LAND COURT OF QUEENSLAND

CITATION:	*LGM Enterprises Pty Ltd v Brisbane City Council* [2008] QLC 0091
PARTIES:	LGM Enterprises Pty Ltd (claimant) v. Brisbane City Council (respondent)
FILE NO:	A2007/0820
DIVISION:	Land Court of Queensland
PROCEEDING:	Preliminary issue concerning a claim for compensation under the *Acquisition of Land Act 1967*.
DELIVERED ON:	16 May 2008
DELIVERED AT:	Brisbane
HEARD AT:	Brisbane
MEMBER:	Mr RP Scott
ORDER:	**The Land Court has no jurisdiction to determine compensation.**
CATCHWORDS:	*Acquisition of Land Act* – s.12(5) – interest sufficient to support claim for compensation – interest must relate to resumed land. *Acquisition of Land Act* – s.12(5) – interest sufficient to support claim for compensation – s.36 *Acts Interpretation Act* - interest in "common area" not demonstrated – no right or privilege in garden beds able to be enforced or protected.
APPEARANCES:	Mr LG McGinn, Director, appeared for the claimant. Mr M Hinson SC (Instructed by Brisbane City Practice), appeared for the respondent.

Background

[1] On 5 January 2005 the respondent took 36 m² of land for road purposes from a parcel of 2,360 m² (the parent parcel) owned by Australian Property Holdings Pty Ltd. The resumed land is described as Lot 1 on SP 172404 and the parent parcel is Lot 2 on RP 117943. The claimant leases part of the parent parcel, that lease being described as

Tenancy 1 in a group of 5 tenancies relating to a building on the parent parcel comprising a small shopping centre. A video store operates from Tenancy 1. No part of Tenancy 1 was resumed.

[2] Pursuant to orders of the President a preliminary issue has come before me for determination; that issue being whether the claimant has an interest sufficient to support a right to claim compensation.

[3] The resumed land was taken in pursuant to the *Acquisition of Land Act 1967*. A right to claim compensation arises by the operation of s.12(5):

> "(5) On and from the date of the publication of the gazette resumption notice the land thereby taken shall be vested or become unallocated State land as provided by the foregoing provisions of this section absolutely freed and discharged from all trusts, obligations, mortgages, charges, rates, contracts, claims, estates, or interest of what kind soever, or if an easement only is taken, such easement shall be vested in the constructing authority or, where the gazette resumption notice prescribes, in the corporation requiring the easement, and the estate and interest of every person entitled to the whole or any part of the land shall thereby be converted into a right to claim compensation under this Act and every person whose estate and interest in the land is injuriously affected by the easement shall have a right to claim compensation under this Act." (my emphasis)

[4] The Notification of Resumption was published in the Queensland Government Gazette dated 7 January 2005. The question of whether the claimant has a right to claim compensation under the *Act* turns on whether it had, at the time of taking, an "estate and interest" which entitled it to the whole or any part of the land. The reference to "the whole or any part of the land" in s.12(5) is, on the basis of standard statutory construction, a reference to "the land thereby taken"; that is, to the 36 m² resumed by the respondent. If the claimant had at the time of taking such an estate or interest[1] the effect of the resumption was the conversion of that into a right to claim compensation.

[5] Part 4 of the *Act* concerns compensation. By section 18(1);

> "… compensation whereto a right is had under section 12 may be claimed from the constructing authority under, subject to and in accordance with the provisions of this part."

[6] Such claim has been lodged by the claimant with the respondent whose position is that the claimant does not satisfy the requirements of s.12(5) sufficient to found a claim for compensation. In *Sorrento* the Court of Appeal had before it a matter which raised issues of relevance to the present preliminary issue. The appellant before the Court of Appeal held a lease of part of the ground floor of a building erected on the relevant land. A medical practice was conducted on the demised premises which did not include car

---

[1] It was held in *Sorrento Medical Services P/L v Chief Executive, Department of Main Roads* [2007] QCA 73 at [49] that the conjunctive "and" was misplaced and the provision should be understood as referring to "an estate or interest".

parking required by a condition of use of the premises imposed by the Gold Coast City Council. Clauses 42 and 43 of the terms of the lease provided:

> "42 The lessor grants to the lessee exclusive rights to use the area marked as 'doctor parking' on the plan annexed hereto for parking of the vehicles of the lessee or its permitted invitees.
>
> 43 The lessor grants to the lessee in common with the lessee and its invitees of the area marked 'D' on the said plan the right to permit its patients and the patients of any person associated with the lessee the right to park its his her or their vehicles upon the land marked 'patient parking'."

[7] Part of the lessors land in *Sorrento* was resumed such that the required number of car parking places was more than halved. No part of the demised premises was resumed. The focus of the Court was therefore on the car park areas part of which comprised "the land thereby taken" (s.12(5)).

