has not and need not be formally adopted by the Council, but is used to guide development in the relevant area in order that development conditions can be appropriately devised and imposed. According to the Management Plan, no works beyond those presently in place on the claimants' land are intended; indeed, there is no flooding problem in the area which would warrant expenditure and adjustment to the natural stream. The stream presently performs well and any stream alteration may result in an undesirable increase in sediment flowing to Moreton Bay. Other than the improvement of road crossings both upstream and downstream from the claimants' land, no works in the form of stream widening or flood mitigation works have been carried out by the Council.

Mr Barnes did admit, however, during cross-examination that water drainage management plans would not always remain static and upstream developments can, in spite of the best intentions by the council, result in an alteration in downstream drainage performance. He thought that the prospect of such a drainage change impacting upon the claimants' land was not probable, but it was a possibility.

The disabilities which I have discussed in the preceding paragraphs do not, in my view, warrant an assessment of compensation in the amount of $16,000 or even in a figure approaching that level. Whilst I think that Mr Iveson has been earnest in his task of assessing compensation for his client, he has been driven more by technicalities than in drawing back and taking a broad view of the situation. On such a broad view, it seems to me that a figure of $16,000 would be excessive even in circumstances where the area of 1,269 m² was resumed as a fee simple parcel from the parent block. On the

other hand, I think that Mr Bertenshaw has arrived at a figure which, though not supported by his technical approach, does reflect the opinion which he expressed as to the significance of the encumbrance in the "after" situation. Notwithstanding this, I am of the view that he has had insufficient regard to the impact of the easement on the potential for the land owner to freely go about beautifying the part of the land over which the easement directly impacts. Accordingly, I will make some more allowance for this and will also include in such allowance my assessment that there is a small though discernible risk that the grantee may act in the future to extend the concrete apron into the easement area or otherwise intrude further onto the claimants' land. My final figure must in the circumstances be a value judgment but supported by the evidence from both valuers concerning the nature of the imposition of the easement, and my appreciation of that evidence. In the result, I assess compensation for the diminution in land value in the amount of $5,000. In the exercise of the discretion granted to the Court under s.28 of the *Acquisition of Land Act* 1967 I order that interest be paid by the respondent in the amount of $78 with respect to the period 25 July 1997 to 24 December 1997 and thereafter at the rate of 6.5 per cent per annum calculated from 25 December 1997 on the amount of $3,350 up to and including the day immediately preceding the date of payment.

RP SCOTT

MEMBER OF THE LAND COURT