[1999] QLC 96

LAND COURT

BRISBANE

17 SEPTEMBER 1999

Re: A99-01 –
Determination of Compensation
Resumption of Land for Environmental Purposes
Acquisition of Land Act 1967

BETWEEN:

Dean Leonard Wanless and Amanda Nicole Wanless

Claimants

AND

Brisbane City Council

Respondent

J U D G M E N T

By Notification of Resumption published in the Government Gazette on 11 September 1998 land described as Lot 12 on Registered Plan 819279, County of Stanley, Parish of Tingalpa, City of Brisbane, containing an area of 12.15 ha, was taken from that date by the Brisbane City Council, for environmental purposes.

The land is situated on the southern frontage of Prout Road, Burbank, about 700 metres westerly of Bacton Road, 14 km radially south-east of the Brisbane GPO.

Mr and Mrs Wanless were the registered proprietors of the land, having purchased it by contract dated 30 April 1997, from Kam Fung Lui and Wai Chi Yim, for the amount of $410,000. A Claim for Compensation dated 28 September 1998 was made in the amount of $516,500 set out as follows:

Land	$430,000.00
Disturbance (stamp duty on purchase, interest, legal fees, valuation fees)	$86,500.00
Amount of claim	$516,500.00

When the matter was called on for hearing and during the course of the hearing, leave was sought by Mr G Allan, counsel for the claimants, without objection

from Mr R Needham, counsel for the respondent, for the claim to be amended. Leave was granted and the amount finally claimed was as follows:

Value of land taken			$410,000.00
Disturbance Items:			
(i) Stamp duty	($10,200)		
(ii) Legal fees	($885)	$11,085.00	
(for purchase of replacement property)			
(ii)(sic) Out of pocket expenses incurred in looking for replacement property		$515.00	
(iii) Valuation fees		$1,420.00	
(iv) Legal costs and outlays		$3,806.30	
Subtotal			$16,826.30
Total			$426,826.30
Less			
Advance against compensation (paid on 21 December 1998)			$309,999.40
Net claim			$116,826.90

Plus interest since date of resumption.

Mr Needham confirmed that a payment had been made on 21 December 1998 as an advance against compensation based on a land value of $300,000; $5,226.30 for the valuation and legal fees (as claimed, there being no dispute about that amount or the validity of that part of the claim) and a further sum of $4,773 which was said to have been a calculation of interest up to the date of payment of the advance. Mr Needham's advice as to the quantum of the advance will be adopted.

The Court was also advised by Mr Needham that the respondent had "made an open offer and is openly stating in Court that it is prepared to pay $360,000 for the value of the land".

The claim for loss of land was in accordance with a valuation prepared by Mr KP Walsh, a registered valuer in private practice, whose opinion it was that the best evidence of the market value of the subject land at the date of resumption was provided by the sale of the subject land itself in the amount of $410,000 on 30 April 1997.

There was no dispute between the parties, through their valuers, that the level of value for rural residential sites in the Burbank locality had remained relatively static

from the date of the sale of the subject land, and indeed for several years before that date, up until the date of resumption.

The formal valuation of the land as at the date of resumption as placed in evidence by the respondent Council was in the amount of $300,000, the valuation being under the hand of Mr G Jorgensen, a registered valuer also in private practice. The "valuation finally put in evidence by the constructing authority", as is relevant to the question of costs pursuant to s.27 of the *Acquisition of Land Act* 1967, was said to have been $360,000 based on the oral evidence given by Mr Jorgensen that, if the resumed land was to be regarded as having significant views, (which he believed was not the case) then he would have valued it in the range of $350,000 - $360,000.

There was no dispute between the parties that, in private ownership, the highest and best use of the "Non Urban (Category A)" zoned land was as a rural residential site, or that the preferred building position was on a knoll feature in the wider southern section of the lot. A building site with approximate area of 2,000 m² had been cleared and levelled at the crest of that knoll, within a natural "bushland" setting. From ground level on that site, wide views to the north and east, but in particular to the east over the waters of Leslie Harrison Dam in the foreground then to the distant Moreton Bay, would be available, if peripheral vegetation cover was permitted to be removed.

However, the land was subject to two Vegetation Protection Orders (VPO's) both of which had come into force prior to the purchase of the land by the claimants. One VPO covering the rear section of the site within which the knoll is situated, is of the category (VE) "Vegetation of Any Nature in a Particular Area", which is intended to protect "vegetation of any nature, being all trees, shrubs, ground cover and vines. Even dead material, such as a tree in which a significant bird species may nest, may be worth protecting.

The Council recognises that there may be some situations in which it is necessary to prune, trim or clear vegetation protected by an ordinance in this category. …" (see p.11 VPO brochure Exhibit 13).

As is relevant to this category, and the subject land, the Council on "Application to Damage or Interfere with Protected Vegetation" may approve such application if the vegetation is:

- in a position or condition which is considered to be dangerous;

- within 15 m of a lawfully constructing building on an allotment greater than 1 ha;
- required to be moved to comply with other legislation, eg noxious weeds, fire hazards abatements.
- part of an ornamental garden or an area under cultivation or pasture at the time of the introduction of the ordinances.

