

**Claim for Compensation consequent upon the
resumption of land for Transport or Incidental
Purposes under the *Acquisition of Land Act 1967* and
the *Transport and Planning Coordination Act 1994*.
(A00-10)**

JJA, KP, AF, MP and NA Savina

v.

Chief Executive, Department of Main Roads

(Hearing at Cairns)

J U D G M E N T

Introduction

This case involves a claim for compensation following the resumption of an area of about 3.282 ha from a cane farm with a total area of approximately 104 ha, owned by the claimants, for the purposes of constructing the Redlynch Bypass Road.

Background

The Savina family has been growing cane in the Redlynch area since 1935. The claimants, who are brothers, inherited the family's cane-farming lands in 1993. Mr MP Savina works the farm under a joint venture agreement with his brothers, whereby he has the day-to-day management of the farm.

In the late 1980's and early 1990's, the land to the west of the Savinas' farm was developed for residential subdivision (the Newlands Development). With the new urban development adjoining their cane farm, the Savinas realised that their cane-farming activities were not compatible with their new neighbours and they considered the possible residential development of part of their land. The family had previously successfully developed part of a farm at Stratford for residential subdivision in the mid 1970's.

The claimants lodged an application for rezoning with the Cairns City Council in November 1994 in respect of part of their farming land, which is bordered by the Cairns-Kuranda railway line on the south, adjacent to which is part of the Brinsmead-Kamerunga Road (BKR1), another part of the Brinsmead-Kamerunga Road (BKR2) on the west, Fairweather Road on the north and a cane tramline on the east.

The Council refused their application and they appealed to the Planning and Environment Court. In April 1996, the Planning and Environment Court granted approval for the rezoning, subject to certain conditions, including a flood model study of the area. However, in July 1996, they received from the respondent a notice of intention to resume part of that land. Although they objected to the resumption, the land was resumed in December 1996.

Following the resumption and the construction of the road, the claimants are of the opinion that the proposed development of the rezoned area is far riskier than it was before. They understand that there will be far fewer lots and the cost of development per lot will be considerably increased.

The Resumption

By Notice of Intention to Resume dated 17 July 1996, the respondent advised the claimants that an area of about 3.282 ha was to be taken, about 2.176 ha from Lot 3 on RP 703109 and about 1.106 ha from Lot 6 on RP 703158, for transport or for an incidental purpose. Lot 3 and Lot 6 are part of the cane farming aggregation held by the claimants.

By proclamation published in the Government Gazette of 13 December 1996, that land was taken for transport or an incidental purpose.

The Claim for Compensation

A claim for compensation for \$2,071,141.70 dated 17 March 2000 was served on the respondent and filed in the Land Court on 13 April 2000. Details of the claim were as follows:

"Value of land resumed severance injurious affection	The Claimants claim in respect of these items the difference in value of their land adopting its highest and best use as residential subdivision assessed on a 'before' and 'after' basis in consequence of the resumption as follows: Before value: \$2,565,000.00 After value: \$ 528,500.00 Loss:	\$2,036,500.00
Loss of rental	The Claimants claim in respect of the loss of rental otherwise payable prior to resumption in respect of the land arising out of the lease of the said land to Mark and Julie Savina commencing from 31 January, 1996	\$ 613.70

Costs of Claim	The Claimants claim for the costs of preparing the claim as follows:		
	Surveyor's fees		\$ 600
	Engineer's fees	\$1,055	
		\$6,145	
		\$1,975	
		<u>\$3,560</u>	\$12,735
	Valuer's fees		\$ 5,493
	Legal costs		\$15,200
			<u>\$ 34,028.00</u>
	TOTAL		<u>\$2,071,141.70</u> "

On the final day of hearing, Mr DB Fraser QC, who appeared on behalf of the claimants with Mr WL Cochrane of counsel, sought and obtained leave to amend the claim to \$1,200,000. No objection was raised by Mr GJ Gibson QC, who appeared on behalf of the respondent with Mr RS Jones, of counsel, subject to the respondent's right to argue for costs of the amendment.

The amended claim for \$1,200,000 was explained by Mr Fraser as follows:

Value Before Resumption:

12.47	ha @ \$140,000 per ha	\$1,745,800
<u>5.8</u>	ha @ \$20,000 per ha	<u>\$ 116,000</u>
<u>18.27</u>	ha	<u>\$1,861,800</u>

Value After Resumption

5.244	ha @ \$100,000 per ha	\$ 524,400
0.5	ha @ \$100,000 per ha	\$ 50,000
<u>9.2493</u>	ha @ \$20,000 per ha	<u>\$ 184,986</u>
<u>14.9933</u>	ha	<u>\$ 759,386</u>
	Difference	\$1,102,414
	Plus .33 ha around existing farmhouse	\$ 40,000
	Plus disturbance items	<u>\$ 34,232</u>
	<u>\$ 74,232</u>	
	TOTAL	<u>\$1,176,646</u>
	ADOPT	<u>\$1,200,000</u>
	(Transcript page 674)	

The amount finally contended for by the respondent was in the sum of \$415,000, exclusive of disturbance items.

I was informed that an advance against compensation of \$174,000 was made by the respondent to the claimants on 3 April 1998.

The Subject Land

The Savinas' cane farm of approximately 104 ha, comprises nine parcels of land and is situated adjacent to the small township of Redlynch, approximately 12 km west of the Cairns Central Business District. The farm is located in the Barron River/Freshwater Creek flood plain, with the Barron River just to its north and Freshwater Creek on its eastern boundary. The farm is bounded on the south by the Cairns-Kuranda railway line and on the west by the Brinsmead-Kamerunga Road (BKR2). The land has a gentle slope from west to east, with the highest part located in the south-west. The farm adjoins existing residential subdivisions to the north and to the south-west, in an area of residential and rural residential development.

The affected lots, Lot 3 and Lot 6, each contain land which is above the 8.6 metre AHD contour line, which is recognised as the contour line for the one in 100 year flood event (Q100) for the Barron River. That land is generally low-lying land, rising from the 5-metre contour near the tramway to the 10-metre contour in the south-west.

Lot 3 is bisected by the cane tramway and powerline easement which runs from the Kuranda railway line in a north-west direction to Fairweather Road, creating a roughly triangular area in the south-west part of the farm. It is that area which was subject of the rezoning application in 1994, which ultimately resulted in the rezoning approval by the Planning and Environment Court on 26 April 1996. The approval to rezone the land from "Rural" to "Residential" was subject to the following conditions:

- "1. The part of the land the subject of this rezoning approval is to be defined by a metes and bounds description to be provided by the Applicant prior to Council forwarding the application to the Department of Local Government and Planning for gazettal.
2. At the time of any application to the Council for subdivisional approval for any part of the subject site below the Q100 flood level, a detailed flood study using Council's established flood model is to be undertaken to determine the boundaries of any such part of the land as would permit the creation of lots with a Q100 flood immunity without adversely affecting any other land provided that where an application is made for subdivision of only part of the land, the Council may exempt the application

from the necessity for a flood model study where the Council is satisfied that the land proposed to be subdivided is already above the Q100 flood level or has flooding immunity due to works previously carried out.

3. The Applicant shall ensure that the development complies in all respects with all Council's Local Laws, Policies and Planning Instruments pertaining thereto."

The rezoning was gazetted on 29 September 2000.

The valuers for the parties agreed that the areas on the proposed development plans prepared by C & B Consultants Pty Ltd should be adopted. Those plans contained the following areas:

- total rezoned area 20.52 ha;
- excluding tramway easements and setbacks of 2.2447 ha = 18.2753 ha;
- area of southern severance 5.244 ha;
- area of northern severance 11.994 ha;
- area of northern severance excluding easements and setbacks = 9.7493 ha.

The rezoned area of the Savina aggregation will be referred to as "the subject land".

For the development proposal envisaged before resumption, an area of approximately 11 ha would need to be filled to depths of up to 3.5 metres and that the fill would extend up to 300 metres into the Freshwater Creek flood plain.

Because of the resumption, the claimants contend that they had delayed seeking subdivisional approval from the Council as the notice of intention to resume part of their land was received in July 1996, only three months after the Planning and Environment Court approval. This will have a major impact on the development plans and they wanted to assess the impact of the road and overpass before proceeding further. The new road was not opened for traffic until September 1999.

The Effects of the Resumption

The resumed land of 3.282 ha, consists of an elongated strip, ranging in width from 67.55 metres to 95.01 metres, diagonally traversing the land subject of the rezoning approval. It is common ground that the resumption impacts adversely upon the subdivisional potential of the land.

The initial stage of the road consists of a dual-lane bitumen sealed carriageway, but the resumed strip is sufficiently wide to cater for a later stage four-lane road. At the southern end of the resumed land, the road comprises an overpass crossing the Cairns to Kuranda railway line and the Brinsmead-Kamerunga Road

(BKR1), which is 6 to 8 metres above ground level, reducing to standard road height. The road is limited access with a speed limit of 80 kilometres per hour.

The purpose of the road has been described thus:

"The Cairns western bypass has been designed essentially for safer travel for commuters and to solve congestion and delay problems which have been experienced in the Redlynch area in the past. It also provides an easy route for tourist and heavy vehicle traffic wishing to travel to the northern beach suburbs and tablelands areas bypassing the city area."

(Mr Eales, Exhibit 7, p.14)

The impact of the resumption will be greatest on the potential lots immediately to the north and south of the bypass road and will be likely to significantly diminish their value, because of traffic noise, smell, dust, vibration, visual pollution and lights. The impact could be reduced by appropriate buffer mounds and/or fencing. However, the parties differed as to the extent of the impact, particularly as there were some pre-existing impacts from the frontage to the railway line and the Brinsmead-Kamerunga Road (BKR1 and BKR2), as well as from the cane tramway and the high voltage electricity line.

There was no dispute that the balance of the claimants' cane farm was not affected by the resumption and that its highest and best use was for cane farming. The effects of the resumption were therefore confined to the subject land.

Town Planning Schemes

The Planning Scheme current at the date of resumption was the Planning Scheme for the balance of the City of Cairns (the Balance Scheme), which was gazetted on 29 November 1996, two weeks prior to the date of resumption. The Balance Scheme replaced the Planning Scheme for the Shire of Mulgrave (the Mulgrave Scheme) gazetted on 17 December 1993. However, that scheme was in force at the date of application for rezoning and at the date of the Planning and Environment Court's determination. Therefore, that scheme had relevance to this matter.

The Strategic Plan of the Mulgrave Scheme established a number of preferred dominant land use designations. At least part of the subject land was included in the rural designation. Under the Freshwater Valley Development Control Plan the western part of the subject land was designated residential, and the balance non-urban. Under the Strategic Plan of the 1996 Balance Scheme, the western part of the subject land is included in the urban designation, the balance in the rural designation.

It is common ground that the Strategic Plan is not cadastrally based, but is a broad-brush document indicating Council's planning intent.

The eastern part of the subject land is included in the Q100 flood inundation land on the Flood Strategy Diagram, which generally corresponds with the area designated rural. The rural preferred dominant land use includes good quality agricultural land, cane land and marginal land, which may be affected by constraints such as flooding. The intent indicates these areas will not be developed during the life of the Planning Scheme.

Objective 1 of the Hazard Strategy is the prevention of both short-term and long-term inundation of urban land. The Council has identified a flood line for urban areas, and development applications relating to areas below the flood line are to be accompanied by an Environmental Impact Statement (EIS). In assessing development applications below the flood line the Council will have regard to:

- the hydraulic model for the Barron River Delta;
- preservation of satisfactory flood plain storage capacity and adequate floodways;
- adverse effects on private and public property or works.

The Department of Transport and the Department of Main Roads required noise and visual buffers for development adjacent to State-controlled roads. To achieve sufficient noise attenuation and visual enhancement required:

- a 10-metre wide buffer strip;
- an earth sound mound to a minimum height of 2.7 metres above the existing natural surface level;
- landscaping of the mound.

The Freshwater Creek Management Plan was finalised in 1997, a component part of that plan was the investigation of flooding and drainage carried out in 1995 by the firm Lawson & Treloar Pty Ltd, which provided a greater level of detail on the flooding characteristics of Freshwater Creek upstream of its confluence with the Barron River. Minimum flood immunity requirements were established for new developments requiring rezoning, subdivision or town planning consent approval as follows:

- Residential - immunity to one in 100-year ARI fill level and 150 mm above one in 100-year ARI floor level.
- Recreation Parks and Open Space - existing surface but to be free draining.

The requirements for development of land within the Barron River Delta flood plain are discussed later when dealing with hydraulic and flood issues. However, from a planning perspective, the town planners were in agreement that:

- the Barron River Delta Study will form the basis on which Council will consider development proposals with regard to flooding;
- this will apply to the development of all residential etc land within the Barron River Delta.

Section 3.3.3 of Part H of the Town Planning Scheme requires that Council will use the results of the Barron River Delta Flood modelling in assessing future development projects, in particular the "Barron River Delta Flood Study - Development in the Delta". The planner who gave evidence for the claimants, Mr Robinson, explained that this process was to ensure that once land was filled above the Q100 level, the hydraulic characteristics in the delta are not changed in ways that increase flood levels or velocities to the extent that they are likely to cause damage or risk to other land or persons.

That was confirmed by the planner who gave evidence for the respondent, Mr Hedley, as being the position at the end of 1996. Both Mr Hedley and Mr Robinson agreed that once a flood study had been carried out, the Council accepted its conclusions.