[8] The members of the Court of Appeal were of the view that clauses 42 and 43 of the lease did not amount to an interest in land as that phrase has been construed at common law and in some statutory contexts.[2] Their Honours concluded that clauses 42 and 43 created a contractual license, without more.[3] The majority held that such a license amounted to an "interest" in terms of s.12(5) such that a right to claim compensation arose.[4] That conclusion was arrived at by applying s.36 of the *Acts Interpretation Act (1954) Qld* which sets out the '[m]eaning of commonly used words and expressions'. One of those meanings is:

> "**interest**, in relation to land … means –
>
> (a) a legal or equitable estate in the land …; or
> (b) a right, power or privilege over, or in relation to, the land …"

[9] Chersterman J said:

> "[63] It may be that to apply the full width of the definition of "interest" found in the Acts Interpretation Act might, in some cases, produce claims for compensation that might properly attract the epithet "absurd", but the present is not of that kind. One has here a right of property clearly identified, the limits of which are specified and which had a value. The proprietor is identified and the existence of the licence was proved in a document available for public search. In my opinion it is a matter of plain justice, not absurdity, that the proprietor should be compensated when his property is destroyed, for the good of the wider public."

[10] His Honour later said:

> "[72] If *interest* in s 12(5) is to be given its wider meaning, as I think it should, the question then becomes whether the appellant's contractual licence was a "right, power or privilege over or in relation to … land …". The Land Appeal Court thought it was a right in relation to land and I would agree. It is probably also a right or a power or privilege over land."

---

2 See *Stow v Mineral Holdings (Aust) Pty Ltd* (1977) 180 CLR 295
3 Paras [10], [18] and [35].
4 Para [14].

and:

> "[77] I conclude that the appellant had a right or power over or in relation to the land taken by the respondent. In my opinion such a right or power is an interest in the resumed land for the purposes of s 12(5). That is so because the definition of "interest" found in the Acts Interpretation Act is the applicable one, the statutory context and subject matter not indicating or requiring otherwise."

[11] It is clear from the reasons of the majority in *Sorrento* that the question of whether the claimant before me has an interest of the type provided for in s.12(5) of the *Acquisition of Land Act* is answered, at least in part, by considering whether the term "interest" as defined in s.36 of the *Acts Interpretation Act* applies to the relevant circumstances to which I shortly turn. As I understand their Honours' reasons, a contractual licence relating to land can, as occurred in *Sorrento*, give rise to a relevant interest whilst it may be that other factual scenarios could be sufficient to amount to such an interest or might properly be described as being absurd. The reasons, as I understand them, provide no further guidance in that regard.

[12] On or about 30 November 1998 a lease was entered into between Australia Capital Holdings Pty Ltd as lessor and Nervana Pty Ltd as lessee in respect of Tenancy 1 on the parent parcel. The lease was subsequently registered and on or about 26 June 2000 was transferred to LGM Enterprises Pty Ltd, the claimant before me.

[13] As part of his submissions Mr McGinn referred to s.18(3) of the *Act*:

> "(3) Compensation shall not be claimable by or payable to a person who is lessee, tenant or licensee of any land taken if the constructing authority upon written application allows the person's estate or interest to continue uninterrupted."

He submitted that he was able to demonstrate that his business was interrupted by the carrying out of the works associated with the resumption and that it therefore followed that a claim for compensation from the claimant was not excluded by s.18(3). The respondent did not rely on s.18(3). It is not a provision apt to cover the present circumstances and cannot be relied on to exclude *LGM's* claim for compensation.

[14] The claimant advanced two bases upon which it suggested that it had an interest or estate of the type referred to in s.12(5) of the *Acquisition of Land Act*. The first of those bases related to the car park, though it would be fair to say that this basis was not pressed before me. Clause 10 of the lease provides:

> "*10.1 The Car Park is subject to the landlord's exclusive control and management.*
>
> *10.2 The Tenant's customers in the Centre may use the Car Park for parking motor vehicles.*
>
> *10.3 The Tenant and the Tenant's employees and agents do not have right to park in the Car Park. The Landlord may prevent them from parking and discourage those who are not customers from parking.*"

Clause 1.2 of the lease defines Car Park and Centre as follows:

> "'***Car Park***' *means that part of the Centre which the Landlord intends for parking motor vehicles including structures, driveways and vehicular ramps.*
>
> ***Centre*** *means the Land and any other land which the Landlord uses with the Land and all improvements constructed on the Land and any other land."*

[15] Unchallenged evidence from the respondent in the form of a plan and two affidavits supports a submission for the respondent that the 36 m² area that was resumed did not contain any area defined in the lease as car park. That submission was not resisted by the claimant. The resumed area contained part of garden beds planted with shrubs and in one location part of the kerb and channel separating the car park from the landscaped garden beds. The kerb and channel performs a drainage function not a car parking function.

[16] Whatever the nature of the claimant's rights, powers or privilege is with respect to the car park, any interest arising there from does not relate to the land taken. It follows that such interest is not converted by s.12(5) into a right to claim compensation.