The second VPO covering the balance area frontage section of the site is of the category (GT) which refers to groups of trees, but in broad terms protects only a tree or shrub of a height exceeding 3 metres. The impact of that VPO is not of real significance in the present matter.

However, the effect of the VPO which protects "all vegetation" and particularly that vegetation on the northern and eastern slopes of the knoll, was an issue which led to the valuation dispute. That vegetation has become relatively dense, comprising some mature eucalypt trees and thick regrowth or "juvenile" trees native to the poor quality gravelly soils. The expansive views which could be made available with some clearing, and some trimming and pruning, were severely restricted by the vegetation which existed at the date of resumption. The eastern slopes immediately below the knoll are moderate, with the height of vegetation rising well above the levelled building platform.

It is the respondent's case that a prudent purchaser of the subject land would have expected that the VPO's would be strictly enforced. It was submitted that even if a dwelling was to be constructed on the extremity of the eastern rim of the levelled knoll, and a 15-metre buffer was permitted to be cleared down the moderate slope, the view to the east would still be significantly restricted, at ground level. The view from the upper level of a two-storey dwelling would still be restricted by the tree canopies, in the respondent's submission.

The respondent called as a witness Mr SL McLean, currently employed by the Brisbane City Council as a Program Officer, Biodiversity Planning, Natural Environment Branch. Part of his duties involves dealing with VPO's and advising owners how they may clear land subject to them. In his written statement, he indicated that the intention of the GT category VPO on the northern part of the allotment was to protect the koala habitat while the intention of the VE category VPO was to protect all wildlife habitat and in particular, the koala habitat. His statement included the following paragraphs:

"7. To build a dwelling on the subject land, a building application and a Vegetation Protection Order application would need to be lodged with Council. The latter application would be assessed by an officer, such as myself.

8. In assessing such an application, I would investigate the proposed extent of interference with the protected vegetation and whether this constituted a significant impact upon the ecological values of the land. Where an application will not protect these values it is refused by Council.

9. For the subject land, Council would have allowed a building location envelope (which includes the dwelling and on-site waste disposal) in the clearing of the knoll.

10. The Vegetation Protection Local Law allows for a further 15 metres of clearing from the building. I believe there is sufficient room on the knoll for this to be included so that no or little further clearing would be needed.

11. Council would not have allowed any clearing of the vegetation outside this platform merely for the purpose of obtaining views."

The evidence was that Mr McLean had met Mr Wanless on the site, after the contract of sale to the claimants had been signed, but before it was settled. Mr McLean stated that "the proposed construction of a dwelling and associated requirements of a Vegetation Protection Order application" had been discussed at that meeting.

Mr Jorgensen had formed the opinion that, while the highest and best use of the subject land would have been served by the construction of a dwelling on the knoll platform, no clearing of the peripheral vegetation would have been permitted to expose the otherwise available view.

In his opinion, rural residential allotments in the locality, comprise three types:

- "Premium" blocks, or "those with bay or city views";
- "Bush" blocks, "being those without a view and more of a secluded lot with mature tree growth";
- "Hobby Farm" blocks, "which are often cleared and utilised for horse paddocks or small-scale agriculture".

Mr Jorgensen considered that, "The two VPO's that cover this property, particularly the rear half where all vegetation is protected, put this property in a position of a bush land type block. ***Any potential view from the rear knoll is lost due to this VPO***. Therefore we consider that these restrictive orders greatly inhibit the likely sale price of this allotment." (emphasis added)

Mr Jorgensen's investigation of the available sales evidence revealed two sales of vacant rural residential sites which he saw as representing the "premium" type; one sale of an improved rural residential site (with a dwelling) which immediately adjoined the subject land to the west, (the "Rushworth" sale), which he placed in the "premium" type, albeit incorporating some hobby-farm usage; one sale of a vacant site of a mix between "premium and hobby farm" type; one sale of a "hobby farm" type site and one sale of a "bush block". All of these sale sites were subject of a VPO.

More will be said of the sales evidence later. Suffice to say at this stage, that Mr Jorgensen was of the opinion that the "Rushworth" sale was "one of the best sales to rely upon" although "the added value of the then 3 year old improvements is open to wide interpretation". His interpretation of the vacant land sales evidence suggested to him that the "Rushworth" sale indicated a land value, with the clearing as existed allowing wide panoramic views to the Bay, of between $350,000 and $400,000.

The subject land is surveyed in a hatchet-type shape with frontage of 150 metres to the bitumen sealed Prout Road, maintaining that width to a depth of 330 metres, before widening on the eastern boundary by a further 90 metres for another 300 metres to the rear boundary. Services available include reticulated water, electricity and telephone.

A high voltage electricity transmission line on double round timber pole supporting structures and accommodated within a registered easement, traverses the frontage "handle" section of the block from westerly of the centre of the road frontage, in a south-easterly direction across the northern part of the eastern boundary. It then re-enters the land by traversing the immediate north-eastern corner of the wider section. One of the double pole supporting structures is located immediately within the road frontage, in an exposed position.

Mr Jorgensen saw the existence of the electricity transmission line as creating a significant blight. He commented (at p.56 of his report):

> "The obvious location of this easement, over half of the street frontage/entry area, together with the tower(s), we feel would stop the majority of potential purchasers from buying this allotment, particularly at the $400,000 price range. The easement is further visible from a number of positions along the existing road into the site. A prominent exposure point being at the southern wing of the road on the rise up to the rear platform/knoll. At this area the road adjoins the easement clearing and provides a full view of the same."