Mr Hedley was previously Director of Planning and Development for the Cairns City Council until December 1995. He provided unchallenged evidence as to the background to the rezoning of the subject land. He explained that the application for rezoning from the "Rural" zone to the "Residential" zone under the 1993 Mulgrave Scheme was submitted to the then Mulgrave Shire Council on 2 December 1994. It was accompanied by a town planning report and a supplementary engineering report. The proposal was for subdivision of the land into approximately 175 residential allotments, all with areas over 600 m². Part of the land was to be filled to raise it above the one in 100-year flood level, with the source of the fill being other parts of the applicants' cane farm on the Freshwater Creek flood plain. However, no precise details of the extent of fill were provided to the Council at that time. The town planning report stated that the northern part had depths of inundation which may make it impracticable or unviable to fill and may be provided as park. Access by Fairweather Road was proposed. The subject land was described as being a low velocity flood fringe area representing a low hazard flood area. Filling of the area

was not expected to have any significant effect on the pattern of flood flows and/or flood levels.

No objections to the application were submitted.

According to Mr Hedley, the application was reported to Council in June 1995 with a recommendation that it be approved subject to conditions, including those required by the Department of Transport. In July 1995 the Council refused the application, on grounds relating to potential for flooding, the extent of filling and the effect of the proposed Redlynch Bypass Road.

The Savinas appealed to the Planning and Environment Court and the hearing was held in April 1996. The appeal was allowed, with the application to rezone being approved subject to the three conditions already discussed. A metes and bounds description was provided to the Council in November 1999, excluding the area of the road corridor. An application for approval of the rezoning was submitted to the relevant Government Department by the Council and the rezoning of the land to "Residential 2" zoning was gazetted on 30 September 2000.

According to Mr Robinson, issues relating to flooding and the Redlynch Development Control Plan were canvassed at the hearing. However, the bypass road issues were dropped and the Council effectively abandoned the issues concerning flood levels and filling. Only the conditions were disputed.

Because the resumption followed shortly after the Planning and Environment Court decision approving the rezoning, the claimants have not applied for subdivision approval. The town planners discussed the likelihood of the proposed subdivision being approved as at the date of resumption. It was agreed that a proposal for subdivision at that date would have been assessed under the *Local Government (Planning and Environment) Act 1990* and the 1996 Balance Scheme. Section 8.2 of that Act established a mechanism for preparation of an Environmental Impact Statement (EIS). A "designated development" is defined as including a proposal for development of land located in an area below a flood line adopted by a local government, if it involved filling an area of more than 5000 m². A flood line had been adopted for urban areas identified in the 1996 Balance Scheme.

Mr Robinson was of the view that the terms of reference for an EIS were likely to be limited to flooding impacts only. Mr Hedley and Mr Robinson generally agreed about the requirement of an EIS and the likely terms of reference.

Mr Robinson summarised the requirements:

'Essentially, the Strategic Plan says that if you want to undertake residential development on the identified flood fringe, you have to show that it can be filled or otherwise protected from inundation from a Q100 flood. You do this by carrying out an EIS including running your proposal through the Barron River Delta flood model.

Provided the results of the flood modelling exercise show that there are no adverse impacts on flooding characteristics on other land, Council will progress the application.

This is a realistic, commonsense appropriate way of dealing with development applications on the flood fringe. It results in development that is protected from floods up to the one in 100 year event and that other land is not adversely impacted upon by the development." (Exhibit 11, paragraph 2)

It was common ground that the flood model is operated by the engineering firm, Connell Wagner Pty Ltd, on behalf of the Council. The flood study required by the Strategic Plan and the rezoning condition would be prepared and submitted as part of, or in association with, an EIS and the requirement for the flood study would also be reflected in the terms of reference for the EIS. If the EIS was to the effect that the land could be filled without adversely affecting flood levels, subdivisional approval would be granted subject to conditions.

Mr Hedley and Mr Robinson agreed that those parts of the subject land which passed the requirements of the Flood Model policy, could be filled and approved for subdivision. However, they viewed the potential of the land below the Q100 line somewhat differently. Mr Robinson thought the area was moderately constrained by flooding. Mr Hedley thought it had very limited potential for development. Mr Robinson identified that the real issue between them is determining a boundary beyond which development is not possible. According to Mr Robinson, that line is likely to be in the vicinity of the tramline. Mr Hedley was less optimistic.

They generally agreed that after the resumption subdivision of the balance of the subject land would not have been refused because of the existence of the bypass road, but Council would have taken account of concerns by MRD and would include conditions relating to landscaping and sound attenuation devices, such as mounds and solid fences of which the developer may bear the cost.

The Surveying Evidence

Evidence for the claimants was given by surveyor, Mr Hutchison of Rowlands Surveys Pty Ltd (Rowlands) and for the respondent by surveyor, Mr James of C & B Consultants Pty Ltd (C & B). Mr Hutchison had previously prepared a subdivisional layout plan in November 1994 as part of the rezoning application for a 177-lot subdivision. In March 1997 he was instructed to prepare a revised layout for the area after resumption. He prepared a layout plan for a 102-lot subdivision with 10-metre wide buffer strips on each side of the bypass road. In his view, what was originally envisaged as a single development had become two separate developments, divided by a major road.

Mr James, on behalf of the respondent, also prepared layout plans, before and after the resumption, limited by the metes and bounds lines, which he calculated to contain an area of about 20.52 ha. His before resumption plan for 175 lots, with an average area of 628 m², provided for 6 metre offset from the tramway line, with an additional allowance of 3 metres for an earthworks embankment.

The differences between the Rowlands plan and the C & B plan of the before resumption area appear to be the result of the approaches which the surveyors adopted, based on advice from their respective engineers, particularly in relation to drainage. Mr James adopted a 10-metre buffer setback from the State-controlled Brinsmead-Kamerunga Road, comprising a 6 metre strip and a 4-metre easement over the lots adjoining the buffer. Mr Hutchison initially doubted such buffer was required. Mr James was of the view that Council would require emergency access through Ernest Street and would not accept emergency access by means of the overland drain as provided for in the Rowlands plan.

No park area was provided for on the C & B plan, but Mr James reasoned that allowing for tramway setback, buffer requirements, drainage corridor and transmission line areas, there was an area of 17.1942 ha of subdividable land; 10% of that area would be required for park; the balance area of 3.081 ha more than met that requirement and could be used for park, subject to negotiations with the Council.

The C & B after resumption plan for 128 lots, with an average area of 651 m², retained the 20-metre drainage corridor. A 10-metre buffer setback (6 metres strip plus 4 metres easement) was allowed for on both sides of the bypass road and a 6-metre wide buffer adjacent to the Cairns-Kuranda railway line for noise amelioration. Proposed access to the northern severance was from Majestic Street and to the southern severance from Ernest Street and Fairweather Road. The subdividable area

after resumption was 13.8117 ha, 10% of that area for park requirement could be met from the balance land.

Their major areas of disagreement were whether a 6 metre strip plus a 4 metre easement would have been acceptable in 1996 for the minimum buffer requirement of 10 metres; whether emergency access to Ernest Street was required; and whether drains would provide acceptable emergency access. There was also disagreement about the number of lots, particularly in the Rowlands after resumption plan. The average size of those lots was 820 m² compared with the pre-resumption average of 671 m².

Mr Hutchison defended the Rowlands plan, explaining that many of the design differences were based on different assumptions, particularly the drainage assumptions, which were based on advice from engineers; in any case his before plan was never meant to be completely accurate, it had been prepared for the rezoning application.

Despite the differences in their plans, a joint statement identified only two real issues between the surveyors. The first was the need for a buffer along the Brinsmead-Kamerunga Road on the before resumption plan. The second was whether emergency access could be provided along the drain or whether there should be emergency access to Ernest Street.

Mr Flanagan, the engineer witness for the claimants, thought that the C & B layouts were better than the Rowlands plans, but felt there were still some problems with them. Mr Eales, the valuer for the claimants, adopted the Rowlands plans for his hypothetical development valuations, but during his evidence conceded that he thought the C & B plans were preferable. (Transcript pages 258 and 262)

There seems to be general agreement that the reasoning adopted by Mr James in the C& B layouts is preferable to that adopted by Mr Hutchison in the Rowlands layouts. However, that depends on how much of the subject land could be developed. If it was not possible to develop to the extent provided for in those plans, then which ones have the better layouts is irrelevant.

The Engineering Evidence

The valuers for the parties relied on direct comparison with in globo sales as the primary methods of valuation of the subject land, before and after the resumption,

adopting check valuations by means of hypothetical development. Much of the detailed evidence given by the engineers related to the costs of hypothetically developing the subject land for their secondary or check methods of valuation. However, as will be discussed later, I have placed no weight on the results obtained from their hypothetical development exercises. Therefore, I see no point in making a detailed analysis of the engineering evidence associated with the costs of development.

However, there are several engineering issues which are relevant to the viability of development of any of the subject land, both before and after resumption. It is upon those issues that I will concentrate in discussing the engineering evidence, without descending into a detailed analysis of costings.

The engineering evidence can be categorised under three headings:

- (i) hydraulic and flooding issues;
- (ii) civil engineering issues; and
- (iii) acoustic issues.

The respondent called three experts, while the claimants' consulting engineer, Mr Flanagan, gave evidence in respect of all three issues.

(i) The Hydraulic and Flooding Issues

The conditions of the rezoning approval by the Planning & Environment Court in April 1996 included one relating to assessing whether the development proposed for the subject land would adversely affect other land. That condition required that at the time of any application for subdivisional approval for any part of the land below Q100 flood level, a detailed flood study using Council's established flood model is to be undertaken to determine the extent of the filling to give the proposed lots a Q100 flood immunity, without adversely affecting any other land. While the terms of that condition seem relatively straightforward, it was by no means certain what was the "Council's established flood model" for the subject land as at December 1996.

It seems that there were at least four model possibilities. ESTRY, RUBICON and MIKE 11, are single dimensional models used by the Council at various times for flood modelling in the Barron River Delta and/or Freshwater Creek. Another model, MIKE 21, was developed by the firm Lawson & Treloar Pty Ltd in about 1995. It is a more sensitive two-dimensional model, which is able to more accurately measure localised flooding impacts.

Flood modelling in 1996 was undertaken on behalf of the Council by the engineering firm, Connell Wagner Pty Ltd, using the ESTRY model to measure the flood impacts in the Barron River Delta. However, from 1998, the ESTRY model ceased to be available and Connell Wagner converted the ESTRY model as best it could into the RUBICON model and Council have used that model for flood modelling since then. But as at December 1996, it was the ESTRY model that was used for flood modelling in the Barron Delta, not the RUBICON model. There seems to be no disagreement that the ESTRY and RUBICON models would not produce identical results.

The RUBICON model is used to model Barron River flood events, but the subject land is influenced by both the Barron River and Freshwater Creek flood events. In 1995, Mr Collins, an engineer at the time employed by Connell Wagner, and now employed by the firm Lawson & Treloar, developed the single dimensional MIKE 11 Freshwater Creek Flood Model, which has since been used by the Council for flood modelling on Freshwater Creek.

The two-dimensional MIKE 21 model was also developed by Lawson & Treloar and first used by the Council in 1995. It can be used for both Barron River and Freshwater Creek modelling, but it seems to have been used by the Council to model only two specific proposed developments prior to December 1996.

In early 1999, on the instructions of the respondent, in connection with the claimants' claim for compensation, Lawson & Treloar had undertaken flood modelling of the proposed development using MIKE 21. The first model was run on the assumption that imported fill would be used, while the second assumed that fill would be extracted from a borrow pit adjacent to the development. These exercises were undertaken by Mr Collins, who gave evidence on behalf of the respondent. Mr Collins explained that he was trying to determine the upper and lower bounds of potential impacts to determine whether or not flooding was an issue. In other words, he was testing best and worst case scenarios.

The results of the first option (the imported fill model with no compensating earthworks) showed impacts of increased flooding of approximately 100 millimetres on the adjacent upstream railway line, and between 10 millimetres and 40 millimetres increase in flood levels at up to seven existing residences at Redlynch. That is not the type of development envisaged for the subject land, so the impacts are not relevant.

The second option (fill from a borrow pit) was modelled including construction of an excavated pit about 2 metres deep, over 400 metres long and 150 metres wide, because from the viewpoint of hydraulic efficiency it appeared to Mr Collins to be the most likely to give minimum impacts.

The results of that option predicted for the 100-year Freshwater Creek and five-year Barron River floods, a 5-centimetre increase at one location and lesser impacts at others. Mr Collins explained that in local authorities throughout Queensland it is becoming the requirement norm that there are no offsite impacts. If it can be demonstrated that there would be tangible flood damage due to a severe flood that can be directly attributed to a proposed development, it is normal policy not to allow it.

However, the results of the cut/fill operation model (February 1999) were submitted to Council and in a letter dated 29 April 1999 (Exhibit 79), Council indicated that such development was likely to be approved in principle, subject to providing more details. That seems to indicate that the Council was prepared to accept limited offsite impacts.

Mr Collins referred to the results of those earlier models in his written evidence in this case and came to the following conclusions:

"Based on our investigations, and the information available at the time of writing this report, we conclude the following:

- The effect of the proposed development on flooding on adjacent properties is likely to fall within the ranges provided by our 25/1/99 and 16/2/99 reports. If the impacts are closer to the 25/1/99 (fully imported fill) case, the impacts on flooding may well be unacceptable to Council.
- In order to minimise impacts on flooding, significant onsite cut works are required immediately adjacent to the proposed filling works. The extent, depths, finished surface elevations and detail of proposed onsite cut works are considered critical in determining the suitability of the project in relation to flooding impacts.
- The proposed development includes encroachment of up to 300 metres into the flood plain, and Council would be likely to be concerned with regard to the precedent set by approving such development, both in terms of future development applications and also the cumulative effect of such works on flooding. This encroachment goes well beyond the approved development lines from the Freshwater Creek Master Plan.