[17] I now turn to the second and main basis of the claimant's argument that it had an interest giving rise to right to claim compensation under the *Act*. The parent parcel is located on the south-west corner of the Appleby and Rode Roads and has a curved frontage to that intersection. A landscaped garden bed comprising a narrow strip of shrubbery irrigated by way of a sprinkler system has been developed between the back of the kerb which borders the car park and a low concrete wall bordering the public footpath. Steps have been constructed towards the northern part of the curved garden bed to allow access to the shops on the parent parcel. Pedestrian access can also be obtained via two vehicular entrance/exit driveways.

[18] Mr McGinn explained that there were nine gaps between the shrubs in the garden area and many shoppers visiting his video store and other shops on the parent parcel would gain access through these gaps. The landlord had placed some large pavers randomly on the garden bed in such gaps. The pavers were placed there, according to Mr McGinn to provide some protection to the irrigation system and to the plants. I understand from Mr McGinn that access onto the parent parcel through four of these gaps has been impeded by the works constructed as part of the purpose of the resumption, in particular by narrowing the garden beds and leaving a slope too steep to allow safe access.

[19] The resumed land included part of the relevant garden bed area. The question is therefore whether the claimant has an estate or interest of the type provided for in s.12(5) which respect to that resumed land. The garden area is not part of the demised premises so the lease held by LGM does not confer on it an estate or interest in real property as such terms are generally understood. The question therefore becomes one of asking

whether the broad definition of "interest" provided by s.36 of the *Acts Interpretation Act* as considered by the Court of Appeal in *Sorrento* applies to the relevant facts to lead to a conclusion in favour of the claimant.

[20] Mr McGinn submitted that LGM enjoys a right, power or privilege over the garden area as it is part of the "common area" referred to in the lease; and the claimant enjoys certain benefits under the lease with respect to that common area.

[21] Common areas is defined in 1.2 of the lease:

> "***Common Areas***" *means the parts of the Centre provided by the Landlord for common use*."

[22] The term "Common Area" has a broadly accepted meaning which is reflected in clause 8.4:

> "*The Tenant may use that part of the Common Areas immediately outside the Premises for display purposes.*"

That is, the areas immediately outside the demised premises which may be a covered walkway, is a common area used by all of the tenants as part of their enjoyment of their leased areas. The lessee may exclusively use part of that area for display purposes. The car park, or an area in which a collection of rubbish bins might be located are other examples of what are frequently referred to as common areas.

[23] Clause 8.3 of the lease says:

> "Subject to the Centre Rules, the Tenant and its employees and agents may use the Common Areas for the purposes for which they are intended."

No evidence of Centre Rules, if such exist, was provided. I think that the central question which arises is whether the landlord may be understood as having intended that the garden area be an area provided for common use in the manner discussed in the preceding paragraph. The garden beds apparently serve an ornamental or decorative purpose. There is no provision in the lease relating to the garden area similar to that found in clause 10.2[5] in which a right or privilege in customers to use the car park is expressed. There is little doubt that the landlord would not have intended the tenants or the customers to have use of the garden area for gardening purposes. Nor do I think that it can be concluded that the garden was intended as a common area for the purpose of access to the shops on the parent parcel, except by way of the steps constructed through a small section of the garden bed. The landlord seems to have tacitly recognised that some shoppers were gaining access to the shops through the gaps between the shrubs in the garden beds and he responded accordingly. At best a licence terminable at will has been

---

[5] See [14].

created. It seems that some shoppers have, since the resumption, on their own initiative devised other "short cuts" onto the parent parcel.

[24] A conclusion that the garden beds were not intended by the parties to the lease to be a common area is supported by reference to the definition of "operating expenses" in clause 1.2 of the lease. That definition refers to a large number of different types of expenses and includes:

> "(i) any costs of cleaning of the Common Areas and the exterior of the building and all plant rooms, service ducts and pipes in the building;
>
> (k) the cost of supplying towels and other toilet requisites in any washrooms in the Common Areas;
>
> (m) the cost of maintaining gardens and landscaped areas;"

[25] The differentiation between the gardens and landscaped areas and the "common areas" referred to in (i) and (k) suggests that the garden beds are not included in the common areas.

[26] In the present matter the management, maintenance or even the destruction of the garden beds are matters completely within the control of the landlord. The claimant as lessee has no right, power or privilege over the garden bed area which it may enforce or protect under the terms of the lease. The claimant therefore has no "estate or interest" in the land taken. I conclude that the claimant before me does not have a right of property clearly identified in the garden beds, similar in any significant way to that found by the Court of Appeal to be case in *Sorrento*. Accordingly, it does not have a right to claim compensation under the *Acquisition of Land Act*. The jurisdiction of this Court to hear and determine a claim for compensation arises under s.26(1) of the *Act*:

> "(1) The Land Court has jurisdiction to hear and determine all matters relating to compensation under this *Act*."

[27] It follows that the Land Court does not jurisdiction to determine compensation in this matter.

RP SCOTT
MEMBER OF THE LAND COURT