Whilst he acknowledged that the subject land had sold in April 1997, Mr Jorgensen did not accept that the sale price represented fair market value. He made the following comments (p.55 of his report)

> "However given the then thick standing of mature trees over the whole of the site; the then existing Vegetation Protection Orders, the obvious location of the power easement within the frontage/entry area and available sales evidence, we feel that the price paid is both excessive and not supportable."

Mr Walsh, on the other hand, had satisfied himself that the circumstances surrounding the arm's length purchase of the subject land by the claimants met the *Spencer* test of market value (see *Spencer v. Commonwealth* (1907) 5 CLR 418 at p.432, Griffith CJ and at p.441 Isaacs J). The purchasers had been aware of the existence of the electricity transmission line; were aware of the existence of VPO's; had familiarised themselves relative to the market for rural residential land through their quest for a site in the locality; were not over-anxious and had negotiated the purchase price after a series of offers.

In Mr Walsh's opinion there had been two sales which supported the price paid by the claimants as being representative of market value. Both of those sales had been included in Mr Jorgensen's schedule of sales evidence. Those sales are discussed initially as follows:

Mr Walsh's Sale 2/Mr Jorgensen's Sale 4

21 Simmins Place, Burbank, $338,250, 22 January 1997, 11.01 ha, zoned "Non Urban (Category A)", selectively cleared, VPO (GT – trees 3 m and above); narrow frontage, fan-shaped lot; access into site over jointly developed causeway on gully area near street frontage. The land is of undulating contour, before rising moderately to the rear. Mr Walsh saw some potential for temporary flash flooding of the access causeway while Mr Jorgensen discounted that as being only a remote possibility which would not have affected the market value of the land. The location is further from the city and Mr Walsh considered the land to provide a rural homesite of inferior market value in comparison with the subject land. Mr Jorgensen on the other hand described the site as having superior location in terms of both street and frontage presentation. There was no dispute that the preferred homesite on the sale land was at lower elevation than the knoll on the subject land. No views of consequence are available from the sale site.

Mr Walsh's Sale 3/Mr Jorgensen's Sale 6

130 Cherbon Street, Burbank, $385,000, 20 November 1988, 10.33 ha, zoned "Non Urban (Category A)", selectively cleared, VPO (VE – all vegetation), gentle slope westerly away from a long road frontage. Mr Walsh said that the rear boundary of the block meets part of the backwater of Leslie Harrison Dam (when the dam is at full capacity). His description included – "Location is further from the city and considered inferior to the subject land." Mr Jorgensen described the land as having a slight fall downward from the road frontage to the rear, adjacent to both local parkland then the Tingalpa Reservoir, and limited, "through the trees", water and uncleared parkland views. Mr Jorgensen agreed in his oral evidence that water views were of an inlet or back water which receded when the water of the dam fell below full capacity. He had observed that there was an electricity transmission line supported on steel towers traversing adjoining land to the north, visible from the northern section of the sale site but not the southern section. An access strip to the uncleared parkland (JC Trotter Memorial Park) adjoined the southern boundary. He provided photographic evidence which showed the limited degree of exposure to the electricity line but as well the location of a large "mobile phone tower" directly across the road. Mr Jorgensen considered that, in comparison with the subject land, the sale land was a superior property with "possible long-term subdivision potential due to 422 metre road frontage". He classified the land as being a "mix of premium and hobby farm". Mr Walsh was of the opinion that the land had no future subdivisional potential due to its location adjacent to the dam. There was no dispute that the knoll on the subject land was higher in elevation than any point on the sale land.

Conclusions relative to the Common Sales Evidence

The Court was invited to view the subject land and the sale properties, in company with the valuers. That inspection was helpful in understanding the difficulties with which the valuers were faced in making "like with like" comparisons. Except for the fact that both of the common sales were of rural residential sites in the same general locality, and both subject to VPO's, direct comparison was somewhat difficult.

It appears to me that the divergent professional valuation opinions as to the comparability of the subject land with these two sale blocks, seems to have stemmed from the equally divergent opinions as to the extent of views capable of being obtained from the subject land.

If Mr Jorgensen was influenced by the "through the trees" views of the uncleared nearby parkland and, at best, the limited water views from the Cherbon Street sale, as it appears he was, when including that land in his classification of a "mix of premium and hobby farm", then I am not persuaded that that sale supports his opinion as to the market value of the subject land. The Cherbon Street land is within the immediate catchment of the Leslie Harrison Dam and Mr Jorgensen's suggestion that the land may have some long-term subdivisional potential seems to be at odds with the stated intent in the Town Plan relative to the preservation and protection of water catchment areas in the "Category A Non Urban" zoned lands.

There was no dispute that the gravelly soils of the subject land were of inferior quality to the sandier grey forest soil types of Cherbon Street, for a hobby farm type activity, if that was an issue, but I have difficulty in understanding how the Cherbon Street land rated the "premium" site inclusion in Mr Jorgensen's considerations.