- There are a number of other issues in relation to water quality and stormwater management that may well also restrict the allowable fill source arrangement on the site, and these may also be taken into consideration by Council." (Exhibit 37, page 7)

Mr Collins' view was that the subject land is heavily dominated by flooding from both the Barron River and Freshwater Creek and hence it is important in considering flooding impacts, particularly on adjoining properties, to carefully analyse flooding from both watercourses.

Mr Flanagan had another opinion. He contended that as the Barron River flooding was the predominant influence on the subject land, the RUBICON model was the model which would be used by the Council. He commissioned Connell Wagner to model the proposed development on the basis that the required fill was obtained from borrow pits on the adjoining Savina farm.

Connell Wagner modelled the proposed project for a 100-year Barron River event with a 100-year Freshwater Creek event, using the RUBICON model, with imported fill and no compensating earthworks. The model results showed a small and localised impact upon flood levels. Connell Wagner also modelled the project with fill excavated from the flood plain. This showed that the project would result in increased water levels of up to 20 millimetres downstream. Connell Wagner expressed the opinion that this would be acceptable to the Council.

However, Mr Collins was critical of the Connell Wagner report. He stated that in his opinion the modelling work carried out lacked sufficient detail to accurately predict localised peak offsite impacts. He thought that the predicted flood level increases may not have been acceptable to Council in any case, as they could adversely impact on existing flood-prone houses. He felt that insufficient testing had been carried out for a range of flood events to be confident that the upper limit of predicted offsite impacts had been achieved.

Mr Collins explained how the conveyance and storage functions of both Freshwater Creek and the Barron River vary depending on the combinations of flooding events in each watercourse, the subject land being affected by all those events, not just the one in 100-year events. His modelling tried to determine the impacts of the proposed developments for a range of combined flood events.

Connell Wagner had used orthophotos to determine the amount of fill to be obtained from the flood plain. However, the evidence indicates that the use of orthophotos for that purpose may be quite inaccurate. Using a photographic survey

instead of the potentially inaccurate orthophotos used by Connell Wagner, Mr Collins applied the MIKE 21 model to testing the cut/fill development proposed, restricting the results to the 100-year Freshwater Creek and the 100-year Barron River events. That model showed a 7 centimetre increase at one location, while the rest were not largely inconsistent with the Connell Wagner results, although there were several 3 centimetre impacts, which were greater than the 2 centimetre increases which Connell Wagner felt would be acceptable to the Council.

Mr Collins said that to reduce the impact of flooding, the proposed development may have to be reduced. When pressed on how much land might need to be sacrificed, Mr Collins expressed the view that it might be between 1 ha and one-third of the area.

Mr Flanagan and Mr Collins were able to agree that an appropriately designed skimming borrow operation which maintained cross-section conveyance appropriately and provided compensation for storage for Barron River entrance and conveyance for Freshwater Creek events, may produce acceptable offsite impacts in terms of flooding.

Originally they agreed that it is unlikely that in 1996 the Council would have been sufficiently aware of full two-dimensional flood modelling to require its use in assessment of this site in 1996. However, Mr Collins later repudiated that agreement. He subsequently recalled that MIKE 21 had been used to model two projects in 1995.

They did agree, however, that at the date of resumption Council required use of the Barron River Flood Model to the assessment of development in the Barron Delta; that the Council had commenced using MIKE 11 flood modelling for assessment in Freshwater Creek upstream of the area covered by the Barron Delta Model; and that MIKE 21 is an appropriate full two-dimensional flood modelling tool.

However, despite those agreements, they also identified several issues of disagreement. Mr Collins felt that the Council would be concerned that approval of the subject proposal would have created a precedent for similar encroachments on the flood plain, which cumulatively would result in significant impact. However, Mr Flanagan was of the view that would not have been part of the Council's consideration in 1996.

Mr Collins was convinced that the appropriate modelling tool was MIKE 21, for both the Barron Delta and Freshwater Creek flood events and it was available in 1996. Because of the sheer scale of the proposed development and the extent of the

intrusion into the flood plain, Mr Collins felt that the Council would be obliged to use the more accurate MIKE 21 two-dimensional model to model the effects of the Barron River and Freshwater Creek, as it takes into account the cumulative effects. In his opinion, RUBICON was incapable of predicting localised impacts.

On the other hand, Mr Flanagan took the view that in 1996 the Barron Delta Model was the approved Council model and the Council would have accepted the outcomes of such an investigation. He rejected the Freshwater Creek model as appropriate, as it did not cover the whole of the subject area.

Despite his concerns and reservations, Mr Collins was sure that a solution could be reached which would make the development, perhaps scaled down, acceptable to the Council. However, just how much of the proposed filling would have to be foregone and therefore the number of lots reduced, was somewhat problematic. Mr Collins thought it may be between 1 ha and up to one-third of the area proposed to be filled. That could only be determined by more extensive, appropriate modelling, using MIKE 21.

Under cross-examination by Mr Fraser, Mr Collins encapsulated his opinion in these words:

"... All I can say is that Council were aware of the modelling and, as I said in an earlier answer, I think it would be prudent given that that technology existed and given such a large development proposed and the sensitivities of adjacent property which was known to be flood prone, that it may well have been prudent for them to take that course. But I can't guarantee that that's what they would have done."

He was then asked by Mr Fraser:

"... But even with your more sensitive modelling which you've been able to apply so far with MIKE 21, you believe that a result acceptable in light of Council's then requirements as to tolerance would have been likely to have been achieved but perhaps involving the removal of one or some more hectares of fill at that point?"

Mr Collins: In combination with an appropriately designed cut, yes. Yes, I've never doubted that there is an outcome for this site ..."
(Transcript p.449)

From the evidence, it is far from certain that, despite Mr Flanagan's confidence, the Council would have approved the development proposed in the C & B plan without significant adjustment to the area to be filled. That uncertainty supports

the view taken by the valuer for the respondent, Mr Gould, that a prudent purchaser of the subject land at the date of resumption would consider that there was a substantial risk of developing any extensive area of the flood plain and would significantly discount the price he/she would pay for the land below 8.6 AHD.

(ii) The Civil Engineering Issues

Both valuers relied on the detailed costings from engineers, Mr Flanagan for the claimants and Mr McPherson for the respondent, for their DCF and hypothetical development exercises. Mr Flanagan said that he and Mr McPherson disagreed on perhaps 80 items, but despite their differences, the engineers' overall costs of development per lot were remarkably similar. In the before resumption scenario, Mr Flanagan estimated costs at \$21,863 per lot and Mr McPherson \$21,702 per lot, if the agreed amount of contribution for external intersections is added to his costings.

Both Mr Flanagan and Mr McPherson as professional engineers advise potential purchasers interested in buying in globo property for development. In Mr McPherson's view there were three distinct stages to any development project. First the initial stage, which usually involved giving some preliminary advice on construction costs, feasibility, preliminary layouts, planning scheme provisions, etc. Second, subsequent to receipt of that advice, developers generally do an analysis as to the suitability of the land for their own purposes, and may contract to purchase it. Third, subsequent to contracting to purchase, developers generally do significantly deeper investigations with more detailed costings before settlement. According to Mr McPherson, the preliminary estimate would probably be within 10% to 15% of actual cost, but the more accurate estimate should be within 5%.

Mr Flanagan and Mr McPherson agreed that the volume of fill estimated by each of them on a solid fill measure was an appropriate reflection of the volumes required for both before and after resumption scenarios for both the C & B and Rowlands layouts, the marginal difference being related to the additional area of 4,000 m² proposed to be filled in the C & B layout. However, they disagreed as to the cost of fill, Mr McPherson adopting \$8.80 per m³, while Mr Flanagan adopted \$6.60 per m³, to which he applied a 10% contingency factor, which would increase the cost to approximately \$7.30 per m³.

Mr McPherson's estimate of \$8.80 per m³ was based on construction rates and costs from the adjoining Newlands development in 1994, escalated to 1996 contract values. He doubted that Mr Flanagan's estimate of \$6.60 per m³ sufficiently allowed

for transporting the material from the farm to the subject land. He also doubted whether sufficient allowance had been made for topsoil stripping, stockpiling and resspreading. Mr Flanagan's \$6.60 per m³ was based on the costs of fill from the Ardel development of \$5.50 per m³ loose measure, equivalent to \$6.60 per m³ solid measure.

However, they applied different costs to the earthworks for the required buffers, Mr Flanagan applied \$5.00 per m³ while Mr McPherson applied \$5.60 per m³, because such earthworks to form a mound required less compaction.

Mr McPherson was confident of the accuracy of his fill estimates and considered there was no need to allow for a contingency factor of 10%. However, Mr McPherson applied 10% to all works except bulk earthworks. Mr Flanagan explained that it was his practice to allow a contingency factor of 10% for the cost estimates overall at the preliminary estimate stage to cater for risks. Mr Flanagan allowed 10% at the detailed design stage as a funding reserve and it was usually used up in changes of scope. In his opinion, the contingency factor does not so much relate to accuracy as to unforeseen risk, and was not related to specific items.

(iii) Acoustic Issues

Another major difference between Mr Flanagan and Mr McPherson was in relation to the cost of noise amelioration and visual amenity treatments, particularly in the development of the subject land after resumption. Before dealing with these costings, it is necessary to consider the opinions of acoustics engineer, Mr Kamst, who gave evidence for the respondent.

Mr Kamst, who had carried out investigations, expressed the opinion that a developer of the subject land would be required to ensure that a noise level not exceeding 63 dB(A) is achieved for the proposed allotments.

His predictions indicated that before resumption, the noise levels in 1996 along the Brinsmead-Kamerunga Road (BKR1) exceeded 63 dB(A) within 10 metres to 15 metres of the boundary, while on BKR2, noise levels would have been 61 dB(A), less than 63 dB(A). However, by 2010, if there had been no resumption, his predictions were that noise levels along BKR1 would exceed 63 dB(A) within 21 metres to 28 metres of the boundary, while noise levels along BKR2 would just exceed 63 dB(A) along the boundary. To meet the noise limit of 63 dB(A), a 2.2 metre high acoustic fence would have been required along BKR1 and a 1.8 metre high acoustic fence along BKR2. Mr Kamst explained that the acoustic barrier can be

achieved by way of a mound, a mound and a fence, or a fence, as long as it was at the required height.

For the after resumption scenario, Mr Kamst's predictions were that by 2010, with the bypass road, noise levels along BKR1 would exceed 63 dB(A) within 6 metres to 8 metres of the boundary, while along BKR2 the predicted noise levels would be less than 59 dB(A) along the boundary. Therefore, only a nominal acoustic fence of height of 1.5 metres along BKR1 would be required, although in practice a 1.8 metre high acoustic fence would be built, as a 1.5 metre fence would not provide any privacy.

Therefore, Mr Kamst concluded that the bypass road has a beneficial effect by reducing noise levels along the Brinsmead-Kamerunga Road compared with those expected without the bypass, with less noise amelioration measures required. However, the situation was quite different on the lands adjacent to the bypass road. Mr Kamst predicted that by 2010 the 63 dB(A) contour on the southern severance would be approximately 40 metres to 46 metres from the edge of the road; on the northern severance it would be approximately 14 metres to 18 metres from the edge of the road. To ensure the noise level of 63 dB(A) was met, along the northern boundary of the corridor a 1.8 metre high acoustic barrier and along the southern boundary a 2.1 metre acoustic barrier, were required. But, in addition a 1 metre high fence was required on the overpass, because the road alignment is closer to the southern boundary of the road corridor. As previously, the required acoustic barriers can be achieved by an earth mound, a fence or a combination of mound with a fence on top of it.

The costing of noise amelioration buffers comprising the buffer mounding, fencing and landscaping of the buffers, for the proposed development after the resumption, is the major difference between Mr Flanagan and Mr McPherson. Mr Flanagan costed these measures for 1550 m² at \$677,975, while Mr McPherson costed them for 500 m² at \$252,530, a difference of \$425,445.

Part of the difference arose because Mr McPherson costed the required noise amelioration measures to meet the 63 dB(A) level in accordance with the opinion of Mr Kamst, while Mr Flanagan costed the measures to achieve 55 dB(A). Mr Flanagan relied on the conditions of approval for the Ardel development by the Cairns City Council and a report by acoustic engineers, Ron Rumble Pty Ltd, concerning that development.

The conditions of approval of the Ardel development contained a requirement that:

"The following maximum road traffic noise levels within each proposed stage of the development are not to be exceeded for 10 years after the completion of that stage:

- external noise levels shall not exceed 63 dB(A) 18h; and
- internal noise levels for all dwelling units ... shall not exceed the maximum noise levels specified in AS2107-1987." (emphasis added) (Exhibit 48, paragraph 19(2)(ii).

It is common ground that the internal noise levels required by Australian Standard 2107-1987 would be achieved if the external noise level was 55 dB(A).

Mr Flanagan took the view that if a potential purchaser had asked in 1996 what noise amelioration measures were required, on the basis of what had been required in the Ardel development, backed by the Ron Rumble report, he would have advised such a purchaser that what had been required in Ardel would be the standard required for the subject land.

Mr Kamst was of the opinion that the only requirement would be to achieve the 63 dB(A) level. He described the requirements in this way:

"The Main Roads Department in Queensland and also a lot of Councils in South-east Queensland work on the basis that 63 external should be met and by whatever means, so that if that's met say by a fence then no further consideration of the noise is looked at. Certainly not on the ground level receptors. On the first floor receptors where a wall would normally not be high enough to interrupt direct line of sight from traffic to the window say, that's where AS2107 would normally be applied, but not on the ground floor if you meet 63 decibels outside." (Transcript p.464)

He went on to say that normally the second condition relating to AS2107 only applied if the first condition could not be met. He had never seen the conditions applied in the way they were set out in the Ardel approval and he felt that the conjunctive "and" was a mistake and that AS2107 would only apply if 63 dB(A) could not be met for lowset residences; AS2107 only applied to upper storeys. Mr Kamst had been told that most of the houses in the subdivision on the subject land would be lowset. He was not aware of any local government in Queensland that insisted on adherence to AS2107 for ground level houses. In any case, the Australian Standards were advisory only and not mandatory. He thought that the person responsible for framing the Ardel condition was not sure what he/she was doing.