There is seen to be a greater degree of comparability between these two selectively cleared, lower elevation sale blocks as rural residential sites than either with the subject land with its elevated knoll building site feature. If anything, the higher sale price for the Cherbon Street land than for the Simmins Place land might have indicated a higher trend in values in the period from January 1997 to November 1998, but that is not a conclusion open to the Court because both valuers suggested that, at least in a broad sense, there was no general change in the level of market value during that period for rural residential sites in the locality.

If I was left with no additional evidence and was limited to a decision whether or not the two common sales either supported or did not support the level of value indicated by the purchase of the subject land in April 1997, I would lean in favour of the view that the purchase price of the subject land was not so high that it should be regarded as a sale out of line with the market, and one which should be discarded as evidence of value.

Mr Jorgensen's Remaining Sales

Having come to that conclusion, it is necessary to closely consider the remainder of Mr Jorgensen's basic evidence.

The remaining sales evidence is discussed as will follow, but not in the order of weight given by Mr Jorgensen:

Sale 5

580 Grieve Road, Rochedale; $230,000, 18 June 1988, 4.11 ha, zoned "Non Urban (Category A)". This site is surveyed as having abnormally narrow street frontage, for a rural residential site, of about 51 metres, with depth of about 800 metres. The preferred homesite due to its elevation, is immediately adjacent and exposed to the road. The balance of the land falls fairly steeply to the rear. The homesite has distant Moreton Bay views and is located in a street of predominantly good quality homes many of which are constructed in proximity to the road which follows an elevated ridge line. It was observed on the inspection that an electricity transmission line of apparently high voltage, traverses the block easterly of the homesite and within the field of view from that position. Mr Walsh suggested that the Rochedale address of this site was a factor which brought with it differing market considerations. It seems to me however that regardless of its size and the view available, this site with its unusual shape and difficult topography would most likely have very limited appeal within the normal rural residential site market, let alone the market for "prestige" quality development.

I find the evidence provided by this sale to be of little, if any, assistance in determining the market value of the subject rural residential site.

Sale 3

409 Prout Road, Burbank; $280,000, 26 February 1996, 6 ha, zoned "Non Urban", located in the same street, being the fourth allotment east of the subject property. It was described as being "heavily timbered with a cleared central portion". The evidence is that the land is subject to a VPO (VE – all vegetation). The land is of easy contour, at a lower elevation than the frontage section of the subject land with no comparable elevated building site, or view potential.

The property had been subject to a contract of sale which was not completed when the intending purchaser established "that the Council had an interest in the property". It seems to be accepted that the contract price had not been influenced (as far as the vendor was concerned) by that Council interest. The Council then proceeded to purchase the property "on similar terms at the same price". It is the sale to the Council upon which Mr Jorgensen relied.

On the evidence there is no disclosed reason for the sale not to be accepted as reflecting open market value.

Mr Jorgensen classified this sale site as a "bush block" as he did the subject land. In his opinion, the subject land was, in comparison, disadvantaged by the

presence of the electricity transmission line and the cost of providing acceptable vehicular access to the elevated homesite. Nevertheless, he saw the sale land as an "inferior property due to size". That inferiority was expressed in his valuation of $300,000 for the subject land.

Mr Walsh had not used this sale as basic evidence of value, for the reason, he said, that he had sales of sites similar in size to the subject land, as well as the sale of the subject land itself. However, on the assumption that it was an arm's length transaction Mr Walsh said he would have "no difficulty in putting it in as part of the body of sales evidence" in support of his valuation.

There can be no doubt that construction of vehicular access is a cost factor involved in the use of the knoll on the subject land as a homesite. However, even if it was assumed that the potential view could not be exploited in any way to improve the glimpses, which was Mr Jorgensen's assumption, it seems to me that the knoll feature, which was included fully within the subject site as a deliberate survey configuration exercise (as will be discussed later) was not recognised sufficiently in Mr Jorgensen's valuation in the amount of $300,000, in comparison with this particular sale.

Sale 1

155 Prout Road, Burbank; $500,000, 6 July 1992, 6.07 ha, zoned "Non Urban". This land is located in close proximity to the south-west of the subject land but in the western section of Prout Road which runs northerly off Mt Gravatt-Capalaba Road then unformed in the section past the sale site. Mr Jorgensen described the land as a "very elevated hill top allotment, which comprises one of the highest allotments within the Prout Road Estate. The land has a natural platform area …, 270 degree view of Brisbane and Moreton Bay. The sale price included a newly constructed 480 metre long, 3 to 4m wide bitumen sealed driveway from the street frontage to the knoll". Mr Jorgensen estimated that the construction cost of the driveway would have been $48,000.

As I understood the evidence, this site at the date of sale, was subject to the same VPO (MP0O1VE06 – all vegetation) as the VPO on the subject property, which came into force on 31 March 1992. The difference is that the views as described by Mr Jorgensen were said to be available at that date from the cleared platform. The view available at the time of inspection (albeit seven years later) was apparently not nearly as expansive as at the date of sale, due to growth and regrowth of peripheral vegetation. There was no suggestion however that the VPO was considered at the

date of sale, or at the date of a subsequent resale to the Council, to be any impediment to the control of protected vegetation when such control would clearly have been necessary if the expansive view was to be retained as a permanent and valuable feature.

The later sale to the Council was said to have taken placed in 1994 for $590,000. Mr Jorgensen was confident that the land and driveway component remained, in that sale, in the amount of $500,000. The difference, he assumed, related to disturbance items for which the Council may have been obliged to pay compensation had resumption action, rather than a negotiated settlement, been necessary.

There is no dispute that this sale land was, as Mr Jorgensen described it, a prestige rural residential site with, at least at the date of the first sale, expansive views from the cleared and secluded building site which was higher in elevation than the knoll on the subject land and with appropriate vehicular access already constructed. Although the sale took place many years before the date relevant in this matter, there was no dispute that the generally static level of values had been maintained in that period.

Sale 2 (The "Rushworth" Sale)

309 Prout Road, Burbank; $452,000, 28 June 1996, 11.25 ha, zoned "Non Urban (Category A)". Mr Jorgensen described the property as follows – "Adjoining property to the western boundary of the subject property. Improved with a then 3 year old, two level, four bedroom, approximately 234 sqm AV Jennings dwelling, with an in ground pool and bitumen sealed driveway."

Mr Jorgensen estimated the replacement cost of the residential improvements to be $160,000.

The frontage section of this sale property is higher in elevation than the frontage section of the subject land falling moderately to steeply towards the subject land. At its highest point near a dogleg in the western boundary where the dwelling had been constructed, the land is at about the same elevation as the knoll in the subject land. A significant difference is that the frontage section of the sale land had been selectively cleared and although subject to the same VPO as the frontage section of the subject land (MP75GT54 – protecting trees and vegetation over 3 metres in height), wide, virtually uninterrupted, views are available from the homesite, to the north and east, and capable of being maintained due to the slope of the land. The rear

section, southerly of the dogleg in the western boundary, is subject to the same VPO (MP01VE06 – all vegetation), as the rear section of the subject land and also Mr Jorgensen's Sale 1.

In his "analysis" of this sale, Mr Jorgensen stated – "The lower elevated sale at 409 Prout Road at $280,000" (Sale 3) "together with other sales would suggest that, if vacant, this land in a cleared state, would have a value of between say $350,000 and $400,000. The Simmins Place and Cherbon Street sales would seem to confirm this range. This then suggests the added value of the improvements is between $52,000 and $102,000 reflecting a discount/depreciation rate on the improvements of between 35% and 66%."

As indicated earlier, Mr Jorgensen in his report at p.55, under the heading of Valuation Rationale, subheading Sales Evidence, at para 18.3 said:

> "In addition to the commentary made within the sales evidence, we summarise our thoughts by saying that we consider that the Rushworth sale is one of the best sales to rely upon. However the added value of the then 3 year old improvements is open to wide interpretation. In our analysis we have discounted these improvements."

The "Rushworth" land is clearly superior to the subject land. With the stance taken by Mr Jorgensen suggesting that the "Rushworth" sale was one of the best sales upon which to rely, the circumstances of the sale came under close scrutiny. Mr Walsh had not used the sale for the reasons first that it was an improved property and as such not comparable, then second that he had understood that the vendors in the sale had been over-anxious to sell. Having become aware that Mr Jorgensen was relying on the sale, Mr Walsh then made inquiries of Mr Rushworth. An affidavit sworn by Mr Rushworth was produced. Mr Rushworth stated that the property was purchased after an auction. At the time he had been informed by the agent that the reserve price was $600,000, and the property was to be sold as part of a divorce settlement. He understood the vendors were anxious to proceed. The Rushworths' principal reason for buying the property was for its location and views. They were considering either demolishing the dwelling or substantially altering it, feeling that the quality of the dwelling was substantially inferior to the quality of the land. They subsequently came to the view that it would not be economically feasible to remove the dwelling and they had decided to make substantial alterations to the structure at some time in the future.. The main motivation for their purchase had been the land itself as distinct from the dwelling.

Mr Rushworth had not been called for examination, as Mr Jorgensen had no quibble with the contents of the affidavit. However, his inquiries of Mr Rushworth had indicated that it was not until after settlement, that they had engaged a "designer" to give them advice as to whether they should demolish the dwelling or improve its quality to be in keeping with that of the site. He saw it as worthy of mention that the Rushworths had sought permission to occupy the dwelling, before settlement.

It was submitted by Mr Needham that the circumstances leading up to the eventual sale of the property subsequent to the auction, were not indicative of the vendors being over-anxious or not having properly exposed the property to the market. The evidence was that the property had been listed for sale at $600,000 for some considerable time prior to the auction. Nevertheless, this seems to me to present a good example of the danger in the use of a sale of an improved property as the prime basis for the valuation of a vacant site. Furthermore, due to the problematic question as to the added value of the improvements, Mr Jorgensen was forced to take the curious approach of "analysing" the land content by reference to other sales evidence. After all, it was the land content supposedly indicated by this sale, which was to provide the best evidence of value in the valuation of the subject land. Even so, he found a range of value for the "Rushworth" land which appears to me to be too low based on the other sales evidence. He suggested that his Sale 3, at a price of $280,000 and the sales of the Simmins Place land at $338,250 and Cherbon Street at $380,000 supported a land content in the range of $350,000 to $400,000. The overall oral evidence, including that of Mr Walsh, indicates to me that in comparison with those sales mentioned by Mr Jorgensen, he has chosen to place insufficient weight (even at the higher end of the suggested range of values) on the significant feature of the elevation and panoramic view available from the Rushworth building site.