Mr Kamst did not think that the Ron Rumble report had any relevance to the subject land as, (apart from apparently being based on some inaccurate data), the lie of the land on Ardel is quite different to the relatively flat subject land. It seems that in the Ardel development, instead of attempting to comply with AS2107, Council accepted that rates notices for those lots which did not achieve the noise levels required by AS2107, contain a notation to that effect.

In addition to the extent of noise amelioration measures required, the cost of landscaping was a major issue.

Mr Flanagan allowed for landscaping on both sides of the noise amelioration mounds, while Mr McPherson allowed for landscaping on the front and top of the mounds, but not the rear abutting the allotments, which he said was in accordance with the requirements of the Main Roads Department and the Council. Combined with Mr Flanagan's different interpretation of the level of sound amelioration to be achieved in the after resumption scenario, those costings add \$5,468 per lot to Mr Flanagan's costings for 124 lots, while Mr McPherson's costings add only \$1,973 per lot for 128 lots.

It is my view that Mr McPherson's estimates should be preferred in respect of noise amelioration measures. Mr Flanagan was originally prepared to accept Mr Kamst's estimates of the required noise levels, but became concerned that the conditions imposed on Ardel were different. He sought to support his challenge to Mr Kamst's estimates by referring to the Ron Rumble report. However, that report might be based on some inaccurate assumptions. Furthermore, the evidence indicates that the topography on Ardel is quite different to that on the subject land. While the subject land is basically flat, there are higher areas on Ardel where the 63 dB(A) may not be able to be achieved. Therefore, that may account for the AS2107 requirement for the achievement of 55 dB(A) for those properties. However, as mentioned earlier, the developers in Ardel sought an alternative solution and decided that, instead of incurring the cost of complying with AS2107, the Council would note the rates notices for those non-complying allotments to the effect that they did not achieve the required noise levels. The weight of evidence indicates that this would be unlikely in the case of the subject land.

Therefore, I am of the view that a prudent purchaser of the subject land after resumption would conclude that Mr McPherson's estimates, being based on Mr

Kamst's noise amelioration measures, were more likely to be accurate than Mr Flanagan's. In the event that 55 dB(A) could not be achieved for the upper storeys of some two-level developments, it seems that the developer could opt to have the rates notices endorsed as happened in Ardel, rather than incur the expense of additional acoustic mounds and/or fencing.

There were other differences of opinion between Mr Flanagan and Mr McPherson. One of these concerned the fee of \$1,900 per lot charged by FNQEB, which was refundable in part. In his estimates, Mr McPherson allowed the full amount, as the refund may be some years in the future. On the other hand, Mr Flanagan allowed the \$700 non-refundable component, saying that his practice is to advise his clients that the \$1,200 subdivision deposit would be refundable at some time in the future.

When it was pointed out that Mr Flanagan had allowed for that item in the Ardel development at a rate of \$2,000 per lot, he explained that Ardel had asked him to do so. It seems to me that if an experienced developer such as Ardel required the FNQEB charges to be included in the costs estimates, so would a prudent purchaser of the subject land.

Mr Flanagan and Mr McPherson also differed over matters, such as the treatment of the charges by the Council and the State Government. However, I do not feel that it is necessary to resolve all these differences, merely to point out that they did occur.

The Valuation Evidence

Valuation evidence was given by registered valuers, Mr Eales gave evidence on behalf of the claimants and Mr Gould gave evidence on behalf of the respondent. Both valuers agreed that the best method of assessing compensation in this case is by means of the "before and after" method, valuing the land before resumption and then separately valuing the remaining land after resumption, the difference between the "before" valuation and the "after" valuation, being the loss in value of the land caused by the resumption.

The valuers took the view that the claimants should be compensated for their loss on the basis of the highest and best use of the subject land. In accordance with the principles established by the High Court in *Spencer v. The Commonwealth* (1907) 5 CLR 418, in undertaking their valuations, they endeavoured to base their

assessments on the price that an informed hypothetical prudent purchaser would have paid for the land as it was before the resumption and the price that such a purchaser would have paid after the resumption, with both the before and after valuations being made at the date of resumption.

However, there were many differences between the two valuers. Perhaps the major differences between them related to the perceived degree of risk in obtaining subdivisional approval and to the viability of developing the land below the Q100 flood level. Mr Eales was more optimistic of the prospects of successfully developing the subject land before resumption, than was Mr Gould. That optimism influenced the approach that he took in directly comparing the subject land with the in globo sales.

Mr Eales undertook hypothetical development valuations before and after the resumption to check his primary method of assessment, while Mr Gould checked his assessment by means of discounted cash flow (DCF) analyses of the proposed development. Both methods envisage the hypothetical development of the subject land into residential allotments, requiring substantial quantities of fill to raise the level of the potential lots above the Q100 level.

Mr Eales' hypothetical development approach involved filling the lower areas of the rezoned land to 8.6 metres AHD to achieve flood immunity for 171 lots based on a layout prepared by Rowlands. However, Mr Gould thought that filling over 75% of the area up to 300 metres into the flood plain was a development which was at considerable risk of not being approved.

In Mr Gould's opinion, the subject land is not good quality residential land; it is low and flood prone; it adjoins the Cairns-Kuranda railway line, the Brinsmead-Kamerunga Road, a tramway and a powerline easement; it is also adjacent to a working cane farm. In fact, Mr Gould disagreed that the highest and best use of all of the subject land is for residential subdivision. He thought it to be the least attractive of all its competitors and the cost of filling combined with the risk of obtaining approvals, make its in globo value much lower than any of them.

These differences in approach to the development potential was evident in the way that the valuers analysed the in globo sales. Mr Eales simply analysed the sales in overall raw terms, dividing the sale price by the total area, comparing the sale and the subject on an overall rate per hectare. Mr Gould, on the other hand, thought it was preferable to compare the developable area of each of the sales with the flood-free area of the subject land.

Mr Eales was of the opinion that during the period 1994 to 1996, the residential market in Cairns was very active, with subdivisional development throughout the region, including the Redlynch area. As an example, he referred to the Newlands Development adjoining the Savina farm, which was commenced in 1994, the last lot being sold in late 1995, a total of 102 lots in 13 months.

To estimate the rate at which allotments from the subject land could be expected to sell at the date of resumption, Mr Eales had regard to various sources. These included research reports published by the valuation firm Herron Todd White, which were derived from details obtained from developers, which Mr Eales thought gave a more accurate indication of the rate of sales of lots. He also referred to data compiled by the Department of Natural Resources concerning vacant land sales during that period, as well as the numbers of building applications made to the Cairns City Council. Mr Eales concluded that in 1996 a developer would have expected to sell four lots per month, or 48 to 50 lots per year. Mr Gould was more pessimistic, as the demand for residential lots had declined considerably since the Newlands development, estimating that at the end of 1996, a developer could expect to sell only 1.5 lots per month, or 18 lots per year.

In Mr Eales' opinion, the subject land was ripe for subdivisional development because it had the following attributes:

- it was located close to State and private primary schools and private secondary schools;
- it was located close to local shopping facilities;
- it had easy access to main arterial roads;
- it was adjacent to existing good quality built-up residential areas;
- it had immediate access to the services infrastructure required for subdivisional development;
- it had easy access to the Cairns City Centre; and
- it had easy access to the Marlin Coast recreational beaches.

In his view, those attributes refuted Mr Gould's opinion that the subject land was the least desirable residential land in the area.

Mr Eales' In Globo Basis

In arriving at his primary valuation of the subject land, Mr Eales referred to nine sales of in globo land, but he relied on few of them. The others were included simply to indicate that there was a market for in globo land with subdivision potential.

In his view, the subject land had many of the attributes which would make it attractive to developers. Apart from being well situated, it had a reasonably regular shape suitable for layout plans, it had frontage to roads which could be worked from (subject to Main Roads and Council consent) and from which the subdivision development could be given a definite entrance statement.

The Ardel Sale

The sale upon which Mr Eales placed most reliance was the sale of a property of 15.79 ha, which had been part of a cane farm, from Tenni to Ardel Pty Ltd (the Ardel sale) in May 1996 for \$2,200,000. That property sold subject to rezoning and showed an overall value of \$139,328 per ha.

It seems that the parties contracted for that sale in April 1995, but settlement did not occur until May 1996. According to Mr Eales, subdivision of that land into residential lots commenced soon after settlement, with the potential for 156 lots.

Mr Eales was of the opinion that the sale was directly comparable with the subject land in location, size, potential to develop to residential lots, zoning and topography. The subject land is situated between that sale and the Newlands subdivision. Most crucially, he had formed the opinion that the cost to develop the Ardel property was comparable to the estimated cost of development of the subject land.

It emerged in evidence that before settlement of the sale, Ardel sought the advice of experts, including the engineer, Mr Flanagan, who provided preliminary estimates which identified a development cost per lot. Ultimately, the costs of development proved to be greater, resulting partly from a greater amount of fill required than estimated and from the increased cost of drainage. However, there is evidence that part of the increased cost was associated with the developers endeavouring to create an atmosphere of quality in their subdivision. It seems that the developer's intentions were changed as the development proceeded, as will be discussed later.

Mr Eales conceded that more filling would be required on the subject land than on Ardel, but in his view that was offset by the extensive drainage required on the sale. He reasoned that the sale is directly comparable with the subject land, as the overall costs of development (filling and draining etc) would be much the same.

Mr Gould did not agree. Although he also had regard to the sale, it was only one of a number of sales which formed his basis of valuation and he said that he placed no particular reliance on it. He did not agree that overall development costs could be compared. The Ardel sale had required more fill than the developers originally expected, but Mr Gould pointed out, far less than the quantity of fill required to bring the subject land to Q100 flood immunity.

In Mr Gould's opinion the sale could not be compared directly with the subject land without adjustments being made for their differences. In his opinion, the price paid reflected the purchaser's expectations at that time, not what occurred subsequently. Mr Gould described the Ardel land as gently sloping, rising from about 8 metres AHD to about 19 metres AHD, with some lower areas which required borrowed fill to achieve Q100 clearance. He believed that at the time of purchase, Ardel estimated that 8,000 m³ of fill was required at an estimated cost of \$125,000 (cost of imported fill) and thought that the surface area requiring fill was less than 5,000 m². According to Mr Gould, the purchaser expected to achieve a 152-lot subdivision and that subsequent to the purchase, extensive additional earthworks were required and the plans were revised for 156 lots.

Mr Gould analysed the sale based on the purchaser's original expectations to show:

\$139,329 per ha overall;

\$147,245 per ha, assuming filled to Q100 level; and

\$15,296 per lot, assuming filled to Q100 level.

To arrive at the analysed per ha rate of \$147,245, Mr Gould added the estimated cost of filling of \$125,000 to the sale price of \$2,200,000 to arrive at a filled value, before dividing by the area.

The Redlynch Bypass Road runs along the eastern boundary of the Ardel sale. However, the resumption itself was from the balance of the Tenni farm. It is common ground between the valuers that the purchaser would have known of the proposed bypass road before contracting to purchase in April 1995. It is also common ground that the market for in globo land was higher in mid-1995 than it was at the date of resumption in December 1996. By that time, the market had declined.

There were other reasons why Mr Gould placed no particular reliance on this sale. He said that he always had reservations about the sale, as he thought it was a

high sale; it had been purchased by a southern based developer who had paid top price at the end of the period of higher prices. He was reluctant to rely entirely upon it, however, he conceded that it generally fitted in with the broad in globo analysis.

According to Mr Gould, the purchaser originally thought that only 5,000 m² of the land required fill, but it turned out to be about 1.6 ha. Even if comparisons were to be made on that basis, rather than on the basis of the purchaser's expectations, Mr Gould was of the opinion that the subject land was significantly inferior. About 10% of the Ardel area required fill, compared with 75% of the subject land.

Mr Gould was of the opinion that it was difficult to make a direct comparison without adjustments. Apart from the costs of development, Mr Gould regarded the sale as superior to the subject land because of its higher elevation and slightly better location.

The Ardel development did not proceed as planned. After developing the land south of the internal drain, in September 1998 Ardel sold the northern area of 8.657 ha to the Uniting Church, which intends to construct a retirement village on that land. That sale is discussed later.

The Newlands Sale

Both Mr Eales and Mr Gould referred to the sale of a property of 11.61 ha known as the Newlands development, situated just to the north-west of the subject land. That property sold, according to Mr Eales, in January 1993 for \$900,000 and according to Mr Gould, in October 1993 for \$1,300,000. Unfortunately, that difference was not resolved.

Mr Eales described the property as a former cane farm in an area of expanding residential development, the developer of which proposed a 102-lot subdivision, with external costs estimated at \$121,000 for sewerage, drainage and a pump station.

Mr Gould described it as being located on a gentle ridge overlooking the Barron River and Freshwater Creek flood plains, rising from the 7-metre contour on the east to a height of 21 metres with some relatively minor filling required to achieve Q100 flood immunity, however Mr Gould was not aware of the cost.

In Mr Eales' opinion, although this sale was transacted some three years prior to the date of resumption, it adjoins the subject land and he considered it to be directly comparable in location, but slightly superior in elevation; development costs were

20% higher at \$27,102 per lot, than were estimated for the subject land. Based on Mr Eales' assumed sale price, plus the estimated cost of external works, the sale showed overall \$87,941 per ha. However, Mr Eales was of the view that if the higher development costs were allowed for, the sale supported a value of \$120,000 to \$130,000 per ha, three years prior to the date of the resumption.