If the improvements on the "Rushworth" land could be argued to add value, then it seems to me that, regardless of the marketing history of the property, the weight of alternative evidence would indicate that it was the "Rushworth" sale which should have been discarded as reliable evidence of fair market value.

The Sale of the Subject Land

Mr Jorgensen had not investigated the circumstances of the sale by interviewing either the vendors or the purchaser. He was aware, however, that the vendors had been responsible for the creation of the subject parcel, to fully include

within its boundaries, the knoll feature. At pp.7, 8 of his report under the heading 15.8 "Sales & General History", he stated:

> "In February 1994, the then owner of Lots 2 & 3 on RP 223200, Messrs Kam Fung Lui & Wai Chi Yim reconfigured these lots so as to create Lots 12 & 13 on RP 819279. The realignment of the central boundary allowed the 92.8 metre knoll to be incorporated within Lot 12.
>
> The then new Lot 13 was sold onto the Brisbane City Council on 26 May 1997 for $240,000.
>
> Lot 12 was sold to A.N. & D.L. Wanless on 30 April 1997 for $410,000."

Mr Jorgensen made no further reference to the sale of Lot 13 to the respondent. No mention of that transaction was made by Mr Walsh. It has to be assumed, therefore, that no evidentiary weight can be placed on that transaction. However, it is observed that Lot 13 might best be described as the "balance" area of the reconfiguration. Lot 13 contains the smaller area of 10.35 ha, is of quite irregular shape, having had the knoll feature excised by survey and is then generally lower in elevation than the subject land. It is also encumbered by two sections of the powerline easement.

In the absence of evidence to the contrary, Lot 13 would appear to be land of significantly inferior rural residential quality in comparison to the subject land.

There was no explanation for a Notice of Intention to Resume the subject land having been first served on the previous owners, apparently on 29 May 1997, when the sale of Lot 13 from those owners to the respondent, had taken place by contract dated three days earlier.

In any event, it would appear on the evidence that while the claimants had been alerted by their agent to the possibility that the subject land might have been acquired by the respondent, they had no knowledge of any formal intention by the respondent to actually resume the land, until after settlement had occurred.

The previous owners of the land had been approached by the claimants' agent and that resulted in an offer to purchase being made by the claimants in the amount of $370,000, countered by an offer to sell at a price of $450,000. A series of offers and counter offers over a relatively short period, resulted in a contract being signed in the amount of $410,000. The purchasers had become informed of market levels of value in the general locality through their efforts to secure a quality rural residential block (over a period of some months). Their intention was to build a dwelling of a

prestigious nature in keeping with their appreciation of the nature and quality of the subject land and the preferred homesite on the knoll.

The oral and written evidence of Mr Wanless was that he and his wife had considered the land well worth the price "considering its views and locality". They were fully aware of the existence of the "power lines running through the property but felt they did not detract from the quality of the land to any significant degree". There was no evidence to the effect that any reference had been made in the contract to the existence of the VPO's. However, it was Mr Wanless's evidence that they were aware of the existence of VPO's on land in the Burbank area, had been informed by the agent, of their existence on the subject land, and had made general inquiries before the specific purchase of the subject land, as to the nature of the ordinances.

Mr Wanless had consulted with a town planner, subsequent to signing the contract, and was also informed "among other things, about the fact that a Vegetation Protection Order existed on the land and what this meant". His understanding had been that despite a VPO, he could still clear some trees for building purposes. The town planner had organised for Mr Wanless to meet Mr McLean on site, and specifically on the site of the knoll. Although there may have been some misunderstanding between Mr Wanless and Mr McLean, after a discussion on the site for about three-quarters of an hour, Mr Wanless recalled speaking of his intention to build on the eastern side of the levelled area and having made reference to the significant views to the Bay which would be available from that position. Mr Wanless accepts that Mr McLean had indicated to him that he should not have expected to clear vegetation "merely for improving the view" but also that the question of obtaining approval for clearing of vegetation to mitigate potential fire hazard had been discussed.

It is clear that Mr Wanless came away from the meeting with Mr McLean believing that there "should be no problems" with his development intentions. As I understood his evidence, Mr McLean had not envisaged any approval problems for an application to build a dwelling on the levelled platform. However, he also envisaged no need for clearing of peripheral vegetation, particularly if the reason for further clearing would have been "merely to improve the view".

There was the suggestion by Mr Jorgensen that the claimants did not qualify as prudent purchasers if they had bought the land believing that clearing would be permitted to the degree that the significant potential view could be realised, or

alternatively, that any significant view might be gained from the upper level of a two-storey dwelling through the canopies of trees as they had existed.

I am of the opinion, after hearing the oral evidence of Mr Wanless, that the claimants were influenced in their purchase decision by their perception of potential for a significant view to be obtained. I am not persuaded however that there was no potential for a view significantly greater than that then available from ground level, through a properly assessed "Application to Damage or Interfere with Protected Vegetation".

There is no question that a screened view whether it be from an upper level or ground level would be significantly inferior to the permanent unobstructed view available from the "Rushworth" site. However, given my findings relative to the "Rushworth" sale that comparison has little relevance.

It is accepted that, at the date of Mr Jorgensen's Sale 1, the view which existed from the building platform on that land was panoramic. However it appears that subsequent growth of vegetation surrounding that platform has interfered, to a degree, with the original view. The question must arise whether a prudent purchaser would have accepted that clearing of new vegetation growth or regrowth, "merely to maintain the view", would not have been permitted.

It seems to me that the submission by the claimants' counsel that VPO's were intended to be regulatory and not strictly prohibitive, is correct, and a consideration which a prudent purchaser would have taken into account – and Mr Wanless had specifically set out to gain some knowledge of VPO's even before he was introduced to the subject land. He went to the trouble of meeting Mr McLean on site and heard nothing which prompted him to ponder the claimants' position relative to the contract which had been signed.

Mr McLean impressed as a Council officer who would be conscientious in his efforts to protect the environment and the habitat of koalas and wildlife in general. I have no doubt that if he thought he was able to achieve prohibition on the destruction of any protected vegetation, other than vegetation adding undue fuel to a potential fire hazard, then that would be his ultimate goal. However, he clearly is not so inflexible as not to respect the need for property owners to live in harmony with a protected environment. He has had considerable experience in dealing with applications for approval to remove protected vegetation both for building applications and other reasons. He advised the Court that in some cases recommendations are made that

applications be approved, but subject to conditions. When asked if, in a case such as the subject, an owner offered to replant an alternative location with suitable vegetation species as a condition in allowing specific vegetation removal, he responded (transcript p.74):

> "That is a difficult one. We generally try and find a way of conditioning an application to grant an approval because the objective of the Vegetation Protection Order was to work with the land owners from day one. It's only in situations where we really do not think that conditions would adequately mitigate the impacts that we would refuse."

The vegetation which now severely restricts the view, is, in the main, thick "juvenile" or sapling type regrowth which probably has resulted from the lack of maintenance of original clearing. The original preparation of the levelled site on the knoll occurred many years ago, prior, no doubt, to the VE category VPO coming into force. Logically, at the time of preparation of the preferred homesite, any vegetation interfering with the valuable view would have been removed, except for those selected mature trees which still remain. Although not, as yet, to the same degree, a similar situation has developed or is in the process of developing, with the regrowth on the periphery of the building site on Mr Jorgensen's Sale 1. It would seem to be demonstrable of an inflexible attitude, and against the objective of working with an owner, as expressed by Mr McLean, if approval to, at least, selectively control or maintain offending regrowth, as opposed to mature trees, was denied on the basis that such interference was "merely" to retain views rather than obtain them. The extent of vegetation with which interference might have been sought, is relatively minor, in the context of a "bushland" site of 12 ha. There was no requirement, for the view to be exposed, that the whole of the eastern slope below the homesite be denuded of vegetation, or for there to be identifiable conflict with the town-planning intent of the Category A, "Non Urban" zone.

Quite apart from the "lack of view" approach adopted by Mr Jorgensen, I think he took an unreasonably blighted view of the subject land because of the existence of the electricity transmission line and its street frontage exposure, together with the need for construction of access to the knoll. There is no doubt that these are matters which would have a negative effect on value, but, even if the sales comparison was limited to Mr Jorgensen's Sale 3, his valuation of $300,000, with view restricted to glimpses does not reflect, in my opinion, the relative qualities of the subject land. The same might be said, in my opinion, of a comparison with the two common sales.

In *Chapman v. The Minister* [1966] 13 LGRA 1, one of the questions of law stated by the trial judge for decision by the Court of Appeal of the Supreme Court of New South Wales, was:

> " Was I bound in law in assessing such compensation to take into consideration the price of … paid for the subject land by the appellant …?"

To which, in his summary of answers at p.8, Wallace P responded:

> "Yes … providing it was not a fancy or special price under the circumstances existing at the date of purchase."

Jacobs and Asprey JJA agreed.

I have been persuaded that there was inherent potential, regardless of the VE category VPO, for views of significance to be reinstated, with approval, from the previously developed homesite platform. That conclusion is reinforced, in my opinion, by the respondent's willingness to offer the amount of $360,000, based, it seems, on the opinion of Mr Jorgensen that such a valuation would be reasonable if significant views could be obtained. Even that opinion of value is, in my finding, too low and not justified by Mr Jorgensen's reliance on the "Rushworth" sale, or supported by any other sales evidence.

While no evidentiary weight can be placed on the statutory unimproved valuation of the land, and on which valuation the respondent was levying rates, it is observed that as at 30 June 1998, that valuation was in the amount of $370,000. There was no evidence before the Court, for any form of comparison, of the statutory unimproved valuations of the sale lands. It seems reasonable to assume however, that the valuation authority would have found support for its valuation of the subject land in the sale to the claimants.

I find that the price paid for the land by the claimants was not outside the range indicated by the market for vacant rural residential sites in the locality. The sale price to the claimants did not represent a "fancy" or "special" price.

Determination of Compensation for Land

I find no reason not to adopt, as Mr Walsh had done, the earlier sale price in the amount of $410,000 as representing the market value of the land at the date of resumption.

Disturbance

Legal and Valuation Fees

There has been agreement between the parties as to the claim in the amount of $5,226.30 for professional fees associated with the compilation of the claim for compensation.