On the other hand, Mr Gould was of the opinion that at the time of the sale the market for residential land was rising and at the date of resumption, the Newlands land would have sold for a significantly higher price, as it is considerably superior to the subject land. Because of the state of the market in 1993, he felt it was difficult to compare the sale with the subject land. Mr Gould did not think that the sale was of any real assistance.

Based on Mr Gould's assumed sale price, the sale showed \$111,972 per ha overall.

The Monte Farm Sale

Mr Eales referred to the sale of a property of 33.4 ha, known as the Monte Farm, which sold in August 1995 for \$1,250,000. That sale overall showed \$37,425 per ha.

That property is located on the Brinsmead-Kamerunga Road at Caravonica, some 19 km from the Cairns City Centre. According to Mr Eales, a large area of the property is low and the concept plans show a large area dedicated to park and lakes, with a 229-lot subdivision and 1.3 ha of commercial land. He went on to say that those plans are now on hold, with an alternative plan to develop as a language school.

In comparing the sale with the subject land, Mr Eales commented that it is a large in globo parcel located further from the city, not zoned for residential development at the date of sale. He saw it as a difficult site to develop, in a more remote location. He thought it was not directly comparable with the subject land.

Mr Gould did not rely on this sale. He said that he was not confident of the accuracy of the information he had received about it, but he thought the sale was relevant.

The University Heights "Sale"

Mr Eales and Mr Gould referred to the aborted sale of a property known as University Heights at Smithfield. That property, of 51.71 ha, was contracted to sell

by the Queensland Government to the Stockland Group in December 1996 for \$5,000,000. The contract was subject to approval for rezoning from "Special Facilities" to a lower intensity "Residential 2" subdivision.

According to Mr Gould, the Queensland Government decided not to proceed with the sale and to retain the land for future university use. However, he said the purchasers were prepared to proceed with the sale and he considered it be good evidence of value at December 1996, the date of resumption in this case. Mr Eales also felt that the agreement constituted evidence of the vendor and purchaser coming together as to the sale price of the property at the date of contract.

According to Mr Eales, the purchaser proposed a residential development comprising 108 courtyard lots of around 500 m², 228 normal size lots and 70 larger lots, a total of 406 lots. The nature of the land, including ridges, creeks and gullies, significantly increased the cost of development.

According to Mr Gould, the engineering estimates available to the purchaser indicated that external access and service works would cost a further \$1,600,000, which he added to the sale price for comparison purposes. He stated that a development assessment at the time identified a developable area of 44.56 ha. Analysed on that basis, "the sale" showed Mr Gould \$148,115 per ha of usable land. Analysed overall it showed \$96,693 per ha.

Mr Eales took the view that "the sale" was not directly comparable with the subject land. He considered "the sale" to be superior. On the other hand, Mr Gould considered "the sale" to be of assistance, as it was negotiated closest of all the sales to the date of resumption, it was offered by public tender, the purchaser was a knowledgeable developer, an engineering report had identified external costs and internal constraints, it was possible to identify the costs and the usable component of the land, so he analysed it that way. However, he agreed that the property is superior to the subject land.

The Timberlea Terraces Sale

Mr Eales referred to a property of about 30.126 ha, known as "Timberlea Terraces" which sold in June 1995 for \$1,725,000, subject to rezoning to "Residential". It is situated about 6 km west of Edmonton in the Cairns southern corridor, in what Mr Eales considered to be an inferior location to the subject land. He stated that it is suitable for development of 110 residential allotments, plus two areas for future group title.

The sale showed overall \$115,000 per ha, but Mr Eales considered it to be not directly comparable to the subject land.

Mr Gould did not refer to that sale.

The Zappala Farm Sale

A property known as Zappala Farm, of 66.73 ha, sold in May 1995 for \$6,600,000 on the basis of a staged settlement, which Mr Eales considered to have a present value at the date of sale of \$6,100,000. The property was a cane farm located about 2.5 km west of Edmonton and was zoned "Residential A" at the time of sale. Mr Eales' preliminary investigations indicated a yield of 607 allotments, averaging 700 m², with the purchaser paying for sewerage and water infrastructure to the site. Based on the present value of the staged sale price, the sale showed \$91,413 per ha, but Mr Eales considered the sale not to be directly comparable to the subject land.

The Leotta's Farm Sale

A property known as Leotta's Farm, with an area of about 42.593 ha, which is also located in the same area, about 1.5 km west of Edmonton. It sold in May 1994 for \$3,700,000, subject to rezoning, with a yield of 280 residential allotments, averaging about 750 m², according to Mr Eales. The sale showed \$86,869 per ha overall, but Mr Eales considered it to be not directly comparable to the subject land.

The Ardel to Uniting Church Sale

Both Mr Eales and Mr Gould referred to this property with an area of 8.657 ha, which was the northern part of the Ardel sale. It sold in September 1998 for \$1,250,000 to the Uniting Church for the development of a retirement village. According to Mr Eales, Ardel had planned to develop a further 81 lots on that land. Part of it, 1.386 ha, is required for Council parkland purposes and drainage area.

Overall the sale shows \$144,392 per ha, or if the net area of 7.271 ha is used, \$171,916 per ha.

Although the sale took place almost two years after the date of resumption, in a period when the market was considered to be on the wane, Mr Eales thought the sale supported the earlier sale of the whole site from Tenni to Ardel. However, he expressed the view that this area was the lower part of the land which would have attracted higher development costs.

Mr Gould thought otherwise. He considered that this sale indicated that there was a downward trend in values, but he did not think that the sale itself was of much assistance; it was two years after the relevant date and it was subject to approval for a much higher use as a retirement village. He was of the opinion that the purchaser had paid that price more as a site value than a value per ha.

The Chapman Sale

Mr Eales and Mr Gould referred to the more recent sale of a parcel of land known as the Chapman property of 9.53 ha, which sold in June 1999 for \$1,800,000 on extended settlement terms. According to Mr Gould, those terms were 10% deposit, with the balance to be paid over three years at no interest as the developed lots settled. Mr Gould concluded that the purchase price equated to a present value of \$1,450,000, or \$152,086 per ha, which represented \$17,901 per lot for 81 lots.

On the other hand, Mr Eales concluded that the sale equated to a value of \$146,904 per ha overall, on his estimated present value. He thought the land was suitable for development into approximately 100 lots.

The Chapman sale is situated at Redlynch, within 500 metres of the subject land. Both valuers considered that sale to be superior to the subject land in terms of topography, although it was broken by a central gully which would not be suitable for development and which would have to be allowed for as a drainage reserve. Mr Eales commented that although at the time of sale the market for residential land was depressed, he thought that the sale was an indication that an experienced developer was prepared to pay in global values equivalent to those of 1996. However, Mr Gould was of the view that the sale illustrates a downturn in the market as it is much superior to the subject land. He thought the sale may be a bit high, but when the terms were discounted to present value, it was more in line with the market.

Mr Eales conceded that the vendor terms make the sale difficult to analyse. However, when the unusable land is excluded it shows over \$200,000 per ha, which he thought supported the other after-date sales evidence.

The Sale at Palm Cove

Mr Gould referred to a property of 20.34 ha, situated on the Captain Cook Highway at Palm Cove, which sold in May 2000 for \$1,525,000. Mr Gould described it as partly cleared, gently sloping land, rising from the highway frontage to steep timbered forest slopes at the rear. He stated that it was planned for a 129-lot

residential subdivision, with approximately 5.23 ha of steep hillside to be rezoned "Open Space" and dedicated as parkland reserve. He went on to state that the developer had to pay an additional \$2,590 per lot for road upgrading and bikeways.

The property was purchased by the Stockland Group, the prospective purchaser of the University Heights land. According to Mr Gould, the sale is significantly superior to the subject land, as it is elevated land situated at Palm Cove. The sale shows \$100,926 per ha for the available land, or \$11,822 per lot, which Mr Gould thought was indicative of the downward trend in values in the residential market since the peak in 1994-95.

Mr Eales thought that this sale was not directly comparable evidence. Mr Gould agreed, but said that he had included the sale to demonstrate the decline in the market. He considered Palm Cove to be a superior address to the subject land and the other sales, although he conceded that it could not be directly compared with the subject land.

The Sale of Flood Plain Land

Mr Gould included another sale, which was the balance area of the former cane farm which became the Newlands sale. It contains an area of 12.47 ha, situated just to the north of the Newlands sale, consisting of land which is generally below the 7 metre contour level in the flood plain of the Barron River. That land sold in October 1993 for \$250,000, or \$20,048 per ha. Mr Gould included the sale to indicate typical values achieved for flood plain land.

The In Globo Assessments - Mr Eales' Approach

Both Mr Eales and Mr Gould agreed that the principal method of assessment should be by valuations made by direct comparison with the in globo sales. By direct comparison with those sales, particularly the Ardel sale, Mr Eales adopted a value of \$140,000 per ha for the subject land before the resumption. He accepted the C& B plan area of 18.2753 ha, arriving at a before resumption value of \$2,558,542, which he rounded to \$2,560,000.

Mr Eales then turned his attention to the value of the remaining land after the resumption, noting that there were no sales which were similarly affected by being severed by a bypass road. He reasoned that after the resumption the remaining land was adversely affected by -

- increased traffic noise and visual pollution;

- increased development cost per lot; and
- disproportionate increase in development costs to the northern severance.

He felt that the bypass road had a significant impact upon the amenity of the land on both sides of the road, caused by increased traffic noise and visual impact. In his opinion, about 4 ha was particularly affected, 1 ha of which would be required as a noise amelioration buffer strip, which he thought would have only a nominal value. He thought that the balance of the affected land when developed into allotments would experience sales resistance and would achieve lower prices, and this should be reflected by reducing the in globo value of the injuriously affected land by 20%.

For the estimated increase in development costs of about \$9,100 per lot, Mr Eales relied on a report by consulting engineer, Mr Flanagan. Mr Flanagan concluded that the increase in development costs was far higher on the northern severance area than for the southern severance. The post-resumption Rowlands plan produced 102 lots, 53 on the northern severance and 49 on the southern severance. Mr Eales was advised that differences in development costs were as follows:

For the northern severance of 53 lots, development costs were estimated to be \$1,920,551, or \$36,237 per lot;

For the southern severance of 49 lots, development costs were estimated to be \$1,319,734, or \$26,933 per lot.

This disproportionate increase in development costs, together with its isolation from any staged development commencing from the southern road frontages and what he referred to as "the ability to achieve an enclave which allows the less suitable in globo land to be developed, has been lost" (Exhibit 7, page 22), led Mr Eales to conclude that after the resumption the northern severance was not ripe for subdivision.

After considering the sales evidence he adopted the following in globo values after resumption (as amended by Exhibit 61):

5.244 ha @ \$100,000	\$524,400
0.5 ha @ \$100,000	\$50,000
9.2493 ha @ \$20,000	<u>\$184,986</u>
Total	<u>\$759,386</u>
Rounded to	\$760,000

Mr Eales seems to have reasoned that after resumption only 5.244 ha had immediate potential for development, but at a much reduced in globo value. He thought that an area of about half a hectare would be developed around some existing

improvements as a rural homesite, while the balance 9.2493 ha was no longer ripe for development and had a value no higher than cane land.

The difference between Mr Eales' before and after valuations amounted to \$1,800,000.

Mr Eales' was confident of the results he obtained by the valuations before and after the resumption, in his primary method of assessment. He thought the in globo sales provided a reliable basis, particularly the Ardel sale, which he considered to be directly comparable with the subject land in all aspects. In considering other methods of valuation, Mr Eales commented that every developer does a hypothetical development exercise, but in his opinion there are too many variables for such a method to be used as a primary method of valuation. However, he felt that the hypothetical development method was an acceptable check method of valuation.

The amended claim for compensation of \$1,200,000 is based on a somewhat different approach to the "before" and "after" valuations.

Mr Gould's Approach

Mr Gould agreed that the most appropriate method of assessment of compensation was by means of the valuation of the land before and after resumption on an in globo basis. The sales evidence had led him to conclude that the value of the land for cane growing was about \$20,000 per ha, while sales of in globo land showed values for usable residential subdivision land ranging from about \$101,000 to about \$152,000 per ha, which Mr Gould felt would be the highest and best use for the flood-free part of the property. He felt that parts of the land below the Q100 level could be filled, if approval was granted and if the expense could be justified. His engineering advice was that the cheapest method of filling the land would be by means of obtaining fill from borrow pits on the balance of the Savinas' farm to the east and raising the level to 8.6 metres AHD.

Mr Gould regarded as significant the condition of the Planning and Environment Court rezoning approval requiring a detailed flood study for the land below Q100 flood level at the time of any application to the Council for subdivisional approval. He felt that at the date of resumption there was considerable uncertainty as to the likelihood of obtaining approval to fill such a large area to such a depth so far onto the flood plain. He thought that a prudent purchaser of the land would apply a

substantial risk factor to the price for the risk of getting subdivisional approval over all that land.

Mr Gould considered the subject land to be far from ideal subdivision land even before the resumption, because of the negative impacts of the tramway, high voltage line easement, the railway line and the Brinsmead-Kamerunga Road. He considered it to be even less desirable after resumption, as even more lots would be affected by road noise and lack of visual amenity. While these could be counteracted with buffer mounds and increased road verge width, he thought that such lots would overcome buyer resistance only if their prices were discounted. In his opinion, a prudent purchaser would pay less per ha after resumption than before.