Costs associated with the purchase of "Replacement" Property

The evidence before the Court was that legal fees and stamp duty associated with the claimants' purchase of the subject land amounted to $13,650. There were, in addition, "significant" borrowing costs.

The claimants say that they purchased the property for the purpose of erecting a dwelling. That is accepted.

In July 1997, not long after the date of purchase, the claimants went to live in Sydney to allow Mr Wanless to take up a short-term employment position. They returned to live in Brisbane in December 1998. A little earlier they had visited Brisbane "to look for a replacement property". It suited their personal circumstances at that time to purchase an established residential property, which they eventually did at a purchase price of $470,000. Being their principal place of residence, the stamp duty was in the concessional amount of $10,200 with legal fees and outlays bringing the total acquisition costs of that property to $11,085.

Mr Wanless estimated that the direct costs involved in his travelling to Brisbane from Sydney together with out-of-pocket expenses associated with inspecting properties and negotiating the purchase, amounted to $515.

Rather than seeking the costs involved in the purchase of the subject land ($13,650), the amended claim was for the legal fees and stamp duty involved in acquiring the dwelling ($11,085). Both sets of costs were proved.

It is well settled that an owner dispossessed of his home, should receive in addition to the open market value of that home, the costs, among other disturbance items, of acquiring a home of equal value to the one taken. Those costs, such as legal fees and stamp duty are assessed as a separate item whether or not they form part of the value to the owner, of the home taken.

It is also now well settled that where land taken was held for investment purposes, the dispossessed owner does not receive compensation for the costs of acquiring replacement investment land. While it may seem unfair where the dispossessed owner has in fact so reinvested, the principle is based on the fact that the choice of reinvestment is not limited to real estate. Indeed, it would seem implicit in the dictum of Lord Denning in *Harvey v. Crawley Development Corporation* (1957) 1

AllER 504 that, unless an owner dispossessed of his home actually incurred expenses in the acquisition of a replacement home, then the notional cost of replacement of that home, if dealt with as a separate heading of disturbance, and presumably not as part of the value of the home to the owner, would not be compensable, for Lord Denning said at p.507:

> "If an elderly man and wife owned and occupied a house which was compulsorily acquired and they thought to themselves: 'We do not think we need to get another house; we will go into a guesthouse', they would not get the costs of moving into a new house when they had not incurred them. Nor would they be able to claim the cost of living in a boarding house for the rest of their days. They would only get the market value of their former home. These illustrations show that the owner only recovers costs of the present kind" (costs expended and which were the direct consequence of an owner being "turned out of her house") "in a case where a house is occupied by an owner, living there, who is forced out and reasonably finds a house elsewhere in which to live … . The costs are then the subject of compensation under the heading of 'disturbance' as specified in section 2(6)" (of the *Acquisition of Land (Assessment of Compensation) Act* 1919 pursuant to which 'compensation for disturbance' was specifically preserved).

Arguable as it was seen by the respondent, it has been accepted in this decision that the purchase price of the claimants' land equated its market value at the date of purchase and at the date of resumption. Had the claimants changed their mind, which is not an uncommon thing, and decided to instead sell the land at market value to buy an established home, it is clear that they could not have expected to receive more than $410,000 gross, less, ordinarily, agent's commission and the legal fees on the sale. It could not be argued that the land would have had special value to them because they had intended to build a dwelling at the time of purchase.

For personal reasons, after their purchase of the land, the claimants moved to Sydney and remained there for about 18 months. By the time they returned, the land had been resumed. The birth of their child being imminent, the claimants preferred to purchase an established home rather than become involved in renting a house, finding a replacement block of vacant land and then building a new dwelling. Again, that was a matter of personal choice. However it would be pure speculation to ponder whether, in the absence of the resumption, the claimants would have in fact built on the subject land after having temporarily moved to Sydney or, for the same personal reasons, decided to sell it and purchase an existing home

Mr Allan submitted that the purchase of the home, rather than another block of land, was in essence, replacing that which had been taken away. That submission is, in my view, drawing too long a bow. He said that because legal fees and stamp duty had already been outlaid once, then at least the second set of costs had been "thrown away". Land cannot be purchased in the absence of those costs and while they may appear to have been thrown away, whenever a block of land is purchased, those costs are an unavoidable expense which merge with but not necessarily add to the asset value of the land.

I am not persuaded that any of the costs associated with the purchase of the dwelling, including the costs of travelling from Sydney are a direct and reasonable consequence of the resumption of the vacant block of land.

Had the claimants decided to purchase a replacement block of land there would have needed to be convincing argument, even then, that the costs involved should be seen first as not being too remote and second a direct and reasonable consequence of the resumption.

Determination of Compensation

Compensation is determined as follows:

Loss of land	$410,000.00
Disturbance	
Legal and valuation fees as agreed	$5,226.30
Total Compensation	$415,226.30

Interest

An advance against compensation in the total amount of $309,999.30 was paid on 21 December 1998. It is ordered that interest at the rate of 5.5 per cent per annum be paid by the respondent to the claimants on the amount of $415,226.30 for the period commencing on and including 11 September 1998 ending on and including 20 December 1998, then on the amount of $105,227 for the period commencing on and including 21 December 1998 to the day immediately preceding the date on which that balance amount is paid.

RE WENCK

MEMBER OF THE LAND COURT