Mr Gould had been advised that the engineer, Mr McPherson, estimated costs of filling the land at \$8.80 per m³, with further allowance of say 20 cents per m³ for disturbance to the balance of the cane land by digging borrow pits, a total of \$9 per m³ for fill. Therefore, as 1 metre of fill over 1 ha would cost \$90,000, Mr Gould reasoned that to fill to depths of much more than 1 metre would not be economic, as it would be cheaper to buy flood free in globo land elsewhere.

Mr Gould therefore thought that a prudent purchaser would value the land above the Q100 flood level by direct comparison with the in globo sales evidence and attribute some added value to the land below that line, taking the risk that approval may be obtained to fill parts of it where it proved to be economic. In Mr Gould's opinion, such a prudent purchaser would apply discounts to the value of the area below the Q100 level, based on the purchaser's assessment of risk of obtaining approval and the likely cost of filling. Those areas which were too low lying and uneconomic to fill may, in his opinion, be considered as park contribution or buffer areas.

In his adjusted before valuation, Mr Gould valued an area of 14.55 ha, which excluded the area of powerline easement and tramway buffer and an area at the northern end identified in the Rowlands Plan as "possible future residential area", but which seems to be agreed as an area not suitable for development.

Before resumption, the 14.55 ha comprised -

Area above flood line	3.5422 ha
Area below flood line	<u>11.0078 ha</u>
Total area	<u>14.55 ha</u>

Therefore, excluding the agreed area of buffer of 2.2447 ha, an area of 3.7253 ha was not valued separately by Mr Gould. In undertaking the valuation of the

subject land before and after the resumption, Mr Gould was well aware that three of his seven sales were after date sales. However, he said that he tried very hard not to use hindsight when considering the valuations as at the date of resumption, but to place himself in the position of a hypothetical purchaser at that date.

Mr Gould did not think that the Rowlands or C & B plans reflected the highest and best use of the land before resumption. He considered the land above the Q100 flood line to be suitable for residential subdivision, but he thought that only part of the land below that line could be developed, the balance being suitable only as cane land. Mr Gould made it clear that his assessment was made on the viability, not the physical possibility, of development. He referred to the Newlands sale where the area above the flood line was surveyed off and that area sold at a much reduced price.

Based on the sales evidence, Mr Gould valued the subject land before resumption as follows:

Land above flood line 3.5422 ha @ \$145,000 per ha	\$513,619
Land below flood line 11.0078 ha @ \$40,000 per ha	<u>\$440,312</u>
Total 14.55 ha	<u>\$953,931</u>
Adopt	<u>\$955,000</u>

Mr Gould explained that the value of \$145,000 attributed to the flood-free land was net area and did not include the area of park contribution, but as will be discussed later, that is not how he analysed the sales. He also explained that the value of \$40,000 attributed to the land below the flood line assumed that some of the land could be economically developed. He said that if he had more information he could have more accurately assessed how much of that land could be developed, but he thought that the fundamental question was how much would a prudent purchaser have paid for that land.

In assessing the value of the subject land after the resumption, Mr Gould was of the view that values had been reduced, principally because of the greater areas that would be exposed to noise and visual impact. In his opinion, the northern severance would be slightly less appealing than the southern severance, which is closest to Redlynch.

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

Land above flood line northern severance 1.0631 ha @ \$100,000 per ha	\$106.310
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Land above flood line southern severance 1.9115 ha @ \$110,000 per ha	\$210,265
Land below flood line northern severance 4.9609 ha @ \$25,000 per ha	\$124,023
Land below flood line southern severance 3.3325 ha @ \$30,000 per ha	<u>\$99,975</u>
Total 11.2680 ha	<u>\$540,573</u>
Adopt	<u>\$540,000</u>

Mr Gould said the figures applied reflected his assessment of the extent of the impact resulting from the resumption. After the resumption the southern severance had a much higher proportion of land that required little fill, while the northern severance had a much higher proportion of land that required extensive fill. He went on to say that there was a number of possible developments of the northern severance after resumption. He suggested that the land that did not require fill could be subdivided off to Fairweather Road, which would be a fairly low cost, high profit subdivision and part of the land below the flood line could be filled with the possibility of rural residential use.

Mr Gould's assessment of compensation on an in globo basis was as follows:

Value of land before resumption	\$955,000
Value of land after resumption	<u>\$540,000</u>
Compensation	<u>\$415,000</u>

Therefore, although both valuers agreed about the primary method of assessment of compensation, their approaches to it were quite different. Mr Eales took an optimistic view of the value of the land before resumption. He had applied a value of \$140,000 per ha by direct comparison principally with the Ardel sale, to the whole 18.2753 ha, making allowance only for the area of 2.2447 ha of easement and tramway buffer. He assumed that all the land below the Q100 flood line could be filled and that approvals could be obtained as a matter of course, without any risk. He saw no difficulty in making a direct comparison with the Ardel sale, reasoning that although the subject land required a greater amount of fill, the overall development costs were much the same per ha.

However, he took a much less optimistic view of the development potential after resumption. He assumed that little if any of the northern severance could be

developed for residential subdivision. Of the land that could be developed, he considered it to be significantly injuriously affected.

On the other hand, Mr Gould took a much more pessimistic view of the development potential of the subject land before resumption, attributing a value of \$145,000 per ha only to the land above the Q100 flood level and a value of \$40,000 to the land below that level. He valued only 14.55 ha as against the area of 18.2753 ha valued by Mr Eales, as he excluded not only the buffer areas, but the areas required for park contribution and the far northern undevelopable area.

Mr Gould disagreed that the Ardel sale could be applied directly. In his opinion the Ardel property was significantly superior to the subject land and required far less fill. In addition, the sale had been negotiated at a time when the market for in globo land was higher than at the date of resumption. If it was to be compared with the subject land, Mr Gould thought that adjustments for the differences between the sale and the subject land would have to be made.

Mr Gould also disagreed that the rate of \$140,000 per ha could be applied to the whole 18.2753 ha of the subject land because of the low-lying nature of such a large proportion of it, without any discount for the costs and the risks of gaining approvals and filling. As explained earlier, it seemed to him that it was imprudent to attempt to fill all of the land below flood level. In his opinion, to fill the subject land to Q100 level would require between 160,000 m³ to 170,000 m³ of fill, some 20 times the original estimate to fill the area on the Ardel property.

In valuing the land below the Q100 level, Mr Gould had discounted for the risk of obtaining approval to fill by about \$20,000 per ha. However, he said that if that risk was removed, then the discount also would be significantly reduced, as the only risk would be the source and the cost to fill.

I will return to this aspect of his evidence later.

The Check Methods of Valuation

Mr Eales undertook a check on his assessment of compensation by means of "before and after" hypothetical development of the subject land. Initially he used the Rowlands layout plans as the basis for his hypothetical subdivision exercises, for a 171 lot subdivision before resumption and a 102 lot subdivision after resumption. However, he later agreed that the plans prepared by C & B Consultants were better plans both before and after the resumption. Those plans showed lot yields of 175 lots

before the resumption and 128 lots after the resumption. Although the proposed development was to undergo some alterations in accordance with the C & B plans, the essential elements of his hypothetical subdivision were retained such as -

- profit and risk allowance 25%;
- rate of sale at four allotments per month, or 48 allotments per year;
- development and selling period of 3.6 years.

In undertaking his assessment, Mr Eales relied upon costs supplied by Mr Flanagan.

Mr Eales' hypothetical development exercise before resumption resulted in a land value of \$2,145,000, or \$119,866 per ha for the 17.895 ha (the area he considered appropriate at that time), which Mr Eales somewhat optimistically felt reflected a similar level of value to his direct comparison valuation assessment, which was \$2,560,000.

To check his in globo assessment of the value of the subject land after the resumption, Mr Eales carried out two hypothetical development valuations of the remaining land, one for the whole area and one for the southern and northern severances separately. The first hypothetical development exercise was carried out for the 102 lot subdivision, using the development costs provided by Mr Flanagan and a profit and risk allowance of 25%, the same as in his development exercise for the before resumption valuation. He adopted a development and selling period of 2.125 years. That exercise produced a land value of \$250,000, or \$17,630 per ha, over the land available for subdivision, after allowing a nominal \$10,000 for the land value of the buffer strip.

In his second hypothetical development exercise, for the 49 lot southern severance, Mr Eales adopted a profit and risk allowance of 25% and a selling period of one year. That resulted in a land value of \$340,000, or \$77,200 per ha, over the land available for subdivision, after allowing a nominal \$5,000 for the buffer strip. Later Mr Eales agreed that the buffer area should be valued at \$20,000 per ha, at the same value as cane land.

For the 53 lot subdivision of the northern severance, Mr Eales again adopted a profit and risk allowance of 25% and a development and selling period of one year. That resulted in a land value in the negative of \$112,753.

That later exercise, in Mr Eales' view, demonstrated that the northern severance was uneconomical to develop and that its highest and best use was as park contribution and as cane land.

Those hypothetical development exercises confirmed Mr Eales' opinion that direct comparison with in globo sales, both before and after the resumption, was the most appropriate method of valuation of the subject land. However, he said that he adopted the direct comparison assessment "... after being satisfied that the hypothetical development approach check valuations are in line with my overall opinion of the property's value Before and After resumption." (Exhibit 7, page 27)

Mr Gould thought that Mr Eales' hypothetical development exercises could be challenged on many grounds, including his adopted rate of sale of lots and his profit and risk allowance. However, quite apart from these criticisms, it is difficult to see how the results of his hypothetical development assessments could be of any assistance in supporting his primary assessment.

Mr Gould also carried out valuations by means of hypothetical development assessments utilising discounted cash flow analyses of the proposed developments before and after the resumption. He did so only because he had been asked to consider the feasibility of such development.

Because of the long-term nature of the development, Mr Gould thought that it would be inappropriate to use a simple hypothetical development exercise in this case. He considered that discounted cash flow analyses (DCF) before and after the resumption, would be more appropriate. However, he recognised that the major shortcoming of the DCF method is that it does not necessarily represent the highest and best use of the property, but merely examines a proposed use. He had serious reservations as to whether a prospective purchaser would have considered the expenditure warranted on survey, engineering and other consultants required to undertake such exercises, when simple mathematics would show that the cost of fill to a depth of 2 metres at \$9 per m³ would amount to \$180,000 per ha, while fill to a depth of 3 metres would cost \$270,000 per ha. In his opinion, for that sort of expenditure much better subdivisional land could be purchased elsewhere.

Significantly, Mr Gould went on to express his opinion about the appropriateness of the DCF method of assessment in this case:

"It is my view that, if land is obviously uneconomic for development, it should not be included in a hypothetical development analysis as this would not represent its highest and best use. Land of this type should be valued by direct comparison if possible and the Before and After values should be compared to arrive at the appropriate level of compensation." (Exhibit 42 p.17)

Mr Gould did not rely on his DCF analyses. He explained that the method had too many drawbacks as the inputs varied. In this case, he had no confidence in the viability of the design or filling up to 3 metres in depth. He said that the same problems were inherent in the hypothetical development method adopted by Mr Eales, but he thought that the DCF method dealt with interest and income more accurately. In Mr Gould's opinion, the broad-brush in globo comparison approach would more correctly reflect what a hypothetical prudent purchaser would have done in considering what he/she should pay for the subject land.

However, notwithstanding his reservations, Mr Gould undertook the exercises using the plans before and after resumption prepared by C & B Consultants. The before resumption plan showed a yield of 175 lots while the after resumption plan showed 128 lots.

The consulting engineer, Mr McPherson, provided estimates of costs and the likely staging of development. However, Mr Gould had reservations as to whether obtaining fill from borrow pits on the flood plain would be approved. He factored that risk into the valuations.

The costs of external intersection works and contributions were estimated by engineers Maunsell McIntyre.

In determining an appropriate rate of sale for the proposed subdivisions before and after the resumption, Mr Gould was well aware that the residential market was in an evident state of decline by December 1996.

After considering the sales history of various individual estates and generally in the western corridor, Mr Gould came to the conclusion that in December 1996 a prudent purchaser would have expected a seasonal return to higher rates of sale in two or three years and it would be reasonable for that purchaser to hope to sell 18 lots per year over the life of the development, a period of about 10 years.

Mr Gould regarded his adopted rate of sale of 18 lots per year as somewhat optimistic and thought that such optimism should not be compounded by an optimistic assessment of the risk factor. In the circumstances, he regarded 30% profit and risk

allowance as the minimum acceptable in the prevailing market. He thought that risk was much greater when the hypothetical development extended over a greater number of years.

His DCF analyses resulted in a value of \$1,260,000 for the 175-lot subdivision before resumption and \$660,000 for the 128-lot subdivision after resumption. However, in his view the exercises did not provide for the risk of obtaining the necessary approvals to fill the property. He reasoned that if a risk factor of 50% was applied, the difference between the before and after analysis was \$400,000.

The Relevant Legislation

Compensation is required to be determined under the provisions of the *Acquisition of Land Act 1967*, s.20 of which provides:

"(1) In assessing the compensation to be paid, regard shall in every case be had not only to the value of land taken but also to the damage (if any) caused by either or both of the following, namely -

- (a) the severing of the land taken from other land of the claimant;
- (b) the exercise of any statutory powers by the constructing authority otherwise injuriously affecting such other land.

(2) Compensation shall be assessed according to the value of the estate or interest of the claimant in the land taken on the date when it was taken.

(3) In assessing the compensation to be paid, there shall be taken into consideration, by way of set-off or abatement, any enhancement of the value of the interest of the claimant in any land adjoining the land taken or severed therefrom by the carrying out of the works or purpose for which the land is taken.

(4) But in no case shall subsection (3) operate so as to require any payment to be made by the claimant in consideration of such enhancement of value."

In this case there was no suggestion that there was any enhancement to the value of the claimants' lands as a result of the new bypass road. It seems to be accepted that it will improve access between Redlynch and Cairns, but neither of the valuers took that into account as any enhancement in value to the balance land as a consequence of the resumption.

Both valuers agreed, however, that in addition to the loss of the resumed land, the remaining land of the claimants suffered damage through severance and injurious affection. They both assessed compensation by means of "before and after" valuations, which approach has the advantage of assessing the value of the land taken, plus the loss in value of the claimants' other lands caused by severance and injurious affection, without having to make separate assessments: *Lansbury v. Brisbane City Council* (1977) 4 QLCR 502.

As mentioned previously, both Mr Eales and Mr Gould adopted as their primary method of valuation direct comparison with sales of in globo land to value the subject land before and after resumption. They then purported to check the result obtained by their principal method, by means of hypothetical development of the subject land for residential subdivision, both before and after resumption. Mr Eales used the traditional approach of hypothetical subdivision while Mr Gould used discounted cash flow analyses.

The valuers agreed that those methods are legitimate check methods of valuation and each of them explained why they considered their adopted approach to be appropriate in the circumstances. However, for reasons explained previously, I do not accept that their check methods provide any assistance in this case. Mr Gould only undertook his DCF exercises because the respondent had requested him to do so and Mr Eales' initial results hardly supported his primary assessment. He later altered his approach during the hearing which, in my view, made the hypothetical development valuations irrelevant.

Therefore, I find that the check valuations are of no assistance in this case.

That leaves each valuer with his primary method of assessment by means of the before and after valuations which were made by direct comparison with the in globo sales.

The Ardel Sale

Mr Eales placed greatest reliance upon the Ardel sale which he regarded as directly comparable to the subject land. Although he recognised that there would be more filling required on the subject land than the sale, he concluded that the overall costs of development of Ardel were comparable to the estimates to develop the subject land before resumption. Therefore, he reasoned that the overall value of \$140,000 per ha could be applied directly to the subject land.

On the other hand, Mr Gould did not regard the Ardel sale as directly comparable. He regarded it as significantly superior to the subject land. In his opinion, substantial adjustments must be made for the differences in any comparison between them. In addition to the flooding and fill differences, Ardel was not adversely affected by proximity to the railway line, cane tramway and the transmission lines.

The evidence is to the effect that prior to Ardel purchasing part of the Tenni farm, Mr Flanagan had advised the developer that the cost of development would be about \$16,000 per lot. Ultimately, the development costs on Ardel amounted to \$20,700 per lot, roughly equivalent to Mr Flanagan's estimates of the cost per lot to develop the subject land. It was not until after settlement that Mr Flanagan revised his estimates from 8,000 m³ of fill required to 23,500 m³. It would seem reasonable to assume that at the time of contracting to purchase, Ardel envisaged that development costs would be about \$16,000 per lot.

Any analysis of the final costs of developing Ardel is complicated by the fact that after developing the southern part of the land, the northern area of 8.657 ha was sold to the Uniting Church for development as a retirement village.

Most of the development proposed for the subject land was the filling of the land below the Q100 level, requiring at least 162,000 m³ of fill (if the Rowlands before resumption plan was adopted). On the other hand, development of Ardel involved only 23,500 m³ of fill, much of the balance of the development costs incurred in expenditure aimed at creating a higher standard of development, which would be unlikely to be incurred in the development of the subject land. This included significant expenditure on a drain which severed the site, including stone pitching, which was more of an issue than fill.

In addition, because of the topography, additional earthworks were involved in the benching of lots in the Ardel development to provide level areas for slabs on ground. Furthermore, the developer incurred expenditure on nostalgia lighting, paved roads and an entry statement all aimed at creating a higher standard of development than was envisaged for the subject land.

In my view, it is clear that the Ardel property is superior to the subject land in its natural state; it has a greater proportion of flood-free land and superior topography, the only detriment being the drain. Any comparison of development costs would be difficult, because of the different standards of development that were envisaged.

However, in my view, any prudent purchaser of the subject land would not ignore the Ardel sale. It is a sale of a similar sized parcel of land, in close proximity, part of which is located on the Freshwater Creek flood plain and required filling before development.

The University Heights Sale

Mr Gould found the University Heights "sale" to be of assistance. He analysed the usable land to show \$148,115 per ha, as explained earlier. The transaction was negotiated close to the date of resumption, offered by public tender, with an experienced, knowledgeable purchaser. An engineering report had identified the external costs and internal constraints. It was therefore possible to accurately identify costs and the usable component.

Mr Gould considered it to be superior to the subject land, notwithstanding that it required rezoning to allow residential development and required a higher level of access and service works.

Mr Gould thought that the "sale" was indicative of the downward trend in the market in late 1996. On the other hand, while Mr Eales thought that the sale was not directly comparable with the subject land, he considered that it supported the Ardel sale.

It is difficult to see how this "sale" could be of great assistance to the valuers, as it is a larger parcel of in globo land, with a larger area of usable land, which both of them consider to be superior, although located further from Cairns. However, neither of them rejected it as evidence of value at the relevant date and Mr Gould has identified the usable component which showed \$148,115 per ha.

The Other Sales

It is unfortunate that the valuers were not able to resolve their differences about the sale price for the Newlands property, as it adjoins the subject land to the north, although the sale occurred over three years before the relevant date, at a time when it was acknowledged that the real estate market was rising.

The Newlands sale had similarities to the subject land, as it was a former cane farm fronting the Brinsmead-Kamerunga Road, with an area which required filling to a depth of about 2.5 metres on the Barron River flood plain. However, the area filled on Newlands was significantly smaller than the area that required filling on the

subject land. From the description of the land, it appears that the flood-free land on the sale was significantly superior.

It is also unfortunate that the valuers were not able to debate the merits of the Monte Farm sale. It is also a large parcel of in globo land, located further from Cairns, with a large proportion of low-lying land. It may well have been of assistance to the valuers, as the sale occurred in August 1995.

The sales referred to by Mr Eales known as Timberlea Terraces, Zappala Farm and Leottas Farm were all acknowledged by Mr Eales to be not directly comparable to the subject land and appeared to have played little part in his valuations.

The sale of the northern part of the Ardel property to the Uniting Church for retirement village purposes was relied upon by Mr Eales as supporting his opinion that there had been no downturn in the market for in globo lands between the date of resumption and the date of the sale in September 1998. However, in my view this sale is clearly for a specific purpose which does not involve traditional residential development and I accept Mr Gould's view that the sale price is more a site value than a value per ha.

The sale of the Chapman property is referred to by both valuers. However, the sale occurred in June 1999, and while Mr Eales saw it as indicating in globo values equivalent to those of 1996, Mr Gould thought the sale illustrated a downturn in the market, as it is so much superior to the subject land, that it would have achieved a much higher rate per ha at the date of resumption.

However, that sale was subject to very generous terms which would have been an attraction to the purchaser. Reducing those terms to a present value complicates the analysis of that sale.

Finally, there is the sale referred to by Mr Gould situated at Palm Cove. As stated previously, he had included that sale to demonstrate the decline in the market, as Palm Cove is so much superior to the subject land. In any case, the sale is not directly comparable evidence and little reliance could be placed upon its analysed value.

Application of the In Globo Sales Evidence

The sales evidence in this case is far from ideal. However, like the valuers, I must endeavour to do the best I can with the evidence before me. It is difficult to see how the valuers were able to confidently arrive at their respective valuations, although

Mr Gibson suggested that there is a certain consistency in the analysis of the flood-free component of each of the sales.

Mr Gibson pointed out that Mr Gould analysed the Ardel sale to show \$147,245 per ha assuming the land was filled to the Q100 level. The University Heights sale showed \$148,115 per ha for the developable land, the Ardel to Uniting Church sale showed \$144,392 per ha and the Chapman sale showed \$152,000 per ha for the flood-free land. He submitted that there was an observable consistency among all of those sales in the vicinity of \$140,000 to \$145,000 per ha for the area capable of development.

As mentioned earlier, Mr Eales applied \$140,000 to 18.2753 ha of the subject land, both above and below the Q100 flood line, including the area to be available for park purposes, excluding only the area of 2.2447 ha of setbacks and buffers. On the other hand, Mr Gould applied \$145,000 per ha to the 3.5422 ha of flood-free area and \$40,000 per ha to 11.0078 ha of land below Q100, a total of 14.55 ha, which excludes an area of 3.7253 ha, part or all of which could be used for park. The values applied by Mr Gould are clearly net areas, excluding not only buffers and setbacks, but potential parkland areas. However, he did not analyse his sales in this manner. Certainly his analyses of the Ardel sale to \$147,245 per ha and the Chapman sale to \$152,000 per ha clearly show no allowance for park and undevelopable areas. If such allowances had been made the analysed rate per ha for the developable land would be considerably higher.

I have come to the conclusion that the value of \$140,000 per ha applied to the whole of the area by Mr Eales is not justified. Having regard to the whole of the evidence, I will adopt \$145,000 per ha to the flood-free component of the subject land, but not on a "net" basis, as I am of the view the whole of the subject land should be valued, including any park area, excluding only the area dedicated to buffers.

The major issue between the valuers was with regard to the application of value to the land below the Q100 level. Mr Eales has included that in his valuation at \$140,000 per ha. On the other hand, Mr Gould has valued the 3.5422 ha above the flood line at \$145,000 per ha, while valuing the 11.0078 ha below the flood line at \$40,000 per ha. Mr Gould explained that the \$40,000 per ha attributed to the land below the flood line assumed that some of the land could be economically developed. However, under cross-examination by Mr Fraser, when it was put to him that Mr Eales had criticised that approach by saying that the land which required little fill was placed in the same category as land which required two to three metres of fill and had

valued it at only a little above cane land value, Mr Gould made the following statement:

"What Mr Eales suggests is right. If I'd had the information to be able to show more than two bands of class of land, if I could have had the rainbow plan and had a number of different bands you could certainly do a more accurate exercise but the question remains what would a prudent purchaser have done?" (Transcript page 578)

The "rainbow plan" referred to by Mr Gould was the pre-resumption fill contour map compiled by Mr Flanagan based on the hypothetical layout area in the Rowlands plan, which became Exhibit 14. A similar map (Exhibit 15) was compiled in respect of the after resumption scenario.

It seems to me that Mr Gould may have adopted a different approach if he had access to Exhibit 14 before he made his valuation. Mr Eales' criticism was that Mr Gould had applied the same rate over the whole of the land below Q100 level, regardless of the depth of fill required.

Exhibit 14, which was not challenged, shows that to raise the land to Q100 level an area of 1.8 ha required fill of between 0 and 0.5 metres, an area of 2.2 ha required fill of between 0.5 metres and 1 metre, an area of 2.1 ha required fill of between 1 metre and 1.5 metres and an area of 1.7 ha required fill of between 1.5 metres and 2 metres, a total of 7.8 metres required fill up to 2 metres in depth. Further out into the flood plain, an area of 1.6 ha required fill of between 2 metres and 2.5 metres, an area of 1.5 ha required fill of between 2.5 metres and 3 metres and an area of 0.2 ha required fill between 3 metres and 3.5 metres.

During the course of his evidence, Mr Collins said that he thought the ESTRY model would have produced an acceptable result if the subject land had been filled between the blue and green colours on Exhibit 14. The line between the blue and the green colouring is at the 1.5 metre mark. However, that was without compensating works, such as appropriate borrow pits on the adjoining farm on the flood plain. Mr Collins said that he was sure that an appropriate solution could be found.

In my view, it would be appropriate to include the additional 1.7 ha contained in the blue contour line, the two metre mark, the average depth of fill between 0 and 2 metres in depth, being 1 metre, provided that appropriate compensating works were carried out.

In my view, having regard to the evidence of Mr Gould and Mr Collins, it would be appropriate to value an area of 7.8 ha at a higher rate as even Mr Gould seemed to consider that 1 metre of fill would be economically viable.

That raises the question of what would be the appropriate value for that land? Again, Mr Gould seems to have provided the answer.

When questioned about his application of \$40,000 per ha to the land below flood level, Mr Gould said that he made approximately 50%, or \$20,000, discount for the risk of gaining subdivision approval. If that risk was totally removed he would have valued that land at \$60,000 per ha, as the only risk would then have been the source and the cost of the fill. In my view, it would be reasonable to assume that that risk was removed from the 7.8 ha of land which required no more than 2 metres of fill, an average of 1 metre over the whole area.

But Mr Gould worked on the basis that fill would cost \$9.00 per m³, so to fill to an average depth of 1 metre would cost \$90,000. He reasoned that to fill to a greater depth would be uneconomic, as flood-free land could be purchased for \$150,000 per ha. In my view, the evidence is such that a potential prudent purchaser would conclude that fill would cost about \$8.00 per m³, or \$80,000 per ha, and decide that he/she could pay \$70,000 per ha for that 7.8 ha.

The risk would still remain over the 3.1 ha requiring fill at between 2.0 metres and 3.0 metres. The remaining land would be considered undevelopable, including the potential parkland and would have flood plain or cane land value of \$20,000 per ha.

Applying those figures to the before resumption valuation:

Land above flood line	3.5422 ha	@ \$145,000 per ha	\$513,619
Land requiring fill to 2 metres	7.8 ha	@ \$70,000 per ha	\$546,000
Land requiring between 2 metres and 3 metres of fill	3.1 ha	@ \$40,000 per ha	\$124,000
Undevelopable land, parkland etc	<u>3.8278 ha</u>	@ \$20,000 per ha	<u>\$76,556</u>
Total	<u>18.27 ha</u>		<u>\$1,260,175</u>

In the after resumption situation, the areas of land above the flood line for both severances are known. Mr Gould applied \$100,000 per ha to the flood-free land in the northern severance, reasoning that it was more affected by the bypass road than the flood-free land in the southern severance, to which he applied \$110,000 per ha. In the absence of any better evidence, I am prepared to accept those values, but on the same reasoning as for the before resumption value, not on a "net" basis.

However, in valuing the land below the flood line he discounted the value from \$40,000 per ha in the before situation to \$25,000 per ha for the northern

severance and from \$40,000 per ha to \$30,000 per ha in the southern severance. The after resumption contour plan (Exhibit 15) does not distinguish between the northern and southern severances with respect to the areas between the contour lines showing the various depths of fill required. It shows that an area of 5.6 ha requires fill up to a depth of 2 metres.

Having regard to that plan and reasoning that it would still cost \$80,000 per ha to fill the land below flood level to an average of 1 metre deep in the after resumption situation, I consider that it would be appropriate to value that 5.6 ha to \$40,000 per ha. This, in my view, would take into account the additional cost of noise amelioration and the other adverse effects of the resumption on the land which has potential for development after resumption.

In respect of the balance 6.4187 ha, in my view, the evidence indicates that there is virtually no likelihood of development of this land in the after situation. Therefore, it would have a value no higher than cane land and I have adopted \$20,000 per ha for that land.

In my opinion, an informed potential prudent purchaser would take the above matters into account in considering what he/she should pay for the land after resumption. Therefore, I am of the opinion that the land should be valued after resumption in the following manner:

Land above flood line (northern severance)	1.0631	ha @	\$100,000 per ha	\$106,310
Land above flood line (southern severance)	1.9115	ha @	\$110,000 per ha	\$210,265
Land below flood line requiring fill up to 2 metres in depth	5.6	ha @	\$40,000 per ha	\$224,000
Balance land	<u>6.4187</u>	ha @	\$20,000 per ha	<u>\$128,374</u>
Total	<u>14.9933</u>	ha		<u>\$668,949</u>

The difference between the valuation before resumption and the valuation after resumption is the amount of compensation.

Value of subject land before resumption	\$1,260,175
Value of subject land after resumption	<u>\$ 668,949</u>
Compensation	<u>\$ 591,226</u>

Disturbance - Professional Fees

The claimants claimed an amount of \$34,232, amended to \$33,272.12 (Exhibit 100) for disturbance items made up of professional fees incurred in the cost of preparing the claim for compensation. Those fees are summarised as follows:

Surveying fees paid on or about 21 May 1997	\$ 600.00
Engineering fees- paid on or about 21 May 1997	\$ 1,055.00
- paid on or about 14 July 1997	\$ 5,090.00
- paid on or about 14 November 1997	\$ 1,975.00
- paid on or about 16 July 1998	\$ 3,560.00
Valuation fees - paid on or about 26 May 1998	\$ 5,493.00
Legal fees - paid on or about 5 June 1998	\$ 1,134.12
- paid on or about 16 July 1998	\$ 7,465.00
- paid on or about 31 March 2000	<u>\$ 900.00</u>
Total	<u>\$33,272.12</u>

The respondent produced invoices, but not receipts, in respect of each of those claims. The respondent does not dispute that each of those fees was paid. However, the respondent does dispute whether those fees were reasonably incurred for the purpose of the preparation of the claim. The respondent submitted that since the reasonableness of the claims had not been proved then no award for disturbance for the professional fees should be made.

Despite extensive attempts to reach agreement, at the conclusion of the hearing the parties were still in dispute. However, without resiling from the respondent's primary submission, Mr Gibson advised me that if the Court concludes that it is open to adopt a broad-brush approach to the question of the professional fees, the respondent would not oppose the following:

- \$600 for the survey fees;
- \$3,500 of the \$5,493 for valuation fees;
- \$5,090 for the engineering fees paid in July 1997;
- \$3,700 of the \$7,465 legal fees paid in July 1998.

The balance of the claimed legal fees were opposed. As the invoice for \$6,900 included counsel's fees and it is unclear how they related to the preparation of the claim for compensation, the respondent was not prepared to concede any of those fees.

That amounts to a total of \$12,890 which the respondent is prepared to concede were professional fees reasonably incurred in the preparation of the claim for compensation.

The claimant relied upon the tendered invoices from the various professionals in Exhibit 45 and the evidence given by Mr John Savina. However, Mr Savina had no knowledge of the details of the professional fees. Mr Fraser submitted that an account rendered from a professional person will prima facie be regarded as reasonable, relying on the judgment of the Land Appeal Court in *Lamont v. Brisbane City Council* (1980) 7 QLCR 120 at 127.

The practice of the Land Court to allow professional fees as an item of disturbance in the preparation of a claim for compensation has been established since the decision of the Land Court in *Howard & Ors v. The Commissioner for Railways* (1967) 34 CLLR 140. In the decision in *Merivale Motel Investments Pty Ltd v. Brisbane Exposition and South Bank Redevelopment Authority* (1985) 10 QLCR 175 at 204 to 206 the Land Court traced the history of such an award. The Court concluded at 206:

" I am satisfied that a claim for legal and valuation expenses up to the date of the lodgment of the claim in the Court are compensable providing they meet the rule expressed by Romer LJ in *Harvey v. Crawley Development Corporation ...* '... provided first, that it is not too remote and, secondly that it is a natural and reasonable consequence of the dispossession of the owner.'"

The claimant in *Merivale* appealed to the Land Appeal Court against the decision of the Land Court. In delivering its judgment the Land Appeal Court had this to say regarding the award for legal and valuation fees by the Land Court:

" We confirm the judgment in respect of its award for legal and valuation fees involved in the preparation and lodgment of the claim for compensation ... We adopt the reasonings and conclusions of the learned Member below ... Our charge as judicially interpreted is to compensate for items which are the reasonable and not too remote consequence of the resumption (*Harvey v. Crawley Development Corporation* (supra)). Dispossessed owners are entitled to seek professional advice and assistance in order to comply with the requirements of the *Acquisition of Land Act* in so far as lodging claims for compensation are concerned. Providing the valuation advice is not frivolous or lacking in bona fides, a fee based on a claimant's valuation should be reimbursed. To refuse this would be lacking in fairness and generosity to the claimant and too restrictive of its personal right of choice irrespective of whether or not the claim is successful." (10 QLCR 287-288).

The principle has since been extended to other professional fees incurred in the preparation and lodgment of a claim. An earlier judgment of the Land Appeal Court was referred to in the *Merivale* case; in *Brisbane City Council v. Lamont* (1980) 7 QLCR 120, the Court had this to say at 127:

" This Court and the Land Court have held that valuation fees and legal fees incurred by a dispossessed owner up to the date of lodgment of the claim in the Court are properly allowable as items of disturbance. In the absence of agreement between the parties it is incumbent on the claimants to prove such heads of claim. No evidence has been led to support the claim in this matter and no award is made."

That essentially is the argument of the respondent in this case. It is not disputed that some of the items claimed had been incurred in the preparation and lodgment of the claim for compensation. However, there are other items in the invoices which the respondent contends may be related to other matters, or which were incurred after the date of its lodgment. As was pointed out in *Merivale*, any costs incurred after the lodgment of the claim are not claimable as disturbance, but are costs of the action to be considered under s.27 of the *Acquisition of Land Act 1967*.

I have examined the various invoices contained in Exhibit 45. This was difficult, as the invoices are not particularised but are in general terms.

With regard to the valuation fees of \$5,493, the account was submitted on 20 May 1998, well before the date of lodgment of the claim. However, the respondent drew attention to items in the claim relating to the travel of the valuer from Brisbane to Cairns for a conference with DMR. It seems to be suggested that such a conference would have nothing to do with the preparation and lodgment of the claim. However, in my view, it may well have done so. The fee was incurred prior to the preparation and lodgment of the claim and there is no suggestion that the fee was not paid. The conference may have been held to attempt to settle the matter, but that may have led to refining the claim. Therefore, in accordance with the principles in the cases cited above, I find that that fee was properly incurred and will allow the whole amount of \$5,493.

The engineers' fees amount to \$11,680, contained in four invoices dating from 30 April 1997 to 30 June 1998. Each of those invoices relates to the preparation of an engineering report upon the impacts of the resumption. They were all incurred and paid prior to the date of lodgment of the claim.

Mr Gibson submitted that it is impossible to tell what role was played in relation to the preparation of the claim by the reports and that it is wholly unclear why

successive reports were required. It is suggested that it is obvious that not all of those reports were incurred in the preparation of the claim. The respondent is prepared to accept that \$5,090 was so incurred on the basis that it would be fair to the claimant to pay them for the fuller report, but not for the other reports.

However, in my view, these reports were prepared prior to the lodgment of the claim and were very likely to have been incurred in relation to the impacts of the resumption. From the evidence it is clear that Mr Flanagan was amending and adapting his advice. Therefore, in accordance with the principles in the *Merivale* case, I will allow the whole of the claim for engineering fees. In a matter of this complexity, with so much of the claim depending heavily on Mr Flanagan's advice, those fees of \$11,680 do not seem to be exorbitant.

The legal fees are contained in three invoices dating from 15 May 1998 to 31 March 2000. The invoice of 15 May 1998 relates to the airfare and accommodation of the valuer and title searches and copying plans. I will consider that shortly.

The second invoice dated 30 June 1998 contains an item relating to a without prejudice conference with representatives of the respondent and attended by representatives of the claimants, including the claimants' valuer and engineer, "... to discuss compensation claim". Those fees were obviously incurred as a consequence of the resumption and were paid prior to the date of lodgment of the claim.

The third invoice for legal fees is dated 31 March 2000, only 12 days prior to the lodgment of the claim in the Land Court. Those fees relate to attendances, correspondence and negotiations with the respondent and consulting engineers, drawing and engrossing briefs to counsel, drawing and engrossing amended claim for compensation, drawing and engrossing referral to Land Court, a total of \$2,900. The balance of the fee of \$4,000 relates largely to counsel's fees.

There is nothing to indicate to what extent those fees were incurred in the preparation and lodgment of the claim and to what extent they were incurred in the preparation for the trial.

The respondent submits that it is not clear to what extent any of those accounts related to the preparation and lodgment of the claim. The respondent is prepared to agree to the amount of \$3,700.

I agree with the respondent's submissions in relation to the last invoice for \$6,900. There may be some part of that amount which can legitimately be claimed, but, on the evidence before me, I have no means of determining how much was involved in the preparation and lodgment of the claim and how much in the

preparation for the trial. In the absence of proof, I do not propose to allow any part of that amount.

The respondent also submits that it is possible that the fee claimed for the airfares and accommodation for the valuer in the first invoice, overlaps with the claim by the valuer. In the absence of proof of whether this relates to a different trip and if so, its purpose, I am not prepared to allow that part of the first invoice. However, with respect to the other items, title searches \$208, copy plans \$36 and plan printing \$7.12, together with the whole of the second invoice on 30 June 1998 for \$7,465, I allow an amount for legal fees of \$7,716.

The Claim for Loss of Rental

Prior to the resumption, the claimants' cane farm had been leased for three years from 1 January 1996, to Mark and Julie Savina. That lease was terminated on 30 June 1998 and the brothers entered into the present joint venture agreement.

In the original claim dated 17 March 2000, the claimants claimed an amount of \$613.70 for loss of rental in respect of the resumed land. That item of claim was not part of the amended claim for \$1,200,000. In any case, the compensation in this case has been assessed on the basis of the highest and best use of the subject land as in globo potential subdivisional land. Since that is at a higher value than cane land, the claim for compensation for loss of rental cannot be allowed under the principles in *Horn v. Sunderland Corporation* [1941] 1 All ER 480.

Assumptions by the Parties

Throughout the hearing the experts for the parties assumed that after the resumption access from the balance of the Savinas' cane farm to the subject land would be available under the overpass. Such access was essential to allow fill to be transported from borrow pits on the farm. The experts also assumed that an appropriate noise barrier could be constructed on the road embankment.

By letters dated 22 November 2000, the respondent confirmed that those assumptions were correct.

Determination of Compensation

In accordance with my findings I determine compensation as follows:

- (a) Compensation for loss of land, severance and injurious affection -

Value of land before resumption	\$1,260,175
Value of land after resumption	\$ 668,949

Compensation		\$ 591,226
(b) Disturbance Items - Professional Fees		
Surveying Fees	\$ 600	
Valuation Fees	\$ 5,493	
Engineering Fees	\$11,680	
Legal Fees	\$ 7,716	\$ 25,489
Total		<u>\$616,715</u>

Interest

This Court has the discretion to order that interest be paid on the amount of compensation determined, excluding any amount of compensation advanced by the constructing authority: *Acquisition of Land Act 1967*, s.28. Interest may be awarded from the date of resumption until the day immediately preceding the date on which payment is made. In accordance with the usual practice of this Court, I intend to award interest for the whole of the period.

I was advised that an advance of \$174,000 was paid on 3 April 1998. However, interest on professional fees incurred in the preparation and lodgment of the claim for compensation is payable only from the date of payment of those fees: *Varitimos v. Queensland Electricity Commission* (1990-91) 13 QLCR 1. Professional fees totalling \$25,489 have been allowed.

Determination and Orders

Compensation is determined in the sum of Six Hundred and Sixteen Thousand Seven Hundred and Fifteen dollars (\$616,715) and the respondent is ordered to pay the claimants that amount.

I further order that the respondent pay interest at the rate of 6.5 per cent per annum making allowance for the various professional fees from the dates that they were paid:

- On the amount of Six Hundred and Sixteen Thousand Seven Hundred and Fifteen Dollars (\$616,715) from 13 December 1996 until 3 April 1998 when the advance was paid;

- On the amount of Four Hundred and Forty-two Thousand Seven Hundred and Fifteen Dollars (\$442,715) from 4 April 1998 up to the day immediately preceding the date on which payment of compensation is made.

JJ TRICKETT
PRESIDENT OF THE LAND COURT